

ST. LOUIS LAW REVIEW

Vol. XV

DECEMBER, 1929

No. 1

COLLECTIVE LABOR AGREEMENTS IN GERMAN LAW

BY RALPH F. FUCHS

The German law applicable to collective labor agreements between trade unions and employers displays an interesting adaptation of the law of contract to the needs of a system of thoroughgoing regulation. The jurisprudence which results is not without its inconsistencies; yet its basic ideas are simple and admirably suited to the realities of modern industrial organization. The government establishes certain minimum standards of employment by direct statutory enactment. Within these minima the workers and employers are expected to establish further standards by collective agreement. If they succeed partially the aid of the government may be invoked to extend their control within a limited area. If they do not succeed at all but one side or the other is making efforts, the government may step in and impose an "agreement" upon a trade or industry. Only where strong efforts are not being made to bring about regulation by collective agreement or where an agreement leaves open the door to further bargaining, does the individual labor contract signify anything more than entry into a relation whose characteristics are determined from without. Yet ideas of contract law continue to influence the manner in which collective "agreements" may be formed for the purpose of controlling individual labor "contracts."

It is scarcely to be supposed that American industry, with its millions of unorganized employees who display few signs of

banding themselves into unions, will soon, if ever, come to accept so comprehensive a system of regulation by governmental and collective action as that which prevails in Germany. But trade unionism in the United States is not dead, although it is far below the peak of its strength, and collective agreements are still numerous. Here and there developments in extensive sharing of control by unions¹ rest upon a foundation of collective agreements. It is likely, therefore, that the question of the legal position of such agreements will continue to arise, perhaps with increasing frequency. In dealing with that question German experience and German theory will aid, if only by way of suggestion.

I. THE SYSTEM OF GERMAN LABOR LAW

The modern system of control of employment in Germany was the immediate product of the revolution of 1918. Yet, as frequently happens, the revolutionists built upon the familiar and the useful in what had existed before; and the system which they created has since been considerably altered. Its foundation is the famous Ordinance of December 23, 1918.² The Ordinance has three parts. The first, dealing with collective agreements and their possible extension by the Minister of Labor, is still in effect. The second part, providing for a system of works councils, has since been superseded by the Works Councils Act of February 4, 1920.³ The third part, providing for conciliation of labor disputes, has been superseded by the Conciliation Ordinance of October 30, 1923.⁴

¹ Such as those in the Chicago men's clothing market and in the shops of the Baltimore and Ohio and other railroads.

² *RGBl. (Reichsgesetzblatt)* p. 1456. The Ordinance is known as the *Tarifvertragsordnung (TVO.)* and was promulgated by the temporary Council of People's Commissars. It was confirmed, along with Imperial legislation and other ordinances of the Council, by an act of the Constituent Assembly at Weimar, enacted Mar. 4, 1919, and by the general provision of Art. 178 of the present Constitution. See Mattern, *PRINCIPLES OF THE CONSTITUTIONAL JURISPRUDENCE OF THE GERMAN NATIONAL REPUBLIC* (1928) 65-96, for an account of the transition from the old order to the new.

³ *Betriebsraetegesetz (BRG.)*, *RGBl.* 147.

⁴ *Schlichtungsverordnung (SchlVO.)*, *RGBl.* I, 1043. The fact that an ordinance, as distinguished from a statute, was enacted to govern so important a matter, is accounted for partly by the broad ordinance-issuing

Even the structure of control created by this relatively recent legislation⁵ is far from the ultimate which is envisaged by its creators. The present German Constitution, which confers jurisdiction over employment upon the national government, contemplates the enactment of a uniform labor law.⁶ Continuous efforts to draft portions of such a law are being made.⁷ The Works Councils Act is the first resulting product to receive statutory enactment, but it is expected that ultimately an arbitration act, a law governing collective agreements, and a law regulating individual labor contracts will be enacted. Meanwhile the acts now in force are superimposed upon the labor contract sections of the Civil Code of 1896,⁸ the Commercial Code of 1897,⁹ and the Industrial Ordinance of 1869 as modified by the order of July 26, 1900,¹⁰ all of which were drafted almost without reference to trade unions or collective agreements. The interpretation of collective agreements, except in so far as there are controlling provisions in the Ordinance of December 23, 1918, is governed by the provisions of the Civil Code applicable to contracts in general.

On the remedial side the situation has been greatly simplified by the Labor Courts Act of December 23, 1926,¹¹ which became effective July 1, 1927. The Act establishes a complete system of labor courts with comprehensive, exclusive jurisdiction in labor cases. A National Labor Court,¹² closely linked with the Na-

power of the executive under the German Constitution (Art. 48 par. 2; Arts. 50, 77), which can be stretched in emergencies. See Mattern, *op. cit.*, ch. XI., for an account of this power. But the Arbitration Ordinance was promulgated by authority of a special enabling act amounting to a constitutional amendment, promulgated Oct. 13, 1923 (*RGBl.* I, 943), to enable the government to deal with the crisis precipitated by extreme inflation and by the situation in the Ruhr.

⁵ There are numerous acts in addition to the important ones already cited.

⁶ Art. 157.

⁷ See Siefert, *The Administration of Labor Law in Germany* (1927) 15 *INTERNATIONAL LABOUR REVIEW* 681, 868, for an account of the present system of labor law and of the contemplated improvements.

⁸ *Bürgerliches Gesetzbuch (BGB.)* secs. 611-630.

⁹ *Handelsgesetzbuch (HGB.)* secs. 59-83.

¹⁰ *RGBl.* 871, secs. 105-139m.

¹¹ *Arbeitsgerichtsgesetz (ArbGG.)*, *RGBl.* I, 507.

¹² *Reichsarbeitsgericht (RAG.)*.

tional Court of Appeal,¹³ has appellate jurisdiction in all cases of importance, so that a unified jurisprudence is likely to develop. Prior to the establishment of the labor courts the civil courts, with the *Reichsgericht* at their head, had jurisdiction of labor as well as of other cases involving the Civil Code. But the great bulk of labor cases arose in special industrial courts created by the Act of July 29, 1890,¹⁴ and in commercial courts created by the Act of July 6, 1904,¹⁵ for neither of which was a system of appeals established. In addition the decisions of conciliators and conciliation commissions are regarded as administrative acts, subject only to very limited review in the ordinary courts. For review of administrative acts there are in many instances administrative "courts," some of whose decisions are reported; but as yet there is no unified system and no central court of appeal such as is called for by the Constitution.¹⁶ Finally there are penalty provisions in various of the labor statutes, whose enforcement is had in criminal proceedings, reported separately from civil cases.

In theory there is developing out of these statutes and decisions, conflicting and uncertain though they be,¹⁷ a body of law known as Labor Law, a major branch of jurisprudence. In accordance with the manifest intent of the revolution as expressed in the German Constitution, that law is taking its place beside the Civil Law, Criminal Law, Commercial Law, Public Law, and perhaps other divisions of law, as an integral part of a modern system of control. Whether ultimately collective agreements will be its most fundamental feature cannot be foretold. At pres-

¹³ *Reichsgericht (RG.)*

¹⁴ *Gewerbgerichtgesetz*, amended by decree of Sep. 29, 1901, *RGBl.* 353.

¹⁵ *Kaufmannsgerichtsgesetz*, *RGBl.* 266.

¹⁶ Art. 108. For an account of the German administrative courts see Blachly & Oatman, *THE GOVERNMENT AND ADMINISTRATION OF GERMANY* (Institute for Government Research Study in Administration, 1928), ch. XIV.

¹⁷ The uncertainty of much of this law causes a feeling of considerable discomfort to many German lawyers, accustomed as they are to a system of codes. Thus the importance of simplification is stressed at the outset in the able work of Hueck & Nipperdey, *LEHRBUCH DES ARBEITSRECHTS* (Mannheim: J. Bensheimer, 1928) v. I, 22-23. "If the parties," say the authors, "lose their perception of the laws applicable to them, the laws become unworkable."

ent, however, they are the basis upon which the system is being constructed. It is the purpose of this paper to examine the present legal position of these agreements.¹⁸

II. COLLECTIVE AGREEMENTS AND FREEDOM OF CONTRACT

Some of the main lines of judicial thought with reference to collective labor agreements, with contract law as their foundation, were laid down prior to the Great War. The decision in the first and leading case in the *Reichsgericht* was rendered on January 20, 1910.¹⁹ The plaintiff was an employers' association which had entered into a collective agreement with a branch of the German Woodworkers' Union. The object of the suit was to recover the damage caused to the plaintiff and to thirteen of its members who had assigned their claims to it, growing out of a strike of the branch union in alleged violation of the agreement. The branch in question, its principal officer N., and the national union were made defendants. The trouble arose when many of the workers in the plants of the thirteen members of the employers' association remained away from work in order to celebrate May Day, 1906. The employers countered with a three-day suspension of the offenders from work. The workers seized the occasion to demand a wage increase of five *pfennigs* an hour, refusing to return to work until it should be granted. At a meeting of the branch union, presided over by defendant N., it was resolved to support the strikers by every means possible, including the payment of strike benefits. The strike actually was carried on for some time. In its decision the *Reichsgericht* decided the following points: (1) there was a valid collective agreement between the plaintiff employers' association and the defendant branch union; (2) the defendant national

¹⁸ To obtain a complete picture of the courts' dealings with collective agreements it would be necessary to examine the reports of all of the courts, civil, criminal, administrative, industrial, and commercial, at least since 1910. No attempt has been made to do so in the preparation of this paper. Attention has been confined to the decisions of the *Reichsgericht* in labor cases and to the decisions of the *Reichsarbeitsgericht* which are reported in the National Labor Gazette (*Reichsarbeitsblatt—RABl.*) through June, 1929. Examination of the decisions of the *Reichsgericht* was rendered much easier by their exhaustive treatment in two volumes by Dersch, Flatow, Hueck & Nipperdey, *DIE ENTSPRECHUNG DES REICHSGERICHTS ZUM ARBEITSRECHT* (Mannheim: J. Bensheimer, 1927, 1929).

¹⁹ 73 *RGZ.* (*Entscheidungen des Reichsgerichts in Zivilsachen*) 92.

union, having had nothing to do with either the agreement or the strike, could not be liable; (3) since the agreement said nothing about May Day as a holiday and did not attempt to limit disciplinary measures, neither the action of the workers in remaining away from work on May Day nor the action of the employers in suspending them was in violation of the agreement; (4) while there was nothing in the agreement to prevent a worker from attempting by individual contract to secure higher wages than those specified in the agreement, a strike in furtherance of an effort to raise wages was a clear violation of the agreement; (5) although the thirteen employers were not themselves parties to the agreement it was made for their benefit and causes of action in favor of each of them arose out of its breach,²⁰ which it was competent for them to assign to the plaintiff; and (6) both the branch union and *N.*, who entered into the agreement on its behalf, were liable for the damage suffered by the plaintiff and its thirteen members.²¹

The conception of collective agreements which this decision announces leaves individual freedom of contract, legally speaking, unimpaired. Such an agreement does not necessarily fix the terms of any individual contract of employment unless one of the parties is individually a party to the agreement and has bound himself to abide by its terms. Where a union and an employers'

²⁰ By virtue of *BGB.* sec. 328, which reads as follows (Wang's translation): "An act of performance in favor of a third party may by contract be stipulated for in such a manner that the third party acquires a direct right to the performance.

"In the absence of express stipulation it is to be inferred from the circumstances, especially from the object of the contract, whether the third party shall acquire the right. . . ."

²¹ *N.* was liable because the branch union had not registered under *BGB.* sec. 21 so as to acquire "juristic personality." *BGB.* sec. 54 provides that "If a member of such an association [which lacks juristic personality], acting in the name of the association, enters into a juristic act with a third party, that member is personally liable; if several members so act, they are liable as joint debtors." The union itself, although lacking "juristic personality," was suable under an express provision of the Code of Civil Procedure (*Zivilprozessordnung—ZPO.*) sec. 50 and was subject to have execution levied upon its funds by virtue of sec. 735 of the same enactment. Its members might have been held liable as partners (*BGB.* sec. 54); but to enforce that liability it would have been necessary for the plaintiff to proceed against them as individuals (*ZPO.*, Sydow's 18th ed., anno. to sec. 736).

association make the agreement, it is simply a pact between two organizations in which these organizations promise each other to do their best to bring about and maintain a certain state of affairs.²² For breach of that promise they are liable to each other and to each others' members for whose benefit the promise is made; but no duty and no liability of any sort attach to the members of the union or of the employers' association.²³ It will be seen that under this view the ultimate power which enforces such agreements in theory as well as in fact is the economic and moral pressure which can be brought to bear upon individual workers and employers. The legal sanction operates only, so far as that is possible, to compel the organizations to exert pressure for the objectives laid down in the agreement.²⁴

Into this pre-war legal situation the Ordinance of December 23, 1918, injected a new idea which all but destroys individual freedom of contract in the presence of a collective agreement. Says the Ordinance:²⁵

If the conditions for the conclusion of labor contracts are regulated by a written collective agreement between organi-

²² Two decisions of the *Reichsgericht*, handed down Oct. 21, 1912, and briefly reported in DAS RECHT 1913, cases no. 154 & 155, state specifically that collective agreements bind the organizations which enter into them but do not bind the members of those organizations. In neither case are the facts reported. In a decision handed down Oct. 13, 1911, reported in JURISTISCHE WOCHENSCHRIFT 1911, p. 1014, the *Reichsgericht* held that a union did not by entering into a collective agreement guarantee that its members would not be guilty of violations. The union promises to use its best efforts to secure adherence to the terms of the agreement, but no more. Liability in damages because of an unauthorized strike was held not to attach to the union in that case, inasmuch as it had done nothing to bring about or to further the strike.

²³ Whether a court should enforce a collective agreement at the suit of individual workers or employers who themselves have refused to follow it is a question which does not seem to have arisen.

²⁴ Where an employer individually enters into a collective agreement the possibility of legal enforcement is greater, as stated above. For then if the employer fails to abide by the terms of employment laid down in the agreement he is answerable. But such agreements are relatively unimportant. At the end of 1916, when they were quantitatively at their height, they applied to 22.3 per cent. of the establishments and 36.5 per cent. of the workers covered by agreements. On Jan. 1, 1927, the corresponding figures were 0.8 per cent. and 3.7 per cent. See table in SONDERHEFT 43 to R.A.B.I., DIE TARIFVERTRÄGE IN DEUTSCHEN REICHE AM 1 JANUAR., 1927, p. 8.

²⁵ Sec. 1.

zations of workers and single employers or associations of employers, labor contracts between affected parties shall be invalid in so far as they depart from the provisions of the collective agreement. Contracts constituting departures shall nevertheless be valid if they are definitely permitted by the collective agreement or if they involve an alteration in the terms of employment which is favorable to the workers and are not definitely forbidden. The corresponding provisions of the collective agreement shall replace invalid [individual] contracts.

Affected parties within the meaning of paragraph 1 are employers and workers who are parties to the collective agreement, who are or were at the time of the conclusion of the agreement members of organizations which formed the agreement, or who have made their [individual] labor contracts with reference to the collective agreement.

In other words, a collective agreement may now lay down terms and conditions of employment which shall exclude other terms and conditions that have been or may be fixed by individual bargaining, except where the latter are more favorable to employees and are not expressly forbidden in the agreement. The terms and conditions established by collective bargaining are, with the exception named, the only ones which a court will enforce in a suit between a worker and an employer. Individual freedom of contract disappears in the face of legislative power which the state delegates to economic organizations or recognizes as existing in them. Freedom of individual contract continues to prevail only as between employers and workers who are not affected by collective agreements.

To remain unaffected by a collective agreement, however, frequently is all but impossible. For :

The National Ministry of Labor may declare generally binding such collective agreements as have acquired outstanding importance in the fixing of terms of employment of certain occupations in the areas covered by the agreements. Within their geographical scope they shall thereupon be valid as to labor contracts for work which comes under the collective agreements and shall be binding as provided in section 1 even though the employer or employee or both are not directly affected by the agreement.²⁶

²⁶ *TVO*, sec. 2. Sec. 3 provides that "The declaration provided for in section 2 shall follow upon a proposal. Parties to the collective agreement and

Nor is there entire freedom of contract as between organizations of workers and of employers. For when a labor dispute becomes a subject of conciliation proceedings an "agreement" may be imposed, the terms of which one side or both sides may have been unwilling to accept voluntarily. In the Conciliation Ordinance it is provided that conciliators shall use all possible means to bring the parties to an industrial dispute into agreement. Failing in that, the final conciliation board is directed to issue a decree which shall constitute a proposal to the parties.²⁷ If it is accepted by both sides it becomes an agreement. The Ordinance then provides:

If the decree is not accepted by the parties, it can be declared binding. . . .

The declaration of binding effect takes the place of acceptance of the decree.²⁸

Thus, where an "agreement" is imposed in this manner of force and acceptance both emanate from official sources.

A collective agreement really contains two kinds of provisions. There are, first, the terms of employment which the agreement in quasi-legislative fashion introduces into the individual labor contracts of affected parties. These are known as "normative" provisions. In addition there are the terms by which the parties to the agreement confer rights and duties upon themselves, known as "obligatory" provisions. The latter are contractual in nature and were recognized and enforced by the *Reichsgericht* in the decision of January 20, 1910, outlined above. The former, in the absence of legal representation of their members by unions and employers' associations,²⁹ could not be made legally binding until the Ordinance of December 23, 1918, gave them a force which the courts would recognize. Prior to that time there

organizations of employers or workers whose members would be affected by the ministry's declaration are entitled to make such a proposal."

²⁷ *SchlVO.* sec. 5.

²⁸ *Id.* sec. 6.

²⁹ The agency theory has not been seriously considered in actual decisions in Germany. It was, however, rejected by the *Reichsgericht* in a decision on Nov. 27, 1925, *RABL.* 1926, 110, *JURISTISCHE WOCHENSCHRIFT*, 1927, 241. Most writers reject it as untenable. See Nipperdey in Dersch, Flatow, etc., *op. cit.* n. 18 above, I, 74-76.

was no recognized legal category into which such privately established norms seemed to fall.³⁰

It is the normative provisions of an existing collective agreement, and only those, which the Minister of Labor extends to non-members of the contracting organizations when he exercises the power conferred upon him by section 2 of the Ordinance. He has no power to extend the obligatory provisions of any agreement to organizations which have not bound themselves. The "agreements" which are imposed in conciliation proceedings, on the other hand, consists of both "normative and "obligatory" provisions and are binding alike upon individual employers and workers and upon unions and employers' associations. It is here that state control fully replaces private action. There is, in effect, compulsory arbitration coupled with compulsory acceptance of decisions.

III. THE OPERATION OF THE LAW OF COLLECTIVE AGREEMENTS

A review of the cases will serve to bring out various significant aspects of the law of collective labor agreements in Germany.

A. *The Duty to Preserve Industrial Peace*

Practically every collective agreement imposes the obligatory duty, which may be express or implied, to preserve industrial peace as to matters included in the agreement. "Collective agreements," said the *Oberlandesgericht* of Saxony in a recent case,³¹ ". . . have the result of introducing civil law obligations between the parties, in which the obligation to keep the peace is included. This duty arises of itself from every collective agreement without express stipulation. For 'It is so closely bound up with the nature of a collective agreement that without it the attainment of the legal and economic purposes which are

³⁰ A great deal of philosophical speculation is possible as to the nature of the obligation, if any, which a collective agreement imposes upon the individuals whom it purports to govern. It has been argued that the obligation arises out of a "community of interest" which the courts should recognize even when the legislature does not require them to do so. Perhaps the best brief discussion in English is contained in an article by M. Leon DuGuit, *Collective Acts as Distinguished from Contracts* (trans. Lorenzen, 1918) 27 *YALE L. J.* 753.

³¹ *RABl.* 1927, 66 (Jan. 12, 1927).

to be served by the conclusion of the agreement would be greatly jeopardized. Collective agreements are designed not only to establish conditions of work but also to further the possibility of making these effective.' . . ."

In the case itself the day shift in the plaintiff's coal mine refused on May 5, 1924, to work for the lengthened hours which were imposed in a conciliation decree. The men were summarily discharged, whereupon their fellows struck spontaneously. The defendant union, to which the miners belonged and to which the conciliation decree applied, assumed charge of the strike and conducted it. The court held that the union was liable to the plaintiff in damages. The plaintiff also sued the officers of the union because of their part in conducting the strike. The court, however, pointed out that the obligatory portion of a collective agreement³² does not apply to individuals merely because they are members and officers of organizations which are parties to the agreement. The individual defendants therefore violated no duty to the plaintiff. A suggestion that the officers might be liable in tort for acting *contra bonos mores*³³ was rejected, since they were acting in good faith in a situation of great difficulty.³⁴

The facts in a case decided by the *Reichsgericht* on June 9, 1925,³⁵ were not dissimilar, except that there the obligation to keep the peace was expressed in the agreement and was broader than an implied obligation would have been. Monthly adjustments of pay were provided for in the agreement and it was further stipulated that all disputes were to be submitted to conciliation. Strikes and lockouts were forbidden. The question of the wage scale for April, 1922, was submitted to conciliation, but the workers refused to accept the award. On April 8 they concertedly loafed on the job, whereupon the plaintiff closed its plant until it should receive assurances that the sabotage would not be resumed. A strike followed, which the defendant union conducted. The union was held liable in damages, not because

³² That is, in this case, of the decree establishing the lengthened hours.

³³ *BGB.* sec. 826 makes such conduct actionable.

³⁴ The same point was decided by the *Reichsgericht* on Dec. 20, 1927, 119 *RGZ.* 291.

³⁵ 111 *RGZ.* 105.

of the sabotage, for which it was not responsible, but for its conduct of the subsequent strike.³⁶

In a third case of like nature, the facts of which are not reported,³⁷ the *Reichsgericht* held both the union which was party to the collective agreement and its leader liable for the damages growing out of a strike in violation of the agreement. Again the agreement was one which had been imposed. By giving judgment against the leader of the union as well as against the union itself the court, stretching the statutory theory, applied the doctrines of contract law to a situation from which all elements of contract had departed. The statute³⁸ expressly states that the declaration of binding effect whereby a conciliation decree is imposed shall take the place of an acceptance by the parties. Another statute³⁹ provides that one who makes a contract on behalf of an unregistered association shall be personally liable upon the contract. The union in this case was unregistered and was represented in the conciliation proceedings by its leader. The court argued that by force of the first statute the imposition of the conciliation decree was substituted not only for the acceptance of an agreement by the union but for an acceptance through this specific leader. That being so, the leader's liability followed from the provision of the second statute. Said the Court:

The meeting of minds which has been brought about in this manner—albeit as a result of compulsion—must, if it is to have full effect, produce the same results according to the civil law of contract as a contract which has been freely entered into.⁴⁰

³⁶ Nipperdey (Dersch, Flatow, etc.), *op. cit.* n. 18 above, 58 et seq. makes the point that the agreement did not provide for compulsory acceptance of conciliation awards and that therefore the supposed strike was not a strike but a justifiable remaining away from work for which no wages had been established. Apparently, however, the court assumed that the agreement, in view of its prohibition of strikes, did intend that the awards should be binding. Its interpretation was reasonable if not inevitable.

³⁷ *RABL.* 1927, 363, *JURISTISCHE WOCHENSCHRIFT* 1927, 2363 (May 25, 1927).

³⁸ *SchlVO.* sec. 6, above.

³⁹ *BGB*, sec. 54, quoted n. 21 above.

⁴⁰ Kaskel, in a note appended to the report of the case in the *JURISTISCHE WOCHENSCHRIFT*, criticises the decision, not upon the ground that contract

The implied obligation to preserve industrial peace which arises out of a collective agreement extends no farther than the ground covered by the agreement.⁴¹ Thus in a case decided on January 29, 1915,⁴² a longshoremen's union, notwithstanding a collective agreement between it and the plaintiff, fostered a strike of its members in sympathy with certain striking deck hands. The *Reichsgericht* held that this act of the union could not be made the basis of a suit for damages, since the union was not seeking to undermine the regulations established by the collective agreement. Similarly in a case decided on June 30, 1926,⁴³ it was held not to be in violation of a collective agreement for a union to foster tactics amounting to a strike when the purpose was to secure higher wages, a scale for the month not having been fixed in accordance with the agreement.

B. The Obligation to Participate in Setting Up Conciliation Machinery

Where a collective agreement provides for the establishment of joint machinery for the settlement of disputes, there is a duty cast upon the organizations which formed the agreement to play the parts assigned to them in setting up that machinery. In a case decided November 30, 1923,⁴⁴ the *Reichsgericht* denied, however, that the duty was one which was enforceable by civil action. The suit was brought in a civil court by an employers' association against a union upon a collective agreement which provided that there should be a central joint board made up of three members selected by the employers and three by the union. Two of the latter were to be named by the defendant and one by the na-

law is inapplicable, but upon the ground that there was no evidence that the union's final acceptance of the award, if it had been accepted, would necessarily have come through the leader who represented it in the conciliation proceedings, and upon the further ground that the Court failed to note that the imposition of the agreement did not, according to the language of the statute, represent an acceptance by the union's agent or anyone else but was, instead, substituted for the acceptance.

⁴¹ An express obligation may, of course, be included in the agreement and may be made as absolute as the parties desire. See the decision in 111 *RGZ.* 105, discussed above.

⁴² 86 *RGZ.* 152.

⁴³ *RABL.* 1926, 197.

⁴⁴ 107 *RGZ.* 247.

tional union of which defendant was a part. The purpose of the suit was to compel the defendant to name its member in order that they might sit in a proceeding instituted by the plaintiff. The *Reichsgericht* refused relief, stating in broad terms that joint conciliation or arbitration boards, although set up by agreements which are civil contracts, partake of the public administrative character of statutory conciliation boards, since they take the place of those boards in cases arising out of the agreements.⁴⁵ Accordingly the remedy, if any, for the defendant union's refusal to play its part in setting up the joint board was deemed to lie with the public administrative authorities.

The decision was a reasonable one in view of a statutory provision which the court does not cite; for section 21 of the Ordinance of December 23, 1918, provided that if a joint board, established by agreement, was available to decide a case, the statutory conciliation or mediation board should urge the parties to invoke its aid and "in the event that this nevertheless is not accomplished or does not lead to a proceeding, shall itself institute mediation proceedings." A clear administrative remedy thus was made available. Criticism of the decision in which Dr. Nipperdey indulges⁴⁶ seems hardly justified, although much of the court's language is open to objection. Dr. Nipperdey seems clearly right in urging that an arbitration clause in a collective agreement is analogous to any other civil contract to arbitrate. The *Reichsgericht* was not called upon to go out of its way, as it did, to deny that there was any such similarity. But in the matter of the remedy available to the plaintiff, which was the only real issue in the case, the court did not need to resort to the statutes applicable to ordinary contracts to arbitrate.⁴⁷ It did

⁴⁵ *TVO*. sec. 20 was in force at the time the case arose. It provides in par. 2 that "In case of disputes over which special mediation or conciliation boards have jurisdiction by virtue of collective agreements or other contracts, such boards shall be summoned, and only when these fail to function shall the regular conciliation or mediation boards assume charge." The same principle has now been incorporated in *ArbGG*. secs. 91 & 105 and, though less clearly, in *SchlVO*. secs. 3 & 4.

⁴⁶ Dersch, Flatow, etc., *op. cit.* n. 18 above, I, 87 *et seq.*

⁴⁷ Such contracts are governed by *ZPO*. secs. 1025-1048. In sec. 1029 it is provided that a civil court shall name an arbitrator to represent any party to such a contract who fails to carry out his contract obligation to name an arbitrator himself.

not deny that there was an obligation resting upon the defendant union, arising out of the agreement, to name its two arbitrators. If the statutory remedy for its failure to abide by that obligation was inadequate, the fault is hardly the court's.

C. The Operation of Extended and Imposed Agreements

It is stated above that extensions of agreements, declared by the Minister of Labor in accordance with section 2 of the Ordinance of December 23, 1918, cannot operate to extend the obligatory provisions of such agreements. This point is emphasized in a recent decision of the *Reichsarbeitsgericht*.⁴⁸ The book printers' union had an agreement with the German book printers' association which provided that none but journeymen printers should be employed as operators upon certain kinds of machines. The agreement was extended to apply to the defendant, a printer who was not a member of the association. He had been employing a woman who was not a journeyman printer upon a machine in his shop, and he continued to do so. The union brought suit to contest his right to employ the woman in this kind of work. The court held that the action must fail for two reasons. The first was that the provision in question was obligatory and not normative and hence could not under the statute be extended in its operation by the Minister of Labor so as to apply to the defendant. The provision was a prohibition of the employment of certain workers and hence could not, like provisions affecting wages and hours, become an implied term in individual employment contracts. The second reason was that the provision in question did not bind even those employers and workers who were members of the organizations which formed the agreement. Its sole effect was to bind the organizations on each side to see to it so far as they could that their members adhered to the provision.

By way of contrast, a decision of the *Reichsgericht*, handed down June 30, 1925,⁴⁹ enforced an obligatory clause in a collective agreement where the agreement had been imposed in conciliation proceedings. The case was one of the many which arose out of the period of inflation when frequent adjustment of wages

⁴⁸ *RABL* 1928, 276 (Oct. 10, 1928).

⁴⁹ 111 *RGZ*. 166.

was necessary to keep pace with the falling mark. An agreement in the lignite mining industry, concluded March 24, 1922, provided for weekly adjustments of wages. Some of the miners refused to accept the scale established for the week of October 15-22, 1923, and walked out. They were summarily discharged. After various efforts to establish peace had failed, a special conciliation commission made an award which the Minister of Labor imposed upon the industry.⁶⁰ It provided that work should be resumed November 2 and that all miners who had been discharged as a result of the strike should be reinstated. The suit was brought by the employers' association against several unions of miners to establish the point that the reinstatement clause bound neither the association nor its members. The court conceded that the plaintiff's members were not legally bound, since the clause belonged to the obligatory portion of the imposed agreement, which could not be enforced against members of either the operators' association or the union. The court, however, rejected the contention that the association itself was not bound. It was obligated, said the court, to do all it could to secure the reinstatement of the men. The court pointed out that the conciliation statutes would be futile if they were construed to make it possible to settle only those disputes which relate to the terms and conditions of employment. The statutes were intended to extend also to disputes⁶¹ over such matters as reinstatement, and the power of the Minister of Labor to declare awards to be binding was made equally broad, so as to enable him to impose obligatory as well as normative provisions. Said the court:

An identification of the imposition of decrees with the extension of collective agreements under section 2 of the Collective Agreement Ordinance must be rejected. The purpose which the latter serves is entirely different from the end sought to be reached by the former. The extension of agreements seeks exclusively the equalization of conditions of employment and is intended to prevent injury to organized workers through underbidding by the unorganized. It

⁶⁰ Although the *SchlVO.* of Oct. 30, 1923, was not yet in force (see sec. 6, quoted above), certain laws supplementary to the Ordinance of Dec. 23, 1918, conferred upon the Minister of Labor the power to impose decrees which he exercised in this case.

⁶¹ *Gesamtstreitigkeiten*—"collective disputes."

has to do, consequently, only with the normative portion of collective agreements. The imposition of a decree of a conciliation board, on the other hand, serves the purpose of restoring industrial peace equally in the interest of employers and workers and in that of the community—a purpose which usually can be attained only by means of the assumption by the parties to the resulting agreement of obligatory duties, including resumption of work and reinstatement.

* * *

If the plaintiff fails to admonish its members to abide by the decree . . . or to proceed against recalcitrant and disobedient members with constitutional means of punishment and of exerting pressure, or if the plaintiff openly or covertly fosters opposition to the imposed agreement, the defendant can . . . sue it in damages upon its contractual obligation. A similar right to sue vests also in the individual members of the defendants against the plaintiff.

D. The Operation of Normative Provisions

The normative portions of a collective agreement are legally enforceable as terms of individual contracts of employment. "By the alteration of an existing collective agreement or by the conclusion of a new one the new norms automatically enter into all the individual contracts of employment."⁵² The individual contracts themselves, however, are not and cannot be formed by the collective agreement. Entry into the employment relation is legally a matter of choice, whatever may be the economic actuality. That much individual freedom of contract remains. Hence the normative provisions of collective agreements must, so to speak, be invoked before they become completely effective.

The situation in this respect is interestingly set forth in a de-

⁵² *Oberlandesgericht* of Saxony, *RABl.* 1927, 66. That the inclusion of the terms of employment fixed by a collective agreement in the individual contracts of employment is automatic and is not dependent upon the will of the parties is illustrated by a decision of the *Reichsarbeitsgericht* rendered Dec. 8, 1928. *RABl.* 1929, 52. The suit was for wages according to the scale laid down in a collective agreement. The plaintiff at the time of the hiring had concealed from the defendant the fact that he was a member of the union which had formed the agreement, and he agreed to accept a lower wage. The defendant did not come under the agreement. It was held that the plaintiff was entitled to recover, since the Ordinance of Dec. 23, 1918, gave him a right to the scale laid down in the collective agreement. Even his bad faith did not deprive him of this right.

cision of the *Reichsarbeitsgericht* handed down June 26, 1929.⁵³ In the course of a dispute between a trade union and an employer, defendant in the case, 86 workers gave the two-weeks' notice required by their contracts of employment, that they would quit on May 24, 1928. On May 26 a conciliation decree was imposed, which provided that these notices of termination of service should be regarded as withdrawn. May 27 and 28 were holidays and on May 29 the 86 workers presented themselves for work. They were turned away, but on May 31 the defendant reinstated 83 of them. It refused to re-employ the other three. Those who were reinstated, however, were not paid for May 29 and 30. They brought this action to recover their wages for these two days and were joined by the other three men, who sued for reinstatement and for back pay. The court pointed out that the decree, or "agreement," could not withdraw the notices of quitting which the 86 men had given. They alone could do that. In this case the notices had taken effect. Neither was it competent for a decree to reinstate men whose employment relation had been severed. All the decree could do, and all that it should be interpreted as having attempted to do, was to lay it down as a normative term, to be incorporated into the individual labor contracts whereby these men might be re-employed, that they were to be deemed as continuing in their former employment. In the case of the 83 who were reinstated this normative term became operative. Accordingly, these men were held to be entitled to the wages for which they sued. In the case of the other three, however, there was no contract of re-employment upon which the provision of the decree, or "agreement," could operate. These men terminated their own employment. No obligation rested upon the defendant to take them back. Accordingly it was held that they could not recover.

A similar situation, with the parties reversed, was dealt with in an earlier decision of the *Reichsgericht*.⁵⁴ A textile manufacturer sued a trade union for damages growing out of a strike in alleged violation of a collective agreement. The wage scale was fixed in a subsidiary agreement, which expired on October 1,

⁵³ *RABL* 1929, 70.

⁵⁴ 118 *RGZ*. 196 (Oct. 14, 1927).

1925. Attempts to establish a new scale failed, and a large number of workers gave the required one-day notice and left the plaintiff's employ. On November 2 a conciliation decree was declared binding, which established a scale. The men, however, did not return to work until November 26. The union was held not liable. It was clearly proper for the men to refuse to work in the absence of a recognized scale of wages. And since they terminated their employment there was no relationship between them and the plaintiff upon which the new scale could operate after November 2. Nor, said the Court, was the union obligated to urge its members to return to an employment they had left.⁵⁵

The extension by the Minister of Labor of the normative provisions of a collective agreement may at times impose rather far-reaching innovations upon a trade or industry in the guise of normative provisions. Thus in the drug trade a collective agreement established a pension fund and provided that the employer should withhold a specified amount from the pay of each employee, add to it a like amount contributed by himself, and turn over the whole to the fund. The agreement was extended by the Minister of Labor. Two employers, who were bound by the agreement only by reason of its extension, resisted conforming to the pension scheme. In a suit against them by the union and the employers' association, which had established the pension fund as partners, it was held by the *Reichsarbeitsgericht*⁵⁶ that the defendants must make the prescribed deductions and payments. The pension provisions of the collective agreement, like the ordinary wage provisions, became incorporated into the individual contracts of employment of all those subject to the agreement.

The defendants had stipulated expressly in their contracts with their employees that the pension scheme was to form no part of their understanding. In the suit they sought to establish the defense that this departure from the terms of the collec-

⁵⁵ The Court's decision on this point was obviously quite technical. Granted that there was no continuing employment relation to which the new wage scale could attach and that there was no obligation upon the part of the men to return, it was still possible to say that the union was obligated to do all it could to terminate what in effect was a strike.

⁵⁶ *RABL* 1929, 18 (Oct. 27, 1928).

tive agreement, since it did away with deductions from the employees' pay, was to the advantage of the employees and hence was an allowable departure from the terms of the collective agreement under section 1 of the Ordinance of December 23, 1918. The Court had no difficulty in reaching an opposite conclusion. The question of whether a departure from the normative terms of a collective agreement is to the advantage or to the disadvantage of the workers is one which has been litigated a number of times. The courts usually have taken a common-sense attitude in reaching their decisions, assuming that what is ordinarily considered to be favorable or unfavorable to the workers actually is so.⁵⁷

The *Reichsgericht* has uttered the obiter dictum that the normative provisions of a collective agreement continue to have a certain force after the agreement itself has expired.⁵⁸ The Court said:

If the normative provisions [of the collective agreement] have become incorporated into the individual contracts of employment, the agreement remains in force as to these until a new agreement has gone into effect or until the parties to the individual contracts of employment have agreed upon different terms.

What the Court obviously means is not that the quasi-legislative force of the agreement lives on, but that the individual contracts of employment continue in force and that the terms originally introduced into them by the collective agreement remain until they are changed. This view appears entirely reasonable.⁵⁹

⁵⁷ In *RABl.* 1926, 110; *JURISTISCHE WOCHENSCHRIFT*, 1927, 241 (Nov. 27, 1925), below, the *Reichsgericht* rejected the contention that a lengthening of hours with added pay was a departure from the terms of a collective agreement favorable to the workers. In *RABl.* 1928, 177 (Jan. 4, 1928) the *Reichsarbeitsgericht* denied that a contract for less than the wages fixed in a collective agreement, even when it was accepted by the employee as the only alternative to no job at all, could be regarded as a favorable departure.

⁵⁸ 114 *RGZ.* 194 (July 2, 1926). The decision in the case was to the effect that the power of a joint board to decide a dispute over the discharge of a worker ceased with the expiration of the agreement under which the board was established, there being no provision in the agreement to preserve the existence of the board for a longer time.

⁵⁹ Nipperdey, however, criticises it severely (*Dersch, Flatow, etc., op cit.* n. 18 above, II, pp. 55-58). He denies that the normative provisions of a

E. *The Anomaly of Retroactive Operation*

Occasionally a collective agreement provides for retroactive increases in the pay of workers. The question has arisen whether such increases can be enforced by workers who no longer are in the service of their employer, as respects the period between the effective date of the increase in pay and the date their employment ended. In theory the answer would be in the negative; for at the time the collective agreement goes into effect there no longer are individual contracts of employment involving these workers, into which the normative obligation to pay back wages can be introduced. Yet both the *Reichsgericht*⁶⁰ and the *Reichsarbeitsgericht*⁶¹ have in broad terms decided the question in the affirmative—assuming in each particular case, of course, that it was the intention of those who framed the collective agreement to have the increase apply to workers who had left the service of their employers. If the holding had been limited to cases in which the possibility of retroactive increases in pay was foreseeable, as it might have been, for example, during the period of inflation, so that a provision for subsequent payment might be deemed to have been incorporated into the original individual contracts of employment,⁶² it would be theoretically defensible. As it is, the decisions represent a victory of fairness and of practicality over formal legal logic.

F. *Waiver of Normative Provisions*

It seems to have become established as the result of an obiter dictum of the *Reichsgericht* in a decision handed down November 27, 1925,⁶³ that individual workers, who cannot contract for

collective agreement theoretically enter into the individual contracts of employment. He thinks, rather, that they constitute extra-contractual standards which there is nothing to maintain after their quasi-legislative force is lost. His view on this point is heterodox.

⁶⁰ NAZIONALZEITUNG FÜR ARBEIT, 1924, 496 (Dec. 11, 1923), discussed in *Dersch, Flatow, etc., op. cit.* n. 18 above, I, 41 *et seq.*

⁶¹ *RABl.* 1929, 119 (Feb. 23, 1929).

⁶² This actually was the situation in the earlier of the two cases, but the court did not rely upon that fact in reaching its decision.

⁶³ *RABl.* 1926, 110; JURISTISCHE WOCHENSCHRIFT, 1927, 241. The *Reichsarbeitsgericht* took the same position in an obiter dictum in a case decided Jan. 4, 1928 (*RABl.* 1928, 177).

lower wages than those specified in a collective agreement, may nevertheless waive the payment of all or a portion of the wages they have already earned. If they do so, they are barred from subsequently recovering according to the terms of the collective agreement. In the case itself the action was brought by certain foremen on a farm to recover back pay and to establish their right to further employment. In March, 1923, under a collective agreement imposed in conciliation proceedings in 1921, the ten-hour day was in force in the agricultural industry. The "agreement" also provided that foremen could be discharged only on November 10 of each year after six months' notice. In the month named the defendant, in conjunction with other farmers, gave his foremen notices of discharge, to be effective unless they should accept a ten and one-half hour day and a new wage scale. The plaintiffs felt impelled to accept the new terms of employment. On June 8, however, they changed their attitude and were summarily discharged. On August 21 a new collective agreement, voluntarily entered into, provided for reinstatement of the men, for the ten-hour day, and for higher wages in return for a renunciation by the men of their claims arising out of the agreement of 1921 and its violation by the employers. The plaintiffs, however, refused to renounce their rights. In the action they sought to recover full wages for the year following June 8, 1923, and to establish their right to their positions until November 10, 1924, upon the theory that their discharge on June 8, 1923, operated merely as a notice of discharge which could not become effective until November 10 of the following year. The *Reichsgericht* ruled that nothing that occurred prior to the new agreement of August 21, 1923, was effective to alter the term of the plaintiffs' employment as defined in the agreement of 1921. Accordingly their action in June in refusing any longer to work ten and one-half hours or to accept the substituted scale of wages was entirely proper and their summary discharge at that time was inoperative. It was in this connection that the Court remarked that although the plaintiffs were not bound by the terms forced upon them in March, they could not recover additional pay for the period between that time and June 8, since they had waived their proper wages by accepting payment according to the substituted

scale. Inasmuch as the plaintiffs did not sue for such additional pay, the remark was gratuitous. The Court did not give any reasons for its view. Nipperdey, who criticises it,⁶⁴ remarks quite justly that he dictum is hardly authority for the future and that the courts should be warned against following it, since thereby "the principle of non-departure will ultimately be surrendered."⁶⁵

Another instance of disregard for the principle of non-departure from the normative terms of collective agreements is represented by the decision of the *Reichsgericht* of May 31, 1922.⁶⁶ The dispute was over the pay of a machinist on a German vessel which had been interned in Chile during the Great War. On the return journey early in 1920 the plaintiff received advancements upon his wages in Jamaica and at Bermuda, in English money. By a special telegraphic arrangement the defendant steamship company had agreed to translate these advances into German money according to the normal rate of exchange. It sought in defense of the case to avoid this special arrangement and to calculate the amount of the advances according to the rate of exchange which was current at the time they were made. It relied upon a clause in a collective agreement, entered into in January, 1919, and applicable to the parties, which forbade any alteration in the terms of the agreement by special contract. The Court satisfied itself that the parties to the collective agreement did not intend to forbid this type of special arrangement and so held the defendant bound to employ the normal rate of exchange in calculating the balance due to the plaintiff. Obviously the decision was rendered in the interest of preventing great hardship in an extraordinary situation. The

⁶⁴ Dersch, Flatow, etc., *op. cit.* n. 18 above, I, 31-32, II, 70.

⁶⁵ In the remainder of the Court's decision it awarded the wages sued for until Nov. 10, 1923, measured by the agreement of 1921 until Aug. 21 and by the new agreement thereafter. It refused to regard the plaintiffs as entitled to recover for the subsequent year, upon the ground that their action on June 8 in insisting upon the hours and wages to which they were entitled operated to give effect to the notices of discharge which had been given them in March and which they had staved off by accepting the lengthened hours and substituted pay. The decision on this point seems highly questionable. Nipperdey, who also differs with the Court on points of interpretation of the agreement of August 21, 1923, criticises it severely.

⁶⁶ 104 RGZ. 385.

Court was quite right in stretching a point or two in order to overcome the strict language of the collective agreement, which was employed without reference to a situation such as that which later developed.

G. THE USE OF DECLARATORY JUDGMENTS

The litigation of collective agreements in German courts is rendered much easier than it would otherwise be by the system of declaratory judgments which prevails there, resting upon section 256 of the Code of Civil Procedure.⁶⁷ If the normative provisions of collective agreements could be enforced only in suits between parties to individual labor contracts and if the chief means of holding unions and employers' associations to the obligatory provisions were actions for damages brought after violations had taken place,⁶⁸ the number of breaches which went unredressed would obviously be considerable. Despite the cheapness and simplicity of the procedure which prevails in the German labor courts,⁶⁹ many workers would fail to sue their employers and many employers would find it hardly worth while to secure performance of their employees' duties by resorting to court

⁶⁷ See Borchard, *The Declaratory Judgment—a Needed Procedural Reform*, 28 YALE L. J. 1, 105, l. c. 16-20, 107-109, for an account of the operation of declaratory judgments in Germany.

⁶⁸ The remedy of compelling performance or of enjoining nonperformance is also available in German law. In fact it is regarded as the primary remedy in civil cases, with damages a secondary remedy, to be resorted to where performance is no longer possible. *BGB.* secs. 249, 251; *ZPO.* sec. 888. But for some unexplained reason there are no reported cases in German courts of last resort in which a union or an employers' association has been sued for the purpose of actually compelling it to live up to its obligation under a collective agreement. The closest approach is a case decided March 21, 1928, by the *Reichsarbeitsgericht* (*RABl.* 1928, 206), in which 21 "key" men in a large plant were enjoined as individuals from continuing a strike which they had begun without having submitted their grievance to conciliation as a collective agreement required them to do. The Court decided the case upon the theory that the defendants were acting *contra bonos mores* and therefore were subject to a tort action under *BGB.* sec. 826. No reason appears why such a remedy might not be employed against a union or an employers' association. A decree for specific performance and an injunction differ from a declaratory judgment in that execution may be had upon them. A declaratory judgment renders the point in issue *res adjudicata*, but it cannot be enforced except in another action brought for that purpose.

⁶⁹ Under the provisions of *ArbGG.* sec. 9 *et seq.*, sec. 46 *et seq.*

action. The inadequacy of damage suits against the organizations is apparent.

Under the provision of the Code of Civil Procedure cited above, however, it is possible for anyone who has a legal interest in "the existence or nonexistence of a legal relation" to bring an action for a declaration of its existence or nonexistence. As respects collective agreements the courts have held that both unions and employers' associations have sufficient legal interest in the existence or nonexistence of disputed normative provisions of collective agreements to entitle them to declaratory judgments upon these provisions even though the members rather than the organizations themselves are the parties directly affected. That a union or an employers' association is entitled to a declaration regarding the existence or nonexistence of an obligatory provision is obvious.

In two recent cases trade unions have exercised their right to apply for declaratory judgments. In a decision handed down January 11, 1928,⁷⁰ the *Reichsarbeitsgericht* held that a union's obligation to further the carrying out of the normative provisions of a collective agreement and its duty to protect the interests of its members entitled it to a decree respecting the duty of an employer not to deduct the period of a strike in calculating the vacations to which his employees were entitled. The alleged duty rested upon the terms of an imposed agreement. Similarly, a union of hotel employees was held to be entitled to apply for a declaratory judgment against a hotel proprietor, to establish the right of bell boys, chambermaids, and apprentice waiters to receive the wages specified in a collective agreement, without regard to tips.⁷¹

In numerous cases the right of a union or of an employers' association to apply for a declaratory judgment has gone unchallenged. Thus in a case in the *Reichsarbeitsgericht* decided February 2, 1929,⁷² an employers' association sought to secure a declaration that an alleged decree of a joint board, establishing lower rates of pay, was valid. It was unsuccessful, but its right to bring the action was not questioned. In the *Reichsgericht's* de-

⁷⁰ *RABl.* 1928, 157.

⁷¹ *RABl.* 1929, 14 (Sept. 19, 1928).

⁷² *RABl.* 1929, 86.

cision of June 30, 1925,⁷³ it was a declaratory judgment which the employers' association sought and obtained.

H. Enforcement by the Parties

Since collective agreements are in effect constitutions for economic commonwealths of limited extent, it is natural that the parties should attempt to provide means of enforcing order which replace such outside agencies as courts and public conciliation boards, leaving these as a last resort. Within limits the courts have had no objection to permitting this sort of self government.⁷⁴ Thus in a recent case⁷⁵ it was held proper for a collective agreement to provide for the shortening of vacations on account of unexcused absence of workers and for the enforcement of this provision by the works council although such matters ordinarily come within the province of the labor courts.

In 1912 a painter found his shop closed and his employees released by order of a joint board set up by a collective agreement, upon the ground that he was underpaying his men.⁷⁶ He sued for damages, joining as defendants the national association of employing painters, the locals of both the employers' association and the union, and the individual members of the joint board which had disciplined him. The court held that he had no cause of action. He had been accorded an opportunity to be heard before the action was taken and the disciplinary measures had been withdrawn as soon as he yielded.⁷⁷

⁷³ N. 49 above.

⁷⁴ The self-government which is thus permitted, having its basis in collective agreements, merely replaces in part a self-government, founded upon statute, which has become traditional in Germany. It was instituted, with limited participation of the workers, by the Industrial Ordinance. (n. 10 above) and is now carried on under the provisions of the Works Councils Act (n. 3 above).

⁷⁵ *RABl.* 1929, 28 (*Reichsarbeitsgericht*, Nov. 7, 1928).

⁷⁶ 81 *RGZ.* 4 (Nov. 19, 1912).

⁷⁷ The law applicable to disciplinary measures authorized by collective agreement is closely related to that which applies to discipline exerted by organizations over their members. In the latter field the courts have been disposed to allow considerable latitude. Thus in a case decided Sep. 22, 1927, and set forth in Dersch, Flatow, etc., *op. cit.* n. 18 above, II, 132, the *Reichsgericht* permitted an employers' association to collect a heavy fine assessed against a member because he had resisted lengthening the hours of his workers from eight to nine a day. The association had adopted the

Enforcement of the "closed" shop clause of a collective agreement was refused by the *Reichsgericht*, however, where the effect would have been to bar the worker from earning his livelihood.⁷⁸ The German actors' union had an agreement with an association of virtually all the important owners of "legitimate" theatres in that country and Austria, providing that none but members of the union should be employed by association members. Apparently the union was "open" and did not have unreasonably large dues or other onerous membership requirements. The plaintiff, an actor, resigned from the union and brought suit against it and the producers' association to prevent them from blocking his employment by members of the association. The court granted the relief which he sought. A contrary holding would have presented the plaintiff with the alternative of either rejoining the union or seeking employment in second-rate theatre or motion picture acting. Such a result, the court held, would have violated Article 159 of the German Constitution, which reads:

Freedom of association in order to protect and develop conditions of labor and economic life is guaranteed for everyone and for all occupations. All agreements and measures which attempt to limit or impede this freedom are contrary to law.⁷⁹

The relation of joint boards established by collective agreement

nine-hour day rule and had imposed the fine in accordance with the provisions of its constitution and by-laws. The Court refused to review the reasonableness of its action, especially since the member had had ample opportunity to resign before the nine-hour day went into effect. In 111 *RGZ*. 199 (July 2, 1925) the court awarded damages to an employers' Association against a member who had refused to participate in a lockout ordered by the association.

⁷⁸ 104 *RGZ*. 327 (Apr. 6, 1922).

⁷⁹ The court also held that to bar the plaintiff from earning his living would be *contra bonos mores*. The decision, of course, did not operate to enable the plaintiff to underbid other actors in applying for work, for the employers were bound by the wage and other normative provisions of the agreement. He could, however, continue to reap the benefits of the union's work without contributing time or money to the union. Apparently the *Reichsgericht* had little sympathy with the "closed" shop. Shortly after the above decision it held several union officials liable in damages to a non-union worker whose discharge they had procured. *RABl.* 1923, 338 (Nov. 8, 1922).

to the labor courts is prescribed in detail in the Labor Courts Act.⁸⁰ The joint boards may invoke the aid of the labor courts in obtaining testimony. Their decrees may be enforced by execution if the judge of a labor court so directs and may be attacked only for lack of jurisdiction, violation of express statutory provisions, falsification of documents, perjury of witnesses, or culpable conduct of judge or counsel. The jurisdiction of the joint boards, however, cannot be made compulsory over employers and workers to whom a collective agreement is extended by the Minister of Labor.

I. Protection of Labor Standards Against Unfair Competition

Ordinarily, as has been pointed out, legal enforcement of the normative provisions of collective agreements is had in actions upon individual labor contracts or in suits for declaratory judgments brought by unions or employers' associations. But it is evident in addition that individual workers and employers have an interest in preventing underbidding by their fellows. If organizations to protect the standards established by collective agreement do not exist or do not act effectively, the tort action for unfair competition remains as a possible means of safeguarding these standards. Thus in a case decided by the *Reichsgericht* on April 12, 1927,⁸¹ the plaintiff was engaged in the business of supplying private watchmen for property in Berlin and was bound by a collective agreement which fixed the wages and working conditions of the watchmen. The agreement had been declared generally binding by the Minister of Labor. The defendant was in the same business and also in the business of furnishing private detectives. He paid his watchmen less than the established scale and was advertising effectively for clients, using his lower charges as bait. In answer to the plaintiff's prayer for a decree forbidding further unfair competition of this sort, the defendant maintained that he was not bound by the agreement. He relied upon certain alleged differences between his services to his clients and those rendered by the plaintiff, to establish his contention that the decree of the Minister of Labor did not apply to him. The Court, however, found that the de-

⁸⁰ Secs. 91-100.

⁸¹ 117 *RGZ.* 16.

fendant was rendering substantially the same services as the plaintiff and was systematically and deliberately seeking to capture business at the expense of his employees and of his competitors by cutting wages and offering lower rates. The Court held that he was bound by the extended agreement and that the plaintiff was entitled to a decree. Said the Court:

Whoever deliberately and with foresight, in order to be able to strike at his competitors in this manner, pays his employees less than the wages which are prescribed in the public interest, employs a reprehensible expedient and acts contrary to good morals.

Thus it appears that the labor standards which a collective agreement attempts to maintain may be protected in German law not only by contract actions but by actions for unfair competition as well. Conceivably such an action might be directed against an outsider to whom a collective agreement had not been extended, although its allowance would stretch the precedent established in the instant case, if not the broad discretion with which the statutes endow the courts in determining what is unfair competition.⁸²

IV. THE INSISTENCE UPON INDEPENDENT CONTRACTING ORGANIZATIONS

Although individual freedom of contract and even the freedom of unions and employers' associations not to contract often disappear almost entirely, as has been shown, from the German system of control of employment by "agreement," the conception of contract has made a contribution which has not been submerged and which appears likely to remain of the essence of the system. That contribution finds expression in the insistence of the courts upon the doctrine that no organization can become party to a collective agreement, whether voluntary or imposed in conciliation proceedings, unless it is in fact an independent association. Its independence is of the essence of its capacity to contract. The courts' conception of the system calls for two interests, with partly common and partly opposing aims, each endowed so far as may be with adequate power, dealing with each other

⁸² Act of June 7, 1909 (*RGBl*, 499) sec. 1; *BGB*. sec. 826.

in the effort to establish a basis for co-operation in production. That, after all, is the essence of the idea of contract, preserved in the only way in which it can be preserved under modern industrial conditions. However much of regulation from above may find its way into the system and however fully the worker or the small employer may at times appear to be lost in a crowd, the individual is reasonably assured that his interests will be safeguarded by an organization which is responsible primarily to him and to his fellows. He can count for as much in his capacity of producer as a single individual has a right to expect in the presence of large aggregates of men and of capital.

The first essential of an organization's capacity to enter into collective labor agreements is that the making of such agreements be part of its purpose as an organization. That purpose is to be gathered from its constitution and by-laws and from the history of its activities. If its purpose be to further the interests of its members in their employment relations, it is ordinarily regarded as capable of entering into collective agreements.⁸³ The same qualifications are necessary to the valid imposition of a collective agreement upon an association. There is, however, this difference: that an organization which advances its members' interests as employers or workers may by express provision in its constitution be unable to enter into a voluntary agreement, but it is doubtful whether it can exempt itself from having an "agreement" imposed upon it.⁸⁴

The question of capacity to enter into collective agreements has arisen a number of times with respect to branch unions. It has been held that they are capable of entering into such agreements if they negotiate independently with employers and have a reasonable degree of control over their own funds and affairs.⁸⁵

Control of a trade union by an employer or a group of employ-

⁸³ 107 *RGZ.* 144 (Oct. 1, 1923); 111 *RGZ.* 354 (Oct. 9, 1925); 115 *RGZ.* 177 (Oct. 29, 1926); *RABL.* 1927, 378 (Jul. 6, 1927); and 119 *RGZ.* 13 (Nov. 18, 1927) are typical cases in which the matter has been decided. In two of them the question arose with regard to bar associations in their relation to clerical employees in law offices.

⁸⁴ See Nipperdey's discussion of this point in Dersch, Flatow, etc., *op. cit.* n. 18 above, I, 14 *et seq.*

⁸⁵ *RABL.* 1928, 212 (May 9, 1928); *RABL.* 1927, 363, n. 37 above; 73 *RGZ.* 92, n. 19 above.

ers is fatal to its capacity to enter into collective agreements. Thus the *Reichsarbeitsgericht* entertained grave doubts as to the independence of the agricultural workers' union involved in a recent case.⁸⁶ It sent the case back to the lower court for further determination upon the facts. The union was a section of the Pomeranian Agricultural League and was largely under the control of the board of directors of the League, which was heavily weighted with employers. The court laid down three requisites to an organization's capacity: (1) a membership composed exclusively of employers or of workers; (2) furtherance of the economic interests of its members as a purpose of the organization; and (3) independence of membership and of finance from control by the opposing labor or employer interest. The question, as the Court emphasized again a little later,⁸⁷ must be decided in each case upon the facts.

A question of considerable difficulty is presented in the case of a union whose membership is confined to workers in the employ of a single concern. There it would seem that the employer has the opportunity of exercising considerable control by means of his power to discharge. In a recent case involving such a union⁸⁸ the *Reichsarbeitsgericht* permitted the finding of the lower Court, to the effect that the union possessed the requisite independence, to stand. The union emphasized the conservation of its methods by abjuring strikes and barring from membership all workers who were members of international organizations. It was, however, financially independent, and a worker who was discharged by the employer might apply to the union's governing body for permission to retain his membership.

At the opposite extreme from these conservative unions stands the revolutionary union, for which such instruments of compro-

⁸⁶ *RABL.* 1929, 23 (Sep. 29, 1928). The question arose there, as it now does fairly frequently, in connection with the provision of *ArbGG.* Sec. 10 provides that workers' and employers' organizations may become parties to actions in the labor courts; sec. 11 that members of such organizations who are parties litigant may be represented by agents of the organizations to which they belong, designated for the purpose. In applying both sections the courts have generally taken the position that only such organizations as have the qualifications for entering into collective agreements have capacity to become parties or to represent parties before the labor courts.

⁸⁷ *RABL.* 1929, 25 (Oct. 10, 1928).

⁸⁸ *RABL.* 1929, 67 (Feb. 9, 1929).

mise as collective agreements are, at least in theory, anathema. Again the German court has taken a realistic attitude and has refused to be frightened by slogans and theoretical objectives. In a case decided November 10, 1928,⁸⁹ the union in question had for its declared purpose the overthrow of the capitalist system. It contemplated entering into quickly terminable agreements with a referendum to its membership in each instance. There was evidence that its leader had once conducted a strike in violation of an imposed "agreement." There was, however, evidence also that the union had kept an agreement since 1925. The lower court had denied the union's capacity to contract or to appear for one of its members in court proceedings, upon the ground that whatever reliability it had displayed was a mere cloak for its real purposes. These, the court felt, were political in character and deprived the union of the right to be trusted. The *Reichsarbeitsgericht* sent the case back for further consideration, remarking that the union's ultimate political purposes were no bar to its capacity if the evidence showed that in the conduct of its affairs it conformed reasonably to the existing order.

V. THE SCOPE OF REGULATION BY AGREEMENT

A. Occupational and Geographical Scope

Obviously there must be some line of demarcation, however hazy, between the field occupied by collective labor agreements in Germany and the areas unoccupied or covered by other agencies of control. The occupational and geographical scope of each agreement is determined from the agreement itself—that is to say, from the extent of the membership of the parties if it is a voluntary agreement, from the decree of the Minister of Labor if it is an extended agreement, and from the decree making it obligatory if it has been imposed in conciliation proceedings. When difficulties of interpretation arise in the course of litigation the courts necessarily pass upon them. The question has arisen only with regard to extended agreements.

A decision of the *Reichsarbeitsgericht*⁹⁰ in regard to the matter was handed down recently in a suit for wages. The plain-

⁸⁹ *RABl.* 1929, 50.

⁹⁰ *RABl.* 1929, 91 (Feb. 20, 1929).

tiffs claimed under a collective agreement which had been extended by the Minister of Labor to the entire metal industry of Berlin. The agreement applied to the parties to the case, if at all, only by reason of its extension. The defendant contended that she was operating a handwork foundry and not an industrial establishment. The Court upheld this contention. A handwork establishment, said the Court, ordinarily is one in which the master works with his men. Here, however, the master was the widow of the former proprietor. The Court therefore relied upon other facts in reaching its conclusion. There were no machines in use in the establishment and only eight or ten men were employed. The Minister of Labor, the Court felt, did not intend to impose the agreement upon a shop of this kind.

In another case which arose in a similar manner⁹¹ the plaintiffs were printers. They claimed that the extended agreement in the printing industry applied to them and to their employer in relation to them. The defendant was a manufacturer of paper bags. On ten per cent. of its product it printed advertising, and for this purpose the plaintiffs were employed. Many of the bags were made outside the establishment by convict labor, so that the plaintiffs formed a fairly large proportion of the employees hired by the defendant. The Court found, however, that in view of all the facts, and especially in view of the fact that the printing work was merely incidental to the primary purpose of producing paper bags, the printing trades agreement should be held not to apply.

Necessarily the court has steered a middle course in choosing between overlapping extensions of craft and industrial agreements. In two cases involving building workers employed by chemical manufacturers⁹² a fairly definite guide was furnished by the Minister of Labor, to which the *Reichsarbeitsgericht* adhered. The Minister in his decree specified that permanent buildings trades employees of chemical companies, hired for repair and replacement work, should be governed by the agreement in the chemical industry, but that builders hired for new construction should have their wages and working conditions fixed

⁹¹ *RABL.* 1928, 288 (Sept. 19, 1928).

⁹² *RABL.* 1928, 233 (June 13, 1928) ; *RABL.* 1929, 66 (Dec. 19, 1928).

by the building trades agreement. In the second of the two cases the plaintiffs' individual contracts of employment stipulated that they should be controlled by the agreement in the chemical industry. The Court, however, held that such a stipulation was of no effect and sent the case back to the lower court for determination upon the facts. The plaintiffs in that case formed a unit of 200 workers in a total force of 1100.

The *Reichsgericht* has held, necessarily, that the discretion of the Minister of Labor and of the conciliators in deciding whether or not to extend or to impose agreements is not reviewable in court. The only question, it is said, which a court will consider if the validity of an imposed agreement is questioned is the jurisdiction⁹³ of the Minister or other official acting in the case.

B. Scope in Relation to Other Forms of Control

Within its occupational and geographical scope, of course, the control exerted by a collective agreement is not exclusive. The relations between that control and individual contract have already been discussed. The possibility of providing for the settlement of disputes by joint boards has also been indicated. It remains to trace the lines of demarcation between control by agreement and regulation of employment by the legislature directly, by works councils, and by guilds.

As regards direct legislative enactment applying to employment, the doctrine is clear that it cannot be displaced by the provisions of collective agreements. Where there is a conflict the statutes prevail. In a case decided by the *Reichsarbeitsgericht* on October 26, 1927,⁹⁴ the plaintiff was a discharged store manager. He sued for two months' pay, relying on the provisions of a statute⁹⁵ which entitled him to three months' notice of discharge. He had received only slightly over thirty days' notice. The defendant relied in part upon the provisions of a collective

⁹³ 119 *RGZ.* 193 (Dec. 2, 1927). Such a formula as that which limits a court's power of review to the question of jurisdiction is, of course, simply a cloak for the real problem of determining which points to review and which to regard as concluded by the administrative action. See the remarks of Dersch in Dersch, Flatow, etc., *op. cit.* n. 18 above, II, 101 *et seq.*

⁹⁴ *RABL.* 1927, 560.

⁹⁵ Act of July 9, 1926, *RGBl.* I, 399.

agreement which entitled it to discharge the plaintiff with thirty days' notice. The Court held that the statute prevailed over the agreement and that the plaintiff was entitled to his pay.

In three cases involving the employees of insurance associations⁹⁶ the *Reichsgericht* has dealt with the relation between collective agreements and statutory regulation. The employment of workers in insurance association offices is regulated by the National Insurance Ordinance.⁹⁷ With respect to numerous matters it is laid down in the Ordinance that the terms and conditions of employment shall be prescribed in rules promulgated by the insurance associations with the approval of the insurance department of the Government. In each of the three cases an employee of an insurance association claimed the benefit of a provision in a collective agreement which was more favorable to him than the rules laid down by his employer pursuant to the provisions of the Insurance Ordinance. In the first case the employee was held to be entitled to the salary fixed by the collective agreement, for it was held to be the meaning of the Insurance Ordinance in the matter of classifying employees that the classifications established by the associations' rules should be minima for salary purposes, leaving it possible for collective agreements to assign employees to higher grades. In the second case, however, an employee claimed the right to life tenure in accordance with a clause in a collective agreement which conferred that right upon employees of his grade who had served ten years. But a rule promulgated by the association which employed him was to the effect that life tenure might be granted by the board of directors to an employee who had served ten years. The court held that the rule promulgated under the Ordinance was in effect a part of statute law and should prevail over the collective agreement. Since the plaintiff had not been granted life tenure by the board of directors of his association, his contention failed.⁹⁸ In

⁹⁶ 114 *RGZ.* 22 (May 18, 1926); 114 *RGZ.* 112 (June 18, 1926); 117 *RGZ.* 415 (July 6, 1927).

⁹⁷ *RGBl.* 1924, I, 779.

⁹⁸ It is doubtful whether a collective agreement can confer a right to a tenure which extends beyond its own term. It would seem that it can, subject to a possible deprivation of the right in a subsequent agreement. See the remarks of Nipperdey in Dersch, Flatow, etc., *op. cit.* n. 18 above, II, 49-50.

the third case an employee sued for the wages he had been promised, which corresponded to those laid down in a collective agreement. It was held that he could not recover, since the salary scale promulgated by his employer, to which statutory force was given by the Insurance Ordinance, prescribed a lower rate.

As respects the works councils, there can be no question regarding their thorough subordination to the control set up by collective agreements. The works councils are simply bodies of workers' representatives, chosen by vote of the employees in each establishment. By statute these bodies are charged with the duty of cooperating with the employer in furthering the purposes of the enterprise and with the further duty of safeguarding the interests of the workers. The Work Councils Act⁹⁹ provides in section 8 that "The right of the economic associations of wage-earning and salaried employees to represent the interests of their members shall not be affected by the provisions of this Act." Section 66 (5) provides that the works council in each establishment shall "come to an agreement with the employer as regards works rules applicable to all employees and amendments thereof, subject to the terms of existing collective agreements." In section 78 (1) it is laid down that the separate councils of wage-earning and salaried employees shall "see that legal provisions for the benefit of employees, collective agreements, and . . . decisions . . . are carried out."¹⁰⁰ Thus at virtually every point where there might be a question of priority of control between works councils and collective agreements the statute is explicit that the latter shall prevail. The statute is so explicit that the matter has not been litigated.¹⁰¹

⁹⁹ N. 3 above.

¹⁰⁰ See *RABL* 1928, 265 (*Reichsarbeitsgericht*, July 4, 1928) for an example of the application of this provision.

¹⁰¹ The works councils have been characterized as administrative in character. The civil and labor courts have no jurisdiction to control their operation or to enforce the provisions of the Works Councils Act. 107 *RGZ*. 244 (Sep. 25, 1923). But of course it is possible for the validity of some act of a works council to be passed upon collaterally in a civil case. Guillebaud, *THE WORKS COUNCIL* (1928) contains an account of the working of the system.

The Industrial Ordinance¹⁰² long ago established guilds of proprietors in the "handwork" industries, to which was assigned the function, among others, of regulating the status of craftsmen and apprentices. These guilds continue to exist. It has been held that the statutory establishment of some of them and the compulsory membership which may be demanded of the proprietor of a shop¹⁰³ does not impair the freedom of association which Article 159 of the Constitution guarantees. That freedom is protected against pressure from private parties, but there is held to be no immunity from legislative interference with the right to associate or to refrain from associating.¹⁰⁴ The same administrative decision in which this point was decided concedes that the arrangements put into effect by a guild must yield to those established by collective agreement in matters connected with the employment relation.

Conflict between guild relations and collective agreements, as evidenced by the cases, has arisen chiefly with regard to apprenticeship. The court¹⁰⁵ had first to deal with the contention that apprenticeship is a matter of education rather than of labor and hence does not fall within the field which it is competent for collective agreements to govern with binding effect. Historically, the court conceded, there is much to be said for that view. But it held that in contemporary society the employer-employee aspect of apprenticeship is so important that, at least in the matter of compensation of the apprentice, a collective agreement may lay down norms which take priority over the compensation specified in contracts of apprenticeship or in guild regulations.¹⁰⁶

C. The Determination of the Limits

The protection of the integrity of control by collective agreement within the limits assigned to it, together with the inter-

¹⁰² N. 10, above. Secs. 81 & 100.

¹⁰³ Sec. 100 of the Ordinance.

¹⁰⁴ *RABl.* 1927, 410 (*Hamburg Oberverwaltungsgericht*, July 12, 1927). The nature of Art. 159 thus is quite different from that of American bills of rights, which confer immunities from governmental but not from private action of an oppressive character.

¹⁰⁵ *RABl.* 1928, 185 (*Reichsarbeitsgericht*, Mar. 14, 1928).

¹⁰⁶ *RABl.* 1928, 277 (Sep. 19, 1928); *ib.* 278 (Sep. 26, 1928) are other decisions of the *Reichsarbeitsgericht* to the same effect.

pretation of the statutes fixing these limits, has been in the hands of the civil courts and of the labor courts. An example is furnished by a recent decision of the *Reichsarbeitsgericht*.¹⁰⁷ A collective agreement established the basic rates of pay in the Rhine-Westphalia iron and steel industry. The unions having properly terminated certain sub-agreements, the Minister of Labor appointed a special conciliator in accordance with the Conciliation Ordinance who summoned a board of seven representatives of each side to sit with him in the matter. On October 26, 1928, the conciliator announced a decree which not only purported to replace the sub-agreements terminated by the unions but also attempted to alter the basic rates of pay established by the principal agreement. By its terms the latter had until April 1, 1929, to run. On October 31 the Minister of Labor declared the decree to be binding upon the industry. The association of iron and steel producers thereupon sued for a declaration that the decree thus imposed was of no effect. The Court granted the declaration. The conciliation board, it said, had no power to trench upon the field covered by the existing agreement. The statute under which it acted gave it power to deal with conflicts of interest between employers and employees, but there can be legitimate conflicts of interest over matters already covered by agreement. The sole questions which can arise under agreements are matters of interpretation, and these are for the courts. The parties to the agreement did not by appearing in the conciliation proceedings confer upon the board broader powers than the statute gave it. There was no evidence that the agreement had been abrogated by consent. The Minister of Labor could not base a binding decree upon an invalid conciliation decision. The collective agreement, therefore, remained in force.

Thus it was placed beyond the power of either party as well as of the Minister of Labor himself to prevent the court from giving full effect to a collective agreement validly formed. Apparently no power short of the national legislature could invade the integrity of the control established by agreement.

¹⁰⁷ *RABl.* 1929, 73 (Jan. 22, 1929).

VI. AN APPRAISAL OF THE SYSTEM

The American student of modern democratic organization can hardly avoid allowing a wistful note to creep into his appraisal of the German system of control of employment by collective agreement. There is indicated by the system a creative ability in devising social mechanisms which is decades in advance of anything that has been developed in the United States. The theoretical soundness and apparent adaptation to present-day needs of the structure which has been set up can only arouse admiration. A summary of the leading features of the plan will indicate why it calls, on the surface, for so favorable a judgment.

Basic in the system is the abandonment of all pretense that the individual labor contract is a democratic means of establishing standards of employment. Legal freedom to work or not to work, to employ or not to employ, remains; but the individual contract is shunted aside as a determinant of the consequences of choosing to work or to employ, wherever an adequate substitute is available. In defining what is an adequate substitute emphasis is placed upon the democratic principle, which replaces the old type of freedom of contract, that individual workers and employers should have a real opportunity, so far as laws can insure it, to make their force felt in establishing the terms of the employment relation. That can only be done where they act collectively. Hence every opportunity is afforded them to deal through organizations of their own devising and to express the results of their dealing in collective agreements, which are kept as genuinely free as possible. But a failure of workers' and employers' organizations to function successfully is not permitted either to introduce disorder into employment relations or to stop the process of production and thereby to deprive the community of needed goods and services. By the extension of existing voluntary agreements, backward producers may be brought up to prevailing standards; and by the imposition of new agreements through state action strikes and lockouts are in many instances outlawed. Behind the whole system stand the courts, ready to apply legal sanctions where obligations are being disregarded, if their jurisdiction is invoked.

In developing legal equipment with which to handle so novel

a situation great ingenuity has been manifested in two directions. Through a combination of legislative and judicial action a body of substantive law has been worked out which translates into legal terms the actualities of collective bargaining. This has been accomplished both by the application of principles of contract law where these seemed to fit and by a bold departure from them where they led to inadequate conclusions. Then, more recently, the act establishing the labor courts¹⁰⁸ has set up a system of tribunals and provided a procedure which will go far in preventing too rigid and unrealistic an application of legal rules to the system of collective agreements. From the courts of first instance up to the *Reichsarbeitsgericht* itself employer and employee representatives sit in judgment alongside of jurists, making use in the lower courts of a simple, inexpensive procedure and in the higher courts of an appellate procedure which is as careful as that of the regular civil courts.¹⁰⁹

As respects the legal doctrines which have been applied in the collective agreement cases, the separation of the terms of

¹⁰⁸ N. 11 above.

¹⁰⁹ The judicial members of the labor courts must possess the qualifications of judges of the ordinary courts and, in addition, must be versed in labor matters. The employer and employee associates are chosen for limited sittings from panels nominated by the interests from which they come. Each chamber of each district and state court is composed of a presiding judicial member and of one labor and one employer associate. Each chamber of the *Reichsarbeitsgericht* has three judicial members and one labor and one employer associate. A judicial member presides in each court. In the district labor courts lawyers are barred and the presiding judge, who handles the preliminary proceedings alone, is directed to proceed at first as a mediator if no previous mediation or conciliation proceedings have been had in the case. In the state labor courts, to which the first appeal is taken in cases of importance, the cause is handled largely like an ordinary civil case, and this is true also in the *Reichsarbeitsgericht*. Lawyers or agents of unions and employers' associations may appear for the parties in the state labor courts, while in the *Reichsarbeitsgericht* the parties must be represented by lawyers. It seems quite likely that a similar combination of the specialist's experience in particular matters with the lawyer's familiarity with the wisdom of the past will be employed in many countries in rendering the entire system of courts able to cope with the demands of the Great Society. Indications of the tendency may be seen in juvenile courts and in various administrative tribunals. Perhaps nowhere else has a substitute for ordinary judicial action been as consciously developed, with as much regard for all the values involved, as in the case of the German labor courts.

these agreements into normative and obligatory provisions was a master stroke upon which the usefulness and symmetry of the whole structure of collective agreement law depend. Only one adverse criticism seems called for in this connection. Either the legislature or the courts should make it an implied term of every agreement that the officials and perhaps also the members of the associations which are parties to the agreement are under a personal duty not to engage in concerted activities to force a change in the terms of the agreement. Such a duty, of course, would be obligatory and yet would be imposed in the same quasi-legislative fashion as the normative provisions. Theoretical objections can be made to it, but these do not seem to be sufficiently weighty to overcome the desirability of compelling not only the associations but also individuals to keep the peace. In view of the attitude of the German courts in labor cases generally, it does not seem likely that this power over individuals would be used in an oppressive manner.

One other major criticism involves the courts' insistence upon the "open" shop. If the labor organizations are to be charged with the responsibility of creating and maintaining a just and permanent system of employment relations, it would seem that they are entitled to the financial support of all the workers whom they benefit. Minor abuses of their power over members could be corrected by appeals to the courts. Major abuses could only result in the unions' being supplanted by some other agency. It should be noted, on the other hand, that there are three competing groups of unions in Germany,¹¹⁰ which exist side by side in some of the larger industries. There would have to be a safeguard against the more powerful of these making use of legal machinery to crowd the others from the field.¹¹¹

¹¹⁰ The "free" or socialist unions, the Christian unions, and the Hirsch-Duncker unions. The former have by far the largest membership.

¹¹¹ A number of lesser criticisms of judicial decisions have been made earlier in this article. See the text based upon cases cited in nn. 55 & 63 above. An additional decision which seems regrettable should be recorded. In 103 *RGZ*. 23 (Sep. 30, 1921) it was held that a decree of the Minister of Labor extending a collective agreement operated to supersede an earlier agreement, calling for lower rates of pay, between the same union and an employer who was not a party to the second agreement. It ought not be possible for an administrative act, which a union in a sense obtains, to obliterate an earlier pledge of faith by the union.

Even from a theoretical standpoint it must be admitted that skepticism as to the power of a court actually to enforce its decrees against a determined group of workers or employers is inevitable and quite justifiable. As to the German law of collective agreements that skepticism is reinforced by the decision of the *Reichsgericht* in a case which already has been discussed in another connection,¹¹² whereby the value of the damage suit as a remedy was considerably diminished. The defendant union was held liable on account of having conducted a strike in violation of a collective agreement. But the case was sent back to the lower court so that the amount of the damages might be determined. This amount, the Court said, should be diminished if it were found, as the facts indicated, that the workers, who began the strike without the authorization of the union, would have continued it in spite of all that the union might have done to cause them to desist. The case, it appears, ultimately was settled out of court.¹¹³

The reaction of the theorist to the German system of collective agreements, however, whether it be that of the advocate of industrial democracy or that of the skeptic, is not the criterion by which the system is actually going to be judged. The final test will be whether the system extends itself as a result of the satisfaction it gives or whether it yields place to some competing method of controlling the employment relation. The data available to the writer are not adequate for the formation of a conclusion upon this point. Collective agreements, as has been noted, became dominant during the immediate post-war period. There was a rapid growth in number of establishments and number of workers covered by such agreements, which reached its peak in 1922. Immediately afterward there was a sharp drop incident to the economic crisis of 1923-1924. From 1925 to January 1, 1927, the last date for which published figures are available, there was a further slight decline in the number of workers governed by collective agreements, but there was at the same time an increase in the number of establishments to which these agreements applied. On the latter date more than 65 per

¹¹² 111 *RGZ.* 105, n. 35 above.

¹¹³ Dersch, Flatow, etc., *op. cit.* n. 18 above, I, 63.

cent. of the male and 63.7 per cent. of the female hand and machine workers, together with 50 per cent. of the male and 41.7 per cent. of the female salaried employees engaged in German agriculture, trade, and industry came under the control of existing collective agreements.¹¹⁴

Figures are not available to show what proportion of these workers came under true, or voluntary, agreements and what proportion under agreements which had been extended to them or imposed by official action. In 1925, however, when nearly 12,000,000 workers were subject to collective agreements, there were just under 5,000,000 workers in the three leading groups of trade unions,¹¹⁵ indicating that perhaps more than half of the workers to whom collective agreements applied were subject to them only because the power of the state has been invoked to extend the agreements made by the unions. Of the latter, also, an undetermined number must have been imposed in conciliation proceedings. If definite figures were available, it would still be

¹¹⁴ SONDERHEFT 43 to RABl., DIE TARIFVERTRAEGE IM DEUTSCHEN REICHE AM 1 JANUAR, 1927, p. 7. The percentage of the total number of workers and employees coming under collective agreements according to these figures was 61.3. Actually the percentage was probably more nearly 69, if correction is made to allow for a shrinkage in the number of persons employed on Jan. 1, 1927, as compared with the summer of 1925 when the census of employed persons, used in calculating the percentages in the text, was taken. The following table, taken from p. 4 of the same study, gives the figures upon the scope of collective agreements year by year:

Date	No. of Agreements	No. of Establishments	No. of Workers
End of 1912	10,739	159,930	1,574,285
" " 1913	10,885	143,088	1,398,597
" " 1914	10,840	143,650	1,395,723
" " 1915	10,171	121,697	943,442
" " 1916	9,435	104,179	740,074
" " 1917	8,854	91,313	905,670
" " 1918	7,819	107,503	1,127,690
" " 1919	11,009	272,251	5,986,475
" " 1920	11,624	434,504	9,561,323
" " 1921	11,488	697,476	12,882,874
" " 1922	10,768	890,237	14,261,106
Jan. 1, 1924*	8,790	812,671	13,135,384
" " 1925	7,099	785,945	11,904,159
" " 1926	7,533	788,755	11,140,521
" " 1927	7,490	807,300	10,970,120

* Figures for this year are estimates.

¹¹⁵ See n. 109 above.

doubtful how many of the agreements which appeared to be voluntary actually were so, for it might well be that many such agreements were reached only because of the threat of official action as the probable alternative. On the other hand, if the trade unions were not reinforced by official extensions of the agreements they made, it is possible that more workers would feel impelled to contribute to their support by becoming members.

It is probable that the decline in the number of workers from 1925 to 1927, which the figures show, was brought about by the great decline in employment that occurred during these years. The number of unemployed recorded at the employment exchanges increased from 400,000 in the summer of 1925 to 2,440,000 on January 1, 1927.¹¹⁶ To a considerable extent this unemployment, like that which has developed in the United States, appears to have been "technological," that is, incident to the elimination of workers by machines and by the use of more efficient methods in industry.¹¹⁷ The fact that the number of workers per establishment decreased in establishments covered by collective agreements lends color to the theory that the decline in the total number of workers controlled by agreements can be accounted for in this way.¹¹⁸ The heaviest decline in number of workers occurred in the metal, textile, chemical, musical instruments and toy, wood-working, and clothing industries, with the metal industries far outweighing all the others in importance. There were partially offsetting increases in agriculture, forestry, mining and building.

Perhaps the greatest single danger to the system of collective agreements in Germany lies in the possibility that powerful employers may attempt to set up company unions in opposition to the trade unions. Democracy is still regarded as an experiment

¹¹⁶ *Op. cit.* n. 113 above, p. 7.

¹¹⁷ This process goes by the name of rationalization in Europe. Because of Germany's international position it is being pursued assiduously in that country and the unions have agreed to its necessity, at the same time emphasizing the need of protecting the workers. For an optimistic discussion of the ultimate effects of rationalization see Henri Fuss, *Rationalization and Unemployment* (1928) 17 INTERNATIONAL LABOR REV. 302.

¹¹⁸ Although rationalization is supposed to result in closing inefficient establishments as well as in throwing workers out of employment.

in politics and it is more certainly an experiment in the economic sphere. It may be that relatively enlightened employers who know how to keep labor satisfied will triumph over organizations controlled by the workers themselves, as thus far they have succeeded in doing in the United States. In Germany such employers have but to capture the works councils, whose expenses they are already required by statute¹¹⁹ to bear. Incentive to do so may come from the increasing pressure of foreign competition and the consequent necessity of pushing "rationalization" to the limit. Willingness on the part of the employees to have them do so may come from the greater ease of life which results from having someone else take care of ordering one's affairs, as well as from fear of economic pressure. Beyond engaging in the election of the councillors, there seems to be no necessity for the ordinary worker to concern himself with the operation of the works councils system unless a meeting of some sort is called by the councillors themselves. Although, as has been indicated, the councils are completely bound to uphold existing collective agreements, there is nothing in the law to prevent them from instituting methods of dealing with employers which in time can replace such agreements.¹²⁰ The councils cannot enter into legally enforceable contracts, but they can make arrangements and agree upon rules with employers, and they can appeal to and be brought before the agencies of conciliation which are established by statute.¹²¹

Two factors in the German situation as it has developed, on the other hand, are likely to operate to defeat any attempt on the part of employers to supplant the system of collective agreements.

¹¹⁹ *BRG.* sec. 36.

¹²⁰ Although *BRG.* sec. 78 (2) requires that where the workers represented by a works council are members of unions the latter shall be permitted to join in negotiations over wages and working conditions.

¹²¹ The wording of sec. 6 of the Conciliation Ordinance allows a conciliation decree to be made binding even when a works council represents the workers. Under *BRG.* sec. 75 certain of such decrees relating to conditions of work become binding automatically. But this binding effect is not deemed to be of the same character as that which attaches to the normative portion of collective agreements. It cannot be given effect in civil suits involving individual labor contracts but must be enforced by whatever statutory penalties may be provided. See the discussion of Dersch in Dersch, Flatow, etc., *op. cit.* n. 18 above, I, 143-148, 155-157.

The first is the fact that to a considerable extent the trade unions have succeeded in annexing the works councils by securing the election of their candidates as members and by exercising control over these members after they are elected.¹²² The second is the fact that the trade union leadership is experienced and reliable and forms both the most powerful single defense against the continuing efforts of communists and syndicalists to capture the works councils, and the greatest guaranty of the stability of the present system of controlling employment. That guaranty would not be present in a system of works agreements.¹²³

Thus it can be seen that the future of collective agreements in Germany lies in the lap of the gods. In any plan that may be developed there or in any other country, however, it is likely that some of the elements of the present system will be found necessary to successful operation. To correlate those elements with valuable features that may be discovered elsewhere is a task with broader confines than the limits of the present article.

¹²² *BRG.* sec. 31 provides that trade union representatives shall be invited to sit with a works council upon the request of one-fourth of the members of the council.

¹²³ See Guillebaud, *op. cit.* n. 100 above, pp. 41-75, for an account of the relation of the works councils to the trade union movement and to collective agreements.