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The Role of Judges in the Implementation of Social Policies

Abstract: This article, based upon the author's general report to the 9th Meeting of European Labour Court Judges (ILO, Geneva, December 2001), discusses the role of Labour Court judges and Labour Courts in the implementation and development of social policy. After surveying the legal sources of social policy and a number of Labour Court 'models', comparative experience in various national systems is described and commented upon. The author contends that judges play an important role in the development of social policy, and suggests that, when dealing with issues in this field, Labour Court judges adhere to an agenda which differs from that of judges in the general courts. It is argued that the personal values, beliefs and experiences of judges influence their decisions regarding social policy issues, so that it is important for judges to recognize and articulate the factors influencing their decisions on such matters. To assist with this, the influence of the judge on social policy should be considered when individuals are appointed and trained to exercise their judicial role. The author further argues that Labour Courts can only make a significant contribution to the development of social policy if there is reasonable access to those courts, and that among the factors capable of furthering such access are the efficiency of, and the attitudes displayed by, Labour Court judges themselves. Finally, it is observed that, in an era of decreasing union density, Labour Courts increasingly provide the principal route for workers to enforce their rights, thereby underlining the key role of Labour Court judges in developing social law and furthering access to industrial justice as an important means for the protection of rights at work.

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1. INTRODUCTION

Rights without effective remedies have little meaning. Social policy which is not implemented does society little good. Therefore, the difficult phase of determining social policy must be complemented by adequate means of implementation. A test of Society's sincerity about social policy is its ability to convert intentions into action. This article discusses social policy relating to workers. Modern economies have constitutions and statutes which guarantee workers a fundamental 'floor of rights' or core labour standards. These rights attempt to balance the inequality of power between the individual worker and his employer and the subordination of the worker to his employer with human dignity and freedom.

Labour Courts have jurisdiction over subjects relating to social policy,[1] a subject which relates to individual labour law, collective labour law, equality and social security. Do Labour Courts decide differently from general civil courts; are their judgments based on different social values? Do Labour Court judges have a different agenda than general court judges? Do Labour Courts function differently from the general courts? Have Labour Courts developed an autonomous labour law; and, indeed, to what extent should labour law be autonomous from the general law?

At a meeting of Labour Court judges organized by the International Labour Organization in December 2001, their role in the implementation of social policies was discussed. A questionnaire was sent to participating judges and each submitted a national report.[2] Information drawn

1 The social policy subjects which Labour Courts deal with include freedom of association, collective bargaining, strikes, prevention of labour conflicts, equality in the work place, the definition of 'employee', the definition of who is the 'employer' of people performing certain types of work, the application of labour law to irregular, disguised or ambiguous working relationships, education or occupational training, freedom of occupation and non-competition clauses, work safety, protection of vulnerable groups and social security.

2 The Ninth Meeting of European Labour Court Judges, organized in cooperation with the ILO, took place in Geneva on 3 December 2001. Papers on this topic were submitted by: Judge Harald Schliemann (Bundesarbeitsgericht, Germany); Judge Aldo de Matteis, (Corte di cassazione, Italy); Judge Janez Novak (Supreme Court, Slovenia); Judge Michael Koch (President, Swedish Labour Court); Judge Juez Bartolome Rios Salmeron (Supreme Court (Tribunal Supremo, Sala IV), Social Chamber, Spain); Justice Geoff Giudice (President, Industrial Relations Commission, Australia); Judge Pierre Sargos (President of the Social Chamber (Chambre Sociale), Cour de Cassation, France); Judge Jorma Saloheimo (Vice President, Labour Court, Finland) and Pekka Orasmaa (President, Labour Court, Finland); Judge Peter Clark (Employment Appeals Tribunal, United Kingdom); Judge Yussof Ahmad (President, Industrial Court, Malaysia); Dr. Bernardo Van Der Laat Echeverria (Supreme Court, Costa Rica); Judge Tunde Hando (Chief Judge, Budapest Labour Court); Ms. Melanie Pine (Director,

from their responses is included in this article. All of the national reports are agreed that Labour Courts are an important part of the implementation system of fundamental labour standards. In this manner, Labour Courts implement social policies. In what follows, we shall examine how they do so. It is, furthermore, suggested that Labour Courts make a significant contribution to the development of social policy. This is not 'judicial activism', but using social values to relate to issues to which existing statutes and precedents provide no answers. Autonomous Labour Courts are also an indication that labour law will have a certain amount of autonomy. It would seem that the more autonomous the Labour Courts are, the more autonomous labour law will be.

It is fashionable for labour law scholars to describe the factors which have eroded workers' rights, threatened their human dignity at the workplace and prevented further development of labour law. They mention the decline of union density, deregulation, globalization and competition, market ideology replacing balanced social policy, irregular work relationships and other such woes. They emphasize the powerlessness, loss of rights and poverty of many workers. However, the common conclusion is either that market forces protect and benefit workers or that an unknown factor may improve the situation. The message of this contribution is that Labour Courts are a partial solution, and can make a significant contribution to overcoming these problems. Since Labour Courts exist in most countries, they can be given the jurisdiction and resources necessary to preserve workers' fundamental rights and safeguard their dignity.

1.1. Social Rights

For the purposes of our discussion it is important to distinguish between different types of social rights and social policy. Social rights reflect societies' aspirations, such as the right to education and training, medical care and adequate housing. Social rights create norms at the workplace (i.e. work safety, freedom of occupation/covenants not to compete) and are, therefore, important to both workers and employers. Social rights are many and varied and reflect social policy. The social policy discussed in this paper relates mainly to the workplace: protective labour legislation;

Note continued

Office of Equality Investigations, Republic of Ireland); Judge Juan Rafael Persomo (Supreme Court – Social Chamber, Venezuela). While the USA has no Labour Courts, Professor Hoyt Wheeler (Moore School of Business, University of South Carolina, USA) submitted a paper concerning the general courts.

labour relations; equality at the workplace; and, fundamental workers' rights, such as freedom of association.[3] Much of the social policy and social rights discussed in this paper make demands on employers, some make demands on the state.[4] Implementation of these rights does not usually involve the Labour Court determining the State budget or ordering the State to take positive action.

1.2. Legal Sources of Social Rights

Social rights are mentioned in various international conventions, such as the European Social Charter. In many countries basic social rights are determined in the Constitution.

The Italian model enumerates social rights in the Constitution. Section 1 of the Italian Constitution of 27 December 1947, amended in 1993, declares that 'Italy is a democratic Republic founded on labour'. The Italian constitution also declares the right to work (Section 4), protects workers and declares the right to fair remuneration which is in proportion to the quality and quantity of his or her work and is sufficient to provide the worker and his/her family with a free and dignified existence (Section 35). Also mentioned are maximum working hours, a weekly day of rest and annual paid vacation (Section 36), the protection of women workers and minors (Section 37), social security for all citizens (Section 38), freedom of association and the right to strike (Sections 39-40). In Italy the constitutional right to 'human dignity' includes protection against

3 Articles 1 to 19 of the European Social Charter (as revised in Strasbourg, 3 May 1996) state the following fundamental social rights which relate to workers: The right to work; the right to just, safe and healthy working conditions; the right to fair remuneration; the right to organize; the right to bargain collectively; the right of employed women to protection; the right to vocational guidance and training; the right of disabled persons to vocational training and integration; the right to social security. Other social rights listed were: the right of children and young persons to protection; the right to protection of health; the right to social and medical assistance and to benefit from social welfare services; the right of the family to protection; the right of freedom of movement, combined with the right to protection and assistance; the protection of the elderly.

4 Many civil and political rights are enforced by courts when they order the State to refrain from acting i.e. refrain from interfering with free speech. This does not usually require significant budgets. There are exceptions to this generalization, but, on the whole, courts' involvement with civil and political rights do not infringe on the legislature's budgetary powers. Social rights, on the other hand, often require positive action by the State, such as to provide education or medical care. When courts set policy regarding social rights they often threaten the legislature's budgetary powers. Some rights, such as the freedom of association, are at the same time civil, political and social rights.

discrimination at work. The Spanish Constitution of 1978 also enumerates social rights, in addition to stating in Article 1 that Spain is a social and democratic state based upon law.

Other countries have adopted the model of a general social declaration in the Constitution with the social rights established in legislation. Section 20 of the German Constitution declares that Germany is a 'democratic and social federal state'. These constitutions create broad rights to human dignity, from which we can imply that all acts of public authorities, including the legislature, must comply with the principles of the welfare state. This is the situation in the Scandinavian countries, Germany and Israel. Thus, in Israel the right to 'human dignity' is broadly interpreted to include many social rights – including the freedom of association.

The Spanish Labour Court (Social Chamber of the Supreme Court) reviews whether proposed legislation and other statutory instruments relating to labour law and social security are compatible with the Constitution. This system of constitutional review of proposed legislation is done in some European countries by the Constitutional Courts (or Constitutional Chamber of the Supreme Court); in Spain, however, matters relating to labour and social issues are reviewed by the Social Chamber of the Supreme Court.

Legislation which is incompatible with social constitutional rights may be declared unconstitutional in some countries, such as Italy, Germany, Spain and Israel. When the Italian Labour Court thinks the only interpretation of a statute is contrary to the Constitution it must refer the case to the Constitutional Court, which can strike it down or modify it.

Constitutional principles are used by some Labour Courts to interpret social legislation. The Italian report mentions that, when a statute is susceptible to several interpretations, it should be interpreted according to the Constitution. In Israel, the Labour Court uses constitutional principles when interpreting statutes, collective agreements or contracts.

An example of the use of constitutional and social principles to interpret both a statute and an employment contract is the Israeli case of *Dan Frumer and Checkpoint Ltd* v. *Radguard Ltd*;[5] in which the former employer of a software engineer sued him and his new employer in the Labour Court for an order preventing him from working for the new employer on the basis of an undertaking not to compete, which was contained in the employment contract between the worker and the former employer. Both companies developed and sold the same end-product

5 The judgment is published in an English language version in Vol. 20 of the *International Labour Law Reports*, Kluwer.

(virtual private networks), and, in this sense, were competitors. In interpreting the legal validity and scope of the contractual non-competition clause, the National Labour Court considered several constitutional rights, some of which were social rights: (a) the worker's right to freedom of occupation; (b) the employer's property right to protect his trade secrets; (c) the workers' property right to the knowledge he has accumulated; and, (d) the workers' right to self-fulfilment, which is derived from the right to human dignity. In addition, the court considered the freedom of contract and trade, which are considered to be basic to the legal system. The Court held that non-competition covenants would not be enforced unless the worker was using trade secrets belonging to the former employer, or had received special training financed by the former employer (i.e. an expensive course), or the worker had received special compensation (i.e. a significant 'signing-on' fee) or a significant breach of loyalty to the former employer. The Court said that in light of the abovementioned constitutional social rights and public policy there was no justification for non-competition clauses, unless one of the abovementioned conditions occurred. In addition to balancing the abovementioned constitutional social rights with the constitutional property right, the Court also used them to interpret the meaning of 'trade secret' as defined in the national Commercial Wrongs Law of 1999. This is also an example of Labour Court decisions affecting general law subjects, such as contracts and intellectual property in a manner which gives proper importance to social policy.

The Israeli Labour Court has also declared provisions of a collective agreement to be contrary to public policy, such as when it discriminated against women or homosexuals. This 'public policy' doctrine is based upon constitutional principles. In the *ELAL* v. *Donolevich* case, the Israeli National Labour Court struck down a clause in the applicable collective agreement, as interpreted by company policy, which gave (as a working condition) two airline tickets for married and common law heterosexual couples but denied them to a homosexual flight attendant and his partner. Equality at the workplace, the Court said, was an integral part of human dignity and required equal treatment for all employees, regardless of their sexual preference.

The United Kingdom, which does not have a written constitution, establishes all rights in legislation and case-made law. Meanwhile, the Irish report mentions legislation concerning employment law and equality law.

Some reports mention an interaction between the Labour Courts and the legislature, which influences social legislation.

1.3. Labour Courts: Jurisdiction and Models

Some Labour Courts are autonomous entities, as in Germany;[6] others are independent but somehow connected to the general court system; others are social chambers within the regular courts, such as in France[7] and Costa Rica;[8] while others are tribunals whose judgments are subject to appeal to the general courts.

There is a broad and narrow jurisdiction model of Labour Courts. The broad model includes Germany, Israel, Slovenia, Spain, Sweden, Malaysia and Venezuela.[9] These Labour Courts have jurisdiction over both collective and individual labour law disputes. The United Kingdom Employment Tribunals (encompassing the England and Wales tribunals, a separate system for Scotland, and yet another system for Northern Ireland) have jurisdiction over applying statutory provisions to individual employment disputes, including unfair dismissal and protection against discrimination.[10] There is, however, a tribunal to which trade unions can apply for compulsory recognition from employers – the Central Arbitration Committee (CAC) – which is referred to in the National Report as 'the only labour court in the United Kingdom charged with regulating collective agreements'. Some broad jurisdiction Labour Courts hear only private law cases, such as the German Labour Courts, while others, such as the Israeli Labour Court, hear both private and public law cases. Germany has separate court systems for labour and social security, while Israel's Labour Court deals with both subjects. The narrow

6 German Labour Courts were established in 1927, and re-established in 1945. They consist of a first instance *(Arbeitsgerichte),* 16 second instance appeal courts *(Landesarbeitsgerichte),* and the highest appeal court, the Federal Supreme Labour Court *(Bundesarbeitsgericht).*

7 In France, the Appeal Court *(Chambre sociale de la Cour de Cassation)* has jurisdiction over social matters.

8 In Costa Rica there is also a Conciliation and Arbitration Tribunal, which has jurisdiction over economic and legal collective conflicts. It is composed of one professional judge and two lay judges. However, according to the report, the role of the professional judge is dominant and the system of lay judges does not work well because it is difficult to find good candidates for the position.

9 The Israeli Labour Court, for example, has jurisdiction over all of the subjects mentioned *supra* in footnote 1, except for education and occupational training. The Swedish Labour Court has jurisdiction over all subjects except education, occupational training and work safety.

10 In the United Kingdom, collective disputes and Central Arbitration Committee (CAC) cases are heard by the general courts.

model includes Norway and Finland, whose jurisdiction is limited to collective disputes, such as the interpretation of collective agreements.[11]

In general, Labour Courts adjudicate upon legal rights. The Australian Industrial Relations Commission, however, decides economic issues, such as determining the minimum wage and weekly working hours, in addition to deciding legal rights concerning unfair dismissal. The Malaysian report also speaks of Labour Courts setting wages and working conditions.

The Republic of Ireland does not have a Labour Court, but a variety of administrative tribunals, one of which is called a Labour Court but is different from other European Labour Courts. Employment law disputes are heard by an Employment Appeals Tribunal, while disputes regarding equality legislation are heard by an Equity Officer of the Office of the Director of Equality Investigations. The Labour Court hears appeals from the Equity Officer concerning discrimination cases and cases under the Organization of Working Time Act, and has initial jurisdiction over discriminatory dismissal cases. However, none of these bodies have professional judges; and, indeed, the Labour Court panel members need not have a legal training.

Labour Courts differ greatly in the number of cases heard annually. The Norwegian Labour Court hears less than 50 cases a year; the Irish Director of Equality Investigation hears about 900 cases a year; the Israeli first instance Labour Courts hear about 90,000 cases annually, half of which are motions and the National Labour Court, the highest appellate instance, hears about 1,800 cases, half of which are motions. The German first instance Labour Courts hear about 635,000 cases annually; the second instance (appeal court) about 31,000; and the Federal Labour Court about 1,000 cases. The United Kingdom Employment Tribunals, which constitute the first instance trial court level, received over 100,000 applications in the year 1999-2000, of which 75 per cent were resolved by ACAS (the Advisory, Conciliation and Arbitration Service); the remaining 25,000 went on for hearing by the Employment Tribunals. The appellate court, the Employment Appeal Tribunal, received about 1,400 appeals in 1999.[12]

11 In Finland, claims based upon labour legislation are heard by the general courts, while social security cases are heard by tribunals.

12 S. Deakin and G. Morris, *Labour Law*, Butterworths, London, 2001, p. 84 and p. 91.

2. Functions of the Labour Courts, Labour Courts' Role in Implementing, Influencing and Making Social Policy

2.1. Implementation

All of the responses mention that Labour Courts contribute to the development of social policy by implementing statutes and regulations. This is generally seen as the only role of the lower instances and the main role of the highest instance. Most reports, such as that of Germany, Slovenia and the United Kingdom, limit the Labour Courts' role to implementing statutes and developing rules and norms within the framework of the Constitution and statutes. This approach emphasizes that courts do not set social policy, which is the political task of the legislature. As stated in the United Kingdom report: 'In the United Kingdom it is for Parliament to reflect social policy and justice in the legislation which the Labour Court implements. It is not for judges to impose their own values where they conflict'. However, most of the reports indicate that judges have an important role in developing labour law and social policy.

2.2. Guidelines for the Legislature

As mentioned above, the Spanish Labour Court (Social Chamber of the Supreme Court) reviews whether proposed legislation is compatible with the Constitution.

Labour Court decisions are also seen as guidelines for setting social policy by legislature. Thus, the Slovenian report mentions 'the practical persuasiveness' of judgments. According to the French report, there is a clear link between Court decisions and labour legislation.

The United Kingdom report indicates that the Employment Appeal Tribunal's role is to point out problems to the legislature. The report suggests that 'occasionally, in construing a statutory provision, the court will point out to the legislature anomalies and problems to be corrected by the legislature and not the court'.

Most of the national reports cite examples of Labour Court decisions which have been enacted into statutes. The German report described the interaction between the Labour Court and the legislature, with court made rules concerning unfair dismissal and temporary work being adopted, adapted and changed by the legislature. The Italian report cites the example of court-made law in the field of workers' compensation (relating to coverage for accidents occurring on the way from home to work) being incorporated into statute. The Swedish report mentions the important role of the Labour Court in developing freedom of association rules, which were later (1936) enacted into statute. Meanwhile, the United

Kingdom report mentions that statutory provisions have been altered following Labour Court 'observations'. On the other hand, the Slovenian report states that there have been no examples of case-made law becoming statutes. The French report mentioned instances of statutes enacted as a reaction to Social Chamber judgments in the field of union representation, hours of work and return to work.[13]

The Australian report cites statutes which incorporate Commission decisions concerning minimum industry-wide wage rates and severance pay. However, the conservative legislature also reversed Commission rules which gave primacy to collective bargaining over individual contract negotiations. In Venezuela, the legislature has reversed court decisions which limited the right to strike and workers participation in enterprises. In the United Kingdom, legislation is occasionally enacted to reverse a court decision on the interpretation of a statutory provision.[14]

2.3. Judge-made Law

Some reports feel that Labour Courts only implement statutes and there is little or no judge-made social law. Thus, the United Kingdom report says that the Employment Tribunals and the Employment Appeal Tribunal mainly implement statutes, and that 'the opportunity for creating policies is limited; our task is to implement policies laid down by Parliament by statute, subject to EC labour law'. However, as the United Kingdom report says, in relation to the civil courts, who have jurisdiction over certain collective disputes, freedom of occupation and non-competition clauses and work safety: 'These concepts are largely developed through judge-made (common law), subject to the statutory definition of trade disputes which must be interpreted by the judges when dealing with attempts to restrain a strike or other industrial action'.

However, some reports mention that Labour Court interpretation has changed social law. Thus, the Italian workers compensation system was

13 The French report mentions cases concerning the right of a union to nominate a worker to negotiate collective agreements where there is no official union representative (1995 judgment, statute enacted in 1998 and 2000); the definition of effective working time; the obligation of employers to re-integrate workers who have suffered from a work injury or occupational disease.

14 The United Kingdom report gives the example of the Court of Appeal decision in *ABP, Palmer, Association Newspapers Ltd.* v. *Wilson,* [1994] ICR 97, on the meaning of 'action short of dismissal' for trade union activities, which was effectively reversed by statute, involving an amendment to the Trade Union Reform and Employment Rights Bill, prior to the subsequent House of Lords judgment [1995] ICR 406.

changed by Labour Court and Constitutional Court decisions from an insurance model to a social security model.

While the German report refers to social justice as involving 'political' decisions, which should be made by the legislature it also stated that Labour Court '... judgments include judge-made law regarding social politics in labour affairs' and that 'labour law is judges' law'.

The Italian report also states that there is no judge-made law in Italy. However, the description of Italian courts' development of freedom of association law can be defined as judge-made law, especially the rules concerning union recognition, which were changed by the court (with the detrimental effect of fragmenting unionization, according to the report).

The Spanish report mentions significant judgments of the Labour Court with respect to the development of social policy, regarding the reinstatement of workers whose dismissal violates fundamental rights; the identification of the 'real' employer by 'lifting the veil'; and expanding the recipients of social security benefits.

The Malaysian report says that the Labour Court has developed social policy regarding security and tenure, limitations on dismissal (definition of 'just and reasonable cause' for dismissal) and fair employment conditions. The example given is a decision that foreign workers are entitled to the same working conditions as local workers.

Social policy is made by the Australian Industrial Relations Commission, when it determines basic labour protections, such as the minimum wage, maximum hours of work, parental leave and family leave. The report explains that such judge-made decisions are based upon value judgments. As the report mentions, 'Historically, the Commission has played a pivotal role in developing social policy in a number of areas'. However, in 1993 the legislature apparently limited by statute the Commission's role in making social policy, and emphasized the implementation role.

The American report states that, in addition to implementing social policy legislation, the general courts engage in judge-made law in all fields, including social policy. This is done by constitutional and statutory interpretation.

2.4. Freedom of Association: An Example of Judge-made Law

Freedom of association is particularly important for collective labour law, since it affects the right to join a trade union, bargain collectively and strike. It is a constitutional right in many nations. This freedom has been developed and influenced by Labour Court judgments; i.e. by judge-made law. All Labour Courts have developed rules governing strikes and lock-outs; many have developed law concerning the protection of workers' rights to join and be active in trade unions, or, on the other hand, not

to join the union. In many instances, the statutes can be interpreted to either permit or forbid a strike; the Labour Court, or general court, hearing the case can develop a general theory of strike law, depending to a large extent upon its particular attitude towards trade unions and strikes.

The French Social Affairs Chamber has created comprehensive representation rights for trade unions and also imposed a burden of proof on the employer when there is a claim of discrimination against trade union members.

In Germany, Labour Court judgments prohibit an employer from enquiring if a worker is a union member. The German Labour Courts also prohibited an employer from making a condition of employment that the worker not be a union member.

In Israel, freedom of association has been recognized as a fundamental right, according to Supreme Court judgments handed down before the Labour Court was founded in 1969. The Labour Court developed this subject, and in 1999 re-instated a worker who had been discharged because of union activity.[15] This doctrine was further expanded in 2000 to include reinstatement of workers discharged for participating in a strike.[16] Shortly thereafter, the Knesset (Parliament) incorporated this protection in a Law.[17]

The Spanish report indicates that the Labour Court (Social Chamber of the Supreme Court) and the Constitutional Chamber of that court have developed the law regarding freedom of association based on the general right mentioned in Section 28.1 of the Constitution. Mention is also made of a subject which the Israeli Labour Courts had also developed; namely, protection of workers against discrimination on the ground of union membership or activities.

In Italy, until recently, union rights concerning the right to strike were developed by case law on the basis of the general constitutional right. However, in 1990 the Parliament enacted a statute regulating strikes in essential public services. Italian case law also governs many issues relating to collective agreements.

The Swedish report mentions that the Labour Court plays an important role in developing law on this subject.

The Finnish Labour Court has developed rules protecting non-union workers and their employers from union strikes whose purpose is to pressure these workers to join the union. Also developed were rules prohibit-

15 LCD 3-239/99, *Adial* v. *Mifali Tachanot*.
16 LCD 1008/00, *Horn & Liebovitz* v. *The New Histadrut General Workers Union*, 35 LCD 145.
17 Amendment No. 5 of the Collective Agreements Law, 10.1.2001.

ing the employer to take into consideration union membership when deciding which workers to dismiss.

In Costa Rica and Venezuela, the Constitutional Chamber of the Supreme Court has jurisdiction over the constitutional right of freedom of association. The Costa Rican report mentions a judgment of the Constitutional Chamber of the Supreme Court[18] which annulled the dismissal of workers for trade union activities and ordered their re-instatement with payment of back wages. This doctrine was adopted into a statute 15 days after the court's decision, and has subsequently been applied by the Labour and Social Chamber of the Supreme Court.

While national reports indicate that most Labour Courts have played an important role in developing freedom of association law, it should be noted that in some nations, such as Slovenia and Malaysia, freedom of association has been determined by detailed statutes. Furthermore, the United Kingdom report indicates that protection against dismissal because of union membership or activities is set out by statute, and the Employment Tribunals' task is to interpret and apply these statutes, but 'not to create social policy'.

2.5. The Implied Term of Mutual Trust and Confidence in the Employment Contract: An Example of Judge-made Law

An interesting example of judge-made law is the United Kingdom courts' development of an implied term in the employment contract to the effect that the employer has a duty of mutual trust and confidence towards his employee. In the *Malik* case,[19] two employees were dismissed when the bank they worked for went into liquidation. Unknown to them, the bank's business had been carried on in a fraudulent manner. They claimed that their employment at the bank placed them at a serious disadvantage when seeking other employment. One plaintiff had worked for 16 years for the bank, and the other had been employed for 12 years; one managed a branch office, and one was the manager of a department in a branch office.

The House of Lords held that the employees had a cause of action for damages because their prospects of finding employment had been hampered. There was an implied obligation on the employer that he would not carry on his business in a dishonest or corrupt manner. A reasonably fore-

18 Decision No. 5000 of 1993.

19 *Malik* v. *Bank of Credit and Commerce International SA (in liquidation)*, 1995, CA, reversed by the House of Lords, [1997] IRLR 462. However, *see Johnson* v. *Unisys Ltd.* [2001] IRLR 279, which limited the *Malik* 'stigma damages' cause of action.

seeable consequence of such corruption was the serious possibility that the employees' future employment prospects would be hampered and for this they were entitled to damages. The terms of the employment contract contemplated that the employee will return to the labour market as well as that the employee has the right to return to the labour market fit for re-employment. The court balanced the employers' right to manage his business with the employees' right not to be unfairly exploited. The court described the implied term of mutual trust and confidence, as follows: 'The employer will not, without reasonable and proper cause, so conduct itself in its dealings with third parties as to destroy or seriously damage the relationship of trust and confidence between employee and employer'. Lord Steyn added that the origin of this implied term was in the duty of cooperation between contracting parties. This case illustrates how a court can create an implied term and right to damages with no statutory basis.

It should be noted, in passing, that, following the workers' success in establishing the general principle, they eventually failed to establish their case, when it came to applying that principle to their particular circumstances. The House of Lords returned the case to the trial court, where the workers failed to prove causation, with the result that their claim was dismissed. In particular, they failed to prove that their job opportunities had been damaged, especially since they had refused what were held to be reasonable job offers.

3. The Contribution of Labour Court Judges to Making Social Policy

In the questionnaire which formed the basis of the data collection underlying this article, 'judicial activism' was not defined, so that each national reporter could use the term in the context of his or her particular country and describe whether its Labour Court was willing to decide social disputes when there was no existing legislation. This was deliberately intended to examine how Labour Courts relate to social changes and problems arising out of changes in labour relations, irregular employment relationships, deregulation, globalization, and the like.

The Slovenian report says that judicial activism does not exist there, since it goes beyond the 'courts' adjudicatory role'. The Finnish report sees no room for judicial activism in that country because of the comprehensive statutory rules complemented by collective agreements, which do not leave the LC much possibility or need to make law.

The Swedish report suggests that judicial activism has no place nowadays, but also mentioned that it exists when the court 'fills gaps' in existing law, and that courts of final instance often make law. The

Spanish report adopts a similar approach, but emphasizes that the progressive application of legislation is understood to be 'judicial activism'.

However, the Italian report says that judicial activism exists in that Labour Courts adapt legal rules and norms to social changes, according to the constitutional social model. This is accomplished by the interpretation of the law and Constitutional Court judgments.

The Malaysian report says that Labour Courts should adopt an active role in determining social policy, and adds that the Court 'is required to have regard to public interest, financial implication on the economy of the country and the industry concerned'.

The German and Israeli approach is that legislation is the preferred tool for solving social problems; however, if there is no statute about a social issue, the court must decide and, by doing so, makes law. The German report relates to this issue by saying that judges are law-makers when there is 'political poverty'. The Israeli approach is that when there is a Law, regulation, agreement or precedent the Labour Court's role is implementation, however, when these are absent and there is a *lacunum*, any decision by the Labour Court makes law. Furthermore, courts are free to rethink precedent in the light of social changes although this must be done carefully and responsibly.

The French report indicates that Social Chamber decisions have substantially contributed to the development of social policy, and mentions the example of strengthening employment protection in times of economic downturn.[20]

The Australian report mentions that 'some "judicial activism" is inevitable, although in a context in which the term has a different application'. The American report also states that judicial activism is inevitable, to some degree, in a common law system. When there is no statute governing a dispute, the court makes rules, such as court-made exceptions to the 'employment at will' doctrine.

The Costa Rican report observes that the role of judges is not only to implement social policy but to create it, and that judicial activism is justified – and even required.

The Venezuelan report says that judges are required to adopt a formalistic approach and cannot develop answers to new problems. However, despite this, the courts have developed new approaches to social problems in certain important judgments. The report expresses the opinion that judges should be given more power to develop social policy.

20 Examples given in the French report include strengthening employment protection in times of economic downturn by obliging the employer to provide training when worker tasks change, and the establishment of social plans when there is a collective dismissal.

In general, the term 'judicial activism' seems to frighten judges and lawyers, since it implies judges taking power which is not theirs. There are few statutes which specifically call upon courts to develop social law. Many legislatures are unhappy about the 'judicial activism', object to any court decisions which involve significant budget allocations and view the courts' role as implementing legislation. However, the balance of governmental powers and authority empowers the legislature to make laws and the courts to implement and develop them. The line between legislative law-making and judicial legal development is vague. The judicial process involves interpretation of constitutions, statutes and agreements which, in effect, allows judges to make law, even though their main task is to implement statutes and precedents.

We are guided by laws and precedents because they embody the wisdom and experience of previous generations. However, when a new workplace issue arises and the existing statute or case law is unclear and can be interpreted in more than one way, then the Labour Court must decide the case. The legislature has empowered the Labour Courts to develop the law by deciding such cases. Not to do so amounts to a policy decision which leaves the worker without a solution to his problems; this is an answer to the problem, a negative answer. When Labour Courts cope with such issues they are not only implementing the general social policy laid down by the constitution and the law but also making social policy. Labour Courts cannot wait for the legislatures to act because the active pursuit of human dignity and labour standards is crucial to our society and 'judge-made law' is a part of our governmental systems. As the Malaysian report puts it: 'Where no policy has been decided [by statutes or precedent] the individual judges' value, philosophy and outlook will have a role to play'. This often occurs in labour law because of the rapidly changing labour market. In so doing, Labour Courts make social policy. We cannot escape this task by saying: 'courts must wait for the legislature to relate to an issue'. When such an issue is brought before a court it must decide – either that a right exists or that it does not exist. A negative decision, denying the right, is as much of a decision as a positive one, declaring that a right exists. Either way the court is making social policy and using value judgments.

Nevertheless, in such instances one can distinguish between a situation where the legislature has dealt with a social issue and failed to create a right and the situation where the legislature has not dealt with an issue. In some instances, when the legislature has dealt with a social issue and failed to create a right, it can be implied that it does not want the right created. In such instances the court should take this into consideration and be reluctant to create the right. On the other hand, this is not always the situation. Sometimes the legislation failed to create a right for reasons

not related to the policy in question. It is not helpful, therefore, to speak of 'judicial activism'. The real issue is a discussion of the policies, values and understanding of society which are inherent in judicial decisions when there is no specific or clear law. When this is recognized, the courts should be discussing policy in their decisions and litigants should present their arguments with an emphasis on policy. Furthermore, it is also important to determine how judges make policy decisions; how they learn about workplace reality; what are their values; and what advanced judicial education should be offered to judges so that they can fulfil their role of making public policy.

4. Judges' Personal Values and Beliefs and their Influence in Deciding Social Policy Issues: How Judges Learn about Social Issues

In making policy decisions, judges are guided by the purposes inherent in the Constitution, law or agreement; they also are guided by the rules of interpretation prevalent in their legal system. However, like all judges, Labour Court judges' decisions are also influenced by their personal values, beliefs and experience. It is, therefore, important to discuss what policy and values judges draw on when deciding cases relating to social policy. How do they balance the various legal principles which relate to a specific case or social policy? The judges were asked questions about how they make decisions relating to social policy and decide what the proper social policy should be and what principles guide them in making social decisions. Later in this presentation we will ask what makes Labour Court judges different from general court judges in deciding social issues. In evaluating judges' behaviour we should differentiate between social policy, social outlook – personal social philosophy and value judgments.

Judges articulate, formulate and apply social policy. However, much of basic social policy is determined in the Constitution and statutes. The main role of judges here is the interpretation and development of social policy. It is particularly important in this respect that the judges give clear and transparent articulation of their decisions concerning social policy, so that they can be scrutinized by democratic and constitutional norms.

We can relate differently to a judge's personal philosophy and social outlook. This is more problematic, and must be dealt with by education and conscious attempts by the judges to understand their personal social philosophy and coordinate it with the accepted social policy of the country. It may be suggested that value judgments made by judges generally relate to particular cases, and must be clear so that they can be scruti-

nized. There is general consensus in the national reports that Labour Court judges are guided by the principles of their Constitution (where there is one) and statutes. In precedent jurisdictions, they added that judges were bound or guided by precedent. What happens, however, when these legal instruments do not deal directly, or are unclear, about an issue? In the view of this author, where this happens, the Labour Court should be guided by the purpose which is inherent in the constitutional principle, statute or agreement. Thus, the French report describes the link between the mention of social justice in the preamble to the Constitution and cases concerning the dismissal of sick employees. To learn what this purpose is, the court must not only evaluate the written word but must also understand the modern workplace and society.[21] With this issue in mind, we asked the Labour Court judges how they learn about society, social problems and the workplace. Some of the answers are explored below.

4.1. Personal Values, Philosophy and Outlook on Life

All of the reports indicate that the individual judge's personal values, philosophy and outlook on life influence his or her judgments. As the Australian report puts it: 'It is beyond doubt that the experience of judges influences their judgments, even if the judge is not conscious of the way in which that influence works'. The French report observes that the idea of social justice underlies Social Chamber judgments. The Costa Rican report suggests that, however objective the judge is, his or her decision will reflect his or her personal values, philosophy and vision of life. The Spanish report describes the approach of Labour Court judges, as reflecting their understanding of the employment relationship, as follows: '[the] Labour Court judge is impartial but not neutral, meaning that, despite being essentially impartial, the Labour Court judge cannot forget the presence of a weaker party in labour proceedings'. The Swedish report mentions lawyers' attitudes to the effect that a judge's personal outlook should not influence his or her judgments; while, however, going on to indicate that this is not always the situation.

The composition of the Labour Court was seen as a neutralizing force to reduce the personal values of individual judges. The presence of lay judges and, in most appeal courts, a number of judges sitting on a

21 For example, the court must understand the variety of 'atypical' work relationships, their use, and the implications of these. It must understand the problems that trade unions have when organizing workers. It must understand the problems of minorities, women and migrant workers.

panel, reduces the influence of any one member's individual values. Furthermore, the natural tendency to reach a unanimous decision compels members to compromise and find common ground.

There is also agreement that judges are trained and obligated to implement the statutes and precedents in an objective, impartial, unbiased and fair manner. In addition, judges have common legal training and adhere to common norms of conduct and professional ethics, which constrain their personal values.

4.2. Experience as a Labour Court Judge

As the Swedish report aptly puts it: 'Judging may very well be described as a lifelong education, and the experiences [of judges] from a long row of cases certainly serves as an education in itself... the most important education is the actual judging'. In Spain, recently appointed judges learn by sitting on panels with experienced judges. Labour Court judges also learn from the lay judges. Thus, the Finnish report suggests that 'constant cooperation with the [lay] members of the employee and employer side is very useful in [keeping in touch with social issues].'

4.3. Familiarity with the Workplace

The Italian report describes an important goal of Labour Court judges' education when it observes that 'a more direct knowledge of the working world is needed'. How does the Labour Court judge achieve this? The German report goes so far as to advocate that 'the best training would be working in plants, trade unions and employers' associations during sabbaticals'. Most Labour Court judges must make an effort to keep abreast of what is happening at the workplace. In Israel some Labour Court judges visit a plant about once a year, as guests of the management and trade union, to learn about workplace problems.

4.4. Court-Organized or Sponsored Education

In some Labour Courts there is advanced training organized and sponsored by the court administration, such as in Italy, Israel, Ireland, Australia, Slovenia, Spain and Malaysia. In Israel and Spain there is a special body within the judiciary which is responsible for judicial training. The Australian report mentions 'personal development activities', which have focused on judgment writing. Israeli Labour Court judges attend three seminars a year organized by the court administration; two focusing on labour law and social security matters and one on a general law topic chosen by each judge. The Irish Office of the Director of

Equality Investigations provides training by specialists in gender and racism studies and has also organized sensitivity training. The Italian and Slovenian reports indicate that such training is inadequate.

However, in some Labour Courts there are no formal programmes – as is the case in Germany, Sweden and Venezuela. The Venezuelan report suggests that this has resulted in judges being 'legal technicians... rather than jurists with a social sense'. On the other hand, some senior judges from these countries participate in international seminars and meetings, which is an educational experience.

4.5. Appointment of Judges

It should be pointed out that the different approaches to the appointment of judges influences the approach to their education. In some jurisdictions, such as those with an Anglo-Saxon system, judges are appointed from experienced jurists, usually senior lawyers (e.g. from the ranks of barristers in England). Other countries train judges from the time they complete their legal education. However, even in the latter countries, such as Spain, it is possible to appoint distinguished academics or lawyers to the bench, without them going through the long-term education process which most judges receive. The Finnish report mentions that Labour Court judges are generally appointed from labour law specialists, often academics.

4.6. Summary

Labour Courts are a location where judges develop particular concern for social policy. While judges of the general courts also are concerned for social policy, they regard this as one of many fields, while the Labour Court judges give particularly great weight to social matters. Labour Court judges learn about social issues through education, experience, interaction with fellow judges, information from lay judges, advanced judges training, meetings with labour and business associations, contact with the academic world and media reports. The workplace is their expertise, and this is why labour law and social security cases are best decided by them, instead of by general court judges.

5. The Role of Lay Judges

It appears that all Labour Courts have panels which include lay members, except for Italy, Spain[22] and Venezuela. In the Republic of Ireland, there are no professional judges. Discrimination cases, which are heard by an Equality Officer who need not have legal training, are thus heard by one lay member; the Employment Appeals Tribunal panel is one person with legal training and union and employer lay members; the Labour Court panel is one chairman, who need not have legal training, together with trade union and employer representatives. The Irish report considers all panel members of all of these tribunals to be lay members. Lay judges have the same vote as the professional judge. Usually, these lay judges reflect an equal number of trade union and employer representatives.

Some Labour Courts have lay judges who are experts or 'neutral' members. The Finnish Labour Court has, in addition to the employee and employer lay judges, 'neutral' members. The Finnish Labour Court sits with 6 members: the chairman, who is the President or Vice-President, a neutral judge, two employee lay judges and two employers. The Australian Commission's lay members are not limited to labour and employer representatives but include experts in fields related to the subject of the case, especially labour economists. In some nations the lay representatives participate only at the first instance, while in others they are also panel members at the appellate level(s), such as in Germany, Israel and Sweden. In the first instances (in Germany the first two instances) lay judges outnumber the professional judge(s). Some Labour Courts do not have lay members at the final appellate level, and in some of the highest appeal instances the professional judges outnumber the lay judges – such as is the case in Germany and Sweden. In Israel, professional judges outnumber lay judges for most cases at the final appeal level; however, in a few particular cases (generally speaking, major collective disputes), the lay members outnumber the professional judges.[23] Lay members are generally appointed by a Minister (of labour and/or of justice) from lists of candidates submitted by trade unions and employers' associations.[24]

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22 Spain had lay judges from 1908 to 1939.

23 Generally, the Israeli National Labour Court panel consists of 3 professional judges, one labour lay member and one employer lay member. However, in the few collective dispute cases the panel is 3 professional judges, 2 labour representatives and 2 employer representatives.

24 In Israel they are appointed jointly by the Ministers of justice and labour; trade unions and employers' associations submit lists of candidates, but the Ministers are not limited to these lists.

All of the national reports say that the practical experience of the members is their main contribution to the Labour Court panel, including knowledge of the particular economic branch which may be the subject of the adjudication. They provide special understanding from the point of view of employers or managers. As the Finnish report observes: 'The lay judges' experience, both legal and practical, is a valuable basis for judgments of the Court'.

Lay judges are said to be impartial by all of the reports – the best evidence of this being that judgments are usually unanimous.[25] Most of the reports indicate that they are not 'representatives' of the sector they come from and exercise independent judgment unrelated to their 'role' as employee or employer lay judge. In short, they do not just vote for their own 'side'. The Slovenian report states that their perspectives on social policy do not differ from the professional judges, and when voting the lay members 'forget' from which sector they were appointed. The German report also mentions that the sector from which they have been appointed (labour or management) normally does not influence their vote; however, it is added that, sometimes, the 'political' organization which they come from seems to influence their vote.

The lay judges have sometimes been described as an 'industrial jury'. However, they are not strictly a jury, since they do not decide alone, without the judge, as does the American or English jury. Perhaps it is more helpful to describe the lay judges system as the participation of the public in the judicial process; the public being those citizens involved in labour relations and social security. This is more obvious in the first instance Labour Courts, where the lay judges tend to be 'grass roots' 'ordinary' people with workplace experience. However, at the highest appeal level the lay judges are usually well qualified and knowledgeable, with a general perspective on workplace problems.[26]

In Italy there are no lay judges.[27] However, the Italian report advocates including lay judges in the Labour Court panel, because of their contribution to the understanding of the workplace.

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25 The Swedish report estimates that 85 per cent of the judgments are unanimous. In Israel this figure is over 90 per cent.

26 In the Israeli National Labour Court, for example, employer lay judges are heads of large companies, professors of law and labour relations and senior government officials. Employee lay judges are senior union officials, professors and senior government officials.

27 Lay judges were recently introduced into the Italian legal system, but not in the labour law panels.

6. The Role of Labour Courts and their Judges in the Network for Implementing and Developing Labour Standards

Legal rights cannot be implemented without an effective means of compelling employers to honour labour law rights and protections. Legal proceedings are a necessary method of implementing social policy and rights. In this regard we shall ask two questions. First, is the role of Labour Courts among the alternate *fora* which settle or decide rights, such mediation and arbitration? Second, why are Labour Courts different from the general civil courts? We shall answer each of these questions below.

6.1. Labour Courts, Arbitration and Other Dispute Resolution Methods

Labour Courts are not the only means of implementing social rights and making social policy. Instead, they are part of a system consisting of mainly government bodies acting for this purpose. Let us, therefore, describe the main parts of this system and discuss the role of Labour Courts therein. One may offer the following as examples of some of the methods for formulating and implementing labour standards:

(a) The legislature has a primary role in formulating social policy;
(b) Non-binding recommendations, generally referred to as 'soft law'. These include general legal principles set out in Constitutions, statutes, treaties and declarations, when they have no binding force and there is no remedy for disobedience;
(c) Cooperation between management, employees and their representatives resulting in agreements, sometimes under State supervision. This can be done voluntarily, with or without sanctions. This arrangement is generally based upon common interests;
(d) Alternative dispute resolution (ADR), such as union-employer grievance procedures, voluntary arbitration, mediation, fact-finding, neutral evaluation, and other methods. In such instances, the worker waives his or her statutory rights and relies upon the wisdom of the arbitrator or mediator. These procedures are advantageous to the State, since it is cheaper than financing Labour Courts. However, the disadvantage to the worker is his or her waiving statutory rights and the lack of neutral (judicial) review of the arbitrator's ruling;
(e) Industrial action and collective solidarity, generally when a trade union compels the employer to grant workers their statutory rights. This option has vanished for most workers, since unionization has decreased. For example, in the United Kingdom this decrease has been from 60 per cent in 1984 to 29 per cent in 1998; in Israel from 85 per cent in the 1960s to 30 per cent in 2001;

(f) Labour Courts or Tribunals implementing statutes and developing social policy.

Labour Courts do not operate in a vacuum and most industrial relations systems include the abovementioned alternative dispute resolution mechanisms. Preceding and parallel to the functioning of the Labour Courts are various mediation and other dispute resolution methods, such as those mentioned above. Without these forums settling disputes, Labour Courts would not be able to cope with the amount of cases. Furthermore, some cases are settled by arbitration, which exists in many countries. When it comes to *fora* for deciding legal rights, the main possibilities are arbitration and Labour Courts. Sometimes arbitration is quicker and less expensive than court proceedings. On the other hand, arbitration is sometimes costly, especially when the arbitrator is paid by the parties. The main alternative to Labour Courts – private arbitration – has the disadvantage that the arbitrator has unfettered discretion which is generally not reviewable. Also, it is not always possible to guarantee that the arbitrator will be neutral. Nevertheless, generally speaking, Labour Courts occupy centre-stage as the main forum for deciding legal rights, since they provide neutral adjudication of legal rights by judicial bodies which are publicly accountable to appeal courts of the Labour Courts or general court system. Labour Courts follow precedent, and their decisions are more predictable than those of arbitrators.

6.2. Are Labour Courts Preferable to the General Civil Courts for Adjudicating Labour Law and Social Security Matters?

It may be suggested that there are a number of advantages which Labour Courts possess for dealing with labour law and social security disputes:

(a) Labour Courts have expertise, experience of workplace problems, and a special understanding of social issues. Labour Court judges understand social issues better than other judges because their focus is on the worker, manager and the workplace. Furthermore, the workplace experience of lay judges, who are part of the Labour Court panel, gives the Labour Courts a better understanding of workplace issues than general courts. On the other hand, some jurisdictions have panels of arbitrators with extensive labour law experience.

Labour Courts set norms which balance the rights of workers and management and take into consideration both the worker's human dignity and management's need to manage the workplace. Labour Courts develop labour law and social security law on the basis of social law principles. They are more likely to develop an autonomous labour law than the general courts. Generally speaking,

it may be argued that, the more autonomous the Labour Courts, the more chance that an autonomous labour law will develop. Where Labour Courts have a great deal of autonomy and labour law is developed by Labour Court judges it is more autonomous and suited to industrial reality than when the general courts decide these issues. In some countries, Labour Courts are less bound by common or civil law doctrines, such as contractual rights, which create difficulties for overcoming the inequality between workers and employers. As the Finnish report puts it: 'the whole activity of the Labour Court can be said to contribute to the smooth and proper functioning of the rules of collective labour law';

(b) Labour Courts make a particular effort to overcome the inequality in the ability to conduct litigation because of the employer's greater resources. This is done by Labour Courts' simple procedural and evidence rules; the absence of costs or low costs; and the availability of free or inexpensive counsel. Labour Courts provide a tool for overcoming modern trends which exaggerate the inequality between worker and employers. By providing a forum in which the individual worker can obtain his or her labour law and social security rights, Labour Courts help to correct the inequality of the employment relationship;

(c) In many countries, Labour Court judges have a different agenda from that of general court judges. Labour Court judges give more weight to social considerations. They relate differently to social issues, and their criteria for deciding are different from general court judges. Perhaps this should not be so, since labour law principles should be applied in the general courts in the same way as they are applied in Labour Courts. However, in practice, general court judges appear to act differently in labour law cases than do Labour Court judges.

An example of Labour Courts having a better understanding of the workplace than general courts can be seen with the way in which they relate to strikes. General courts tend to interpret narrowly trade unions' rights to strike, while Labour Courts generally are more understanding of the role of industrial action in the collective bargaining process.

When one balances the available methods of implementing social policy against the advantages and disadvantages of Labour Courts, there would seem to be quite strong justification for using Labour Courts; notably, their expertise, understanding of the inequality of the employee-employer relationship, 'user friendly' procedures and relatively low costs and neutrality. However, the disadvantage is that adjudication often takes longer than arbitration and voluntary settlement procedures. The implication is that Labour Courts must improve their efficiency in order to

counteract the trend towards privatization of the implementation of workers' rights. As can be seen from the national reports, most Labour Courts are making a considerable effort in this direction. For these efforts to be successful, the State must commit more resources in order to improve Labour Courts' efficiency.

7. Labour Courts and Access to Justice

An essential element for the implementation of protective labour legislation, workers' rights and management's rights is access to the courts. Rights and norms are not complete unless they can be effectively, efficiently and inexpensively enforced in courts. Labour Courts should be easily accessible, inexpensive, less formal than the regular courts, and speedy in order to fulfil their purpose. The purpose of Labour Court rules concerning costs is to equalize the litigation position of the parties. The worker is generally the weaker party in this regard, since he or she has less resources to pay costs involved in litigation. Representation is an important factor in access to the courts. However, many workers, and even some employers, cannot afford a lawyer.

In addition, a question arises as to the role of the Labour Court judge in conducting the hearing, especially in an adversarial system. Furthermore, quick resolution of a case generally benefits the worker, who is hoping to receive monetary, or other, relief. On the other hand, there are instances in which the employer or management is interested in speedy resolution of the case, such as when they petition the court to enjoin a strike. Thus, efficient and fast conduct of Labour Court litigation is essential for both parties to achieve workplace justice.

Court procedural and evidence rules are another factor in the access to justice. Such rules affect the ability of parties to conduct their own case. If the procedure is simple, basic and easy to understand, the unrepresented party (usually the worker) should be capable of presenting his or her case reasonably well. Another factor related to access to justice is the extent of the right to appeal.

The Labour Court judges were asked about Labour Courts' contribution to effectively ensure the appearance before the court on truly equal terms for all parties. We shall discuss here the basic factors relating to access to justice: the judges' role in conducting hearings, representation, costs, free legal assistance, rules of procedure and evidence, the right to appeal, and speed and efficiency.

7.1. The Judges' Role in Conducting Hearings

What should the judges' role be in conducting hearings in Labour Courts, should he or she act in order to equalize the imbalance of economic power between the weaker worker and the stronger employer? This can be an especially acute problem in the adversarial system. There was no question in any of the reporters' minds that the judgment had to be impartial and based on merit. The conduct of the hearing also had to be in line with the merits of each procedural question which arises. However, the issue is whether the Labour Court judge should act in order to facilitate the worker to present his case? This also applies sometimes to the employer but usually it is the worker who has difficulty in presenting his facts and legal arguments. Most reports answered this question in the affirmative. The United Kingdom report suggests that: 'Whilst the adversarial system applies, Employment Tribunal chairmen[28] are skilled in assisting unrepresented litigants to present their cases effectively and to the point'. How does the Labour Court judge's role in the hearing differ from that of the civil court judge?

7.2. Representation

Formal access to justice is guaranteed in most Labour Courts by the individual workers right to institute claims and appear without a lawyer. This is true in Israel, Italy, the United Kingdom, Slovenia, Ireland, Malaysia, Australia, Costa Rica and in the first instance level of the German Labour Courts. In addition, trade unions can be party to litigation in collective disputes. In some Labour Courts, such as those of Finland and Norway, the parties to litigation are usually trade unions and employers' associations, so that there is no problem of representation or costs. However, if the union decides not to initiate proceedings, the individual worker in Finland has the right to do so. However, in the German second instance and third instance Labour Courts, individual parties are not allowed to represent themselves. In the second instance, the parties have to be represented by a lawyer, union representative or employers' association representative. In the third instance German Labour Court, the *Bundesarbeitsgericht*, only lawyers may appear.

However, formal access is not enough. How does the weaker party obtain representation? If he or she is not represented, how does the worker prepare a court action? In Germany, when the worker is incapable of preparing a complaint to the first instance, the court secretary *(Rechtspfleger)* will assist and file the case for him or her. This official will not,

28 Employment Tribunal chairmen are Labour Court judges who head the panels in the trial instance of the United Kingdom system.

however, be the worker's representative before the court. In Israel, there are forms which the worker can use to prepare simple claims, such as failure to pay wages, severance pay, overtime pay, and vacation pay. In most Labour Courts, workers can be assisted and represented by trade union officials, and management can be assisted and represented by employers' association officials. The German and Swedish reports suggest that most workers are represented without cost by trade union officials. The Irish report indicates that 48 per cent of complainants before the Equity Officers are represented by trade union officials, 28 per cent appear unrepresented and 15 per cent are represented by lawyers. Trade union officials can represent workers before the Costa Rican and Malaysian Labour Courts. In Italy, trade unions can give 'information' or opinions, but require special permission to represent the worker. Workers may also be represented in Labour Courts by lawyers supplied by special interest associations. In Israel, such associations represent women, Palestinian workers, foreign workers, homosexual and lesbians, 'whistle-blowers', and disabled workers. Parties may also be represented in Labour Courts by private lawyers. In the United Kingdom Labour Courts, about 23 per cent of the parties are represented by lawyers.[29]

There are, however, rules limiting or prohibiting representation in the Labour Courts. In Australia, only registered unions or employer associations can represent parties before the Commission in industrial dispute cases. While family members have been allowed to represent a worker or manager in the Israeli Labour Court this has not been extended to non-lawyers who want to help for a fee or without one. The reasoning has been that lawyers are most suitable to represent a worker, and representation by untrained people can harm the workers' case and deny him or her of relevant rights.

7.3. Costs of Litigation

Costs can be an obstacle to workers achieving their rights in Labour Courts. Such costs consist of the filing fee paid to the court, the cost of the lawyer representing the party, and the costs imposed by the court upon the losing party.

7.4. Filing Cost

Most Labour Courts have no filing fee, or a low one. There is no filing fee in the Malaysian Labour Court. In Israel, there is no filing fee for collective disputes, and small claims and low fees for most other cases.

29 S. Deakin and G. Morris, *op.cit.*, p. 90, referring to 1999 statistics.

Other reports mention low court fees, as, for example, in Australia. In Germany, there is a low filing fee in the first instance, but regular court filing fees apply in the second and third instances. Some reports, such as Slovenia, mention the Labour Court's power to exempt workers from the filing fee. In Israel, a motion can be made to postpone the filing fee. There are generally no court fees imposed when the parties reach an agreement in the court, before the judge, or through mediation.

7.5. Lawyers' Costs

A party making use of a private lawyer is responsible for the charges incurred in so doing. However, in Germany a party can petition the court to contribute to the costs of his or her litigation. Some countries provide free legal assistance, as is mentioned below. Sometimes, the lawyer will take a fee from the amount which the worker receives from the court, as is the case in Venezuela.

In Israel and Spain there is no cost in workers' compensation cases, and parties to such proceedings are even provided with free representation in court.

Another type of lawyers' costs is to be seen in the 'costs' or payment which a Labour Court may compel the losing party to pay to the successful party. In many Labour Courts no costs are imposed upon the losing party to cover the successful parties lawyer's fees, especially in collective dispute cases and social security cases. This is the practice in first instance German Labour Courts and the Labour Courts of the United Kingdom,[30] Malaysia, and in Irish discrimination hearings. In Australia, there are usually no costs.[31] Israel and Spain impose no costs in collective dispute cases and social security cases. On the basis of judgments delivered by the Constitutional Chamber of the Spanish Supreme Court, there are no costs charged or imposed by Labour Courts for social security cases. The reason for this is the weaker position of the worker compared with the body administering social security. Some Labour Courts impose costs only on employers. Some Labour Courts impose moderate or low costs.

Some Labour Courts impose court costs similar to those in the general courts – as is the situation in Germany at the second and third instance levels.[32]

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30 The United Kingdom tribunals can award costs where a party has acted frivolously, vexatiously, abusively, or otherwise unreasonably.

31 The Australian report says that costs may be imposed in termination of employment cases, but this is very infrequent.

32 The United Kingdom report mentions a proposal in Parliament which envisages higher costs in Labour Court cases.

7.6. Free Legal Assistance

Free legal assistance is a major step towards achieving access to justice. Some countries, such as Italy, Israel, Australia and the United Kingdom, have legal aid services or *pro bono* legal services available for those unable to pay a lawyer's fees.

In the United Kingdom, though, there is no legal aid at the first instance, and very little for the principal appeal level i.e. the Employment Appeal Tribunal. However, the Employment Appeal Tribunal has begun a *pro bono* programme which offers unrepresented appellants free legal aid for the preliminary hearing; this is known as the 'Employment Law Appeal Advice Scheme – ELAAS' and is administered by court staff. Lawyers with employment law experience volunteer their services as a public service, which the court encourages. The lawyer's role is limited, but crucial: he or she does not file the case or advise the appellant prior to the hearing, but is sent a copy of the court file anything from a week to a day prior to the preliminary hearing so that he or she can become familiar with the case. The lawyer then files a short written summary of his or her arguments, arrives at the court one hour prior to the preliminary hearing to consult with the appellant, and argues the case in court. The appellant must be present for the lawyer to argue the case.

In many nations, such as Italy, Spain, Germany, the United Kingdom and Israel, trade unions often provide free legal representation. In both Spain and Israel, workers are entitled to free medical opinions in workers' compensation cases. Sometimes employers' associations also provide free legal assistance to their members.

7.7. Rules of Procedure and Evidence

Procedural and evidence rules which are simple and comprehensible to a layman are essential in order to guarantee unrepresented parties (usually workers) access to justice. The Finnish report mentions informal procedures as the best method of furthering efficiency. In Israel, the general court rules of evidence do not bind the Labour Court; thus, while basic rules or evidence necessary to ensure a fair hearing are observed, the Labour Court is free from many rules which are difficult for a layman to understand. For example, parties are not required to submit the original document and may submit xerox copies.

7.8. Pre-trial Proceedings

Labour Courts, like the general courts, must develop new procedures in order to efficiently cope with their massive case-load. Labour Courts

have been particularly flexible, bold and imaginative in initiating such procedures, such as pre-trial procedures, which make the hearing simpler and more expeditious than the general courts. Pre-trial procedures enable the judge to learn the facts and issues of the case prior to the hearing; such preparation facilitates the hearing. Pre-trial procedures differ for the trial instance and the appellate instance. In the German first instance Labour Courts preparation techniques are determined by each judge, most judges require pre-trial preparation so that the facts, issues and documents are before the court prior to the hearing. Many final-appellate instance Labour Courts have special pre-hearing procedures which serve to make the hearing more efficient and fair. Usually, written summaries of claims or briefs are required. Some of these pre-trial procedures are indicated below:

(a) *Preliminary hearings* – Preliminary hearings are for preparation of the hearing. This is accomplished by setting the issues, non-contested facts and the witnesses. The possibility of settling the case, or parts of it, are also explored. These preliminary hearings can be before the Court Registrar or a judge.

In the United Kingdom Employment Appeal Tribunal, there are preliminary hearings for all appeals before a full panel. Only the appellant appears and he or she must convince the panel that the appeal has a reasonable chance of success; if not, the court immediately dismisses the case. The respondent is not invited to appear, so as to save costs. If the case is not dismissed, a regular hearing is held with both parties appearing.

In Italy, the Labour Court requires the parties to make a statement of facts, submit documents, and list their witnesses before the pre-trial conciliation hearing.

The Israeli Labour Court has developed a pre-trial procedure before the Court Registrar which includes preparation of the hearing, agreement on facts and issues, submission of documents prior to the hearing, and discussion of the factual and legal issues to be litigated for the purpose of narrowing the scope of the hearing.

(b) *Direct testimony in affidavit form* – Represented parties are also required to submit their direct testimony in affidavits in order to facilitate the hearing. The person submitting the affidavit must appear in court for cross-examination. This occurs at the trial instance only.

(c) *Court appointed experts* – Instead of each party bringing his own expert witness, the Israeli Labour Court appoints neutral experts, whose fees are paid by the court. This is widely done in workers' compensation cases when medical questions arise.

(d) *ADR – Mediation procedures* – Sometimes there is pre-hearing ADR mediation. Labour Courts also have extensive ADR programmes,

either within the court procedure or administered by specialized mediation services or agencies. There are also private ADR procedures. The operation of these falls outside the scope of this article.

(e) *Limitations on oral arguments* – Often, time limits are placed on oral arguments.

The Australian Commission also uses pre-hearing procedures to make hearings more efficient. They rely on pre-trial directions, require submission of outline arguments or written briefs (submissions), and place time limits on oral arguments. The Italian Labour Court has developed a procedure of referring certain issues (mainly factual) to court-appointed experts, who also meet with the parties and attempt to mediate their dispute. The Israeli Labour Court also refers medical and other issues to court-appointed experts, who are paid by the court and submit written opinions.[33]

7.9. The Right to Appeal

In relation to some Labour Court decisions there is a right to appeal; for others, the party must request leave to appeal; and for others there is no appeal. In Germany and Israel, there is an appeal for small cases only if the party receives permission. All appeals from the German second instance to the Federal Labour Court need permission.

7.10. Speed and Efficiency

Justice delayed is justice denied. Yet many Labour Courts are over-burdened with cases and under-staffed. Judges and court administrators have little control over these factors and, therefore, must make the most of what they have. This means the development of more efficient procedures and maximum use of the judges' time.

The United Kingdom first instance Labour Court judges are encouraged to deliver their judgments orally, at the end of the hearing, whenever possible. Also, 'most EAT [appeals level] judgments are similarly given orally; only the difficult ones are reserved'. This is sometimes done in Israel by the judge dictating the decision or judgment to the official protocol. In both the United Kingdom and Israel, when the court dictates an oral judgment to the official protocol it is done from detailed notes,

33 *See* S. Adler, 'Court appointed Medical Experts in the Israeli Labour Court', in *Hospital Law*, 1988.

often after a break when a draft or main points of the judgment are prepared to be a basis for the oral judgment handed down in open court.

The Australian Commission has met this challenge by a combination of professional development activities focusing on judgment writing, encouraging judges to hand down *ex tempore* decisions (orally, announced to the parties at the end of the hearing), a central research department which assists judges in research and drafting of judgments, computerized judgment bank, computerized hearing transcripts available on-line, electronic search capability, e-mail drafting of joint decisions, bench books summarizing relevant authorities, and time limits on presentations.

Some Labour Courts are using the internet to facilitate their hearings. Thus, in Australia and Israel court dockets are on-line and can be viewed by the public. In Israel the protocol is typed by a court stenographer directly into the internet and is immediately available to the public. Also, judgments appear on the court internet site within a day or two of being handed down. Australia, Israel and Slovenia have computerized court proceedings and these are available to the public on the internet.

The Irish report speaks of freeing the Equality Officers as much as possible from routine administration.

Most reports indicate that judges should develop personal managerial qualities so as to do their work efficiently, especially regarding the handling of case-loads. Some Labour Courts, such as those in the United Kingdom and Israel, have begun to use 'case management' techniques.

Regarding results – the German Labour Courts finish 50 per cent of all first instance cases within three months, and over 90 per cent within six months. The United Kingdom Employment Tribunals bring 85 per cent of cases to a first hearing within 26 weeks of filing.[34] When procedural rules are adhered to in Italy, the case is completed at both the first and second instances within a year. In Finland, the average duration of cases was four and a half months in 2000. In the first instance Israeli Labour Courts, in the year 2000, 28.5 per cent of cases were completed within three months, 52 per cent within six months, 72.3 per cent within a year, and 90.3 per cent within two years. In the appeal instance, the National Labour Court, in the same year, 40 per cent of cases were completed within three months, 54 per cent within six months, 67 per cent within a year, and 89 per cent within two years.

A number of reports make mention of emergency cases, such as strikes or lock-outs, which are completed within a few days.

34 S. Deakin and G. Morris, *op.cit.*, p. 91.

8. Implementation in a Low Union Density Economy

The decline of union density is one of the outstanding phenomena in modern labour relations. This has occurred in most countries. In the United Kingdom, trade union density is down from over 50 per cent in 1979 to 27 per cent in 1999.[35] In Germany and Israel, union density is down to about one-third of the work force. In the United States, only 11-12 per cent of the workforce is organized. Moreover, in many countries most union membership is in the public sector. In the United Kingdom, 60 per cent of the public sector was organized in 1979, but only 19 per cent of the private sector. In Israel, union density in 1999 in the private sector was only 10 per cent. One result of this decline in union density is that, in most nations, the only body to which a worker can turn in order to enforce his or her labour law rights is the Labour Court.[36] This illustrates the importance of Labour Courts in the implementation of social rights.

Let us try to remember the situation when union density was high. In most nations, the worker would turn to his or her union in order to implement social rights. Generally, an elaborate grievance procedure existed for this purpose. Such procedures included negotiation, mediation and arbitration. The worker was represented by his or her trade union official. Costs were nil or minimal. In general, trade unions provided for the worker the protection which only collective organization and power can provide. In many countries, this protection included social rights such as union pensions and workers' education and training. Many unions provided further social services, such as cultural, sporting, and financing the education of workers' children. All of this has disappeared for most workers in today's new economy. With all due regard to our market economy, it provides workers with few of these social protections and benefits. Most important for our discussion, without trade unions there is little or no implementation and enforcement of labour law rights outside of the courts. For the majority, and sometimes the vast majority, of workers in today's new economy the only forum they can turn to in order to implement their labour law rights is the Labour Court. This has important implications about the role of Labour Courts in making social policy. It means that states must grant Labour Courts the jurisdiction, power, status and material means to fulfil their important task. It also means that Labour Court judges must be aware of their role in making social policy.

35 *See* S. Deakin and G. Morris, *op.cit.*, pp. 708-711.

36 In the absence of Labour Courts, the worker can implement his or her rights in the general courts or through specialized tribunals. This article relates only to Labour Courts.

The decline of union density, coupled with rapid changes in the labour market, has created many new problems in labour law which have no legislative solution. This great void has resulted in an acute problem of unachieved social rights in many countries. In the absence of statutes and precedent, Labour Courts can play a crucial role in developing solutions to new problems at the workplace.

While Labour Courts cannot perform all of the functions of implementing workers' fundamental social rights which unions performed in bygone days, they do fulfil some of them. Labour Courts fill part of the void left by the disappearance of unions in many sectors of the economy. To achieve this goal the jurisdiction, powers and resources of Labour Courts should be expanded. Where it is not the case, the Labour Courts should be given a status comparable to regular courts.

9. Autonomous Labour Courts; Autonomous Labour Law

When we have a Labour Court which concentrates on workplace and social problems one result is the development of a more autonomous labour law and social security law than occurs when the general courts have jurisdiction over these matters or are the final appeal instance.

The agenda of specialized courts or tribunals is generally focused on the subject of their jurisdiction. The agenda of Labour Court judges, which is generally different than that of general court judges, emphasizes the importance of social rights. This is the heart of the autonomy of labour law, which places special importance on the weak position of the worker, as compared to his or her employer. Labour Courts concentrate on developing the special principles of labour law; they balance and change the general law principles which are not suitable to labour law. Labour law, for example, gives more importance to cogent labour rights than contractual principles. Thus, the worker's contractual agreement to work for less wages than the statutory minimum wage is not enforced. Labour Courts focus on the general industrial reality which includes labour relations, labour force problems, equality at the workplace and, in general, fairly governing the workplace. On the other hand, Labour Courts are part of a State's court system, and must also be guided by constitutional principles and general law principles, such as good faith.

In conclusion, then, it may be argued that social policy determines a country's quality of life. Labour Courts have an important role to play in implementing and making social policy. Labour Court judges, therefore, should be aware of the way in which they make social policy. Their judgments should reflect and discuss the value judgments made, and the social policy developed. Labour Court judges should be given special

training to assist them in making social decisions. Labour Courts should be given a large amount of autonomy to develop social policy. Access to Labour Courts should be inexpensive, less formal than the general courts, and relatively speedy. In most nations, the Labour Court is the worker's only forum for enforcing his or her labour law rights and, therefore, we must ensure that they can adequately perform their task.