Is There a Need for Independent Labour Courts?

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ABSTRACT

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

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

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## CONTENTS

I. **INTRODUCTION** .................................................................................................................. 321

II. **WHAT CAN A LABOUR COURT SYSTEM BE?** .............................................................. 322
   A. *The Labour Court System in the Context of the Separation of Powers* .................................................. 322
   B. *Comparative Law* .............................................................................................................. 324
      1. *Overview* .................................................................................................................. 324
      2. *Taiwan in Particular* ................................................................................................. 327
      3. *Germany in Particular* .............................................................................................. 329

III. **IMPLICATIONS AND EFFECTS OF A LABOUR COURT SYSTEM** ............ 330
    A. *The Organisation of the Courts* .................................................................................. 330
    B. *The Labour Court System and Substantive Labour Law* ............................................. 332
    C. *Lay Judges in the Labour Court System* ...................................................................... 334
    D. *Are There Characteristics of Labour Judicature?* ....................................................... 335

IV. **CONCLUSIONS** ............................................................................................................. 336
    A. *Conclusions for Germany* .......................................................................................... 336
    B. *Conclusions for Taiwan* ............................................................................................ 336

REFERENCES ................................................................................................................................ 338
I. INTRODUCTION

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

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

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

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

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

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

II. WHAT CAN A LABOUR COURT SYSTEM BE?

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

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

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


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

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

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

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

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

1. **Overview**

To this day, numerous states do not have an independent labour court system. Yet, in terms of actual effects, that can mean different things. It may mean that disputes concerning labour law are resolved solely by the ordinary (civil) courts. Those courts will then in part have to pay attention to certain characteristics of conflicts under labour law. This is the approach taken by the Netherlands, where a *distinct mode of trial* can be chosen. Going further, in Italy there are *distinct chambers* on the first and second level of regular *jurisdiction*.

This is the same in Austria since a reform in 1987 whereby the former labour and social welfare courts were abolished. Since then (except in Vienna), the regular (district and state) courts make decisions “as labour and social welfare courts.” Before the great reform in *Japan* there were special chambers for labour law at the ordinary courts in some large cities.

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

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

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

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


8. Id. at 242, 244.
decision-making. Their decisions, however, are not binding. If the parties involved do not accept the decisions, the action is passed onto a regular chamber of the same district court and thereby the regular court system to be tried normally. The reform is reported to be successful, even if there are still some problems within the system like potentially prohibitive lawyers’ fees.9

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

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

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

10. The Circuit Court of Kanawha County has jurisdiction over all those trials.
11. For the help with this information we thank attorney Mark McMillian, JD, Charleston, West Virginia, USA.
Germany and France. On top of that, there is the cantonal fragmentation of law that is typical for the Swiss Confederation.

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

On the contrary, since 1963, there have been attempts in the United Kingdom to introduce a labour court system (at present known as: Employment Tribunals and Employment Appeal Tribunals). At present, tribunals exercise independent jurisdiction outside that of the Courts (the “ordinary” court system). Historically these evolved from tribunals that were special offices of public administration or the government. The political process moved sluggishly and – depending on the current political majorities – by no means in a straight line. At their core the employment tribunals up to this day have a limited jurisdiction over certain cases such as unfair dismissal, discrimination, unjustified deduction from pay and some other claims involving the employer-employee relationship. Furthermore, jurisdiction is limited to certain values at stake in disputes. Alongside the employment tribunals, the ordinary courts also have jurisdiction by their own rules. An expulsion of the ordinary courts from disputes under labour law seems to be missing. Traditionally arbitration in the United Kingdom is carried out intra-company. In 2004 the rules for such arbitration were unified and made stricter. Most importantly the implementation of an intra-company complaint procedure was made a prerequisite for filing a complaint to an employment tribunal. Above all, that change was intended to reduce the workload of the employment tribunals, but was revoked in 2008 along with the rules about the intra-company pre-trial.

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

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12. Edward Jacobs, Something Old, Something New: The New Tribunal System, 38 IND. L.J. 417 (2009). It is concerning that there is now an ongoing political process to unify all tribunals except the employment courts.
labour court system with two levels of jurisdiction. But until the end of the last millennium, the legal protection seemingly only existed in theory. It is said that there were only six judges for both levels of jurisdiction in the entire country.

2. Taiwan in Particular

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

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

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17. See Yang, supra note 4, at 97.
law. As a result, ASLMD was revised. Since May 1, 2011, mediation and arbitration can be chosen to assist with disputes under labour law.

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

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

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19. See Yang, supra note 4, at 99.
20. Amended and promulgated a total sixty-six articles of the Act by Hua Tsung I I Tzu Ti 09800165161 [the Presidential Order No. 09800165161] (July 1, 2009), effective since May 1, 2011 by Order No.-Yuan-Tai-Lau-Tzu-1000019757A of the Executive Yuan [Executive Yuan Order No. 1000019757A ] (Apr. 26, 2011).
21. See Kuo-Chang Huang, Wokuo Laotung Susung Chih Shihchêng Yenchiu I Ti I Shên Susung Chih Shênli Yu Chungechieh Ch'inghsing Wei Chunghsin (Shang) [An empirical study on labour litigation in Taiwan: With focus on the adjudication process and case outcome in the trial court (1)], 106 CHÊNGTA FAHSIAO P’INGLUN [CHENGCHI L. REV.] 203 (2008); Kuo-Chang Huang, Wokuo Laotung Susung Chih Shihchêng Yenchiu I Ti I Shên Susung Chih Shênli Yu Chungechieh Ch'inghsing Wei Chunghsin (Hsia) [An empirical study on labour litigation in Taiwan: With focus on the adjudication process and case outcome in the trial court (2)], 107 CHÊNGTA FAHSIAO P’INGLUN [CHENGCHI L. REV.] 165 (2009).
disputes. An example is the agreement of local jurisdiction (Article 24 of CCP): Under this provision, the employer can make an agreement about local jurisdiction with the employee at the beginning of the employment, which would then compel the employee to go somewhere other than where the factory or firm is located to carry out a lawsuit against his or her employer. This is not just a problem of expenditures; it is also a problem of whether the employee has time to travel a considerable distance. As a result, in some circumstances employees may reluctantly choose not to sue their employers.

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

3. Germany in Particular

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

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

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23. Please refer to III. 3.
24. For historical aspects, see Krause, supra note 4, at 3.
25. In contrast to that, the court system established in 1890 also had jurisdiction over certain issues concerning social welfare law, GERDELMEYER ET AL., supra note 3, at para.7.
All three levels are characterized by the participation of two lay judges. Half of these are selected by the employees (Unions), and half by the employers (employer’s associations). Thus, the constitutionally guaranteed coalitions (Article 9 III GG) are represented on the judge’s bench. At the first two levels, one professional judge presides. Because of this, the lay judges outnumber him or her. This is not so at the federal labour court, however. There, in addition to the chief judge and the lay judges, two other professional judges complete the bench.

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

III. IMPLICATIONS AND EFFECTS OF A LABOUR COURT SYSTEM

A. The Organisation of the Courts

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

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

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27. Details in id. at 7-12.
28. USA, Japan, France, South Africa as well as the intra-company procedure in the UK.
29. But see Brand, supra note 3, at 81-82.
different ways by the state laws.\textsuperscript{31}

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

Another follow-up question lies in the fact that the existence of different legal recourses demand some kind of regulation to decide who has jurisdiction and a process to determine which legal recourse is the correct one, if there should arise controversy. Responses to both of these legal issues were codified in Germany in 1990 and 1991 in a rather reasonable way.\textsuperscript{33}

Nevertheless, to this day, there occur judicial conflicts between the legal recourses. For instance, the United Senate of the five Federal Supreme Courts recently had to decide, whether the labour courts or the ordinary courts are to pass judgment over the reclaiming of employee’s wages during the bankruptcy of the employer.\textsuperscript{34} Such conflicts take time despite all efforts to speed up the decision-making process. In this example it took two years, during which all such trials in Germany had to be put on hold.

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

\textsuperscript{31} GERMELMANN ET AL., supra note at 3, paras. 32-36.
\textsuperscript{32} Brand, supra note 3, at 81.
seems possible that substantive “claims” \(^{35}\) can arise between company-constitutional organs.\(^{36}\) In that case, the individual labour law seems to be the foundation of collective labour law disputes.

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

B. The Labour Court System and Substantive Labour Law

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

Firstly, to what extent is a codification\(^ {41}\) of the norms of the entire working world beneficial? In particular, should such a move be

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35. The correct solution would be controlling internal law by right of action.
36. Concerning the problem, see GERMELMANN ET AL., supra note 3, at para. 150.
38. GERMELMANN ET AL., supra note 3, at para.178.
41. See Hanau, supra note 40, at 809, 812.
achieved at the price of “judicialization” of the working world? In Germany countless employee-employer relationships are clarified in court today, which would be unimaginable without special labour courts with (at the first level of jurisdiction) easier accessibility.

Secondly, is there a lack of substantive labour law? In Germany this question has to be considered differently today than it would have been at the time the labour court codes were created in 1926 and 1953. Germany may still not have one code on labour law, but many rules have been codified in the meantime. That may in many cases be nothing but codified judge-made law at its core, but that does not change the fact that the job description of German labour courts is subject to change. Of course labour courts have not lost all of their significance in the development of substantive labour law. But, this significance does not seem to be appreciably larger than that of the ordinary courts for the civil law in general anymore.

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

42. Id. at 809, 812.
43. There are privileges concerning legal expenses here, critically Brand, supra note 3, at 81, 83.
44. The labour court code (ArbGG) still valid today dates back to 1979. This time should roughly be at the turning point. But, back then it wasn’t at its core about the fortification of an labour court system as such, but more about the adaption of the ArbGG to the ZPO, which was fundamentally reformed in 1976, GERMELMANN ET AL., supra note 3, at para. 23.
45. Concerning this see Alfred Soellner, Die Arbeitsgerichtsbarkeit im Wandel der Zeit [The Labour courts through the ages], in ARBEITSGERICHTSBARKEIT – FESTSCHRIFT ZUM 100 JAHRE BETEHNEN DES DEUTSCHEN ARBEITSGERICHTSVERBANDES [LABOUR COURTS - COLLECTED PAPERS IN HONOR OF 100TH ANNIVERSARY OF THE GERMAN LABOUR COURTS ASSOCIATION], supra note 37, at 1, 14.
46. About the ideology of German labour law, see Bernd Ruethers, Arbeitsrechts und Ideologie [Labour Law and ideology] in ARBEITSGERICHTSBARKEIT – FESTSCHRIFT ZUM 100 JAHRE BETEHNEN DES DEUTSCHEN ARBEITSGERICHTSVERBANDES [LABOUR COURTS - COLLECTED PAPERS IN HONOR OF 100TH ANNIVERSARY OF THE GERMAN LABOUR COURTS ASSOCIATION], supra note 37, at 39, 54.
47. Hanau, supra note 40, at 809, 811.
class actions are filed as “socio-political demonstrations.” But the whole degree of political influence can only be appreciated, if one takes a closer look at the internal structure of the labour court system.

C. Lay Judges in the Labour Court System

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

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

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49. Id. at 1485-86.
52. Hau-Min Rai, Chuich’iu Liennêng Chi Chihtê Shênlai Tê Ssufa Ch’uangtsao Kung I Shêhui [Judicial reform to be continued to build a just society], Ssufa Yuan Niehchung Chichê Hui Yüen’ang Chih’z’u [Outline of Speech by Judicial Yuan President at end-of-year Press Conference], 1157 SSUFA CHOUK’AN [JUDICIAL WEEKLY] 2 (2012).
53. This is the scope of the paper of Croydon, supra note 51, at 1.
54. Overview in Windel, supra note 50, at 293.
55. Instead of others, see Guenter Ide, Die Stellung der ehrenamtlichen Richter [The status of lay judges], in ARBEITSGERICHTSBARKEIT – FESTSCHRIFT ZUM 100JÄHRIGEN BESTEHEN DES DEUTSCHEN ARBEITSGERICHTSVERBANDES [LABOUR COURTS - COLLECTED PAPERS IN HONOR OF 100TH ANNIVERSARY OF THE GERMAN LABOUR COURTS ASSOCIATION], supra note 37, at 253-54.
264; Ruediger Krause, Die Beteiligung der Sozialpartner am Gerichtsverfahren in Arbeitssachen [The involvement of the social partners at the trial in Labour cases], paper presented at Symposium of the Legal Proceedings on Labour Disputes Litigation, Taipei (2008).
disputes under tenancy law, trials about consumer rights and claims concerning medical malpractice liability for example.  

But above all, the inclusion of laypersons leads to an injection of the political process into the trial. After all, lay judges are, as representatives of the social partners, often themselves involved in the lobbies surrounding the legislative procedure or in collective bargaining. If on top of that one takes into account the fact that the parties in the labour courts are usually coalition members themselves, it can be said with some justification that “basically it is always the same parties” involved.  

The mixing of political interests and justice is finally further deepened due to the fact that because of another characteristic of the German labour court system, representation by a lawyer is not obligatory. Instead, coalition representatives can represent the parties in court as well.  

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

D. Are There Characteristics of Labour Judicature? 

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

The procedural rules of the ordinary and labour courts are also less different from each other nowadays than they used to be. The general civil trial has become more “social” and therefore became more or less like the labour trial. For instance, the stipulation of local jurisdiction was restricted
back in 1974 (§§ 38-40 ZPO/CCP). Moreover, the distinct mode of labour law trials might have been the model for reforms of the civil procedure law. Namely, there is an obligatory conciliation hearing here as well under § 278 Abs. 2-5 ZPO. Lingering characteristics in labour trials seem increasingly questionable in light of this background.

IV. CONCLUSIONS

A. Conclusions for Germany

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

B. Conclusions for Taiwan

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

64. Concerning this see Peter Axel Windel, Zur Justizfoermigkeit der zivilprozessualen Gueterverhandlung, [The judicial formation of conciliation hearings in civil litigation] in FESTSCHRIFT FUER WALTER GERHARDT [COLLECTED PAPER IN HONOR OF WALTER GERHARDT] 1091 (E. Schilken et al. eds., 2004).
65. Details in Krause, supra note 4, at 6.
66. Brand, supra note 3, at 81.
67. Especially concerning this, see Soellner, supra note 45, at 1, 11.
69. Cf. The political legitimation of the ArbGG 1953, traced in Hanau, supra note 40, at 809-10; Lipke, supra note 39, at 1, 9.
70. For the overview, see Brand, supra note 3, at 81-82.
71. Hanau, supra note 40, at 809, 813.
labour disputes through mediation. The other means of labour administration, that is conciliation and arbitration, do not play an important role in Taiwan. Besides, if a labour party tries to bring a claim against his or her opponent, then s/he must follow the provisions of the Code of Civil Procedure. We will find that some provisions in the Code of Civil Procedure are not suitable for labour disputes, and that they must be revised or even abolished. The introduction of a lay judges system could represent the interests of both sides (trade unions and employer’s associations), and bring social peace between employee and employer. Taiwanese legislators should consider adopting such a system and take the next step of enactment. The place of lay jurors, however, might be in pre-trial ADR, and not in the courts. Finally, for the short term and medium term, we do not advise the establishment of an independent labour court system like in the German model. In our opinion, the provisions about mediation, conciliation and arbitration have already been improved, and the next pressing matter to be addressed is the revision of relevant provisions of the Code of Civil Procedure. That should be adequate for ensuring the resolution of labour disputes.\footnote{72. Tong-Shuan Yang, Kêpieh Laokung Falun Yü Shihiwu [Individual Labour Law – Theory and Practice]10-12 (2010).}
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設立獨立勞動訴訟制度之必要性探討

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摘 要

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

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