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Labour Jurisdiction in Germany - Past, Present and Future

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1. *Introduction*

"A legal system that allows itself a special labour jurisdiction expresses that it is particularly committed to the human, material and non-material needs of people. This is the claim to be realised by labour jurisdiction in the past, present and future; the raison d'être of this special branch of jurisdiction is based on this"[1].

With these words, which can also be found on the homepage of the Federal Labour Court[2], the eminent labour law professor *Peter Hanau* (*1935) summarised decades ago[3] the special circumstance that Germany has a labour

[1] Originally: "*Eine Rechtsordnung, die sich eine besondere Arbeitsgerichtsbarkeit leistet, drückt damit aus, dass sie dem Humanen, den materiellen und ideellen Bedürfnissen des Menschen in besonderer Weise verpflichtet ist. Dies ist der zu verwirklichende Anspruch an die Arbeitsgerichtsbarkeit in Vergangenheit, Gegenwart und Zukunft; darauf beruht die Daseinsberechtigung dieses besonderen Zweiges der Gerichtsbarkeit*".

[2] Available at: https://www.bundesarbeitsgericht.de/.

[3] Hanau, *Neue Zeitschrift für Arbeitsrecht* (NZA), 1986, p. 813.

judiciary that is completely separate from the ordinary judiciary in terms of organisation and personnel in all three instances, with equal participation of employers and employees.

The outstanding importance of an independent labour judiciary in the German legal system is already reflected in its constitutional basis. Art. 95(1) of the Basic Law (*Grundgesetz* = GG) of the Federal Republic of Germany provided the establishment of a Federal Labour Court as one of the supreme courts of the Federation[4]. Furthermore, the mentioning of the labour judiciary guarantees their existence as such under constitutional law and at the same time guarantees a core set of subject matter jurisdiction for labour law disputes[5]. The lively discussion about merging the labour judiciary and the ordinary judiciary that took place around twenty years ago[6] would therefore require a constitutional amendment.

Germany devotes considerable resources to realising the constitutionally guaranteed independence of the labour judiciary: In addition to the Federal Labour Court based in *Erfurt*[7] with its current ten senates, 18 regional labour courts and 106 local labour courts are spread across the country. Around 935 professional judges work at these courts[8], who dealt with around 260,000 disputes[9] in 2022[10] (with a total number of around 42 million employees)[11]. The fact that around 95 % of these proceedings are brought by employees[12], while employers can regularly protect their interests unilaterally without the help of the courts, illustrates the relevance of the existence of the labour

[4] Until 1968, regulated with a slightly different wording in Art. 96 (1) GG.

[5] Detterbeck, *Grundgesetz*, in Sachs (Ed.), 9th Ed., 2021, Art. 95, para. 4; Vosskuhle, *Grundgesetz*, in Mangoldt, Klein, Starck (Eds.), 7th Ed., 2018, Art. 95, para. 22, pp. 27-29.

[6] For this, see only Rieble, *Zukunft der Arbeitsgerichtsbarkeit*, in Rieble (Ed.), Zaar, *Schriftenreihe*, 2005, Vol. 3, pp. 9-30 with references in fn. 2. From a socio-historical perspective Rehder, *WSI Mitteilungen*, 2007, pp. 448-454.

[7] Established in 1954, the Federal Labour Court was initially based in Kassel before being relocated to Erfurt following German reunification in 1999.

[8] *Bundesamt für Justiz*, *Richterstatistik,* 2020, available at: https://www.bundesjustizamt.de. The figure refers to full-time equivalents. In comparison: in 2019, around 13,000 judges ruled on 925,000 cases at the ordinary courts.

[9] Available at: https://www-genesis.destatis.de.

[10] The figure refers to the so-called judgement procedure. In addition, there are regularly over 12,000 so-called order procedure per year, cf. Grotmann-Höfling, *Arbeit und Recht* (AuR), 2022, p. 17.

[11] Available at: https://statistik.arbeitsagentur.de.

[12] Cf. Grotmann-Höfling, *AuR*, 2019, p. 452.

courts for asserting the interests of employees as the generally weaker party in working life. In terms of content, this mainly involves disputes about the existence of the employment relationship, payment claims and the correct pay scale classification[13].

The present article examines this particular branch of the German juridical system and highlights its special features. Following a review of the historical development of judicial conflict resolution in labour matters (II.), the issues relating to judges in the labour judiciary will be examined in more detail (III.), before moving on to the characteristic features of labour court proceedings (IV.) and finally to current developments in the labour judiciary (V.).

2. *Historical development*

The idea of a special judiciary separate from the ordinary courts for the settlement of labour-related disputes has a long history[14]. Even if some traditions go back further (guild jurisdiction, factory courts), the actual forerunners of modern labour judiciary are the municipal industrial tribunals that emerged at the beginning of the 19th century in post-revolutionary France. The starting point was the establishment of the first industrial tribunal in Lyon in 1806, at the initiative of entrepreneurs (particularly the silk manufacturers based there) who were dissatisfied with the slow and impractical decision-making process of the ordinary courts and administrative authorities[15]. Strictly speaking, it was originally a council of trade experts ("Conseil de prud'hommes"), made up of employers and workshop managers (but not

[13] Cf. Grotmann-Höfling, *AuR*, 2019, p. 452.

[14] To the following, see Leinemann, *NZA,* 1991, pp. 961-966: Linsenmaier, *NZA,* 2004, pp. 401-408; Neumann, *NZA*, 1993, pp. 342-345; Opolony, *NZA,* 2004, pp. 519-524; Prütting, *Arbeitsgerichtsgesetz,* in Germelmann, Matthes, Prütting (Ed.), 2022, Einl paras. 1-33a; Sawall, *Die Entwicklung der Arbeitsgerichtsbarkeit*, 2007; Söllner, *Die Arbeitsgerichtsbarkeit, Festschrift zum 100jährigen Bestehen des Deutschen Arbeitsgerichtsverbandes*, 1994, pp. 1-17; comprehensive presentation of the beginnings by Brand, *Untersuchungen zur Entstehung der Arbeitsgerichtsbarkeit in Deutschland*, 1990, Vol. 1, 2002, Vol. 2, 2008, Vol. 3.

[15] Leinemann, *NZA*, 1991, p. 962; for more details see Globig, *Gerichtsbarkeit als Mittel sozialer Befriedung, dargestellt am Beispiel der Entstehung der Arbeitsgerichtsbarkeit in Deutschland*, 1985, pp. 68-70.

representatives of the actual workforce) and chaired by an employer[16], whose task it was to settle disputes between manufacturers and workers.

This institution subsequently spread not only to France, but also to the areas on the left bank of the Rhine in Germany (1808 in Aachen and 1811 in Cologne)[17]. From the 1830s, industrial courts were also established in a number of other German cities[18]. The Prussian Ordinance on the Establishment of Industrial Courts of 1849 (*Preußische Gewerbegerichtsverordnung* = GewGVO) provided for the first time that a conciliation proceedings involving a conciliation committee was to precede the dispute proceedings before the industrial court (Sections 17 et seq. GewGVO)[19]. Furthermore, the Saxon Industrial Act (*Sächsisches Gewerbegesetz* = GewG) of 1861 was the first to consistently implement the idea of parity by providing for a legally qualified administrative official to chair the court, with an equal number of employer and employee representatives voting assessors (Section 4 GewG)[20]. This set the course for further legislative developments in Germany as early as the middle of the 19th century. In practical terms, however, these legal regulations initially proved to be a failure. It should also not be overlooked that the main function of the industrial tribunals was originally to discipline workers[21]. In 1841, for example, two thirds of the cases brought before the Barmen Industrial Court were filed by employers[22].

The foundation of the German Empire (*Deutsches Reich*) in 1871 created the conditions for the unification of the previously fragmented legal system. However, the Imperial Justice Acts (*Reichsjustizgesetze*) of 1877 were initially a step backwards by assigning all labour law disputes to the ordinary courts, although this was corrected in favour of the industrial courts by subsequent amendments at the beginning of the 1880s[23]. However, comprehensive new regulations were not introduced until the Industrial Courts Act (*Gewer-*

[16] GLOBIG (fn. 15), p. 77.

[17] These areas of Germany were occupied by France from 1794 to 1813.

[18] LEINEMANN, *NZA*, 1991, pp. 962.

[19] *Gesetz-Sammlung für die Königlichen Preußischen Staaten*, 1849, p. 110.

[20] Cf. SÖLLNER (fn. 14), p. 4.

[21] LEINEMANN, *NZA*, 1991, pp. 962-963; LINSENMAIER, *NZA*, 2004, p. 403.

[22] STAHLHACKE, *Die Arbeitsgerichtsbarkeit, Festschrift zum 100jährigen Bestehen des Deutschen Arbeitsgerichtsverbandes*, 1994, p. 74.

[23] Cf. SÖLLNER (fn. 14), p. 5.

begerichtsgesetz = GewGG) of 1890[24], which aimed to create the institutional conditions for the proper, quick and trust-based settlement of labour law disputes in industrial enterprises throughout the Empire[25]. At the same time, the GewGG served to pacify the politically increasingly important working class[26], which felt that its legal protection interests were not adequately safeguarded by the bourgeois-conservative judicial apparatus of the Empire[27]. In view of the discussion about modernising labour jurisdiction that had been going on since the 1870s, this law was not the exclusive fruit of the so-called "New Course", a brief phase of socio-political reform in the early years of the then *Kaiser Wilhelm II*, but it was strongly favoured by this trend[28].

However, the GewGG initially only provided for the mere possibility of establishing industrial courts for the district of a municipality. It was not until an amendment in 1901 that the establishment of such courts became mandatory for municipalities with more than 20,000 inhabitants[29]. Where an industrial court existed and had jurisdiction, the jurisdiction of the ordinary courts for labour disputes was thereby excluded. The industrial court was composed of a chairman (usually a senior local authority official) and one assessor from the employer side and one from the employee side. The proceedings were governed by separate rules of procedure, which referred to the general provisions of the Civil Procedure Code (*Zivilprozessordnung* = ZPO) for all issues not dealt with in the special rules, a regulatory technique that has remained in place to this day. An appeal against a judgement of the industrial court was possible under certain conditions, but then to the ordinary regional court. In contrast, there was no higher instance for labour law disputes to ensure a uniform interpretation of labour law at that time. In addition, the industrial court could be called upon to act as an arbitration board, i.e. it was competent not only for legal disputes but also for regulatory

[24] *Reichsgesetzblatt*, 1890, p. 141.

[25] Cf. *Reichstagsdrucksache,* 8/1890, 5, pp. 18-21.

[26] However, the working class in the German Empire was anything but homogeneous, cf. WEHLER, *Deutsche Gesellschaftsgeschichte* 1849-1914, 2nd Ed., 2006, pp. 772-804.

[27] Cf. REICHOLD, *Zeitschrift für Arbeitsrecht* (ZFA), 1990, p. 18; see also GLOBIG (fn. 15), pp. 177-179.

[28] Cf. REICHOLD, *ZFA*, 1990, p. 18.

[29] By the turn of the century, all large cities with over 50,000 inhabitants (with the exception of two) had an industrial court, but only 60 % of medium-sized cities with between 20,000 and 50,000 inhabitants had one.

disputes and could issue an arbitration award, although this was not binding.

The industrial courts increasingly proved to be a success story and, after initial scepticism[30], were seen not least by the Social Democrats as an effective instrument for the enforcement of workers' rights. According to a contemporary assessment, the GewGG was the "Magna Charta of the German worker"[31]. By 1896 there were already 284 industrial courts in the German Empire, 316 by 1900 and 504 on the eve of the First World War in 1913[32]. The industrial courts were popular with workers, and in 1907 there were more than 15,000 complaints in Berlin alone[33]. The rise of the industrial courts prompted the legislator to enact the Merchant Courts Act (*Kaufmannsgerichtsgesetz* = KfmGG) in 1904[34], according to which merchant courts could or (in municipalities with more than 20,000 inhabitants) had to be established for labour law disputes in trade enterprises. Reference was made to the GewGG for all essential points of the procedure. Despite their legal independence, the merchant courts were in fact regularly affiliated to the industrial courts, with the presiding judge taking on both functions[35]. With all of this, the idea of assigning labour law conflicts to a special jurisdiction with equal participation of the employer and employee sides for settlement due to their peculiarities took root in Germany more than one hundred years ago.

In the period of upheaval following the First World War, the industrial and merchant courts initially continued to exist. However, the additional arbitration committees introduced during the war continued to create an unclear situation[36]. It was not until the Conciliation Ordinance of 1923[37] that a seminal institutional separation was made between the adjudication of legal disputes with the exclusive jurisdiction of the industrial and merchants' courts on the one hand and the adjudication of regulatory disputes with the

[30] Cf. Weiss, *Die Arbeitsgerichtsbarkeit, Festschrift zum 100jährigen Bestehen des Deutschen Arbeitsgerichtsverbandes*, 1994, p. 76.

[31] Jastrow, *Sozialpolitik und Verwaltungswissenschaft*, 1902, Vol. 1, p. 405.

[32] Cf. Söllner (fn. 14), p. 6.

[33] Nipperdey, *Deutsche Geschichte 1866-1918*, 1994, Vol. I, p. 363.

[34] *Reichsgesetzblatt*, 1904, p. 266.

[35] Linsenmaier, *NZA,* 2004, p. 405.

[36] Wenzel, *JuristenZeitung* (JZ)*,* 1965, p. 749.

[37] *Reichsgesetzblatt I*, 1923, p. 1043.

exclusive jurisdiction of the conciliation committees on the other. The implementing provisions of the Arbitration Ordinance also introduced a distinction between the judgement procedure (*Urteilsverfahren*) and the order procedure (*Beschlussverfahren*) (for disputes under works constitution law), which has been retained to this day[38].

After the demand for a unified labour judiciary had already been raised in 1919[39], the specific structure was the subject of controversial debate in the following years[40]. The independent trade unions in particular demanded labour courts to be completely separate from the ordinary courts as they still harboured a deep mistrust of the conservative judiciary and its allegiance to the old forces. In contrast, the lawyers' associations and employers argued in favour of integrating the labour courts into the ordinary courts under the guiding principle of judicial unity[41]. Against this background, the Labour Court Act (*Arbeitsgerichtsgesetz* = ArbGG) of 1926[42] was a compromise. On the one hand, the local labour courts were established as independent courts in organisational terms (Section 14(1) ArbGG). However, this independence was immediately relativised by the requirement that the presiding judges should be ordinary judges (Section 18(2) ArbGG 1926). In addition, the regional labour courts were incorporated into the regional courts (Section 33 ArbGG), while the Imperial Labour Court was established within the Imperial Court (Section 40 ArbGG). In the Weimar Republic, it was therefore not yet possible to completely separate the labour courts from the ordinary courts.

Nevertheless, the ArbGG of 1926 marked an important turning point. It was the end of the formative phase in which energetic presidents of industrial courts shaped rather than implemented labour law in the course of settling labour-related disputes[43]. Instead, the phase of ever-increasing legal penetration of labour law by an increasingly professional judiciary began. The establishment of a nationwide and unified labour court system for all

[38] *Reichsgesetzblatt I,* 1923, pp. 1191-1192.

[39] Cf. SINZHEIMER, *Arbeitsrecht und Rechtssoziologie*, 1976, Vol. 1, p. 65.

[40] For more details see *Bewer*, *Zeitschrift für Deutschen Zivilprozeß*, (ZZP), 49, 1925, pp. 74-88.

[41] KRAUSHAAR, *Betriebs-Berater* (BB), 1987, pp. 2309-2312; REHDER, *WSI Mitteilungen*, 2007, pp. 449-450; WENZEL, *JZ*, 1965, p. 750.

[42] *Reichsgesetzblatt I,* 1926, p. 507.

[43] In that sense REICHOLD, *ZFA*, 1990, p. 25.

employees including the introduction of an appeal body instead of a fragmented structure of institutions[44] can also be regarded as progress.

During the National Socialist period, the regulations on labour judiciary were amended by the Labour Court Act of 1934[45], primarily to the effect that jurisdiction for all collective disputes was eliminated which was in line with the prevailing totalitarian ideology. In contrast, the regulations for individual proceedings remained largely unchanged on the outside. Internally, however, even the most elementary principles of the rule of law were increasingly undermined by a judiciary that was often compliant with the new rulers[46].

In the period after the Second World War, the Allies pushed for the independence of the labour courts with the Control Council Law (KRG) No. 21 of 1946[47], probably also under a certain trade union influence. Both the local labour courts and the regional labour courts were to be newly established separately from the ordinary courts, while reference was made to the ArbGG of 1926 for proceedings. However, different adaptation regulations in the western occupation zones led to a considerable fragmentation of the law[48]. It was not until the Federal Republic of Germany was founded in 1949 that the legal conditions for renewed unification were created[49].

This unification took place with the Labour Court Act of 1953 (ArbGG 1953)[50], which in its structure and in many details was deliberately based on the ArbGG of 1926[51] and with which the labour courts were now established as an independent special jurisdiction in all three instances in accordance with the constitutional requirements mentioned at the beginning. The Fed-

[44] Cf. the explanatory memorandum of the ArbGG, *Verhandlungen des Reichstags*, III/1924, Vol. 407, 2065, p. 21.

[45] *Reichsgesetzblatt I*, 1934, p. 319.

[46] Cf. WENZEL, *JZ*, 1965, pp. 749-754, (751-753). Examples of changes in labour jurisdiction during the Nazi era LEICH/LUNDT, *60 Jahre Berliner Arbeitsgerichtsbarkeit*, 1987, pp. 75-92.

[47] *Amtsblatt des Kontrollrats in Deutschland*, 1946, p. 124.

[48] More about the first years after 1945 MÜLLER, *Die Arbeitsgerichtsbarkeit, Festschrift zum 100jährigen Bestehen des Deutschen Arbeitsgerichtsverbandes*, 1994, pp. 106-112.

[49] In the Soviet occupation zone and then in the German Democratic Republic, there was a different development, which will not be described in detail here and which ended after German reunification in the early 1990s.

[50] *Bundesgesetzblatt I*, 1953, p. 1267.

[51] Cf. *Bundestagsdrucksache*, 3516, p. 24.

eral Labour Court commenced its activities in 1954. This can be seen as the end point of a decades-long development that reflects not least the increasing influence of the trade unions in Germany, which have always campaigned for a labour jurisdiction that is as independent as possible from the ordinary courts.

After numerous minor amendments to the ArbGG 1953, a reform debate ensued in the mid-1970s as part of a general effort to simplify and speed up civil proceedings, leading to the Labour Court Act of 1979 (ArbGG 1979)[52] . The central aim was to settle legal disputes at first instance wherever possible, thereby reducing the burden on the appeal courts. The ArbGG 1979 has also been repeatedly amended since then, for example by the Labour Court Acceleration Act of 2000[53].

3. *Judges at the labour courts*

Despite the constant increase in legal regulations, the settlement of labour law disputes does not depend solely on statutory law. Rather, in view of the gaps in statutory law and the rapid pace of change in working life, case law continues to play a significant role in labour law. Furthermore, in the day-to-day work of the first and second instance, not only purely legal skills are required, but also other qualities so that the labour courts can live up to their claim of dealing with the conflicts in the world of work that come before them in a socially satisfactory manner, especially since only a small proportion of the proceedings that come before the labour courts end in a judgement. With this in mind, the following section will focus on the issues associated with the staffing of the courts.

3.1. The composition of the bench

As outlined in the historical overview, the idea of a court with equal representation of employers and employees and a chairman who does not belong to one of the two social groups, which differs from the original concept of the Conseil de prud'hommes, was established as a decision-making

[52] *Bundesgesetzblatt I*, 1979, p. 545.
[53] *Bundesgesetzblatt I*, 2000, p. 333.

body in Germany at an early stage. In continuation of older traditions, the GewGG of 1890 already provided for the courts to be composed of a neutral chairman and one assessor each from the employerand employee side (Section 22(1) GewGG). The idea behind the involvement of lay judges from the world of work is to reach decisions that are as realistic as possible and reflect the views of the parties involved. Furthermore, especially in the early phase of the labour movement and the development of a labour law separate from civil law, the aim was to ensure acceptance of this form of dispute resolution among workers by involving the employee side in the judicial decision of labour law disputes on an equal footing.

While the judges of the ordinary courts were regularly far removed from the oppressive reality of workers' lives and had a reputation for exercising "class justice", the industrial courts advanced to become, so to speak, "courts of trust" ("*Vertrauensgerichte*")[54] for workers. In a similar sense, it was pointed out decades later during the deliberations on the German constitution in connection with the question of the election of labour judges that it was important to maintain the trust of employees and trade unions in the labour courts[55]. Both aspects, namely increasing both the quality of the content and the social acceptance of judicial decisions, are still cited today as key reasons for the participation of lay judges from the employer and employee side[56].

This tradition was continued and even expanded as the labour judiciary developed. The ArbGG of 1926 already provided for an equal number of laymen to act as judges in all three instances, from the local labour courts to the regional labour courts to the Imperial Labour Court (Sections 16(2), 35(2), 41(2) ArbGG 1926). The ArbGG of 1953 and 1979 continued this line (Sections 16(2), 35(2), 41(2) ArbGG 1953 and 1979). The involvement of honorary judges at the reviewing court is particularly noteworthy. It is true that they are always in a minority given the fact that the senates are composed of

[54] This term was used by *Hugo Sinzheimer* already in 1915, cf. SINZHEIMER, *Arbeitsrecht und Rechtssoziologie*, 1976, Vol. 1, pp. 150-168; and also by BEWER, *ZZP*, 49, 1925, p. 77.

[55] Cf. ABGEORDNETER DR. SUHR (SPD), *Jahrbuch des öffentlichen Rechts der Gegenwart* (JöR), 1951, Vol. 1, p. 751.

[56] BAG 19.8.2004 – 1 AS 6/03, *NZA*, 2004, p. 1118; HÖLAND, BUCHWALD, KRAUSBECK, *AuR*, 2018, p. 405; IDE, *Die Arbeitsgerichtsbarkeit, Festschrift zum 100jährigen Bestehen des Deutschen Arbeitsgerichtsverbandes*, 1994, pp. 253-264; OPOLONY, *NZA*, 2004, p. 523; STÖHR, *AuR*, 2021, G13-G16 (G16).

three professional judges. However, since the reviewing court is not concerned with the establishment of facts but only with the precise legal assessment of facts, this means that the lay judges are also involved in the determination of the law as such and should not only contribute to a better understanding of the facts of the case.

3.2. Qualification and recruitment of the presiding judge

The qualifications required of presiding judges at the courts for labour law disputes have undergone repeated changes over the course of time, reflecting the general development of labour law and German history as a whole. The GewGG of 1890 did not yet impose any specific professional requirements on the presiding judge. In practice, they were usually senior municipal officials with a general legal background. In contrast, the KfmGG of 1904 required in principle the ability to become an ordinary judge, which in Germany is traditionally acquired through two state law examinations, but still allowed for exceptions (Section 11(1) KfmGG). The ArbGG of 1926 required professional judges to be "legally qualified" for all instances (Section 6(1) ArbGG). Whether this also meant that all presiding judges at local labour courts had to be capable to become an ordinary judge[57], was apparently disputed. However, due to another legal requirement (Section 18(2) ArbGG 1926), the presiding judges at the labour courts were mostly ordinary judges anyway, as mentioned above[58]. At the regional labour courts and the Imperial Labour Court, only judges working at the regional courts or higher regional courts or at the Imperial Court could be appointed from the outset (Sections 36(1), 41(1) ArbGG 1926). In addition, for all three instances, only judges with knowledge and experience[59] in labour law and social matters were to be appointed (Sections 18(1), 36(2), 42 ArbGG 1926), reflecting the increasing complexity of labour law as early as the 1920s.

In view of the difficult conditions in the destroyed Germany after the Second World War, the KRG No. 21 of 1946 remarkably dispensed with the requirement of qualification for the chairpersons of the labour courts and regional labour courts, but instead allowed special skills in labour matters

[57] In this sense FLATOW, JOACHIM, *Arbeitsgerichtsgesetz*, 1928, § 6 para. 2.

[58] In 1930, for example, only 34 of the 610 chairmen and 677 deputy chairmen were not ordinary judges, cf. WENZEL, *JZ*, 1965, p. 751 fn. 49.

[59] At the Imperial Labour Court: "particular" knowledge and experience.

and the performance of judicial duties to suffice. The presiding judges at the regional labour courts were, however, required to have "appropriate legal qualifications" (Art. 6 n. 1(a) KRG No. 21). In addition, "recognised democratic views" were expressly required for all judges (chairpersons and assessors) (Art. 5 KRG No. 21).

The ArbGG of 1953 marked the beginning of a renewed professionalisation of chairpersons in legal terms. At the regional labour courts (as well as at the Federal Labour Court), it was now necessary to have the ability to become an ordinary judge as well as to have special knowledge and experience in the areas of labour law and working life (Sections 36(1), 42(2) ArbGG). For the presiding judges at the local labour courts, the qualification to become an ordinary judge could originally be replaced by the fact that the person concerned had acquired comprehensive knowledge and experience in labour law through at least five years of work in representation before the labour courts (Section 18(3) ArbGG) in order not to force the particularly qualified non-lawyers out of office. The German Judges Act (*Deutsches Richtergesetz* = DRiG) of 1961 abolished this special regulation[60], meaning that since then, presiding judges at labour courts must also have the ability to become an ordinary judge. However, the same Act also abolished the special knowledge and experience relating to labour law and working life as a professional requirement for being a professional judge in the labour courts. The legislator no longer considered this useful due to the lack of verifiability and also wanted to increase permeability between the different judiciaries[61].

Specialist knowledge of labour law is therefore not expressly required by law. At first glance, this means that a lawyer can be appointed to the position of chairperson at a local labour court immediately after passing the second state examination at a relatively young age and without any previous knowledge or experience in labour law. In reality, however, various mechanisms ensure that only people with the necessary expertise are appointed to the labour courts. For example, the appointment of a chairperson at a local labour court is made on the recommendation of the competent supreme state authority (previously only the ministries of labour, since a change in the law in 1990[62]

[60] *Bundesgesetzblatt I*, 1961, pp. 1665 and 1678.
[61] *Bundestagsdrucksache*, *III*/2785, pp. 12 and 21.
[62] *Bundesgesetzblatt I*, 1990, p. 1206.

now regularly the ministries of justice)[63] after consultation with a committee, one-third of which is made up of representatives of the trade unions and employers' associations representative for working life at state level and representatives of the labour courts (Section 18 ArbGG). This procedure alone ensures that only sufficiently suitable persons are appointed to the office of chairman of the local labour courts. Furthermore, the appointment is preceded by up to five years of service as a probationary judge (Section 12 DRiG), during which the president of the respective regional labour court can adequately determine the judge's qualifications. In addition, practice tends to pay attention to prior knowledge and practical experience in labour law when appointing probationary judges in the local labour courts. The appointment of the president and the chairpersons of the regional labour courts is also made after consultation with the aforementioned committee (Section 36 ArbGG). Thus, the professional judges of first and second instance are not only democratically and constitutionally legitimised by this procedure, but are also supported by the trust of the associations on the employer and employee sides.

Judges at the Federal Labour Court are appointed by the Federal Minister of Labour and Social Affairs together with the Judges' Election Committee and appointed by the Federal President in accordance with the Judges' Election Act (*Richterwahlgesetz* = RiWG). The Judges' Election Committee consists of the relevant state ministers and an equal number of members elected by the German Parliament (*Bundestag*) in accordance with the rules of proportional representation. In addition to the professional qualifications of the candidates, the general political balance of power at federal level therefore also plays a decisive role. In addition, care is taken to ensure a regional balance in the election, so that the judges at the Federal Labour Court come from all states (*Bundesländer*) and thus achieve the broadest possible representation overall.

3.3. Appointment, qualification and position of honorary judges

The principle of equal participation of honorary judges from the employer and employee sides in the resolution of labour law disputes can be traced back to the 19th century, as explained above.

[63] For the dispute over ministerial competence, see KRAUSHAAR, *Betriebs-Berater*, 1987, pp. 2311-2314; REHDER, *WSI Mitteilungen*, 2007, pp. 451-453.

The GewGG of 1890 still provided that the assessors at the municipal trade courts were to be elected by the employers and employees based in the court district (Sections 12, 13 GewGG). The ArbGG of 1926 had already abolished this time-consuming procedure and replaced it with an appointment by the competent authority on the recommendation of the employers' and employees' associations (Sections 20, 37, 43 ArbGG). This form of appointment of honorary judges has proved its worth and has therefore been maintained in a comparable manner to this day (Sections 20, 37, 43 ArbGG of 1979). The competent authorities are bound by the lists of nominees. This means that no other persons can be appointed as honorary judges, which underlines the strong role of the trade unions and employers' associations in the area of labour jurisdiction. Ultimately, the lay judges are thus doubly legitimised: Formally on the basis of appointment by the competent authority, materially by the relevant associations of the world of work.

The currently around 25,000 honorary judges at the labour courts in Germany[64] are appointed for five years according to their social role as an employer or employee[65], whereby re-election is permitted and common. Unemployed persons can also act on the employee side (Section 23(1) ArbGG). Understandably, no one can be an honorary judge on the employee side and the employer side at the same time (Section 21(4) sentence 2 ArbGG).

Honorary judges must work or live in the relevant court district (Sections 21(1), 37(2) ArbGG), so that regional working life is represented. However, no special professional qualification is required in the first instance. For the second instance, at least five years' experience as an honorary judge at a labour court is regulated as a "target requirement" (Section 37(1) ArbGG). In fact, most lay judges in the first two instances have no legal training. On the employee side, they are often works council members with very different professional backgrounds side, almost all of whom are trade union members; on the employer side, they are often HR managers or managing directors[66]. Experience shows that, especially in the lower instances, the honorary judges do not judge according to preconceived notions. Rather, the focus is mainly on reaching a decision that is appropriate and practical in the individual

[64] Cf. Höland, Buchwald, Krausbeck, *AuR*, 2018, p. 405.

[65] Details in Sections 22, 23 ArbGG.

[66] Stein, *BB*, 2007, p. 2683.

case[67]. In addition, trade unions and employers' associations offer further training events for lay judges. In addition to at least five years' experience as a lay judge in a lower court, special knowledge and experience in the field of labour law and working life are required to be an honorary judge at the Federal Labour Court (Section 43(2) ArbGG).

The lay judges exercise their office in full independence. In particular, they are not bound by instructions from their respective organisations and may not follow them. The honorary judges are basically on an equal footing with the professional judges and have full participation and voting rights in the deliberations, as well as a right to comprehensive access to the files. In the first two instances, this can lead to the two lay judges outvoting the professional judge. Professional judges may therefore have to justify a decision that they would not have made themselves.

The relevance of the honorary judges is reinforced by a committee formed by them at the local labour court or regional labour court, which must be consulted before the honorary judges are allocated to the chambers and before the lists for the individual hearing dates are drawn up (Sections 29, 38 ArbGG).

4. *Characteristic features of the legal proceedings*

4.1. General aspects

The labour courts have comprehensive and exclusive jurisdiction for all labour law disputes. The catalogue of subject matter jurisdiction leaves practically no question open and is constantly amended as new issues arise. Exclusion of labour court jurisdiction in favour of arbitration proceedings is only possible by means of a collective agreement and, in addition, limited to disputes arising from an individual employment relationship, requires that the collective agreement predominantly covers stage performers, filmmakers or artists (Sections 4, 101(2) ArbGG).

A characteristic feature of labour court proceedings is the existence of two different types of procedures, which, following their first appearance in 1923, already characterised the ArbGG of 1926, namely on the one hand the

[67] Höland, Buchwald, Krausbeck, *AuR*, 2018, pp. 407-408.

judgement procedure (Sections 46 et seq. ArbGG) and on the other hand the order procedure (Sections 80 et seq. ArbGG). While the judgement procedure applies to individual disputes between the employer and individual employees and to disputes between the parties to collective agreements, the order procedure is applicable for disputes in connection with institutional employee participation. The main difference is that in judgement procedure, the general principles of civil procedure regarding the burden of presentation and proof of facts apply. In the order procedure, on the other hand, the facts of the case are determined ex officio (Section 83(1) ArbGG). The historical background to this is the fact that the works constitution was originally regarded as part of a public-law economic constitution following the provisions of Art. 165 of the Weimar Constitution[68]. It was not until several decades later that the view prevailed that the works constitution should be classified as private social law[69], although this did not affect the continued division of labour court proceedings into two parts.

As already mentioned, the labour judiciary has a three-instance structure. Legal proceedings begin with the local labour courts as the court of first instance. An appeal against the judgements of the local labour courts can be lodged with the regional labour courts (under certain conditions, e.g. always in the case of disputes about the existence of an employment relationship or the lawfulness of a dismissal (Sections 8(2), 64 ArbGG). An appeal on points of law to the Federal Labour Court is permitted against the judgements of the regional labour courts (under very limited conditions, e.g. if a legal issue relevant to the decision is of fundamental importance) (Sections 8(3), 72 ArbGG).

In fact, the vast majority of cases are settled at first instance. According to older data, only 3.7 % of all lawsuits are appealed and only 0.24 % are appealed on points of law[70]. In 2018, around 320,000 cases were filed with the labour courts, around 13,500 cases with the regional labour courts and around 1,850 cases with the Federal Labour Court[71].

[68] In a contemporary commentary, it is said that it is not about acts of jurisdiction, but about acts of administration, cf. FLATOW, JOACHIM, *Schlichtungsverordnung*, 1924, p. 92.

[69] Detailed information on the development by REICHOLD, *Betriebsverfassung als Sozialprivatrecht*, 1995.

[70] STEIN, *BB*, 2007, p. 2682.

[71] Cf. GROTMANN-HÖFLING, *AuR*, 2019, p. 453-454.

4.2. Priority of conciliation and mediation

The priority given to the amicable settlement of labour law disputes has always been a characteristic feature of the relevant procedural regulations. For example, following older traditions (cf. Section 54(3) GewGG), the ArbGG of 1926 already provided that a conciliation hearing should first take place before the chairman alone, the aim of which is to reach an amicable settlement between the parties. This has remained the case to this day (Section 54 ArbGG). A contentious hearing before the chamber with the participation of both assessors only takes place if the conciliation hearing fails and the proceedings cannot be concluded by the chairman in any other way (Sections 55, 57 ArbGG). Even in this case, however, the labour court should continue to strive for an amicable settlement of the dispute (Section 57(2) ArbGG). In practice, it is reported that around 18 cases are heard in a conciliation hearing and around 6 cases in a chamber hearing on a single day[72]. The proportion of judgements in labour courts is traditionally low and significantly lower than in ordinary courts. By 2018, only 23,100 (7.2%) of around 320,000 settled cases ended in a judgement, while over 202,000 (63%) ended in a settlement[73].

The legislator is endeavouring to promote the goal of an amicable settlement of the dispute with further regulations. Firstly, in 2012, the possibility was expressly introduced for the court to suggest to the parties to a pending dispute that mediation or another out-of-court dispute resolution procedure be carried out (Section 54a ArbGG). This involves mediation close to court and not to in-court mediation, which was also partially carried out as a pilot project in some labour courts between 2002 and 2013 without a legal basis, but which was deliberately terminated by the legislator due to the mixing of the roles of judge and mediator (cf. Section 9 Mediation Act). Instead, the figure of the "conciliation judge" was introduced, who is a judge not authorised to make decisions and to whom the parties can be referred for the conciliation hearing (Section 54(6) ArbGG)[74]. Statistically, however, referral to the conciliation judge only occurs in less than 1 % of all proceedings and is primarily recommended in emotionally highly charged situations[75].

[72] Stein, *BB*, 2007, p. 2682.

[73] Cf. Grotmann-Höfling, *AuR*, 2019, p. 451.

[74] For more details see Francken, *NZA*, 2012, pp. 836-841.

[75] Francken, *NZA*, 2015, pp. 641-643.

In addition, great importance is attached to the quick settlement of disputes in labour court proceedings in line with practical requirements. In this sense, the principle of acceleration in all instances has been expressly enshrined in law for decades (Section 9(3) ArbGG 1926, Section 9(1) ArbGG 1953[76] and 1979). Furthermore, dismissal proceedings shall be priorised due to their great importance for the economic existence of the employee (Section 61a ArbGG)[77]. Statistically, in 2018 disputes regarding the existence of an employment relationship ended at first instance after a lawsuit was filed: 28 % after one month, 45 % after three months and 91 % after six months; of the remaining proceedings, less than 5 % lasted longer than twelve months[78].

4.3. Costs of the litigation

Another peculiarity of labour court proceedings is that they are less expensive than ordinary court proceedings. This has traditionally been of considerable importance, especially for employees as the economically weaker party, as high litigation costs may deter them from asserting their rights. Various regulations exist to reduce the cost risk. Firstly, court fees, which depend on the value in dispute of the case, are lower in the labour courts than in the ordinary courts (Court Fees Act, *Gerichtskostengesetz* = GKG, Annex 1 Parts 1 and 8). Secondly, the value in dispute is capped, particularly in disputes concerning the existence of the employment relationship (Section 42(2) GKG). Thirdly, in contrast to the legal situation in the ordinary courts, there is no obligation to pay the labour court fees in advance (Section 11 GKG). Fourthly, also in deviation from the general principles of civil procedure law, the winning party in the first instance has no claim to reimbursement of legal costs against the losing party (Section 12 ArbGG). The employee therefore does not have to fear having to bear the employer's legal costs in addition to a possible loss of the case. In addition, the general provisions on legal aid apply (Section 11a ArbGG).

For disputes under works constitution law, there is also the special provision that the employer must bear all costs arising from the activities of the

[76] Cf. *Bundestagsdrucksache*, 3516, p. 26: "dominant principle of labour court proceedings".

[77] *Bundestagsdrucksache*, 8/1567, p. 18.

[78] Grotmann-Höfling, *AuR*, 2019, p. 453.

works council (Section 40(1) BetrVG). This also includes the costs of legal proceedings, including the involvement of a lawyer, regardless of the outcome of the proceedings, if this corresponds to a reasonable assessment by the works council[79]. Moreover, no court fees are charged from the outset in disputes under works constitution law (Section 2(2) GKG).

4.4. Representation in court

In order to reduce the costs of proceedings, but also to guarantee their immediacy and to prevent social inequality between employers and employees, representation by lawyers before the industrial and merchant courts was excluded (Section 29 GewGG, Section 16(1) KfmGG)[80]. For the same reasons, such a provision was also included in the ArbGG of 1926[81] after controversial discussion (Section 11(1) ArbGG)[82]. The ArbGG of 1953 then provided for the possibility of representation by lawyers at first instance under certain conditions (Section 11(1) sentences 2 to 5 ArbGG). Since the ArbGG of 1979, representation by lawyers has also been permitted without any restriction at first instance (Section 11(1) ArbGG).

Trade unions were also originally entirely excluded from legal representation and were only able to achieve the right to represent their members before the industrial and merchant courts through an amendment in 1922[83]. This regulation was incorporated into the ArbGG of 1926 (Section 11(1) ArbGG) and was extended to the second instance (from which the representation by a lawyer is mandatory) (Section 11(2) ArbGG). This was a response to the growing importance of legal assistance by trade unions for their members, which existed since the mid-1890s[84]. Since 2008, representatives of trade unions and employers' associations have also been able to appear before the Federal Labour Court, provided they are qualified to hold

[79] See FITTING, *Betriebsverfassungsgesetz*, 31st Ed., 2022, § 40 para. 9, pp. 21-34.

[80] Cf. the explanatory memorandum of the GewGG, *Reichstagsdrucksache* 8/1890, 51, pp. 22-23: "fairness towards the working class".

[81] Cf. the explanatory memorandum of the ArbGG, *Verhandlungen des Reichstags*, III/1924, Vol. 407, 2065, pp. 36-37.

[82] Overview on the heated debate by OTTO, *AuR,* 2021, G17-G21.

[83] *Reichsgesetzblatt I*, 1922, p. 155.

[84] For the history of legal assistance by trade unions in Germany, see BUSCHMANN, *AuR*, 2018, G13-G16; KEHRMANN, *Die Arbeitsgerichtsbarkeit, Festschrift zum 100jährigen Bestehen des Deutschen Arbeitsgerichtsverbandes*, 1994, pp. 169-186; KIEL, *AuR,* 1995, pp. 317-320.

judicial office (Section 11(4) ArbGG)[85], because, as the legislator has put it, "there are no qualitative concerns with these institutions"[86]. It has thus taken almost 120 years since the making of the GewGG for the representatives of trade associations to advance to the highest bastion of the labour judiciary on the issue of representation in court[87], while lawyers vice versa have already reached the first instance in the opposite direction after around 90 years.

5. *Current developments*

5.1. Digitalisation of the legal proceedings

The digital transformation is not only changing substantive employment law, but is also increasingly affecting labour court proceedings[88].

In this respect, the coronavirus pandemic has triggered a significant modernisation push in recent years. Video hearings are at the centre of this. The legislator had already introduced the option of video hearings for civil proceedings in general in 2002 and made it significantly easier once again in 2013 (Section 128a ZPO), meaning that this option has also been available for first and second instance hearings in labour court proceedings since then as a result of the general reference to the ZPO (Section 46(2) ArbGG). However, this option was hardly used for a long time, especially as the labour courts were often insufficiently equipped with technical facilities.

The coronavirus pandemic has fundamentally changed this situation. Firstly, the legislator introduced a temporary special regulation in 2020. While the possibility of video participation under the general provisions only applies to parties, authorised representatives, witnesses and experts, honorary judges could also be connected temporarily (until 31 December 2020) (Sec-

[85] *Bundesgesetzblatt I,* 2007, pp. 2840 and 2853.

[86] In this sense expressly *Bundestagsdrucksache*, 16/3655, p. 94.

[87] Trade unions, however, have been admitted as legal representatives in the order procedure also at the Federal Labour Court since 1953, cf. Section 92(2) sentence 2 that had referred only to Section 11(1) but not to Section 11(2) ArbGG, 1953; cf. Fitting, *Bundesarbeitsblatt*, 1953, p. 575.

[88] Comprehensive information on this by Oltmanns, *NZA*, 2021, pp. 525-529; Oltmanns, *NZA*, 2022, pp. 1153-1159.

tion 114 ArbGG)[89]. More importantly, the option of video hearings was used much more during the pandemic and the labour courts have also upgraded their technology since then. The organisation of a video hearing is at the dutiful discretion of the court. A video hearing can neither be forced nor prevented by the parties, although they are free to appear in person at the hearing. A very recent law proposal from 2023 will expressly include the possibility of video hearings in the ArbGG and make them even easier (Section 50a ArbGG)[90]. However, in contrast to the first draft of the new law, which was heavily critized by the whole German labour law community[91], and also in contrast to the ordinary courts[92] ("hybrid bench")[93] video hearings are only permitted for the parties and their representatives, but not for the judges, who must all be present in the courtroom[94].

Another current development concerns the introduction of electronic communication between the labour courts and lawyers (Sections 46c, 46g ArbGG) and the introduction of electronic files, which are currently still optional but will be mandatory for the labour courts from 1 January 2026 (Section 46e ArbGG).

5.2. Decrease in the number of labour court cases

Another development concerns the continuous decline in labour court proceedings that has been observed for over 20 years. With around 675,000 lawsuits, the number of court cases peaked in 1996. In contrast, only 320,000 lawsuits were filed in 2018 and even less in 2022, around 260,000 lawsuits[95]. The reasons for this have not yet been conclusively investigated. For the same trend in general civil proceedings, a growing

[89] *Bundesgesetzblatt I*, 2020, p. 1055. In detail FRANCKEN, *NZA*, 2020, pp. 681-685; FRANCKEN, NATTER, *NZA*, 2021, pp. 153-158.

[90] Cf. *Bundestagsdrucksache*, 20/8095, pp. 18 and 70.

[91] E.g. FRANCKEN, *NZA*, 2022, pp. 1225-1227.

[92] See Section 128a(3) ZPO new.

[93] Cf. *Bundestagsdrucksache*, 20/8095, p. 51 (although limited to significant reasons).

[94] At present, the Federal Council (*Bundesrat*), the representative body of the states (*Bundesländer*), which is responsible for all local and regional courts, stopped the entire proposal for a reform on video hearings and called on the Conciliation Committee (*Vermittlungsausschuss*), *Bundesratsdrucksache*, 604/23. In June 2024, the Conciliation Committee confirmed the proposed amendments to the ArbGG without any further changes, cf. Bundestagsdrucksache, 20/11770.

[95] Cf. GROTMANN-HÖFLING, *AuR*, 2019, p. 452.

awareness of the effort, costs, duration and uncertain prospects of success of a lawsuit is cited[96]. For the labour courts, the (currently) good economic situation on the labour market is likely to play a role, leading to fewer dismissals and therefore fewer actions for unfair dismissal.

6. *Concluding remarks*

The labour judiciary as a special judiciary with equal participation of employers and employees has a tradition in Germany dating back to the 19th century. The existence of a judiciary that is completely separate from ordinary judiciary and thus, from a legal-sociological perspective, the differentiation of the judiciary[97] is an expression of the fact that working life is of paramount importance to society, meaning that the settlement of labour disputes is best handled by specialised courts. Furthermore, labour courts are best placed to deal appropriately with labour law, which structures working life in normative terms and whose expansion, independence and further development was once described by the great legal historian *Franz Wieacker* (1908-1994) as one of the "few unquestionable advances in the legal culture of the 20th century"[98]. At the same time, the autonomy of the labour courts as a "production condition of jurisdiction" has contributed to an ever-increasing juridification of labour relations in Germany[99], which is further accelerated by the traditionally close professional exchange, especially between the Federal Labour Court and labour law scholars[100].

As a state judiciary additionally legitimised by the associations of working life, the labour courts have undoubtedly made an important contribution to the idea of social partnership and social peace in general over the course

[96] Meller-Hannich, Höland, Nöhre, *Erforschung der Ursachen des Rückgangs der Eingangszahlen bei den Zivilgerichten*, 2023, pp. 339-343.

[97] Cf. Rothleuthner, *Rechtssoziologische Studien zur Arbeitsgerichtsbarkeit*, in Rothleuthner (Ed.), 1984, pp. 313-356.

[98] Wieacker, *Privatrechtsgeschichte der Neuzeit*, 2nd Ed., 1967, p. 549.

[99] Cf. Kissel, *Der Betrieb* (DB), 1987, pp. 1485-149; Reichold, *ZFA*, 1990, pp. 5-41; from a social science perspective Blankenburg, Rogowski, Schönholz, *Zur Soziologie des Arbeitsgerichtsverfahrens*, 1979, pp. 19-31. Generally Simitis, *Verrechtlichung von Wirtschaft, Arbeit und sozialer Solidarität*, Zacher et al., 1984, pp. 73-165.

[100] See only the two commemorative publications on the 25th (1979) and 50th (2004) anniversaries of the Federal Labour Court.

of time. In the words of the eminent labour law professor *Franz Gamillscheg* (1924-2018)[101]: "The fact that the labour courts have found the socially 'correct' law in recent decades is a major achievement of the highest political significance. For it has played a major role in the fact that the worker has achieved and is still striving to achieve liberation from an unworthy existence not by destroying the bourgeois order, but by transforming it into a social constitutional state"[102]. The times of a general mistrust of the ordinary judiciary by the working class might be a thing of the past. Nevertheless, there is still a practical need on the part of both employees and employers for practical, fast and cost-effective legal protection. Even if employees rarely file lawsuits during an existing employment relationship and the number of cases filed has been declining for some time, there is no serious alternative to the current form of labour jurisdiction in Germany in the future.

[101] GAMILLSCHEG, *Archiv für die civilistische Praxis* (AcP), 164, 1964, p. 445.

[102] Originally: "*Dass die Arbeitsrechtsprechung in den vergangenen Jahrzehnten das sozial „richtige" Recht gefunden hat, ist eine Großtat von höchster politischer Bedeutung. Denn sie hat ihren wesentlichen Anteil daran, dass der Arbeiter die Befreiung aus einem unwürdigen Dasein nicht aus der Zerschlagung der bürgerlichen Ordnung, sondern aus ihrem Wandel zum sozialen Rechtsstaat erreicht hat und noch zu erreichen trachtet*".

Abstract

The idea of a special judiciary separate from the ordinary courts for the settlement of labour law disputes took root in Germany as early as the 19th century. Since then, a series of legislative reforms have led to a fully independent labour jurisdiction, with the Federal Labour Court as a purely reviewing court as the final step of a decades-long development and expression of the influence of trade unions which have always campaigned for a separate labour jurisdiction. One of the special features of the labour courts has always been that they are staffed equally by honorary judges from the employer and employee sides and have a neutral chairman. In addition, the aim has always been to reach an amicable settlement between the parties. Furthermore, the costs of labour court proceedings are lower than those of ordinary court proceedings. Currently, and driven by the coronavirus pandemic, labour court proceedings are being increasingly digitalised.

Keywords

Independent labour jurisdiction, honorary judges at labour courts, priority for amicable settlement, costs of labour court proceedings, digitalisation of labour court proceedings.