

## **The Role of Judges in the Implementation of Social Policies**

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*I. Introduction; II. What Labour Courts do? Labour Courts role in implementing, influencing and making social policy; III. Judges' contribution to making social policy; IV. Judges' personal values and beliefs and their influence in deciding social policy issues; how judges learn about social issues; V. The role of lay judges; VI. The role of Labour Courts and their judges in the network for implementing and developing labour standards; VII. Labour Courts and the access to justice; VIII. Implementation in a low union density economy; IX. Autonomous Labour Courts; autonomous labour law; X. Conclusion.*

### **I. 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' converting intentions into action.

This paper 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 (LC) have jurisdiction over subjects relating to social policy,<sup>1</sup> a subject which relates to individual labour law, collective labour law, equality and social security. Do LC decide differently from general civil courts; are their judgments based on different social values? Do LC judges have a different agenda than general court judges? Do LC function differently than the general courts? Have LC developed an autonomous labour law; to what extent should labour law be autonomous from the general law?

At a meeting of LC judges their role in the implementation of social policies was discussed. A questionnaire was sent to participating judges and

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<sup>1</sup> The social policy subjects which Labour Courts deal with include freedom of association, collective bargaining, strikes, prevention of labour conflicts, equality at 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.

they submitted national reports.<sup>2</sup> Information from their replies is included in this paper.

All national reports agreed that Labour Courts (LC) are an important part of the implementation system of fundamental labour standards. In this manner LC implement social policies. We shall examine how they do so.

I furthermore suggest that LC 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 precedent provide no answers.

Autonomous LC are also an indication that labour law will have a certain amount of autonomy. It would seem that the more autonomous the LC the more autonomous will be labour law.

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 will improve the situation. My message is that LC are a partial solution and can make a significant contribution to overcoming these problems. Since LC exist in most countries they can be given the jurisdiction and resources necessary to preserve workers’ fundamental rights and safeguard their dignity.

### **Social Rights -**

There are 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 are many and varied and reflect social policy.

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<sup>2</sup> The Ninth Meeting of European Labour Court Judges, organized in co-operation with the ILO, took place in Geneva on December 3, 2001. Papers on this topic were submitted by: Judge Harald Schliemann, Bundesarbeitsgericht – Federal Labour Court, Germany; Judge Aldo de Matteis, 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 (La 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, Office of Equality Investigations, Republic of Ireland; Judge Juan Rafael Persomo, Supreme Court – Social Chamber, Venezuela... While the U.S.A. has no Labour Courts, Professor Hoyt Wheeler, Moore School of Business, U. of South Carolina, U.S.A. submitted a paper concerning the general courts.

The social policy discussed in this paper relates mainly to the workplace, protective labour legislation, labour relations, equality at the workplace and fundamental workers' rights, such as freedom of association.<sup>3</sup> Social rights create norms at the workplace (ie, work safety, freedom of occupation/covenants not to compete) and are, therefore, important to both workers and employers.

Much of the social policy and social rights discussed in this paper make demands on employers; some make demands on the state; a few make demands on labour unions.<sup>4</sup> One argument for courts not changing social policy is that it infringes on the legislature's control of the state budget. However, when LC implement social workplace rights they generally do not alter the state budget or order the state to take positive action.

### **Legal sources of workplace social rights -**

Workplace social rights are determined by international conventions, constitutions, statutes, court judgments, collective agreements and contracts.

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 December 27, 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 work and declares the right to a fair remuneration which is in proportion to the quality and quantity of his/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

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<sup>3</sup> Articles 1 to 19 of the **European Social Charter** (revised in Strasbourg, 3.5.1996) 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..

<sup>4</sup> Many civil and political rights are enforced by courts when they order the State to refrain from acting, ie, refrain from interfering with free speech. This does not usually require significant budgets. There are exceptions to this generalization but, as a whole, courts' involvement with civil and political rights do not infringe of 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 both civil, political and social rights.

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 rights to strike (Section 39-40). In **Italy** the constitutional right to “human dignity” includes protection against 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 welfare state principles. 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. In **Israel** it includes the freedom of association,

The **Spanish** LC (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 review of constitutional 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** LC 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 LC to interpret social legislation. The **Italian** report mentioned that when a statute is susceptible to several interpretations, it should be interpreted according to the constitution. In **Israel** the LC 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 case of **Dan Frumer and Checkpoint Ltd v. Radguard Ltd**,<sup>5</sup> in which the former employer of a software engineer sued him and his new employer in the LC for an order

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<sup>5</sup> To published in English in volume 20 of the **International Labour Law Reports**, Kluwer.

preventing him from working for the new employer on the basis of a undertaking not to compete, which was in the employment contract between the worker and the former employer. Both companies developed and sold the same end-product, virtual private networks, and in this sense were competitors. In interpreting the legal validity and scope of the contractual non-competition clause the National LC 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; [d] the workers' right to self-fulfillment, which is derived from the right to human dignity. In addition the court considered the freedom of contract and trade, which are basic to our 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 (ie, an expensive course), or the worker had received special compensation (ie, a significant "sign-on" fee) or a significant breach of loyalty to the former employer. The court said that in light of the above-mentioned constitutional social rights and public policy there was no justification for non-competition clauses, unless one of the above-mentioned conditions occurred. In addition to balancing the above mentioned constitutional social rights with the constitutional property right, the court also used them to interpret the meaning of "trade secret" as defined in **The Commercial Wrongs Law of 1999**. This is also an example of LC decisions affecting general law subjects, such as contracts and intellectual property in a manner which gives proper importance to social policy.

The **Israeli** LC has also declared provisions of a collective agreement against public policy, such as when it discriminated against women or homosexuals. This "public policy" doctrine is based on constitutional principles. In the **ELAL v. Donolevich** case the **Israeli** National Labour Court struck out a clause in the applicable collective agreement, as interpreted by company policy, which gave as a working condition two plane 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.

Workplace social rights are, of course, also determined by statutes and case law. The **United Kingdom**, which do not have a written constitution, establish all rights in legislation and case made law.

### **Labour Courts: jurisdiction and models -**

Some LC are autonomous entities, like in **Germany**,<sup>6</sup> others are independent but somehow connected to the general court system; others are social chambers within the regular courts, such as in **France**<sup>7</sup> and **Costa Rica**,<sup>8</sup> while others are tribunals whose judgments are appealable 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**.<sup>9</sup> These LC have jurisdiction over both collective and individual labour law disputes. The **United Kingdom** Employment Tribunals have jurisdiction over applying statutory provisions to individual employment disputes, including unfair dismissal and protection against discrimination.<sup>10</sup> There is, however, a tribunal to which unions can apply for compulsory recognition from employers; it is the Central Arbitration Committee (CAC) and was referred to in the **UK** report as *‘the only labour court in the UK charged with regulating collective agreements’*. Some broad jurisdiction LC hear only private law cases, such as the **German LC**, while others, such as the **Israeli LC**, hear both private and public law cases. **Germany** has separate court systems for labour and social security while **Israel’s LC** deals with both subjects.

The narrow model includes **Norway** and **Finland**, whose jurisdiction is limited to collective disputes, such as the interpretation of collective agreements.<sup>11</sup>

In general LC judicate 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 spoke of LC setting wages and working conditions.

The Republic of **Ireland** does not have a LC but a variety of administrative tribunals, one of which is called a LC but different from

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<sup>6</sup> German LC were established in 1927, re-established in 1945 and consist of a first instance (Arbeitsgerichte), 16 second instance appeal courts (Landesarbeitsgerichte) and the highest appeal court, the Federal Supreme LC (Bundesarbeitsgericht).

<sup>7</sup> In France the Chamber of Appeals Court (Chambre sociale de la Cour de Cassation) has jurisdiction over social matters.

<sup>8</sup> 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.

<sup>9</sup> The Israeli LC, for example, has jurisdiction over all subjects mentioned in footnote 1, except education and occupational training. The Swedish LC has jurisdiction over all subjects except education, occupational training and work safety.

<sup>10</sup> In The United Kingdom collective disputes and Central Arbitration Committee (CAC) cases are heard by the general courts.

<sup>11</sup> In Finland claims based upon labour legislation are heard by the general courts and social security cases are heard by tribunals.

other European LC. 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 LC hears appeals on 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; the LC panel members need not have legal training.

LC differ greatly in the number of cases heard annually. The **Norwegian** LC hears less than 50 cases a year, the **Irish** Director of Equality Investigation hears about 900 cases a year, the **Israeli** first instance LC hear about 90,000 cases annually, half of which are motions and the National LC, the highest appellate instance, hears about 1,800 cases, half of which are motions. The **German** first instance LC hear about 635,000 cases annually, the second instance (appeal court) about 31,000 and the Federal LC about 1,000. The **British** Employment Tribunals, which is the first instance trial court, received over 100,000 applications in the year 1999-2000, of which 75% were resolved by the ACAS (Advisory, Conciliation and Arbitration Service); the remaining 25,000 were heard by the Employment Tribunals. The appellate court, the Employment Appeal Tribunal received about 1,400 appeals in 1999. <sup>12</sup>

## **II. What Labour Courts Do? Labour Courts role in implementing, influencing and making social policy**

### **Implementation:**

All responses mentioned that LC contributed to the development of social policy by implementing statutes and regulations. This was 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 **UK**, limited the LC's role to implementing statutes and developing rules and norms within the framework of the constitution and statutes. This approach emphasized that courts do not set social policy, which is the political task of the legislature, as stated in the **UK** report: *“In the UK it is for parliament to reflect social policy and justice in the legislation which LC implements. It is not for judges to impose their own values where they conflict”*.

However, most of the reports indicated that judges have an important role in developing labour law and social policy, in the following manner:

### **Guideline for the legislature:**

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<sup>12</sup> S. Deakin and G. Morris, **Labour Law**, Butterworths, 2001, p. 84, 91.

As mentioned above, the **Spanish** LC (Social Chamber of the Supreme Court) reviews whether proposed legislation is compatible to the constitution.

LC decisions were also seen as a guideline to setting social policy by the legislature. Thus, the **Slovanian** report mentioned “the practical persuasiveness” of judgments. According to the **French** report there is a clear link between Court decisions and labour legislation.

The **UK** report said that the Employment Appeals Tribunal’s role was to point out problems to the legislature. The report said 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 reports cited examples of LC decisions which have been enacted into statutes. The **German** report described the interaction between the LC and the legislature, with court made rules concerning unfair dismissal and temporary work being adopted, adapted and changed by the legislature. The **Italian** report cited the example of the court made law in the workers compensation area relating to coverage for accidents occurring on the way from home to work, being incorporated into statute. The **Swedish** report mentioned the important role of the LC in developing freedom of association rules, which were later (1936) enacted into statute. The **UK** report mentions that statutory provisions have been altered following LC “*observations*”.

On the other hand, the **Slovanian** report said that there were 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.<sup>13</sup>

The **Australian** report cited statutes which incorporated 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 reversed court decisions which limited the right to strike and workers participation in enterprises. In the **UK** legislation is occasionally passed reversing a court decision on the interpretation of a statutory provision.<sup>14</sup>

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<sup>13</sup> The French report mentioned 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 reintegrate workers who suffered a work injury or occupational disease.

<sup>14</sup> The **UK** report gave 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 House of Lords judgment [1995] ICR 406.

### **Judge made law:**

Some reports felt that LC only implemented statutes and there was no judge made social law. Thus, the **United Kingdom** report said that the Employment Tribunals and Industrial Appeals 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 **UK** report said about 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 mentioned that LC interpretation has changed social law. Thus, the **Italian** workers compensation system was changed by LC and Constitutional Court decisions from an insurance model to a social security model.

While the **German** report referred to social justice as involving “political” decisions, which should be made by the legislature it also stated that LC “... 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 mentioned significant judgments of the LC regarding 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 said that the LC had 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 was 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 explained 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 stated the Commissions 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.

### **Freedom of Association; an example of judge made law -**

Freedom of association is particularly important for collective labour law, since it effects the right to join a union, bargain collectively and strike. It is a constitutional right in many nations. This freedom has been developed and influenced by LC judgments, ie, by judge made law.

All LC have developed rules governing strikes and lockouts; many have developed law concerning protection of workers' right to join and be active in 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 LC, or general court, hearing the case can develop a general theory of strike law depending a great deal on its' attitude toward 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 unions members

In **Germany** LC judgments prohibit an employer from inquiring if a worker is a union member. The German LC 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 LC was founded in 1969. The LC developed this subject and in 1999 reinstated a worker discharged because of union activity.<sup>15</sup> This doctrine was further expanded in 2000 to include reinstatement of workers discharged for participating in a strike.<sup>16</sup> Shortly thereafter the Knesset (parliament) incorporated this protection in a law.<sup>17</sup>

The **Spanish** report said that the LC (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. Mentioned was a subject which the

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<sup>15</sup> LCD 3-239/99 **Adial v. Mifali Tachanot**.

<sup>16</sup> LCD 1008/00 **Horn & Liebovitz v. The New Histadrut General Workers Union**, 35 LCD 145.

<sup>17</sup> Amendment No. – of the Settlement of Collective Disputes Law.

**Israeli** LC had also developed, ie, protection of workers against discrimination because 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 passed a statute regulating strikes in essential public services. Italian case law also governs many issues relating to collective agreements.

The **Swedish** report mentions the LC important role in developing law on this subject.

The **Finnish** LC 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 prohibiting 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 Rica** report mentions a judgment of the Constitutional Chamber of the Supreme Court<sup>18</sup> which voided the dismissal of workers for union activities and ordered their reinstatement with payment of back wages. This doctrine was adopted into a statute 15 days after the court's decision and has been later applied by the Labour and Social Chamber of the Supreme Court.

While the national reports indicate that most LC have had 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 **UK** report said that protection against dismissal because of union membership or activities is set out by statute and the Employment Tribunal's task is to interpret and apply these statutes, but "*not to create social policy*".

### **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 **English** courts' developing an implied term in the employment contract that the employer has a duty of mutual trust and confidence towards his employee. In the **Malik** case<sup>19</sup> 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 in serious disadvantage when seeking other

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<sup>18</sup> Decision No. 5000 from 1993

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

employment. One Plaintiff worked for 16 years for the bank and the other for 12 years; one managed a branch office and one was 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 of the employer that he would not carry on his business in a dishonest or corrupt manner. A reasonably foreseeable 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; 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.

We should note that following the worker's success they failed to prove their case. The House of Lords returned the case to the trial court but the workers failed to prove causation and their claim was dismissed. They failed to prove that their job opportunities had been damaged, especially since they refused reasonable job offers.

### III. Judges' contribution to making social policy

In the questionnaire "judicial activism" was not defined, so that each national report could use the term in the context of that country and describe whether its' LC was willing to decide social disputes when there was no existing legislation. This was to examine how LC related to social changes and problems arising out of changes in labour relations, irregular employment relationships, deregulation, globalization and the like.

The **Slovenia** 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 said that judicial activism has no place today but also mentioned that it exists when the court “fills gaps” in existing law and that courts of the final instance often make law.

The **Spanish** report has a similar approach but emphasized that the progressive application of legislation is understood to be “judicial activism”.

However, the **Italian** report says judicial activism exists in that LC’s adapt legal rules and norms to social changes, according to the consitutional social model. This is accomplished by the interpretation of the law and constitutional court judgments.

The **Malaysian** report said that LC should adopt an active role in determining social policy and added 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 related 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 LC’s role is implementation; however, when these are absent and there is a lacuna any decision by the LC makes law. Furthermore, courts are free to rethink precedent in the light of social changes; this must be done carefully and responsibly.

The **French** report said that Social Chamber decisions have substantially contributed to the development of social policy and mentioned the example of strengthening employment protection in times of economic downturn.<sup>20</sup>

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 Rica** report says that the role of judges is not only to implement social policy but to create it and judicial activism is justified and even required.

The **Venezuela** report said that judges were required to follow a formalist approach and cannot develop answers to new problems. However, despite this, the courts have developed new approaches to social

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<sup>20</sup> Examples in the French report were 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.

problems in certain important judgments. The report expressed the opinion that judges should be given more power to develop social policy.

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 on 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 LC must decide the case. The legislature has empowered the LC to develop the law by deciding such cases. Not to do is a policy decision which leaves the worker without a solution to his problems; this is an answer to the problem, a negative answer. When LC 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. LC 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 said: “*Where no policy has been decided [by statutes or precedent] the individual judges’ value, philosophy and outlook will have a role to play*”. This occurs often in labour law because of the rapidly changing labour market. In so doing LC 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 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 a social policy and using value judgments.

Nevertheless, in such instances I would 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 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 judges so that they can fulfill their role of making public policy.

#### **IV. 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, LC 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 paper we will ask what makes LC judges different from general court judges in deciding social issues.

In evaluating judges' behavior 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. Judges' main role here is the interpretation and development of social policy. It is particularly important in this regard 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 judges' personal philosophy and social outlook. This is more problematic and must be dealt with by education and conscious attempts of the judges to understand their personal social philosophy and co-ordinate it with the accepted social policy of the country.

Value judgments made by judges generally relate to particular cases and must be clear so they can be scrutinized.

There was general consensus that LC 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 my opinion, when this happens, the LC should be guided by the *purpose which is inherent in the constitutional principle, statute or agreement*.

Thus, the **French** report described the link between the mention of social justice in the preamble to the constitution and cases concerning 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.<sup>21</sup>

We asked the LC judges how they learn about society, social problems and the workplace; these were some of the answers:

**[a] Personal values, philosophy and outlook on life:**

All reports indicated that the individual judges' personal values, philosophy and outlook on life influence his judgments. As the **Australian** report mentioned: "*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 said that the idea of social justice underlies Social Chamber judgments. The **Costa Rica** report said that however objective the judge is his/her decision will reflect his/her personal values, philosophy and vision of life. The **Spanish** report described the approach of LC judges, as reflecting his/her 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 mentioned lawyers' attitude that a judges' personal outlook should not influence his judgments; however, continued and indicated that this is not always the situation.

The composition of the LC 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 panel reduce the influence of any one members' individual values. Furthermore, the

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<sup>21</sup> For example, the court must understand the irregular work relationships, their use and implications. It must understand the problems unions have when organizing workers. It must understand the problems of minorities, women and migrant workers.

natural tendency to reach a unanimous decision compels members to compromise and reach a 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.

#### **[b] Experience as a LC judge:**

As the **Swedish** report aptly said: “*Judging may very well be described as a life-long-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.

LC judges also learn from the lay judges. The **Finnish** report said that “*constant cooperation with the [lay] members of the employee and employer side is very useful in [keeping in touch with social issues]*.”

#### **[c] Familiarity with the workplace:**

The Italian report described an important goal of LC judges’ education when he said that “*a more direct knowledge of the working world is needed*”. How does the LC judge achieve this? The **German** report went so far as advocating that “*the best training would be working in plants, trade unions and employers’ associations during sabbaticals*”. Most LC judges must make an effort to keep abreast of what is happening at the workplace. In **Israel** some LC visit a plant about once a year, as guests of the management and union, to learn about workplace problems.

#### **[d] Court organized or sponsored education:**

In some LC there is advanced training organized and sponsored by the court administration, such as in **Italy, Israeli, 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 mentioned “personal development activities”, which have focused on judgment writing.

**Israeli** LC 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 **Slovanian** reports indicated that such training was inadequate.

However, in some LC there are no formal programs, such as **Germany**, **Sweden** and **Venezuela**. The **Venezuela** report said that this 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.

### **Appointment of judges -**

It should be pointed out the different approaches to the appointment of judges, which 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 (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 most judges receive.

The **Finnish** report mentioned that LC judges were generally appointed from labour law specialists, often academics.

### **To summarize this issue -**

LC 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 LC judges give great weight to social matters.

LC 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 general court judges.

## **V. The role of lay judges -**

To my knowledge all LC have panels which include lay members, except **Italy**, **Spain**<sup>22</sup> 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 legally 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

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<sup>22</sup> Spain had lay judges from 1908 to 1939.

panel is one chairman, who need not have legal training and union and employer representatives. The **Irish** report considered all panel members of all these tribunals to be lay members.

Lay judges have the same vote as the professional judge. Usually, these lay judges are and equal number of union and employer representatives.

Some LC have lay judges who are experts or “neutral” members. The **Finnish** LC has, in addition to the employee and employer lay judges, “neutral” members. The **Finnish** LC sits with 6 members: the chairman, who is the President or Vice President, a neutral judge, two employee lay judges and two employer. The **Australian** Commission’s lay members are not limited to labor 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 LC 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 **Germany** and **Sweden**. In **Israel** professional judges outnumber lay judges for most cases at the final appeal level; however, in certain few cases, generally major collective disputes, the lay members outnumber the professional judges.<sup>23</sup> Lay members are generally appointed by a minister (labour and/or justice) from lists of candidates submitted by unions and employer associations.<sup>24</sup>

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

Lay judges were said to be impartial by all reports, the best proof of this was that judgments were usually unanimous.<sup>25</sup> Most reports said that they are not “representatives” of the sector they came 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 **Slovanian** report stated that their perspectives on social policy did not differ from the professional judges and when voting the lay members

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<sup>23</sup> 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.

<sup>24</sup> In Israel they are appointed jointly by the ministers of justice and labour; unions and employer associations submit lists of candidates but the ministers are not limited to these lists.

<sup>25</sup> The Swedish report estimated that 85% of the judgments were unanimous. In Israel this figure is over 90%.

“forgot” from which sector they were appointed. The **German** report also mentioned that the sector from they were appointed (labour or management) normally does not influence their vote; however it 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. I think 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 the labour relations and social security. This is more obvious in the first instance LC, where the lay judges tend to be “grass roots” type of ordinary people with workplace experience. However, at the highest appeal level the lay judges are usually well qualified and knowledgeable, with a general perspective of workplace problems.<sup>26</sup>

In **Italy** there are no lay judges.<sup>27</sup> However, the **Italian** report advocating including lay judges in the LC panel, because of their contribution to the understanding of the workplace.

## **VI. 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 honor 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: **the first question** is the role of LC among the alternate forums which settle or decide rights, such mediation and arbitration? **The second question** is why LC are different from the general civil courts? We shall relate to each question, in turn:

### **Labour Courts, arbitration and other dispute resolution methods -**

LC are not the only way of implementing social rights and making social policy; they are part of a system consisting of mainly government bodies acting for this purpose. Let us describe the main parts of this system and discuss LC role therein.

These are some of the methods for formulating and implementing labour standards:

[1] The legislature has a primary role in formulating social policy.

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<sup>26</sup> 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.

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

[2] Non-binding recommendations, generally referred to as “soft law”. These include general legal principles set in constitutions, statutes, treaties and declarations, when they have no binding force and there is no remedy for disobedience.

[3] Co-operation 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.

[4] ADR, alternate dispute resolution, such as union-employer grievance procedures, voluntary arbitration, mediation, fact finding, neutral evaluation and other methods. In such instance the worker waives her/his statutory rights and relies on 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 her/his waiving of statutory rights and the lack of neutral (judicial) review of the arbitrator’s ruling.

[5] Industrial action and collective solidarity, generally when a union compels the employer to grant workers their statutory rights. This alternative has vanished for most workers, since unionization has decreased. For example, in **England** this decrease has been from 60% unionization in 1984 to 29% in 1998; in **Israel** from 85% in the 1960’s to 30% today.

[6] LC or Tribunals implementing statutes and developing social policy.

LC do not operate in a vacuum and most industrial relations systems include the above mentioned alternate dispute resolution mechanisms. Proceeding and parallel to the functioning of the LC is the various mediation and other dispute resolution methods, such as those mentioned above. Without these forums settling disputes LC 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 forums for deciding legal rights the main possibilities are arbitration and LC. 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 LC, 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.

However, generally LC are at center 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 LC or general court system. LC follow precedent and their decisions are more predictable than those of arbitrators.

### **Are Labour Courts preferable to the general civil courts for adjudicating labour law and social security matters?**

There are a number of advantages which LC have for dealing with labour law and social security disputes:

[a] LC have expertise, experience of workplace problems and a special understanding of social issues. LC 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 LC panel, give the LC a better understanding of workplace issues than general courts. On the other hand, some jurisdictions have panels of arbitrators with extensive labour law experience.

LC set norms which balance the rights of workers and management and take into consideration both the workers' human dignity and managements' need to manage the workplace.

LC 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. Speaking roughly we can argue that the more autonomous the LC the more chance that an autonomous labour law will develop. In some countries LC 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 said: "*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] LC's 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 LC's simple procedural and evidence rules; the absence of costs or low costs; and the availability of free or inexpensive counsel.

Labour Courts are 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 her/his labour law and social security rights, LC help correct the inequality of the employment relationship

[c] In many countries LC judges have a different agenda than general court judges. LC judges give more weight to social considerations. They relate differently to social issues and their criteria for deciding are different than general court judges. Perhaps this shouldn't be so, since labour law principles should be applied in the general courts the same way they are applied in LC. However, in practice general court judges act differently in labour law cases than do LC judges.

Where LC have a great deal of autonomy and labour law is developed by LC judges it is more autonomous and suitable to industrial reality than when the general courts decide these issues.

An example of LC having a better understanding of the workplace than general courts is the way they relate to strikes. General courts tend to interpret narrowly unions' rights to strike, while LC generally are more understanding of the role of a strike in the collective bargaining process.

When we balance the available methods of implementing social policy against the advantages and disadvantages of LC, there is justification for using LC, ie. their expertise, understanding of the inequality of the employee-employer relationship, "user friendly" procedures and relatively low law costs and neutrality.

However, the disadvantage is that adjudication often takes longer than arbitration and voluntary settlement procedures. The implication is that LC must improve their efficiency in order to counteract the trend towards privatization of the implementation of workers' rights. As we have seen from the national reports most LC are making a considerable effort in this direction. For these efforts to be successful the State must commit more resources to improve LC efficiency.

## VII. Labour Courts and the access to justice

An essential element for the implementation of protective labour legislation, workers' rights and managements' rights is access to the courts. Rights and norms are not complete unless they can be effectively, efficiently and inexpensively enforced in courts. LC should be easily accessible, inexpensive, less formal than the regular courts and speedy in order to fulfill their purpose.

The purpose of LC rules concerning costs is to equalize the litigative position of the parties. The worker is generally the weaker party in this regard, since he/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 LC judge in conducting the hearing, especially in an adversarial system.

Furthermore, quick resolve 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 resolve of the case, such as when they petition the court to enjoin a strike. Thus, efficient and fast conduct of LC 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 effect parties ability to conduct their own case. If procedure is simple, basic and easy to understand the unrepresented party, usually the worker, should be capable of presenting his case reasonable well.

Another factor related to access to justice is the extent of the right to appeal.

LC judges were asked about LC contribution to effectively ensuring the appearance before the court on truly equal terms for all parties. We shall discuss the basic factors relating to the 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.

#### **[a] Judges' role in conducting hearings –**

What should the judges' role be in conducting hearing in LC, should he/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 judgement had to be impartial and based on the merits. 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 LC 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 UK report said: "*Whilst the adversarial system applies,*

*ET chairmen* <sup>28</sup> *are skilled in assisting unrepresented litigants to present their cases effectively and to the point”.*

How does the LC judge role in the hearing differ from that of the civil court judge?

### **[b] Representation -**

Formal access to justice is guaranteed in most LC by the individual workers right to institute claims and appear without an attorney. This is true in **Israel, Italy, United Kingdom, Slovenia, Ireland, Malaysia, Australia, Costa Rica** and in the first instance of the **German LC**. In addition, unions can be parties to litigation in collective disputes.

In some LC, such as **Finland** and **Norway**, the parties to litigation are usually unions and employers’ associations, so 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, the **German** second instance and third instance LC 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 LC**, the **Bundesarbeitsgericht**, only lawyers may appear.

However, formal access is not enough. How does the weaker party obtain representation? If he is not represented how does the worker prepare his court filing?

In **Germany** when the worker is incapable of preparing his complaint to the first instance the court secretary (**Rechtspfleger**) will assist him/her and file the case for him. She/he will not, 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 LC, workers can be assisted and represented by union officials and management can be assisted and represented by employer association officials. The **Germany** and **Swedish** report said that most workers are represented without cost by union officials. The **Irish** report said that 48% of complainants before the Equity Officers were represented by union officials, 28% appeared unrepresented and 15% were represented by lawyers. Union officials can represent workers before the **Costa Rica** and **Malaysian LC**. In **Italy** trade unions can give “informations” or opinions but require special permission to represent the worker.

Workers may also be represented in LC by attorneys supplied by special interest associations. In **Israel** such associations represent women,

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<sup>28</sup> ET chairman are LC judges who head the panels in the trial instance of the UK LC.

Palestinian workers, foreign workers, homosexual and lesbians “whistleblowers”, and disabled workers.

Parties may also be represented in LC by private attorneys. In the **UK** LC about 23% of the parties were represented by attorneys.<sup>29</sup>

There are, however, rules limiting or prohibiting representation in the LC. 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** LC this has not been extended to non-lawyers who want to help for a fee or without one. The reasoning was that lawyers are most suitable to represent a worker and representation by untrained people can harm the workers’ case and deny her/him of her/his rights.

### **[c] Cost of litigation -**

Cost can be an obstacle to workers’ achieving their rights in LC. 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.

Based on judgments of the Constitutional Chamber of the **Spanish** Supreme court there are no costs charged or imposed by LC for social security cases. The reason is the weaker position of the worker compared with the body administering social security.

There is generally no filing fee in social security cases. Therefore, our discussion relates only to labour law cases.

### **[d] Filing cost -**

Most LC have no filing fee or a low one. There is no filing fee in the **Malaysian** LC. In **Israel** there is no filing fee for collective disputes and small claims and low fees for most other cases. Other reports mentioned low court fees, such as **Australia**. In **Germany** there is a low filing fee in the first instance but regular court filing fees in the second and third instances.

Some reports, such as **Slovenia**, mentioned the LC 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.

### **[e] Lawyers’ costs -**

A party taking a private lawyer is responsible for his charges. However, in **Germany** a party can petition the court to contribute to the costs of

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<sup>29</sup> S. Deakin and G. Morris, cited above, p. 90, referring to 1999 statistics.

his/her litigation. Some countries provide free legal assistance, as we shall discuss below. Sometimes, the lawyer will take his fee from the amount the worker receives from the court, such as in **Venezuela**.

In Israel and Spain there is no cost in worker's compensation cases and they are even given free representation in court.

Another type of lawyers' costs is the "costs" or payment which a LC compels the losing party to pay the successful party.

In many LC 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** LC and the LC of **England**,<sup>30</sup> **Malaysia**, and in the **Irish** discrimination hearings. In **Australia** there are usually no costs.<sup>31</sup> **Israel** and **Spain** impose no costs in collective dispute cases and social security cases. Some LC impose costs only on employers. Some LC impose moderate or low costs.

Some LC impose court costs similar to those in the general courts, such as **Germany** in the second and third instance.<sup>32</sup>

#### [f] Free legal assistance -

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

In the **UK** there is no legal aid in the first instance and little in the appeals level, ie, **UK** Employment Appeals Tribunal. However, the EAT has begun a *pro bono* program which offers unrepresented appellants free legal aid for the preliminary hearing; it is called 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/she does not file the case or advise the appellant prior to the hearing, but is sent a copy of the court file a week to a day prior to the preliminary hearing so that he/she can familiarize himself/herself with the case, files a short written summary of his 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**, **England** and **Israel** unions often provide free legal representation. In both **Spain** and **Israel** workers are entitled to free medical opinions in workers' compensation

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<sup>30</sup> The **English** LC can set costs when a party has acted frivolously or abusively.

<sup>31</sup> The Australian report said that costs may be imposed in termination of employment cases but this is very infrequent

<sup>32</sup> The **UK** report mentioned a proposal in parliament which envisages higher costs in LC cases.

cases. Sometimes employer associations also provide free legal assistance to their members.

### **[g] Rules of procedure and evidence -**

Procedural and evidence rules which are simple and understandable to a layman are essential to guarantee unrepresented parties, usually workers, access to justice.

The **Finnish** report mentioned informal procedures as the best method of furthering efficiency.

In **Israel** the general court rules of evidence do not bind the LC; thus, while basic evidence rules necessary to ensure a fair hearing are observed, the LC 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 zerox copies.

### **[h] Pre-trial proceedings –**

LC, like the general courts, must develop new procedures in order to efficiently cope with their massive case load. LC have been particularly flexible, bold and imaginative in initiating such procedures, such as **pre-trial procedures**, which make the hearing simpler and more expedient 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 LC 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 LC, whose judges participate in this seminar, have special pre-hearing procedures which make the hearing more efficient and fair. Usually, written summary of claims or briefs are required.

Some of these pre-trial procedures will be discussed below:

**[1] 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 English **Employment Appeals Tribunal** there are preliminary hearings for all appeals before a full panel. Only the appellant appears and he/she must convince the panel that his/her 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 LC requires the parties to state make a statement of facts, submit documents and list their witnesses before the pre-trial conciliation hearing.

The **Israeli** LC has developed a pre-trial procedure before the Court Registrar which includes preperation 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.

[2] **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 affadivit must appear in court for cross-examination. The occurs at the trial instance only.

[2] **Court appointed experts** – Instead of each party bringing his own expert witness the **Israeli** LC appoints neutral experts, whose fee is paid by the court. This is widely done in workers’ compensation cases when medical questions arise.

[4] **ADR – Mediation procedures** - Sometimes there is pre-hearing ADR mediation. LC also have extensive ADR programs, either within the court procedure or administered by specialized mediation services or agencies. There are also private ADR procedures. These are outside the scope of this paper, but were discussed at one of our prior seminars.

[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** LC 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** LC also refers medical and other issues to court appointed experts, who are paid by the court and submit written opinions.<sup>33</sup>

[i] **The right to appeal** -

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<sup>33</sup> See: S. Adler, “Court appointed Medical Experts in the Israeli Labour Court”, in **Hospital Law**, 199 , published, pp. .

Regarding some LC decisions there is a right to appeal, for others the party must request 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 LC need permission.

### **[j] Speed and efficiency -**

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

The **UK** first instance LC judges are encouraged to deliver their judgements 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 **UK** and **Israel**, when the court dictates an oral judgment to the official protocol it is done from detailed notes, 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: professional development activities focusing on judgment writing, encouraging judges to hand down ex temore 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 online, electronic search capability, e-mail drafting of joint decisions, bench books summarizing relevant authorities and time limit on presentations.

Some LC 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 they are available to the public in the internet.

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

Most reports said that judges should develop personal managerial qualities so as to do their work efficiently, especially regarding the handling of case loads.

Some LC, such as the **UK** and **Israel**, have begun to use “case management” techniques.

Regarding results – the **German** LC finish 50% of all first instance cases within 3 months and over 90% within 6 months. The **British** Industrial Tribunals bring 85% of cases to a first hearing within 26 weeks of filing.<sup>34</sup> 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 4 1/2 months in 2000. In the first instance **Israeli** LC in the year 2000, 28.5% of cases were completed within 3 months, 52% within 6 months, 72.3% within a year and 90.3% within 2 years. In the appeal instance, the National Labour Court, in the same year, 40% of cases were completed within 3 months, 54% within 6 months, 67% within a year and 89% within 2 years.

A number of reports related to emergency cases, such as strikes or lockouts, which are completed within a few days.

### VIII. Implementation in a low union density economy

The decline of union density is one of the outstanding phenomenon in modern labour relations. This has occurred in most countries. In the **UK** union density is down from over 50% in 1979 to 27% in 1999.<sup>35</sup> In **Germany** and **Israel** union density is down to about a third of the workforce. In the **United States** only 11-12% of the workforce is organized. Moreover, in many countries most of the union membership is in the public sector. In the **UK** 60% of the public sector was organized in 1979 but only 19% of the private sector. In **Israel** union density in 1999 in the private sector was only 10%. One result of this decline in union density is that most nations the only body to which a worker can turn in order to enforce his labour law rights is the LC.<sup>36</sup> This illustrates the importance of LC 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 union in order to implement his social rights. Generally, an elaborate grievance procedure existed for this purpose. Such procedures included negotiation, mediation and arbitration. The worker was represented by his union official. Costs were nil or minimal. In general 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, sport and financing the education of workers' children. All this has disappeared for most workers in today's new economy. With all due

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<sup>34</sup> S. Deakin and G. Morris, cited above, p. 91.

<sup>35</sup> See: S. Deakin and G. Morris, **Labour Law**, Butterworths, 2001, pp. 708 – 711.

<sup>36</sup> In the absence of LC the worker can implement his rights in the general courts or specialized tribunals. This paper relates only to LC.

regard to our market economy, it provides workers with few of these social benefits. Most important for our discussion, without unions there is little or no private enforcement outside of courts.

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

While LC cannot perform all the functions of implementing workers' fundamental social rights which unions performed in bygone days, they do fulfill some of them. LC 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 LC should be expanded. Where it is not the case, the LC should be given the status comparable of regular 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 LC. This has important implications about the role of LC in making social policy. It means that states must grant LC the jurisdiction, power, status and material means to fulfill their important task. It also means that LC judges must be aware of their role in making social policy.

### **IX. Autonomous Labour Courts; autonomous labour law**

When we have a LC 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 LC judges, therefore, is different than that of general court judges and emphasizes the importance of social rights. The importance given social rights is the heart of labour law's autonomy, especially those social rights which correct the power imbalance between the worker and his employer. LC develop the special principles, values and norms of labour law; they balance and change the general law principles which are not suitable to labour law. LC balance workers' human dignity and the employers' property right.

Labour law, for example, gives more importance to cogent labour rights than contractual principles. Thus, the workers' contractual

agreement to work for less wages than the statutory minimum wage is not enforced.

LC focus on workplace reality which includes labour relations, labour force problems, equality at the workplace and, in general, fairly governing the workplace. LC emphasize that workplace law must enable businesses to profit and survive in a competitive world, while providing a decent place to work.

On the other hand, LC are part of a state's court system and must also be guided by constitutional principles and general law principles, such as good faith. LC autonomy is, therefore, not absolute. One of LC important contributions to a state's court system is to convince the general courts and especially the highest constitutional court (or supreme court) that social rights should be given their due importance in the balance between them and other constitutional rights.

### **X. Conclusion**

In conclusion, social policy determines a countries' quality of life. LC have an important role in implementing and making social policy. LC judges, therefore, should be aware of the manner they make social policy. Their judgments should reflect and discuss the value judgments made and the social policy which are the basis for their decisions. LC judges should be given special training to assist them in making social decisions. Access to LC should be inexpensive, less formal than the general courts and relatively speedy. In most nations the LC is the worker's only forum for enforcing his/her labour law rights and, therefore, we must ensure that they can adequately perform their task. Finally, LC should be given significant autonomy to develop social policy.