ISSN 0930-861X

ZIAS 2018 Heft 1

Zeitschrift für ausländisches und internationales Arbeits- und Sozialrecht

ZIAS 1/2018
32. Jahrgang
Seiten 1–96

Aus dem Inhalt

C.F. Müller
CFM

Zeitschrift für ausländisches und internationales Arbeits- und Sozialrecht (ZIAS)

Heft 1, 32. Jahrgang 2018, Seiten 1–96

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Zeitschrift für ausländisches und internationales Arbeits- und Sozialrecht (ZIAS)

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Bezugsbedingungen: Zeitschrift für ausländisches und internationales Arbeits- und Sozialrecht (Zitierweise: ZIAS) erscheint halbjährlich (zwei Hefte ergeben einen Band) und ist durch den Buchhandel oder vom Verlag zu beziehen. Abonnementsbedingungen/Bezugspreise: jährlich € 165,00 (einschl. 7 % Mehrwertsteuer) zuzüglich Versandspesen ab Verlag von € 13,– Inland und € 18,– Ausland. Einzelheft € 90,00 zuzüglich Versandkosten. Der Abonnementsvertrag wird auf unbestimmte Zeit geschlossen. Kündigungen sind jeweils zwei Monate vor Ende des Bezugszeitraums möglich und dem Verlag schriftlich mitzuteilen, ansonsten verlängert sich das Abonnement um ein Jahr. Die Abonnementsgelder werden jährlich im voraus in Rechnung gestellt. Über Postgiroämter und Bankinstitute ist eine Teilnahme am Lastschriftabbuchungsverfahren und vierteljährliche Abbuchung möglich. Bei Neubestellungen kann der Abonnent seine Bestellung innerhalb von sieben Tagen schriftlich durch Mitteilung an die Verlagsadresse widerrufen. Zur Fristwahrung genügt die rechtzeitige Absendung des Widerrufs (Datum des Poststempels).

C. F. Müller GmbH; Waldhofer Straße 100, 69123 Heidelberg. Anzeigen: Judith Hamm, Telefon (06221) 48 94 16. Es gilt die Anzeigenpreisliste Nr. 26 vom 1. Januar 2018. Vertrieb: Verlagsgruppe Hüthig Jehle Rehm, Abonnementsservice, Hultschiner Str. 8, D-81677 München, Telefon (089) 21 83-71 10, Fax (089) 21 83-76 20, e-mail: aboservice@hjr-verlag.de. Satz: Strassner ComputerSatz, Heidelberg. Druck: Westermann Druck, Zwickau.

Ulrich Becker

Rolf Birk zum 80. Geburtstag

Rolf Birk, Mitbegründer dieser Zeitung, hat im April dieses Jahres sein 80. Lebensjahr vollendet. Dazu soll ihm auch an dieser Stelle gratuliert werden. Vor allem aber gebührt ihm ein herzlicher Dank: dafür, dass er viele Jahre die Zeitschrift für Internationales Arbeits- und Sozialrecht betreut, und vor allem dafür, dass er auf diese Weise den Austausch zwischen Arbeits- und Sozialrecht vorangebracht hat. Das ist in Deutschland bekanntlich kein leichtes Unterfangen, weil hier – anders als in fast allen anderen Ländern – ein großer Teil der Sozialrechtler über einen öffentlich-rechtlichen Hintergrund verfügt, die „Kontaktstellen" zwischen den beiden Fächern dementsprechend geringer und etwa auch die wissenschaftlichen Verbände getrennt organisiert sind.

Rolf Birk gehört zu den wenigen deutschen Arbeitsrechtlern, die nicht nur einen regen Austausch über die Fachgrenzen, sondern vor allem auch über die nationalen Grenzen hinaus pflegen und selbst in nennenswertem Umfang über lange Jahre rechtsvergleichend gearbeitet haben. In gewisser Weise war er schon zu Beginn seiner akademischen Karriere ein Grenzgänger, weil er in Erlangen Assistent von *Reinhard Zippelius* war, aber unter der Betreuung von *Ludwig Schnorr von Carolsfelds* promoviert (1966) und sich habilitiert hat (1971). Nach einigen Jahren als Inhaber des Lehrstuhls für Privatrecht, Rechtssoziologie und Rechtstheorie an der Juristischen Fakultät der Universität Augsburg wechselte er 1983 an die Universität Trier auf den Lehrstuhl für Arbeitsrecht, Privatrecht und Internationales Privatrecht. Zugleich wurde er Gründungsdirektor des Instituts für Arbeitsrecht und Arbeitsbeziehungen in der Europäischen Gemeinschaft. Das war eine Verbindung, die hervorragend passte. Rolf Birk konnte seine umfangreichen Kenntnisse ausländischer Arbeitsrechtsordnungen einbringen, arbeitete weiter an deren Vertiefung, verbesserte auch seine eigenen, von ihm zu recht als notwendige Grundlage angesehenen Kenntnisse der Sprachen und der kulturellen Hintergründe und baute eine beeindruckende Bibliothek des internationalen Arbeitsrechts in Trier auf. Rolf Birk konzentrierte sich aber nicht völlig auf Auslandsaktivitäten. Er beherzigte immer den Grundsatz, dass die Anerkennung zu Hause unerlässlich ist, um auch auf internationaler Ebene überzeugen zu können. Dementsprechend hat er sein ganzes Leben als Forscher über auch bedeutende Beiträge zum deutschen Arbeitsrecht geliefert. Zugleich hat er es geschafft, Beziehungen zu anderen Rechtswissenschaftlern in aller Welt aufzubauen. Die große Zahl seiner Gastprofessuren und Vortragsaufenthalten rund um den Globus legt davon Zeugnis ab, ebenso wie zwei Ehrendoktorate der Universitäten *Miskolc* und *Pécs*.

Seit seiner Emeritierung hat Rolf Birk seine Tätigkeiten schrittweise zurückgefahren. Gerade weil er sein wissenschaftliches Feld lange und höchst verdienstvoll bestellt hat, sah er die Zeit gekommen, anderen Platz zu ma-

chen. Das ist einsichtig, aber auch zu bedauern, weil die Gespräche mit ihm selten werden. Sie waren immer etwas Besonderes, geprägt durch Offenheit und Direktheit, durch Humor bei großer Ernsthaftigkeit in der Sache, durch geerdete Weltläufigkeit, durch ein kaum fassbares Arsenal an Wissen und Erfahrung. Das betrifft nicht nur das Recht und seine Protagonisten, sondern auch die schönen Dinge des Lebens, als dessen profunder Kenner sich Rolf Birk immer wieder in erstaunlicher Vielfalt und Tiefe erwiesen hat. Es ist ihm von Herzen zu wünschen, dass ihm seine Lebensfreude möglichst lange erhalten bleibt.

Gabriela Mendizábal Bermúdez, Cuernavaca

Labour Inspection as the Authority that Contributes to the Enforcement of Workers' Rights

Comparative Law in 5 Latin American Countries

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A. Introduction

For more than a century, labour inspection has contributed to the enforcement (*Durchsetzung*) of workers' rights with regard to their employers around the world.

This authority has the capacity to enforce compliance with labour and social security regulations through the imposition of penalties, with or without a request of action filed by workers, and without the need to go before the courts to deliver justice.

The issue of labour inspection is so important that both the Treaty of Versailles and the constitution of the International Labour Organization itself already contained provisions to that effect, and this international body has been advocating the ratification of international instruments among its members for the last 70 years. This effort has crystallized into 4 conventions, one protocol and 5 recommendations.

The scope of labour inspection varies from one country to another, but its main functions are: control; penalty, prevention and advisory services; and the generation of information. These functions are primarily regulated in provisions set forth in legislative, administrative and collective agreements. Some countries like Costa Rica even include exceptional measures such as giving talks to students at schools and in training centres to familiarize them with issues regarding their future labour relations and working conditions.

Therefore, this article presents an analysis of labour inspection as the authority that contributes to the enforcement of workers' rights by performing a comparative study of 5 Latin American countries.

This article is divided into 4 parts. The first discusses the role of labour inspection at international level from a conceptual, historical and ILO perspective. The second presents the most salient points of the comparative study of 4 Latin American countries, selected based on the ratification and entry into force of ILO Conventions 81 and 129: Argentina, Costa Rica, Colombia, and Uruguay. A fifth country, Mexico, was added even though it has yet to ratify the mentioned conventions because its experience serves as a contrast to the analysis of the other countries, its socio-economic context is similar, it shares the same colonial past and it is part of the same geographical region: Latin America.

The third part analyses the relationship of labour inspection in the enforcement of workers' labour and social security rights, where it is shown to be even more important for poor workers. This third section also presents a brief overview of the current problems labour inspection faces in this region. Lastly, the article closes with the fourth part: the corresponding conclusions and research sources.

B. Labour inspection

Labour inspection is an authority with the ability to enforce the application of labour and social security regulations through the imposition of penalties with or without a request of action filed by workers, and without the need to go before the courts to deliver justice.

The ILO stipulates the following:

Labour inspection is a public function of labour administration that ensures the application of labour legislation in the workplace. Its main role is to convince the social partners of the need to observe the law at the workplace and their mutual interest in this regard, through preventive, educational and, where necessary, enforcement measures.1

Labour inspection has the following characteristics:

- It is a public function. Therefore, it is a government or State-commissioned authority that can also be made up of a private organization in concert with an authority.
- Its field of competence is stipulated in international and national provisions, laws, administrative rules and regulations, and collective agreements.
- The legal provisions that regulate labour inspection are *sui generis* provisions aimed at protecting workers' rights while also regulating the functions of the authorities themselves. To this effect, these provisions are framed within Administrative Labour Law.
- Scope of application: The subjective scope of protection of labour inspection provisions is determined by a relationship of paid work and of learning, although systems in developed countries also include self-employment. Each country defines its own field of application; that is, labour inspection in some countries oversees the working and social security conditions of factory and commerce workers while in other countries, it extends to agriculture and mining, child labour, etc.
- Functions: Today, the following functions are recognized among countries that have signed Convention 81: control, punishment, prevention and advisory services, and information, in addition to making the corresponding authority aware of the defects or abuses not specifically covered by existing legal provisions.
- The main issues labour inspection must oversee are: labour relations, wages, general working conditions, occupational health and safety, and issues related to employment and social security.

1 *ILO*, Inspección del trabajo: lo que es y lo que hace, 2011, 12.

I. History

The origin of labour inspection dates back to the time of the Industrial Revolution.

In the late 18th and early 19th centuries, the exploitation and excesses carried out by the employer class led to discontent among the working classes. The nature of the work activities did not guarantee hygienic conditions for the workers; the workers did dangerous activities without any type of protection; the workers worked long hours for unfair wages, and so on. These conditions led workers in the United Kingdom (the country with the most advanced technology in mechanization at the time) to rise up. As a result, the first labour laws, which would soon include labour oversight, were established.

The history of labour inspection is the story of State intervention in worker-employer relations, especially after the State evolved from simply being a judge in settling disputes between parties to developing a technique to enforce labour standards, in which the State becomes the party to balance out the differences between employers and workers as both an authority and as an indispensable element of social justice.

The objective and substantive rules regulating workers' rights established not only workers' rights, but also the procedural mechanisms for these rights to be asserted in court. According to Antonio Saracho, UK judges originally had the power to inspect and apply penalties,[2] but it was not until this function is taken away from State authority and placed under the responsibility of two persons: a judge and an inspector, that labour inspection emerges as a means for the application of workers' rights.

And as seen in this article, labour inspection is a technique for externalizing the enforcement of workers' rights, which was initially implemented in continental Europe. However, over the years, it has been replicated in many countries around the world and endowed with very local characteristics.

The history of labour inspection can be divided into three stages:

The first began with the separation of the figures of judge and the inspector, and is set forth in the first labour laws, of which the following stand out:

1. The first labour laws were established in the United Kingdom. The Health and Morals of Apprentices Act was passed on 22 June 1802. This act established a rudimentary form of labour inspection: volunteer committees made up of local notables would supervise the application of the act by having the local magistrate appoint two visitors: a clergyman and a Justice of the Peace[3] to inspect the premises.
2. The above act was ineffective, and in 1833 the United Kingdom passed the Althorp's Factory Act, which aimed at officially overseeing factory

2 *Ramírez*, JZ 1983, 159.
3 *Kurczyn*, JZ 1997, 565.

working conditions by appointing labour inspectors. This is the true emergence of labour inspection by separating the functions of judge and inspector who are authorized to impose sanctions.[4]

3. The Prussian Child Labour Law was passed in 1839. This law established the facultative inspection carried out by a bilateral commission comprising the police and school inspectors.[5]
4. The regulations of 9 March 1839 set a precedent for labour inspection in Germany. These rules centred on the creation of a factory inspection system to supervise the work of young factory workers. By 1853, inspectors were authorized to oversee issues regarding the health and safety of young workers.[6]
5. In 1872, the German Kingdom of Prussia established a general occupational safety and hygiene inspection system.[7]
6. The first precedents of labour oversight in Spain are found in the mining sector in, but it was not until 1906 that labour inspection was implemented as a technical body of the Institute of Social Reform.[8]
7. In France, the law of 19 May 1874 was created for the purpose of creating a special unit of officials to monitor compliance with social laws. This unit was consisted of 15 inspectors who were appointed and paid by the State, and another 15 inspectors who were appointed and paid by employers' councils.[9]
8. In Germany on 15 July 1878, an imperial law instituted mandatory inspections for all German industries regardless of the industrial activity carried out.[10]
9. In 1883, Kaiser Franz Joseph I of Austria authorized the law on the appointment of commercial inspectors (*Gesetz betreffend die Bestellung von Gewerbeinspectoren*). The first nine commercial inspectors –for the entire territory of the former Austrian Empire– began their duties on 1 February 1884.[11]
10. Later, the idea of choosing some workers to act as safety delegates materialized. This idea spread and was adopted by several countries, especially in the mining industry (France in 1890, Belgium in 1897, and the Netherlands in 1906).[12]

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4 *Ramírez*, JZ 1983, 160.
5 *Suárez*, La inspección en el trabajo, 1997, 783.
6 *Biblioteca virtual en salud- Desarrollo sostenible*, Antecedentes, 4, (http://www.bvsde.org.ni/Web_textos/UNICA/UNICA0007/Antecedente.pdf) <August 7, 2017>.
7 *Biblioteca virtual en salud* (Fn. 6).
8 *Beneyto Calabuig, Damian,* La Inspección de Trabajo. Funciones, actas y recursos, 2012, 23.
9 *Suárez*, La inspección en el trabajo, 1997, 784.
10 *Biblioteca virtual en salud* (Fn. 6).
11 *Szymanski,* JZ 2010, 182–185.
12 *Espuny,* JZ 2010, 1.

11. In Hamburg, the 9th Conference of the Metal Workers' Union in May 1909 called for the restructuring of the Inspectorate by strengthening the role of inspectors. They requested that physicians, persons specializing in industrial hygiene, and workers be admitted as inspectors to ensure compliance with protective laws and laws regarding occupational accidents.[13]

The second stage is characterized by international recognition of labour inspections.

Since its creation, the ILO had already contemplated labour inspection in the same two documents that established it as a body: the Treaty of Versailles and its constitution:

Article 427, and specifically Point 9, contained in Part XIII of the Treaty of Versailles of 1919 states that:

The High Contracting Parties, recognising that the well-being, physical, moral and intellectual, of industrial wage-earners is of supreme international importance, having framed, in order to further this great end, the permanent machinery provided for in Section I, and associated with that of the League of Nations.

They recognize that differences of climate, habits and customs, of economic opportunity and industrial tradition, make strict uniformity in the conditions of labour difficult of immediate attainment. But, holding as they do that labour should not be regarded merely as an article of commerce, they think that there are methods and principles for regulating labour conditions which all industrial communities should endeavour to apply, so far as their special circumstances will permit.

Among these methods and principles, the following seem to the High Contracting Parties to be of special and urgent importance:

Ninth. – Each State should make provision for a system of inspection in which women should take part, in order to ensure the enforcement of the laws and regulations for the protection of the employed.[14]

Meanwhile, Article 10, paragraph 2, b) of the ILO Constitution declares that:

Functions of the Office

2. Subject to such directions as the Governing Body may give, the Office shall:

(b) accord to governments at their request all appropriate assistance within its power in connection with the framing of laws and regulations on the basis of the decisions of the Conference and the improvement of administrative practices and systems of inspection;[15]

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13 *Espuny*, JZ 2010, 3.
14 Treaty of Versailles, 1919.
15 *ILO*, Constitution, 1919.

Later, the work of the ILO on labour inspection led to the creation of several international instruments that have had positive effects on the legislation of country members that have ratified the corresponding conventions, as seen in the sections below.

The third stage alludes to the enhancement of the functions assigned to labour inspection while making control mechanisms more flexible, so that countries have the option to put the oversight of certain labour activities in the hands of private agencies. For example, Mexico entrusts private and social organizations with the training of the inspectors who will be in charge of monitoring compliance with labour legislation.

The functions of labour inspection have extended over the years, going from the simple application of labour regulations, to advisory services and a prevention mechanism for occupational accidents and illnesses, including today's inspections of »psychological and psychosomatic aspects of the employment relationship, such as stress, harassment and bullying in the workplace.«[16] Their functions are also extended according to regional or local needs. For example, while in Ghana, Thailand or Ukraine, labour inspectors help protect workers in relation to the HIV/AIDS pandemic, while in Finland, the inspectorate contributes to the prevention of safety and health risks to children living on farms aimed at reducing the number of tractor accidents, and so on.[17]

II. The Functions of Labour Inspection

The functions assigned to labour inspection around the world are defined by a common goal: the application of labour standards in order to improve working conditions and protection for workers.

Although each country has entrusted labour inspection with diverse functions depending on the country's needs, resources and organization, it is possible to highlight the following general functions:

1. Controls

Control of compliance with labour standards is carried out by means of workplace visits since *in situ* inspections are based on: 1. An overall approach to workers well-being; 2. Proper compliance with current regulations; and 3. Specific issues when verifying cases: for instance, irregular migrant workers, child labour, maternal and child health, etc.

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16 *ILO*, Inspección del Trabajo, Estudio general relativo al Convenio sobre la inspección del trabajo, 1947 (núm. 81), y al Protocolo de 1995 relativo al Convenio sobre la inspección del trabajo, 1947, a la Recomendación sobre la inspección del trabajo (minas y transporte), 1947 (núm. 82), al Convenio sobre la inspección del trabajo (agricultura), 1969 (núm. 129), y a la Recomendación sobre la inspección del trabajo (agricultura), 1969 (núm. 133): tercer punto del orden del día: informaciones y memorias sobre la aplicación de convenios y recomendaciones, 2006, 4.

17 *ILO* (Fn. 16), 20 ff.

2. Penalties

The ILO notes that the principal sanction for many labour inspection systems takes the form of administrative fines, even though there may also be other sanctions procedures (administrative, criminal or civil). However, all sanctions can be challenged in court. In some countries, there are specialized social security inspectorates with special administrative procedures of their own, providing for automatic affiliation and expeditious means of enforcement.[18]

3. Prevention and advisory services

Article 3, paragraph 1 (b) of Convention 81 indicates that labour inspection should supply technical information and advice to employers and workers concerning the most effective means of complying with legal provisions. On closer analysis of this subparagraph, it is clear that the advisory role is twofold in terms of protection: on the one hand, it protects workers by informing them of their rights; and on the other, it also protects the employers before the self-same labour authorities by providing employers with the information needed to help them fulfil their obligations.

4. Information

The generation of information is important for planning and improving workers' quality of life. Hence, international instruments include the publication and communication of annual reports that take into account current legislation, the personnel in charge of labour inspection, their jurisdiction and activities, as well as statistical data on occupational accidents and illnesses.

5. Bringing to the notice of the competent authority

To bring to the notice of the competent authority defects and abuses not specifically covered by existing legal provisions and, where appropriate, are included in other legal provisions, for example, criminal offenses.

III. The ILO and Labour Inspection Nowadays

One of the ILO objectives in terms of labour inspection is to guarantee a minimal universal threshold of protection for workers in the relevant sectors by establishing international regulations that apply to the Member States that ratify them.

18 *ILO* (Fn. 16), 4.

They do not seek to impose a uniform labour inspection system. They set the organizing and functioning principles that should underlie labour inspection as an institution that is responsible for, on one hand, ensuring the application of legislation on conditions of work and the protection of workers, and on the other hand, contributing to the development of this legislation in step with developments in the national and international labour markets.[19]

The instruments the ILO has established regarding labour inspection are quite diverse, as seen in the following list:

a) Convention No. 81 concerning Labour Inspection in Industry and Commerce, 1947, entry into force: 7 April 1950, with 145 ratifications as of August 2017.[20]

b) Convention No. 85 concerning Labour Inspectorates (Non-Metropolitan Territories), 1947,[21] Entry into force: 26 July 1955, with just 11 ratifications.[22]

c) Convention No. 129 concerning Labour Inspection in Agriculture, 1969, entry into force: 19 January 1972, with 53 ratifications. [23]

d) Convention No. 178 concerning the Inspection of Seafarer's Working and Living Conditions, 1996, entry into force: 22 April 2000, with only 15 ratifications.[24]

e) Protocol of 1995 to the Labour Inspection Convention, 1947.

f) Recommendation No. 5 on labour inspection (Health Services), 1919. (withdrawn by the Conference in June 2000).

g) Recommendation No. 20, on labour inspection, 1923.

h) Recommendation No. 81, on labour inspection, 1947.

i) Recommendation No. 82, on labour inspection (mining and transport), 1947.

j) Recommendation No. 133, on labour inspection (agriculture), 1969.

As seen, there are not many ratifications. Even then, the two most important conventions on this issue, Nos. 81 and 129 have been better received. These two particular conventions are binding and provide guidelines for the enforcement of labour inspection.

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19 *ILO* (Fn. 16), 4.

20 *ILO*, Ratificación del C081, 1947, (http://www.ilo.org/dyn/normlex/es/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312226) <August 4, 2017>

21 Article 9 of this Convention states that its provisions cease to apply in a territory when the provisions of Convention No 81 are applied.

22 *ILO*, Ratificación del C085, 1947, (http://www.ilo.org/dyn/normlex/es/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312230) < August 4, 2017>

23 *ILO*, Ratificación del C129, 1969, (http://www.ilo.org/dyn/normlex/es/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312274) < August 4, 2017>

24 *ILO*, Ratificación del C178, 1996, (http://www.ilo.org/dyn/normlex/es/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312323) < August 4, 2017>

These two conventions define the functions, duties and responsibilities of labour inspection systems; the requirements for hiring personnel, the course of action for inspectors to follow, inspectors' powers and obligations in terms of ethics and information about their activities.

Zambia was the latest nation to ratify both conventions in 2013, more than six decades after its entry into force. Thus, it can be said that both the conventions and their content are still current.

The ILO has been constantly working on this issue. Since 2006, the ILO has backed a global strategy to build modern and effective labour inspection systems. »The strategy includes various activities both nationally and globally, like helping Member States prepare for labour inspection audits, developing national action plans to improve the effectiveness of labour inspection and guaranteeing training for labour inspectors.«[25]

In addition to the above, some of the most important actions in recent years include:

1. In terms of spreading information, the results of various research projects been published, such as: the 2017 Labour inspection and other compliance mechanisms in the domestic work sector, etc. Furthermore, two guides were published in 2011: one for workers and one for employers, both of which were entitled »Labour Inspection: What It Is and What It Does.« The purpose of these guides is to provide the information each specific sector (employer and worker) needs to understand the role of inspection and to contribute to its functions.[26]
2. The 2017 implementation of »Guidelines on flag State inspection of working and living conditions on board fishing vessels«[27] for compliance with international conventions (specifically with the Work in Fishing Convention No. 188) and each country's national legislation.
3. In 2017, the »Optimizing compliance with child labour legislation through strategic collaboration of labour inspection and child labour monitoring programmes« was established. This program was established to fight against child labour and its worst forms through the use of both its enforcement and advisory actions. This program contemplates cooperation among various institutions, including labour inspectorates since they have unwaveringly contributed to the eradication of child labour.[28]

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25 *ILO*, (Fn. 1), 12.
26 *ILO* (Fn. 1), 14.
27 *ILO*, Pautas sobre la inspección por el Estado del pabellón de las condiciones de vida de trabajo a bordo de los buques pesqueros – Guidelines on ag State inspection of working and living conditions on board shing vessels, 2017, VI.
28 *ILO*, Optimización del cumplimiento de la legislación sobre el trabajo infantil a través de la colaboración entre los servicios de inspección del trabajo y los programas vigilancia y seguimiento del trabajo infantil, 2017, 3.

C. Comparative study of labour inspection in 5 Latin American countries

In Latin America, labour inspection and social security institutions are in charge of ensuring the enforcement of labour provisions in each country's legal system. These institutions, in turn, have their own oversight and enforcement mechanisms.

It is highly interesting to analyse labour inspection as one of these enforcement mechanisms, especially because it is a technique to externalize the enforcement of law. While it might present the common features marked by the guidelines set forth in ILO conventions, every country, as stated before, has not only historically developed labour inspection in different ways, but their structure, organization and functions have corresponded to the economic, legal, and social development, as well as the needs, of each nation.

For that reason, this section presents the results of a comparative study of labour inspection in five countries in the same geographical region: Latin America.

The choice of countries was based on the ratification and entry into force of Conventions No. 81 and No. 129: Argentina, Costa Rica, Colombia, and Uruguay. A fifth country, Mexico, was added despite the fact that it has not ratified these conventions because its conditions and similar socioeconomic context serve as a contrast in the analysis of the other countries.

Another factor that helped determine which countries to analyse was having a similar colonial past, as well as the influence of Article 123 of the Mexican Constitution, which marks the beginning of the social constitutionalism that was replicated in other constitutions in the region.

Article 123 is one of the victories the working class gained from the Mexican Revolution. Consequently, it stands as a rule of minimums to protect workers against their employers. This same trend is seen in its legislation, the Federal Labour Act, as well as in Latin American labour regulations.

»The evolution of Latin American labour legislation has undergone changes in various directions, without having essentially altered its original design. The structural reforms affected the social security systems to a greater extent, but they did not touch the essential features of old labour regulation models.«[29]

29 *Besunsán*, Regulaciones laborales, calidad de los empleos y modelos de inspección: México en el contexto latinoamericano, Naciones Unidas, 2008, 14.

I. Contextual Framework

In order to contextualize the issues and the scope of labour inspection in the 5 selected countries, some statistical data are given. Although these figures are intentionally broad, it makes it possible to obtain a general view of the economic and labour situation of each country.

The 5 selected countries have the following population data:

Table 1: *Total population per country in 2017 and percentage of populations over 60 and youth*

Countries	Total Population	% of population over 60	% of youth population
Argentina	44,044,811	15.20 %	23.90 %
Costa Rica	4,938,264	8.40 %	25.94 %
Colombia	49,353,115	11.68 %	25.74 %
Mexico	123,057,147	11.66 %	24.93 %
Uruguay	3,493,205	14.15 %	23.90 %

Source: Developed by the author using national indicators.[30]

The region analysed takes into account a representative sample of countries in the north, centre and south of Latin America and considers the number of inhabitants. There are two small countries like Costa Rica and Uruguay, two countries with a medium-size population like Argentina and Colombia, and Mexico with the highest number of inhabitants of the five.

The region has a high percentage of youth population compared to that of older adults. This provides these countries with a large capital for work made up of young human resources that do not yet have family responsibilities and few economic dependents. On the other hand, these youth exert much pressure on their governments because the jobs these youth require are not being created, as will be seen below. The countries with the highest levels of population ageing are Argentina and Uruguay.

Employment indicators for these countries are as follows:

30 Argentina: *Instituto Nacional de Estadística y Censos*, Proyecciones nacionales, (http://www.indec.gob.ar/nivel4_default.asp?id_tema_1=2&id_tema_2=24&id_tema_3=84) <August 14, 2017>.
Costa Rica: *Instituto Nacional de Estadística y Censos*, Estimaciones y proyecciones de población, (http://www.inec.go.cr/poblacion/estimaciones-y-proyecciones-de-poblacion) < August 14, 2017>.
Colombia: *DANE*, Población proyectada de Colombia (https://www.dane.gov.co/files/investigaciones/boletines/ech/ech/CP_empleo_jun_17.pdf) < August 14, 2017>.
Mexico: *Instituto Nacional de Estadística y Geografía, Encuesta Nacional de Ocupación y Empleo (ENOE),* Población de 15 años y más de edad, (http://www.beta.inegi.org.mx/proyectos/enchogares/regulares/enoe/) < August 15, 2017>.
Uruguay: *Instituto Nacional de Estadística*, Indicadores demográficos, (http://www.ine.gub.uy/web/guest/indicadores-demograficos1) < August 15, 2017>.

Table 2: *Economically active population and rates of employment, formality, informality and unemployment in 2017*

Countries	EAP in Millions	Employment Rate (CEPAL)	Workers in the Formal Sector	Informal Workers	Unemployment Rate	GDP Growth Rates (CEPAL)
Argentina	12.40	52.0 %	7.6 million	3.7 million	9.2 %	2.0 %
Costa Rica	2.08	54.0 %	916,000	919,000	8.5 %	4.1 %
Colombia	24.90	57.0 %	7.8 million	15 million	9.0 %	2.1 %
Mexico	53.70	57.2 %	22.1 million	29.7 million	3.3 %	2.2 %
Uruguay	2.20	57.8 %	965,200	1.2 million	7.9 %	3.0 %

Source: Developed by the author based on CEPAL[31] and national statistics.[32]
** Estimated number of people based on the employed population.*

It proves interesting to note that the countries with the highest growth in GDP are the smallest ones: Uruguay and Costa Rica.

The Latin American labour market is noted for having a high rate of underemployment and, as seen in Table 2, a high percentage of informal employment. This is a major challenge for labour inspectorates since the actions they carry out in following up on ILO conventions are limited to the oversight of secondary labour activities, and furthermore, in formal jobs. Therefore, it poses a big challenge to the governments analysed.

As seen in Table 3, the rate of unemployment is considerably lower in Mexico. However, this figure follows the way in which information is gathered for generating statistics. In Mexico, the National Institute of Statistics and Geography [Instituto Nacional de Estadísitica y Geografía – INEGI] measures unemployment through the ENOE, that is the national survey of occupation and employment. For this survey, the number of economically active population (EAP) is divided into employed and unemployed persons. According to the ENOE, employed persons are those who worked at least one hour a

31 *Comisión Económica para América Latina*, Estudio Económico de América Latina y el Caribe, La dinámica del ciclo económico actual y los desafíos de política para dinamizar la inversión y el crecimiento, 2017, 197.

32 Argentina: *Ministerio de Trabajo Empleo y Seguridad Social*, Indicadores generales (http://www.trabajo.gob.ar/left/estadisticas/bel/belDisplay.asp?idSeccion=1&idSubseccion=1&idSubseccion2=1) <August 15, 2017>. Costa Rica: *Instituto Nacional de Estadística y Censos*, Resultados Encuesta Continua de Empleo segundo trimestre 2017, (http://www.inec.go.cr/noticia/disminuyo-desempleo-cerca-de-un-punto) <15 ago 2017>. Colombia: *DANE*, Indicadores del mercado laboral (IML), (https://www.dane.gov.co/files/investigaciones/boletines/ech/ech/CP_empleo_jun_17.pdf) <August 14, 2017>. México: *Instituto Nacional de Estadística y Geografía*, Empleo y ocupación, (http://www.beta.inegi.org.mx/temas/empleo/) <August 15, 2017>.Uruguay: *Instituto Nacional de Estadística*, Encuesta Continua de Hogares mayo 2017, (http://www.ine.gub.uy/documents/10181/30865/ECH+Mayo+2017/e9a67abd-24b0-487a-b6f1-5a848b01bff0) <August 15, 2017>.

week, while the unemployed are those without a job, but are seeking one.[33] Therefore, both informal workers – even street vendors – are not considered unemployed.

II. Legal Framework: ILO Conventions and Legislation

One of the basic criteria for labour inspection assessment in each country is set forth in Conventions 81 and 129, which state that labour inspection regulations must be based on national laws and regulations. In turn, these must effectively protect and enforce the functions assigned to labour inspection.

Thus, the legal framework of labour inspection is made up of ratified ILO conventions and national legislation.

To this regard, we see that of the countries analysed only Mexico has not ratified the conventions. However, it does have a labour inspection system that is upheld by national legislation. »The Government of Mexico does not plan to ratify any of the instruments, given the areas of divergence between the instruments and national legislation.«[34]

Table 3: *Ratifications of ILO Conventions 81 and 129*

Countries	Ratification of Convention 81	Ratification of Convention 129
Argentina	17 February 1955	20 June 1985
Costa Rica	2 June 1960	16 March 1972
Colombia	13 November 1967	16 November 1976
Mexico	Not ratified	Not ratified
Uruguay	28 June 1973	28 June 1973

Source: Developed by the author using International Labour Organization data.[35]

Before discussing the analysis of national legislation, it should be pointed out that there are also provisions that promote labour inspection through regional international organizations:

For instance:

1. The Organization of American States (OAS) has an Inter-American Charter of Social Guarantees or the Declaration of the Social Rights of Workers adopted in Rio de Janeiro, Brazil, in 1947, and applies to the 5 countries analysed. This charter regulates labour inspection in Article 35, which establishes that workers are entitled to having the State provide a technical inspection service in charge of supervising faithful compliance with legal or labour

33 *INEGI*, Como se hace la ENOE Métodos y procedimientos, 2007 (http://www.inegi.org.mx/est/contenidos/espanol/metodologias/enoe/ENOE_como_se_hace_la_ENOE1.pdf) <January,14 2017>.

34 *ILO* (Fn. 16), 4.

35 *ILO*, Ratificación del C081, 1947, (http://www.ilo.org/dyn/normlex/es/f?p=NORMLEXPUB:11300:0::NO::P11300_INSTRUMENT_ID:312226) <August 9, 2017>.
Ratificación del C129 (http://www.ilo.org/dyn/normlex/es/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312274) <August 9, 2017>.

provisions, assistance, prevision and social security, as well as to its verifying results and suggesting appropriate reforms.[36]

Likewise, in paragraph 3, subsection B of Article 27 on Labour Rights of the American Declaration on the Rights of Indigenous Peoples, the OAS stipulated that States must take the necessary measures to »establish, apply or improve labour inspection and the enforcement of rules with particular attention to, *inter alia*, regions, companies, and labour activities in which indigenous workers or employees participate.«[37]

2. The Common Market of the South (MERCOSUR). Article 18 of the Mercosur Social and Labour Declaration (applicable to two of the countries analysed: Argentina and Uruguay) states that: »[a]ll workers are entitled to appropriate protection in respect of their working conditions and work environment. The States parties undertake to institute and maintain labour inspection services for the purpose of monitoring, throughout their territories, compliance with the standards guaranteeing the protection of workers and occupational safety and health.«[38] In addition to the above, there is also the 2009 Mercosur Regional Labour Inspection Plan, which is divided into two main dimensions: the first consists of oversight and the second focuses on training Labour Inspectors, among others.[39]

3. Central American Integration System (SICA). In 2013, the Declaration of the Council of Labour Ministers from Central America and the Dominican Republic was drafted in San Jose, Costa Rica. In this declaration several agreements were made. The one that interests us in this paper is the third agreement: »To support the various national efforts in pursuit of improving the socioeconomic conditions of decent employment in the region, the advancement of employment insertion for youth, in quality jobs and the eradication of child labour.«[40] Within this context, the highest priority is that of developing and strengthening youth employment programmes starting by exploring the labour market while strengthening employability, public employment services and their labour intermediation mechanisms, in addition to labour and occupational health inspection. It should be noted that of the countries analysed this agreement applies to Costa Rica with Mexico and Uruguay as regional observers.

4. Andean Community of Nations (CAN). This group (of which Colombia is part from among the countries selected for the comparative study in this section) has Decision 584 that includes the Andean Instrument on Work-

36 Inter-American Charter of Social Guarantees or the Declaration of the Social Rights of Workers, (http://www.ordenjuridico.gob.mx/TratInt/Derechos%20Humanos/OTROS%2001.pdf) <August 12, 2017>.

37 Labour Rights of the American Declaration on the Rights of Indigenous Peoples, 2016, (http://www.oas.org/es/sadye/documentos/res-2888-16-es.pdf) <August 15, 2017>.

38 Mercosur Social and Labour Declaration (http://www.sice.oas.org/labor/MERCOSUR_Sociolab.pdf) <August 14, 2017>.

39 (Fn. 38).

40 *ILO*, Consejo de Ministros de Trabajo de Centroamérica y República Dominicana, San José, Costa Rica, 2013, 13.

place Safety and Health, which addresses labour inspection in two articles. Article 10 establishes that »Country Members must adopt the necessary measures to strengthen their respective labour inspection services in order for these to guide the interested parties on issues related to workplace safety and health, to oversee the proper enforcement of the principles, obligations and rights in force in the matter and, if necessary, to apply the corresponding sanctions in the event of any violation.«[41] Likewise, Article 20 establishes the rights of workers or their representatives to request an inspection of working conditions.[42]

The main national laws that govern labour inspection in the selected countries are:

1. Argentina:

- The Constitution of the Argentine Nation, Article 14 bis
- Law on Labour Regulations, passed in March 2004 and with a specific title on »Labour Administration« which is divided into three chapters. The first refers to labour inspection
- Act 25.212, 1999, Federal Labour Pact. General Sanction Regulations for Labour Offenses to which the 23 provinces and the Autonomous City of Buenos Aires have subscribed. This act reaffirms the standing of the Central Inspection Authority of the Ministry of Labour, Employment and Social Security
- Act 25.877, 2004, Comprehensive System of Labour and Social Security Inspection SIDITYSS for the nation and provinces
- Act N° 14.329 ratifying ILO Convention No. 81
- Act N° 22.609 ratifying ILO Convention No. 129
- Act 18.695, which establishes the procedure for the ascertainment and prosecution of infringements to standards and regulations on the provision of work nationwide
- Act 26.940, Promotion of registered work and the prevention of labour fraud. This act created a registry of inspections, violations and sanctions, in addition to establishing the duty of reporting its activities and results to worker and employer organizations

2. Costa Rica:

- Political Constitution of the Republic of Costa Rica, Article 56
- Organic Law of the Ministry of Labour and Social Security, specifically Title V on the regulation of labour inspection

41 Andean Instrument on Workplace Safety and Health, (http://www.sice.oas.org/trade/JUNAC/Decisiones/DEC584s.asp) <August 18, 2017>.
42 (Fn. 41).

- Regulations for the Organization and Services of Labour Inspection, which entered into force on 3 February 2000
- Procedure Manual for Labour Inspection, adopted on 3 January 2001

3. Colombia

- Political Constitution of Colombia, Articles 6, 29 and 209
- Substantive Labour Code, Articles 485 and 486
- Labour Procedure Code, Chapter XVI (executive procedure)
- Act 584, 2000, which repeals and amends certain provisions in the Substantive Labour Code
- Act 1444 of 4 May 2011 that divides the Ministry of Social Protection into: the Ministry of Health and Social Protection, and the Ministry of Labour, the latter of which is in charge of performing labour inspections
- Decree 4108 of 2011 by which the objectives and the structure of the Ministry of Labour are modified and labour administration is incorporated
- Act 1562 of 11 July 2012 by which the occupational risk system is modified and other provisions on occupational health are issued
- Act 1610 of 2013 by which certain aspects of labour inspection and the formalization of employment are regulated
- Decree 1443 of 2014 by which provisions on the implementation of the Occupational Health and Safety Management System (SG-SST) are issued

4. Mexico

- Political Constitution of the United Mexican States, Article 123, Section A
- Federal Labour Act, Chapter V, Articles 540 to 550
- Organic Law of the Federal Public Administration, Article 40, Section I
- Federal Law on Administrative Procedures
- Federal Law on Metrology and Standardization
- General Regulations for Labour Inspection and the Application of Sanctions
- Federal Occupational Health and Safety Regulations
- Internal Regulation of the Ministry of Labour and Social Prevision (Articles 2 and 18)

5. Uruguay

- Constitution of the Eastern Republic of Uruguay, Articles 7, 53, 54, and 55
- Decree No. 680/977 entitled »General Inspectorate of Labour and Social Security. Occupational Hygiene« which creates the labour inspectorate

- Act on the Regulation on Occupational Accident and Occupational Illness Insurances No. 16.074
- Act for the Calculation of Bonuses in the Private Sector No. 12.840
- Weekly Rest Act No. 7.318
- Severance Payment Act No. 12.597
- Labour Proceedings Act No. 18.572
- Overtime Act No. 15.996
- Eight Hour Work Day Act No. 5.350
- Domestic Labour Act No. 18.065
- Sickness Insurance Act No. 18.211
- National Holiday Act No. 16.805.
- National legal frameworks show that as a result of the influence of Article 123 of the Mexican Constitution, all the countries institute the regulation of labour inspection in their constitutions and leave the corresponding rules to federal acts or decrees. Even then, all these countries have a specific provision for regulating labour inspection.

III. Functions

This section analyses whether each of the general functions of the labour inspection system as stated in Article 3 of ILO Convention No. 81 is duly provided for by national legislation.

These functions are:

1. To secure the enforcement of the legal provisions relating to conditions of work and the protection of workers while engaged in their work, such as provisions relating to hours, wages, safety, health and welfare, the employment of children and young persons, and other connected matters, in so far as such provisions are enforceable by labour inspectors;
2. To supply technical information and advice to employers and workers concerning the most effective means of complying with the legal provisions; and
3. To bring to the notice of the competent authority defects or abuses not specifically covered by existing legal provisions.[43]

These functions are rounded out by that established in Article 6, Point 2 of ILO Convention No. 129: »National laws or regulations may give labour inspectors in agriculture advisory or enforcement functions regarding legal provisions relating to conditions of life of workers and their families.«

To this effect, it was found that the legislation of the 5 countries analysed contain the following labour inspection functions: enforcement, sanction, pre-

43 Article 3 of ILO Convention No. 81.

vention and advisory services, information generation and informing the competent authorities of the defects.

These functions can be organized into 3 categories: preventive, remedial and information generation.

1. Preventive functions:

These are activities that are entrusted to labour inspectorates for the purpose of preventing occupational risks. Its main functions are prevention and advisory services. The activities consist of sharing information regarding workers' rights and obligations in a labour relationship and how to avoid the specific risks to which they are exposed in the performance of their work.

Sharing information can be at the request of the parties in general, in the form of advisory and technical assistance given on specific topics, or as an obligation for both labour inspection and employers. For example, in Mexico, the advisory role is even considered part of workers' training; in other words, it is part of the training each employer must provide.

The scope of application of the role of advisory services can also be broadened. In the case of Costa Rica, for example, the specific function of the country's labour inspection is to extend the functions of advisory and information services through *sui generis* actions. The first consists of giving talks to students in schools and training centres to familiarize them with issues regarding their future labour relations and working conditions. The second is to advise employer and worker union organizations through tripartite advisory labour councils.

It was also found that the preventive functions are more easily adjusted to real contexts by incorporating preventive provisions for common occupational risks, as well as modern ones, such as psychosocial risks or incorporating measures aimed at family well-being.

In other words, it is easier to add preventive measures for psychosocial risks, like mobbing, than detecting it, proving it and sanctioning it.[44]

2. Remedial:

These are functions that gave rise to labour inspection. The common features of these functions are those of helping with the enforcement of labour and social security law, on the basis of the vulnerability that arises from compliance. In other words, the State not only creates the regulations to govern employer-worker relations, but these regulations also protect workers from their employers in terms of existing vulnerability. And if this were not enough,

44 For instance, in Mexico from September to December 2015, the Ministry of Labour and Social Prevision performed 21,149 labour inspections to prevent workplace bullying and harassment, benefiting 557, 626 workers. Moreover, 163 people received training as promoters by means of an online course on the Prevention of Addictions in the Workplace.

compliance by the parties is not left to good will, but the inspectorate also oversees that the law is enforced through oversight, visits, audits, and so on.

The remedial functions found in the 5 countries are:

- Control
- Penalties and
- Bringing to the notice of the competent authority the defects

It was found that the 5 countries state that the objective of the function of control is to monitor compliance with workers' labour and social security rights. In the case of Mexico, this function is extended to protect, respect and guarantee workers' *human rights*, as well as their labour and social security rights. This broadens the legal framework for monitoring compliance in a labour relation.

Labour inspectors in Colombia are assigned the task of conciliation within the framework of labour disputes, which clearly corresponds to a remedial function.

In the case of penalties, Article 18 of Convention 81 states that »[a]dequate penalties for violations of the legal provisions enforceable by labour inspectors and for obstructing labour inspectors in the performance of their duties shall be provided for by national laws or regulations and effectively enforced.«

In this regard, the particularities of the following countries stand out:

In Argentina, the amount of the financial penalties imposed for violating labour regulations, the compliance of which is controlled by the labour inspectorate, are allocated to improving labour inspection services.[45]

Penalties can even include imprisonment.[46]

In Uruguay, legislation grants inspectors far-reaching powers to control the living conditions of agricultural workers and their families. Labour inspectors also have the authority to impose fines to employers that violate similar provisions that set forth the obligation of providing food to the worker's spouse, children and parents; the prohibition of using housing as warehouses; the obligation of encouraging children's schooling by enabling them to attend school; and the obligation of allowing a fired worker or member of his or her family to stay at the establishment in the case of illness. Lastly, national tripartite councils have been established to specifically examine issues of occupational health and safety in industry and commerce.[47]

One aspect that stands out in this analysis is the duty to bring to the notice of the competent authority defects and abuses not specifically covered by existing legal provisions, since its effects are twofold:

45 Articule 34 of Ley 25.877,
46 *ILO* (Fn. 16), 104.
47 *ILO* (Fn. 16), 23 ff.

The first is that it increases worker protection beyond the competence of labour inspection, taking this protection to be dealt with by other legal areas, like criminal law, when the worker is a victim of a crime like slave labour or child labour.

The second one refers to the possibility of increasing the competence of labour inspection to determine needs detected by the visits that should be included as part of the worker's protection and is not covered by legal provisions, as in the case of extending protection to teleworkers or protection against psychosocial risks when national legislation has yet to provide for such circumstances.

In this sense, it is interesting to note that in its »Labour Inspector Manual«, Colombia recommends that the records of inspection visits inform of the observations and indications needed for the special labour inspection, oversight and enforcement unit to have useful elements to improve the existing legal provisions.48 Likewise, based on Article 3, part 4, of Act 1610 of 2013, labour inspection in Colombia decides on the improvements to be made in labour legislation by implementing initiatives that make it possible to overcome the procedural gaps and defects found in the enforcement of existing legal provisions.

3. Information generation:

This function aims at generating statistical data and making them available. The comparative study found that the information generated follows the guidelines established in Articles 20 and 21 of ILO Convention 81 along two main lines. The first directly deals with the number of occupational risks that take place in a specific period. This information helps compile statistics on accidents in the workplace and occupational illnesses by year and create strategies and action plans for their prevention. The second one is on the work of the inspection services under their control. The aforementioned convention indicates that an annual report is to be published and should include:

- laws and regulations relevant to the work of the inspection service;
- staff of the labour inspection service;
- statistics of workplaces liable to inspection and the number of workers employed therein;
- statistics of inspection visits; and
- statistics of violations and penalties imposed.

48 *ILO* (Fn. 16), 50.

IV. Structure

According to that established in ILO Conventions 81 and 129, members are obligated to maintain »a labour inspection system.« This consists of a labour authority represented by public officials who are the inspectors that carry out the functions established by law. This can be done either autonomously or in coordination with agents or representatives from professional organizations whose activities supplement the work of the public officials.

Article 5 of ILO Convention No. 81 states that "the competent authority shall make appropriate agreements to promote:

(a) effective co-operation between the inspection services and other government services and public or private institutions engaged in similar activities; and

(b) collaboration between officials of the labour inspectorate and employers and workers or their organizations."

In this sense we find that the structure of the labour inspection systems of the countries analysed is:

1. Argentina

Since 1984, each of the 22 provincial states in the Argentine Republic (with the exception of the Province of Jujuy) organizes and autonomously oversees compliance with labour legislation. Each of the provincial labour administrations has its own team of inspectors and administrative personnel dedicated to this task. In turn, the staff offers various profiles in the way of carrying out inspection activities. It should be noted that the existing legislation on labour inspection varies in each provincial state and the inspection processes in place differ according to the circumstances of each province.[49]

Provinces have their respective institutional areas of administrative structures that are in charge of investigation activities, giving them the possibility to oversee general working conditions, as well as compliance with occupational hygiene and safety standards and the rules contained in collective labour agreements.[50]

2. Colombia

Based on that set forth in Article 115 of the Political Constitution of Colombia, the Labour Ministry is a public administrative body under the Executive Branch.

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49 *Ministerio de Trabajo y seguridad social*, Inspección del Trabajo en la Argentina, (http://trabajo.gob.ar/downloads/biblioteca_estadisticas/inspeccion98.pdf) <August 17, 2017>.

50 *Ministerio de Trabajo y seguridad social*, Perfil de la inspección del Trabajo, (http://www.trabajo.gov.ar/downloads/inspeccion/perfil_01-2011.pdf) < August 17, 2017>.

Labour inspection in Colombia is entrusted to the Special Unit of Labour Inspection, Oversight and Enforcement of the mentioned ministry, assigned to the Office of the Vice-Ministry of Labour. This unit has 32 regional directorates (one for each department, but some with jurisdiction in municipalities of other departments for reasons of administrative efficiency, two special offices (created by the Ministry in cities that are not department capitals, when political, economic and social conditions so require), and labour inspectorates. Regional directorates of the Ministry of Social Protection have offices in each of the department capitals[51] that administratively report to the Special Unit of Inspection, Oversight and Enforcement.[52]

3. Costa Rica

The National Labour Inspection Office is part of the Ministry of Labour and Social Security. It is the only one of the eight offices that is decentralized.

Article 6 of the Regulations on the Organization and Services of Labour Inspection alludes to the organizational structure of the National Labour Inspection Office, which is composed as follows:

a) One National Director
b) Regional Offices led by their respective regional heads
c) Legal Counsel, under the responsibility of the designated Co-ordinator
d) Management Consultancy, led by the corresponding Coordinator
e) Provincial and Cantonal Offices, led by the corresponding Coordinators
f) The National Technical Advisory Board and Regional Technical Advisory Boards that operate as bodies attached to the Labour Inspectorate and Regional Offices, respectively
g) Labour inspectors.[53]

4. Mexico

Mexico has a Federal and a Local Labour Inspectorate. Federal or local jurisdiction is determined by the Mexican Constitution that lists the most important industrial and service sectors for the country subject to the application of federal justice and, in the same way, to federal labour inspection. The rest falls under local jurisdiction.

Article 21 of the *General Regulations for Labour Inspection and the Application of Sanctions* states that labour authorities can perform inspections to determine administrative jurisdiction in order to establish whether a workplace is subject to oversight from a federal or local labour authority.

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51 Departments are the regional and political-administrative units found in Colombia.

52 *Molina*, JZ 2008, 67.

53 *ILO,* Reglamento de Organización y de Servicios de la Inspección de Trabajo (http://www.ilo.org/dyn/travail/docs/897/Decreto%20Nº%2028578-MTSS.pdf) <April 2, 2017>.

According to Article 545 of the Federal Labour Act, the federal level of the labour inspectorate is composed of the General Office of Federal Labour Inspection (DGIFT), which is part of the Ministry of Labour and Social Prevision (STPS), which is in turn part of the government and reports to the federal executive branch. The STPS has 32 federal labour delegations; that is, one for each state in the country. These delegations have their respective areas in charge of labour inspection under federal jurisdiction.

Meanwhile, local labour inspectorates have their respective offices that depend on the governments of the 32 states.

This is yet another reason why Mexico has not ratified the ILO conventions. Article 4 of Convention 81 states that:

1. So far as is compatible with the administrative practice of the Member, labour inspection shall be placed under the supervision and control of a central authority.
2. In the case of a federal State, the term *central authority* may mean either a federal authority or a central authority of a federated unit.

As seen in section d), Mexico has a federal labour inspectorate, but it also has 32 local ones that are completely independent from the central authority.

5. Uruguay

The General Inspectorate for Labour and Social Security is a federal body that depends directly on the Ministry of Labour and Social Security. However, to carry out its activities nationwide, labour inspection services are organized by departments and regions throughout Uruguay. These services at all times depend on the General Inspector for Labour and Social Security and there is a chief inspector in charge of each department or region.[54] Uruguay is divided into 5 regions and 19 departments.[55]

The organization of the General Inspectorate for Labour and Social Security unit is structured as follows: first, it is headed by the Head of the Inspectorate, a Technical Advisory, four divisions (the Registry Division of the General Inspectorate for Labour and Social Security, the Legal Division, the General Workplace Conditions Division and the Environmental Conditions Division) and three departments (the Administration Department, the Department for the Coordination and Supervision of Inspections to General Working Conditions (CGT) and the Department for the Coordination and Supervision of Inspections to Environmental Conditions at the Workplace (CAT).[56]

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54 *Dirección Nacional de Impresiones y Publicaciones Oficiales,* Decreto 680/977 Inspección General del Trabajo y la Seguridad Social. Seguridad Laboral. Higiene Ocupacional, Uruguay, (https://www.impo.com.uy/bases/decretos/680-1977) <August 15, 2017>.

55 *Ministerio de Economía y Finanzas*, Regiones, (https://www.mef.gub.uy/10101/8/areas/regiones.html#) <August 15, 2017>.

56 *Ministerio de Trabajo y Seguridad Social*, Organigrama, (https://www.mtss.gub.uy/c/document_library/get_file?uuid=fa0b3105-ff02-4019-9d37-39f8c3e71640&groupId=11515) <15 ago 2017>.

One extremely important aspect of the labour inspectorate structure lies not only in how it is organized, but in the number and training of labour inspectors.

Article 10 of Convention No. 81 provides that:

The number of labour inspectors shall be sufficient to secure the effective discharge of the duties of the inspectorate and shall be determined with due regard for:

(a) the importance of the duties which inspectors have to perform, in particular --
  (i) the number, nature, size and situation of the workplaces liable to inspection;
  (ii) the number and classes of workers employed in such workplaces; and
  (iii) the number and complexity of the legal provisions to be enforced;

(b) the material means placed at the disposal of the inspectors; and

(c) the practical conditions under which visits of inspection must be carried out in order to be effective.

On this point, Table 4 shows that the number of inspectors per country is not enough to attend either the number of enterprises per country or the number of EAP.

Table 4: *Labour inspectors by country 2016*

Countries	Number of inspectors	Percentage per 10,000 employed
Argentina	440	0.4*
Costa Rica	100	0.5
Colombia	904	0.4
Mexico	926	0.2
Uruguay	113	0.8**

Source: Developed by the author based on national data provided by the Labour Ministries and ILOSTAT[57]
** Data from 2014 ** National data*

In this table, certain inconsistencies stand out. The first is that if Mexico is compared to Colombia, the number of inspectors is quite similar despite

57 *ILOSTAT,* Cantidad de inspectores por 10‘000 personas ocupadas (%), (http://www.ilo.org/ilostat/faces/oracle/webcenter/portalapp/pagehierarchy/Page27.jspx?subject=OSH&indicator=LAI_INDE_NOC_RT&datasetCode=A&collectionCode=YI&_afrLoop=100651005174796&_afrWindowMode=0&_afrWindowId=13uqhqhpsv_83#!%40 %40 %3Findicator%3DLAI_INDE_NOC_RT%26_afrWindowId%3D13uqhqhpsv_83 %26subject%3DOSH%26_afrLoop%3D100651005174796 %26datasetCode%3DA%26collectionCode%3DYI%26_afrWindowMode%3D0 %26_adf.ctrl-state%3D13uqhqhpsv_103) <14 ago 2017>.
Uruguay: *Ministerio de Trabajo y seguridad Social*, Estudios sobre Trabajo y Seguridad Social, 86, (https://www.mtss.gub.uy/c/document_library/get_file?uuid=cf6ff492-ffee-49c3-89be-fd3fb96ec895&groupId=11515) <August 14, 2017>.

the fact that the countries have different numbers of workers and inhabitants. However, in the case of Mexico, only the number of federal inspectors, and not local ones, were taken into account. A second inconsistency appears when comparing the number of inspectors per working population. According to the ILO database (ILOSTAT) figures, the world average stands at 0.6 inspectors per 10,000 employed persons. Uruguay has 0.8 and Mexico, only 0.2 while countries like Germany have 1.5, Romania, 1.9 and China-Macau, 2.7, which leave the Latin American countries under study far behind.

The conventions alluding to labour inspection state that inspectors should be public officials with assured job stability and independent of changes of government and of any improper external influences.

This point is also a key issue for Mexico's non-ratification of the conventions since inspectors are public officials without job stability.

In the rest of the countries analysed, inspectors do have job stability.

The last point to underline in terms of structure is that stipulated in Article 5 of Convention No. 81:

The competent authority shall make appropriate arrangements to promote:

(a) effective co-operation between the inspection services and other government services and public or private institutions engaged in similar activities; and

(b) collaborate between officials of the labour inspectorate and employers and workers or their organizations.

On this particular point, it can be said that:

In Argentina, Autonomous Communities can empower technical officials as collaborators of the Inspectorate on issues of the prevention of occupational risks. In Colombia, the Occupational Health and Safety Management System involves both private and public enterprises in the prevention of and protection against physical and psychosocial risks in the workplace. Furthermore, paragraph 2 of Article 3 of Law 1610 of 2013 establishes that Labour Ministry officials can request collaboration from other public agencies in the exercise of their duties. In Costa Rica, the National Technical Advisory Council and the Regional Technical Advisory Councils operate as bodies affiliated to the Labour Inspectorate and Regional Offices, respectively. Meanwhile, in Mexico, there are tripartite commissions in companies in charge of overseeing issues of occupational safety and hygiene.

V. Inspections

The ILO conventions stipulate that the workplaces must be inspected at the frequency and with the diligence needed to guarantee the effective enforcement of the relevant legal provisions. Thus, each country determines the frequency and type of inspections to be performed, mainly: at the request of the party, at its own initiative or spontaneously and to enforce specific issues like child labour or irregular migrants, and so on.

Hence, we find that according to ILO database information the countries in question carried out the following number of inspections in 2015:

Table 5: *Labour inspections per country carried out in 2015 according to ILOSTAT*

Countries	No. of inspections
Argentina	133623
Costa Rica	22*
Colombia	10458
Mexico	128864
Uruguay	17002**

Source: Developed by the author based on national data provided by Labour Ministries[58] and ILOSTAT
** Limited to in situ/physical inspections ** According to national data*

Costa Rica stands out as the country with the least number of inspections. This is due to several reasons. First of all, Costa Rica is the country with the smallest population. Secondly, each country reports its inspections to the ILO and Costa Rica only reported *in situ* labour inspections without including documentation audits as other countries do. In any case, the information analysed underscores the constant complaint of all the countries under study that they cannot carry out the necessary inspections, among other reasons, due to a lack of personnel and financial resources.

The types of inspections seen in the countries analysed are usually on their own initiative or through a claim with certain peculiarities when carrying out an inspection. For example:

In Mexico, there are two types of inspections according to the General Regulations for Labour Inspection, classified as ordinary and extraordinary inspections. There are three types of ordinary inspections:

a) Initial inspections. These are the first ones carried out at workplaces, or due to expansion or modifications of said workplaces;

b) Periodic inspections. These are carried out every twelve months;

c) Verification inspections. These are carried out when it is necessary to verify compliance with safety and hygiene measures or directives that have been previously issued by labour authorities.

58 Argentina: *Ministerio de Trabajo y Seguridad Social*, Memorial Institucional, 2016, 117. Uruguay: *Ministerio de Trabajo y seguridad Social*, Estudios sobre trabajo y seguridad social, 2016, 86. *ILOSTAT,* Número de visitas de inspección del trabajo a lugares de trabajo durante el año, (http://www.ilo.org/ilostat/faces/oracle/webcenter/portalapp/pagehierarchy/Page27.jspx?subject=OSH&indicator=LAI_VIST_NOC_NB&datasetCode=A&collectionCode=YI&_afrLoop=100578808763423&_afrWindowMode=0&_afrWindowId=13uqhqhpsv_42#!%40%40%3Findicator%3DLAI_VIST_NOC_NB%26_afrWindowId%3D13uqhqhpsv_42%26subject%3DOSH%26_afrLoop%3D100578808763423%26datasetCode%3DA%26collectionCode%3DYI%26_afrWindowMode%3D0%26_adf.ctrl-state%3D13uqhqhpsv_86) <August 14, 2017>.

Extraordinary inspections proceed when labour authorities become aware, by any means, of possible violations to labour legislation.[59]

In Uruguay, inspections can take place in three ways:

a) Inspection by business activity. The inspector general gives the order to carry out the inspection based on the inspections scheduled for the year and depending on the business activity of the source of employment;

b) At their own initiative or by zone. Labour inspectors have the authority to carry out inspections in their previously established zones by their own initiative in cases where a gross infringement to labour legislation has been observed,

c) By complaint. Under complete anonymity, workers can directly lodge a complaint to initiate the procedure.[60]

As to Argentina, there are two basic procedures used by labour inspection to verify compliance with labour regulations. The first consists of physical visits to work centres and workplaces. In this case, all the pertinent documents are requested for review to verify that these workplaces are in order, followed by a visual inspection of the facilities. In the second procedure, the facts are corroborated by having the company or the workers appear before the inspector official at a designated public office or by examining the documentation found in the file.

In Costa Rica, the Procedure Manual for Labour Inspection has three categories of inspections:

a) By origin: This type of inspection is carried out as a result of a complaint filed with the labour inspectorate. Workers can initiate an inspection by appearing at the offices in person, by phone or anonymously.

b) By nature: This inspection aims at persuading the employer to correct the violations found before going before a labour court. It also identifies the areas with the highest rates of violations, for the purpose of building, verifying or adapting indicators to direct or redirect the proceedings.

c) By coverage: This is divided in two classes: a comprehensive visit and targeted visit. The first consists of detecting violations that may come to happen at a given work centre. The second type arises from previous studies of occupational vulnerability and labour violations in different sectors. There are established procedures for each one.[61]

In Colombia, at the request of the party or by their own initiative according to that set forth in Article 6 of Law 1610 of 213, the labour inspectorate can carry out inspections to enforce labour legislation. These inspections can

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59 Reglamento General de Inspección del Trabajo y Aplicación de Sanciones. 2014; Diario Oficial de la federación.

60 *Ministerio de Trabajo y Seguridad Social de Uruguay,* Inspecciones, (https://www.mtss.gub.uy/web/mtss/inspecciones) <April 9, 2017>.

61 *Ministerio de Trabajo y Seguridad Social*, Manual de Procedimiento de la Inspección de Trabajo*,* 2014.

encompass the conditions of safety, hygiene, and risk prevention, as well as the enforcement of the regulations as required by the legal framework of the country.[62]

Meanwhile, Argentina has specially trained inspectors in charge of monitoring child labour. In Costa Rica and Uruguay, the assistance of law enforcement authorities is allowed for carrying out labour inspections and for protecting the physical integrity of the inspectors.

As mentioned above, in Mexico, the employer or the employer's representative must be notified of the inspector's presence in order to perform an inspection, even if it only involves documentation.

In summary, national inspections can be divided according to the classification established by the ILO, as seen in the following table:

Table 6: *Types of inspections in selected countries*

Type of inspection	General description	Country	National/ Local Name
Routine Visits	These inspections are carried out to check compliance with labour and social security provisions at workplaces.[63]	Costa Rica	By Initiative
		Mexico	Ordinary
		Uruguay	By business activity
		Colombia	Administrative Visits
		Argentina	Routine action
Visits by request	These are visits aimed at settling a problem concerning the application of a legal text, the prevention of a hazard, the exercise of trade union rights, or to give an opinion on the layout of a workshop or the planning of social services, or again to investigate a worker's complaint.[64]	Costa Rica	At the request of a party
		Mexico	Supervision
		Uruguay	By complaint
		Colombia	By complaint or information from the public official
		Argentina	Complaints
Emergency Visit	This is the type of visit determined by events that require inspectors to be on spot without delay.[65]	Costa Rica	Targeted
		Mexico	Extraordinary
		Uruguay	By initiative or zone

Source: Developed by the author based on ILO data and national legislation[66]

Lastly, it should be noted that Article 12 of ILO Convention No. 81 says that: »Labour inspectors provided with proper credentials shall be empowered:

62 Ley No. 1610 del 2013, 2013; Presidencia de la República.
63 *ILO*, Inspección del trabajo, lo que es y lo que se hace, guía para los trabajadores, 2015, 26.
64 (Fn. 63).
65 (Fn. 63).
66 (Fn. 63).

(a) to enter freely and without previous notice at any hour of the day or night any workplace liable to inspection; […]« This is yet another reason why Mexico has not ratified this convention since its internal legislation requires that employers be notified at least 24 hours prior to the visit.

VI. Social security

In general terms it can be noted that in all the countries analysed, labour inspection is for social security purposes:

1. To verify that the workers are duly registered with a social security institution so that they can receive the corresponding benefits. This means that the dates of entry and the wage amount should be the actual ones.
2. To control compliance with occupational hygiene and safety standards in order to prevent occupational hazards, including the immediate closure of the workplace if the inspector believes that the workers are deemed to be in imminent danger.

On the other hand, although the rules regulating labour inspection generally stipulate that inspectors have the power to verify compliance with social security laws, the reality is that there are no provisions for monitoring anything beyond the benefits granted by occupational risk, maternity and health insurances.

In fact, there are laws like the ones in Mexico that expressly state that pensions and social benefits lay outside the sphere of competence of labour inspection.[67]

D. Labour inspection and the implementation of workers' labour and social security

Each country has developed legal enforceability mechanisms for the social rights conferred to workers and granted to them in view of their labour relation. Among these mechanisms, there are traditional ones like legal proceedings in which any worker can sue his or her counterpart to demand the fulfilment of his or her rights.

Even then, since these are asymmetric relations arising from a labour relation between the employer and the worker, the law has developed mechanisms by means of externalization. These measures are implemented by authorities in favour of the workers, to help contribute to the recognition of and the protection of workers' labour and social security rights.

With the information analysed so far, there is no doubt that labour inspection is an effective instrument for enforcing workers' labour and social security rights.

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67 *Secretaría del Trabajo y Previsión Social*, Cuarto Informe de labores de la Secretaría del Trabajo y Previsión Social, 2016, 38.

As mentioned in the section on history, labour inspection emerged as one more technique for enforcing workers' rights when the role of the State was separated into two: that of a judge and that of an inspector.

Together, the various functions, scope of action, punitive or enforcement mechanisms, and the legal framework applicable to labour inspection give life to a way of externalizing the enforcement of the law in favour of a specific social group: workers.

I. The implementation of workers' rights

The objective and substantive provisions that regulate workers› rights establish not only workers' rights, but also the procedural mechanisms for them to assert these rights before a judge and, therefore, seek justice; that is, ensure the enforceability of these rights.

In Latin America, the enforcement of labour rights is entrusted to legal systems, certain authorities like the social security institutions that have their own oversight and enforcement mechanisms, and of course labour inspection.

Along this line of thought, labour inspection is the main instrument for the »externalization of the enforcement of the law« (*Externalisierung der Rechtsdurchsetzung*), and specifically for the enforcement of social rights.

In the words of Dr Becker: In labour law, special techniques for the enforcement of social rights have been developed; again, they may vary according to the respective legal system. This includes, firstly, the externalisation of the law enforcement process, i. e. the dislocation of the latter from the labour relationship or, respectively, from the »general case« of enforcement by the employee himself, and transferral to the public authorities. This is based on the notion that the enforcement of (certain) social rights is not only in the interest of the individual, but also in the general interest.

1. From inspection to the enforcement of the law

The implementation of workers' rights through labour inspection – sometimes – provides workers with a tool that is more accessible and expeditious than legal mechanisms themselves.

Inspections requested by workers not only contribute to strengthening a fair labour culture that empowers workers, but it also benefits employers because the advisory function is for both the workers who request advice and their employers.

Inspections by request and by initiative make it possible for the application of justice to reach out to workers without the need for them to intervene. This helps balance out the parties when the relations are asymmetric, especially in the case of workers living in extreme poverty.

Meanwhile, thematic inspections contribute to achieving certain national and/or international objectives, such as the eradication of the exploitation of child labour, slavery, irregular work migration, etc.

Together, these inspections contribute to making the world a fairer place and work better quality, which could have positive repercussions on other issues, like migration, delinquency, and so on.

2. Labour and social security rights and their nexus with criminal law through labour inspection

Non-compliance or violation of labour and social security rights is not a crime. Therefore, the sanctions the labour inspectorate establishes are administrative offenses or economic sanctions.

Despite the above, there are certain behaviours that are considered crimes and that due to their nature cannot be punished by the Labour Inspectorate, but it can file a complaint with the competent authority.

In Latin America, the powers given to labour inspectors are limited to working conditions, as mentioned above. However, inspectors can play a decisive role in the fight against people trafficking for purposes of labour exploitation, child exploitation, sexual harassment, injuries, intimidation, threats, extortion, etc. The crimes vary according to the legal classification of each country. Generally, inspectors have greater powers than police or tax authorities to access most work centres and gather information that can serve as a basis to undertake investigations that can even lead to criminal proceedings.[68]

Specifically, from the countries analysed it was found that labour inspectorates have certain powers associated with criminal law, such as:

In Argentina, the labour inspectorate can file the corresponding complaints in cases of child labour, undeclared work[69] or labour trafficking. Most of the investigations on this last item are initiated by reports filed by the labour inspectorate.[70]

In Colombia, labour inspectors must notify the competent judge, notwithstanding the administrative labour investigation they are obligated to report, if the employer refuses to negotiate with trade unions that have presented their petitions as stipulated by judicial procedures as this violates the right of association and of assembly set forth in Article 200 of the Criminal Code.

In Mexico, Article 1003 of the Federal Labour Act states that both labour inspectors and the presidents of the Conciliation and Arbitration Boards are obligated to report to the Public Prosecutor about any employer that has stopped paying wages, that pays his workers less than the minimum wage in force, that does not register his workers with the Mexican Social Security In-

68 *OIM*, Trata de personas con fines de explotación laboral en Centroamérica, 2013, 49.
69 *ILO*, Sanciones de la Inspección del Trabajo: Legislación y práctica de los sistemas nacionales de Inspección del Trabajo, 2013, 11.
70 *Procuraduría de trata y explotación de personas*, Trata laboral en Argentina, 2014.

stitute, or that registers his workers under a salary lower than what the workers actually receive. In turn, Article 387, Section XVII of the Federal Criminal Code typifies these behaviours as fraud – »Whoever, availing himself or herself of the ignorance or the poor economic conditions of a worker in his or her service, pays the worker a lesser amount than what legally corresponds for the tasks the worker performs or makes the worker give receipts or payment vouchers of any kind for amounts of money exceeding what was effectively given.« If the labour inspector disregards these behaviours and does not report them, the inspector is also held responsible, according to Article 547, Section VI of the Federal Labour Act.

In this same country, there is an Inspection Protocol to prevent and detect people trafficking in work centres.[71] This protocol states that the labour inspector who detects workers victims of people trafficking or any other crime must report it to the corresponding authorities.

In Uruguay, Article 7 of the Law No. 16074 on the Regulation of Insurance for employment accidents and occupational illnesses states that »On proving wilful intent or gross negligence on behalf of the employer in the event of an employment accident or occupational illness, the acting officials of the National Insurance Bank must report said circumstance to the Inspector General of Labour and Social Security, who shall, under their strict functional responsibility, report to the competent criminal court the acts that constitute an alleged crime against the life or the physical integrity of the workers, submitting a statement of the available administrative precedents.«[72]

These examples make it possible to conclude that both areas of law are connected and that despite the fact that the inspectors' powers do not apply to criminal matters, inspectors do have the obligation to bring to the notice of the responsible authority the acts that constitute crimes.

3. Labour inspection as a mechanism to protect informal workers and the poor

In Latin America and the Caribbean, labour inspection has been considered a tool to reduce informal labour »through a culture of compliance, the communication of regulations and sensitizing actors toward compliance, or in other cases, facilitating [the process] to do so.«[73] In most cases, informal labour is coupled with poor working conditions: no social security and a low salary, factors that undoubtedly contribute to poverty. This is why governments rely on the reduction of informal labour as a means to reduce poverty.

Despite the above, it must be said that there are some problems of an administrative nature that hinder it from functioning properly, including the

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71 *Secretaría de Trabajo y Previsión Social*, Protocolo de inspección para prevenir y detectar la trata de personas en los centros de trabajo, 2017.

72 Ley No. 19.196 Accidentes laborales. 2014; Parlamento de Uruguay.

73 *ILO- FORLAC*, Tendencias de la inspección del trabajo frente a la formalización: experiencias de América Latina y el Caribe, 2015, 8.

shortage of inspectors and their lack of training, as well as the fact that »inspection is generally concentrated in urban areas, in the formal sector and attending the complaints of salaried workers, often neglecting to attend workers in rural zones or difficult access areas.«[74]

This is why the ILO has given Latin America and the Caribbean some recommendations that refer to the implementation of policies »on matters of labour and social protection: increased coverage of social security, compliance with minimum wages, the formalization of labour contracts in writing, the strengthening of labour inspection and the advancement of worker and employer organizations.«[75]

In the case of Mexico, child labour-related poverty has dropped due in part to the dynamics of inspection with regard to child labour.[76]

II. The main problems

Generally speaking, the problems found in the countries analysed can be sorted into the following points:

1. Limitations in the scope of competence

These are generalized limitations that are only a problem in Latin America, but worldwide. However, it undoubtedly affects developing countries more. They include limitations in overseeing formal labour relations, specific areas of production and the size and number of work centres compared to the number of workers.

2. Design flaws

- The high cost of compliance and the low cost of non-compliance:[77]

  In this context, it can be pointed out that the costs involved in complying with labour legislation are very high for micro-enterprises that also have to compete with large companies while the costs of non-compliance with said provisions are very low. This also benefits large companies at the expense of the quality of workers' performing their work activities.
- Difficulties in coordination among the various labour authorities
- A restricted relation between judicial bodies and the labour inspectorate. There are more and more complaints filed by labour unions contending ju-

74 *ILO- FORLAC*, (Fn. 74), 3.
75 *ILO*, OIT: 52 Millones de trabajadores en el campo en América Latina y el Caribe, (http://www.ilo.org/americas/sala-de-prensa/WCMS_532477/lang--es/index.htm) <June 15, 2017>.
76 *PUDH UNAM*, El persistente problema del trabajo infantil y s. u. relación con la pobreza de niños, niñas y adolescentes (http://www.pudh.unam.mx/perseo/el-persistente-problema-del-trabajo-infantil-y-s. u.-relacion-con-la-pobreza-de-ninos-ninas-y-adolescentes/) <August 15, 2017>.
77 Besunsán, (Fn. 29), 14.

dicial bodies' lack of support to labour inspection measures as in the case of Costa Rica.[78]

- Less authority and lower salaries than tax inspectors. In some of the countries examined, labour inspectors have lower salaries and their authority is belittled by employers (Mexico and Colombia).

3. Corruption

Corruption is a problem that afflicts certain Latin American countries at all levels, and labour inspection is no exception. Employers' compliance with their obligations is undermined by a broad scope of tolerance towards certain attitudes and labour rights violations on behalf of labour inspection authorities. This results in corruption defined by two elements: the lack of resources to pay inspectors' salaries and/or employers' poor acceptance of the provisions in force.[79]

Convention No. 81 already includes some anti-corruption provisions. For instance, Article 15 states that: »labour inspectors shall be prohibited from having any direct or indirect interest in the undertakings under their supervision.« Only one specific provision was found in Uruguay's Law 16226, of 29 October 1991, that prohibits an inspector from intervening in any matter directly or indirectly related to his or her private employment.

In Mexico, inspectors are prohibited from receiving gifts and gratuities from workers, from employers or from their representatives.

In Costa Rica, we find that Article 100 of the Organic Law of the Ministry of Labour and Social Security sets forth the sanctions a labour inspector would receive for incurring in bribery. Meanwhile, the Costa Rican Criminal Code establishes the sanctions for officials who receive any handout for doing or not doing acts that go against their activities.

Article 340. – The public official who, whether by himself or through a related party, receives a handout or any other undue advantage or accepts the promise of compensation of that nature to engage in an act inherent to his functions shall be punished by imprisonment for six months to two years.[80]

4. Lack of suitable resources:

- Financial and material

  In Latin America, labour organizations or labour inspector unions often point to the presence of financial difficulties that affect labour inspection. A national trade union centre in Uruguay and a professional organization of labour inspectors in Costa Rica have reported the lack of paper or office

78 *ILO* (Fn. 16), 60.
79 *Bensusán,* JZ 2009, 1010.
80 *Organización* de *los Estados Americanos*, Código Penal Costa Rica, (http://www.oas.org/dil/esp/codigo_penal_costa_rica.pdf) <April 2, 2017>

supplies. In Costa Rica, there are accounts of shortages in certain inspection offices, in addition to the lack of arrangements for the reimbursement of travel expenses.[81]

- Manpower

In general, the number of inspectors in the 5 countries examined was not consistent with the needs of the job. Consequently, inspection visits and the oversight that can be undertaken are insufficient.

In addition to the above, labour inspectors' lack of training affects the effectiveness of the inspection.[82] Accordingly, there is talk of the training that inspectors could have. In the case of Mexico, the only professional training required is to have finished a bachelor's degree or its equivalent. As a result, labour inspectors are not specialized in any of the fields required, such as knowledge of official or minimum standards on safety and hygiene, or labour legislation as the basis of his or her education. While it is true that the professional conditions required in each of the countries examined is different, a labour inspector should generally fit a profile that meets the technical qualifications needed to attend »the scope of enforcement of the provisions that the inspector must verify: lawyers, sociologists, engineers, chemists, physicians, psychologists, etc.«[83]

E. Conclusions

This history of labour inspection began with the State protection of workers opposite their employer and the separation of the role of judges into two: the first as a judge for conflict resolution between individuals, and the second as a State authority that advises and oversees the enforcement of labour law while punishing non-compliance with labour legislation.

This State authority went from simple acts statutes that compiled functions to the global recognition of binding international provisions, as well as the expansion of functions, field of competence, etc.

The ILO has contributed to bringing labour inspection to the attention of most of its members through multiple conventions, protocols and recommendations, but in addition to its collaboration and continuous updating, it has also demonstrated that the asymmetrical difference in labour relations between the employer and workers, new forms of work procedures (flexible contracting, informality, Industry 4.0, etc.) and global factors (economic crises, climate change, etc.) have still made it necessary, even after 100 years of the establishment of labour norms, to oversee compliance.

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81 *ILO* (Fn. 16), 60.

82 *ILO*, Conferencia Internacional del Trabajo, Informe III, 1999, 203.

83 *ILO*, Los procesos de selección y formación de los inspectores de trabajo: prácticas, programas y lagunas, 2012.

The ILO's versatility has made great strides on various problematic labour issues, such as the eradication of child labour, where the ILO has worked together with countries to optimize compliance with child labour legislation through collaboration between labour inspection services and oversight, and follow-up programmes on child labour.

In Latin America, 18 countries have ratified Convention No. 81 and 11 and 129. Argentina, Costa Rica, Colombia and Uruguay are among part of nations. Despite Mexico's not having ratified these conventions because they contravene its national legislation, this fact attests to the importance of labour inspection in the enforcement of social laws.

The comparative study of the legal framework of labour inspection in these 5 countries has revealed that there are great similarities since:

- All the countries (except Mexico) have ratified the two main ILO labour inspection conventions.
- Each of the regional integration organizations (OEA, MERCOSUR, SICA and CAN) of which the countries analysed are members have provisions regarding the importance of labour inspection.
- In all the countries labour inspection is substantiated in their highest law: the constitution. Although there are certain provisions in the regulatory legislation in the constitutions, the laws that truly bring about labour inspectorates are administrative in nature: decrees or regulations.

As to functions, the comparative study finds that the 5 countries analysed have the following labour inspection functions contained in their respective legislations: control, sanction, prevention and advisory services, the generation of information, and bring to the notice to the competent authorities the defects.

The structure of the inspectorate is different in each country. However, except for Mexico, the countries uphold the requirement of depending directly on the labour ministry or its central counterpart (federal or national).

Inspectors are public officials and in the literature examined, a common denominator is that they do not have the sufficient number of inspectors or sufficient amounts of resources to perform their duties.

The types of inspections in each country vary although it is possible to say that they all have inspections by complaints, voluntary or anonymous ones; of oversight, of review, of documentation, of working conditions *in situ* and targeted ones.

From this study, it can be gathered that, on the one hand, labour inspection is an effective tool to externalize the enforcement of workers' labour and social security rights in such a way that it contributes to complying with the law. Moreover, by having legislation that empowers inspectors to report cases with the corresponding authorities, including criminal ones, it is an effective tool for the implementation of the actions propounded by both governments and

international organizations to fight against labour exploitation, child labour, people trafficking, and so on.

On the other hand, the problems that afflict labour inspection in most of these countries reduce its potential. The main problems detected are corruption, a lack of human and material resources for inspectors to perform their duties and specialized training in specific areas, the flaws in the design of labour inspection, and limitations in the scope of competence, as in the case of informal labour or the geographic location of work centres.

Even so, it can be considered an outsourcing mechanism as they only contribute to legal compliance. Since they are not seen as the main mechanism to ensure justice, they are simply aids and from that perspective they fulfil their function; they can be improved, but they do fulfil their function.

F. Research Sources

Beneyto Calabuig, Damian, La Inspección de Trabajo. Funciones, actas y recursos, España, 2012.

Bensusán Graciela, La Inspección del Trabajo en América Latina: teorías, contextos y evidencias Estudios Sociológicos, JZ, 2009.

Besunsán Graciela, Regulaciones laborales, calidad de los empleos y modelos de inspección: México en el contexto latinoamericano*,* México, 2008.

Biblioteca Virtual en Salud Desarrollo Sostenible y Salud, Antecedentes, Nicaragua, 2013, http://www.bvsde.org.ni/Web_textos/UNICA/UNICA0007/Antecedente.pdf (accessed 7 ago 2017).

Comisión Económica para América Latina, Estudio Económico de América Latina y el Caribe, La dinámica del ciclo económico actual y los desafíos de política para dinamizar la inversión y el crecimiento, CEPAL, Chile, 2017.

Espuny Tomas, María Jesús, Los colaboradores de la Inspección del Trabajo desde la historia*, Revistes Catalanes amb Accés Obert* »IUSLabor«*,* JZ 2007.

ILO- FORLAC, Tendencias de la inspección del trabajo frente a la formalización: experiencias de América Latina y el Caribe, Perú, 2015.

ILO, Conferencia Internacional del Trabajo, Informe III, Ginebra, 1999.

ILO, Consejo de Ministros de Trabajo de Centroamérica y República Dominicana, Costa Rica, 2013.

ILO, Guidelines on flag State inspection of working and living conditions on board shing vessels, Switzerland, 2017.

ILO, Inspección del trabajo, lo que es y lo que se hace, guía para los trabajadores, Suiza, 2011.

ILO, Inspección del Trabajo, Estudio general relativo al Convenio sobre la inspección del trabajo, 1947 (núm. 81), y al Protocolo de 1995 relativo al Convenio sobre la inspección del trabajo, 1947, a la Recomendación sobre la inspección del trabajo (minas y transporte), 1947 (núm. 82), al Convenio sobre la inspección del trabajo (agricultura), 1969 (núm. 129), y a la Recomendación sobre la inspección del trabajo (agricultura), 1969 (núm. 133): tercer punto del orden del día: informaciones y memorias sobre la aplicación de convenios y recomendaciones, Ginebra, 2006.

ILO, Los procesos de selección y formación de los inspectores de trabajo: prácticas, programas y lagunas, Suiza, 2012.

ILO, OIT: 52 Millones de trabajadores en el campo en América Latina y el Caribe, Perú, 2016.

ILO, Optimización del cumplimiento de la legislación sobre el trabajo infantil a través de la colaboración entre los servicios de inspección del trabajo y los programas vigilancia y seguimiento del trabajo infantil, Suiza, 2017.

ILO, Sanciones de la Inspección del Trabajo: Legislación y práctica de los sistemas nacionales de Inspección del Trabajo, Ginebra, 2013.

IOM, Trata de personas con fines de explotación laboral en Centroamérica, Costa Rica, 2013.

Kurczyn Villalobos, Patricia, El trabajo de los niños. Realidad y legislación, Boletín Mexicano de Derecho Comparado, JZ 1989.

Ministerio de Economía y Finanzas, Regiones, Uruguay, 2017, https://www.mef.gub.uy/10101/8/areas/regiones.html#, (accessed 15 ago 2017).

Ministerio de Trabajo y seguridad Social, Estudios sobre Trabajo y Seguridad Social, Uruguay, 2016. https://www.mtss.gub.uy/c/document_library/get_file?uuid=cf6ff492-ffee-49c3-89be-fd3fb96ec895&groupId=11515, (accessed 14 ago 2017).

Ministerio de Trabajo y seguridad social, Inspección del Trabajo en la Argentina*,* Argentina, 1998. http://trabajo.gob.ar/downloads/biblioteca_estadisticas/inspeccion98.pdf (accessed 17 ago 2017).

Ministerio de Trabajo y Seguridad Social, Inspecciones, Uruguay, 2008, https://www.mtss.gub.uy/web/mtss/inspecciones (accessed 9 apr 2017).

Ministerio de Trabajo y Seguridad Social, Memorial Institucional, Costa Rica, 2016, http://www.mtss.go.cr/elmininisterio/despacho/memorias/Memoria_Institucional_2016.pdf. (accessed 14 ago 2017).

Ministerio de Trabajo y Seguridad Social, Organigrama, Uruguay, 2017, https://www.mtss.gub.uy/c/document_library/get_file?uuid=fa0b3105-ff02-4019-9d37-39f8c3e71640&groupId=11515 (accessed 15 ago 2017).

Ministerio de Trabajo, Empleo y seguridad social, Presidencia de la Nación, Listado de inspectores, Argentina, 2017. http://www.trabajo.gob.ar/fiscalizacion/inspectores/?id_seccion=700 (accessed 15 ago 2017).

Ministerio de Trabajo, Estudio de la OCDE sobre Mercados Laborales y Políticas Sociales: Colombia 2016. Evaluación y recomendaciones, Colombia, 2016, http://www.mintrabajo.gov.co/documents/20147/200428/Estudio+OECD+sobre+Mercados+Laborales+y+Politicas+sociales_Colombia2016.pdf/1e434624-f413-9155-8688-947c0656ef0f (accessed 15 ago 2017).

Ministro de Trabajo Empleo y Seguridad Social, Perfil de la inspección del Trabajo, Argentina, 2011. http://www.trabajo.gov.ar/downloads/inspeccion/perfil_01-2011.pdf (accessed 15 ago 2017)

Molina Carlos Ernesto, La inspección del trabajo en Colombia, Revista Latinoamericana de Derecho Social, número 6, enero-junio JZ 2008.

OAS, Declaración Americana sobre los Derechos de los Pueblos Indígenas, Estados Unidos, 2016.

OAS, Declaración sociolaboral del Mercosur, Brasil, 1998.

Procuraduría de Trata y Explotación de Personas, Trata laboral en Argentina, Argentina, 2014.

PUDH UNAM, El persistente problema del trabajo infantil y su relación con la pobreza de niños, niñas y adolescentes, México, 2017.

Ramírez Reynoso, Braulio, La inspección del trabajo en México, Boletín Mexicano de Derecho Comparado, JZ 1983.

Secretaria del Trabajo y Previsión Social, Cuarto Informe de labores de la Secretaría del Trabajo y Previsión Social, México, 2016.
Secretaría del Trabajo y Previsión Social, Protocolo de inspección, México, 2017.
Suárez González, Fernando, La inspección en el trabajo, in De Buen Lozano Néstor/ Morgado Valenzuela Emilio (Hrsg.), Instituciones del Derecho del Trabajo y de la Seguridad Social, México, 1997.
Szymanski, E., Aufgaben und Zuständigkeit der Arbeitsinspektion und des Verkehrs-Arbeitsinspektorats, BHM, JZ 2010.

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The Role of the Public Authorities and Penal Law in the Enforcement of Employees' Rights: Perspectives from South Africa and Southern Africa*

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1. Introduction

The aim of this contribution is to critically discuss the role of public authorities and penal laws in the enforcement of employees' rights through the externalisation of the law enforcement process in southern Africa.[1] This burden

* This contribution is based on a paper presented at the 36th Conference of the Society for Comparative Law, 14 September 2017, Basel, Switzerland. The finacial support of the National Research Foundation (South Africa) (hereinafter the NRF) towards this research is acknowledged and greatly appreciated. Opinions expressed and conclusions arrived at are those of the authors and are not necessarily to be attributed to the NRF.

1 ›Southern Africa‹ in the context of this contribution is based on Mhone's (Mhone G »Labour market discrimination and its aftermath in southern Africa«, Paper prepared for the United Nations Research Institute for Social Development (UNRISD) (2001)) at 3) definition which is restricted to those countries that have historically formed a part and parcel of the apartheid South Africa's economic hub. These countries are: South Africa, Botswana, Lesotho, Swaziland, Namibia, Zimbabwe, Zambia, Mozambique and Malawi. As Mhone (Mhone G »Labour market discrimination and its aftermath in southern Africa«, Paper prepared for the United Nations Research Institute for Social Development (UNRISD) (2001)) at 3) puts it: »Historically, they have been linked through trade, business relationships, financial markets, infrastructure networks and labour markets to one degree or another. These linkages in turn have implied a high degree of mutual political interest in the affairs of each other's countries. This network of economic and political relationships has

will be discharged through a discussion of the statutory or legislative regime dealing with employees' rights. It further provides an overview of institutions mandated to advance the protection of the fundamental rights of employees. This paper further highlights the difficulties associated with the enforcement regime and proffer solutions to the identified challenges.

In southern Africa, governments, unilaterally and collectively, endeavour to ensure that due deference is given to the protection of the fundamental rights of workers. At an individual level, this is abundantly clear from the various laws that have been enacted to protect and give effect to fundamental rights of the workers eking a living within the borders of the different countries found in southern Africa. Southern African countries, under the auspices of the Southern African Development Community (hereinafter the SADC) signed the Charter of Fundamental Social Rights in SADC (2003) and the SADC Protocol on Employment and Labour (2014). These instruments make provision for workers' rights such the freedom of association and collective bargaining, equal treatment, organisational rights, social protection, occupational health and safety and settlement of disputes.

The contribution commences with a discussion on the historical background. This is followed by an analysis of the legislative framework with a particular emphasis on the constitutions, labour laws, social security laws and other pertinent laws. The discussion on the legislative framework is succeeded by an overview on the relevant institutions involved in, *inter alia*, the enforcement of employee's rights. These institutions are the departments of labour and labour inspectorates, courts and other constitutionally mandated institutions. The paper proceeds by reflecting on the issues, challenges and possible solutions to be considered when dealing with the enforcement of employees' rights. It closes with some concluding observations.

2. Historical background

Labour laws and practices in southern African countries have been largely influenced by their colonial history.[2] With the abundance of human capital and exploitation of mineral resources, black Africans were largely engaged as cheap labour. Colonial laws dealing with labour related issues were thus used as a tool to exercise control and dominance over the black African labour force.[3] Over a period of time, premium was placed on laws passed by colonial masters. Accordingly, punitive sanctions were invariably imposed

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been defined and driven by South Africa as the de facto economic and political powerhouse of the region.« It should be noted that all the above-mentioned countries are currently member states of the Southern African Development Community (hereinafter the SADC).

2 See, for example, Fenwick C, Kalula E and Landau I *Labour Law: A Southern African Perspective* (International Labour Organisation (2007)) at 3.

3 Fenwick C, Kalula E and Landau I *Labour Law: A Southern African Perspective* (International Labour Organisation (2007)) at 3.

on the indigenous labourers for failure to obey the laws or going contrary to colonial laws.[4]

The 1960's to the 1970's was another phase of development of labour laws in southern Africa.[5] This was the period that there was a continental wave of the decolonisation of the African continent (i. e. West Africa as well as East and Central Africa). Gradually, countries were becoming aware of the international labour standards that ought to be maintained. Labour laws in southern Africa during this period were somewhat influenced by the International Labour Organisation (hereinafter the ILO) (standards)[6] even though governments did not completely obliterate colonial laws. Colonial laws on labour were still operational during this period. However, and particularly in apartheid South Africa and Namibia, there were clear instances of non-compliance with international labour standards.[7] Hence, South Africa during this period recorded an increased abuse and violation of fundamental human rights. Compliance with labour laws during this period was imperative and the legislative intent was to enhance the ultimate interest of employers to the detriment of the employees.

Democracy and democratisation heightened during the early 1990's.[8] Most African countries, regardless of the intermittent military engagement in politics, adopted multiparty democracy. A majority of the southern African countries promulgated constitutions as the supreme law of their respective countries.[9] The Constitutions were used as a conduit to entrench fundamental human rights notable of which include labour related rights. Such countries

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4 See, generally, Fenwick C and Kalula E »Law and labour market regulation in East Asia and Southern Africa: Comparative perspectives« (2005) 21 *Interational Journal of Comparative Labour Law and Industrial Relations* 193 at 215–216.

5 See, for further reading, Encylopaedia Britannica »Independence and Decolonzation in Southern Africa« – accessed at https://www.britannica.com/place/Southern-Africa/Independence-and-decolonization-in-Southern-Africa (4 April 2018) and Saunders C »Decolonisation in Southern Africa: Reflections on the Namibian and South African cases« (2017) 42 *Journal for Contemprary History* 99.

6 See, for an illuminatng discussion on the International Labour Organization's influence on labour law in southern Africa, Fenwick C and Kalula E »Law and labour market regulation in East Asia and Southern Africa: Comparative perspectives« (2005) 21 *Interational Journal of Comparative Labour Law and Industrial Relations* 193 at 215–218.

7 See International Labour Organization Century Projects »From workplace rights to constitutional rights in South Africa: The role and action of the tripartite ILO constituency in the challenge to appartheid and the transition to democracy« – accesssed at http://www.ilo.org/wcmsp5/groups/public/---africa/documents/publication/wcms_229509.pdf (4 April 2018) and International Labour Office *Special Report of the Director-General in the Application of the Declaraton Concerning Action against Apartheid in South Africa and Namibia* (International Labour Office (1990)).

8 Fashoyin T *Industrial Realtion in Southern Africa: The Challenge of Change* (Southern Africa Multidisciplinary Advisory Team (International Labour Organisation) (1998)) at 5. Also see Takirambudde PN »Protection of labour rights in the age of democratization and economic restructuring in Southern Africa« (1995) 39 *Journal of African Law* 39.

9 See, for example, section 2 of the Constitution of Lesotho of 1993, sections 1(c) and 2 of the Constitution of the Republic of South Africa of 1996 (as amended), article 5 of the Constitution of the Republic of Malawi of 1994 (as amended), section 2(3)-(4) of the Constitution of the Republic of Mozambique of 2004, section 1 of the Constitution of Zambia (Amendment) Act 2 of 2016 and sections 2 and 3(a) of Constitution of the Republic of Zimbabwe of 2013 (as amended).

include Malawi,[10] Mozambique[11] and South Africa.[12] Colonial laws that were in conflict with the provisions of the Constitution were repealed and some instances declared unconstitutional. This led to significant reforms of labour laws and other labour related issues.[13] At this point, the legislative intent had shifted from advancing the economic interest of employers to protecting the interest of the weaker party in the employer-employee relationship, i. e. employees. Several laws were promulgated; numerous institutions were created with the net aim to ensure that rights of employees are upheld.[14]

Also during the 1990's there was steady engagements amongst southern African countries to form an economic bloc or community, i. e. the SADC.[15] The quintessence of this regional block is to create a somewhat regional integration of pertinent areas such as free flow of labour and international trade and commerce.[16] Regional standards strive to encourage reforms and labour laws that are in accordance with international labour standards.[17] This, in the long run, led to creation in some countries of robust institutions meant to promote labour related issues amongst countries in the SADC.

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10 Section 31 of the Constitution of the Republic of Malawi makes provision for labour rights as follows: »(1) Every person shall have the right to fair and safe labour practices and to fair remuneration. (2) All persons shall have the right to form and join trade unions or not to join them. (3) Every person shall be entitled to fair wages and equal remuneration for work of equal value without distinction and discrimination of any kind, in particular on the basis of sex.«

11 Article 112 of the Constitution of the Republic of Mozambique states that: »(1) Labour is the driving force of development and shall merit respect and protection. (2) The State shall promote the fair distribution of the proceeds of labour. (3) The State maintains that everyone should receive equal pay for equal work.«

12 Section 23 of the Constitution of the Republic of South Africa provides that: »(1) Everyone has the right to fair labour practices. (2) Every worker has the right – (a) to form and join a trade union; (b) to participate in the activities and programmes of a trade union; and (c) to strike. (3) Every employer has the right – (a) to form and join an employers' organisation; and (b) to participate in the activities and programmes of an employers' organisation. (4) Every trade union and every employers' organisation has the right – (a) to determine its own administration, programmes and activities; (b) to organise; and (c) to form and join a federation. (5) Every trade union, employers' organisation and employer has the right to engage in collective bargaining. National legislation may be enacted to regulate collective bargaining. To the extent that the legislation may limit a right in this Chapter, the limitation must comply with section 36(1). (6) National legislation may recognise union security arrangements contained in collective agreements. To the extent that the legislation may limit a right in this Chapter, the limitation must comply with section 36(1).«

13 See, generally, Fashoyin T *Industrial Realtion in Southern Africa: The Challenge of Change* (Southern Africa Multidisciplinary Advisory Team (International Labour Organisation) (1998)) and Fenwick C, Kalula E and Landau I *Labour Law: A Southern African Perspective* (International Labour Organisation (2007)) at 5–7.

14 Fenwick C, Kalula E and Landau I *Labour Law: A Southern African Perspective* (International Labour Organisation (2007)) at 5–7.

15 See Hwang KD »The historical evolution of SADC and regionalism in Southern Africa« (2007) *International Area Review* 55, Schoeman M »From SADCC to SADC and beyond: The politics of economic integration« – accessed at http://www.alternative-regionalisms.org/wp-content/uploads/2009/07/schoemar_fromsadcctosadc.pdf (4 April 2018); Osode P »The Southern African Development Community in legal historical perspective« (2003) 28 *Journal for Juridical Science* 1 at 2–4, Morgan R »Social security in the SADCC states of southern Africa: Social-welfare programmes and the reduction of household vulnerability« in Ahmad E *et al* (eds) *Social Security in Developing Countries* (Claredon (1991)) 415, Hill CR »Regional co-operation in southern Africa« (1983) 82 *African Affairs* 215 and Boyd JB »A subsystemic analysis of the Southern African Development Coordination Conference« (1985) 28 *African Studies Review* 46.

16 See article 5 of the Treaty of the Southern African Development Community of 1992 (as amended).

17 See articles 3, 4, 5, 6 and 7 of the Charter of Fundamental Social Rights in SADC (2003) and articles 3(f), 5, 6,7, 11, 12, 16, 18 and 19 SADC Protocol on Employment and Labour (2014).

3. Legislative framework

3.1 Legislative framework: A general overview

A proclamation of respect for social rights of employees is a step in the right direction. However, merely proclaiming respect is not enough but a rather conscious effort by state institutions to ensure that laws are enforced to the benefit of employees is what matters. A legal system that gives utmost deference to rights of employees can be characterised as one that is matured, particularly within the context of international and regional labour law and standards. To pursue social justice for employees means the creation of resolute institutions. The operations of these institutions must mirror the objective intent of the drafters of the various constitutions and the labour and related legislation.

3.2 Constitutions

Protection of rights of employees is an indispensable right in terms of the various constitutions of the southern African countries. This is manifested through the constitionalisation of fundamental rights such as, the respect for dignity of a person;[18] right to equality;[19] right to life;[20] right of access to information;[21] freedom from slavery and forced labour;[22] right of just administrative action;[23] freedom of profession, trade or occupation;[24] and social security rights.[25] The constitutions, on the individual level, prohibits in express terms unfair labour practices.[26] They provide every person with the right to fair and safe labour practices.[27] At a collective level, the constitutions make provision

18 See, for example, section of 10 of the Constitution of the Republic of South Africa and section 51 of the of Constitution of the Republic of Zimbabwe.

19 See, for example, sections 18 and 19 of the Constitution of Lesotho, section 20 of the Constitution of the Kingdom of Swaziland of 2005, section 9 of the Constitution of the Republic of South Africa, section 23 of the Constitution of Zambia and section 56 of the Constitution of the Republic of Zimbabwe.

20 See, for example, section 5 of the Constitution of Lesotho, section 15 of the Constitution of the Kingdom of Swaziland of 2005, section 11 of the Constitution of the Republic of South Africa, section 12 of the Constitution of Zambia of 1991 (as amended) and section 48 of the Constitution of the Republic of Zimbabwe.

21 See, for example, section 32 of the Constitution of the Republic of South Africa and section 62 of the Constitution of the Republic of Zimbabwe.

22 See, for example, section 9 of the Constitution of Lesotho, section 17 of the Constitution of the Kingdom of Swaziland, section 13 of the Constituion of the Republic of South Africa, section 14 of the Constitution of Zambia (as amended) and sections 54 and 55 of the Constitution of the Republic of Zimbabwe.

23 See, for example, section 33 of the Constitution of the Kingdom of Swaziland section 33 of the Constitution of South Africa and section 68 of the Constitution of the Republic of Zimbabwe.

24 See, for example, section 32(1) of the Constitution of the Kingdom of Swaziland, section 22 of the Constitution of the Republic of South Africa, section 64 of the Constitution of the Republic of Zimbabwe.

25 See section 27(1)(c) of the Constitution of the Republic of South Africa.

26 See, for example, section 33 of the Constitution of the Republic of South Africa and section 68 of the Constitution of the Republic of Zimbabwe.

27 See section 32(4)(d) of the Constitution of the Kingdom of Swaziland, section 23(1) of the Constitution of the Republic of South Africa, section 65(1) of the Constituion of the Republic of Zimbabwe.

for freedom of expression,[28] freedom of assembly and association,[29] and freedom to demonstrate and petition.[30] Workers have a right to form and join a trade union.[31] In addition they can embark on strike action[32] and participate in collective bargaining.[33] The basic rights entrenched as fundamental human rights and freedoms are enforceable[34] and bind the legislature, the executive, the judiciary and all organs of state.[35] In addition, they bind both natural and juristic persons.[36] This is subject to the nature of the right or freedom and the duty imposed.[37] In addition, the aforementioned rights and freedoms are not absolute. They can be limited.[38]

It should be noted that certain constitutions in southern Africa contain provisions related to employee rights as principles of state policy[39] or national objectives.[40] These are generally non-binding and uneforceable rights and freedoms.[41] The Constitution of Lesotho is one of such constitutions. It provides for equality and justice,[42] opportunity to work,[43] just and favourable conditions of work,[44] protection of workers' rights and interests[45] and economic opportunities[46] as the principles of state policy which forms part of the public policy of Lesotho.[47] The drawback of this approach is that such principles are not enforceable by any court.[48] They are mere guiding principles, aimed at the authorities and agencies of Lesotho and other public authorities, which are sub-

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28 See, for example, section 14 of the Constitution of Lesotho, section 24 of the Constitution of the Kingdom of Swaziland, section 16 of the Constitution of the Republic of South Africa, section 20 of the Constitution of Zambia (as amended) and section 61 of the Constitution of the Republic of Zimbabwe.

29 See, for example, sections 15 and 16 of the Constitution of Lesotho, section 25 of the Constitution of the Kingdom of Swaziland, section of 18 of the Constitution of the Republic of South Africa, section 58 of the Constitution of the Republic of Zimbabwe.

30 See, for example, section 17 of the Constitution of the Republic of South Africa and section 59 of the Constitution of the Republic of Zimbabwe.

31 See, for example, section 32(2)(a) of the Constitution of the Kingdom of Swaziland, section 23(2)(a) of the Constitution of the Republic of South Africa and sections 65(2) and 65(5)(b)-(c) of the Constitution of the Republic of Zimbabwe.

32 Section 23(2)(c) of the Constitution of the Republic of South Africa.

33 See, for example, section 32(1)(b) of the Constitution of the Kingdom of Swaziland, section 23(5) of the Constitution of the Republic of South Africa and section 65(5)(a) of the Constitution of the Republic of Zimbabwe.

34 See section 35 of the Constitution of the Kingdom of Swaziland, section 38 of the Constitution of the Republic of South Africa and section 85 of the Constitution of the Republic of Zimbabwe.

35 See, for instance, section 8(1) of the Constitution of the Republic of South Africa and section 45(1) of the Constitution of the Republic of Zimbabwe.

36 See section 8(2) of the Constitution of the Republic of South Africa and section 45(2) of the Constitition of the Republic of Zimbabwe.

37 *Ibid*.

38 See, for example, section 36 of the Constitution of the Republic of South Africa and section 86 of the Constitution of the Republic of Zimbabwe.

39 Chapter III of the Constitution of Lesotho and Part IX of the Constitution of Zambia (as amended).

40 Chapter 2 of the Constitution of the Republic of Zimbabwe.

41 See, for example, section 111 of the Constitution of Zmbia (as amended).

42 Section 26 of the Constitution of Lesotho.

43 Section 29 of the Constitution of Lesotho.

44 Section 30 of the Constitution of Lesotho.

45 Section 31 of the Constitution of Lesotho.

46 Section 34 of the Constitution of Lesotho.

47 Section 25 of the Constitution of Lesotho.

48 *Ibid*.

jected to the availability of resources.[49] Needless to say, these principles should not be rejected at face value. The point is that: »Although not justiciable, these principles cannot be dismissed on that basis but their importance should rather be seen in light of their purpose, which is to inform policy at every level of state action, in every organ of the state and in every activity of the state.«[50]

3.3 Labour laws

Labour laws in southern Africa are generally enacted as acts of Parliament. They are mainly enacted to give effect to the labour and related rights contained in the constitutions and to comply with the international obligations.[51] These acts underscore the countries' commitment towards the protection of employees' rights. They include acts dealing with the following matters which are intricately linked to the employees' rights:

Topics	Examples of Acts of Parliament
Basic Conditions of Employment	Basic Conditions of Employment Act of 1997 (South Africa) and Labour Relations Act of 2007 (Namibia).
Employment Equity	Employment Act of 1981 (Botswana), Employment Act of 2000 (Lesotho), Affrimative Action (Employment) of 1998 (Namibia), and Employment Equity Act of 1998 (South Africa).
Labour Relations (particulalry individual and collective labour law)	Labour Code (Order 24) of 1992 (Lesotho), Labour Act of 2007 (Namibia), Labour Relations Act of 1995 (South Africa), and Industrial Relations Act of 2000 (Swaziland).
Occupational Health and Safety	Factories Act of 1978 (Chapter 44:01) (Botswana); Occupational Safety, Health and Welfare Act of 1997 (Malawi); Occupational Health and Safety Act of 1993 (South Africa); Mines Health and Safety Act of 1996 (South Africa); Occupational Safety and Health Act of 2001 (Swaziland); Factories, Machinery and Construction Works Act of 1972 (Swaziland); Factories Act (of 1996 (Bap 441) (Zambia); Occupational Health and Safety Act of 2010 (Zambia); and Factories and Works Act of 1948 (Zimbabwe).
Social Insurance	Workers' Compensation Act of 2004 (Bostwana), Workers' Compensation Act of 1977 (Lesotho), Workers Compensation Act of 2000 (Malawi), Employees' Compensation of 1941 (Namibia), Compensation for Occupational Injuries and Diseases Act of 1993 (South Africa), Occupational Diseases in Mines and Works Act of 1973 (South Africa), Road Accident Fund Act of 1996 (South Africa), and Workers' Compensation Act of 1999 (Zambia).

49 *Ibid*.

50 Fenwick C, Kalula E and Landau I *Labour Law: A Southern African Perspective* (International Labour Organisation (2007)) at 28.

51 For example, the Labour Relations Act of 1995 (South Africa), effectuates that country's international obligations as a member state of the International Labour Organisation (see the preamble of the Labour Relations Act (South Africa).

In terms of externalization of tasks through laws, for instance, labour inspectors enforce basic conditions of employment and safety and health in the workplace. Furthermore, through laws, a favourable atmosphere is created to resolve labour disputes. Labour disputes can be resolved either through mediation, conciliation and/or arbitration. The presence of the labour court that has the competence to impose appropriate sanctions against persons who act contrary to labour laws assists in enforcing the rights of the affected parties.

3.4 Social security laws

Social security laws that make provision for both tax-financed (non-contributory) benefits and contributory benefits give effect to provisions contained in the constitutions pertaining to social security and social welfare.[52] Both public and private contributory social insurance schemes can be found in southern Africa.[53] These schemes, which have a limited scope of coverage are invariably supported, albeit unofficially, by informal self-organised coping strategies. The task of monitoring and enforcing compliance with the provisions of social insurance laws, which are largely occupationaly based, is mainly carried out by the labour inspectors. Courts, which include criminal, civil and labour courts, adjudicate disputes emanating from the application of these laws.

3.5 Other laws

Other pertinet laws include the common law and administrative law. The common law is one of the sources of labour rights in most common law jurisdictions found in southern Africa. Adminstrative law principles such as the rules of natural justice play a central role in the enforcement and adjudication of labour rights. In addition, labour law often intersects with crimininal law. This happens predominantly in two cases. Firstly, labour statutes often prescribe sanctions, for non-compliance with their provisions, such as a fine and/or imprisonment. Thus, criminal courts are called upon to adjudicate on such matters and impose an appropriate sentence. Prosecution of criminal offences arising from labour statutes are dealt with by the criminal justice system. Secondly, certain acts of misconduct committed during the course and scope of employment such as theft may be illegal. This is one of those instances where criminal law and labour law co-exists. Contrary to some erronous perceptions, being found guilty in a court of law and in a disciplinary hearing instituted by an employer does not amount to ›double jeopardy‹. The criminal law and labour law connection in the employment relations' sphere has been succinctly explained by Van Niekerk *et al.* as follows:

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52 See, for example, section 27(1)(c) of the Constitution of the Republic of South Africa.

53 See, for example, Mpedi LG »Social protection law in the Republic of South Africa« (2017) 20 *Law in Africa* 33 and Mpedi LG and Nyenti MAT *Employment Injury Protection in Eastern and Southern African Countries* (Sun Press (2016)).

»Criminal conduct outside the workplace causes particular problems. The general rule remains applicable, in other words the fact of a criminal charge or conviction is not necessarily a fair reason for dismissal and there should be some relevance of the offence to the employment relationship. Conversely, an acquittal in a criminal court does not mean that an employer is not entitled to take disciplinary action against the employee. There is a popular misconception than an employee may not be ›charged twice‹ in that the principle of double jeopardy applies in these circumstances. This is not correct. An act of misconduct that is a criminal offence and which impacts on the employment relationship may be dealt with by the employer as a disciplinary matter. It is for criminal courts to decide (using a different test in the form of establishing guilt beyond reasonable doubt) whether the accused is guilty and what sentence is appropriate. It is entirely feasible therefore that an employee can be acquited by a criminal court but fairly dismissed.«[54]

It should be pointed out that there are laws that establish certain institutions that enforce, among others, the labour rights. These institutions include the Office of the Public Protector (South Africa)[55] and the Human Rights Commission (South Africa and Zimbabwe). These offices which are creatures of statutes are also provided for in the constitutions of various southern African countries.[56]

4. Institutional overview

4.1 Department of labour and labour inspectorates

Southern African countries have specific institutions and ministries dealing with labour and other labour related issues. These institutions and ministries are required to be proactive and must be quick to react to grievances of employees by, for instance, conducting the necessary investigations. The overall oversight responsibility of enforcing labour rights of employees largely falls squarely within the scope of operation of the department of labour and its labour inspectorates. Labour inspectorates in southern African countries have the mandate to investigate and inspect both public and private institutions on whether the required labour standards are met. Labour inspectors and departments also have the authority to issue compliance orders to institutions that fail to meet the minimum labour standards. Therefore, failure to comply with the orders and directives can attract fines. The department of labour and labour inspectorates are therefore important institutions to enforce the labour rights of employees.

54 Van Niekerk A et al *Law@Work* (4th edition) (LexisNexis (2017)) at 320–303.
55 Public Protector Act 23 of 1994.
56 See 4.3. below.

4.2 Courts and other related institutions

All member states of SADC have resolute courts that (are supposed to) champion the interests of the general public. For purposes of labour law, there exist labour courts specifically created to deal with labour related issues. Recently, courts have taken a posturing of insisting that employment relations are in consonance with international standards. The courts have, on some occasions, imposed fines and other sanctions on employers who go contrary to the standards as has been laid down. Over a period of time, the courts have to a large extent protected the interests of weaker parties in the employment relationship.

Notwithstanding the foregoing assertions, the period of settling disputes coupled with the cost of litigation has been a matter of major concern. Protracted litigation and excessive costs have mainly been a disincentive for employees to use the courts. Also, the very nature of court processes makes it in such a way that individuals themselves must present their cases and issues before court in order for them to be resolved. The court, unlike the human right commissions does not investigate into human right abuses and call on perpetrators. Thus, until a matter is taken to court, the matter will not be dealt with. However, for purposes of enforcement of rights of employees, the court has important role on imposing sanctions and fines. Labour courts and criminal courts generally adjudicate disputes pertaining to labour rights of employees when other constitutionally mandated institutions and individuals bring the issues to the court on behalf of affected individual employees. Criminal courts are empowered to enforce labour rights by issuing compliance orders, fines and, in some instances, imprisonment of the guilty person(s).

Apart from courts, labour laws make provisions for institutions that conciliate, mediate and arbitrate certain labour disputes between employers and employers. These institutions include the Commission for Conciliation, Mediation and Arbitration (South Africa)[57] and the Conciliation, Mediation and Arbitration Commission (Swaziland).[58]

4.3 Other constitutionally mandated institutions

4.3.1 Lesotho

Section 134 of the Constitution of Lesotho of 1993 (as amended) makes provision for the appointment of an Ombudsman. The functions of the Ombudsman include, investigating action taken by an officer or authority in the exercise of the adminsitrative function of the officer or authority in instances where it is alleged that a person has suffered an injustice in consequences

57 The Commission for Conciliation, Mediation and Arbitration was established in accordance with section 112 of the Labour Relations Act (South Africa).

58 The Conciliation, Mediation and Arbitration Commission is esteablished in terms of section 62 of the Industrial Relations Act of 2000 (Swaziland) .

of that action.[59] The Ombudsman is supposed to execute his or her functions independently. Thus, he or she cannot excecise his or her function under the directions or control of any other person or authority.[60]

4.3.2 Mozambique

The Constitution of the Republic of Mozambique makes provision for the establishment of the Ombudsman.[61] The Ombudsman is defined as »an office established to guarantee the rights of citizens and to uphold legality and justice in the actions of the Public Administration.«[62] The Ombudsman is elected by a two-thirds majority of the deputies of the Assembly of the Republic of Mozambique.[63] The Constitution of the Republic of Mozambique requires the Ombudsman to be independent and impartial in the exercise of his or her functions.[64] However, his or her actions must comply with the provisions of the Constitution and other laws of Mozambique.[65] The Ombudsman has the power to investigate cases submitted to him or her.[66] In addition, he or she has the power to make decisions about cases referred to him or her and submit recommendations to appropriate offices to correct or prevent illegalities or injustices.[67] The offices and agents of the Public Adminisitration are obliged by the Constitution of the Republic of Mozambique to cooperate with the Ombudsman in the exercise of her duties should he or she require them to do so.[68]

4.3.3 Namibia

As a general rule, the Constitution of the Republic of Namibia imposes an obligation on all administrative bodies and its officials to act reasonably in the performance of their duties.[69] Furthermore, anybody whose activities have the potency of affecting the fate of any individual is enjoined to act within the confines of law as prescribed by the common law and/or any other relevant legislation. Any person whose right or freedom is affected by the actions of any administrative body has the right to seek redress in court or the designated tribunal.[70] The Ombudsman has the authority and power to protect and enforce fundamental rights and freedoms contained in the Constitution.

The Constitution of Namibia jealously protects fundamental rights.[71] Accordingly, no organ or institution of state with legislative authority has the

59 Section 135(1) of the Constitution of Lesotho.
60 Section 135(4) of the Constitution of Lesotho.
61 Article 256 of the Constitution of the Republic of Mozambique.
62 *Ibid*.
63 Article 257 of the Constitution of the Republic of Mozambique.
64 Article 258 (1) of the Constitution of the Republic of Mozambique.
65 *Ibid*.
66 Article 259(1) of the Constitution of the Republic of Mozambique.
67 *Ibid*.
68 Article 260 of the Constitution fo the Republic of Mozambique.
69 Article 18 of Constitution of Republic of Namibia.
70 Article 18 of Constitution of Republic of Namibia.
71 Article 25(1) of Constitution of Republic of Namibia.

power to enact laws that derogate and abolish fundamental rights provided for under the Constitution unless the Constitution expressly allows for same.[72] Furthermore, any aggrieved person who claims that a fundamental right or freedom guaranteed by the Constitution has been infringed is entitled to seek a remedy or redress in any competent court or approach the Ombudsman for assistance.[73] However, the response of the Ombudsman in this regard is discretionary and may do so when she finds prudent to do so.[74] Therefore, the Constitution of Namibia provides the court and the Ombudsman as the »right enforcement institutions.«

The office of the Ombudsman is a creature of the Constitution of Namibia.[75] The Constitution further establishes its independence.[76] Consequently, no person or organ of state is allowed to interfere in the activities of the Ombudsman.[77] Operations of the Ombudsman are subject to the provisions of the Constitution.[78] All organs of state are required to accord the Ombudsman the needed respect for the protection, independence, dignity and effectiveness.[79]

The broad investigative mandate of the office of the Ombudsman gives an indication of the possibility of the institution taking up the role of initiating and enforcing fundamental rights of employees when the need arises. Indeed, the Ombudsman can initiate or bring an action in any competent court about activities of private or public institution that undermines fundamental rights pertained in the Constitution. Accordingly, it will not be misplaced if enforcement of social rights of employees is transferred to the Ombudsman. However, as noted earlier, the smooth and effective enforcement of social rights so transferred to the Ombudsman depends on financial capacity and the degree of actual independence that the institution enjoys.

4.3.4 South Africa

The constitutional and legislative order of South Africa provides convenient atmosphere to enforce fundamental rights including labour rights. Institutions specifically created by the Constitution of the Republic of South Africa to support democracy are meant to protect fundamental human rights in general. The constitutional order creates an internal mechanism where enforcement of rights is not left only to individuals themselves. Institutions such as the South African Human Rights Commission and the Office of the Public Protector (hereinafter the OPP) are notable examples.

The South African Human Rights Commission (hereinafter the SAHRC or »the Commission«) has an oversight responsibility to ensure that fundamental

72 Article 25(1) of Constitution of Republic of Namibia.
73 Article 25(2) of Constitution of Republic of Namibia.
74 Article 25(2) of Constitution of Republic of Namibia.
75 Article 89(1) of Constitution of Republic of Namibia.
76 Article 89(2) of Constitution of Republic of Namibia.
77 Article 89(2) of Constitution of Republic of Namibia.
78 Article 89(2) of Constitution of Republic of Namibia.
79 Article 89(3) of Constitution of Republic of Namibia.

rights provided for under the Constitution are protected.[80] The SARHC was established to ensure that egregious human rights abuses that pertained during the apartheid regime do not occur again.[81] Accordingly, the Commission is regarded as a major supporting pillar of South African democracy.[82] As averred in the case of *New National Party of South Africa v. Government of Republic of South Africa & Others*:[83]

»… institutions under Chapter 9 of the Constitution are a new development on the South African scene. They are a product of the new constitutionalism and their advent inevitably has important implications for other organs of state that must understand and recognise their respective roles in the new constitutional arrangement. The Constitution places a constitutional obligation on those organs of state to assist and protect the Commission in order to ensure its independence, impartiality, dignity and effectiveness. If this means that old legislative and policy arrangements, public administration practices and budgetary conventions must be adjusted to be brought in line with the new constitutional prescripts, so be it …«

Though the Commission is a creature of the Constitution, its operations were given effect through the promulgation of the Human Rights Commission Act of 1994. This Act prescribes, *inter alia*, the functions and composition of the SAHRC.[84] The SAHRC is established as an independent and autonomous institution.[85] The activities of the Commission are subject to the dictates of the Constitution and other state organs. Nonetheless, the Constitution limits potential interference by other state institutions in the activities of the Commission. The limitation is to emphasize and enhance the concept of institutional independence granted to the SAHRC.

With the above pronoucements in mind, enforcement of fundamental rights of employees obviously falls within the mandate of the Commission. Indeed, there have been instances where the Commission has appeared as *amicus curiae* in a number of court cases as a way of protecting and promoting fundamental human rights in South Africa.[86] With these interventions coupled with the broad mandate of the Commission, it becomes easy for the Commission to take up the role of enforcing the social rights of employees. The institutional capacity, legal mandate and wits of the Commission can undeniably ensure that rights of employees are protected particularly in those circumstances that the employee cannot assert his or her rights against the employers. The in-

80 Section 184(1) of Constitution of Republic of South Africa of 1996.
81 Human Rights Watch *Protectors or Pretenders? Government Human Rights Commissions in Africa* (Human Rights Watch (2001)) 293.
82 Article 181(1) of Constitution of Republic of South Africa of 1996.
83 1993 3 SA 19.1
84 See generally Human Rights Commission Act of 1994.
85 Section 181(2) of Constitution of Republic of South Africa of 1996. See also Matshekga J »Toothless bulldogs? The human rights commissions of Uganda and South Africa: A comparative study of their independence« (2002) 1 *African Human Rights Law Journal* 68 at 70.
86 See *Minister of Justice v Ntuli* 1997 3 SA 772 (CC); *Fose v Minister of Safety & Security* 1997 7 BCLR 851 and *S v Twala* 2000 1 BCLR 106.

vestigative mandate arrogated to the Commission also makes it possible for enforcement of social rights of employees to be transferred to it when the need arises.

The Office of the Public Protector is one of the unique creations of the South African Constitution.[87] The OPP has responsibility to insist that state institutions and its actors operate within the confines of law. The primary purpose of the OPP is to ensure that state institutions are accountable to South African people and also operate in a »gold fish bowl.«[88] The office of the Public Protector is not a human rights institution. Its constitutional mandate and existence is meant to fortify enforcement of fundamental human rights in South Africa but not to arrogate protection and enforcement of human rights to it.[89] The OPP therefore does not compete with the Human Rights Commission.

The public protector ensures that administrative bodies act in a fair, candid and in a manner that advances the interests of the general public. Through this role, the public protector seeks to defend the rights of South Africans.[90] In furtherance of its constitutional functions, the Public Protector seeks to promote and protect fundamental rights by: (1) reinforcing a strong and cohesive tradition of civil society; (2) emphasising respect of human rights; (3) adherence to the constitutional principle of rule of law.[91] Therefore, it may be opined that the enforcement of fundamental rights under the Constitution of the Republic of South Africa is merely incidental to the functions of the Office of the Public Protector.

The net aim of the functions of the OPP is to solidify the South African democracy by ensuring good governance at all facets of state and private institutions.[92] Thus the OPP is seen as a medium through which the constitutional values contained in the South African Constitution are achieved.[93] It can be said to be the catalyst for constitutional democracy in South Africa. The Public Protector serves the interest of the public by assisting and reporting to courts and Parliament about issues of maladministration.[94] The OPP serves as a monitoring institution that can highlight maladministration that falls beyond the scope of the court and the legislature.[95]

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87 Thipanyane T »Strengthening constitutional democracy: Progress and challenges of the South African Human Rights Commission and Public Protector« (2015–2016) 60 *New York Law School Law Review* 125 at 136–127.

88 See generally section 182 of Constitution of Republic of South Africa, 1996.

89 Madonsela T »The role of the public protector in protecting human rights and deepening democracy« (2012) *Stellenbosch Law Review* 4 at 6.

90 See section 182 of Constitution of Republic of South Africa of 1996.

91 Madonsela T »The role of the public protector in protecting human rights and deepening democracy« (2012) *Stellenbosch Law Review* 4 at 9.

92 See generally Mubangizi JC »The South African Public Protector, the Ugandan Inspector-General of Government and the Namibian Ombudsman: A comparative review of their roles in good governance and human rights protection« (2012) 45 *Comparative and International Law Journal of South Africa* 304.

93 Madonsela T »The role of the public protector in protecting human rights and deepening democracy« (2012) *Stellenbosch Law Review* 4 at 6.

94 Section 181(5) of the Constitution of the Republic of South Africa.

95 See, generally, Madonsela T »The role of the public protector in protecting human rights and deepening democracy« (2012) *Stellenbosch Law Review* 4.

Though the OPP is not a human rights institution, it has also been admitted that the net result of its operations leads to the protection of fundamental rights and freedoms. For purposes of enforcing the rights of employees, the investigative power, constitutional backing, financial wits and institutional capacity of the OPP can be a tool to highlight abuses of right of employees.

4.3.5 Swaziland

The Constitution of the Kingdom of Swaziland makes provision for the establishment of the Commission on Human Rights and Public Administration.[96] The Commission on Human Rights and Public Administration's functions include investigating complaints brought before it as specified in the Constitution of the Kingdom of Swaziland; taking action for the remedying, correction or reversal of instances it has investigated; eliminating or fostering the elimination of corruption, abuse of authority or public office; promoting and fostering strict adherence to the rule of law and principles of natural justice in public administration; and promoting fair, efficient and good governance in public affairs.[97] It has the power to issue subpeonas, fine any person for contempt of any subpoena or order, question any persons and require any person to disclose truthfully and frankly any information within the knowledge of that persons relevant to any investigation it is conducting.[98] The Commission on Human Rights and Public Administration is required by section 166 of the Constitution of the Kingdom of Swaziland to function as an independent organisation.

4.3.6 Zambia

The Constitution of Zambia of 1991 (as amended) makes provision for the establishment of the Human Rights Commission.[99] This is established as an autonomous institution.[100] The functions, powers, composition, funding and administrative procedure of the Zambian Human Rights Commission are provided for in the Human Rights Commission Act 39 of 1996. The Human Rights Commission has the power to, *inter alia*, investigate any human rights abuses.[101] It has the power to issue summons or order, question any person, require any person to disclose information and recommend punishment.[102]

4.3.7 Zimbabwe

The legal regime in Zimbabwe makes it possible for state institutions to effectively enforce individual rights. The legal order of the Republic of Zim-

96 Section 162 of the Constitution of the Kingdom of Swaziland.
97 Section 164 of the Constitution of the Kingdom of Swaziland.
98 Section 165(1) of the Constitution of the Kingdom of Swaziland.
99 Section 125(1) of the Constitution of Zambia (as amended).
100 Section 125(2) of the Constitution of Zambia (as amended).
101 Section 10(1) of Zambian Human Rights Commission Act.
102 Section 10(2) of the Zambian Human Rights Commission.

babwe provides a plethora of fundamental human rights.[103] The Constitution of Zimbabwe grants the Human Rights Commission (hereinafter the ZHRC) exclusive powers to protect and enforce fundamental rights.[104] The ZHRC is an independent institution created to support growth of democracy in Zimbabwe by promoting transparency, accountability and ensuring that democratic values are upheld.[105] The ZHRC also has power to investigate issues of human rights abuse both in public and private institutions.

The broad investigative mandate can therefore be used by the Commission to protect the interests of individuals both engaged in the public and private sectors. Accordingly, where the need arises to protect the interests of employees against employers, the Commission has the power within the law to do so. This interventionist power to protect the interests of employees becomes relevant particularly where the Constitution of Zimbabwe provide numerous rights regarding labour, social security and other employment related issues.[106] Again, with the legal backing, institutional capacity and legitimacy in operations, enforcement of social rights of employees can accordingly be transferred to the ZHRC with ease.

5. Issues, challenges and possible solutions

5.1 Legislative shortfalls and possible solutions

5.1.1 Proliferation of laws and regulations

One major problem that inhibits enforcement of social rights of employees is the proliferation of laws that make provision for employees' rights. There exists a plethora of pieces of legislation and regulations dealing with same or similar subject matters. Unfortunately, most of the regulations dealing with labour and related matters are not codified. The downside of this is the possibility of existing legal provisions conflicting with each other. This generally pose problems in the determination of cases or disputes. It also makes it difficult for public institutions and even individuals themselves to identify the best law(s) of regulation(s) that will best advance their interest. Therefore, there must be the commitment to codify all pertinent laws and regulations.

5.1.2 Plethora of dispute resolution mechanisms and institutions

It is trite in southern Africa that each law makes provision for its own monitoring, enforcement and dispute resolution mechanisms and institutions. This has resulted in a multitude of dispute resolutions mechanisms and institutions. These mechanisms and institutions range from courts of law (i. e. civil, crim-

103 See section 14–65 of Constitution of the Republic of Zimbabwe.
104 Section 241 of Constitution of the Republic of Zimbabwe.
105 See Chapter 12 of the Constitution of of the Republic of Zimbabwe. See also sections 233(a), 233(d), 233(b), 235(1) (a) and 233(e) of Constitution of Republic of Zimbabwe.
106 See section 14, 24, 65, 30 and 65 of the Constitution of the Republic of Zimbabwe.

inal and labour courts); special mediation, conciliation and arbitration mechanisms, offices (for example, office of the pubic protector), and commissions (for example, the Human Rights Commission). The multiplicity of dispute resolution mechanism can invariably lead to ›forum shopping‹ by those who have the means.[107] Thus, the dispute resolution mechanisms and institutions dealing with employees' rights need to be streamlined in southern African countries.

Furthermore, the role of the courts is somewhat constricted. This is largely due the fact that, in a majority of southern African countries, »… the courts have limited themselves – or have been limited by legislation – to dispute-resolution functions, and to matters relating to contract of employment.«[108] To make matters worse, »[s]ome courts have also proven reluctant to apply international human rights law, even where it is open for them to do so.«[109]

Financial constraints and lack of independence of constitutionally mandated institutions is also a major challenge. The independence of most Human Rights Commissions and other government institutions enjoined to enforce rights of individuals is merely a flimsy façade. This is mainly because they are financed by the state and, in addition, they report to and subjected to the directions of their respective Parliaments.

5.1.3 Inaccessible laws

Law are generally inacessible in southern Africa. This assertion stems from the fact that laws are often not published in all the offical languages in the various countries of the SADC.[110] Secondly, laws are still drafted in legalese which makes them difficult to comprehend by individuals who are not legally educated. Furthermore, there is no legal duty imposed on relevant departments and institutions to educate ordinary members of the public about their legal entitlements and duties.

5.2 Other challenges

5.2.1 Socio-economic factors

There are socio-economic factors that cannot be discounted in any discussion about the enforcement of employees' rights in southern Africa.[111] Firstly,

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107 See, for example, Cohen T »Compensation and forum shopping in South African labour law« (2005) 122 *South African Law Journal* 614 and Garbers C »The battle of the courts: Forum shopping and the aftermath of Wolfaardt and Fredericks« (2002) 6 *Law, Democracy and Development* 97.

108 Fenwick C, Kalula E and Landau I *Labour Law: A Southern African Perspective* (International Labour Organisation (2007)) at 25.

109 *Ibid*.

110 For example, section 6 (1) of the Constitution of the Republic of South Africa states that: »The official languages of the Republic are Sepedi, Sesotho, Setswana, siSwati, Tshivenda, Xitsonga, Afrikaans, English, isiNdebele, isiXhosa and isiZulu.« Nevertheless, laws in that country are rarely published in all eleven official languages.

111 The fact of the matter is that: »… socio-economic woes [have] implications for the capacity of labour laws to protect workers in the region. Most significantly, high levels of poverty, income inequality and

poverty, which is underlined by inequality, exclusion and marginalisation is rife in that region.[112] The situation is exacerbated by the fact that most services and relevant institutions are situated in urban areas.[113] Thus, the rural poor struggle to access these services which are vital in their quest to enforce their rights. Another point to note is that legal services are prohibitively expensive for the poor. Secondly, the labour market issues such as unemployment, skills deficit and budding informal sector are prevalent in southern African countries. Thirdly, widespread poor governance of pertinent institutions which is invigorated by the lack of accountability and poor levels of service hinder efforts to ensure that employees' rights are enforced. Fourthly, endemic corruption and fraud in public institutions in southern African countries undermines confidence in public institutions by ordinary citizens and workers. This situation has been rightly characterised by Mwansa as a »crisis of confidence in the act of governance«.[114] Therefore, it is critical that southern African countries restore the confidence in the relevant institutions by ensuring that they are governed correctly in line with the provisions of their respective constitutions which require ethical and accountable public service.[115] In addition, measures aimed at poverty erradication need to be meaningful and must be be prioritised and intensified. Afterall, poverty in southern African is symptomic of poor governance and bad leadership.[116] Resources aimed at the upliftment of the poor communities are habitually lost to corruption and fraud. As pointed out by Mwansa:

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unemployment have predisposed many workers to accept employment on any terms, even where it may be unstable or precarious. Workers are in an increasingly vulnerable situation as employers are in a position to vary the terms and conditions of employment at will. With no better alternative, many workers accept work under very poor conditions without seeking the protection of labour law. Their exclusion from the protection offered by labour laws in turn fuels a vicious cycle of poverty and income inequality« (Fenwick C, Kalula E and Landau I *Labour Law: A Southern African Perspective* (International Labour Organisation (2007)) at 11).

112 See Fenwick C, Kalula E and Landau I *Labour Law: A Southern African Perspective* (International Labour Organisation (2007)) at 9–11 and Fenwick C and Kalula E »Law and labour market regulation in East Asia and Southern Africa: Comparative perspectives« (2005) 21 *Interational Journal of Comparative Labour Law and Industrial Relations* 193 at 204–206.

113 Mwansa L-K J »Corruption and social services in Africa« in Frimpong K and Jacques G (eds) *Corruption, Democracy and Good Governance in Africa: Essays on Accountability and Ethical Behaviour* (Lightbooks (1999)) 122 at 123.

114 *Ibid* at 125.

115 For example, section 195(1) of the Constitution of the Republic of South Africa provides that: »Public administration must be governed by the democratic values and principles enshrined in the Constitution, including the following principles: A high standard of professional ethics must be promoted and maintained. Efficient, economic and effective use of resources must be promoted. Public service must be development-oriented. Services must be provided impartially, fairly, equitably and without bias. People's needs must be responded to, and the public must be encouraged to participate in policy-making. Public administration must be accountable. Transparency must be fostered by providing the public with timely, accessible and accurate information. Good human resource management and career-development practices, to maximise human potential, must be cultivated. Public administration must be broadly representative of the South African people, with employment and personnel management practices based on ability, objectivity, fairness, and the need to redress the imbalances of the past to achieve broad representation.«

116 See, for example, Nxumalo M » Social consequences of corruption in society« in Frimpong K and Jacques G (eds) *Corruption, Democracy and Good Governance in Africa: Essays on Accountability and Ethical Behaviour* (Lightbooks (1999)) 130 and Mwansa L-K J »Corruption and social services in Africa« in Frimpong K and Jacques G (eds) *Corruption, Democracy and Good Governance in Africa: Essays on Accountability and Ethical Behaviour* (Lightbooks (1999)) 122.

»In many parts of Africa today, the majority of people lack basic social services. In fact, outside the urban areas, basic social services are virtually non-existent. There are situations where children learn under trees due to lack of classrooms; patients have to walk long distances before they can find a health facility where drugs may not even be available; roads are neither built nor repaired or have reverted to bush and there is no access to a clean water supply, electricity, housing and sporting facilities, despite annual finances allocations. Despite the repeated promises of better things to come, resources continue to be plundered by a few to deny the majority of people social services. Lack of services in many parts of africa is not simply an accident but an inevitable historical outcome of rampant corrupt practices perpertuated by those entrusted with public office … By affecting the provision of social services, corruption frustrates social policy efforts, thus reinforcing the existing inequalities in society.«[117]

5.2.2 Labour inspectors

Each and every southern African country has labour inspectors which invariably fall under the ambit of the department of labour. The labour inspectorates in southern Africa are mostly ›reactive‹ instead of ›proactive‹. There is a dire a need for a preventative approach. Staffing the habitualy short-staffed labour inspectorates and capacity development of labour inspectors would be an ideal start. Furthermore, challenges facing labour inspectors that lead to low morale, such as the shortage of the requisite equipment (e. g., transport) to discharge their duties meaningfully and efficiently, need to be addressed. Effective labour inspection and enforment of employees' rights is more important than ever – particurlarly in the wake of growing investments and influence of foreign companies in southern Africa. It has been uncovered that most foreign companies have a penchant for disregarding local laws, rules, regulations, customs and cultures as well as utter disrespect for local authorities and institutions.[118]

5.2.3 Trade unions' role and involvement

Trade unions in southern Africa are, for obvious reasons, focussed mainly on organising the formal sector of the labour market much to the negelct of the informal sector workers.[119] Furthermore, trade unions in the SADC region rarely prioritise health and safety issues as well as social protection in their collective barganing endeavours. Therefore, trade unions need to find and im-

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117 Mwansa L-K J »Corruption and social services in Africa« in Frimpong K and Jacques G (eds) *Corruption, Democracy and Good Governance in Africa: Essays on Accountability and Ethical Behaviour* (Lightbooks (1999)) 122 at 123.

118 See, for example, Baah AY and Jauch H *Chinese Investments in Africa: A Labour Perspective* (African Labour Research Network (2009)).

119 See, for example, Mpedi LG »The evolving relationship between labour law and social security« (2012) *Acta Juridica* 270 at 284.

plement innovative strategies to deal with key labour market challenges prevalent at country and regional levels.[120] It is the solemn duty of trade unions to advance the socio-economic interests of workers (in the informal and formal sectors) which include health and safety and social protection. This would require some serious capacity development of trade union officials. The point is that many trade unions in southern Africa are handicapped by the »limited organizational, financial and administrative capability, and … a lack of leadership and research skills.« [121]

6. Concluding reflections

In conclusion, it can be asserted that the protection of fundamental rights of employees requires concerted efforts of all stakeholders particularly institutions specifically created to ensure the protection of these rights. Most legal systems in southern Africa attempt to protect social rights of employees by providing a coherent and cohesive legislative framework that seeks to advance the ultimate interests of employees. The role of the courts, social security institutions and other related bodies cannot be underestimated in this regard. As shown in this paper this is mainly because of the stark reality that smooth enforcement of social rights is inextricably intertwined with the operations of administrative bodies mandated to enforce those rights. Rules and procedures provided in a legal system for purposes of enforcing social rights of employees' further underscore the alacrity with which that system protects rights of employees.

Another key point to note is that the protection and enforcement of social rights of employees cannot be one sided. The fact of the matter is that it requires collective responsibility of all stakeholders. Generally, individuals themselves must assert and insist on their rights particularly when they are infringed upon. In labour law, a breach of an employee's right affords him/her the liberty to assert his or her right against the breaching party. Through this, an employee enforces rights granted to him or her by law. It is important to note that it is not only dependent on employees to assert that their right(s) have been violated. Invariably, a duty is imposed on designated public authorities to ensure that those rights are protected. The ideation of involving public authorities in the enforcement agenda could be viewed as an acknowledgement of the fact that the protection and enforcement of fundamental rights largely benefits the public as a whole and not only the individual whose rights have been violated. Thus, for purposes of enforcement, externalization essentially deals with deepening the role of public authorities in the enforcement of the fundamental (social) rights of employees.

120 Fenwick C, Kalula E and Landau I *Labour Law: A Southern African Perspective* (International Labour Organisation (2007)) at 25.

121 *Ibid* at 24.

7. Bibliography

Baah AY and Jauch H *Chinese Investments in Africa: A Labour Perspective* (African Labour Research Network (2009)).

Boyd JB »A subsystemic analysis of the Southern African Development Coordination Conference« (1985) 28 *African Studies Review* 46.

Cohen T »Compensation and forum shopping in South African labour law« (2005) 122 *South African Law Journal* 614.

Encylopaedia Britannica »Independence and Decolonzation in Southern Africa« – accessed at https://www.britannica.com/place/Southern-Africa/Independence-and-decolonization-in-Southern-Africa (4 April 2018).

Fashoyin T *Industrial Realtion in Southern Africa: The Challenge of Change* (Southern Africa Multidisciplinary Advisory Team (International Labour Organisation) (1998)).

Fenwick C, Kalula E and Landau I *Labour Law: A Southern African Perspective* (International Labour Organisation (2007)).

Fenwick C and Kalula E »Law and labour market regulation in East Asia and Southern Africa: Comparative perspectives« (2005) 21 *Interational Journal of Comparative Labour Law and Industrial Relations* 193.

Garbers C »The battle of the courts: Forum shopping and the aftermath of Wolfaardt and Fredericks« (2002) 6 *Law, Democracy and Development* 97.

Hill CR »Regional co-operation in Southern Africa« (1983) 82 *African Affairs* 215.

International Labour Office *Special Report of the Director-General in the Application of the Declaraton Concerning Action against Apartheid in South AFric and Namibia* (International Labour Office (1990)).

Human Rights Watch *Protectors or Pretenders? Government Human Rights Commissions in Africa* (Human Rights Watch (2001)).

Hwang KD »The historical evolution of SADC and regionalism in Southern Africa« (2007) *International Area Review* 55.

International Labour Organization Century Projects »From workplace rights to constitutional rights in South Africa: The role and action of the tripartite ILO constituency in the challenge to appartheid and the transition to democracy« – accesssed at http://www.ilo.org/wcmsp5/groups/public/---africa/documents/publication/wcms_229509.pdf (4 April 2018).

Madonsela T »The role of the public protector in protecting human rights and deepening democracy« (2012) *Stellenbosch Law Review* 4.

Matshekga J »Toothless bulldogs? The human rights commissions of Uganda and South Africa: A comparative study of their independence« (2002) 1 *African Human Rights Law Journal* 68 at 70.

Mhone G »Labour market discrimination and its aftermath in southern Africa«, Paper prepared for the United Nations Research Institute for Social Development (UNRISD) (2001)).

Morgan R »Social security in the SADCC states of southern Africa: Social-welfare programmes and the reduction of household vulnerability« in Ahmad E *et al* (eds) *Social Security in Developing Countries* (Claredon (1991)) 415.

Mpedi LG »Social protection law in the Republic of South Africa« (2017) 20 *Law in Africa* 33.

Mpedi LG »The evolving relationship between labour law and social security« (2012) *Acta Juridica* 270.

Mpedi LG and Nyenti MAT *Employment InjuryProtection in Eastern and Southern African Countries* (Sun Press (2016)).

Mubangizi JC »The South African Public Protector, the Ugandan Inspector-General of Government and the Namibian Ombudsman: A comparative review of their roles in good governance and human rights protection« (2012) 45 *Comparative and International Law Journal of South Africa* 304.

Mwansa L-KJ »Corruption and social services in Africa« in Frimpong K and Jacques G (eds) *Corruption, Democracy and Good Governance in Africa: Essays on Accountability and Ethical Behaviour* (Lightbooks (1999)) 122.

Nxumalo M »Social consequences of corruption in society« in Frimpong K and Jacques G (eds) *Corruption, Democracy and Good Governance in Africa: Essays on Accountability and Ethical Behaviour* (Lightbooks (1999)) 13.

Osode P »The Southern African Development Community in legal historical perspective« (2003) 28 *Journal for Juridical Science* 1.

Schoeman M »From SADCC to SADC and beyond: The politics of economic integration« – accessed at http://www.alternative-regionalisms.org/wp-content/uploads/2009/07/schoemar_fromsadcctosadc.pdf (4 April 2018).

Takirambudde PN »Protection of labour rights in the age of democratization and economic restructuring in Southern Africa« (1195) 39 *Journal of African Law* 39.

Thipanyane T »Strengthening constitutional democracy: Progress and challenges of the South African Human Rights Commission and Public Protector« (2015–2016) 60 *New York Law School Law Review* 125.

Van Niekerk A et al *Law@Work* (4th edition) (LexisNexis (2017)).

Hajime Wada, Nagoya

Japan's System for Enforcing Workers' Rights, with a Focus on Judicial Remedy

Table of Content

Introduction

The main purpose of labor law regulation is to protect the rights and interests of workers, who are socially and economically weak (protection of rights). Realizing this protection of rights requires the provision of effective legal mechanisms and systems for that purpose. These consist mainly of judicial remedy through civil lawsuits, but recently alternative dispute resolution (ADR), which uses dispute-resolution processes other than lawsuits, has come to perform an important function. Further, labor law has a number of special mechanisms for protecting workers' rights.

Japan's labor law learned much from German labor law over approximately 100 years starting in the Weimar period, and on that basis Japan has achieved the advancement of employment and the democratization of employment society. With this in mind, I will proceed with the discussion while describing Japanese peculiarities.

The paper comprises six sections: Part I describes the character and substance of the workers' rights (according to substantive law) which are protected by labor law. Workers' rights protected by law include the rights to organize, bargain collectively, and strike, which are guaranteed by Article 28 of Japan's Constitution, and are known as basic workers' rights, as well as the right to work, which is related to the working conditions guaranteed by Article 27 of the Constitution. This paper deals with only the latter. Part II explores the peculiar system of labor law which ensures fulfillment of rights, while also referring to the peculiarity of Japanese law. Part III continues with an analysis of normal civil lawsuits, which constitute remedy in the courts, while Part IV analyzes the Labor Tribunal System, a recently founded system which now finds active use. Part V presents several case studies to show the characteristics of Japanese law and employment society, and Part VI presents a summation.

A. Protection of Workers' Rights by Labor Law

I. Substantive Labor Law

How does substantive law[1] guarantee workers' rights?

Article 27 of the Japanese Constitution says, »Standards for wages, hours, rest and other working conditions shall be fixed by law,« and much labor legislation builds on this provision.

Japan does not have a strict distinction like that of Germany between »labor protection law« (*Arbeitsschutzrecht*) and »labor contract law« (*Arbeitsvertragsrecht*), but theoretical analyses are in general conducted on the basis of such distinctions.[2] Although both guarantee workers' rights, labor protection law includes criminal punishment and administrative supervision, and in that sense it comes under both criminal law and public law. On the other hand, labor contract law has no provisions for criminal punishment or administrative supervision, and belongs to the system of private law.

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1 English translations of Japanese labor laws can be found on the website of the Japan Institute for Labour Policy and Training (http://www.jil.go.jp/english/laws/index.html).

2 Traditionally, the 1947 Labor Standards Act broadly regulates working conditions, and as such there was little debate about the distinction between labor protection law or the labor contract law. This distinction became a subject of serious debate owing to enactment of the Labor Contract Act in 2007. See: Wada, »›Roudou Keiyaku-hou‹ no Seikaku to Kisei Naiyou ni Kansuru Oboegaki« [»The Character and Regulatory Specifics of the ›Labor Contract Act‹«] *Roudou Houritsu Jumpou* 1594 (2005), 29 ff.; Nishitani, *Roudou-hou Dai-ni Han* [*Labor Law, Second Edition*], Nihon Hyoronsha, 2013, 31 and 38.

A comparison of Japanese and German labor law finds several characteristics.

One is the large differences in the specifics of workers' rights and working conditions regulated by labor protection law. For example, in Germany the Federal Vacation Act (*Bundesurlaubsgesetz*) that regulates annual paid vacations, the Minimum Wage Act (*Mindestlohngesetz*) that regulates minimum wages, and other laws are in the domain of labor contract law. In Japan vacations are regulated by the Labor Standards Act (LSA; Article 39), which falls under labor protection law, while minimum wages, which were originally regulated by the LSA, came an independent law, the 1959 Minimum Wage Act. Therefore it also comes under labor protection law. Penalties are sometimes imposed for violations of these rights. In Germany labor protection law is mainly concerned with working hours and workplace safety and sanitation, which are related to worker health and safety, while in Japan, as discussed below, regulation by the LSA, which is a labor protection law, covers a very broad spectrum. As such, the scope of Japanese labor protection law is very extensive.

Second, many Japanese laws leave doubt as to whether they are labor protection laws or labor contract laws. Specifically, the 1985 Equal Employment Act and the 1993 Part-Time Workers Act have no criminal punishment provisions, but many academic theories place them in the public law domain. This is because to achieve their purposes these laws incorporate many elements which establish the basic policies and administrative guidance for the government's employment measures (such as Article 14 of the Equal Employment Act, which prescribes state assistance for employers), and prepare administrative dispute resolution systems (Article 17 and following of the same law for state assistance in resolving disputes over discrimination).

The same can be said for the Part-Time Workers Act, although it has a stronger public-law character. That is to say, although the law is meant to improve employment management for part-time workers, it has only a few provisions for protecting labor contract rights, and basically achieves its purpose through state assistance and administrative guidance. The parts of the law which prescribe this constitute the core regulatory provisions.

As a result, these laws are complex in character. This is a significant matter concerning the private-law force of worker protection provisions under public law, which I shall discuss below.

II. Labor Standards Act

The 1947 Labor Standards Act (LSA) comprehensively regulates working conditions, and in that sense it systemically guarantees workers' rights. Chapter 1, »General Provisions,« establishes principles that are known as a »bill of rights« for eliminating Japan's feudalistic employment practices of the pre-WW2 period. Chapter 2, »Labor Contracts,« has provisions pertaining mainly to procedural regulations for dismissal. The other provisions are:

Chapter 3, »Wages,« Chapter 4, »Working Hours, Rest Periods, Days Off, and Annual Paid Leave,« Chapter 5, »Safety and Health« (deleted in 1974 due to enactment of a separate law), Chapter 6, »Women and Minors« (extensively modified owing to the 1985 Equal Employment Act and its subsequent amendments), Chapter 7, »Accident Compensation,« Chapter 9, »Rules of Employment,« Chapter 10 (omitted), Chapter 11, »Supervising Bodies,« Chapter 12 (omitted), and Chapter 13, »Penal Provisions.«

Article 13 of the LSA has this to say about the force of working-condition protection with regard to labor contracts: »Labor contracts which provide for working conditions that do not meet the standards of this Act are invalid with respect to such portions. In such cases, the portions which have become invalid shall be governed by the standards set forth in this Act.« To explain using a specific example, LSA Article 32 states that the maximum time worked per day is eight hours. Therefore, even if an individual labor contract calls for a 10-hour workday, that provision is void and substituted with the provisions of LSA Article 32, making that worker's workday eight hours. The former is the mandatory force of the article, and the latter is its supplementary force.

LSA Article 39 has provisions for annual paid vacations. As such, even if a company's employment regulations have no provisions for annual vacations, workers gain the right for annual vacations as provided in this article. In this case, only the LSA's supplementary force is operative.

The Minimum Wage Act (Article 4), which was derived from the LSA, has similar provisions. Therefore, if an agreement has been reached on wages that are lower than the statutory minimum wage, then that agreement is void; the contract is construed to provide for the minimum wage, and the worker has the right to claim it.[3]

German law has no such provisions, which are peculiar to Japanese law. I shall discuss the supervisory administrative authorities and penal provisions below.[4]

III. Laws Belonging to Labor Contract Law

The representative law belonging to labor contract law is the 2007 Labor Contract Act. But the law concerns mainly the conclusion of labor contracts, fixed-term labor contracts, and the force of employment regulations, not workers' contractual rights, especially conferring the right to claim them.

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3 Concerning the differences between minimum wage laws in Germany and Japan, see Wank, »Mindestlohn in Deutschland und Japan,« *Chuo University Hougaku Shimpou* 121-7 and 8, 121 ff. In Japan, for example, the minimum wage is not set nationally; rather, it is set annually by councils individually for each of the 47 prefectures. In 2017 the highest minimum wage is ¥ 958 in Metropolitan Tokyo and the lowest is ¥ 737 in Okinawa and seven other prefectures.

4 Already in Weimar Germany, Nipperdey had already developed the legal theory that the rules of labor protection law were inherent in labor contracts owing to the protection obligation that labor contracts impose on employers. A book which explains this to a Japanese audience is Nishtani, *Roudou-hou no Kiso Kouzou* [*The Basic Structure of Labor Law*], Houritsu, 2016, 133 ff.

The Act on Childcare Leave and Caregiver Leave, which was enacted in 1991 and subsequently amended a number of times, is another labor contract law. This law confers on workers the rights to request childcare leave, caregiver leave, and leave to look after a sick child. It is thus similar to Germany's Federal Vacation Act. Under this law, for example, workers can request childcare leave from their employers »for children under age 1 they are raising« (Article 5), and employers cannot refuse this request (Article 6). Similarly, workers can request nursing care leave (Article 11), and employers cannot refuse this request (Article 12). Workers who are raising preschool children can request leave of up to five days each business year »for taking care of or preventing the illness of« their children (Article 16.2), and employers cannot refuse this request (Article 16.3). As such, this law directly grants workers rights under labor contracts.

Additionally, enactment of the Act on the Succession to Labor Contracts upon Company Split, which establishes the rules for contract succession in conjunction with a company split, was meant to correspond to Article 613a of Germany's Civil Code and its Organization Restructuring Act (*Umwandlungsgesetz*), and hence is included among labor contract laws. Specifically, its Article 4 provides that a worker »with respect to whom there is no provision in the split contract to the effect that the successor company will succeed to the labor contract … may … file with the split company concerned an objection in writing with respect to the successor company concerned not succeeding to the labor contract concerned.« In such a situation, the successor company will of course succeed to the labor contract of the worker filing the objection.

Even if such laws lack provisions such as LSA Article 13, which confer mandatory force and supplementary force, their force in directly regulating the terms of labor contracts is recognized.

IV. Laws Belonging to Public Law

Unlike the above laws, there are some laws or provisions in which the substance and character of workers' rights are ill-defined. One example is laws which, by virtue of their fundamental nature, are understood as belonging to public law. A representative example is the Equal Employment Act.

The Equal Employment Act clearly prohibits discrimination against women with regard to dismissal and other termination of employment (such as retirement and the refusal to renew fixed-term labor contracts that have been repeatedly renewed) (Article 6(4)), bans disadvantageous treatment for reasons such as pregnancy and childbirth (Article 9), and has provisions whose force is recognized to void legal acts which violate these prohibitions. Workers can also claim damages for violation of mandatory provisions.

Contrasting with this are situations that violate prohibition provisions involving, for example, personnel transfers (especially promotions), education and training, and the use of employee welfare facilities (Articles 6(1),

6(2), 11, and others). The majority view adopts the understanding that with judgments ordering performance or declaratory judgments there are no recognized ways of realizing workers' contractual rights, the reason being that relief from discrimination is basically left to administrative agencies.[5] But despite being in the minority, my view affirms such rights of claim for these provisional violations on the grounds that employers have a contractual obligation to treat employees fairly.[6]

A similar provision is the Equal Employment Act's Article 11 on sexual harassment. Article 11.1 states, »Employers shall establish necessary measures in terms of employment management to give advice to workers and cope with problems of workers, and take other necessary measures so that workers they employ do not suffer any disadvantage in their working conditions by reason of said workers' responses to sexual harassment in the workplace, or in their working environments do not suffer any harm due to said sexual harassment,« and the following clause reads, »The Minister of Health, Labor and Welfare shall formulate guidelines required for appropriate and valid implementation of measures to be taken by employers pursuant to the provisions of the preceding paragraph.« These provisions are configured so that employers take measures in line with sexual harassment rules set forth in Ministry of Health, Labor and Welfare ordinances. For this reason the interpretation of some academic theories is that employer obligations established by this article are public-law obligations, and that if actions are in keeping with administrative guidelines, employers are not liable for torts if the article has been violated.[7] This view is influenced by traditional theories of public law, which draws a clear distinction between public law and private law.

Apart from this view, it is the understanding of not only this theory, but also theories and judicial precedents in general, that the obligation of employers to prevent sexual harassment is derived as an obligation under tort law, or an interpretation based on the good-faith principle in labor contracts. For that reason, according to some of the above-mentioned theories the matter of sexual harassment brings forth a complex structure of obligations involving a public-law obligation under Article 11 of the Equal Employment Law, and an obligation under general tort law or an obligation arising from non-performance.

V. Soft Law

The second public-law example is provisions known as soft law.

According to Araki, who asserts the usefulness of soft law in Japan, the case for soft law is made in the following way: Unlike hard law, which prohibits certain acts by employers or actively imposes obligations upon them, soft law induces employers to implement a certain policy by means of admin-

5 See, for example: Sugeno, *Roudou-hou* [*Labor Law*] *11th Revised Edition*, 2017, 256.

6 Wada, *Jinken Hoshou to Roudou-hou* [*Human Rights Guarantee and Labor Law*], Nihon Hyoron-sha, 2008, 60 ff.

7 Sugeno, op. cit., note 5, p. 262.

istrative control provisions, or provisions which require employers to make their best effort.

The first Equal Employment Law, enacted in 1985, required employers' best effort in relation to recruitment and hiring, and to personnel treatment in placement and promotions,[8] but by way of subsequent amendments this gradually changed to provisions which impose obligations to ban discrimination and treat employees fairly.[9] Even labor law for part-time workers at first was merely regulations meant to achieve government policy measures, but through amendments gradually incorporated provisions that prohibit unreasonable discrimination against part-time workers. The Senior Citizens Employment Stability Act similarly changed from provisions requiring best efforts to introduce age-60 mandatory retirement systems to provisions which ban mandatory retirement systems for people under age 60. Araki says it is very effective in Japan to adopt the approach which, when a law is first enacted, requires best efforts to demonstrate a certain policy orientation when agreement of the involved parties could not be obtained, and then, at a later stage when agreement has developed, progressively change to provisions which require prohibition provisions and decisive actions (or measures).[10]

Although Japanese legislation often uses such techniques, I have doubts about Araki's views and this manner of legislation.[11] One is that the normative content of these provisions is not distinct, and therefore cannot be used as trial norms. For example, Article 3 of the Part-Time Workers Act states, »A business operator may seek to ensure the treatment of Part-Time Workers employed by him/her that is balanced with that of ordinary workers employed by him/her … and by means of taking such measures as those for ensuring of proper working conditions, implementation of education and training, enrichment of a welfare program, other improvement of employment management.« However, it is not clear what norms of conduct are required of employers.

My second doubt is that in many cases soft law is guidelines for administrative guidance and assistance, or it restricts assistance for dispute resolution by administrative agencies. As a result, fulfilling workers' rights is based on policy guidance by administrative authorities, not on being the adversary of lawsuits by private individuals, and that involves problems inherent in sys-

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8 Here are some excerpts from the law's initial version. Article 9: »Employers must endeavor to provide women with opportunities equal to those of men with respect to worker recruitment and hiring.« Article 10: »Employers must endeavor to treat women workers the same as men workers with respect to worker placement and promotions.« Additionally, businesses' in-house education and training was limited to certain persons specified by Labor Ministry ordinances. Article 9: »With regard to education and training prescribed by Labor Ministry ordinances for the purpose of conferring the basic capabilities needed by workers to perform their duties, employers must not treat women workers differently than men workers by reason of being women.«

9 The 1997 amendment changed the best-effort provision to a prohibition provision, and eliminated restrictions on education and training.

10 Araki, »Roudou Rippou ni okeru Doryoku Kitei no Kinou: Nihon-gata Sofutolo Apurochi [The Function of Effort Provisions in Labor Legislation: The Japanese-Style Soft-Law Approach],« *Roudou Kankei no Gendai-teki Tenkai* [*The Modern Development of Labor-Relations Law*], 2004, 19 ff.

11 Wada, *Roudou-hou no Fukken* [*The Resurgence of Labor Law*], 2016, 197 ff.

tems for rights fulfillment. Like the Equal Employment Law, this approach has been adopted for many matters pertaining to the human rights guaranteed by Article 14 of the Constitution (which prohibits discrimination),[12] and that is a factor behind the long years required for rights fulfillment.

In my view, legislation like Germany's 2006 General Act on Equal Treatment (*Allgemeines Gleichbehandlungsgesetz*) is appropriate.[13]

I-6. Anti-Discrimination Provisions

Here I would like to describe Japan's provisions for employment equality and prohibiting discrimination in order to illustrate the complexity of Japanese labor law.

In the main this is based on the Constitution, whose Article 14 reads, »All of the people are equal under the law and there shall be no discrimination in political, economic or social relations because of race, creed, sex, social status or family origin.« The enactment of labor laws has built on this article and on Article 27.

Viewed chronologically, Article 3 of the 1947 Labor Standards Act (LSA) established a comprehensive anti-discrimination provision: »Employers shall not use the nationality, creed or social status of any workers as a basis for engaging in discriminatory treatment with respect to wages, working hours or other working conditions.« However, this text lacks mention of sex. This is related to the LSA's separate provisions according special protection (prohibition and limitation) to women for overtime and late-night work. But with sole regard to wages, which had in particular been subject to serious discrimination from before World War 2, LSA Article 4 states, »Employers shall not use the fact that a worker is a woman as a basis for engaging in differential treatment in comparison to men with respect to wages.« Such incoherent regulation has for many years caused employment discrimination against women.

Japan enacted the Equal Employment Act in 1985, which was late for a developed country. And as noted above, anti-discrimination in the law's initial version was limited to dismissal and termination of employment (such as reaching retirement age, and the refusal to renew fixed-term labor contracts). Other working conditions were left to the employer's best effort. The 1997 amendment established prohibition provisions for everything from recruitment and hiring to employment termination, including the conditions in the previous version, and the 2006 amendment changed the law from a law that prohibited »discrimination against women« to a law that prohibited »sexual discrimination.«

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12 When the Equal Employment Act was first enacted it read, »Employers must endeavor to provide women with opportunities equal to those of men with respect to worker recruitment and hiring« (Article 7), and »Employers must endeavor to treat women workers the same as men workers with respect to worker placement and promotions.« The 1996 amended version changed these to the current prohibition provisions.

13 Yamakawa/Wada. »Doitsu ni okeru Ippan Byoudou Rippou no Imi [The Significance of General Equality Legislation in Germany]«, *Nihon Roudou Kenkyuu Zasshi* [*The Japanese Journal of Labour Studies*], 574 (2008), 18 ff.

The 2015 amendment of the Act on Employment Promotion of Persons with Disabilities prohibited discrimination against handicapped people in the area of employment.

More complicated are anti-discrimination laws for non-regular employment.[14] Germany regulates fixed-term workers and part-time workers with the same law, the Part-Time and Fixed-Term Employment Act (*Teilzeit-und Befristungsgesetz*), but Japan regulates them with different laws. Specifically, the 1993 Part-Time Workers Act regulates part-time workers, while the 2015 amended Labor Contract Act regulates fixed-term employees. As noted previously, these laws are different in character, and it is hard to find how they differ in terms of regulation. Moreover, their provisions pertaining to equal treatment are soft law and abstract, and they differ in terms of their regulation targets.[15] As such, in the case of people working part-time under fixed-term labor contracts, there are practical difficulties in determining which law applies.

On June 2018 the Part-Time Work Act (Act on Improvement, etc. of Employment Management for Part-Time Workers) was amended as a part of the Act on the Arrangement of Relevant Acts on Promoting the Work Style Reform. By this amendment, Article 20 of Labor Contract Act which regulates prohibition of unreasonable treatment of fixed-term contract workers was transferred to the Part-Time Work Act. As a result the name of the Act was changed to Part-Time and Fixed-Term Contract Work Act. The new Article 8 of this Act states that, considering the content of workers' duties and the responsibility accompanying the duties, the extent of changes in the content of duties and work locations, and other circumstances, each item of the working conditions of part-time workers and fixed term contract workers in comparison to normal (typical) workers should not be unreasonable.

In fact, there have been many lawsuits seeking equal treatment, and even an exceptional case[16] which denied the reasonableness of differences in base pay, but court actions have merely provided relief for parts of pay, such as

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14 Non-regular employment such as part-time employment and fixed-term contract employment are statuses under labor contracts, and it is understood that they do not correspond to the »social status« given in Article 3 of the Labor Standards Act as an anti-discrimination attribute (see, for example, the Osaka Appellate Court Decision of July 16, 2009 in *Labor Case Judgments*, No. 1001, p. 77), and therefore special legislation was needed to remedy discrimination against such workers.

15 Only one article – Articl 20 – of the Labor Contract Law deals with fixed-term labor contracts (»If a labor condition of a fixed-term labor contract for a worker is different from the counterpart labor condition of another labor contract without a fixed term for another worker with the same employer due to the existence of a fixed term, it is not to be found unreasonable, considering the content of the duties of the workers and the extent of responsibility accompanying the said duties …, the extent of changes in the content of duties and work locations, and other circumstances«). By contrast, the Part-Time Workers Act first establishes general provisions in Article 8 (»With regard to a Part-Time Worker for whom the description of his/her work and the level of responsibilities associated with said work … are equal to those of ordinary workers … the business operator shall not engage in discriminatory treatment in terms of the decision of wages, the implementation of education and training, the utilization of welfare facilities and other treatments for workers by reason of being a Part-Time Worker«). This is followed by provisions requiring efforts by employers for equal treatment in wages (Article 9), provisions for equal treatment in education and training (Article 10), and provisions for equal consideration in the use of employee welfare facilities (Article 11).

16 Oita District Court Decision of December 10, 2013, *Labor Case Judgments*, No. 1090, p. 44. This case involved a part-time worker whose daily work time was only one hour short of the usual hours, and there-

commuting allowances.[17] This is the limit for soft-law regulation, making it necessary to tackle the problem with basic-level legislation.

B. The System for Securing Rights that Is Peculiar to Labor Law

I. Criminal Punishment

Criminal punishment is a powerful means of enforcing labor protection law. Some laws which provide for criminal punishment are the Labor Standards Act (LSA), Minimum Wage Act, and Industrial Safety and Health Act.

For LSA violations, the law calls for four levels of imprisonment and fines depending on the gravity of violations. Subject to penal provisions are proprietors (such as CEOs), executives (such as directors), »or any other person who acts on behalf of the business operator of the enterprise in matters concerning the workers of the enterprise« (such as a personnel department manager or factory manager) (Article 10).

During 2016, 71 suspects were sent to the prosecutor by the Labor Standards Inspection Office of Aichi Prefecture (Japan's fourth-largest municipality, with a population of about 7 million), where I live. The breakdown was 32 violations of the LSA (nonpayment of regular wages: 17 cases; nonpayment of overtime: six cases; working hour violations: four cases; other violations: five cases) and 39 violations of the Industrial Safety and Health Act. The overall trend is about the same every year.

II-2. The Labor Standards Inspection Office and Administrative Supervision

As an organ of the Ministry of Health, Labor, and Welfare (MHLW), the Labor Standards Inspection Office functions to both oversee labor standards administration and act as a law enforcement agency. According to the slightly outdated statistics of 2010, Japan has 2,914 labor standards inspectors (0.53 per 10,000 workers), as compared to 2,742 in the United Kingdom (0.93), 1,703 in France (0.74), 6,336 in Germany (1.89), and 262 in Sweden (0.64).[18] The sparsity of such inspectors in Japan is striking.

Labor protection laws (*Arbeitsschutzrecht*), such as the *Labor Standards Act*, *Minimum Wage Act*, and *Industrial Safety and Health Act* comprise the subjects of labor standards supervision. Administrative supervision performs two roles. First, it functions as the recipient of the Work Rules drafted at each business enterprise and, checking compliance, orders corrections where violations are found.

Second, upon receipt of a notification by a worker (*LSA*, Article 104) or, alternatively, based on its independent judgement, the Office may require the submission of reports, conduct routine supervision and, where necessary,

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fore the court ruled that there was hardly any difference with full-time regular employees in terms of duties performed and personnel changes. The court consented to payment of damages for the difference.

17 See, for example: Osaka Appellate Court Decision of July 26, 2016, *Labor Case Judgments,* No. 1143, p. 5.

18 *Shogaikoku ni okeru Roudou Kijun Kantokukan no Kazu*, MHLW, May 2010.

on-site inspections. In the event of detection of a violation, guidance will be given to rectify the problem. Guidance takes many forms, including ordering the payment of unpaid overtime or dismissal notice allowance, as well as corrective instructions vis-à-vis illegalities in working hour management, or deficiencies in safety and health management.

Taking just one example of such administrative supervision, in FY 2012 numerous incidents of unpaid overtime were exposed as a result of a nationwide inspection. If including only the data of businesses which where consequently required to pay an amount exceeding \1,000,000 as a form of redress, then 1,300 businesses, 100,000 workers and the payment of \10,400,000,000 (10 thousand, four hundred million yen) were involved.[19] Many European researchers will undoubtedly be surprised by this number. In Japan, the correction of long working hours continues to be the single largest labor problem.[20]

Where recommendations for correction are not followed, malicious violations may be subject to criminal penalties.

II. Special System – Making Company Names Public

With regard to public construction works, where accidents that violate the *Industrial Safety and Health Act* (and many of these are fatal) occur, not only at principal contracting companies, but also at their sub-contractors and sub-sub-contractors, there are occasional cases of principal contracting companies receiving bidding suspensions from the contractees, i. e., the Ministry of Land, Infrastructure and Transport or municipal governments. In contrast, as mentioned at the beginning of this presentation, bidding suspensions by central or local government are extremely rare in the case of fatal accidents that contravene the *LSA*. However, the fact that such suspensions function as an important sanction against legal violations is beyond doubt.

Another, what is thought to be a typically Japanese sanction exits: Publicizing the names of violating companies. Cases that violate the *LSA* or *Industrial Safety and Health Act* and are turned over to the prosecutor's office, are made public by Prefectural Labor Bureaus. In addition, there are other systems that publicize violating companies' names. The *Act on Employment Promotion etc. of Persons with Disabilities* obligates companies to employ disabled persons up to a proportion prescribed according to business category. Companies which fail to reach employment targets are ordered by the Minister of the MHLW to draw up corrective measures and, where these are not implemented, are served with recommendations on implementation. Where, in

19 *Kantoku Shidou ni yoru Chingin Fubarai Zangyo no Zesei Kekka*, MHLW, 2012.

20 During the first half (April to September) of FY 2016, in guidance given to businesses where overtime was suspected to be in excess of 80 hours per month (this number is deemed the *Karoshi* threshold, in that suicide from overwork is recognized as an industrial accident, where such overtime hours have been conducted for a number of months), and in the approximately 10,000 companies where incidents of death from overwork occurred, it was gauged that 80 hours of overtime were being conducted in roughly one-third of the enterprises, and that in approximately 500 of these companies, this exceeded 150 hours (MHLW public announcement).

the absence of reasonable grounds, these recommendations are not followed, the companies' names are made public (Article 46 et seq.). Every year, several companies' names are publicized through this system.

The same publicizing of names is provided for where employers do not follow recommendations on implementing the *Act on Securing, etc. of Equal Opportunity and Treatment between Men and Women in Employment* (Article 30), or where they accept workers who have been illegally dispatched (*Act for Securing the Proper Operation of Worker Dispatching Undertakings and Improved Working Conditions for Dispatched Workers*, Article 49(2)). With regard to these latter two laws, no company names have yet been disclosed.

In Japan, the damage to companies incurred by being publicly named for the violation of laws is far greater than that of criminal sanctions, in particular fines.

C. Labor Dispute Characteristics and Trials

I. Right to a Trial

Ultimately all labor disputes pertaining to labor relations are settled in court, just as other civil disputes are. The people are guaranteed the right to a trial (Constitution, Article 32). All disputes (legal disputes) over what rights and obligations people have, and whether or not there are legal relations, are all to be resolved in the courts (Constitution, Article 76; Court Act, Article 3).

Because labor trials are the final word in labor-dispute settlements, they have a decisive influence on the decisions and makeup of dispute-resolution systems, either de jure or de facto. In this respect, labor trials perform a core role in the labor dispute resolution system.

II. Characteristics of Labor Trials

The characteristics of labor relations are in the inequality and continuity of economic and social relations between the involved parties, and in the strong element of personal connections between the parties. Owing to the influence of these factors, labor disputes also have their peculiar characteristics.

Matters at issue in labor trials often involve the way in which labor is offered, and assessments of a worker's character. Therefore to workers, labor trials are contests in which they bet their integrity. As such, labor trials too are by nature a matter of character.

The inequality of parties in labor relations is most noticeable in employee dismissal cases. That is to say, in almost all dismissal cases employers indicate their will to dismiss workers, who are expelled from those companies (legally, employers are refusing to accept workers' labor). Workers who have no economic clout, who have lost their income, and who have been expelled from their companies might then file lawsuits, but the longer the trials drag on, the more desperate their circumstances become. And if a worker suffers

unfavorable treatment in working conditions other than dismissal, then that worker, who is in a vulnerable position, needs considerable courage to file a lawsuit alone, and must also shoulder economic and mental burdens.

One can find inequality between parties in labor relations also in terms of access to information. Many of the documents used in labor disputes are in the hands of employers, and are difficult for workers to obtain. In other words, there is asymmetry of evidence.

In addition to this situation, until creation of the labor tribunal procedures described below, Japan had no special labor court system like those in several European countries, and labor trials were conducted using normal civil trial procedures. In part because of this, the labor trial system was not something that anyone could use simply and quickly.

III. Labor Trials Today

To gain knowledge of the background against which the Labor Tribunal System was conceived, I would like to examine the current state of labor trials using documents from that time (a multi-year study of the Supreme Court's »Summaries of Labor-Related Civil and Administrative Cases«).

The number of new labor-related normal civil suits received at the district-court level exhibits a nearly consistent rising trend; in 2000 it surpassed 2,000 cases, and in 2015 it was 3,389 cases. More than 90 % of the lawsuits were filed by workers.

Labor-related provisional dispositions tended to decrease starting in 2003, and in 2005 636 new cases were received. By type of petition, there were, among others, 474 seeking to preserve rights as workers, 55 seeking payment of wages, and 23 seeking preservation of rights under the assumption that reassignment orders or disciplinary actions were void. In subsequent years the level stayed about the same.

Trial durations showed a consistent trend toward shortening. In 2005 the average duration of finalized normal civil suits was 11.2 months. Over 60 % of the total finished within a year. A change subsequently appeared in these numbers as trial durations lengthened. In 2015 the average trial duration was 14.2 months, and under 50 % of cases ended within a year.

IV. Overcoming Inequality in Lawsuits

1. Order to Produce Documents

In labor trials there is often a lack of equality between worker and employer due to asymmetry of evidence. In civil trials it is generally accepted that the parties are obligated to disclose the truth, and substantial equality is required for procedures. The main theme for trial procedure in this respect is the order to produce documents (discovery) and shifting the burden of proof.

In dismissal lawsuits and trials seeking to redress disadvantageous treatment in, for example, personnel or wages (claims for damages or for promotion), the employer's submission of documents for making determinations is important for solving the case and for a speedy trial. In cases of discrimination affecting wages or other benefits because of sexual (gender) or union activities, it is extremely difficult or impossible for workers to accurately prove how much they would have received in wages or other benefits (in many cases the average of that received by people who joined the company at the same time) if they had not been subject to discrimination. In such instances, in the trial process the worker will seek, based on Article 220 (4) of the Code of Civil Procedure,[21] disclosure of performance evaluation information pertaining to wages and other benefits (not only of that worker, but other workers hired earlier, later, and the same time) that is held by the employer. In response, the employer will argue that providing such documents would impinge on the privacy of other workers, or that the documents are for the employer's own internal use.

Cases which involve the production of documents, and in which rulings order production, are recently very common in actions dealing with, for example, sexual (gender) discrimination in wages. Court determinations are generally positive about producing such documents, but arriving at a decision on and determination of this motion is time-consuming and this tends to bring about a stay in proceedings. It is therefore desirable that the future will see the development of a practice in which the parties voluntarily produce actually existing documents.

2. Shifting the Burden of Proof

The burden of pleading and burden of proof in civil trials are ordinarily determined by juristic requisites, i. e., ultimate facts according to substantive law (specific facts corresponding to requirements which bring about certain legal effects: creation, impairment, extinguishment, and inhibition of rights), and apportionment of the probative burden between the parties (plaintiff and defendant) is determined by the principle of fairness in civil lawsuits. Generally it is considered that, regarding the requirement for the party which asserts and claims its rights to plead and prove the ultimate facts of the authority underlying its rights, and to inhibit the emergence of its effect, it is fair to make the party disputing that effect plead and prove ultimate facts.

Amid asymmetry of evidence in labor trials, the worker's side suffers constraints and limitations in its efforts to establish facts, and when the establishment of facts in response to this by the employer's side is inappropriate (although in many cases this involves the establishment of evidentiary facts), courts will in some instances make their judgments after a de facto shift in the

21 Article 220. »In the following cases, the holder of the document may not refuse to submit the documents.« An example offered by Paragraph 4 is when a document contains personal information. The Code requires the disclosure of the document with personal information deleted.

burden of proof. Article 2 of the (Japanese) Code of Civil Procedure states, pertaining to such judgments by courts, »Courts must endeavor to ensure that civil lawsuits proceed in a fair and speedy manner, and parties to trials must follow by proceeding with civil lawsuits in good faith.« Such court judgments are commendable for implementing the intent of this provision.

3. Provisional Disposition Proceedings

Provisional disposition proceedings, which are proceedings on civil provisional remedies, have often been used in labor dispute cases. The application for provisional disposition first brought before the court was in fact that of an employer; it was an injunction against an illegal strike, and a measure to deal with a labor dispute. Subsequently, in cases such as dismissals, and from a desire for speedy trials, workers' counsels similarly started using provisional disposition proceedings prior to bringing the suit on the merits, which requires the rigorous investigation of evidence.

Previously in provisional disposition proceedings, oral proceedings were held just as in the merits phase, and hearings were conducted with care by, for example, actually examining witnesses (making provisional disposition into the merits), but recently provisional disposition proceedings are being conducted speedily thanks to the 1991 amended Civil Provisional Remedies Act. Trials for labor-related provisional dispositions generally take three to four months, and in terms of case type, as many as 70 to 80 % of cases involve preserving worker rights and similar cases. To the parties, petitions for provisional disposition are increasingly limited to cases in which legal judgments are quite clear, the judge's decision is predictable, and the matter is very urgent. By contrast, labor tribunal proceedings find increasing use.[22]

4. Small Claims Lawsuits and Other Actions

When the amount in a monetary claim is under ¥ 600,000, litigants can avail themselves of summary and speedy trial procedures in summary court (Code of Civil Procedure, Article 368). There are more than 1,000 such cases a month, and 10-odd percent are thought to be labor-related lawsuits (such as claims for wages and for dismissal notice payments).

Additionally, disputes pertaining to labor relations are also civil disputes and therefore subject to civil conciliation, but this is hardly used except at a few summary courts such as Tokyo Summary Court.

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22 This part is a modification of: Wada, H. »Individual Labor-Related Disputes: Focus on the Labor Tribunal System,« Bruns/Suzuki(eds.), *Realization of Substantive Law through Legal Proceedings*, 2017, 109. About this system, see also: Sugeno, *Japan Labor Review*, Volume 13, 2016, p. 4; Kezuka, *Japan Labor Review*, Volume 13, 2016, same article, 13; and Hamaguchi, »Comparative Analysis of Employment Dispute Cases Resolved by Labor Bureau Conciliation, Labor Tribunals and Court Settlement,« *Japan Labor Review*, Volume 13, 2016, 119.

D. Labor Tribunals

I. Background of System Inauguration

Japan's modern labor relations and industrial relations were shaped and developed after defeat in World War 2. As this proceeded, labor unions gained increased organizing capacity, and company unions played a major role also in resolving labor disputes. While those years could be called the era of collective industrial relations, individual labor disputes were also dealt with within this framework while making use of provisions in collective agreements for consultations and dismissal, or systems such as those for handling grievances.

From about the second half of the 1970s, however, the unionization rate declined and labor unions played a decreasing role in resolving individual labor-related disputes. But at the same time, individual labor disputes rapidly increased as international competitiveness strengthened and the business climate changed in conjunction with that, and especially as the collapse of bubble economy the first half of the 1990s. These altered circumstances compelled changes in labor dispute resolution systems and the building of new systems.

In response to the rising number of individual labor-related disputes, the government first created a dispute resolution system in Labor Bureaus, which were prefecture-level branch administrative agencies of the Ministry of Health, Labor and Welfare, or in the Dispute Coordinating Committees that had been created in the Labor Bureaus (2001 Act on Promoting the Resolution of Individual Labor-Related Disputes). This is an administrative type of alternative dispute resolution (ADR). Specifically, Labor Bureau directors provide dispute-resolution advice and guidance, while Dispute Coordinating Committees conduct mediation.[23] Although these are not compulsory dispute-resolution procedures, in practice they often lead to resolution of disputes. Because these are provided as part of administrative services, the parties need not pay any special fees to use them. For this reason administrative ADR finds active use.

As noted above, the court dispute resolution system involves lawsuits on the merits and provisional disposition proceedings. According to statistics from around 2000, the average trial duration for labor-related lawsuits in district courts is 13.5 months,[24] taking about 1.5 times as long as civil cases in general. Of the total, 38 % take longer than a year. This imposes a heavy burden on workers in terms of time, money, and mental health. For this reason as well, only 2,100-odd new cases are received each year.

In Germany at that time there were somewhat fewer than 570,000 new cases filed in procedures for decisions in district courts, and close to 90 %

23 Mediation is a procedure which inventories the parties' respective arguments and endeavors to resolve the matter, while conciliation is a procedure in which a mediator presents a conciliation proposal and resolves the dispute.

24 It was about 20 months in the early 1990s, and therefore 13.5 months is a considerable shortening.

were processed within six months. Of these, processing in lawsuit judgments and other judgments account for 22 %, and other reason for the short processing time is that the rest were resolved through settlements or other means. Surprising in comparison with Japan are the large number of lawsuits and the short processing time in spite of that.

The Labor Tribunal System was instituted to solve the problem of difficulty in gaining access to courts because of long trials (2004 Labor Tribunal Act). This system adopts the conciliation-first principle (Article 1), and in that respect draws on German law. The Labor Tribunal System has made access to the courts far easier.[25]

II. Labor Tribunal System: Description and Current State

1. Description of the System

Labor tribunals are meant for »disputes concerning civil affairs arising between individual employees and employers about whether or not a labor contract exists or about any other matters in connection to labor relations« (civil disputes arising from individual labor relations). By establishing labor tribunal procedures, the system's aim is to provide »prompt, proper, and effective dispute resolution in accordance with the actual circumstances« of the dispute (Labor Tribunal Act, Article 1).

An agency which conducts labor tribunals is »a labor tribunal composed of one labor tribunal judge and two labor tribunal members« (Article 7). The judge is a professional, and the tribunal members are chosen from lists submitted by labor and management. »Labor tribunal members are appointed from among persons who have expert knowledge and experience in labor relations« (Article 9.2), but they must have a »neutral and fair standpoint,« and not represent the interests of either labor or management (Article 9.1). It is believed that about 1,000 labor tribunal members are needed nationally. Members from employers are, for example, personnel department directors and directors in charge of personnel, while members from labor are people such as labor union officers with experience in consulting on matters like wages and dismissals.

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25 Despite the recent increase, the courts' number of newly accepted cases is only about 1/80th that of Germany. The sociology of law willingly takes up the theme of how this can be explained. Takeyoshi Kawashima's *Nihonjin no Hou Ishiki* [*The Legal Consciousness of the Japanese*], 1967 was the first to discuss this matter. Kawashima explains this from aspects such as a legal consciousness which values harmony, a legal culture which does not clearly define rights and obligations, and a legal culture in which people leave dispute resolution to community authorities (also called the culture theory). Subsequently US academics took up the analysis and argued, for example, that this was caused by judicial system dysfunction due to low numbers of judges and lawyers, which resulted in trial delays (dysfunction theory) (see: Kisa et al. *Gendai Shihou Dai 6 Ban* [*Present-Day Justice, Sixth Edition*] 2015, 53 ff.). In my view, all of these factors act as a composite. Incidentally, as of 2015 judges numbered 2,880 in Japan and 20,382 in Germany, while lawyers numbered 35,045 in Japan (thanks to the creation of law schools, this number has risen more than 13,000 in fewer than 10 years) and 164,539 in Germany. In addition to judges and lawyers, Japan has other legal professionals including more than 36,000 related legal experts and specialists such as judicial scriveners, administrative scriveners, and certified social insurance and labor consultants.

Labor tribunal proceedings as a rule hold hearings three times (Article 15.2). To begin with, the two sides endeavor to settle through talks, and if that seems likely, a resolution is reached through conciliation. If not, a labor tribunal is held. If the parties do not file challenges against tribunal decisions within two weeks, decisions become final, but if challenges are filed, tribunal decisions are void, and those cases are carried over to normal lawsuits.

On its first session, a tribunal sets up its plan for hearings, such as for organizing the issues and examining witnesses, and in instances that proceed quickly, the labor tribunal will present its conciliation proposal in the second session.

2. Disputes Suitable for Proceedings

Characteristics of labor tribunals are that they take advantage of the expertise of labor and management, and that inquiries conclude after only three sessions. There are expectations that not only will the participation of neutral and fair tribunal members from labor and management assure the capability to clear up the case and the appropriateness of fact-finding, but also guarantee the soundness of conclusions to a considerable degree. Arguably, such tribunals are appropriate for simple and clear cases dealing with dismissals, non-payment of wages, and other matters. Cases such as those involving sexual harassment and workplace harassment are likewise suited to labor tribunals if the fact situation is not complex. Cases dealing with disadvantageous changes to working conditions due to revision of employment regulations are not suited to the three-meeting format if they are complex, and sexual(gender)-discrimination cases involving problems such as career-track management are likewise not suited to these proceedings.

Although this information is old, the labor tribunal cases processed at Tokyo District Court in 2006 totaled 188, and the largest category was cases in which workers sought status confirmation in response to dismissal by their employers, which accounted for about half (91 cases). At present there are also various kinds of harassment.

3. State of System Implementation

The Labor Tribunal System is highly rated in the following respects. (1) Because people having expert knowledge and experience concerning labor relations join judges as tribunal members in panel talks and verdicts to conduct tribunals, the experience and knowledge of labor and management are reflected in the way labor-management disputes are settled. (2) As a rule, simple and speedy hearings are conducted on three occasions. (3) If a tribunal's decision becomes final, it has the same force as a court-mediated settlement. (4) If a challenge is filed, a tribunal facilitates effective solutions which are, for example, linked to litigation procedure, a feature lacking in administrative and other dispute resolution mechanisms.

In 2015 there were 3,674 labor tribunals. According to finalization reason, 68 % (2,497 cases) of them ended successfully through conciliation. One could therefore say that the conciliation-first principle is working. In 614 labor tribunals, challenges were filed in 372, or 60.6 % of cases.

With respect to trial durations of labor tribunal cases in the same year, 67 % of the total concluded within three months, and the average trial duration was 2.7 months. These figures have been about the same every year since the beginning of the Labor Tribunal System. Because the average trial duration of normal civil lawsuits in district courts is 14.2 months, it is obvious that labor tribunal trial durations are very short. According to Article 1 of the Labor Tribunal Act, the purpose of the Labor Tribunal System is to achieve »prompt, proper, and effective dispute resolution in accordance with the actual circumstances of the dispute,« and therefore it is safe to say that the purpose has been quite well achieved with respect to time.

But a number of problems have also been observed in the Labor Tribunal System. For example, It is necessary to prepare documents and written responses in a short time, which imposes a heavy burden on lawyers and other involved parties. The oral principle increasingly exists in name only, the result being, for example, that labor tribunals try to arrive at a conclusion quickly using written documents alone. In dismissal disputes, labor tribunals will sometimes indicate their intention to prepare conciliation proposals that involve monetary compensation, and it is observed that in some ways this is not necessarily a desirable system to workers who want to get their jobs back. I shall examine this in the next section.

III. Dismissal Disputes

According to Article 16 of the Labor Contract Act, a dismissal that »lacks objectively reasonable grounds and is not considered to be appropriate in general societal terms« is invalid. Regarding the legal effect of dismissal invalidity, in some countries the rule is that the employment relationship has ended and that workers have only the right to claim compensation, while in others the courts can only suggest reinstatement to workers. Japan has long had no statutory provisions on this, but just as in Germany, which has a Protection Against Dismissal Act (*Kündigungsschutzgesetz*), the interpretation has been that although workers cannot claim compensation, they can demand confirmation of their status according to their labor contracts.[26] And in fact, there are few actual dismissal cases in which workers claim compensation; in nearly all cases they claim status confirmation (and unpaid wages for the dismissal period).

But even if a dismissal is invalid, that does not mean the dismissed worker can actually return to the workplace. In some instances the employer might

26 On the substance and function of the legal principles underlying abuse of the right of dismissal in Japan, see: Nishitani,. *Vergleichende Einführung in das japanische Arbeitsrecht*, 2003, 323.

persistently refuse for reasons such as damage to the relationship of trust, or on the other hand the worker might not wish to return; instead, efforts are made for a monetary resolution through a court-mediated settlement or conciliation. Even under the Labor Tribunal System, resolutions for terminating employment and payment of monetary settlements far outnumber those for reinstatement, accounting for over 90 % of cases.[27]

Germany's monetary compensation amounts have a predetermined maximum time period (Protection Against Dismissal Act, Article 10), but in many instances it appears to be 0.5 month's pay for each year of continuous service (one month's pay × 0.5 × years continuous service). Such calculation methods are not necessarily used in Japan. According to a study (Note 29), average amounts are ¥ 3 million for claims and ¥ 1 million for settlements. The latter amount is about 3.4 months' pay.

For this and other reasons, since at least 10 years ago there have been vociferously expressed opinions, especially from employers, that Japan should emulate Germany by having normal lawsuits and labor tribunals introduce monetary settlement systems which to an extent set specific figures (benchmarks). The main reason for this argument is that it would provide for the transparency of settlement amounts. This is being explored under the Abe administration as well.

However, many scholars of labor law, including me as well as workers, have a highly critical opinion about introducing this system. Our reasons are as follows.[28] First, several studies have confirmed that in normal lawsuits, cases in which workers are reinstated to their original jobs after court decisions have invalidated their dismissals account for about 40 %,[29] which is too significant to ignore.

Table 1: *Settlement Amounts and Durations of Labor Tribunals and Court Trials (Employment Termination Cases)*

	Claim amount/ monthly amount	Settlement amount	Time elapsed from problem emergence to settlement
Labor tribunals	¥ 460,000	¥ 1,314,000	8.3 months
Court-mediated settlement	¥ 482,000	¥ 6,665,000	21.7 months
Court decision	¥ 498,000	¥ 6,099,000	33.7 months

Source: See Note 29.

27 Because the Labor Tribunal System was designed as a system for non-contentious cases, hearings are held behind closed doors, and tribunal results are not made public. Analyses are based on information such as parties' responses to questionnaires. For details, see: Sugano/Nitta/Sato/Mizumachi(eds.), *Roudou Shimpan Seido no Riyousha Chousa* [*Survey of Labor Tribunal System Users*], 2013.

28 Wada, »Roudou Kankei no Shuuryou to Roudou Keiyaku Housei« [»The End of Labor Relations, and the Labor Contract Legal System«], *Roudou Houritsu Jumpou*, 1615–16 combined issue (2006), 61 ff.

29 JILPT Document Series No. 4 (2005): Hirasawa, *Kaiko Mukou Hanketsu-go no Genshoku Fukki no Joukyou ni Kansuru Chousa Kenkyuu* [*A Study on the State of Workers' Reinstatement to* Their *Original Jobs after Court Decisions Invalidating Their Dismissals*], 3 ff.

Second, precisely because of this principle of original job reinstatement, one could speculate that even in cases where workers do not return to their workplaces, this principle leads to settlements that award workers with considerable settlement amounts. As the table shows, settlement amounts are highest when decided by court decisions. It is understood that this has something to do with the length of the time period from the problem's emergence to its solution (see Table 1).

Third, there is the nagging question about the possibility of moral hazard arising among employers if all they must do is pay money to achieve the same effect as a dismissal. In Japan there is a strong possibility that issues involving employment termination will influence workers' character evaluations.

Fourth, the problem of how to regulate dismissals is related in a major way to the state of the labor market. That is to say, Japan's labor market is modeled on a »lifetime employment system« in which, once workers are hired by companies, they spend their careers at those same companies until retirement; the job change market is not highly developed as in Western countries. Japan's market is supported by systems which pay high retirement allowances based on years of employment, and by a seniority-based wage system in which workers' basic pay rises quite rapidly according to years of employment. This reality discourages the introduction of a system which resolves disputes monetarily.

In fact, many labor tribunals do end in monetary resolutions, while among normal lawsuits there are many cases which involve original job reinstatement. Japan needs to design its system carefully while keeping these facts in mind.

E. Case Studies

I. Reassignment

Reassignment, in which jobs or workplaces are changed, is a kind of in-house transfer of employed workers. Employment regulations provide for this as follows: »When necessitated by business operations, employers may sometimes order worker reassignment. Workers cannot refuse without justifiable reasons.« Based on this provision, it is generally understood that employers have the right to order reassignment. Needless to say, people having certain skills or qualifications such as physicians, nurses, and university instructors and researchers, or workers who are supposed to work at only business sites in certain geographical areas, have special agreements on job types and work locations, and therefore employers have no arbitrary right to order reassignment.

Employment in Japan does not involve clear job descriptions as in the West, which generally holds for both white- and blue-collar workers. Hence employment in Japan is sometimes referred to as »membership employment« in the sense that workers gain the qualification as employees of their companies.

Under such employment practices, reassignment is very common as a system for career development within companies.

Even if employers thus gain the right to reassign workers, it is judged invalid as the abuse of a right if business operations do not require reassignment, if a worker is reassigned for an inappropriate purpose such as discrimination or harassment, or if its »detriment considerably exceeds the extent that the worker would ordinarily have to put up with.«[30] At first, this detriment was not recognized in circumstances such as when an ill parent or a small child needing care was in the home,[31] and because of that, job transfers away from one's family were quite common. Subsequently, however, there was a growing demand for work-life balance, and an amendment to the Act on Childcare Leave and Caregiver Leave required that employers must take such matters into consideration when deciding on personnel transfers (Article 26). An accumulation of lower-court decisions resulted in overruling previous precedents.[32] Although belated, in Japan too work-life balance has at last come to be observed in business practice.

II. Overtime Work Cases

One more matter to consider in our examination of Japan-style employment practices is that of overtime and holiday work.

On this matter as well, employment regulations have this provision: »Employers may sometimes order workers to work overtime or on holidays when necessitated by business operations. Workers cannot refuse without justifiable reasons.« On this basis, precedents recognize that employers have broad discretionary power with their judgment of what is necessitated by business operations, and courts rule that workers must obey these orders unless there are quite urgent or grave circumstances.[33] Many theories are critical of these court decisions, which show little if any regard for work-life balance.

This judicial doctrine is one factor underlying long working hours in Japan. Another major factor is regulation under the Labor Standards Act, whose Article 32 provides that the maximum number of hours worked per day is eight hours. However, there is a major exception to that: Article 36 provides that employers may have workers work overtime or on holidays with a labor-management agreement between the employer and the company's majority labor union (a union organizing the majority of the workers) or the person representing the majority of the workers if there is no such union. Although there are guidelines[34] for administrative guidance concerning the maximum limit on hours in such instances, the hours are fairly long, and the standards are just

30 Supreme Court decision of July 14, 1986, *Labor Case Judgments*, 477, 6.
31 Supreme Court decision of January 28, 2000, *Labor Case Judgments*, 774, 7.
32 Osaka Appellate Court decision of April 14, 2006, *Labor Case Judgments*, 915, 60; Sapporo Appellate Court decision of March 26, 2009, *Labor Case Judgments*, 982, 44; and others.
33 Supreme Court decision of November 28, 1991, *Supreme Court Civil Case Judgments*, 45–8, 1270.
34 Hour limits are: 15 hours per week, 45 hours per month, 120 hours for three months, and 360 hours per year.

non-binding targets to be honored, not something with imperative effect. Additionally, depending on the circumstances of a business, exceptions are recognized in times of urgent need, and in extreme cases labor and management agree to 1,000 hours of overtime in a year. As this shows, the mechanism for directly regulating overtime and holiday work is weak.

To assure work-life balance, a law amendment is needed to make the current lax regulation of overtime work stricter.[35]

III. Contract Renewal Rejection Cases

After a fixed-term labor contract has been renewed a number of times, is it acceptable to refuse further contract renewal? The understanding of precedents has been that legal principles underlying abuse of the right of dismissal are applied by analogy when (a) the situation is virtually the same as when there is an open-ended labor contract,[36] or, even if not to that extent, (b) the worker has a reasonable right to expect that the contract will be renewed.[37] This is similar to the theory of avoidance in Germany's legal principle of abusing the right of dismissal. The 2015 amendment to the Labor Contract Act made this judicial doctrine into statute law in Article 19.

What the legal principle related to (a), that related to (b), and the legal principle of abusing the right of dismissal regarding open-ended labor contracts have in common is that dismissal and refusal to renew contracts without reasonable grounds are invalid. On the other hand, they differ with respect to the nature and extent of their reasonableness. Typically, when the reason for dismissal is financial difficulties, dismissal priorities from high to low are (a), (b), and then the dismissal of workers with open-ended contracts. Whether (a) or (b), it is thought that non-regular employment serves to moderate the impact of personnel layoffs.

But in this respect as well, the dominant view is that, in conjunction with the increase and diversification of non-regular employment, consideration should be given to each individual case with regard to criteria such as family circumstances, abilities, and degree of contribution to the employer's business.

F. Conclusion

Here I would like to present a brief summary of the foregoing discussion.

Japanese labor law too has labor protection law and labor contract law, but they target a considerably different area than the corresponding German law. Japanese labor law has many laws which, as laws that are by nature indigenous, have a public-law character and that establish the general aims for ad-

35 This has been advocated repeatedly for several years, but does not come to pass owing to strong resistance from employer organizations which support the conservative administration.

36 Supreme Court decision of July 22, 1974, *Supreme Court Civil Case Judgments*, 28-5, 927.

37 Supreme Court decision of December 4, 1986, *Labor Case Judgments*,486, 6.

ministrative guidelines and administrative guidance. Additionally, much use is made of soft-law regulation, mainly equal-opportunity legislation. Features such as these are impediments to judicial remedies.

The system for workers' fulfillment of rights also has much in common with that of Germany, but halting public-sector transactions (bidding) by violating businesses and making company names public are also arguably Japanese-style systems.

Japan has far fewer labor lawsuits than other developed nations. One reason is the institutional factor that Japan has few lawyers, but the number of lawsuits is also heavily influenced by the culture and mindset of the Japanese, who desire to keep disputes out of the public eye. An additional influence on the number of lawsuits is that trials consume much time and impose heavy mental burdens, but attempts have been made to find a solution since the second half of the 1990s. In particular, Japan has launched various ADR systems such as the System for Promoting the Resolution of Individual Labor-Related Disputes and the Labor Tribunal System. In this way, the labor dispute resolution system is undergoing great change. This is also conceivably the process of bringing about the »legalization (*Verrechtlichung*)[38] of labor relations,« which has been long observed in the world of labor law.

Even in normal civil lawsuits, hearing durations have recently been shortened, and the time, cost, and mental burdens on the parties – particularly workers – are clearly less onerous than in past trials. That in itself is commendable. Meanwhile, another important purpose of dispute resolution is bringing about appropriate resolutions in which justice is served, but we must not ignore the fact that this tends to be sacrificed often to speediness.[39] This is a major issue in the matter of introducing a system for the monetary resolution of invalid dismissals. How to reconcile these is a problem which continually plagues the dispute resolution system, especially resolutions by court trials.

38 Nishitani, »Nihon ni okeru Roudou Funsou Kaiketsu Shisutemu« [»The Labor Dispute Resolution System in Japan«], in: Ishibe/Matsumoto,(eds)., *Hou no Jitsugen to Tetsuzuki* [*Realization and Procedure of Law*], 1993, 279 ff.

39 On the presence of such problems in recent labor-related precedents, see: Wada, H. »Roudou Hanrei kara Mietekuru Mono« [»What We Can Discover from Labor-Related Precedents«], *Roudou Houritsu Jumpou* 1645 (2007), 5.

Dimitrios Sideris, Thessaloniki

Das Recht der leitenden Angestellten im griechischen Arbeitsrecht

Inhaltsübersicht

A. Einleitung

In Griechenland stellen die leitenden Angestellten eine wenig zahlreiche Gruppe dar. Dies ist darauf zurückführen, dass die Mehrheit der griechischen Betriebe eine kleine Zahl von Arbeitnehmern beschäftigt. So kommt es dazu, dass die Betriebseinstellung der leitenden Angestellten nicht mehr von großer Bedeutung ist[1]. Betreffende Nachforschungen stellen fest, dass nur 2 % ungefähr der griechischen tätigen Unternehmen einen Personalbestand von mehr als 50 Arbeitnehmern beschäftigen[2]. Stattdessen werden viele Betriebsangehörige, die in einem Arbeitsverhältnis zu dem Betriebshaber stehen, als leitende Angestellte charakterisiert, obwohl sie von den beteiligten Berufskreisen nicht als leitende Angestellte angesehen werden können. Dadurch kann der Arbeitgeber nämlich die Zulage für Arbeitseinsatz während des Bereitschaftsdienstes für die Nachtarbeit und für Sonn- und Samstagsarbeit vermeiden.

B. Die Gesetzesentstehung – Das Gesetzgebungsverfahren

Im Gegensatz zu den übrigen europäischen Ländern, wie zum Beispiel Spanien[3], Italien[4] und natürlich Deutschland[5], hat der griechische Gesetz-

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1 Hromadka Wolfgang, Das Recht der leitenden Angestellten, 1979, S. 28 ff., 91 ff., Wiedemann Herbert, Die »arbeitgeberähnlichen« leitenden Angestellten im Betriebsverfassungsrecht, RdA 1972, 91.

2 Nach der vorigen Regulierung der Gewerkschafts Auslegung G. 1264/1982 nur Unternehmen mit einer Belegenschaft von mehr als 50 Arbeitnehmer konnten Betriebsverfassungen gründen. Beschäftigte Arbeitnehmer in kleineren Unternehmen konnten nur in Industrieverbände teilnehmen und durch Branchentarifverträge zuständig sein.

3 Zum spanischen Recht vgl. Müller Jan-Freerk, Die Rechtsstellung der leitenden Angestellten im spanischen Arbeitsrecht, (Diss.), 2000.

4 Zum italienischen Recht vgl. Henrichel Erhard, Die leitende Angestellten (dirigenti) im italienischen Arbeitsrecht (diss.), 1999.

5 Zum deutschen Recht vgl. Hromadka Wolfgang, Das Recht der leitenden Angestellten im historisch-gesellschaftlichen Zusammenhang, 1979, Martens Klaus-Peter, Das Arbeitsrecht der leitenden Angestellten, 1982.

geber den beruflichen Status der leitenden Angestellten und deren betriebsverfassungsrechtlichen Rechte und Pflichten nicht mit einer bestimmten arbeitsrechtlichen Vorschrift geregelt. Als geltende Gesetzgebung wird das Internationale Übereinkommen von Washington[6] befolgt, welches die leitenden Angestellten von den Vorschriften über die Arbeitszeit ausnimmt. Nach griechischem Arbeitsrecht gelten für die leitenden Angestellten keine gesetzlichen Sonderregelungen, wie zum Beispiel Vorschriften über die Einstellung, die Regelung des Arbeitsverhältnisses, das Probearbeitsverhältnis und die Probezeit, die Beförderungsregeln, den Erholungsurlaub oder die Kündigung und die Kündigungserklärung[7]. Dazu existieren keine Sonderregelungen, obwohl die leitenden Angestellten als eine besondere Arbeitnehmergruppe betrachtet werden und sich von dem Angestellten/Unternehmern und den Arbeitern unterscheiden.

Zusätzlich gibt es auch keine gesetzliche Rechtsvorschrift für ihre kollektive Vertretung, sowie auch nicht für ihre Beteiligung in der Organisationsform der Gewerkschaften. Anwendung findet nur die Vorschrift des Artikels 14 (Abs. 3) des Gesetzes 1264/1982. Nach dieser Vorschrift werden von der Organisationsform der Gewerkschaft nicht nur die Arbeitgeber ausgenommen, sondern (durch teleologische Auslegung ermittelt) auch diejenigen, die innerhalb der Gewerkschaft die Arbeitgeberinteressen vertreten können.

C. Die Rechtsprechung

In allen Regeln des griechischen Arbeitsrechts werden leitende Angestellte als Arbeitnehmer betrachtet[8]. Da jedoch für das Rechtsgebiet der leitenden Angestellten keine detaillierte gesetzliche Sonder-Grundlage besteht, ist die Rechtsprechung von herausragender Bedeutung um diese Regelungslücke durch Rechtsfortbildung zu schließen und den beruflichen Status der leitenden Angestellten zu entwickeln. Unabhängig von der notwendigen Erarbeitung einer detaillierten gesetzlichen Grundlage des Begriffsstatus der leitenden Angestellten, der auch andere Rechtsordnungen beschäftigt und trotz Kodifizierung einer L-AN Regelungs-Vorschrift[9], ist es weiterhin Aufgabe der Rechtsprechung durch rechtskräftige Entscheidungen die Rechtsunsicherheit bei den den Themen des Erholungsurlaubs der leitenden Angestellten und ihrem Bedürfnis nach eigenen Interessenvertretungen in der Gewerkschaft zu beheben. Zu diesen Fragen hat die Rechtssprechung folgende Feststellungen getroffen:

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6 Der IMT (Internationale Arbeitsvertrag) wurde durch G. 2269/1920 ratifiziert und trat als internes Recht in Kraft.

7 BGH 561/2007 DEN 2007, 957; BG Athens 6207/2011 DEN 2012, 1303.

8 Zerdelis Dimitrios, Individualarbeitsrecht, 2015, S. 23, BGH 1148/2017 EErgD 2018,60.

9 Richardi Reinhard, Der Begriff des leitenden Angestellten. AuR 1991, 33 ff.

I. Merkmale der leitenden Angestellten:

Die Rechtsprechung knüpft an besonderen Kriterien um den Begriff der leitenden Angestellten zu präzisieren:

1. Nach Stellung im Unternehmen:

Leitender Angestellter ist, wer nach Arbeitsvertrag und Stellung im Unternehmen (oder im Betrieb) eine umfassende Generalvollmacht (Prokura) hat, die ihn von den anderen Arbeitnehmern differenziert. Regelmäßig nimmt er sonstige Aufgaben wahr, die für den Verlauf und die Entwicklung des Unternehmens (oder eines Betriebs) von großer Bedeutung sind[10]. Öfters werden Vorstandsmitglieder einer Aktiengesellschaft, die aufgrund von Arbeitsverträgen mit dem Vorstand tätig werden, als leitende Angestellte angesehen[11].

2. Leitende Funktion – Autonomie

Leitende Angestellte sind vor allem Arbeitnehmer mit Arbeitgeberfunktionen, die im Rahmen einer allgemeinen Weisungsgebundenheit verbundene Arbeitsleistungen erbringen und nach freier Entschließung arbeiten, dies im Gegensatz zu den Angestellten-Arbeitnehmern, denen die Leitungsaufgaben und Verantwortung durch verbindlichen Weisungen übertragen werden[12].

3. Gehalt-Jahresarbeitsentgelt

Aufgrund der Wahrnehmung von verantwortungsvollen unternehmerischen Aufgaben ist es gerechtfertigt, dass die leitenden Angestellten ein regelmäßig überdurchschnittliches Gehalt halten, welches höher ist als bei anderen Angestellten. Nach Meinung der Rechtsprechung führt der Bezug eines überdurchschnittlichen Jahreseinkommens zur Qualifikation eines Arbeitnehmers als leitender Angestellter[13].

Die erwähnten Kriterien müssen nicht kumulativ bestehen. Die Existenz von nur einem dieser Kriterien reicht aus um jemanden die Eigenschaft des leitenden Angestellten zuerkennen zu können[14].

Auf diese Grundlage bezeichnet die Rechtsprechung als leitende Angestellte die Direktoren einer Zweigniederlassung einer Bank[15].

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10 BGH 978/2009 EErgD 2010, 102; BGH 87/2009 EllD 2009, 1721; BGH 1724/2008 EErgD 2009, 1107; OLG-Piraeus 372/1997 Armenopoulos 1997, 1261.

11 BGH 544/2010 DEN 2011, 345; BGH 127/2008 EllD 2009, 741; BGH 1791/2006 DEN 2007, 216 = EllD 2007, 475; BGH 842/1999 EllD 2000, 419; BGH 1204/1995 DEN 1996, 189; BGH 1364/1990 EErgD 1991, 210, Brox Hans, Leitende Angestellte als Aufsichtsmitglieder des Unternehmens, Festschrift für Ficker, 1967, s. 95 ff., Henssler Martin, Das Anstellungsverhältnis der Organmitglieder, RdA 1992, 292–293.

12 BG-Piraeus 372/1997 Armenopoulos 1997, 1261.

13 BGH 45/1997 EllD 1997, 1572; BGH 83/2007 DEN 2007, 888; BGH 1047/2007 EErgD 2008, 1362.

14 BGH 74/2011 EllD 2011, 1645 = EErgD 2012, 803; OLG-Piraeus 479/2011 DEE 2011, 1289.

15 BGH 230/1985 EErgD 1987, 473.

4. Erholungsurlaub

Sonderbar erscheint es, dass die Rechtsprechung den Erholungsurlaub mit den zeitlichen Grenzen der Arbeit verwechselt. Aus diesem Grund wird auf die leitenden Angestellten nicht das Recht auf Erholungsurlaub anerkannt und auch nicht angewendet[16]. Die Rechtslehre stimmt zu dieser Position jedoch nicht zu[17]. Der Ausschluss von dem Recht auf Erholungsurlaub im Einklang mit der Rechtsprechung verstößt gegen das Unionsrecht, insbesondere gegen Art. 7 der Richtlinie/Ordnung 2003/88 und gegen Art. 31 Abs. 2 der Charta der Grundrechte der Europäischen Union. In der Praxis ist es jedoch üblich, dass eine Betriebsvereinbarung oder einzelvertragliche Abrede über den Erholungsurlaub in den individuellen Arbeitsverträgen der leitenden Angestellten dies vorsieht, damit auch die leitenden Angestellten diesen Rechtsanspruch durchsetzen können. Regelmäßig bedeutet das, dass diese Regelung den Vorrang vor den gesetzlichen Arbeitnehmer-Regelungen genießt.

5. Teilnahme – Organisationsform der Gewerkschaften

Eine uneinheitliche Rechtsprechung über die Teilnahme der leitenden Angestellten in der Organisationsform der Gewerkschaften hat ihre Spuren hinterlassen. Auf der einen Seite stellen manche Gerichtsentscheidungen fest, dass dieses Recht in diesem Fall keine Anwendung finden kann. Mit der Herausnahme der leitenden Angestellten aus der Gewerkschaftsverfassung sollte sichergestellt werden, dass die Interessen und die Vorteile des Arbeitgebers nicht durch seine Vertrauten vertreten werden können[18]. Mit einer teleologischen Auslegung berufen sich diese Gerichtsentscheidungen auf das Gewerkschaftsgesetz (Art. 14 Abs. 3 G. 1264/1982), d. h. auf die entsprechende Vorschrift, die ausdrücklich die Arbeitgeber-Teilnahme verbietet. Andererseits erklären manche Gerichtsentscheidungen dieses Recht jedoch als selbstverständlich[19]. Dieselbe Ambiguität herrscht auch über das Streikrecht der leitenden Angestellten. Natürlich betrachtet man das als gerechtfertigt, denn Streikrecht und Tarifautonomie der Berufsverbände stehen unabhängig nebeneinander[20]. Sinnfälliger wäre es, wenn die leitenden Angestellten aus den Gewerkschaften ausgenommen sind und ihre Koalitionsfreiheit durch eine eigene Betriebsverfassung ausschließlich für leitenden

16 BGH 935/2017 DEN 2017, 11 04 BGH 980/2013 DEN 2013, 1430; BGH 1467/2012 DEN 2013, 956; BGH985/2011 EErgD 2011, 1068; BGH74/2011 EErgD 2011,803; BGH 636/2009 EllD 2011, 1643 ΄ BGH1047/2007 DEE 2008, 751; BGH 1030/2005 ErIPR 2006, 176 = DEE 2006, 420.

17 Kalomiris Dimitrios, EErgD 1974, 1295, Ntasios Leonidas, Arbeitsverfahrensrecht, A/1, 1999, s. 518, Papadimitriou Kostas, DEN 1994, 1148.

18 AG Eleusis 9/1988 DEN 1989, 1061; LG-Athens 1313/2003 DEE 2002, 737.

19 Βλ. BGH 561/2007 DEN 2007, 957; LG-Athens 1358/1985 EErgD 1985, 210, die die AG-Athens 1810/1984 (EErgD 1984, 701) bestätigte.

20 Martens Klaus-Peter, Das Arbeitsrecht der leitenden Angestellten,1982, S. 423 ff.

Angestellten (Sprecherverfassungen)[21] erfüllen und ihre Bedürfnisse durch eigene Interessenvertretungen wirksam wahrnehmen lassen[22].

Damit sollte abschließend nach außen sinnfällig werden, dass die Rechtsprechung eine restriktive Auslegung auf die Definition der leitenden Angestellten übernimmt. Nach Auffassung der Rechtsprechung ist die Existenz der leitenden Angestellten mit großen Unternehmen verknüpft; hingegen begünstigt die Charakterisierung als leitende Angestellte die Interessen des Arbeitgebers, weil die Arbeitszeitregelung auf sie keine Anwendung findet.

D. Nachwort

Die Übersicht über den Rechtsstatus der leitenden Angestellten lässt zu dem Schluss gelangen, dass trotz Regelungslücken in den arbeitsrechtlichen Vorschriften des geltenden Gesetzes die Rechtsprechung eine restriktive Auslegung des Begriffs der leitenden Angestellten bevorzugt, weil sie einerseits wahrnimmt, das ihre Präsenz mit der Existenz von großen Unternehmen verknüpft ist, während gleichzeitig ihre Charakterisierung den Arbeitgebern nützlich ist, weil die Arbeitszeitregelung auf sie keine Anwendung findet.

Darüber hinaus ist die Rolle der Rechtsprechung auch in Ländern, in denen eine einschlägige Regelung kodifiziert ist, von grundlegender Bedeutung im Hinblick auf die Erarbeitung des Begriffes der leitenden Angestellten[23].

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21 Zum Beispiel in Deutschland mit der ULA (Union der Leitende Angestellte), aber auch in Frankreich mit der CGC (Conferedation Generale de Cadre).

22 Sideris Dimitrios, Der Beruf-Status der leitenden Angestellten, 2005, S. 130.

23 Zöllner Wolfgang, Zur Abgrenzung der leitenden Angestellten im Sinn des Betriebsverfassungsrechts, dargelegt am Beispiel der Angestellten Wirtschaftsprüfer, Gedächtnisschrift für Rolf Dietz, 1973, s. 377 ff., Birk Rolf, Der leitende Angestellten. Einige rechtsvergleichende Bemerkungen, RdA 1988, s. 211 ff.

Ulrich Becker

Zum Gedenken an Robert Rebhahn

Robert Rebhahn ist am 30.1.2018 verstorben. Mit seinem Tod verliert der ohnehin kleine Kreis der deutschsprachigen Arbeits- und Sozialrechtler, die am internationalen Austausch und der internationalen Dimension ihrer Wissenschaft interessiert sind, eines seiner herausragenden Mitglieder, viele aus diesem Kreis verlieren einen inspirierenden Gesprächspartner und einige einen Freund.

Robert Rebhahn begann seine wissenschaftliche Karriere an der Universität Linz, wo er sich für die Fächer Arbeitsrecht, öffentliches Dienstrecht und Sozialrecht habilitierte. Er wurde dann außerordentlicher und später ordentlicher Professor an der Universität Klagenfurt, um schon kurz danach einem Ruf an die Humboldt-Universität in Berlin zu folgen. Er kehrte aber nach Österreich zurück und übernahm 2003 die Nachfolge von *Theodor Tomandl* und einen Lehrstuhl für Arbeits- und Sozialrecht an der Juristischen Fakultät der Universität Wien. Rufe nach München und Salzburg lehnte er ab. Er hatte seine universitäre Heimat gefunden, eine Heimat, die ihm auch außerhalb der Universität intellektuellen Austausch und kulturelle Genüsse bot, obwohl er sich die Suche nach ihr im Verlaufe seiner Karriere immer wieder ebenso wenig einfach gemacht hatte wie die Suche nach wissenschaftlichen Erkenntnissen.

Robert Rebhahn war ein Gelehrter im besten Sinne, und wenn das Wort Universalgelehrter heute noch gebraucht werden kann, dann traf es auf ihn zu wie auf wenige andere. Seine Interessen beschränkten sich nicht auf einzelne Rechtsgebiete; er forschte nicht nur im Arbeitsrecht, sondern auch im allgemeinen Europarecht, setzte sich mit verfassungsrechtlichen Fragen auseinander und schrieb unter anderem – seine Publikationsliste ist höchst eindrucksvoll und seine Produktivität blieb trotz schwerer Krankheit bis zum Ende ungebrochen, siehe nur seine im Dezember 2017 erschienene anregende Monographie zur Freizügigkeit – etwa auch eine bahnbrechende Arbeit zum Staatshaftungsrecht. Seine Interessen waren nicht auf einzelne Rechtsordnungen beschränkt; er eröffnete sich und seinen Lesern vergleichende Perspektiven, hielt Vorträge an verschiedensten Orten auf der Welt, beteiligte sich an internationalen Konferenzen und europäischen Netzwerken. Seine Interessen gingen zudem über die disziplinären Grenzen hinaus; er suchte den Austausch mit anderen Wissenschaftlerinnen und Wissenschaftlern, seien es Philosophen, Ökonomen, Historiker oder Mediziner. Was ihn vor allem auszeichnete, waren seine nie zu bändigende Neugier und die ernsthafte Suche nach dem Grund der Dinge, die er aber zunächst in jedem Fall vorher sorgfältig und bis ins letzte Detail erfasst hatte. Er vertrat klare, durchdachte Positionen und war, ganz wörtlich genommen, meinungsbildend. Das aber schloss die Auseinandersetzung mit anderen Meinungen nicht aus. Im Gegenteil: Schon seine Freude an einem offenen Diskurs hätte es

ihm nicht erlaubt, nicht auch andere Positionen anzuerkennen und gegebenenfalls auf eine Korrektur der eigenen zu verzichten.

Robert Rebhahn war ein höchst anregender und origineller Gesprächspartner, interessiert an den großen Schicksalsfragen der Menschheit, aber eben auch an anderen Menschen und deren persönlichen Schicksalen. Man konnte von ihm lernen, man konnte mit ihm streiten und sich auch über ihn ärgern, der Austausch mit ihm aber war in jedem Fall bereichernd. Dass wir ihn nicht fortsetzen können, macht sehr traurig.

Mitarbeiterinnen und Mitarbeiter dieses Heftes

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