EMPLOYMENT LITIGATION ON THE RISE? COMPARING BRITISH EMPLOYMENT TRIBUNALS AND GERMAN LABOR COURTS

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I. INTRODUCTION: AN INDIVIDUALIZATION OF CONFLICT?

The number of conflicts brought before British industrial tribunals—now called employment tribunals—increased substantially over the past decade. In 1989, the tribunals had finished some 29,000 complaints. Ten years later, their annual workload amounted to some 74,000 finished cases—a growth by 150%. Cully et al. find similar evidence when discussing results from the British Workplace Employment Relations Surveys.[1] They remark in addition that, while British workers came to invoke the employment tribunals more often over the 1990s, union recognition and strike action, as reported by managers, declined dramatically. "In short, individual conflict between employers and employees rose during the course of our series at the same time that collective conflict all but disappeared."[2]

In Germany, legal complaints by workers were already frequent before the 1990s. The high caseload of the labor courts in Germany is often attributed to the country's strongly regulated labor market.[3] Between 1970 and 1997, the number of cases resolved by the local labor courts grew further, from some 45,000 to some 310,000. Of course, the steep increase after 1990 is an outcome of German

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1. MARK CULLY ET AL., BRITAIN AT WORK, *in* 1998 WORKPLACE EMPLOYEE RELATIONS SURVEY 245 (1999). For similar evidence, *see also* K.G. Knight & Paul L. Latreille, *Discipline, Dismissals and Complaints to Employment Tribunals*, 38 BRIT. J. INDUS. REL. 548 (2000).

2. CULLY ET AL., *supra* note 1.

3. *See* Helge Berger, *Regulation in Germany: Some Stylized Facts About its Time Path, Causes, and Consequences*, 118 ZEITSCHRIFT FÜR WIRTSCHAFTS- UND SOZIALWISSENSCHAFTEN 191 (1998); Bernd Frick & Martin Schneider, *Zunehmende Konfliktregulierung durch Arbeitsgerichte? Eine ökonomische Analyse der Häufigkeit von Kündigungsschutzprozessen*, *in* ENTLOHNUNG UND ARBEITSZEITGESTALTUNG IM RAHMEN BETRIEBLICHER PERSONALPOLITIK (Uschi Backes-Gellner et al. eds., 1999).

unification. During economic transformation, legal uncertainty provoked an extremely high number of conflicts. Yet, as I show elsewhere,[4] eastern German workers are still—years after the legal transformation and statistically controlling for the labor market dynamics—more likely than their western colleagues to take legal action before a labor court. This corresponds with weaker collective voice institutions—trade unions and works councils—in the eastern part of Germany.

Taken together, the developments in Britain and Germany suggest that individual voice via court or tribunal complaints are becoming more important for employees when compared with collective voice via union bargaining or strike action. Such a development—if indicating a general trend—would be of crucial interest to employers. A seeming restoration of the "managerial prerogative" in union-free and strike-free environments might be offset to some extent by intensified conflict before courts and tribunals. Therefore, to assess the degree of country-specific barriers to employer discretion, for example, in terms of employment protection, the role of the courts cannot be sidestepped any longer.[5]

Yet, industrial relations research is mostly concerned with the study of collective, rather than individual, voice: union organization, workplace representation, collective bargaining, and industrial action. Given the rising importance of the labor jurisprudence just hinted at, this one-sided orientation is more and more at odds with reality; labor courts and tribunals should be included when portraying and comparing national industrial relations systems.

In this paper, I examine British employment tribunals and German labor courts in order to discuss various factors that may explain the rise in employment litigation and to pinpoint some of the evolving research issues. First, the German labor courts and the British employment tribunals are analyzed against the background of the respective system of labor conflict resolution. Borrowing from the economic analysis of the legal process, possible determinants of the demand for individual employment litigation are then discussed. It seems, on the whole, that decreasing union power and more "flexible" terms of employment can lead to an increase in litigation.

4. Martin Schneider, *Gerichtliche Konfliktregulierung in turbulenten Arbeitsbeziehungen: Die Funktion der Arbeitsgerichtsbarkeit in der ostdeutschen Transformation*, 6 INDUSTRIELLE BEZIEHUNGEN 455-475 (1999).

5. Giuseppe Bertola et al., *Employment Protection in Industrialized Countries: The Case for New Indicators*, 139 INT'L LAB. R. 66f. (2000).

Given the strongly divergent legal traditions in the two countries, it is surprising to see tribunals and labor courts evolve as key institutions to resolve disputes in both Britain and Germany. It is even more surprising that both jurisprudences are confronted with very similar problems; among them a widespread criticism of their "legalistic" approach in adjudication and concerns about very low reinstatement rates in unfair dismissal cases. It is argued in section III that these common problems result from certain peculiarities of the employment relationship as examined by the new institutional economics.[6] In the concluding section IV, I indicate a number of research issues worth following.

II. COURTS AND TRIBUNALS IN THEIR RESPECTIVE SYSTEM OF LABOR CONFLICT RESOLUTION

A. Divergent Histories, But a Similar Function of Courts and Tribunals

British employment tribunals and German labor courts differ in their origins and evolution. British industrial tribunals started life in 1964, as administrative tribunals dealing with conflicts over training levies. Soon, further jurisdictions were added. Most importantly, with the Industrial Relations Act of 1971, the tribunals took responsibility of unfair dismissals.[7] The tribunals' broad jurisdiction today includes discrimination by race, sex, or disability; health and safety issues; and, working time.[8] The tribunal organization, as opposed to a court system, was believed to be convenient for employment matters, partly because, traditionally, trade unions tended to assume an employer-friendly bias of the ordinary courts.

Labor courts in Germany have a longer history. Industrial courts (*Gewerbegerichte*) were introduced by act of parliament in 1890. The first judiciary actually termed a "labor court" (*Arbeitsgerichte*) was introduced in 1926. The present jurisdiction of the labor court system, comprising almost any legal dispute in the employment relationship,[9]

6. *See, e.g.*, Oliver E. Williamson, *The Economics of Governance: Framework and Implications*, *in* ECONOMICS AS A PROCESS: ESSAYS IN THE NEW INSTITUTIONAL ECONOMICS 171-202 (Richard N. Langlois ed., 1986); Dieter Sadowski, *Ausgehandelte Arbeitsbeziehungen: Zur Verbindung ökonomischer und rechtlicher Theorien des Arbeitsvertrages*, *in* MITBESTIMMUNG: GESELLSCHAFTLICHER AUFTRAG UND ÖKONOMISCHE RESULTATE. FESTSCHRIFT FÜR HARTMUT WÄCHTER 142-162 (Thomas Breisig ed., 1999).

7. *See* PAUL LEWIS, LAW OF EMPLOYMENT, PRACTICE AND ANALYSIS 34ff. (1998).

8. For a comprehensive catalog, *see* JOHN BOWERS ET AL., EMPLOYMENT TRIBUNAL PRACTICE AND PROCEDURE, Vol. 1, 1-4 (3rd ed. 1999).

9. Manfred Weiss et al., *The Settlement of Labour Disputes in the Federal Republic of Germany*, *in* INDUSTRIAL CONFLICT RESOLUTION IN MARKET ECONOMIES: A STUDY OF

derives from a 1953 statute law that remains largely unchanged ever since. Despite these divergent trajectories, the tribunals and the labor courts perform a similar function in each country's institutional setup of the labor market.

Labor conflicts are often divided into two types of disputes: conflicts over interests concerning the contents of a new contract (usually articulated by bilateral employer-employee negotiations or collective bargaining) and conflicts over rights (arising when the interpretation of an existing contract is controversial). This occurs often because an employment contract is incomplete.[10] Employer and employee cannot predict the contingencies in the course of their relationship. Hence, the parties to the labor contract often disagree, for instance, as to whether an economic crisis justifies a redundancy (a termination of the contract) or a wage cut, or whether some perceived worker misconduct is a legitimate ground for dismissal. Settling these disputes over rights is the main function of specialized labor courts and employment tribunals.

These courts are, however, only one among a number of institutional mechanisms that articulate labor conflicts over rights. Just as strikes are the ultimate weapon to workers in conflicts over interests, the jurisprudence may be considered as a last resort for workers in conflicts over rights. Before litigation, the parties involved usually use private law or, in Williamson's terms, a "governance structure" to resolve disputes, so as to save on transactions costs incurred by strikes and lengthy court proceedings.[11] The combination of the private law and the jurisprudence that govern the employment relationship is to a large extent country-specific. Therefore, the importance of employment litigation must be analyzed against the background of other institutions in each country.

B. The Stages of Individual Employment Conflicts

The main stages of conflict resolution in Britain and Germany are summarized in Figures 1 and 2 respectively. Legal details are omitted in what follows because the comparison merely aims to paint a broad-brush picture of the major similarities and differences between the two national systems of conflict resolution. Furthermore, a typical

AUSTRALIA, THE FEDERAL REPUBLIC OF GERMANY, ITALY, JAPAN AND THE USA 100 (Tadashi Hanami & Roger Blanpain eds.) (2nd ed. 1989).

10. *See* Williamson, *supra* note 6; Sadowski, *supra* note 6.

11. *See* Paul Fenn & Christopher J. Whelan, *Remedies for Dismissed Employees in the UK: An Economic Analysis*, 2 INT'L R. L. & ECON. 205-225 (1982).

court or tribunal conflict is assumed: An individual worker perceives the breach of a contractual right—most often an allegedly unfair dismissal—and seeks to enforce this right.

The various stages in the evolution of conflicts can be seen as a succession of filters. Only a fraction of potential conflicts lead to a formal complaint before court or tribunal, and only a fraction of these complaints are resolved at trial.[12] At the beginning of the chronology of a (potential) legal conflict, collective voice institutions in the workplace often make legal conflicts unnecessary. In many British workplaces, grievance procedures channel and resolve conflicts. Additionally, the sheer presence of a union can be a restriction on the managerial prerogative. Until the 1970s, it was not unusual for British unions to call out a strike as a response to an allegedly unfair individual dismissal. Therefore, in order to avoid industrial action, employers tend to be wary of breaking overtly the explicit or implicit contract.[13]

In Germany, this form of workplace unionism is unknown and strikes for conflicts over rights are unlawful. The threat effect of trade unions is therefore smaller. Instead, works councils articulate and solve disputes at the workplace. Works councils are granted a hierarchical set of information, consultation, and veto rights, particularly in issues such as individual dismissals, redundancies on economic grounds, or changes in the pay system. These rights, along with informal conciliation on behalf of individual employees, make for an effective voice institution comparable to workplace unionism in Britain.[14] Its efficacy is also reflected in the fact that formal grievance procedures, which can be instituted according to a procedure laid down in the law, are hardly made use of in German establishments.[15]

When attempts at dispute resolution within the workplace fail, employees often seek legal advice before issuing a formal complaint. By consulting an expert, workers usually become more informed about the prospects of a complaint and may then refrain from proceeding with the legal action. In Britain, apart from lawyers and union officials, the Advisory, Conciliation and Arbitration Service

12. Robert D. Cooter & Daniel L. Rubinfeld, *Economic Analysis of Legal Disputes and Their Resolution,* 27 J. ECON. LITERATURE 1067-1097 (1989).

13. LINDA DICKENS ET AL., DISMISSED: A STUDY OF UNFAIR DISMISSAL AND THE INDUSTRIAL TRIBUNAL SYSTEM 215 (1985).

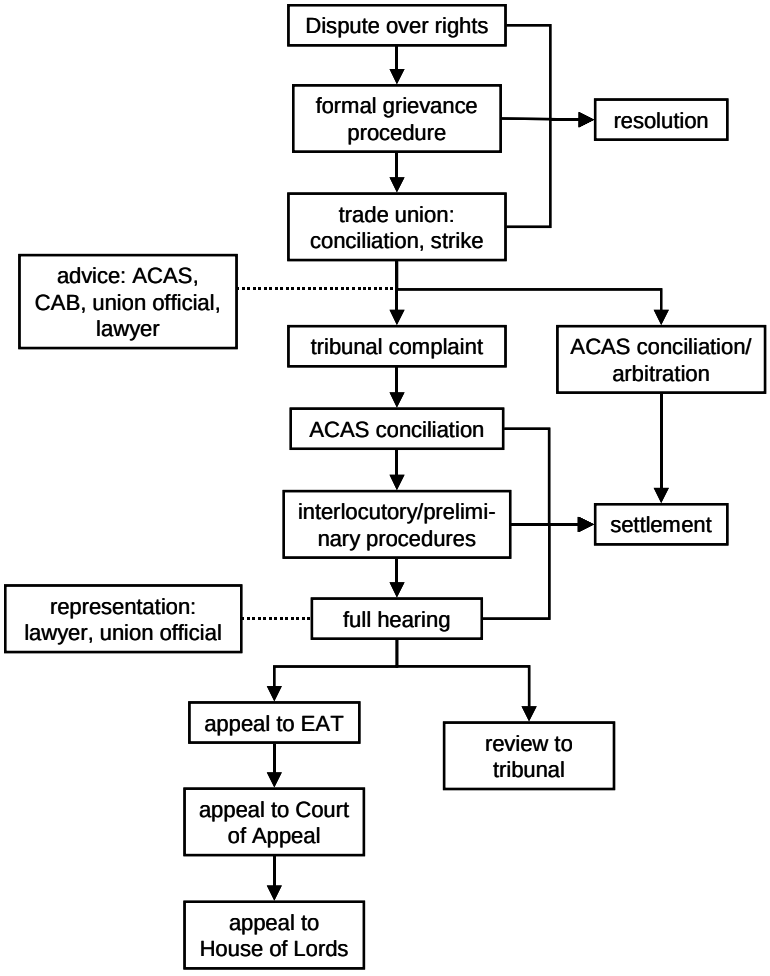
14. BERND FRICK, MITBESTIMMUNG UND PERSONALFLUKTUATION: ZUR WIRTSCHAFTLICHKEIT DER BUNDESDEUTSCHEN BETRIEBSVERFASSUNG IM INTERNATIONALEN VERGLEICH (1997).

15. THOMAS BREISIG, BETRIEBLICHE KONFLIKTREGULIERUNG DURCH BESCHWERDEVERFAHREN IN DEUTSCHLAND UND IN DEN USA (1996).

(ACAS), a tripartite organization, offers legal advice. Presumably because British unions are weaker, recently workers consult the Citizens' Advice Bureau (CAB) more often.[16]

16. Brian Abbott, *The Emergence of a New Industrial Relations Actor—The Role of the Citizens' Advice Bureaux?*, 29 INDUS. REL. J. 257-69 (1998).

Figure 1: The Resolution of Disputes Over Rights—Main Stages in Britain

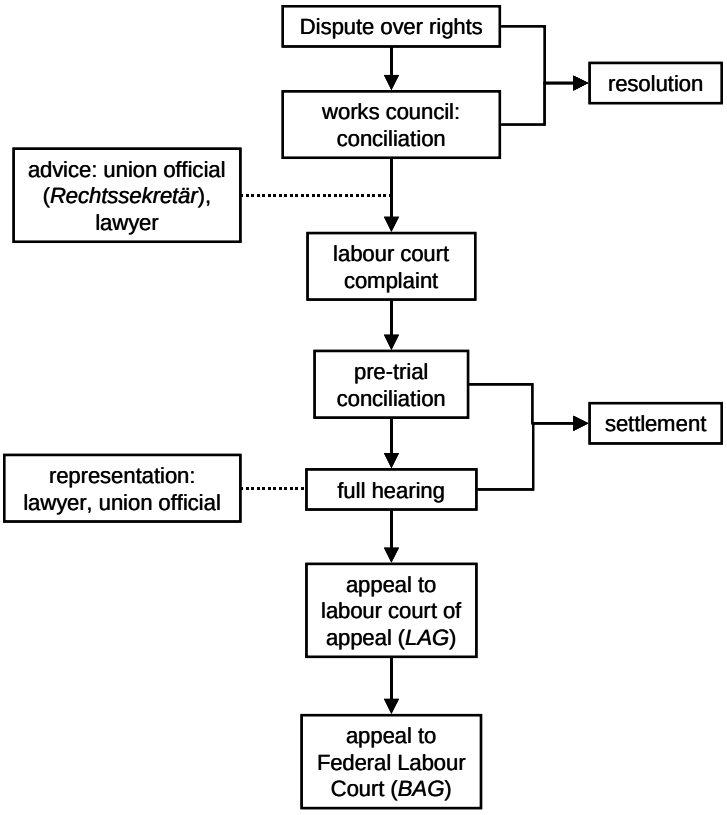


ACAS: Advisory, Conciliation and Arbitration Service
CAB: Citizens' Advice Bureau
EAT: Employment Appeals Tribunal

In Germany, the institutions offering advice are less scattered. Workers either turn to a lawyer (*Anwalt*), particularly if they are covered by legal aid insurance, or to a union, specifically from a union law secretary (*gewerkschaftlicher Rechtssekretär*). German unions

traditionally run a legal advice branch, offering free advice and representation for their members in matters of labor law.[17]

Figure 2: The Resolution of Disputes Over Rights—Main Stages in Germany



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LAG: *Landesarbeitsgericht*
BAG: *Bundesarbeitsgericht*

It is widely accepted that employment disputes should be resolved via third party intervention rather than through a costly legal conflict.[18] In the British system of conflict resolution, the ACAS

17. Karl Kehrmann, *Die Entwicklung des gewerkschaftlichen Rechtsschutzes*, *in* DIE ARBEITSGERICHTSBARKEIT: FESTSCHRIFT ZUM 100 JÄHRIGEN BESTEHEN DES DEUTSCHEN ARBEITSGERICHTSVERBANDES 169-186 (1994).

18. *See* Arnold M. Zack, *Can Alternative Dispute Resolution Help Resolve Employment Disputes?*, 136 INT'L LAB. R. 95-108 (1998).

allows employers and workers to submit their case to arbitration. Hence, after leaving the workplace, conflicts in Britain can follow two separate tracks: ACAS arbitration or employment tribunal proceeding. In practice, however, arbitration is of only minor importance.[19] In 1998, a fresh attempt was made in the Employment Rights (Dispute Resolution) Act to promote alternative dispute resolution. Whether this new initiative is going to be adopted by workers and employers remains to be seen; the limited success of previous arbitration schemes gives rise to skepticism.

In Germany, the arbitration route is blocked for almost the entire workforce. Except for a defined set of professions, it is forbidden by law for worker and employer to have disputes over rights resolved by arbitration. Harmed workers must turn to the courts if they do not reach agreements during the earlier stages of conflict.

After a formal complaint before a German labor court or a British employment tribunal, a further attempt is made to reach a pre-trial settlement. In Britain, conciliation is delegated to the ACAS. After receiving notice of a complaint, the ACAS then tries to involve the conflicting parties in conciliation. Only after failure of this attempt and some additional procedures does a full hearing occur. In Germany, obligatory mediation is tied closely to the court hearing. Immediately before the full hearing, the professional judge and the parties involved meet to discuss pre-trial settlement options. Only after failure of this process does the trial hearing begin.

The possibilities of review and appeal differ between the court and the tribunal system. In Britain, the parties can apply to the tribunal for review of its decision, for example on the ground that new evidence has come to light since the hearing. To challenge a tribunal decision on points of law—but not on points of fact—either party can appeal to the Employment Appeal Tribunal, then the Court of Appeal (or the Court of Session in Scotland), and, eventually, the House of Lords. In Germany, decisions of a labor court can be challenged by appeal to a labor court of appeal (*Landesarbeitsgericht*), either on points of law or on points of fact. The Supreme Labor Court (*Bundesarbeitsgericht*) only considers appeals on legal grounds.[20]

To summarize, in both countries a succession of institutions mediates the conflict before it reaches the litigation stage. Institutions

19. DICKENS ET AL., *supra* note 13, at 278ff.

20. When a case touches upon the interpretation and application of European Union law, the courts and tribunals at each level can also refer the case to the European Court of Justice for it to issue a preliminary opinion that the national court or tribunal takes into account when deciding the issue.

in the workplace can make legal conflicts obsolete. Legal advice can inform workers that a legal complaint may be futile. Arbitration, conciliation, and mediation before and after a formal complaint can resolve disputes via settlement. Since conflict incurs costs at any of these stages, the parties try to anticipate the outcome of various actions, given the expected opponents' actions. For instance, employers who expect a union to respond by strike action may refrain from certain dismissals; workers who consider their prospects of winning as unsure may be satisfied with a settlement.[21] Hence, the duration of conflicts is dependent on the strategic interactions of forward-looking opponents. The resulting picture is a pyramid of conflicts. A large number of disputes form the broad bottom, while the number of trials at the various court or tribunal levels represent the narrow top of the pyramid.

C. Determinants of the Demand for Employment Litigation

It was argued in section I that litigation seems to become more important in both Britain and Germany. If this development indicates a permanent shift in the demand for litigation, it may be helpful to identify reasons for this process and learn how other industrial relations variables interact with the demand for litigation. For such a discussion, the economic analysis of conflict, indicated above, offers a convenient framework.

A discussion of the possible determinants of litigation must depart from considering the labor market. The strong impact of the inflow into unemployment on the frequency of court cases is obvious from Figure 3. Inflows into unemployment reflect employer-employee separations. When more workers are considered redundant or are dismissed on behavioral grounds, more workers will invoke a court or tribunal. Statistical evidence on unfair dismissal cases in Britain and Germany confirms the claim that the labor market significantly influences the frequency of unfair dismissal cases.[22] Other types of legal conflicts, for instance over wage claims, also tend to rise in connection with a separation. Understandably, workers

21. *Id.*; ROBERT J. FLANAGAN, LABOR RELATIONS AND THE LITIGATION EXPLOSION 73ff (1987).

22. Frick & Schneider, *supr*a note 3; Sarah Brown et al., *Unemployment, Vacancies and Unfair Dismissals*, 11 LABOUR 329-49 (1997). These results show, in addition, that rising inflows into unemployment will lead to a more than proportionate rise in litigation. If inflow figures are high, the prospects for many workers to find reemployment will be bad. Their opportunity costs of the time spent at trial—i.e. the expected gains from seeking a new job—are therefore low, and they will tend to pursue their legal action more vigorously.

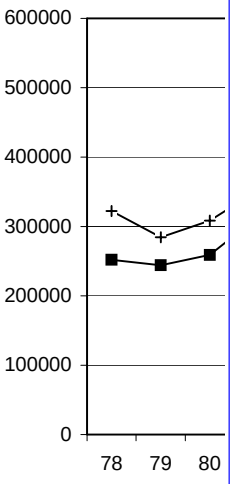
refrain from issuing a legal complaint in an ongoing contract because this damages the climate in the employment relationship. In addition, conflicts that do not result in a separation are most likely to be solved by the various "filters" short of a legal action, i.e. by in-house grievance procedures or informal works council mediation.

Figure 3: The Number of Processed Cases Before Labor Courts and Inflow into Unemployment (Western Germany)

Source: MITTEILUNGEN AUS DER ARBEITSMARKT- UND BERUFSFORSCHUNG (various issues); BUNDESARBEITSBLATT (various issues).

Apart from the labor market, it is frequently stated that legal regulation and the extent to which rights are granted to workers are also potential drivers of litigation. The rise and fall of these rights, in turn, are strongly influenced by the ideological complexion of governments. Hence, to suggest that legal regulation influences the number of legal conflicts implies that politics have a measurable impact on the demand for litigation. In Germany, stronger rights in dismissal protection in 1969, and in works council co-determination in 1972, have been estimated to have a positive effect on workers' demand for unfair dismissal claims. Similarly, the British Employment Protection (Consolidation) Act of 1978 had a positive impact. Yet, the series of subsequent statutes that watered down workers' rights had a negative impact on the incidence of cases over unfair dismissals.[23]

23. *Id.*



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This leaves unexplained, however, why British workers raised tribunal action more frequently between 1979 and 1997, a period of a weakening rather than strengthening of workers' rights in Britain.[24] More importantly, the theoretical links between regulation and litigation are intricate. For one, given the various filters in the pyramid of conflicts, more workers' rights will not necessarily entail an increase in litigation. Anticipating the enhanced prospects of workers' success in court or tribunal, employers may tend to abide by the law in the first place or may be more willing to concede certain stakes in conciliation. Seen from law . . . and . . . economics, the uncertainty in the enforcement of the statute, rather than its substance, can be expected to influence the occurrence of legal disputes. With uncertain legal standards, the conflicting parties' expectations to win their case tend to be more diverse. These divergent expectations are one way to explain why disputants are often unable to settle their case before litigation.[25] To complicate matters, the statutes themselves do not fully reflect the degree of regulation, because judge-made law and court enforcement of the statutes influence the parties' expectations; *de jure* in Britain (a common law country), but *de facto* also in Germany (a civil law country). Hence, the likely influence of employment regulation, both by statute law and case law, on the number of legal conflicts is far from obvious.

Another argument to account for an increasing number of legal conflicts is the change in the employment relationship. Flexible employment, restructuring towards the service economy, and new forms of remuneration all make the employment relationship less standardized in most industrialized countries. This transformation is likely to broaden the scope for individual conflicts. Put simply, if more disputes arise at the broad bottom of the conflict pyramid, it is very likely that, in absolute terms, more conflicts tend to reach the thin peak of the pyramid. Since the move towards flexible employment and deindustrialization have been relatively pronounced in Britain, it is hardly surprising to see the demand for individual conflict resolution rise in this country. Similarly, the high incidence of labor court litigation in the aftermath of German unification is also a reflection of a changing employment relationship. The economic transformation gives rise not only to redundancies; for most

24. *See* LEWIS, *supra* note 7, at 483ff.

25. *See* Joel Waldfogel, *Reconciling Asymmetric Information and Divergent Expectations Theories of Litigation*, 41 J. L. & ECON. 451-476 (1998).

employees, it also meant an abrupt change in the terms and conditions of employment. Many workers responded by invoking the labor courts.[26]

It was argued that voice institutions in the workplace could filter out disputes at work. But, in particular, in Britain and the United States we have seen the retreat of trade unions and a resulting "representation gap,"[27] i.e. a weakening of collective voice at the workplace. This process may also influence the demand for litigation. In the absence of collective voice, workers are more likely to invoke individual voice, such as an employment tribunal, when disputes over rights arise. Some indirect evidence concurs with this idea. In a recent case study, more than 30 British employers were asked about their experience with unfair dismissal cases.[28] In non-unionized settings, grievance procedures were used only very rarely and employers without such procedures were more likely to lose an unfair dismissal case before a tribunal. Likewise, Knight and Latreille,[29] who employ the Workplace Employment Relations Survey 1998, find that high union density reduces the likelihood of an occurring tribunal complaint at the workplace, although this result is not statistically significant. A comprehensive, but somewhat outdated, study of unfair dismissal cases in Britain revealed that tribunal action in the 1970s was more likely to arise in such sectors where union density was low and in smaller plants where formal grievance procedures were often lacking.[30] Similarly, the persistently high incidence of litigation in eastern Germany may in part be a reflection of weak trade unions and works councils in the eastern part of the country.[31]

The strength of union representation also shapes the way in which legal advice and representation are organized, which, in turn, influences the number of legal conflicts. In both countries, unions have traditionally been involved in these activities, but now, with weaker unions, their role may be diminishing. In Britain, the Citizens' Advice Bureau is already partaking in this function formerly associated with the unions and even unionized workers often consult

26. Schneider, *supra* note 4; Martin Schneider, *What Do Labour Courts Do? Evidence from Eastern German Transformation* (June 2000) (unpublished manuscript presented at the EALE/SOLE World Conference, Milan, 2000, on file with author).

27. BRIAN TOWERS, THE REPRESENTATION GAP: CHANGE AND REFORM IN THE BRITISH AND AMERICAN WORKPLACE (1997).

28. Jill Earnshaw et al., *Industrial Tribunals, Workplace Disciplinary Procedures and Employment Practice*, 106 LAB. MARKET TRENDS 479-481 (1998).

29. Knight & Latreille, *supra* note 1, at 248.

30. DICKENS ET AL., *supra* note 13, at 37-43.

31. Schneider, *supra* note 4.

the CABs.[32] In Germany, the peak union confederation (*Deutscher Gewerkschaftsbund*), recently "outsourced" its legal advice branch to a legally independent company because of increasing financial pressures on union budgets. This may mark a first step in a more far-reaching retreat from legal advice activities of unions. The impact on the frequency of cases is unclear and largely depends on the way alternative actors, like the CABs in Britain or lawyers in Germany, will inform their clients.

Overall, the link between the various factors discussed and the demand for employment litigation are far from deterministic. In addition, the lack of appropriate data has hampered research to arrive at sound conclusions. "The steep slope of the 'dispute pyramid' and the relative superiority of data describing the top as opposed to the bottom make the empirical study of the litigation process especially difficult."[33] Yet, it seems likely that less stable and more flexible employment relationships, in conjunction with weaker trade unions, partly explain the recent extensive use of litigation in both Britain and (eastern) Germany. If this is the case, conflict resolution via labor courts and tribunals will remain important.

III. SIMILARITIES IN THE WORKINGS OF LABOR COURTS AND TRIBUNALS

Given the differences in the systems of conflict resolution outlined in the previous section, it is surprising to see so many common features of German labor courts and British employment tribunals. Not only have both evolved as major institutions in the respective industrial relations systems over the past decades, but the workings of both jurisdictions also reveal striking similarities.

A. Procedures to Enhance Perceived Fairness

In the first instance of each jurisprudence, the panel is made up of one professional lawyer ("chairperson," *Vorsitzender Richter*) and two lay judges.[34] One of these is drawn from a list of candidates nominated by trade unions; the other is drawn from a list of candidates nominated by employers' organizations. Compared to ordinary courts, labor courts and tribunals should be highly accessible

32. Abbott, *supra* note 16.

33. Cooter & Rubinfeld, *supra* note 12, at 241f.

34. For these and other organizational features, *see* LEWIS, *supra* note 7, at 35ff; BOWERS ET AL., *supra* note 8; CLAAS-HINRICH GERMELMANN ET AL., ARBEITSGERICHTSGESETZ. KOMMENTAR (3rd ed. 1999).

for claimants. Therefore, the procedural costs are low, particularly in comparison to the ordinary courts.[35] Representation before the court or tribunal is not obligatory, so as to allow claimants to bring the case on their own. Overall, the philosophy of both the labor courts and the employment tribunals is well described by the alleged advantages that the Donovan commission mentioned in favor of tribunals: easy accessibility, informality, speediness, and cheapness.[36] On the face of it, this organization seems to be a waste of resources, attracting too many cases because of the low costs of bringing an action and by involving lay members that are usually not fully trained in law. Particularly the tripartite composition seems superfluous, since it is a stylized fact in both countries that the professional member of the panel dominates the decision making.[37] The reasons given for the inclusion of lay members on the panel, however, are virtually the same in both countries. The role of lay members is to bring their "knowledge of human nature and industrial practice," to communicate in plain words the complicated legal matter to participants, and to enhance the perceived fairness of the hearing, thus ensuring acceptance with the outcome of the case.[38]

Hence, tribunal proceedings, or in the case of Germany, the tribunal-like court proceedings, can be understood with reference to the theory of procedural justice.[39] Even if a more court-like proceeding were to lead to similar substantive results, the type of procedure would still matter. People value "dignity"[40] and are more willing to accept detrimental results, such as a confirmed dismissal, if they consider the procedure which yields the results as fair and legitimate. As survey studies in the procedural justice literature have revealed, participants tend to regard a procedure as fair if they are treated in a dignified way, if they are heard in the process and are able "to state their case," if a ruling is considered as based on the complete set of information and in an impartial way, and finally, if a decision

35. DICKENS ET AL., *supra* note 13, at 183f; Andreas Kotzorek, *Zur Häufigkeit arbeitsrechtlicher Prozesse in der Bundesrepublik Deutschland: Eine ökonomische Analyse*, 141 ZEITSCHRIFT FÜR DIE GESAMTE STAATSWISSENSCHAFT 312-355 (1985).

36. John K. MacMillan, *Employment Tribunals: Philosophies and Practicalities*, 28 INDUS. L.J. 33-56 (1999).

37. *See, e.g.*, DICKENS ET AL., *supra* note 13, at 65-69.

38. *Id.* at 59ff; Günter Ide, *Die Stellung der Ehrenamtlichen Richter*, *in* DIE ARBEITSGERICHTSBARKEIT: FESTSCHRIFT ZUM 100 JÄHRIGEN BESTEHEN DES DEUTSCHEN ARBEITSGERICHTSVERBANDES 254 (1994).

39. *See* NIKLAS LUHMAN, LEGITIMATION DURCH VERFAHREN (3rd ed. 1983); JOHN W. THIBAUT & LAURENS WALKER, PROCEDURAL JUSTICE: A PSYCHOLOGICAL ANALYSIS (1975).

40. Williamson, *supra* note 6, at 177.

can be corrected by some appellate authority.[41] Tribunal-like proceedings appear to be compatible with all of these criteria because there are only minor barriers to take legal action. Employees are allowed to present their case on their own and the tripartite composition allows the parties to regard the procedure as "impartial."

B. "Legalism": The Importance of Case Law

As argued above, German labor courts are organized much like tribunals, but, in turn, British tribunals have been criticized for being too much court-like. "The most frequent criticism levelled at the modern employment tribunal is that is has become legalistic."[42] For instance, appeals against tribunal decisions can only be based on points of law, not of fact. This may be considered as being at odds with the idea of an informal and non-legalistic forum for worker complaints.[43] Even in the German labor law jurisdiction, which is a court-system, disputants are allowed to appeal a first-instance decision on points of fact.

Furthermore, a substantial body of tribunal case law has accumulated over the years and is frequently cited in decisions. Hence, the statutes that the employment tribunals are supposed to administer have increasingly been "subjected to subtle lawyers' reasoning."[44] This development is said to contradict the philosophy of informality and easy accessibility of the tribunals, resulting for instance in a large proportion of parties being represented by a lawyer or union official in the hearings. This share amounted to some 30% in 1998/1999.[45]

Yet, Roderick Munday claims that the idea of a "layman's law" and the concern about legalism are largely unfounded. Although tribunals are to administer certain statutes, the development of case law is inevitable only because the language in the statutes is vague and may be difficult to apply to complex "real-world" cases.[46] Moreover, from a law-and-economics perspective, precedents are a capital stock

41. For a summary, *see* Astrid Epp, *Divergierende Konzepte von "Verfahrensgerechtigkeit": Eine Kritik der Procedural Justice Forschung* 34-38 (Wissenschaftszentrum Berlin für Sozialforschung, Working Paper FS II 98-302) (1998).

42. MacMillan, *supra* note 36, at 37.

43. This point was raised by an anonymous referee.

44. Roderick Munday, *Tribunal Lore: Legalism and the Industrial Tribunals*, 10 INDUS. L.J. 147 (1981).

45. LAB. MARKET TRENDS 496 (Sept. 1999).

46. *See* Munday, *supra* note 44.

facilitating the resolution of subsequent cases.[47] Tribunal panels and potential litigants are able to predict the outcome of a trial more accurately if precedent cases interpreted and clarified the content of the statutory law. The fact that most disputes are settled—just as in Germany—is in part an outcome of a consistent case law.

A comparison of the alleged legalism in tribunal cases with the legal process in other countries corroborates the claim that case law is not to be avoided.

> By analogy, comparative lawyers who have studied the ways in which French and English courts approach precedent, are forming the view that, although the two legal systems appear to rest upon diametrically opposed axioms—the one founded upon the idea that courts are forbidden in their judgments to lay down general rules binding upon their successors, the other upon the idea that courts are strictly bound by the reasoning of their predecessors—in practice they behave in rather like ways, their dogmas yielding to common legal exigencies of flexibility and certainty, in similar proportions.[48]

It is therefore not surprising that British concerns about legalism are mirrored by German lawyers who complain about the accumulation of case law produced by the Supreme Labor Court (*Bundesarbeitsgericht*). Although Germany is a civil law country, these decisions strongly prejudice future decisions of lower instance courts.[49] Judges of the Supreme Labor Court, in turn, point out that the evolution of case law is a matter of course.[50] The German legislature has failed to pass acts to regulate key aspects of the employment relationship, such as industrial disputes. Therefore, labor court judges must apply general civil law statutes to the employment relationship; a task that is far from unambiguous.

Case law, as the comparison reveals, is important in both British and German labor law to enhance the consistency of adjudication. The need for case law is enhanced by the complex nature of the employment contract. These contracts are often long-term, relational, incomplete, and implicit, as a variety of theories in economics now acknowledge.[51] These more sophisticated relationships evade

47. William M. Landes & Richard A. Posner, *Adjudication as a Private Good*, 8 J. LEGAL STUD. 235-284 (1979).

48. *See* Munday, *supra* note 44, at 153f.

49. *See* BERND RÜTHERS, BESCHÄFTIGUNGSKRISE UND ARBEITSRECHT: ZUR ARBEITSMARKTPOLITIK DER ARBEITSGERICHTSBARKEIT (1996).

50. *See, e.g.*, Otto R. Kissel, *Zur Funktion der Rechtsprechung*, *in* TARIFAUTONOMIE FÜR EIN NEUES JAHRHUNDERT: FESTSCHRIFT FÜR GÜNTER SCHAUB ZUM, 65 GEBURTSTAG 373-388 (Monika Schlachter et al. eds., 1998).

51. *See* Sadowski, *supra* note 6.

regulation by simple rules. Apart from this, complexity may derive also from the dynamic character of these contracts. Changes in technology, work organization, market competition, and industry composition constantly give rise to new types of conflicts. By resolving such conflicts in a trial, a judge brings forth an innovation; an invention that is then made accessible to the legal community by the published decision. Overall, the proliferation of case law almost inevitably accompanies the "application" of statutes and, given the complex nature of the employment relationship, this proliferation has to be more imminent in labor law.

C. Low Reemployment Rates in Unfair Dismissal Cases

"Although reinstatement is clearly the primary remedy for unfair dismissal provided by law, the usual remedy for successful applicants, both at conciliation and hearing, is compensation."[52] Over the years, the level of reemployment as a proportion of successful cases declined and, in 1998 and 1999, it was less than 1%.[53] In Germany, similarly, the objective of the statute law is to protect workers from unfair dismissals, but the law effectively works like an act stipulating compensation or redundancy payments.[54] Although Linda Dickens et al. complain that reemployment has become "the lost remedy,"[55] it seems likely that a low reemployment rate is but a natural outcome of unfair dismissal cases.

As argued in section II, legal action is the ultimate means of resolving disputes arising in the employment relationship. Given the cumbersome process of litigation and the high cost in terms of time spent at hearings, the disputes that proceed to the litigation stage will be serious. Employers, anticipating the cost of litigation, shy away from dismissing an employee unless they are determined to do so. Workers, in turn, are aware of the fact that the employment relationship is an implicit contract that includes elements of mutual trust and understanding. Thus, legal action in an ongoing employment relationship is very unlikely and would be considered as a breach of an implicit contract by both parties. Conversely, unfair dismissal cases are outflows of employment relationships that are beyond repair. Neither the employer nor the employee is usually

52. Linda Dickens et al., *Re-employment of Unfairly Dismissed Workers: The Lost Remedy*, 10 INDUS. L.J. 161 (1981).

53. LAB. MARKET TRENDS 494 (Sept. 1999).

54. WOLFGANG DÄUBLER, DAS ARBEITSRECHT, 2 LEITFADEN FÜR ARBEITNEHMER 635 (11th ed. 1998).

55. *See* Dickens et al., *supra* note 52.

interested in a continuation of the contract and compensation or other remedies seem more appropriate than reemployment. Hence, the reluctance of courts and tribunals to enforce reemployment seems appropriate.

IV. INDUSTRIAL RELATIONS RESEARCH AND THE JURISPRUDENCE: EVOLVING RESEARCH ISSUES

If higher levels of employment litigation are here to stay, it is "misleading to concentrate exclusively on the traditional industrial relations actors, as identified, for instance, by Dunlop . . . If early models . . . are to remain relevant and of value they need to be modified to reflect the increasingly diverse and fragmented nature of representation and conflict resolution."[56] Arguably, courts and tribunals are major actors to be considered in these modified theoretical approaches. In more practical terms, this concluding section suggests a number of research routes worth following.

Is the impression of an increase in litigation a universal or at least widespread phenomenon among industrialized countries? Cross-country comparisons of individual conflict resolution and, in particular, more quantitative analyses of the demand for litigation have been rare.[57]

Are collective voice and individual voice substitutes or complements? The answer may depend on both the country in question and the issue studied. In the United States, for instance, the "litigation explosion" in labor law reflects union attempts to enforce compliance with the National Labor Relations Act, while employers had increased cost incentives to be hostile towards unions.[58] Here, litigation concerned the collective voice institutions as such and worker representatives used legal action as a resource. More litigation and intensified industrial action complemented each other. This paper, by contrast, dealt with individual conflicts in the employment relationship; here it is more appropriate to assume a substitution of litigation for collective action.

56. *See* Abbott, *supra* note 16, at 257.

57. For qualitative work, *see* Trevor Bain, *Third Party Dispute Resolution, Rights & Disputes*, *in* THE HUMAN RESOURCE HANDBOOK, PART III. 219-244 (David Lewin et al. eds., 1997); Alan Gladstone, *Settlement of Disputes Over Rights*, *in* COMPARATIVE LABOUR LAW AND INDUSTRIAL RELATIONS IN INDUSTRIALIZED MARKET ECONOMIES 503-537 (Roger Blanpain & Chris Engels eds., 1998). Procedural aspects are discussed in EUROPEAN LABOUR COURTS: INDUSTRIAL ACTION AND PROCEDURAL ASPECTS (Werner Blenk ed., 1993).

58. *See* FLANAGAN, *supra* note 21.

Collective voice and individual voice, even if they are substitutes, may differ in terms of the employment conditions they eventually bring forth. Which workers are better off, which are worse off? Is individual conflict resolution really cheaper for employers as their increased preference for union-free workplaces indicate? After all, the "economies of scale"—the cost savings by regulating the terms and conditions for all workers at a time—may be lost and employers may be obliged to appear before court or tribunal for every individual complaint.

Is the tripartite, tribunal-like organization of labor courts and similar institutions a dominant organizational mode? Is there even some convergence towards this type of individual conflict resolution? From a functional perspective, it is then worth asking why this may be so. The idea of "procedural justice" seems a potentially fruitful route to approach this question.

Finally, can arbitration take on some of the workload of tribunals and courts?[59] The 1998 Employment Rights (Dispute Resolution) Act in Britain introduced an alternative dispute resolution device as a response to a perceived cost explosion incurred by litigation.[60] The German public has discussed similar schemes to relieve the workload of labor courts for years. From the law-and-economics perspective, arbitration may well be an appropriate institution for the resolution of disputes, but it is doubtful whether it can take on the rulemaking function of adjudication. Given the prominent role of case law to bring consistency to the law, this is a major restriction on the potential value of arbitration.

59. *See* Zack, *supra* note 18.

60. Matthias Kilian, *Entwicklungen in der Englischen Arbeitsgerichtsbarkeit*, 16 NEUE ZEITSCHRIFT FÜR ARBEITSRECHT 1088-1092 (1999).