

Article

Is There a Need for Independent Labour Courts?

Peter Axel Windel* & Tong-Shuan Yang**

ABSTRACT

Much of labour law consists of contract law at its core, but there are characteristics of labour matters that demand particular attention. Therefore specific regulations on labour matters have been promulgated to complement the regular civil law. Furthermore, ordinary civil litigation is not an avenue for particular issues that arise in disputes under labour law. A wide range of approaches to handle these issues can be found in comparative law. Like in many other countries, special divisions governing labour matters have been established in Taiwan under the auspices of the ordinary courts. On the other hand, Germany is among the few nations worldwide with an independent labour court system. Even if further reform of the rules governing disputes under labour law is desirable, there is no need to mirror the German model in order to improve judicial quality in Taiwan. On the contrary, the complex structure and the costs of the labour court system in Germany should be reconsidered, as special divisions of the ordinary courts may govern labour matters in a similar way.

Keywords: *Judicial Quality, Court and Tribunal Systems, Labour Law, Civil Litigation, Lay Judges, ADR*

* Universitätsprofessor Dr. iur. utr. Peter A. Windel Chair of Procedural Law and Civil Law, Faculty of Law, Ruhr-University Bochum. E-mail: zpo@rub.de.

** Professor of Department of Labor Relations and Institute of Labor Studies, National Chung Cheng University. E-mail: tgyang@ccu.edu.tw.

CONTENTS

I. INTRODUCTION	321
II. WHAT CAN A LABOUR COURT SYSTEM BE?	322
A. <i>The Labour Court System in the Context of the Separation of Powers</i>	322
B. <i>Comparative Law</i>	324
1. <i>Overview</i>	324
2. <i>Taiwan in Particular</i>	327
3. <i>Germany in Particular</i>	329
III. IMPLICATIONS AND EFFECTS OF A LABOUR COURT SYSTEM	330
A. <i>The Organisation of the Courts</i>	330
B. <i>The Labour Court System and Substantive Labour Law</i>	332
C. <i>Lay Judges in the Labour Court System</i>	334
D. <i>Are There Characteristics of Labour Judicature?</i>	335
IV. CONCLUSIONS	336
A. <i>Conclusions for Germany</i>	336
B. <i>Conclusions for Taiwan</i>	336
REFERENCES	338

I. INTRODUCTION

In Taiwan, Article 16 of the Constitution of the R.O.C. (Taiwan) stipulates that “everyone has the right to sue”. It also means that for a long time we have only had ordinary courts and administration courts. We do not have constitutional courts or even other special courts. Neither do we have labour courts. Nevertheless, there are many special labour chambers provided in every ordinary court of first instance and also in some appeal courts. But, it appears that the number of legal disputes between employees and employers are on the rise in Taiwan. Ordinary courts, which have limited expertise in dealing with the special nature of labour disputes, are not able to adequately resolve these problems.

Currently, when there is a labour dispute case between employees and employers, the people who manage labour dispute settlements and judges can only peruse different laws and regulations to find the solution. The Code of Civil Procedure (hereinafter CCP) is still the main procedural law applying to labour disputes which judges and parties to labour disputes must obey. However there is a lot of criticism about the present legal situation, and appeals over the last few years, around 2008, especially by some labour law scholars, have called for the establishment of a specialized procedural law especially designed for labour disputes. According to these appeals, procedural law in addition to substantive laws can resolve labour disputes. This suggestion has given rise to a turbulent debate among practitioners, civil servants and scholars.¹ A final conclusion is still not in sight.

In contrast to Taiwan, there are five different branches of jurisdiction in Germany that are provided under Article 95 of the Basic Law of the Federal Republic of Germany (the German Constitution). These are the ordinary courts, which decide general civil and criminal cases, the labour courts as special civil courts, the general administration courts as well as the social welfare courts and the finance courts. The latter two are specialised administration courts. The constitutional courts exist outside and in addition to these five judicial branches.

One of the great German lawyers once aptly called this fragmentation of jurisdiction the original sin of the German judiciary.² It seems to us as well, that Germany might have become lost in a labyrinth of different court systems. Certainly, more justices do not automatically mean more justice.

1. See Cheng-Kuang Huang, Remarks at The Status Quo and Dilemma of Legal Proceedings on Labour Disputes in Taiwan, Symposium on The Legal Proceedings on Labour Disputes (Dec. 2, 2008).

2. Konrad Redeker, *Anmerkung zum Urteil des Bundesgerichtshofes vom 1.7.1973 – BGH III ZR 187/73*, [Note to the judgment of the Federal Court from 1.7.1973 – BGH III ZR 187/73], 27(3)AnwBl [Lawyers’ Leafs]. 106, 108-109 (1977).

Therefore a look at Germany is instructive, because a great *judicial reform*³ has been discussed there for years now. In essence the question Germany facing is whether it should keep an independent labour court system or combine it with either the ordinary or social welfare courts.

In order to answer the question—of whether there is a need for independent labour courts—we will first consider what a “labour court system” can be in the first place (II.). We will then point out the implications and effects of a labour court system using the German model as an example (III.). Finally we will draw conclusions for Germany as well as for Taiwan (IV.).

II. WHAT CAN A LABOUR COURT SYSTEM BE?

Whether an independent labour court system makes sense can only be evaluated when its function is defined in the context of the structure and organisation of the state in which it is implemented (1.). Furthermore, an overview of comparative law is advisable, during which we will focus on Taiwan and Germany (2.).

A. *The Labour Court System in the Context of the Separation of Powers*

Disputes under labour law can be solved in different ways. Mediation, conciliation or arbitration (Alternative Dispute Resolution – ADR) can be considered as options. Alternatively, public authorities may be in charge of solving the disputes by decisions of individual officers, commissions or even tribunals.⁴ In all of those cases, we are talking about services of justice in the widest, nontechnical sense, which are provided by the execution as one of the powers of the state (hereinafter administrative services of justice). However, a binding decision by a neutral and independent court may also be

3. See, e.g., CLAAS-HINRICH GERMELMANN ET AL., ARBEITSGERICHTSGESETZ: KOMMENTAR [LABOUR COURT LAW: COMMENTARY], (7th ed. 2009), para. 33; FRANZ JOSEF DUEWELL & GERT-ALBERT LIPKE, ARBEITSGERICHTSGESETZ: KOMMENTAR FUER DIE PRAXIS [LABOUR COURT LAW: COMMENTARY FOR PRACTICE], (2d ed. 2005) para. 238; Peter Andreas Brand, *Über den Sinn und Unsinn der Arbeitsgerichtsbarkeit – Ein Beitrag zur Diskussion über die Zusammenfassung von Arbeits- und ordentlicher Gerichtsbarkeit* [On the sense and nonsense of the labour tribunal – A contribution to the discussion on the consolidation of labour and ordinary jurisdiction], 43 ZRP [JOURNAL OF LEGAL POLICY] 81 (2010).

4. Tong-Shuan Yang, *Kuochia Chungli Yüentsê Tsai Laotzu Chêngi Chung Chih Yünyung* [The Application of the State Neutrality Principle to Labour-Capital Disputes Settlement], 10 (1) KUOK'ÉHUI YENCHIU HUIK'AN JÉNWÊN CHI SHÉHUI K'ÉHSIAO [PROC. NATL. SCI. COUN. ROC(C)] 79, 96; Ruediger Krause, *Erladigung von Arbeitsstreitigkeiten – Differenzierte Funktionalitaet von Arbeitsgerichtsbarkeit und Alternativer Streiterledigung (ADR)* [Settlement of Labour disputes - Differentiated Functionality of Labour courts and alternative dispute resolution (ADR)], paper presented at International Conference, *Arbeitsgerichtsbarkeit, Schlichtung und Arbitrage von Arbeitsstreitigkeiten* [Labour courts, mediation and arbitration of Labour disputes], Taipei (2007).

considered as an option. In this case, a labour court system would be equal to the system of the ordinary courts. Therefore, no such labour court system is conceivable without a jurisdiction separate from the other powers (legislative and executive in Germany, and the Examination and Control Yuan in Taiwan). Only when there is an independent jurisdiction can one ask whether it should in itself be split up into different courts. So, we are in fact talking about the separation of one of the already separated branches of power. For the constitution of a state, the splitting up of jurisdiction into different groups is by no means imperative. Abstractly speaking, two criteria are important:

Firstly, the distinction between public and private law is considered to be very important in Germany. The more the differences between public and private law are emphasized in a national legal system, the sooner the state will create courts for disputes concerning public law on the one hand and for conflicts under private law on the other hand. The basic distinction is then between two types of legal recourse. Whether there is supposed to be a labour court system depends on whether the substantive labour law shows enough distinction from the rest of substantive private law. By that token, the organisation of the courts follows the substantive labour law. Labour courts would then be special civil courts for labour affairs only.

Secondly, law can be distinguished by the aspect of social life it is supposed to govern, without regard to its dogmatic character. In general, the legal rules that are applicable to the working world partly belong to public law and partly to private law. Whether there is supposed to be a special court system for this body of law depends on whether the working world is different enough from other areas of life. Thus, the organisation of the courts is in accordance with (legal-)sociology. Independent courts would then not only be special civil courts, but also would at least have to include also the part of social welfare law that concerns working life. In fact, we are talking about a court for *labour affairs* as well as *social welfare* then.

These theoretical foundations are important for our topic. But they are not decisive in and of themselves. Because as far as there are labour court systems, they have rarely been established solely due to plans concerning state theory. Much more common is that labour court systems are the result of historical development, which takes place under the specific economic and socio-political conditions of the particular state.

B. *Comparative Law*⁵

Due to the aforementioned reasons, there can be found in ways of comparative law a large range of systems by which nations attempt to resolve disputes occurring under labour law.

1. *Overview*

To this day, numerous states do not have an independent labour court system. Yet, in terms of actual effects, that can mean different things. It may mean that disputes concerning labour law are resolved solely by the ordinary (civil) courts. Those courts will then in part have to pay attention to certain characteristics of conflicts under labour law. This is the approach taken by the *Netherlands*, where a *distinct mode of trial* can be chosen. Going further, in *Italy* there are *distinct chambers* on the first and second level of *regular jurisdiction*. This is the same in *Austria* since a reform in 1987 whereby the former labour and social welfare courts were abolished. Since then (except in Vienna), the regular (district and state) courts make decisions “as labour and social welfare courts.” Before the great reform in *Japan*⁶ there were special chambers for labour law at the ordinary courts in some large cities.

The absence of an independent labour court system can also mean that there are at least administrative services of justice to solve disputes under labour law. The *USA* and *Japan*, for example, traditionally did not have a labour court system as a rival to the regular courts, but indeed there were commissions or public offices to arbitrate disputes under labour law and to enforce protective labour legislation. Thus, both countries provided administrative services of justice, but no court system.

In the meantime, a similar development has taken place in both of these states. In *Japan*,⁷ in the course of the broad economic, administrative and judicial reforms of the last decade (since 2001), a wide array of ADR-services have come to be provided through the labour administration. The success rate has been said to be at 40%⁸ even after the first steps of the reform. Since 2006, there have been special labour tribunals in addition to the district courts to complement them, which are staffed by a professional judge and two lay judges, one nominated by the labour unions and one by the employer's associations. Their duty lies in mediation and

5. GERMELMANN ET AL., *supra* note 3, at paras. 307-37 with additional references (sadly partially outdated).

6. Upon this point please refer to the following analysis.

7. Kazuo Sugeno, *Die Entstehung des Arbeitsgerichtssystems in Japan: eine Synthese zwischen Arbeitsrechtsreform und Gerichtsreform* [*The emergence of the Labour court system in Japan: a synthesis of Labour law reform and judicial reform*], 59 RDA [LABOUR LAW] 242 (2006).

8. *Id.* at 242, 244.

decision-making. Their decisions, however, are not binding. If the parties involved do not accept the decisions, the action is passed onto a regular chamber of the same district court and thereby the regular court system to be tried normally. The reform is reported to be successful, even if there are still some problems within the system like potentially prohibitive lawyers' fees.⁹

The process in the United States is largely unchanged under federal law. But, due to anti-discrimination legislation in particular, public authorities have been gaining more influence as control boards. In addition to this, there are trials following state law in some states. In *West Virginia* for example, the process starts with the decision of a *deputy* of the employment office (W. Va. Code, § 21A-7-4 [2011]), which can be appealed at an appeal tribunal (W. Va. Code, § 21A-7-7 [2011]). This tribunal regularly consists of three administrative law judges (W. Va. Code, § 21A-7-7 [2011]). The so-called board of review is the next avenue of appeal (W. Va. Code, § 21A-7-9 [2011]), a three-person special appeals board (composed pursuant to W. Va. Code, § 21A-4 [2011]). If this administrative procedure (for further procedural details see Title 84 of the W. Va. Code of State Rules [1999]) is exhausted, the parties may seek judicial review in the ordinary courts by appealing to a circuit court (W. Va. Code, § 21A-7-17 [2011])¹⁰ and ultimately to the supreme court of appeals (W. Va. Code, § 21A-7-27 [2011]).¹¹

A *hybrid form* of resolving disputes under labour law similar to those in *Japan* and in several American states exists in *France*. Labour tribunals (*conseils de prud'hommes*) only exist for individual trials and on the first level of jurisdiction. These are further separated into a *bureau de conciliation* and a *bureau des jugement*. The *bureau de conciliation* will initially attempt to arbitrate. Here, there are only lay judges involved. If the arbitration fails, the case is again tried by the *bureau de jugement* under the direction of a professional judge. The decision is binding, but can be appealed at two further levels of jurisdiction. Here the ordinary courts have jurisdiction, but there are special departments for this purpose. This model combines the concepts behind the models of *Japan* and the *USA* with those of *Italy* and *Austria*.

Differences in the organisational design are interesting, as are the disparities between historical traditions and the political intensions behind the introduction of labour court systems. In *Switzerland* for example, the labour court system has traditionally grown in a similar way to those of

9. Iwao Sato, *Expanding Access to Justice for Labor Disputes: The Impact of the Labor Tribunal System*, 46 SOCIAL SCIENCE JAPAN 6 (2012).

10. The *Circuit Court of Kanawha County* has jurisdiction over all those trials.

11. For the help with this information we thank attorney Mark McMillian, JD, Charleston, West Virginia, USA.

Germany and *France*. On top of that, there is the cantonal fragmentation of law that is typical for the Swiss Confederation.

Labour court systems with a long tradition obviously have a strong tendency to endure. For example the *Labour and Social Welfare Court Vienna* could not be abolished by the great reform of 1987. As a result, since then, labour jurisdiction has been administered differently by region in *Austria*. After all, outside of Vienna, independent labour and social welfare courts have been abolished.

On the contrary, since 1963, there have been attempts in the *United Kingdom* to introduce a labour court system (at present known as: *Employment Tribunals* and *Employment Appeal Tribunals*). At present, *tribunals* exercise independent jurisdiction outside that of the *Courts* (the “ordinary” court system). Historically these evolved from tribunals that were special offices of public administration or the government.¹² The political process moved sluggishly and – depending on the current political majorities – by no means in a straight line. At their core the employment tribunals up to this day have a limited jurisdiction over certain cases such as unfair dismissal, discrimination, unjustified deduction from pay and some other claims involving the employer-employee relationship. Furthermore, jurisdiction is limited to certain values at stake in disputes. Alongside the employment tribunals, the ordinary courts also have jurisdiction by their own rules. An expulsion of the ordinary courts from disputes under labour law seems to be missing.¹³ Traditionally *arbitration* in the United Kingdom is carried out *intra-company*. In 2004 the rules for such arbitration were unified and made stricter. Most importantly the implementation of an intra-company complaint procedure was made a prerequisite for filing a complaint to an employment tribunal¹⁴. Above all, that change was intended to reduce the workload of the employment tribunals, but was revoked in 2008¹⁵ along with the rules about the intra-company pre-trial.¹⁶

Finally, in 1995 and 1996, *South Africa* has put into place what is probably the most comprehensive model to solve disputes concerning labour law. In addition to pre-trial arbitration committees, there is an independent

12. Edward Jacobs, *Something Old, Something New: The New Tribunal System*, 38 IND. L.J. 417 (2009). It is concerning that there is now an ongoing political process to unify all tribunals except the employment courts.

13. Andrew Kaufman, *Arbeitsgerichtsbarkeit in England [Labour Court in England]*, FACHANWALT ARBEITSRECHT [ATTORNEY OF LABOUR LAW] 354 (2003).

14. Carla Detmers, *Neue Regelungen zum Disziplinar-, Kuendigungs- und Beschwerdeverfahren im englischen Recht [New regulations for disciplinary, dismissal and grievance procedures in English law]*, FACHANWALT ARBEITSRECHT [ATTORNEY OF LABOUR LAW] 101 (2005).

15. Gregor Thuesing, *Blick in das europäische und ausländische Arbeitsrecht [An oversight on the European and Foreign Labour Law]*, 63 RDA [LABOUR LAW] 187-88 (2010).

16. On the critical perspective, see Astrid Sanders, *Part One of the Employment Act 2008: “Better” Dispute Resolution?*, 38 IND. L.J. 30 (2009).

labour court system with two levels of jurisdiction. But until the end of the last millennium, the legal protection seemingly only existed in theory. It is said that there were only six judges for both levels of jurisdiction in the entire country.

2. *Taiwan in Particular*

In Taiwan, there is no independent labour court system. For a long time, disputes over labour law may either be solved in special labour chambers with compulsory mediation in ordinary courts (§ 403 of CCP), or by way of conciliation, mediation and arbitration proceedings. It means that the approach strongly emphasises administrative services of justice. This is independent of the separation of powers (jurisdiction, legislative and executive). In fact, it results from the theory of state corporatism which for decades dominated the labour disputes practice in Taiwan. Under this theory, the Taiwanese government can solve labour disputes by means of conciliation, mediation and arbitration proceedings.¹⁷ Ultimately, this is similar to the situation in the USA and Japan, where parties can also resolve labour disputes through labour administration.

According to the former Settlement of Labour-Management Disputes Act (ASLMD), the disputing parties could attempt to receive assistance from administrative conciliation and arbitration before bringing a lawsuit in special labour chambers or a regular court. Typically, the conciliation and arbitration have been voluntary. But, in special cases, labour administration authorities could automatically mandate the use of conciliation and arbitration. The compulsory conciliation never took place in practice, and compulsory arbitration took place several times, but never reached any conclusion. According to long-standing experience, neither voluntary nor compulsory conciliation or arbitration can really help to solve labour disputes. On the contrary, the most important way to solve labour disputes is mediation, which was not stipulated by any law or regulation.¹⁸ The labour administration authorities used mediation themselves or entrusted a layperson to mediate labour disputes. This legal situation was criticized by some scholars, however, because it might have violated the principle of rule of

17. See Yang, *supra* note 4, at 97.

18. See Geng-Scheng Lin, Remarks at Labour and management representatives taking part in labour disputes proceedings, Symposium on The Legal Proceedings on Labour Disputes (Dec. 2, 2008).

law.¹⁹ As a result, ASLMD was revised.²⁰ Since May 1, 2011, mediation and arbitration can be chosen to assist with disputes under labour law.

We can see there are comprehensive regulations for administrative services of justice, and many cases are resolved via ADR. However, if labour parties cannot settle their disputes by way of conciliation, mediation or arbitration, then they must go through lawsuits in labour chambers or ordinary courts. In Taiwan, we have yet to enact a Labour Court Code, and unlike Germany, we do not have three levels of jurisdiction. The current labour chambers are designed as special courts within ordinary courts. Nowadays, all courts of first instance have labour chambers. But, only some second-level courts have labour chambers. The particular considerations of labour lawsuits which are emphasized or demanded by some scholars here, such as shorter proceedings time and exemption or reduction of fees,²¹ have not been followed by judges. According to Article 68 of CCP, the chief judge can allow a normal person (non-lawyer) to act on behalf of parties to the lawsuit. In this situation, secretaries of unions and employees who work in a personnel department or even graduates from human resource management departments, as well as the graduates from labour relation departments and labour affairs departments, may attend trial proceedings as representatives for either side.

As aforementioned, the Taiwanese government has yet to pass a special Labour Courts Law. Only in some substantive labour laws can we find individual regulations that especially appear for legal proceedings, for example Article 32 of the Protection for Workers incurring Occupation Accidents Act. But in general, if labour parties sue each other, whether in special labour chambers or in ordinary courts, the provisions of the Code of Civil Procedure must be followed. Therefore the real problem in Taiwan is: many stipulations in the Code of Civil Procedure are not suitable for labour disputes. They are originally intended for application to regular civil

19. See Yang, *supra* note 4, at 99.

20. Amended and promulgated a total sixty-six articles of the Act by Hua Tsung I I Tzu Ti 09800165161 [the Presidential Order No. 09800165161] (July 1, 2009), effective since May 1, 2011 by Order No. Yuan-Tai-Lau-Tzu-1000019757A of the Executive Yuan [Executive Yuan Order No. 1000019757A] (Apr. 26, 2011).

21. See Kuo-Chang Huang, *Wokuo Laotung Susung Chih Shihchêng Yenchiu I Ti I Shên Susung Chih Shênli Yü Chungchieh Ch'inghsing Wei Chunghsin (Shang)* [An empirical study on labour litigation in Taiwan: With focus on the adjudication process and case outcome in the trial court (1)], 106 CHÈNGTA FAHSIAO P'INGLUN [CHENGCHI L. REV.] 203 (2008); Kuo-Chang Huang, *Wokuo Laotung Susung Chih Shihchêng Yenchiu I Ti I Shên Susung Chih Shênli Yü Chungchieh Ch'inghsing Wei Chunghsin (Hsia)* [An empirical study on labour litigation in Taiwan: With focus on the adjudication process and case outcome in the trial court (2)], 107 CHÈNGTA FAHSIAO P'INGLUN [CHENGCHI L. REV.] 165 (2009).

disputes. An example is the agreement of local jurisdiction (Article 24 of CCP): Under this provision, the employer can make an agreement about local jurisdiction with the employee at the beginning of the employment, which would then compel the employee to go somewhere other than where the factory or firm is located to carry out a lawsuit against his or her employer. This is not just a problem of expenditures; it is also a problem of whether the employee has time to travel a considerable distance. As a result, in some circumstances employees may reluctantly choose not to sue their employers.

Because many provisions of the Code of Civil Procedure are not suitable for labour disputes, many have called for revision of the relevant provisions. Furthermore, recently there are some scholars who insist that Taiwanese legislators should try to introduce a system of lay judges in labour tribunal proceedings or labour chambers.²² According to these scholars, the German lay judges system in German Labour Courts Law should serve as the model for Taiwan. The participation of two lay judges in German labour courts has a significant influence on labour disputes. The two lay judges could bring their observations, professional knowledge and experience into the trial proceedings so that the court might reach a better decision.²³

3. *Germany in Particular*

Like *Spain* and *Brazil*, *Germany* also has an independent labour court system. At present,²⁴ there is a labour court system as well as a social welfare court system.²⁵ The labour courts adjudicate in two different modes of trial: The *judgment-trial* (Urteilsverfahren, §§ 2, 46 ff. of the Labour Court Act – Arbeitsgerichtsgesetz/ArbGG) is applicable in *individual* labour law, and determines the contractual relationship between employers and employees. The *adjudication-trial* (Beschlussverfahren, §§ 2a, 80 ff. ArbGG) is for *collective* labour law. For instance, conflicts between an employer and the staff committee (Betriebsrat) are adjudicated, but also controversy about the status of a union or an employer's association.²⁶

There are three levels of jurisdiction for each mode of trial: the *district labour courts* (Arbeitsgerichte; ArbG), the *state labour courts* (Landesarbeitsgerichte; LAG) and the *federal labour court* (Bundesarbeitsgericht; BAG) with its seat in Erfurt.

22. Kuan-Ling Shen, Remarks at Labour and management representatives taking part in labour disputes proceedings, Symposium on The Legal Proceedings on Labour Disputes (Dec. 2, 2008).

23. Please refer to III. 3.

24. For historical aspects, see Krause, *supra* note 4, at 3.

25. In contrast to that, the court system established in 1890 also had jurisdiction over certain issues concerning social welfare law, GERMELMANN ET AL., *supra* note 3, at para.7.

26. Details in Krause, *supra* note 4, at 6.

All three levels are characterized by the *participation of two lay judges*. Half of these are selected by the employees (Unions), and half by the employers (employer's associations).²⁷ Thus, the constitutionally guaranteed coalitions (Article 9 III GG) are represented on the judge's bench. At the first two levels, one professional judge presides. Because of this, the lay judges outnumber him or her. This is not so at the federal labour court, however. There, in addition to the chief judge and the lay judges, two other professional judges complete the bench.

Conciliation is integrated into the labour court system in the form of an obligatory *conciliation hearing* (*Gueteverhandlung*; § 54 ArbGG). This is in contrast to many other legal systems that explicitly place arbitration as ADR in the pre-trial stage and/or in the hands of institutions, which have no full jurisdiction.²⁸ Even more astounding is that *conciliation* takes place *without* the participation of *lay judges*. Only the chief judge, meaning a professional judge, is responsible for proceedings at this stage. This is in contrast to many other legal systems.

III. IMPLICATIONS AND EFFECTS OF A LABOUR COURT SYSTEM

A. *The Organisation of the Courts*

An independent labour court system allows for a high degree of specialisation on the side of the judges and a lean court management of similar cases. Therefore the *quality* and *efficiency* of labour courts are often emphasized.²⁹

On the other hand, the separation of the labour courts leads to organisational follow-up questions, which need to be answered. The first of those follow up questions is related to *departmental* matters on the side of the government. In the Federal Republic of Germany, the administration of the labour courts has for a long time been the responsibility of the ministries of labour affairs of the whole nation, not of the ministries of justice. This fact has also generated a great deal of political controversy.³⁰ Today on the *federal level*, the ministry of labour affairs and social welfare executes the administrative duties and has supervision, but does so "in accordance" with the federal ministry of justice under § 40 Abs. 2 ArbGG. On the *state level*, the departmental organisation is exempt from federal rules, and arranged in

27. Details in *id.* at 7-12.

28. USA, Japan, France, South Africa as well as the intra-company procedure in the UK.

29. But see Brand, *supra* note 3, at 81-82.

30. See, e.g., Otto Rudolf Kissel, *60 Jahre Arbeitsgerichtsbarkeit [60 years of Labour Courts]*, 40 DB [THE ENTERPRISE] 1485-86, 1489 (1987); GERMELMANN ET AL., *supra* note 3, at para. 133; Brand, *supra* note 3, at 81.

different ways by the state laws.³¹

As for why an “in-house jurisdiction” approach for the ministries of labour affairs is desirable, again competence and synergy are often mentioned. What speaks against this arrangement, however, is that the administration of the courts should in fact be put under the control of a ministry that at its core does not carry out administrative duties in the first place. The idea behind this position is to achieve the clearest possible separation of powers. This problem is by no means merely one of academic interest, and it cannot be reduced to a matter of the egos and vanities of various ministers, either. Rather it is common practice in Germany for labour cases, especially those about protection against dismissal, to end with the burdening of a third party. That is, employer and employee agree with the assistance of the judge on a compromise that obliges the state to make payments from the social budget, which are in fact unwarranted.³²

Another follow-up question lies in the fact that the existence of different legal recourses demand some kind of regulation to decide who has *jurisdiction* and a *process to determine which legal recourse is the correct one*, if there should arise controversy. Responses to both of these legal issues were codified in Germany in 1990 and 1991 in a rather reasonable way.³³ Nevertheless, to this day, there occur judicial conflicts between the legal recourses. For instance, the *United Senate of the five Federal Supreme Courts* recently had to decide, whether the labour courts or the ordinary courts are to pass judgment over the reclaiming of employee’s wages during the bankruptcy of the employer.³⁴ Such conflicts take time despite all efforts to speed up the decision-making process. In this example it took two years, during which all such trials in Germany had to be put on hold.

Similar problems related to who has jurisdiction, the labour courts or the ordinary courts, do exist internally. After all, the labour courts make decisions partially in *judgment-trials* and partially in *adjudication-trials*. The distinction is difficult insofar as the collective labour law naturally affects individual labour affairs, and because of that, often collective labour law is the foundation of the decision in judgment-trials as well. Furthermore, it

31. GERMELMANN ET AL., *supra* note at 3, paras. 32-36.

32. Brand, *supra* note 3, at 81.

33. See Peter Axel Windel, *Die Bedeutung der §§ 17 II, 17a GVG fuer den Umfang der richterlichen Kognition und die Rechtswegzuständigkeit* [The meaning of §§ 17 II, 17 GVG for the scope of judicial cognition and the jurisdiction of different courts], 111 ZZP [J. OF CIVIL PROCEDURES] 3 (1998).

34. Peter Axel Windel, *Anmerkung zum Beschluss des Gemeinsamer Senat der Obersten Gerichtshoeefe des Bundes, Beschluss vom Sep. 27, 2010 – GmS-OGB 1/09, AP ArbGG 1979 § 2 Arbeitsrechtliche Praxis (Nachschlagewerk des Bundesarbeitsgerichts)* [Note on the United Senate of the five Federal Supreme Courts, decision of 27.9.2010 –GmS-OGB 1/09, labour law practice (reference to federal labour court)], 14 ZUSTAENDIGKEITSPRUEFUNG [JURISDICTION TEST] 605 (2011).

seems possible that substantive “claims”³⁵ can arise between company-constitutional organs.³⁶ In that case, the individual labour law seems to be the foundation of collective labour law disputes.

It has been suggested that these jurisdictional problems be solved by a strengthening or widening of the separation-model. So, the jurisdiction of the labour courts should be strengthened compared to that of the ordinary civil courts,³⁷ and there should be an all-embracing mode of trial for all collective actions, which supersedes the current adjudication-trial.³⁸ But by that nothing would be revealed, except the tendency of every institution to further expand itself. The problem of separation is not being solved; rather, the boundaries are only rearranged.

B. *The Labour Court System and Substantive Labour Law*

Germany belongs to the Continental-European legal tradition. Therefore the positive law and legislations play much bigger roles in developing the legal system than judicature does. This is the decisive difference from the *case law* tradition, which dominates the Anglo-American law. Nevertheless judicature does play an important part in the development (Fortbildung) of the substantive law in our system as well. Especially in the context of labour law, judicature has been so important for a long time that one may speak fittingly of judge made law (“*Richterrecht*”) in this regard.³⁹ It surely is no exaggeration to categorise the employment of an independent labour court system as a *means of developing modern labour law*.⁴⁰ With this in mind, the question of whether an independent labour court system should be introduced depends on *three preliminary questions*:

Firstly, to what extent is a *codification*⁴¹ of the norms of the entire working world beneficial? In particular, should such a move be

35. The correct solution would be controlling internal law by right of action.

36. Concerning the problem, see GERMELMANN ET AL., *supra* note 3, at para. 150.

37. Otto Rudolf Kissel, *Defizite im arbeitsgerichtlichen Rechtsschutz* [Deficits in labour disputes under labour law], in ARBEITSGERICHTSBARKEIT – FESTSCHRIFT ZUM 100JAEHRIGEN BESTEHEN DES DEUTSCHEN ARBEITSGERICHTSVERBANDES [LABOUR COURTS - COLLECTED PAPERS IN HONOR OF 100TH ANNIVERSARY OF THE GERMAN LABOUR COURTS ASSOCIATION] 19, 23. (Deutscher Arbeitsgerichtsverband [German Labour Court Association] eds., 1994).

38. GERMELMANN ET AL., *supra* note 3, at para.178.

39. E.g. Kissel, *supra* note 30, at 1485, 1487; Gert Albert Lipke, *Beitrag der Arbeitsgerichtsbarkeit zur Gesellschaft und zum Schutz der Arbeitnehmer in der Bundesrepublik Deutschland* [Contribution of the labour courts to society and labourthe protection of employees in the Federal Republic of Germany], paper presented at International Conference, *Gerichtsverfahren in Arbeitsachen* [Litigation in Labour issues], Taipei (2008).

40. Peter Hanau, *Arbeitsgerichtsbarkeit – Anspruch und Wirklichkeit* [Labour courts – Claim and reality], 3 NZA [NEW J. OF LABOUR RIGHT] 809, 810 (1986); Lipke, *supra* note 39, at 2.

41. See Hanau, *supra* note 40, at 809, 812.

achieved at the price of “judicialization”⁴² of the working world? In Germany countless employee-employer relationships are clarified in court today, which would be unimaginable without special labour courts with (at the first level of jurisdiction) easier accessibility.⁴³

Secondly, is there a lack of substantive labour law? In Germany this question has to be considered differently today than it would have been at the time the labour court codes were created in 1926 and 1953.⁴⁴ Germany may still not have one code on labour law, but many rules have been codified in the meantime. That may in many cases be nothing but codified judge-made law at its core, but that does not change the fact that the job description of German labour courts is subject to change.⁴⁵ Of course labour courts have not lost all of their significance in the development of substantive labour law. But, this significance does not seem to be appreciably larger than that of the ordinary courts for the civil law in general anymore.

Thirdly, labour law appears to be especially ideologically charged.⁴⁶ This places the labour courts into an awkward position in deciding between obeying the law and following legal politics as the wish for “social advancement.” That is, it is hard to obey the law if the law is altogether missing or erroneous, and especially if it is incomplete. But what a society considers socially desirable can hardly be determined without a legal basis.⁴⁷ This is because law is the expression of the people’s will. Therefore labour courts tend to be especially drawn into the process of political design.⁴⁸ This happens partially from the outside because of the actions of the politically active social partners and the media. Sometimes even

42. *Id.* at 809, 812.

43. There are privileges concerning legal expenses here, critically Brand, *supra* note 3, at 81, 83.

44. The labour court code (ArbGG) still valid today dates back to 1979. This time should roughly be at the turning point. But, back then it wasn’t at its core about the fortification of a labour court system as such, but more about the adaption of the ArbGG to the ZPO, which was fundamentally reformed in 1976, GERMELMANN ET AL., *supra* note 3, at para. 23.

45. Concerning this see Alfred Soellner, *Die Arbeitsgerichtsbarkeit im Wandel der Zeit [The Labour courts through the ages]*, in ARBEITSGERICHTSBARKEIT – FESTSCHRIFT ZUM 100 JAEHRIGEN BESTEHEN DES DEUTSCHEN ARBEITSGERICHTSVERBANDES [LABOUR COURTS - COLLECTED PAPERS IN HONOR OF 100TH ANNIVERSARY OF THE GERMAN LABOUR COURTS ASSOCIATION], *supra* note 37, at 1, 14.

46. About the ideology of German labour law, see Bernd Ruethers, *Arbeitsrechts und Ideologie [Labour Law and ideology]* in ARBEITSGERICHTSBARKEIT - FESTSCHRIFT ZUM 100 JAEHRIGEN BESTEHEN DES DEUTSCHEN ARBEITSGERICHTSVERBANDES [LABOUR COURTS - COLLECTED PAPERS IN HONOR OF 100TH ANNIVERSARY OF THE GERMAN LABOUR COURTS ASSOCIATION], *supra* note 37, at 39, 54.

47. Hanau, *supra* note 40, at 809, 811.

48. Kissel, *supra* note 30, at 1485, 1487.

class actions are filed as “socio-political demonstrations.”⁴⁹ But the whole degree of political influence can only be appreciated, if one takes a closer look at the internal structure of the labour court system.

C. *Lay Judges in the Labour Court System*

The participation of laypersons in the court has been discussed for centuries. At present, the question of whether or not they should act as jurors or even as judges has again become an issue. Nations with long-standing experience both with juries and with lay assessor systems doubt their value,⁵⁰ whilst Japan and South Korea recently established quasi-jury systems. Thailand⁵¹ and Taiwan⁵² are about to do likewise. Jury and quasi-jury systems may be appropriate for criminal litigation.⁵³ For civil litigation, the system of continental Europe should be given even more consideration, where lay assessors traditionally share the bench with professional judges. But in Germany, such lay judges are only employed in certain trials.⁵⁴ It is a characteristic of German labour courts that there is always one lay judge for each coalition. A German labour court system without those lay judges as representatives of the politically influential social partners is unthinkable.

The clear value of this type of lay judge in labour law has often been emphasized. Laypersons supposedly introduce the views, opinions and expertise of those participating in the working world thereby making decisions that are more understandable and overall acceptable.⁵⁵ But these hardly controllable advantages would be no less desirable for other trials that are based on a typical social conflict of interests as well. One may think of

49. *Id.* at 1485-86.

50. ARTHUR T. VON MEHREN & PETER L. MURRAY, DAS RECHT IN DEN VEREINIGTEN STAATEN VON AMERIKA [THE LAW IN THE UNITED STATES OF AMERICA] 273, 300-2 (2008); Peter Axel Windel, *Soll am Laienrichter wesen festgehalten werden?* [Should we hold onto the lay judge system?], 112 ZZP [J. OF CIVIL PROCEDURE] 293 (1999).

51. Silvia A. Croydon, *Returning a Verdict on the Jury: How the Japanese Have Reacted to the Introduction of a Lay Judge System*, 7(1) ASIAN J. OF COMPARATIVE L. 1, 17 (2012).

52. Hau-Min Rai, *Chuich'iu Liennêng Chi Chihtê Shênlai Tê Ssufa Ch'uangtsao Kung I Shêhui* [Judicial reform to be continued to build a just society], *Ssufa Yuan Nienchung Chichê Hui Yüench'ang Chihtz'u* [Outline of Speech by Judicial Yuan President at end-of-year Press Conference], 1157 SSUFA CHOUK'AN [JUDICIAL WEEKLY] 2 (2012).

53. This is the scope of the paper of Croydon, *supra* note 51, at 1.

54. Overview in Windel, *supra* note 50, at 293.

55. Instead of others, see Guenter Ide, *Die Stellung der ehrenamtlichen Richter* [The status of lay judges], in ARBEITSGERICHTSBARKEIT – Festschrift zum 100jähri-gen Bestehen des Deutschen Arbeitsgerichtsverbandes [LABOUR COURTS - COLLECTED PAPERS IN HONOR OF 100TH ANNIVERSARY OF THE GERMAN LABOUR COURTS ASSOCIATION], *supra* note 37, at 253-54. 264; Ruediger Krause, *Die Beteiligung der Sozialpartner am Gerichtsverfahren in Arbeitssachen* [The involvement of the social partners at the trial in Labour cases], paper presented at *Symposium of the Legal Proceedings on Labour Disputes Litigation*, Taipei (2008).

disputes under tenancy law, trials about consumer rights and claims concerning medical malpractice liability for example.⁵⁶

But above all, the inclusion of laypersons leads to an injection of the political process into the trial. After all, lay judges are, as representatives of the social partners, often themselves involved in the lobbies surrounding the legislative procedure or in collective bargaining. If on top of that one takes into account the fact that the parties in the labour courts are usually coalition members themselves, it can be said with some justification that “basically it is always the same parties” involved.⁵⁷ The mixing of political interests and justice is finally further deepened due to the fact that because of another characteristic of the German labour court system, representation by a lawyer is not obligatory. Instead, coalition representatives can represent the parties in court as well.⁵⁸

It should be clear by now that the German way of incorporating laypersons is structurally problematic. Absolutely critical to our understanding of this are cases in which unorganised “outsiders” try to enforce something that is contrary to the coalition-interests of both lay judges.⁵⁹

D. *Are There Characteristics of Labour Judicature?*

One would expect the judicature of the labour courts to exhibit particular characteristics.⁶⁰ However in actual fact, an increasing convergence of the judicature of the labour courts and ordinary courts can be identified.⁶¹ Change in the duties of the labour courts was seen as early as in 1994 and – fittingly at the time – these changes brought the protection of fundamental rights to the centre of attention.⁶² Today, it can be said that “social” aspects have found their way into judicature everywhere in Germany. Subsequently, labour law no longer has its particular approach.⁶³

The procedural rules of the ordinary and labour courts are also less different from each other nowadays than they used to be. The general civil trial has become more “social” and therefore became more or less like the labour trial. For instance, the stipulation of local jurisdiction was restricted

56. Windel, *supra* note 50, at 293, 308; Brand, *supra* note 3, at 81-82.

57. Kissel, *supra* note 30, at 1485, 1487.

58. Brand, *supra* note 3, at 81, 83.

59. More details in Windel, *supra* note 50, at 293, 308.

60. Thus, *see, e.g.*, Wolfgang Linsenmaier, *Von Lyon nach Erfurt – Zur Geschichte der Arbeitsgerichtsbarkeit* [From Lyon to Erfurt- History of Labour court], 27 NZA [NEW J. OF LABOUR LAW] 401, 402 (2004), who welcomes this.

61. Hanau, *supra* note 40, at 809, 812; GERMELMANN ET AL., *supra* note 3, at para. 248; Lipke, *supra* note 39, at 8, 10.

62. Soellner, *supra* note 45, at 1, 15.

63. Hanau, *supra* note 40, at 809, 813.

back in 1974 (§§ 38-40 ZPO/CCP). Moreover, the distinct mode of labour law trials might have been the model for reforms of the civil procedure law. Namely, there is an obligatory conciliation hearing here as well under § 278 Abs. 2-5 ZPO.⁶⁴ Lingering characteristics in labour trials⁶⁵ seem increasingly questionable in light of this background.⁶⁶

IV. CONCLUSIONS

A. *Conclusions for Germany*

If we want to evaluate the German labour court system today, we cannot deny its great achievements in forming substantive labour law and in maintaining social peace⁶⁷ in the Federal Republic of Germany after World War II. It was probably part of the failed model “Weimarer Republik”⁶⁸ and of the successful model “social market economy”.⁶⁹ Today many aspects have outlived their purpose. In the political discourse, the independent labour court system is basically defended by the unions and the labour judges themselves. Legal scholars disagree on the topic.⁷⁰ A great judicial reform has nevertheless only a small chance to succeed in the face of the tendency of large institutions like an independent labour court system to persist and the costs of restructuring. Germany will therefore, in the foreseeable future, “sponsor” a court system that is in a special way committed to “the humane, the material and the ideological needs of man”.⁷¹ At some point, however, this will likely become too expensive.

B. *Conclusions for Taiwan*

As mentioned earlier, Taiwan does not have a special Labour Court Law, but there are special labour chambers in every district court. Most importantly, we have a set of comprehensive ADR-Services of justice provided by the labour administration, resulting in the resolution of many

64. Concerning this see Peter Axel Windel, *Zur Justizfoermigkeit der zivilprozessualen Gueteverhandlung*, [The judicial formation of conciliation hearings in civil litigation] in FESTSCHRIFT FUER WALTER GERHARDT [COLLECTED PAPER IN HONOR OF WALTER GERHARDT] 1091 (E. Schilken et al. eds., 2004).

65. Details in Krause, *supra* note 4, at 6.

66. Brand, *supra* note 3, at 81.

67. Especially concerning this, see Soellner, *supra* note 45, at 1, 11.

68. Franz Josef Duesel, *Das Erbe von Weimar: Unser Arbeitsrecht und seine Gerichtsbarkeit* [The legacy of Weimar: our labour law and its jurisdiction], 63 RDA [LABOUR LAW] 129, 133 (2010).

69. Cf. The political legitimization of the ArbGG 1953, traced in Hanau, *supra* note 40, at 809-10; Lipke, *supra* note 39, at 1, 9.

70. For the overview, see Brand, *supra* note 3, at 81-82.

71. Hanau, *supra* note 40, at 809, 813.

labour disputes through mediation. The other means of labour administration, that is conciliation and arbitration, do not play an important role in Taiwan. Besides, if a labour party tries to bring a claim against his or her opponent, then s/he must follow the provisions of the Code of Civil Procedure. We will find that some provisions in the Code of Civil Procedure are not suitable for labour disputes, and that they must be revised or even abolished. The introduction of a lay judges system could represent the interests of both sides (trade unions and employer's associations), and bring social peace between employee and employer. Taiwanese legislators should consider adopting such a system and take the next step of enactment. The place of lay jurors, however, might be in pre-trial ADR, and not in the courts. Finally, for the short term and medium term, we do not advise the establishment of an independent labour court system like in the German model. In our opinion, the provisions about mediation, conciliation and arbitration have already been improved, and the next pressing matter to be addressed is the revision of relevant provisions of the Code of Civil Procedure. That should be adequate for ensuring the resolution of labour disputes.⁷²

72. TONG -SHUAN YANG, KĒPIEH LAOKUNG FALUN YŪ SHIHWU [INDIVIDUAL LABOUR LAW – THEORY AND PRACTICE]10-12 (2010).

REFERENCES

- Brand, P.-A. (2010). Über den Sinn und Unsinn der Arbeitsgerichtsbarkeit – Ein Beitrag zur Diskussion über die Zusammenfassung von Arbeits- und ordentlicher Gerichtsbarkeit. [On the sense and nonsense of the labour tribunal – A contribution to the discussion on the consolidation of labour and ordinary jurisdiction] *Zeitschrift fuer Rechtspolitik [Journal of Legal Policy]*, 43, 81-84.
- Chunghua Minkuo Hsingchêngyuan [Executive Yuan, Taiwan, R.O.C.]. (April 26, 2011). Order No. Yuan-Tai-Lau-Tzu-1000019757A of the Executive Yuan [Executive Yuan Order No. 1000019757A].
- Chunghua Minkuo Tsung'ungfu [President Office, R.O.C (Taiwan)]. (July 1, 2009). Hua Tsung I I Tzu Ti 09800165161 [the Presidential Order No. 09800165161].
- Croydon, S. A. (2012). Returning a verdict on the Jury: How the Japanese have reacted to the introduction of a Lay Judge System, *Asian Journal of Comparative Law*, 7(1), 1-17.
- Detmers, C. (2005, April). Neue Regelungen zum Disziplinar-, Kuendigungs- und Beschwerdeverfahren im englischen Recht [New regulations for disciplinary, dismissal and grievance procedures in English law]. *Fachanwalt Arbeitsrecht [Attorney of Labour Law]*, 101-04.
- Duewell, F. J. & Lipke, G.-A. (2005). *Arbeitsgerichtsgesetz: Kommentar fuer die Praxis. [Labour court law: Commentary for practice]* (2nd ed.) Frankfurt am Main: Bund-Verlag.
- Duewell, F. J. (2010). Das Erbe von Weimar: Unser Arbeitsrecht und seine Gerichtsbarkeit. [The legacy of Weimar: our labour law and its jurisdiction.] *Recht der Arbeit [The Labour Law]*, 63, 129-35.
- Germelmann, C.-H., Matthes, H.-C., Mueller-Gloege, R., Pruetting, H. & Schlewing, A. (2009). *Arbeitsgerichtsgesetz: Kommentar [Labour court law: Commetary]* (7th ed.) Muenchen: C. H. Beck.
- Hanau, P. (1986). Arbeitsgerichtsbarkeit – Anspruch und Wirklichkeit. [Labour courts – Claim and reality] *Neue Zeitschrift fuer Arbeitsrecht [New Journal of Labour Law]*, 3, 809-13.
- Huang, C.-K. (2008, December 2) Remarks at The Status Quo and Dilemma of Legal Proceedings on Labour Disputes in Taiwan, Symposium on The Legal Proceedings on Labour Disputes, Taipei, Taiwan, R.O.C.
- Huang, K.-C. (2008). Wokuo Laotung Susung Chih Shihchêng Yenchiu I Ti I Shên Susung Chih Shênli Yü Chungchieh Ch'inghsing Wei Chunghsin

- (Shang) [An empirical study on labour litigation in Taiwan: With focus on the adjudication process and case outcome in the trial court(1)] *Chêng Ta Fa Hsiao P'ing Lun* [*Chengchi Law Review*], 106, 203-47.
- Huang, K.-C. (2009). Wokuo Laotung Susung Chih Shihchêng Yenchiu I Ti I Shên Susung Chih Shênli Yü Chungchieh Ch'inghsing Wei Chungsin (Hsia) [An empirical study on labour litigation in Taiwan: With focus on the adjudication process and case outcome in the trial court(2)] *Chêng Ta Fa Hsiao P'ing Lun* [*Chengchi Law Review*], 107, 165-228.
- Ide, G. (1994). Die Stellung der ehrenamtlichen Richter [The status of lay judges]. In: Deutscher Arbeitsgerichtsverband [German Labour Court Association] (Eds.), *Arbeitsgerichtsbarkeit – Festschrift zum 100jaehrigen Bestehen des Deutschen Arbeitsgerichtsverbandes* [*Labour courts - Collected papers in honor of 100th Anniversary of the German Labour Courts Association*] (pp. 253-64). Berlin: Luchterhand.
- Jacobs, E. (2009). Something old, something new: The new tribunal system. *Industrial Law Journal*, 38, 417-23.
- Kaufman, A. (2003, December), Arbeitsgerichtsbarkeit in England. [Labour court law in England] *Fachanwalt Arbeitsrecht* [*Attorney of Labour Law*], 354-57.
- Kissel, O. R. (1987). 60 Jahre Arbeitsgerichtsbarkeit [60 years of Labour courts]. *Der Betrieb* [*The Enterprise*], 40, 1485-91.
- Kissel, O. R. (1994). Defizite im arbeitsgerichtlichen Rechtsschutz. [Deficits in labour disputes under labour law] In: Deutscher Arbeitsgerichtsverband [German Labour Court Association] (Eds.), *Arbeitsgerichtsbarkeit – Festschrift zum 100jaehrigen Bestehen des Deutschen Arbeitsgerichtsverbandes* [*Labour court - Collected papers in honor of 100th Anniversary of the German Labour Courts Association*] (pp. 19-30). Berlin: Luchterhand.
- Krause, R. (2007, September). *Erladigung von Arbeitsstreitigkeiten – Differenzierte Funktionalitaet von Arbeitsgerichtsbarkeit und Alternativer Streiterledigung (ADR)*, [Settlement of labour disputes – Differentiated Functionality of labour courts and alternative dispute resolution (ADR)], paper presented at International Conference, Arbeitsgerichtsbarkeit, Schlichtung und Arbitrage von Arbeitsstreitigkeiten [Labour courts, mediation and arbitration of labour disputes], Taipei, Taiwan, R.O.C.
- Krause, R. (2008, December). *Die Beteiligung der Sozialpartner am Gerichtsverfahren in Arbeitsachen*, [The involvement of the social partners at the trial in labour courts], paper presented at Symposium on the Legal Proceedings on Labour Disputes Taipei, Taiwan, R.O.C.

- Lin, G.-S. (2008, December). Remarks at Labour and management representatives taking part in labour disputes proceedings, Symposium on the Legal Proceedings on Labour Disputes, Taipei, Taiwan, R.O.C.
- Linsenmaier, W. (2010). Von Lyon nach Erfurt – Zur Geschichte der Arbeitsgerichtsbarkeit. [From Lyon to Erfurt- The history of labour courts] *Neue Zeitschrift fuer Arbeitsrecht [New Journal of Labour Law]*, 27, 401-08.
- Lipke, G.-A. (2008). *Beitrag der Arbeitsgerichtsbarkeit zur Gesellschaft und zum Schutz der Arbeitnehmer in der Bundesrepublik Deutschland [Contribution of the labour courts to society and labourthe protection of employees in the Federal Republic of Germany]*, paper presented at Symposium on the Legal Proceedings on Labour Disputes, Taipei, Taiwan, R.O.C.
- Rai, H.-M. (2012, January). Chuich'iu Liennêng Chi Chihtê Shênlai Tê Ssufa Ch'uangtsao Kung I Shêhui [Judicial reform to be continued to build a just society], Ssufa Yuan Nienchung Chichêhui Yüench'ang Chihtz'u [Outline of Speech by Judicial Yuan President at end-of-year Press Conference], *Ssufa Chouk'an [Judicial Weekly]*, 1117, 2.
- Redeker, K. (1977). Anmerkung zum Urteil des Bundesgerichtshofes vom 1.7.1976 – BGH III ZR 187/73, [Note to the judgment of the Federal Supreme Court 07/01/1976 - BGH III ZR 187/73] *Anwaltsblatt [Lawyers' Leaf]*, 27(3), 106-09.
- Ruethers, B. (1994). Arbeitsrecht und Ideologie [Labour law and ideology]. In: Deutscher Arbeitsgerichtsverband [German Labour Court Association] (Eds.), *Arbeitsgerichtsbarkeit – Festschrift zum 100jaehrigen Bestehen des Deutschen Arbeitsgerichtsverbandes [Labour court – Collected papers in honor of 100th Anniversary of the German Labour Courts Association]*, (pp. 39-58). Berlin: Luchterhand.
- Sanders, A. (2009). Part one of the Employment Act 2008: “Better” dispute resolution? *Industrial Law Journal*, 38, 30-49.
- Sato, I. (2012). Expanding access to justice for labor disputes: The impact of the labor tribunal system, *Social Science Japan*, 46, 6-10.
- Shen, K.-L. (2008). Remarks at Labour and management representatives taking part in labour disputes proceedings, Symposium on The Legal Proceedings on Labour Disputes, Taipei, Taiwan, R.O.C.
- Soellner, A. (1994). Die Arbeitsgerichtsbarkeit im Wandel der Zeit. [The labour courts through the ages] In: Deutscher Arbeitsgerichtsverband [German Labour Court Association] (Eds.), *Arbeitsgerichtsbarkeit – Festschrift zum 100jaehrigen Bestehen des Deutschen Arbeitsgerichtsverbandes [Labour court – Collected papers in honor of*

- 100th Anniversary of the German Labour Court Association*] (pp. 1-18). Berlin: Luchterhand.
- Sugeno, K. (2006). Die Entstehung des Arbeitsgerichtssystems in Japan: eine Synthese zwischen Arbeitsrechtsreform und Gerichtsreform [The emergence of the labour court system in Japan: a synthesis of labour law reform and judicial reform] *Recht der Arbeit [Labour Law]*, 59, 242-45.
- Thuesing, G. (2010). Blick in das europäische und ausländische Arbeitsrecht. [An oversight on the European and foreign labour law] *Recht der Arbeit [Labour Law]*, 63, 187-90.
- von Mehren, A. T. & Murray, P. L. (2008). Das Recht in den Vereinigten Staaten von Amerika, [The law in the United States of America] Berlin: Xenomoi Verlag.
- Windel, P. A. (1998). Die Bedeutung der §§ 17 II, 17a GVG fuer den Umfang der richterlichen Kognition und die Rechtswegzustaendigkeit. [The meaning of §§ 17 II, 17 GVG for the scope of judicial cognition and the jurisdiction of different courts]. *Zeitschrift fuer Zivilprozess [Journal of Civil Procedure]*, 111, 3-33.
- Windel, P. A. (1999). Soll am Laienrichter wesen festgehalten werden? [Should we hold onto the lay judge system?] *Zeitschrift fuer Zivilprozess [Journal of Civil Procedure]*, 112, 293-313.
- Windel, P. A. (2004). Zur Justizfoermigkeit der zivilprozessualen Gueteverhandlung. [The judicial formation of conciliation hearings in civil litigation] In: Schilken, E., Kreft, G., Wagner, G. (Eds.), *Festschrift fuer Walter Gerhardt [Collected papers in honor of Walter Gerhardt]* (pp. 1091-1115). Koeln: RWS Verlag Kommunikationsforum.
- Windel, P. A. (2011). Anmerkung zum Beschluss des Gemeinsamen Senats der Obersten Gerichtshoefe des Bundes vom 27.9.2010 -GmS-OGB 1/09, Arbeitsrechtliche Praxis (Nachschlagewerk des Bundesarbeitsgerichts) § 2 ArbGG 1979 [Note on the United Senate of the five Federal Supreme Courts, decision of 27.9.2010 -GmS-OGB 1/09, labour law practice (reference to federal labour court)] *Zustaendigkeitspruefung [Jurisdiction Test]*, 14, 605-11.
- Yang, T.-S. (2010). Kêpieh Laokung Falun Yü Shihwu [Individual labour law – Theory and practice]. Taipei: Wunan publishing company.
- Yang, T.-S. (2000). Kuochia Chungli Yüentsê Tsai Kuochia Chungli Yüentsê Tsai Laotzu Chêngi Chung Chih Yünyung [The application of the state neutrality principle to labour-capital disputes settlement], *Kuok'êhui Yenchiu Huik'an Jênwên Chi Shêhuik'êhsiao [Proceedings of National Council of Science, Republic of China (Taiwan) (C)]*, 10(1), 79-105.

設立獨立勞動訴訟制度 之必要性探討

Peter Axel Windel、楊通軒

摘 要

實體勞工法的核心是契約法，只是勞動事務具有特殊的性格。因此，立法者乃制定施行有關勞動事務的特殊法規，以補充普通民事法規的不足。同樣地，相對於普通的民事訴訟程序，勞工法中也有針對特殊問題的爭議解決程序。從比較法上來看，可以發現有一大串解決勞動問題的途徑。就像其他國家一般，臺灣在民事法院中也有設立解決勞工案件的特殊法庭。另一方面，德國則是少數國家中，選擇一個獨立的勞動法院處理勞動爭議者。惟臺灣即使要採取一些改革以處理勞動爭議案件，也不必要全盤引進德國模式以期改善裁判品質。相反地，德國由於勞動訴訟的結構複雜及勞動法院體系的所需費用高昂，也促使人們重新思考以普通法院審理勞動案件的可能性，蓋普通法院也可以類似的方法解決勞動爭議。

關鍵詞：裁判品質、法院及審判體系、勞動法、民事訴訟程序、陪審員、其他替代性的爭議解決辦法