

# Ninth Meeting of European Labour Court Judges

Geneva, 3-4 December 2001

## UNITED STATES

### THE ROLE OF LABOUR COURT JUDGES IN THE IMPLEMENTATION OF SOCIAL POLICIES

#### Questionnaire

General Reporter: Judge Stephen Adler, President  
National Labour Court of Israel

#### 1 Labour Court Judges and Social Policy

##### a) In what areas do judgments of your or other courts in your country pertain to social policy by either implementing or creating policies?

Possible areas:	Yes	No
- freedom of association	<input checked="" type="checkbox"/>	<input type="checkbox"/>
- collective bargaining	<input checked="" type="checkbox"/>	<input type="checkbox"/>
- strikes	<input checked="" type="checkbox"/>	<input type="checkbox"/>
- prevention of collective conflicts	<input checked="" type="checkbox"/>	<input type="checkbox"/>
- equality at the work place	<input checked="" type="checkbox"/>	<input type="checkbox"/>
- the definition of "employee"	<input checked="" type="checkbox"/>	<input type="checkbox"/>
- the definition of who is the "employer" of people performing certain types of work	<input checked="" type="checkbox"/>	<input type="checkbox"/>
- the application of labour law to irregular, disguised, or ambiguous working relationships	<input checked="" type="checkbox"/>	<input type="checkbox"/>
- education or occupational training	<input checked="" type="checkbox"/>	<input type="checkbox"/>
- freedom of occupation and non-competition clauses	<input checked="" type="checkbox"/>	<input type="checkbox"/>
- work safety	<input checked="" type="checkbox"/>	<input type="checkbox"/>
- protection of vulnerable groups (such as unskilled people, foreign workers, disabled people, etc).	<input checked="" type="checkbox"/>	<input type="checkbox"/>
- <b>other (please describe)</b>		

**b) What has been, in general, the contribution of the labour courts in your country to the development of social policy? (Please see under (c) before answering this.)**

There are no labour courts in the United States. My answers will relate to the ordinary courts, National Labor Relations Board, and (on occasion) labor arbitrators, which, together, perform the function of dealing with labor and employment law issues. I will limit my responses on this survey to employment law issues. I believe that the ordinary courts have had the greatest role in setting social policy. They have done this in three ways: (1) developing court-made common law; (2) interpretation of statutes; (3) interpretation of the U. S. Constitution. In general, the contributions have been very substantial, particularly in developing common law principles and interpreting the Constitution.

**c) Relating specifically to freedom of association, what has been the labour courts' role in developing and/or implementing your country's social policy?**

With respect to freedom of association, the Federal courts have held that there is a right under the U. S. Constitution for *government employees* to join unions, although this does not include the obligation of government at either the national or state/local level to bargain collectively with their unions. This right stems from (implicit) constitutional prohibitions on *government* interference with the right of free association. Under state court decisions in different states, state and local governments may or may not have the *right* to bargain with unions of their employees if they wish to do so. No constitutional right of free association exists for private sector employees *vis a vis their employers*, since the constitution covers only *government* action that interferes with civil liberties.

The National Labor Relations Board and the courts have interpreted and applied the National Labor Relations Act. This federal statute gives private sector employees the right to form, join and assist unions, engage in collective bargaining and other concerted activities, and to refrain from these activities. The right to refrain may be limited by a collective agreement (in effect) requiring the payment of some portion of union dues as a condition of employment.

As to the right to strike, the courts have held that, in the absence of a statute, government employees have no such right. Private sector employees have this right by statute – the National Labor Relations Act. Even here, the National Labor Relations Board and courts have held that employees can be permanently replaced while on strike, so long as the strike is not prompted by unfair labor practices by their employer.

**d) Describe briefly some labour court judgments which have implemented or determined social policy; if possible, relating to freedom of association, including the protection or encouragement of trade unions and collective agreements.**

Freedom of association, although not expressly included in the U. S. Constitution, has been held by the U. S. Supreme Court to be nevertheless constitutionally protected. In *Thomas v. Collins* (1944), the U. S. Supreme Court held that this protection applied to business and economic activity, and in particular covered rights relating to union organizing from interference by state (or federal) government. In *Smith v. Arkansas State Highway Employees* (1979) the U. S. Supreme Court held that state government employees have a constitutional right to free association in labor unions, but that this did not include an obligation on the part

of the state to deal with their union. As noted above, the U. S. Constitution does not protect the actions of private sector employees relative to unions from interference by their employer. The protection that exists derives from the National Labor Relations Act and some state laws.

The U. S. Supreme Court in the historic *Jones & Laughlin* case held that the National Labor Relations Act, which gives private sector employees the right to form, join and assist unions, to be constitutional – a landmark decision at the time. There is a statutory right to strike for private sector employees, but, as noted above, under the *Mackay Radio* case, employees can be permanently replaced for striking. Government employees generally have no right to strike, although some states do allow some (generally nonessential) state and local employees to strike. Laws of several states that permit public employees to strike, but prohibit strikes by such essential employees as police and firefighters, provide for compulsory arbitration in disputes involving these essential employees.

**e) Have there been instances in which labour court decisions relating to social policy have been incorporated into statutes, changed by statutes, or adopted by the general courts?**

Probably the most important modern instance of court decisions on social policy being changed by statute involves employment discrimination under Title VII of the Civil Rights Act of 1964. In *Griggs v. Duke Power Co.* (1971) the U. S. Supreme Court invented the doctrine of disparate impact discrimination, under which facially neutral employer policies that had the effect of discriminating, and were not justified by business necessity, were held to be illegal. Over the years a more conservative Supreme Court emasculated this doctrine in a series of decisions, most importantly the *Wards Cove* case. In response, Congress enacted the 1991 Civil Rights Act which enshrined disparate impact principles in statutory law.

An important common law development is creation of exceptions to the employment-at-will rule. American common law holds that in the absence of an agreement to the contrary, employment can be terminated at any time for any, or no, reason by either the employer or the employee. There are, of course, many statutory exceptions to this rule. In addition, in recent years state courts have established exceptions where a termination would violate public policy, or where there is a contractual obligation implied either in fact or in law. Also, abusive firing is a tort that can give rise to a legal claim. This is all state law. Given 50 different state jurisdictions, there is little consistency in this law nationally.

**f) Is there a connection between social policy and social justice in labour court judgments? Please explain.**

The traditional approach to legal decision-making in areas of social policy has been to balance interests. This leads to considerations of social justice. In recent years, notions of law and economics, which utilize a single standard – efficiency that is supposedly guaranteed by market forces – has eroded this view, and may be leading courts away from considerations of social justice. I believe that this idea of allowing the market to be accorded decisive weight departs from the traditional interest balancing analysis and moves courts away from considerations of social justice. *Marks v. Loral* (1997), a California age discrimination decision, is an example of this in which the employer's basing a decision on market forces was a defence in an age discrimination case.

## 2 Labour Court Judges and Access to Justice

- a) **What has been the contribution of the labour courts in your country to effectively ensuring the appearance before the judge on truly equal terms for all parties involved? To what extent is this contribution related to aspects such as cost (for instance, exemption from certain court costs for the financially weaker party); the possibility for workers to receive professional assistance by a lawyer or to be represented by other experts (for free?); the possibility for trade unions to appear in court (on their own behalf, as representatives of their members, and under what conditions if any); and the burden of proof?**

Where violations of the National Labor Relations Act are found to be justified, the National Labor Relations Board's General Counsel's office represents the employee (or employer), without cost to the charging party. Attorney's fees and costs are recoverable in employment discrimination litigation, and in wage and hour cases. Trade unions, utilizing either union staff members or attorneys, represent employees in labor arbitration cases involving discipline, termination, or contract rights under a collective bargaining agreement. In employment arbitration cases (not involving a union) the courts appear to require the employer to assume at least most of the costs (the law on employment arbitration is quite new and still developing on a case-by-case basis). The burden of proof is on the employer in discipline and termination cases before labor arbitrators under collective bargaining agreements. The reverse appears to be true in employment arbitration cases. In employment discrimination cases in the courts the employee bears the overall burden of persuasion, although the burden of coming forward with the evidence shifts.

- b) **In what manner and to what extent is the labour court able to reconcile careful analysis leading to well-founded and impartial rulings, with the need, strongly felt in the area of labour law and social protection, for a rapid delivery of judgements? (This may include a discussion of issues such as the use of new technologies; "out-sourcing" of certain tasks (formerly) performed by judges; shortening of deadlines; oral procedures.)**

Labor arbitration has traditionally been distinguished from court proceedings by its relative speed and economy. This has eroded over the years, but is still an advantage that arbitration has over the courts. I believe that this, along with overloaded court dockets, contributed to the U. S. Supreme Court in *Circuit City v. Adams* (2001) which gave broad approval to arbitration agreements that require statutory discrimination claims to go to arbitration. There is, in general, a great deal of emphasis on alternative dispute resolution in American statutes and court processes. Mediation and arbitration are being increasingly used in a wide range of civil cases, including employment law cases. The National Labor Relations Board has adopted tight schedules for case handling, but still has problems with cases taking years to resolve.

- c) **Do you consider, in this regard, that the requirement of an efficient labour court raises the question for the judge to also develop personal managerial qualities?**

To a limited degree. The chief solution to these problems in the U. S. has been the adoption of improved procedures that are required to be followed.

## 3 Labour Court Status and Social Policies

- a) **Is the role of your court, or other courts in your country, limited to the implementation of social policy set in statutes? Or do your court's judgments include judge-made law regarding social policy?**

In the United States, all courts can engage in judge-made law on social policy as well as in other areas. They are, of course, limited by relevant statutes and state and national constitutions. However, the U. S. Supreme Court has the final word on what the U. S. Constitution means, and the state courts have similar powers with regard to their constitutions.

- b) **In your opinion, should labour courts adopt a role of "judicial activism", especially relating to judge-made social policy?**

Yes, within limits. In a common law system this is inevitable to some degree. Where there are relevant statutes, the courts, of course, must respect them. In areas, such as the court-made exceptions to the employment-at-will doctrine, they must necessarily make policy, at least unless and until legislative bodies take action.

#### **4 The Judge's Personal Condition and Social Policy**

- a) **What is the role of individual judges' personal values, philosophy and outlook on life in their judgments? What is their role (personal influence) in deciding social policy issues?**

I believe that judges' personal values inevitably influence their decisions to some degree. However, at least professional judges (except for some labor arbitrators) all have a common legal training, and there are, I believe, some universal norms of justice. These, as well as the professional ethics of the judges, constrain to a significant degree the tendency of judges to utilize their personal values. These limits are exemplified by the experience of American presidents appointing judges who they believe will support a particular ideology, only to find that the judges are lawyers whose fidelity to the law and legal traditions of analysis often outweighs their political views.

- b) **How do judges learn about social problems, social issues at the workplace and social values? In other words, how are judges trained to deal with social policy?**

The traditional pre-law curriculum, in which lawyers are trained prior to going to law school, at one time very commonly consisted of training in political science, with a healthy dose of history (particularly English history) and logic. This has changed in recent years, so that undergraduate backgrounds vary widely. There are some, largely conservative, think tanks that sponsor elaborate conferences to which judges are invited. Law professors are wined and dined at such conferences, many of which are dedicated to law and economics ideas and other conservative views.

- c) **Is this adequate in your view, and how should they be trained?**

The training is probably adequate. This is such an individual and ideological matter, it would be difficult to design training that would be unbiased and objective, yet deal with social matters.

## **5 Lay Judges, Professional Judges and Social Policy**

**In case your labour courts have professional and lay judges:**

- a) What is the role of lay judges (public representatives) in implementing and making social policy and deciding issues relating to social policy?**

The U. S. does not have lay judges per se, although many labor arbitrators have no professional legal training.

- b) What is the lay judges' contribution to the judgement itself, if any? (Would they be able to overrule the professional judge, for example?)**
- c) Are the perspectives and ideas of lay judges on social policy different than those of the professional judges?**
- d) Are there any patterns in the way lay judges decide on matters relating to social policy? For example, do lay judges representative of labour usually vote to implement social rights while lay judges representative of management vote to oppose them?**