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LABOUR LAW RESEARCH IN TWELVE COUNTRIES

The Swedish Work Environment Fund

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Labour Law Research in the Federal Republic of Germany

WOLFGANG DÄUBLER

The Subject "Labour Law"

German labour law is only partially regulated in statutes. Large areas of the law governing collective bargaining and labour disputes and also rights and obligations arising from the individual labour contract have not been legally structured until today. Even where extensive regulation is to be found the complexity of social life and circumstances produces numerous problems which cannot be solved satisfactorily by completely defining and interpreting the existing legislative programme. As a consequence the competence for decision-making effectively shifts to the courts.

Since equivalent or similar conflicts will probably be decided in light of the prevailing jurisdiction, the courts' opinions gain directive functions for the practice. As a consequence a system of judge-made regulations highly subdivided into sections was generated; individual decisions of the Federal Labour Court are sometimes interpreted with the same precision as new statutes. It is obvious that under these circumstances the jurisdiction is the most important addressee of research results in labour law.

As far as a particular problem has not yet been decided by the highest court, legal practitioners generally acquires their orientation from the so-called "prevailing opinion" in legal literature. Thereby the "prevailing opinion" gains a kind of subsidiary competence of "legislation" – for example the opinions in the great commentaries of the Employees' Representation Act are taken as a basis in arguments between works council and management. Thereby the "authority" and the "prestige" of individual legal scholars is of great importance. Under these circumstances influence on research is equivalent to influence on the development of law.[1]

This is all the more important as the subject "labour law" has great practical significance. According to very common

views the relations between employers and employees in the FRG are regulated by law in a particularly large extent. There is a legal solution for every problem, even for the permissible content of a conversation with working colleagues. If legal solutions are referred to will depend on many, particularly internal circumstances within the companies. However, in periods of unemployment particularly, other ways of settling conflicts might fail because of the employees' "inability to confront". The question how labour law research works is therefore an essential part of the generation and development of labour law.

The Labour Law Community

The Persons Involved

Individual researchers

The academic study of labour law typically takes the form of individual research. As can be seen from published books and journal articles, research is usually done by individuals, though they may be assisted by research staff at universities or supreme Federal Courts.

University professors no doubt make up the most important group of individuals engaging in research and publication; occasionally lecturers at specialized colleges for further training make a contribution. It is to be noted that by no means only those professors whose chair or job description carries a reference to labour law write on labour law topics. In the past 10-15 years in particular many representatives of the constitutional law branch have made pronouncements on questions of labour law. This is a result of the extension of norms of constitutional law to the field of labour.

The second, similarly important group consists of judges, in particular those who work in the supreme Federal Courts, such as the Federal Labour Court (Bundesarbeitsgericht–BAG) or the Federal Social Court (Bundessozialgericht). While the Act governing the judiciary (Richtergesetz) generally forbids judges to produce expert legal opinions, it does not oppose the publication of views expressed. Extensive use is made of this facility. Thus the manual of labour law most widely used in practice emanates from a judge at the Federal Labour Court[2] and the most widely disseminated and most important com-

mentary on dismissal law is the joint work of eight authors, four of whom are judges at the Federal Labour Court and two judges at labour courts of first instance.[3]

The third group, quantitatively less important than the first two, is that of ministerial officials. Thus the most widely disseminated commentary on the Employees' Representation Act (Betriebsverfassungsgesetz – BetrVG) is the production of two senior officials from the Federal Ministry of Labour (plus one judge at the Federal Labour Court).[4] Considerable influence has been (and still is) exerted by Wilhelm Herschel who also belonged to the Federal Ministry of Labour till his retirement.[5]

In addition publications of legal experts holding posts with an employers' association or a trade union play a major role. Thus each side has produced its own commentary on the Employees' Representation Act; both exert a certain influence in jurisdiction and in academic discussion.[6] Numerous publications by trade union lawyers on the question of the inadmissibility of lockouts have also appeared.[7]

Finally another group, highly heterogenous in professional and personal engagement, attorneys and counsels as well as academic researchers, also contributes to the academic labour law discussion.

Groups of researchers

Individual research is also a prominent feature in publications, such as major commentaries or manuals, edited by several persons. Typically, these publications consist of an addition of several chapters devoted to specific subjects which have been researched by individuals. Presumably the individual authors may discuss their contributions with each other on occasions. Collective research of the kind in which many of the stages in the work are undertaken jointly seems to be the absolute exception.

Furthermore, there is relatively little experience of interdisciplinary research in German labour law studies. This is related to the structure of public institutions of research, the universities in particular. They are traditionally based on the principle of autonomous chairs and faculties whose field of work is defined by special system concepts such as "labour law and civil law" or "labour law and business law". Co-operation with an industrial sociologist or a specialist in labour studies is absolutely unusual and even against the institutional structure. There are exceptions at some of the newer universities, where it is possible to build interdisciplinary teams for specific research projects. Thus, for example, a research project has been carried

out under the guidance of Rottleuthner at the Free University of Berlin to investigate labour court jurisdiction.

There is no Max Planck Institute for Labour Law in which interdisciplinary research would be possible. At first sight this is a surprising fact, since there are corresponding institutes for social law (in Munich), for penal law (in Freiburg), for public law and international law (in Heidelberg) and for private law (in Hamburg). The Zentrum für Europäische Rechtspolitik (Centre for European legal policy) in Bremen does not currently devote attention to labour law. On the other hand, there is close co-operation between lawyers and social scientists in two different departments of the Wissenschaftszentrum Berlin.[8]

For the rest, there are occasional research contracts placed by the Federal Ministry of Labour, the Stiftung Volkswagenwerk and the Deutsche Forschungsgemeinschaft.[9]

Publication Media

The way in which research results are published depends very much on the intentions of the author and his recipients.

Textbooks are written for university teaching purposes, but they also provide a basis for judicial interpretation and the further development of theory. In the fifties and sixties the three-volume works of Hueck-Nipperdey and Nikisch gained particular importance in that regard.[10] Because of the rapid development of labour legislation and case law over the past fifteen years, these two textbooks are now obsolete. Since basic principles of labour law have undergone new thinking, they are now seldom referred to.

The manual of Schaub (5th ed. 1983), mentioned above is presently valued as a leading commentary for the practice of labour law. It mostly abstains from developing particular positions and, because of its close leaning on case law, is regarded as a particularly reliable guide. Its volume of 1514 pages is due to a remarkable completeness in the field of individual employment law (though not on the subject of collective labour law). Then there are the "Arbeitsrechts-Blattei", a commentary in several volumes, and the "Handbuch des Arbeitsrechts" published in Baden-Baden. Both are only referred to by courts, lawyers or personnel departments in exceptional cases.

Textbooks of short to medium length are now used for tuition purposes at the universitites.[11]

For the professional community, in addition to the textbooks there are monograph studies and journal articles; contributions to commemorative publications, in particular, also en-

joy relatively high prestige. Commentaries constitute aids for practitioners.

The volume of literature produced each year is not easily to survey. The *Zeitschrift für Arbeitsrecht* each year produces a list of writings published during the past year. For 1980 it listed 115 individual book titles dealing with various areas of labour law or at least concerned in part with labour law (Picker ZfA 1981, 303 ff). In 1981 the number of titles recorded ran up to 117 (Mummenhoff ZfA, 1982, 311 ff). The main journals concerned with labour law (*Recht der Arbeit*–RdA; *Arbeit und Recht*–AuR; *Betriebsberater*–BB; *Blätter für Steuerrecht, Sozialversicherung und Arbeitsrecht*–BlfStR; *Neue Zeitschrift für Arbeitsrecht*–NZA; *Arbeitsrecht im Betrieb*–AiB; *Zeitschrift fur Arbeitsrecht*–ZfA) annually produce a total volume of about 3,500 DIN A4 pages on labour law alone. In addition labour law contributions appear quite frequently in the general legal journals (JZ, NJW, AcP, AÖR, JuS, JA, DUR, KJ, WSI-Mitteilungen, GMH, ArbGeb).

The Polarization of Discussion

Authors publishing research results on labour law (or in exceptional cases research groups) do not form in any way an independent professional community for whom only the quality of the argument counts. In fact two groups can be discerned, the relationship between which is characterized much more by power considerations than by rational discourse.

The two groups and their theoretical viewpoints

On the one hand there is a large group of influential university teachers, judges, ministerial officials and legal advisers to employers' associations. The scholarly approach of this group is essentially a traditional normative one. Basically the main concern consists in interpreting existing law. Though empirical phenomena might be considered in individual cases, the possibilities of the individual researcher are quite limited in that respect. Research in regard to comparative law may only be undertaken within the framework of the capacities available to the individual. Historical research forms little more than a marginal element in study projects.[12]

The publications of these authors don't contain any considerations for the development and reform of the existing law. In the period of socio-liberal reform policy between 1969 and 1976, constitutional objections were voiced regarding certain legislative intentions. These focussed mainly on the reform of company management structures by increasing employee re-

presentation on supervisory boards.[13] The government's legal proposal for the Employees' Representation Act (Betriebsverfassungsgesetz – BetrVG) had also given cause to constitutional objections at first, but these were not pursued.[14]

In the university area, the great majority of this group are linked by a pupil or pupil-pupil relationship to the "grand old men" of (conservative) labour law, Alfred Hueck, Hans Carl Nipperdey and Rolf Dietz.[15]

In view of all these considerations the "ruling group" may be labelled "conservative", though there can be considerable distinctions in individual cases. Also, it would be an inadmissible simplification if "academic genealogy" were to be made the deciding factor in a political evaluation.

The opposing group is characterized by its method of study not limiting itself to analyses founded on legal dogmatics. It rather seeks to understand existing labour law structures, including judicial interpretation and the "prevailing opinion", as a "piece of society". This means on the one hand that the questions generally asked are how the subject area "employed labour" is actually constituted and how legal standards effect the reality of the society. The question of political interests is also considered; in so far the "minority opinion" is critical of the leading social ideology. In addition an attempt is made to understand the existing legal situation as the result of a historical development – an undertaking which, because of the complexity of historical processes, never yields more than tentative indications. Finally the "future dimension" is included, and the question is asked under what conditions the existing legal situation can be changed.[16]

In a numerical sense, this academic fraction is definitely subjected to the group outlined above. In the universities it is practically only represented at a few North German reform faculties and at the Hamburg School of Economics and Political Science (which is influenced by the trade unions). It also includes some labour judges and numerous legal officers on the staffs of trade unions.

In terms of its social policy option, the minority group can be called "employee-oriented". For example, a criterion for the critical investigation of existing law may be the emancipatory interests of employed labour. The relationship with the trade unions of the members of this group active in the universities is by no means free from tensions; but there are close co-operative links with those sections of the trade union movement which are critical and less interested in integration within the existing social system.

Scholars in the field usually fall immediately into one

group or the other; intermediate rankings are almost non-existent.

When they engage in empirical research, scholars usually find themselves moving towards the position of the minority group; this also applies when they do not share its social policy options.

Modes of interaction

The academic controversy between the majority and minority group is geared – as already suggested above – less to the model of rational discourse than to a struggle for influence. This has to do with the eminent political significance of the labour law discussion. The majority view resorts to a whole range of mechanisms in order to isolate the minority view and thus to deprive it of social influence. These mechanisms take a variety of forms.

(1) The minority is excluded from certain particularly important fora of communication. Thus its representatives in the university sector almost never appear as speakers at the so-called "Arbeitsgerichtsverbund" (Labour court association), although it organizes a large number of gatherings.

The same applies to the German Section of the International Association for Labour and Social Law (with one exception) and the Deutscher Juristentag (German Conference of Jurists). The minority group is refused admission to publications of high prestige value. Thus not a single representative of the minority group has contributed to any of the commemorative publications (Festschriften) which have appeared in the past few years.[17] Basically this can be explained by the fact that, for any involvement in a commemorative publication, some personal link with the personality honoured plays a crucial role. However, no such links have existed in the case of the minority opinion. This argument does not apply to the Festschrift published in 1979 commemorating the 25th anniversary of the Federal Labour Court, however, to which 35 professors from various faculties made contributions but from which the entire minority fraction (including Simitis and his pupils Weiss and Dorndorf) was excluded.[18] Therefore, it is not at all surprising, that the minority view is not represented in influential private discussion groups, such as the so-called Dietz Seminar.

(2) The arguments developed by the minority group are either disregarded or considered and discussed in a very selective manner. Certain books and articles are regarded as "uncitable"; others are mentioned, but only with the comment "takes a different view", or they are referred to in relation to a point of

quite secondary importance. In view of the mass of literature produced, it is not difficult to get away with this attitude without incurring too much criticism for negligent scientific research.

In the past few years there has been a certain tendency for individual representatives of the minority group to be quoted fairly frequently, while others still remain under a kind of interdiction. Some divisions of the Federal Labour Court have also referred to the position of the minority group (occasionally even agreeing with it).

(3) A further method applied quite frequently is to subject individual writings of the minority group to a once and for all discussion, condemning them as completely unusable and unscientific. If the reviewer – as is usually the case – is a well known representative of the leading opinion, the matter is thereby also settled for many others. Thus a review of the book by Wahsner-Bayh, "Widerstand bis hin zum Generalstreik" (Resistance till up to a general strike), Marburg 1983, 148 pp., said that the pamphlet was based on an "agitatorial concept", that "legal considerations were of secondary importance" to the authors, that it was "not a work of legal scholarship", but a tract of propaganda for political strike (Rüthers JZ 1984, 468). The Communist "bogey" is readily evoked in such cases; thus the authors are accused by critics such as Rüthers of ignoring in their work (which refers in particular to strikes against the deployment of missiles) the fact that Soviet missiles are already deployed and of taking up this one-sided standpoint for "recognizably (party-?)ideological reasons" (Rüthers JZ 1984, 468). The same attitude is found in Ramm in his dispute with the labour law left (JZ 1978, 184 ff).[19]

The suspicion of sympathies with the countries of "real socialism", is all the more defamatory since the policies of the socialist countries have been criticized precisely by the minority faction.[20]

In particular: the unwillingness to acknowledge the results of empirical research

The treatment and assessment presented here may lay the author open to the charge that he cannot deal with the processes considered as an impartial observer. It cannot be disputed that it is not possible ever completely to rule out a subjective view of matters. For that reason I should like briefly to mention the way in which empirical research relating to the legal coverage of dependant labour was dealt with by Hanau-Adomeit, Söllner & Zöllner in the new editions of the textbooks which

appeared in 1983 and 1984. As an example I would like to take two projects of the (then) social science research group at the Max Planck Institute in Hamburg. The works concerned were Falke *et al.*, "Kündigungspraxis und Kündigungsschutz in der Bundesrepublik Deutschland" (Dismissal practice and protection against dismissal in the Federal Republic of Germany), published by the Federal Ministry of Labour and Social Affairs, 2 volumes, 1981, and Gessner-Plett, "Der Sozialplan im Konkursunternehmen. Die Praxis eines autonomen Regelungsmodells im Schnittpunkt von Arbeits- und Konkursrecht" (The social plan in the company under liquidation. The practice of an autonomous regulation model at the interface of labour law and bankrupcy law), published by the Federal Ministry of Justice, Cologne 1982. Both studies were – as the publication details indicate – not only produced under contract to the Federal Ministry but also contained results – which have to some extent attracted considerable attention in the community – on the non-functioning of dismissal law or the impossibility of a social plan in companies under liquidation.

In Hanau-Adomeit (Arbeitsrecht (Labour Law), 7th ed. 1983) there is on page 213 an overall assessment of protection against dismissal, but nowhere any reference to the insufficiency which has been revealed by the above-mentioned study. The social plan in liquidation is also dealt with (p. 200), but there is no mention of Gessner-Plett.

In Söllner (Grundriss des Arbeitsrechts (Basic outline of labour law), 8th ed., 1984), in footnote 2 on p. 286, there is a reference to "the effectiveness of protection against dismissal, cf. the study of the social science research group at the Max Planck Institute ...", but nothing is said about its content and no reference is made to it in the further discussion. The social plan in liquidation is dealt with on p. 190, but there is no mention of Gessner-Plett. On p. 2 the author speaks out in favour of research into legal facts, but he hardly seems to draw any practical consequences from this.

In Zöllner (Arbeitsrecht, 3rd ed. 1983) both studies are mentioned. While Gessner-Plett only is listed in footnote 17 on p. 477, together with four other studies (mainly geared to the exegesis of standards), the dismissal study is dealt with in more detail. Thus we read on p. 236:

> "Increased attention has recently been devoted to the legal facts research which is necessary (to gain knowlege of the processes actually at work) with specific reference to dismissal practice and the effects of dismissal protection. (The footnote mentions the study produced by Falke *et al.*, together with one other

study.) It is of course particularly difficult to interpret and evaluate these legal facts. Thus statements have been made regarding the alleged functional inadequacy of protection against dismissal, but these statements do not fully withstand critical examination."

The author's scepticism becomes even clearer in the introductory section, where he emphasizes that the ascertainment of legal facts is "painstaking" work, that it is a subject which should "not lie in the hands of either social revolutionaries or implacable defenders of the existing order". In the same section (pp. 27-28) we read:

> "If the investigation of legal facts must not be subjected to political ideology, even less should their evaluation. Legal facts seldom allow conclusions as to legal consequences. That applies not only *de lege lata*, but also *de lege ferenda*. ... How the legal system should react (to regulatory deficiencies) is not a task for the research of legal facts or for the social sciences, it is a specifically legal question."

At no point there is any content-related discussion of the alleged shortcomings of the dismissal study. Although the practical inefficiency of protection is of relevance in settling the question, for example, whether a dismissed employee has to be employed until the court has decided the case, there is no examination of the subject. The communication barriers are so insurmontable that a content-related discussion cannot be expected.

The legal community ranked according to prestige

The situation outlined here is indirectly confirmed by an empirical investigation conducted among the law faculties of the Federal Republic of Germany in 1975 and 1976.[21]

Of the 130 university teachers surveyed, 91.5% answered the "prestige ranking" question in the affirmative: in other words certain faculties enjoyed a higher reputation than others (op.cit. p. 333). The same persons had to assess the other faculties on a scale of marks ranging from 1 (excellent) to 5 (unsatisfactory). It is to be noted that the North German reform faculties, where the minority group discussed here is to be found lagged far behind the rest in the ranking.[22]

The political attitudes of the respondents were determined by asking them to indicate their party preference and to state whether they thought that so-called radicals could be employed

in the public service or not. Similar questions had been put two years previously in a survey of university teachers conducted by the well known opinion poll institute "Infratest". The responses were very similar. Allegiance to the German Social Democratic Party (SPD) accounted respectively for 16% and 18% of the responses, while the Christian Democrats (CDU/CSU) and the Free Democrats (FDP) got about 70%. Only 16% and 19% respectively spoke out against any discrimination against radicals in employment, 5% and 13% respectively gave no answer, while the rest – 79% and 68% respectively – considered radicals to be generally unsuited for any job of any kind in the public service (op. cit. p. 337). There was a clear correlation between political preferences thus determined and assessments of the various faculties. Thus the conservative group awarded the Hanover Legal Studies Department a mark of 4.75, while the liberal-left group of SPD adherents – even so – gave an assessment of 3.4 (op.cit. p. 338).

Why Research?

The reasons which prompt an individual (or in exceptional cases a group of researchers) to undertake research can be divided into three categories. Of course in individual cases, all three reasons may be present cumulatively.

Research for Self-Qualification

Monograph studies are undertaken on the one hand because they secure the author his doctorate in law or qualify him for appointment as a lecturer at a German faculty. Theses are rarely published in book form and thus made available to a wider public; as a rule they are merely sent to the libraries. In the case of the procedure for appointment to a teaching post (Habilitation), the reverse happens. Thus in the sixties and seventies wideranging studies were produced on collective bargaining autonomy, all of them arising out of (planned or completed) habilitation procedures.[23]

Of great importance to the further development of labour conflict law was the habilitation study of Hugo Seiter on "Streikrecht und Aussperrungsrecht" (The law of strikes and lockouts) (Tübingen 1975).

Although a thesis with an empirical emphasis is conceiv-

able, a habilitation study of this kind would first have to dispose of the argument that it belonged more properly to the field of social science.

Contract Research

One form of research – however with its own specific problems – takes on particular importance in labour law, the commissioning of legal opinions by an interested party.[24]

Particularly prominent among the clients for such reports are employers' associations, individual firms and trade unions. Federal government ministries occasionally also commission legal opinions. The reason is usually a specific dispute, for example a case before the Federal Labour Court or the Federal Constitutional Court. Sometimes they are intended to prepare or postpone a legislation initiative.

It makes sense in selecting experts for such opinions to go for persons who have already, at least in outline, expressed views tending to coincide with the interests pursued by the prospective client. Thus an employers' association would not seek out a university teacher who had stated views in support of the legality of the political strike. Conversely it may be of particular advantage to trade unions seeking a legal opinion to obtain the services of a university teacher considered to be associated with the "prevailing opinion" but who shares their view on a particular question. Thus, the argument would be wrong that expert opinions can simply be "bought". Where an expert has not previously voiced an opinion on a given subject, it is usual for him to supply a preliminary report (for a fee) which more or less outlines the result expected. The fact that there has virtually never been an instance in which an expert has in his client's interest departed from a position previously stated does of course not mean that the quite substantial fee which the assignment carries does not create a certain amenability to the concerns of the client. An opposite assumption would be to turn scholars into ideal beings. It is also well known of course that the value of an opinion depends to a considerable extent on the status of its author in the prestige hierarchy of the law-studies community. Hence there is a general "pressure to conform", not related to the specific assignment, which ensures that new professionals do not move unconventional views. The significance of *this* mechanism must not be underestimated, since the legal opinion work of many university teachers gives them the chance to increase their regular income by considerable amounts.

The fact that expert opinions are invariably commissioned

for specific purposes means that the reality of labour matters and, moreover, their political and social appraisal rarely form the subject of study in depth. In the vast majority of cases the procedure is to examine a clearly defined area of that reality – for example, warning strikes during the progress of collective negotiations – and not to institute an investigation, for example, into the function of strikes in the existing economic order. Questions of principle are examined at most under a contract from a public institution. The two studies already referred to of the social science research group at the Max Planck Institute in Hamburg and two studies on labour court practice[25] may serve as examples here. Thus in this (relatively narrow) field even interdisciplinary work is called for.

Individual Commitment

Research is also pursued because the author is personally involved with a particular question or with a particular field of law; he perceives himself as the "advocate of the weak" or as the "advocate of technical progress" and attempts to make his contribution to the desired development. In some cases it may also be more a question of improving the present state of legal research (by which a researcher also enhances his own academic reputation). One does not necessarily exclude the other, of course.

It must be assumed that research of this kind is the exception rather than the rule in university circles, since research contracts in many cases leave little capacity for self-determined purposes. However, the actual possibility of pursuing research outside any "plan" or "assignment" constitutes a crucial guarantee for the freedom of the individual researcher and for the capacity for innovation of the entire scholarship system. The relatively free status enjoyed by the teaching staffs of universities in the Federal Republic of Germany is based on the consideration that this is a way to promote the creation of new knowledge.

Main Areas of Emphasis in the Content of Labour Law Research

The volume of published material on labour law outlined above makes it difficult to discern precise areas of concentration in

content. The lists published in *Zeitschrift für Arbeitsrecht* each year covering the past year show clearly that, quantitatively speaking, collective labour law is represented slightly more than invididual labour law – assuming that the report does not assign a particular weight itself, for example, giving a more detailed coverage of articles on collective labour law.[26]

Despite the overwhelming volume of publications, it is nevertheless possible to single out two characteristics.

Research as a Reaction

Labour law research usually represents reactions to industrial developments or trade union demands to the employers or to the government. Anticipatory research, which assumes certain developments in the future and examines their implications for labour law, is extremely unusual.[27]

The link with the present industrial and collective bargaining situation for example becomes clear by considering that the emphasis in the discussion of labour dispute law has shifted heavily towards the warning strike of a few hours duration, which takes place during negotiations for a collective agreement.[28]

The dismantling of additional benefits paid by the company becomes a legal problem in particular when those benefits were previously not laid down in a company's agreement but were accorded as a "subsidiary benefit" implicitly included in the contract of employment. Whether the employer in this case has to change all the employees work contracts by laying them off and re-employ them with changed conditions or whether he can reach a so-called "deterioration" agreement with the works council at plant level is the subject of lively discussion and, moreover, one on which the Plenum of the Federal Labour Court has shortly to decide.[29]

In connection with the introduction of new technologies a controversy has also arisen as to the rights of co-determination, if any, falling to the works council on the installation of VDU (visual display unit) workplaces.[30] Here too, the legal problems were discussed after the VDU workplaces had already been installed.

As a consequence of the decline of the demand of employees and the uncertain economic situation, employers have increasingly introduced flexible working hours. Some of these schemes have already been examined from the legal point of

view.[31] Other questions, such as the legal problems raised by capacity related variations in working hours, have hitherto been less investigated, although a certain body of practical experience already exists in this area.[32]

In recent years particular attention has been devoted to employee data protection, and a total of five fairly long monographs have been produced on this subject.[33]

Even in the context of legal policy questions, the research community did not become active until demands had already achieved a certain amount of publicity. Thus, for example, the debate on the constitutionality of worker participation in management through the supervisory board only really began when the German Trade Union Federation (DGB) had incorporated demands on the matter into its programme of action.[34]

Interest-based Selection of Research Topics

The first important decision a researcher has to make is the selection of the problem he wants to investigate. With research under contract the actual decision is already made by the contracting agency.

Even outside the field of legal opinions, the choice is usually not a completely independent one. Anyone not wishing to incur any disadvantage in the hierarchy of reputation will be advised not to deal with subjects which will attract opposition from influential groups or the disapproval of the law-guild. That means that certain subjects become taboo. A researcher does not make himself particularly popular, for example, if, when dealing with labour law during the period 1933-45, he draws attention to a certain continuity of personalities from that period through to labour law studies in the Federal Republic of Germany.

Labour Law Research and Social Control

Control by the Public?

According to the traditional view, science is legitimized by rational discourse. The individual submits himself to the criticism of his colleagues: solidity and originality of argument convince, the charlatan is unmasked.

This (model of) self-regulation may serve to justify the principle that the circle of persons who may take part in the discussion should be relatively limited. This legitimation is nullified when the scientific process is dominated not by impartial debate, but by a struggle for positions of power and by a certain degree of "outside direction". Precisely when scientific study has such crucial significance for the development of law as in the Federal Republic of Germany, there is a need for other mechanisms, which will invalidate the charge of an "authoritarian legal culture".

Some years ago Häberle raised the same question in relation to constitutional law and demanded the replacement of the "closed society of legal constitutional interpreters" by an "open society of constitutional interpreters".[35]

As Utopian as this proposal may seem at first sight, there are at least some indications that labour law is opening up to a more general, political public. This can be seen from the fact that those who write on the subject do not necessarily have a university degree in law. Trade union legal protection secretaries, but occasionally also spokesmen from the employers' associations and trade union executives, readily make pronouncements on questions of labour law. More importantly, there is a not inconsiderable number of publications which are expressly directed, not – or not only – to the professional community, but to those "affected". This is particularly characteristic of the minority group outlined above, whose publications sometimes claim that they can be understood by non-lawyers and are therefore useful in trade union education. It is to be noted that two "professional journals" (Arbeitsrecht im Betrieb, Der Betriebsrat) exist which, although they deal with legal questions, are exclusively aimed at the representatives of employees' interest groups. The majority faction has, with a certain hesitation, also followed this widening of the circles to which they address themselves.

However, it would be an exaggeration to assume that the development of labour law was subject to the same public control and public criticism, as, for example, the work of the legislature or the government. Despite the "popularization" of labour law structures, the great majority of the general public are compelled to accept the statements of experts. Criticism and the indication of alternatives are only possible in absolutely exceptional cases. Hence an extensive legitimation deficit remains.

Control by Democratically Legitimated Institutions?

Clearly the shortcomings in the scholarship community cannot be remedied by prescribing certain opinions or by suppressing certain other opinions. Even a scholarship system which is bound in institutional power politics has more freedom and is more innovative than an extensively regulated institution hedged in by prohibitions. The only possible way therefore is to turn the apparent pluralism into a real one. This can only be achieved by a system in which democratically legitimated instances, such as ministries, local government bodies, public enterprises etc., pursue a compensatory research policy. They must fill the gaps left by the mechanisms controlling the scholarship process which have been described. In concrete terms, this means that more contracts should be placed for interdisciplinary research which, at least in the medium term, could reduce the distance between the prevailing labour law research establishment and a comprehensive study of labour law reality. Furthermore, the study of those subjects should be encouraged which, in the present situation, are all too easily ignored, i.e. historical and social theory questions, but also the interests of those groups of persons who have not organized themselves. This can be characterized as intervention "geared to the market". Thus progress would be made in the direction of a more democratic labour law.

NOTES

1. See Rita Zimmermann, 1983, Die Relevanz der herrschenden Meinung für Anwendung, Fortbildung und wissenschaftliche Erforschung des Rechts.
2. Schaub, 1983, Arbeitsrechtshandbuch (5th ed.)
3. Becker *et al.* 1984, Gemeinschaftskommentar zum Kündigungsschutzgesetz und sonstigen kündigungsschutzrechtlichen Vorschriften (2nd ed.).
4. Fitting, Auffarth & Kaiser, 1984, Kommentar zum BetrVG (14th ed.).
5. He was honoured with commemorative publications on his 69th birthday in 1955, on his 80th birthday in 1975 and on his 85th birthday in 1982. These contain references to his many publications.
6. Kammann, Hess & Schlochauer, 1979, Kommentar zum BetrVG (employers' side); Gnade, Kehrmann, Schneider & Blanke, 2nd ed. 1983, Kommentar zum BetrVG (trade union's side).
7. See e.g. Bobke, 1982, Gewerkschaften und Aussperrung; Kittner, 1978, Verbot der Aussperrung; Wohlgemuth, 1979, "Aussperrung und Grundgesetz", *BB* 111: Zachert, Metzke & Hamer, 1979, Die Aussperrung (2nd ed.).

8. See, for an example of a research result, Dohse, Jürgens & Russig (eds.), 1982, Ältere Arbeitnehmer zwischen Unternehmensinteressen und Sozialpolitik.

9. Thus for example the above-mentioned study of labour court practice was by the Deutsche Forschungsgemeinschaft. Reference may be made for an example of research initiated by the Federal Ministry of Labour to Münstermann & Preiser, 1978, Schichtarbeit in der BRD.

10. Hueck & Nipperdey, Lehrbuch des Arbeitsrechts (7th ed.). Vol. I, 1963; Vol. II/1, 1967; Vol. II/2, 1970. The total volume runs to 2,907 pages. Nikisch, Arbeitsrecht. Vol. I, 3rd ed. 1961; Vol II, 2nd ed. 1959; Vol. III, 2nd ed. 1966. The total volume ran to 2,116 pages.

11. In widespread use in particular are the following (in alphabetical order):
Brox, 6th ed. 1983, Grundbegriffe des Arbeitsrechts (204 pp.);
Däubler, Das Arbeitsrecht 1, 7th ed. 1983 (632 pp.), Arbeitsrecht 2, 3rd ed. 1983 (644 pp.);
Gamillscheg, 6th ed. 1983, Arbeitsrecht, Rechtsfälle in Frage und Antwort (2 volumes);
Hanau & Adomeit, 7th ed. 1983, Arbeitsrecht (245 pp.);
Söllner, 8th ed. 1984, Grundriss des Arbeitsrechts (336 pp.);
Zöllner, 3rd ed. 1983, Arbeitsrecht (532 pp.).

12. The numerous historical publications of The Mayer-Maly form an exception here.

13. A critical approach to the discussion from Udo Mayer & Norbert Reich (eds.), 1975, Mitbestimmung contra Grundgesetz? Argumente und Materialien zu einer überfälligen Reform, particularly the contributions it contains from Mayer, Wahsner and Meyer.

14. Galperin, 1971, Der Regierungsentwurf zum BetrVG; Herbert Kruger, 1971, Regierungsentwurf zum BetrVG; Obermayer DB 1971, 1715 ff..

15. The pattern of personality links has been discussed in detail by Wahsner, 1974, "Das Arbeitsrechtskartell – die Restauration des kapitalistischen Arbeitsrechts in Westdeutschland nach 1945" (The labour law cartel – the restoration of capitalist labour law in West Germany after 1945), *KJ*, 369 ff. This demonstrated the role played in the period before 1945 by Hueck, Nipperdey and Dietz, who wrote the standard commentary on the Labour Regulation Act (Arbeitsordnungsgesetz) of 1934.

16. See e.g. Manfred Bobke, 1982, Gewerkschaften und Aussperrung, which deals in particular with the mass complaints of the trade unions against the lockout and with the relative degree of legal progress thus achieved.

17. *Festschriften* for Herschel, 1982, Gerhard Müller, 1981, Hilger and Stumpf, 1983.

18. Gamillscheg, Hueck & Wiedemann (eds.), 1979, Festschrift for the 25th anniversary of the Federal Labour Court.

19. For further examples of this form of discussion, see Ehmann *RdA* 1976, 175 ff.; Reuter, 1983, Festschrift for Hilger and Stumpf, *op.cit.*, pp. 573 ff.

20. Cf. Mückenberger, 1982, "Streikrecht und Staatsgewalt in Polen", *KJ*, 4-66; Wahsner, 1982, "Gewerkschaftsrechte im internationalen Recht – Einheitliches Koalitions- und Streikrechts für kapitalistische und sozialistische Länder?", *DuR*, 73 ff., which in particular criticizes the fact that the declaration of the World Federation of Trade Unions on trade union rights in the enterprise has not even been published in the GDR.

21. On this and the following indications: Klausa, 1978, "Die Prestigeordnung juristischer Fakultäten in der Bundesrepublik und den USA", *Kölner Zeitschrift für Soziologie und Sozialpsychologie*, 321-360.

22. The Hamburger Reformmodell took 22nd place out of 28, the Hanover Faculty took 26th and that of Bremen 28th (Table, p. 334).

23. See Biedenkopf, 1964, Grenzen der Tarifautonomie;
Richardi, 1968, Kollektivgewalt und Indivualwille bei der Gestaltung des Arbeitsverhältnisses;
Säcker, 1972, Gruppenautonomie und Übermachtkontrolle im Arbeitsrecht;
Däubler, 1973, Das Grundrecht aut Mitbestimmung und seine Realisierung durch tarifvertragliche Begründung von Beteiligungsrechten.

24. The activity of the legal faculties and their members in the production of legal opinions is nothing new. For its historical development, see in detail Hermann Lange, 1969, "Das Rechtsgutachten im Wandel der Geschichte", *JZ*, 157 ff.

25. Blankenburg & Schönholz, 1979, Zur Soziologie des Arbeitsgerichtverfahrens: Die Verrechtlichung von Arbeitskonflikten;
Rottleuthner, 1984, Probleme der Arbeitsgerichtbarkeit.

26. Koller ZfA 1980, 521 ff. (44 pp. collective labour law, 32 pp. individual employment law);
Picker ZfA 1981, 303 ff. (117 pp. collective labour law, 55 pp. individual employment law);
Mummenhoff ZfA 1982, 311 ff. (38 pp. collective labour law, 35 pp. individual employment law).

27. Thus, in the context of the nuclear energy debate, a study has been produced, investigating the labour law consequences of extended plutonium technology: Rossnagel, 1984, Radioaktiver Zerfall der Grundrechte?, p.68 ("The nuclear labour relation").

28. On this point, see Bieback *AuR* 1983, 361 ff.; Bobke & Grimberg, 1983, Der gewerkschaftliche Warnstreik im Arbeitskampfrecht; Picker, 1983, Der Warnstreik; each with further references.

29. See Buchner *DB* 1983, 877; Coester BB 1984, 797 ff.; Däubler *AuR* 1984, 1 ff.; von Hoyningen & Huene *RdA* 1983, 225 ff.; Martens *RdA* 1983, 217 ff.; Löwisch *DB* 1983, 1709; Pfarr *BB* 1983, 2001 ff.; Richardi *RdA* 1983, 210 ff., 278 ff. The list makes no claim to be complete.

30. See Ehmann, 1981, Arbeitsschutz und Mitbestimmung bei neuen Technologien: Eine Darstellung der Mitbestimmungsrechte des Betriebsrats am Beispiel der Einrichtung von Arbeitsplätzen mit Bildschirmterminals; Gaul, 1981, Die rechtliche Ordnung der Bildschirmarbeitsplätze; Engel *AuR* 1982, 79 ff.
Further references in *BAG DB* 1984, 775; information on the industrial reality to be found in Cakir, Reuter *et al.*, 1978, Anpassung von Bildschirmarbeitsplätzen an die physische und psychische Funktionsweise des Menschen, research report commissioned by the Federal Ministry of Labour.

31. Example: Job sharing. In this connection, Schüren, 1983, Das job sharing; Ulber *DB* 1982, 741 ff.; von Hoyningen & Huene *BB* 1982, 1241 ff.; Koeve, 1983, "Das job sharing-Arbeitsverhältnis", *AuR*, 75 ff.; Schüren *BB* 1983, 2121.

32. See Löwisch & Schüren *BB* 1984, 929; Bobke *AiB* 1983, 123 f.

33. Kroll, 1981, Datenschutz im Arbeitsverhältnis;
Kuhla, 1983, Datenschutz im Beamten- und Arbeitsverhältnis;
Simitis, 1980, Schutz von Arbeitnehmerdaten: Regelungsdefizite, Lösungsvorschläge, published by the Federal Minister for Labour and Social Affairs;
Wohlgemuth, 1983, Datenschutz für Arbeitnehmer, eine systematische Darstellung;
Zöllner, 1982, Daten- und Informationsschutz im Arbeitsverhältnis;
Hümmerich & Gola, 1975, Personaldatenrecht im Arbeitsverhältnis (a book which played a precursor role).

34. For a more detailed treatment, see Wahsner, 1975, "Mitbestimmung, Koalitions- und Streikrecht, Tarifautonomie: Historische Notizen", in Mayer & Reich (eds.), Mitbestimmung contra Grundgesetz, pp. 87 ff.

35. Häberle *JZ* 1975, 297 ff.