Wrongful Dismissals In The Federal Republic Of Germany *

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I. Introduction

Since the *Weimar* Republic , protection against wrongful dismissals is one of the core elements of German labor law. In its present form, its essential function – at least in theory – is to protect the employee against arbitrary dismissals and hence to maintain existing employment relationships (*Bestandsschutz*): If a dismissal is wrongful, in principle the employee has the right to be reinstated to his or her former job. Contrary to other legal systems, the idea of a compensation for financial disadvantages caused by a dismissal is not prevailing in the German model. This concept of maintaining employment relationships against arbitrary dismissals even has constitutional character. According to the Federal Constitutional Court, a minimum of statutory dismissal protection is guaranteed by the German constitution . [1] As a result of the freedom of occupation [2] and the Welfare-State clause in Article 20, paragraph 1 of the Constitution, the federal legislature has the constitutional obligation to establish a minimum of protection against dismissals; however, in fulfilling this constitutional task it has a wide discretionary power.

In spite of its long existence, the legal system of dismissal protection is presently undergoing a fundamental crisis. For several years, there has been a highly controversial debate in Germany on whether the existing level of dismissal protection should be reduced. Due to the increasingly high unemployment rate in Germany , more and more economists, labor lawyers, and politicians raised the question of whether or not the existing strict dismissal protection has negative effects on unemployment. As this question is affirmed by a growing number of people arguing that the German dismissal protection is too expensive for employers, particularly for small and medium-sized enterprises and is therefore an obstacle to the creation of new jobs, a great number of reform proposals are “on the market” in order to remedy these insinuated negative effects of dismissal protection on the labor markets and to give incentives for the creation of new jobs.

The reform debate is embedded in the existing legal context. We therefore first have to outline – after a brief view on the historical background (Section II) – the key elements of the existing German model of protection against dismissals with notice. The emphasis will be on the general regime of dismissal protection (Section III), in particular on the concept of social justification as the core element of German dismissal protection. However, the statutory dismissal protection for specific groups, such as disabled employees or pregnant women will be touched briefly (Section IV). An analysis of the statutory dismissal protection would be incomplete if the procedural mechanisms provided by the law were not taken into account: We therefore have to glance at the forms of dispute resolution and their efficiency (Section V). The two final sections are reserved to the most significant economic effects of the German dismissal protection (Section VI) and – as linked with the debate on the economic effects – to the discussion of some of the most relevant reform proposals (Section VII).

II. Historical Background

The German system of dismissal protection has undergone a fundamental change since its beginnings in the *Weimar* Republic (1918-1933). Only a few historical remarks will suffice to show how the statutory dismissal protection has changed from a rather compensation-oriented model to a system aimed at the job protection of the dismissed employee.

Leaving aside some specific rules in the context of the demobilization after the end of World War I, the protection against unfair dismissal was essentially regulated in section 84 of the Works Councils Act of 1920. [3] According to this provision, dismissed employees could have recourse to the works council within a period of five days if the dismissal: (1) had a discriminatory character, (2) was not motivated, (3) was the result of the employee's refusal to accept work other than that agreed upon in the employment contract, or (4) if the dismissal had to be considered as inequitable and not justified by the employee's behavior or by the economic situation of the establishment. In cases where the employee's appeal was grounded, the employer could freely demand the dissolution of the employment relationship for severances pay to the employee. [4] Another characteristic trait of this model was that the Works Council could sue the employer without the dismissed employee's consent. Consequently, the Works Council had a very strong position in the then existing system of dismissal protection. This collectivism was in accordance with the general theory underlying German labor law during the *Weimar* Republic . [5]

During the era of National Socialism, these collective elements of dismissal protection were abolished. [6] However, there are also surprising continuities with the *Weimar*

system of dismissal protection: According to section 56 of the Act on the Order of National Labor of January 20, 1934, [7] in establishments with at least ten employees dismissals were illegal when they had to be considered as an undue hardship for the dismissed employee and when they were not caused by the economic situation of the establishment; in these cases the employee could sue the employer before the Labor Court and could demand from him the revocation of the dismissal. [8] In cases where the dismissal had to be considered wrongful, the Labor Court had to dissolve the employment relationship on the – even non-motivated – demand of the employer. [9] Consequently, also during National Socialism, dismissal protection lead in most cases only to the payment of an indemnity for the job loss and did not require the maintenance of the employment relationship. [10]

It was only shortly after the end of World War II, that most of the re-founded States (*Länder*) established the Acts on the Protection against Dismissal. [11] Some of them mainly reverted to the model of section 84 of the Works Council Act of 1920, whereas others required a social justification of the dismissal. It was only in 1951, that the Federal Parliament enacted a federal Act on the Protection against Dismissal (*Kündigungsschutzgesetz*) and that the dispersion of legal regimes in the field of protection against wrongful dismissal could be overcome. It was based on a compromise between the umbrella organizations of the unions and the employers' associations in 1950. [12] Essentially, the new Act provided that dismissals in establishments with more than five employees – apprentices not counted – required a social justification. Since then, the notion of social justification is the essential criterion for the legality of dismissals; we will come back to this central notion of dismissal protection later. [13] The Act on the Protection against Dismissal was revised in 1969 and received – excepted the small business clause in section 23, paragraph 1 [14] – the form that is still valid today. [15] It does not provide collective elements in the dismissal procedure. These were established only one year later by the Works Constitution Act of October 11, 1952 : [16] According to its section 66, the works council only disposed of an information and consultation right with regard to dismissals; these participation rights have been affirmed by the reform of the Works Constitution Act in 1972. [17]

In summary, two points merit mention regarding the historical development of dismissal protection in Germany . First, it has to be noticed, that the center of gravity of dismissal protection has shifted from a rather collectivistic understanding at its beginning to an essentially individualistic approach. And, second, it is important to note, that the statutory dismissal protection originally was rather conceived as a compensation system whereas today it aims at the maintenance of the job.

III. General Regime of Dismissal Protection

A. The Role of the Works Council

Although we have stated that the German system has been developed into a system of dismissal protection in which the individual elements are prevailing, [18] the model would not become clear, if we did not take into consideration the important role that the works councils play in dismissal procedures. [19] The Works Constitution Act of 1972 establishes for the private sector an institutionalized system of workers participation by works councils. [20] In every establishment with more than five employees, a works council has to be elected by the entire workforce with the exception of the executive staff. According to the law, works councils are independent from trade unions and cannot be considered as unions' representatives on the establishment level such as shop stewards. [21] They dispose of various participation rights, such as rights to information, consultation and co-determination. Among them, the most important are certainly those of co-determination, because they entail matters that belong – in the absence of a works council – to the prerogative of management. Moreover, these rights can be invoked by means of a ruling of the establishment-level arbitration committee (*Einigungsstelle*) when a voluntary solution of the establishment dispute cannot be reached and when the works council or the employer requests the arbitration. In particular, co-determination of works councils covers participation in arrangements regarding so-called „social matters“ (e.g. working time schemes, health, safety at work etc.), participation concerning certain personnel decisions (e.g. the elaboration of guidelines for personnel selection) and concerning certain economic matters (such as the conclusion of a „social compensation plan“ in case of a down-sizing or the closure of the establishment). It is important to note that works councils are not entitled to go to strike in order to pursue the employees' interests. There is an absolute peace obligation for them provided by section 74, paragraph 2 of the Works Constitution Act.

Regarding dismissals, the competence of the works councils is rather limited. They cannot prevent the employer from dismissing employees; the decision of the employer as to whether one or several employees shall be dismissed is not covered by the participation of the works council. Its role is limited to information and consultation. Before pronouncing a dismissal, the employer has to inform and to consult the works council on the dismissal project [22] . Nonetheless, the role played by it in the dismissal procedure should not be underestimated since the dismissal is void and cannot be healed by a later consultation of the works council if the employer does not respect the information and consultation procedure [23] .

In the case of a dismissal with notice, the works council has to react within one week; in the case of a dismissal without notice, within three working days. There are three ways of reaction possible. First, the works council can declare its consent with the dismissal project. Second, the works council can react by saying nothing. In this case, the law assumes its consent with the dismissal project after the consultation period has expired. And third, the works council can contradict the dismissal project. However, the law specifies only five reasons for a justified contradiction. [24] (1) The employer has not sufficiently taken into consideration social aspects, (2) the dismissal violates one of the agreed company guidelines on personnel policy, (3) the dismissed employee can be transferred within the establishment or to another establishment of the employer, (4) a re-training that the employer reasonably can be expected to provide is possible, or (5) a continuation of the employment relationship with changed working conditions is possible. It is important to note that an objection by the works council does not affect the validity of the dismissal at all. However, there is one important effect of a justified objection for the dismissed employee: He or she can demand reinstatement to his or her old position, according to the conditions of his or her employment contract, until the end of the procedure before the labor court. [25]

Summing up the role of the works council in dismissal cases, we can say that its main task is to involve the employer in a communication process about the proposed dismissal and to rationalize dismissal decisions. There is some empirical evidence that employers respect the information and consultation of works councils in practice. [26]

B. Statutory Notice Periods

Another legal requirement for dismissals with notice is that the notice period is respected. Until 1994, the law distinguished between notice periods for blue-collar and white-collar workers and privileged the latter. Due to a decision of the Federal Constitutional Court of May 30, 1990, [27] the notice periods had to be assimilated, which has been done by the reform of section 622 Civil Code. There is now a notice period of one month to fifteenth day of that same month, or to the end of the month if the employment contract has been existing up to two years. It increases in correlation with the length of service. The longest notice period provided by the law is seven months if the employment contract has been existing twenty years or more. These statutory notice periods can be prolonged by employment contract. However, in principle, a reduction of them is not possible. [28] Only collective agreements can modify these statutory notice periods. [29]

C. The Concept of Social Justification

The core element of the statutory dismissal protection in Germany is, as we already have pointed out, the notion of social justification provided by section 1 of the Act on Protection against Dismissal. Only socially-justified dismissals are lawful.

1. Applicability of the Act on Protection against Dismissal

The statutory dismissal protection provided by the Act on Protection against Dismissal does not cover all employees. An employee is covered by the Act on Protection against Dismissal only if two conditions are fulfilled. First, the employment relationship has to exist for at least six months. [30] In employment relationships that exist for less than six months, the employer can dismiss without the restriction of the Act on Protection against Dismissal. Consequently, employees are normally on probation for six months.

Much more important in practice is the so-called small business clause of section 23, paragraph 1 of the Act on Protection against Dismissal. According to this provision, small establishments with ten or fewer employees, part-time employees only counting *pro rata temporis*, not including trainees, are not covered by the statutory dismissal protection. [31] Since the 1980s, this threshold is probably one of the most discussed provisions in the German legal system of dismissal protection. The adherents of section 23, paragraph 1 hold that the threshold is necessary to protect small business establishments against high costs resulting from the protection against dismissal and that relief contributes to more job creation in small businesses. [32] The opponents of the small business clause, on the other side, reject the threshold since it would lead to an unjustified discrimination of employees in small business. Originally, section 23, paragraph 1 only excluded employment relationships in establishments with five or fewer employees calculated *per capita* . In 1985, the German parliament adopted the Employment Promotion Act by which the *pro rata temporis* calculation has been established in section 23, paragraph 1. The Act on Employment Promotion of 1996, [33] voted under the liberal-conservative majority of Chancellor Helmut Kohl, raised the threshold from five to ten employees per establishment. In an important decision from 1998, the Federal Constitutional Court [34] considered this reform constitutional. The Court mainly argued that the specific situation and problems of small business justify an exemption of these establishments from the statutory protection against dismissal; the provision, therefore, does not violate the constitutional principle of equal treatment. [35] After the Social-democrats and Greens came into power in 1998, the reform of 1996 was abolished and again the threshold of section 23, paragraph 1 was reduced to five employees maintaining the *pro rata temporis* calculation. By this, the new majority fulfilled a campaign promise. However, due to the increasing political

pressure on the Federal Government during the following years, in 2004 the Social-democratic/Green majority again raised the threshold from five to ten employees. [36]

What are the consequences of the small business clause for employees working in establishments with ten or fewer employees? Do they have no protection against unfair dismissal at all? Generally speaking, the employer does not need a specific reason to dismiss one or several of its employees. However, the employers' freedom to “fire” is limited by the general clauses of public policy [37] and of good faith. [38] According to the previously mentioned decision of the Federal Constitutional Court of 1998, these general clauses of civil law have to be interpreted in light of the employees' constitutionally-guaranteed freedom of occupation. [39] The employer therefore has to respect a minimum of social protection when dismissing employees. The only example the Court gives is that the employee's confidence in the continuation of an employment relationship that already existed for a long period of time should be taken into consideration. [40] The Federal Labor Court has solidified this obligation of the employer in two recent decisions. [41] However, the precise extent of this constitutionally-guaranteed minimum dismissal protection in small businesses still remains unclear.

2. The Principle of proportionality

One essential element of the concept of social justification that has to be taken into consideration for every dismissal under the Act on Protection against Dismissal is the principle of proportionality. [42] The social justification of a dismissal requires that it is proportional.

This principle has several aspects. In particular, it implies that a dismissal under the Act on Protection against Dismissal is only lawful, if the termination of the employment contract by the employer is the *ultima ratio* . [43] The law solidifies this principle of last resort in several of its provisions. The employee only can be dismissed if he or she cannot be employed on another (comparable) workplace in the same establishment or in another establishment of the same company; [44] the same applies to dismissals if the employee can be transferred to another workplace with changed working conditions after a retraining for reasonable costs. [45] Moreover, the principle of last resort demands that the employer first declares a dismissal to change working conditions (*Änderungskündigung*) before terminating the employment contract by dismissal. [46]

Furthermore, the principle of proportionality demands that all aspects of the case are taken into consideration and that the conflicting interests of the employee and those of the employer are balanced. On the one hand, this produces more justice in the particular

case. On the other hand, however, it leads to an often deplored legal uncertainty. Since the outcome of the balancing of interests highly depends on the subjective views of the judge, it is often unclear for the parties whether an individual dismissal complies with the law or not.

3. Types of social justification

As mentioned above, the Act on Protection against Dismissal contains three different types of social justification.

a. Reasons concerning the Employee's Personality

A reason concerning the employee's personality justifying a dismissal presupposes that the employee is no longer able to fulfill his or her contractual obligation to work. By far the most important case in practice is probably long-term or repeated sicknesses of employees.

Dismissals for sickness pose difficult problems since the employer has to pay the employee sick pay during a sickness for a maximum period of six weeks. [47] Up to this point, the employer has to bear the remuneration costs of sicknesses. It is obvious that this can lead to considerable financial burdens in particular for small and medium sized enterprises. This is the reason the Federal Labor Court allows dismissals for sickness under certain severe requirements, although sick employees, in demanding sick pay, have only exercised their statutory right. The courts examine the social justification of dismissals for sickness in three steps. [48] First, there has to be a negative medical prognosis regarding the employee's sickness. As the doctor who is treating the employee is obliged to professional secrecy, the employee eventually has to allow him or her to disclose the necessary information on his or her health condition. Second, the permanent or repeated absence of the employee has to cause an “unacceptable burden” to the employer. However, there are no fix numbers that indicate when the financial burdens borne by the employer are unacceptable; the evaluation is on a case-by-case basis. And finally, the dismissal for sickness must be result of a consideration of interests from a reasonable employer's point of view. All aspects of the case must be taken into consideration and have to be balanced by the judge.

b. Reasons Concerning the Employee's Behavior

Reasons concerning the employee's behavior refer to breaches of his or her obligations resulting from the employment contract. The dismissal is a sanction for contract breaches from the employee's side.

Major examples of dismissals for reasons concerning the employee's behavior are repeated unpunctuality of the employee; [49] committing criminal tort referring to the employment relationship, [50] such as insults of the employer or one of the members of his executive staff; [51] and sexual harassment of colleagues [52] Hence misbehavior of the employee can be sanctioned severely by the employer.

The principle of last resort normally requires that, before pronouncing a dismissal, the employer has to warn the employee. Only if an admonition remains fruitless the employer can dismiss for reasons concerning the employee's behavior. However, a warning is not necessary in exceptional cases if it is obvious that the employee would not change his or her behavior or if the contract breach is of such an importance that a continuation of the employment relationship is no longer reasonable for the employer. [53]

c. Economic Reasons

The third, and by far the most discussed type of social justification are dismissals for economic reasons. [54] Those reasons can be internal (e.g. capacity reductions because of rationalization) or external (e.g. economic slowdown) to the employer. The entrepreneurial decision to reduce capacity, in particular the employer's considerations of expediency, are in principle not controlled by the Labor Courts. [55] Consequently, the employer has a discretionary power as far as the decision about the maintenance of the job or jobs in question is concerned.

The principle of last resort requires that the employer examines whether the employee in question can be transferred to another workplace in the same establishment or in another establishment of the employer. [56] It is not necessary that the employee has the skills for the alternative job, since the employer is obliged to train and retrain the employee for the new job to which he or she shall be transferred. However, this obligation is limited: a retraining only has to take place if the payment of the retraining costs can reasonably be expected by the employer. It is obvious that this obligation to transfer the employee can pose serious problems in big companies. In companies with thousands of employees (and with a large number of establishments), it is practically impossible to confirm with certainty that there is no adequate workplace to which the employee can be transferred. [57]

Furthermore, the employer is obliged to carry out a so-called “social selection” (*Sozialauswahl*) before dismissing employees for economic reasons; if he does not respect the legal requirements the dismissal is socially not justified. [58] The general idea of this selection procedure is that employees who would be affected the most by a

dismissal are protected more than those who easily can find a new job. The employer is obliged in selecting the employees who shall be dismissed to take sufficiently into consideration the employee's length of service, his or her age, his or her obligation to pay alimonies to family members and disabilities of the employee. This limitation of the social selection to four criteria results from the previously mentioned Act on Reforms on the Labor Market of 2003. Before, the employer had to take into consideration all relevant social aspects that are related to the employment relationship such as the chances of the dismissed employee on the labor market. [59] Of course, not only social criteria have to be taken into account in the selection decision. The employers' operational interests also must be considered. Those employees whose employment is in the legitimate interest of the employer are not included in the social selection. [60] This is particularly the case when an employee is needed for his skills, abilities and performances. The same applies to employees whose employment has to be continued when it is necessary to maintain a balanced age structure of staff: [61] Since the length of service and the employee's age are social aspects that favor older employees, the maintenance of a balanced age structure of staff permits the employer to avoid a “senescence” of his staff resulting from the “social selection” procedure.

In practice, the “social selection” can pose serious problems for employers. The main reason is the legal uncertainty it creates for the employer. Although the law enumerates all social aspects that have to be taken into consideration by the employer, it remains unclear how they are to weigh. Section 1, paragraph 3 of the Act on Protection against Dismissal leaves it open whether the length of service or the employee's age ranks higher or lower than family burdens or disabilities. “Point-schemes” fixed by the employer and providing for each social aspect (e.g., for every year of service) a certain amount of points are only accepted as an instrument of “pre-selection”; they do not substitute the individual act of balancing. [62] However, the employer can get legal certainty as to the balancing of the social aspects if a collective agreement or a works agreement [63] defines criteria how the different aspects have to be weight. [64] These collective contracts can only be controlled by the Labor Courts whether or not they contain serious violations of section 1, paragraph 3 of the Act on Protection against Dismissal. Despite this considerable legal advantage, there are only a few collective agreements or works agreements on “social selection” criteria. The reason for this retention might be that neither unions nor works councils want to de-legitimize themselves vis-à-vis the represented employees with such agreements. Another problem is building up groups of relevant employees who have to be included into the “social selection”. Finally, the “social selection” can be attacked by every dismissed employee. In the case of collective dismissals, for instance, this can considerably increase the risks for the employer since it can happen that different chambers within the Labor Court

have to deal with the “social selection” procedure and that they come to different results.

4. Reinstatement until the End of the Labor Court Procedure

As previously mentioned, the Act on Protection against Dismissal aims at protecting the existing employment relationship vis-à-vis arbitrary dismissals by the employer. Consequently, the employee who has been dismissed without social justification is entitled to be reinstated on his or her former job according to the working conditions agreed upon in the employment contract. The German law even goes further. Although it is unclear during the Labor Court procedure whether the employment contract has been terminated by the dismissal in question or not, the employee can demand under certain conditions to continue working on his or her job until the final decision of the Labor Court . According to section 102, paragraph 4 of the Works Constitution Act, the dismissed employee is entitled to be reinstated during the procedure, if the works council has contradicted the dismissal. [65] However, the Federal Labor Court has extended this right of the dismissed employee to be reinstated during the Labor Court procedure to other cases. According to an important decision of 1985, [66] the dismissed employee can demand the provisional reinstatement if the dismissal is evidently unlawful or if the Labor Court of first instance declares the dismissal to be unlawful. In these cases, the employee's interest to continue working, constitutionally protected by the right of personality, would outweigh the employer's interest to terminate the employment relationship. However, it seems that the right to be reinstated during the Labor Court procedure does not play an important role in practice.

D. Anti-discrimination law

The concept of social justification is – as we have seen – the core element in the German model of dismissal protection. Anti-discrimination law, on the contrary, traditionally possesses only a less relevant place in this system. Of course, there are several statutory provisions in German labor law forbidding discriminatory dismissals. The constitutionally-guaranteed freedom of association, for example, excludes dismissals on the ground of union membership of employees. [67] Moreover, it is consented that Article 3, paragraph 3 of the German Constitution prohibiting discriminations on the grounds of race, ethnic provenance or religion are not only binding on the State but have also a (certain) horizontal effect and are binding on employers as well. Consequently, dismissals that violate this constitutional provision are void since they are contrary to public policy. [68] The efficiency of this dismissal protection should not be overestimated: In spite of the horizontal effect of these

constitutional guarantees, anti-discrimination law has not yet played an important role in dismissal protection.

Much more important for the dismissal protection is the European labor law. Section 611a, paragraph 1 of the Civil Code, established in 1980 with the intention to transpose the EC Directive 76/207 of February 9, 1976 [69] "on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions", forbids *inter alia* direct as well as indirect discriminatory dismissals of employers on the ground of gender. [70] However, the impact of this provision seems to be rather marginal. At present, the question is whether this situation is going to change with the new anti-discrimination Directives of the EC from 2000. The Directive 2000/78/EC of November 27, 2000 [71] "establishing a general framework for equal treatment in employment and occupation" forbids direct and indirect discriminations on the grounds of the employee's religion, disability, age or sexual orientation and the EU-Directive 2000/43/EC of June 29, 2000 [72] "implementing the principle of equal treatment between persons irrespective of racial or ethnic origin" excludes discriminations on the grounds of racial or ethnic origin. Both Directives also cover the termination of employment contracts. [73] Until now (October 2005), the German legislature has not transposed these two important European Directives into German law, [74] although the Directive 2000/43/EC had to be transposed until July 19, 2005 and the Directive 2000/78/EC even by December 2, 2003. [75] At the moment, the concrete impact of these two European Directives on the statutory dismissal protection remains unclear. However, it is probable that antidiscrimination law particularly becomes relevant for discriminations on the grounds of religious belief such as prohibitions of the Muslim headscarf or Muslim prayers at the workplace. [76] Since the European Directives also forbid indirect discriminations, the protection of religious freedom at the workplace in German labor law has to be revisited in the near future.

E. Statutory and Collectively Agreed Dismissal Protection

Dismissal protection in Germany essentially has a statutory character, the core of which builds the Act on Protection against Dismissal. This predominance of statutory law in the field of dismissal protection is a result of a deeply rooted understanding in Germany that the Welfare State has to provide a minimum dismissal protection for employees. [77] However, this does not mean that collective bargaining does not have any relevance for dismissal protection. According to section 1, paragraph 1 of the Collective Agreement Act, [78] norms of collective agreements can also regulate the termination of the employment contract. Consequently, the employer's freedom to dismiss can be subject to a collective agreement. [79] Nevertheless there is one important restriction:

Since the provisions of the Act on Protection against Dismissals provide a statutory minimum for the dismissal protection, collective agreements only can modify them in favor of the employee. [80]

In practice, there are a large number of collective agreements that improve the employees' protection against dismissal. It will suffice to name only the two most important types. The first type of collective provisions concern the notice period: Many collective agreements extend the statutory notice period provided by section 622 Civil Code. [81] Much more interesting in our context are collective agreements that refer to the content of the employer's right to dismiss. A number of collective agreements even exclude ordinary dismissals by the employer for certain groups of employees. Some of them augment the protection for older employees: In the public sector collective agreement, for instance, employees with at least fifteen years of service cannot be dismissed anymore. [82] Others are included in concession agreements: These collective agreements, aiming at improving job security in companies that suffer serious economic difficulties, typically contain a *quid pro quo*. [83] The employees' side accepts – sometimes far-reaching – wage cuts [84] for a certain period of time contributing to the restructuring of the company; in return, the employer normally renounces his or her right to dismiss for economic reasons during the period of time the collective agreements remains in force (“employment guarantee”).

IV. Dismissal Protection For Specific Groups

Beyond this general regime of dismissal protection, based on the notion of social justification, specific groups of employees such as disabled employees, trainees or young mothers dispose of a higher level of statutory dismissal protection. The law considers them as “problem groups” and raises the general level of dismissal protection in their favor. We only emphasize on the most relevant of them.

One instrument to raise the level of dismissal protection is the involvement of public authorities in the dismissal procedure. Disabled employees, for instance, can only be dismissed with the authorization of the so-called integration office. [85] The authorization is in the discretionary power of the integration office. [86] Another example is pregnant employees and mothers until four months after the childbirth: In principle, the employer cannot dismiss them, if she has knowledge of the pregnancy or the accouchement or if she receives information about it within two weeks after the pronouncement of the dismissal [87] . However, the competent authority of the State is entitled to authorize the dismissal, if the dismissal is not motivated by the pregnancy or by the accouchement of the employee [88]. In practice, this can lead to long administrative procedures for the employer.

Another instrument is to limit the employer's freedom to dismiss not only to the cases of a social justification in the sense of section 1 of the Act on Protection against Dismissal, but to the legal requirements of a dismissal without notice [89] . Trainees, for example, only can be dismissed if there is an important reason. [90] Another example is members of works councils or other legally provided employee representations (e.g. the apprentices' representatives): An important reason is needed for them as well; [91] moreover, the works council has to declare its consent with the dismissal. [92] Only if the establishment is closed down can members of works council be dismissed with notice. [93] In the case that only a department of the establishment is closed down, works council members have to be transferred to another department. [94] This obligation to transfer the employee is far-reaching. The employer can even be obliged to dismiss another employee in order to be enabled to move the works council member to another workplace. [95] By establishing this higher level of dismissal protection for members of works councils, the legislature wants to safeguard the continuity and the functioning of the workers´ representation.

V. Dispute Resolution

The efficiency of every system of dismissal protection stands and falls with the mechanisms of dispute resolution that is provided by the law. In Germany , this is the jurisdiction in labor matters. 43.9 % of all files decided by the Labor Courts concern the termination of the employment contract. [96] It is therefore important to give a brief overview of the essential elements of the structure of the labor courts and the procedure to be followed before them in dismissal cases.

However, it has to be noted that only a small minority of the dismissed employees, 15 %, attack their dismissal before the labor courts. [97] Hence, the vast majority of the dismissal cases disputes are resolved outside the dispute resolution machinery provided by the law. For some time now, the legislature tended to promote settlements of dismissal disputes outside the Courts. For in 2003 the legislature created a new section 1a Act on Protection against Dismissal, according to which in cases of dismissals for economic reasons the employee is entitled to a severance pay if he or she does not attack the dismissal before the Labor Court within three weeks – the statutory delay for the filing of a law suit against the employer in dismissal cases [98] – and if the employer has declared that he or she is willing to pay an indemnity. [99] However, the impact of this new provision should not be overestimated, since the parties already have had the right to agree upon severance pays before the reform of 2003. It has rather symbolic relevance. [100]

A. The Labor Courts

In contrast to most other countries, Germany has a specific labor jurisdiction that was established by the Labor Courts Act in 1926. All individual and collective labor law disputes are decided by labor courts and not by the ordinary courts for civil law matters. The jurisdiction in labor matters is divided into three instances: the Labor Courts (*Arbeitsgerichte*) on the local level, the State Labor Courts (*Landesarbeitsgerichte*) on the regional level, and the Federal Labor Court (*Bundesarbeitsgericht*) on the federal level. It is characterized by its tripartite structure. In the Labor Courts of first instance, for example, the panels are composed of one career judge, the chairperson of the panel, and two lay judges – one coming from the employers' side and the other from the employees' side. [101] The same applies to the State Labor Courts. [102] The Senates of the Federal Labor Court are composed of three career judges (the chairperson and two assessors) and two lay judges. [103]

In terms of costs, the labor courts are easily accessible for employees. The court fees in the labor jurisdiction are smaller than court fees of other jurisdictions such as the ordinary court. [104] Advance payments of the court fees are, contrary to other jurisdictions, excluded. [105] In procedures before the Labor Courts of first instance each party has to bear the costs of its own lawyer. [106] This limits the employee's cost risk resulting from an action before the Labor Court considerably and facilitates the access to the labor courts. Furthermore, there is no legal requirement for the parties to be represented by a lawyer before the courts of first instance; [107] only in procedures before the State Labor Courts and the Federal Labor Court there is such an obligation. [108] However, unionized employees are privileged, since they can be represented before the Labor Court and the State Labor Court by union representatives. [109] Non-unionized employees can minimize their cost risks by a legal insurance that covers the costs of necessary law suits. [110] For employees who do not have the financial means to pay a lawyer honorary, section 11a, paragraph 1 of the Labor Court Act provides the possibility of an assignment of counsel to the suing employee. As far as the Court fees are concerned, employees can receive – as all other parties in court procedures – legal aid under certain restrictive conditions. [111]

B. Procedure Before the Labor Courts

If a dismissed employee wants to legally attack the dismissal, he or she can apply for protection against dismissal before the labor court and has to bring the action against the employer within a delay of three weeks starting with the receiving of the dismissal's notification. [112] After the expiration of the delay, the dismissal is considered as legal.

[113] Only in cases of special hardship can the court admit abelated application. [114] Employees, therefore have to act quickly after receiving a dismissal.

It is important to note that the activity of the Labor Courts is not limited to jurisdiction. On the contrary, one essential element of the procedure before the Labor Courts is mediation. The Labor Courts Act provides in section 54 compulsory mediation hearings in every labor dispute to be held before the audience. It shall take place within two weeks after the commencement of the action. [115] The mediation hearing is presided by the chairperson of the Labor Court panel alone, *i.e.* by the career judge; the two lay judges are not involved in this stage of the procedure. The purpose of the hearing is to bring the parties to a compromise. A large number of dismissal cases are already settled in this early stage of the procedure. The main reason for this figure is the high legal uncertainty that exist in most of the dismissal cases. In order to avoid an increasing of transaction costs in particular employers have an economic interest to settle the conflict by paying compensation to the suing employee. Their willingness for a compromise can be explained by the legal effects of a Labor Court ruling in favor of the suing employee. If the Labor Court decided that the dismissal is illegal, the sued employer would have to pay the wages for the whole period of the Labor Court procedure. [116] In procedures that take one year, or including the second instance, even two years, the wages to be paid to the employee can grow to a considerable sum and can be a very high financial burden, especially for small and medium sized enterprises. Although the Labor Courts Act provides explicitly that complaints against dismissals must be dealt with immediately, this fundamental time problem has not been resolved by the law. [117]

Only after the failure of the mediation procedure can the regular hearing before the Labor Court take place. As a large number of cases are settled during the mediation hearing and others are settled in the regular hearing – sometimes the outcome of a hearing of evidence increases the willingness of one party to settle the dispute –, only 11 % of all cases regarding the termination of the employment contract are decided by the Labor Courts. [118] The length of the procedure in one instance depends on several aspects, particularly on the complexity of the case in question: If a hearing of evidence is needed, for instance, the Labor Court has to assign another hearing date and has to prepare it (*e.g.* summoning of witnesses). Statistics about the average length of procedures before the Labor Courts are not available on Federal Level. [119] However, the already mentioned empirical study from Höland, Kahl and Zeibig [120] shows that the average length of the analyzed Labor Court procedures (from the filing to the last hearing before the Court) amounts to six months in the first instance; the same applies to the appeal procedure before the State Labor Court. But, due to budget cuts in the administration of justice at State-level during recent years, there are fewer career judges

at the Labor Courts for an increasing number of files. Hence, the lengthening of procedures before the Labor Courts seems to be inevitable in the near future.

As mentioned above, the main intention of the dismissal protection is to enforce the reinstatement of the dismissed employee and not the financial compensation of the employee for his or her lost job. Nonetheless, there is one important exception that plays a considerable role in practice: The Labor Court can dissolve the employment contract on request of the employer, if the dismissal is illegal and a further profitable cooperation between both parties is not to be expected. [121] It is important to note, that the facts constituting the expectation of a non-profitable co-operation in the future, can be created by the employer himself or herself during the Labor Court procedure. [122] However, the termination of the contract is not without cost since the employer has to pay severances to the employee. The fixation of the severance pay is left to the discretion of the Labor Court , within the limits defined by the law. [123] The general rule is that for each year of service the employer has to pay between one half and one month's remuneration. [124] Consequently, it is more or less in the hands of the employer to undermine the legislature's intention to protect employment relationships against arbitrary dismissals.

In summary, it can be said that the activity of the Labor Court is incompletely characterized by the term jurisdiction. Due to the specific situation and to the interests of the parties involved in dismissal procedures, Labor Courts fulfill the function of mediation machinery much more than other jurisdictions. Consequently, the original intention of reintegration of dismissed employees is substituted to a large extent by severance pay. F ew of the dismissal cases brought to the Labor Courts lead to the reinstatement of the employee.

VI. Economic Effects Of The Dismissal Protection

The economic effects of the German system of dismissal protection are more increasingly discussed than the last two decades. The main reason for this is the changed economic background in Germany since the late 1970s. At that time, the “economic miracle” of the post-war period found its end. Since then, the Federal Republic of Germany has to face an increasing long term mass unemployment that has amounted to 12 % in April 2005 [125] and therefore has won a frightening dimension. In particular, in the five new States in East Germany – whose economy has been transformed from a centrally planned into a market economy – unemployment is the crucial problem. It is therefore not surprising that employment promotion has gained a privileged place in the political arena and that the question of possible (negative) effects of the Act on Protection against Dismissals on the labor markets – particularly on the

unemployment rate – has been raised. These macro-economic effects are controversially discussed by economists and labor lawyers.

A. The Impact of Dismissal Protection on Unemployment

Many economists and labor lawyers argue that the existing employment protection is in part responsible for the increasing structural unemployment in the Federal Republic of Germany. [126] The high costs for the termination of an employment contract caused by the Act on Protection against Dismissal (court fees, lawyer expenses, severance pays etc.) would be likely to prevent employers from hiring new employees in times of economic growth. Their possibilities to react to changed conditions on the markets by "firing" are reduced, with the consequence that they will be more reluctant to hire employees during an upswing. To make the point: The existing dismissal protection would protect the interests of those integrated into an employment relationship (insiders) and would disadvantage job-seekers (outsiders) on the labor markets. [127] The labor markets would become ossified. [128] Following the adherents of the insider-outsider-model, the existing system of dismissal protection has to be "deregulated" and "flexibilized". This widespread view has not been without effects on the German labor law legislature: One recent example is the reform of the dismissal protection in 2004 by which the threshold of the small-business-clause [129] has been raised from five to ten employees. [130]

However, there is no empirical evidence for the negative impact of employment protection on the unemployment rate suggested by the adherents of the insider-outsider-model. The only comparative study we are disposing of is the OECD Employment Outlook of 1999. [131] The cross-country comparison of employment protection regulation refers to dismissal protection as well as regulation of temporary work. The strictness of the dismissal protection is measured by regular procedural inconveniences, notice and severance pays for no-fault individual dismissals and the difficulty of dismissal. [132] According to the country ranking, the overall strictness of German statutory dismissal protection amounts to 2.8 in the late 1990s, which is corresponding to place twenty-first out of 26 countries *in toto*. [133] Hence, the German dismissal protection belongs to the stricter models and is only surpassed by Sweden (2.8), Italy (2.8), the Czech Republic (2.8), the Netherlands (3.1), Korea (3.2) and Portugal (4.3). [134] As one important conclusion, the study suggests that strictness of employment protection regulation has little or no effect on the unemployment rate. [135] However, the level of employment protection can influence the demographic composition of unemployment: In countries with strict employment protection regulation, the unemployment of prime-age men as the "normal employees" will be lower whereas the unemployment of specific labor market groups such as younger workers, will be higher.

Furthermore, “a strict employment protection is associated with lower flows into and out of unemployment and longer durations of unemployment”. [136] In general, the results of the OECD study have been confirmed by a recent study effectuated for the European Commission. [137]

Also a recent within-country study by the Institute for Economic and Social Research of the Hans-Böckler-Stiftung [138] has confirmed these findings. The study shows that the threshold of the small business clause does not have any significant (negative) impact on job creation [139] . The most relevant criterion for employers to hire is the economic situation.

B. Some Other Economic Effects

The strict dismissal protection in Germany also can have other (positive) economic effects that shall only be pointed out briefly in this context. Some economists argue that employers react to the statutory limitations of their freedom to terminate the employment relationship by rationalizing their recruitment procedures. [140] Hence, the anticipation of possible dismissal costs favors the development of a rational personnel policy in companies covered by the Act on Protection against Dismissal and can positively influence the productivity of the firm. Another possible effect of the statutory dismissal protection on the firm's productivity is that it favors the existence of long-term employment relationships and by this can increase the willingness of employees to acquire firm-specific know-how. [141] However, there is no empirical evidence about the concrete relevance of these economic effects resulting from dismissal protection.

VII. Reform Proposals

The critics of the Act on Protection against Dismissal favor a “deregulation” of the existing regime. By “flexibilizing” the labor markets, they essentially intend to promote job creation. [142] There is a great number of reform proposals “on the market”. We only emphasize two types of reform proposals that seem to be the most relevant in the ongoing discussion.

A. Severance Pays Instead of Reinstatement

The most far-reaching proposals demand a paradigm shift in the existing system of dismissal protection. One step in this direction has been the above mentioned establishment of section 1a of the Act on Protection against Dismissal. Following this group of proposals, the main function of the Act on Protection against Dismissal, the maintenance of existing employment relationships, shall be substituted by a financial

compensation of the dismissed employee. Instead of the reinstatement, the employee shall be entitled only to a severance pay. [143] The proposed models differ considerably. Buchner, [144] for example, suggests a radical reform of the existing system: According to him, the employer should be obliged to pay a compensation for every dismissal. Others want to exclude dismissals for economic reasons from a paradigm shift. [145] And finally, Hanau wants to give to the employee the choice between the reinstatement or a severance pay if a dismissal for economic reasons or for reasons concerning the employee's personality is socially unjustified. [146]

However, there are serious doubts whether or not the intended cost reductions for employers can be realized by a compensation model. Following the empirical study of the Hans-Böckler-Stiftung on the Regulation on the Labor Market (REGAM), only a small minority of all dismissed employees (15 %) receive severance pays. [147] If this is true, it has to be feared that more employees than before demand severance pays in the case of a statutory compensation duty for the employer. Consequently, the employers' costs of the dismissal protection, contrary to the intention of the adherents of a compensation model, probably tend to increase these costs. [148] Furthermore, all reform proposals do not resolve the (implicit) problem of the costs caused by the Labor Court procedures in dismissal cases. Since most of the compensation models also differentiate between socially justified and unjustified dismissals, [149] there will be an incentive for dismissed employees to go to the Labor Courts.

Finally, there is a more fundamental objection. The adherents of compensation models insinuate that dismissal protection is nothing more than an instrument to alleviate financial disadvantages caused by a job loss. They underestimate the fact that it is also a core element of our labor law to compensate the employee's economic and social dependence within the employment relationship. [150] The protection against arbitrary dismissals strengthens the employee's freedom to refuse unfair working conditions without having to fear that the employer will punish the refusal with a dismissal. However, it can be doubted whether the proposed compensation models are able to fulfill this function of the dismissal protection: Only high severance pays could realize this function. Since severance pays essentially depend on the tenure, it is questionable whether a compensation model could protect employees with a short length of service against arbitrary dismissals.

B. Extension of the Small Business Clause

Another important element of the reform debate is the promotion of small and medium-sized enterprises. They are considered to be a major source of economic growth and of employment promotion and shall therefore be relieved financially. Consequently, the

extension of the threshold of the small business clause in section 23, paragraph 1 of the Act on Protection against Dismissal from ten to twenty [151] or even to eighty employees [152] is proposed by some. It is obvious, that such a reform would lead to a considerable reduction of the scope of the statutory dismissal protection.

However, there are two major arguments against an extension of the small-business-clause. First, there are high constitutional risks. The Federal Constitutional Court has stated in its above-mentioned ruling from January 27, 1998, [153] that the reduction of dismissal protection in small business establishments only is justified, if it compensates specific disadvantages of these businesses, such as the personal relationship between employees and employer or specific cost risks of small establishments. In a second decision of the same date, [154] the Court denied these specificities in establishments with about fifty part-time employees. It therefore has to be doubted whether the Court would tolerate a threshold of 20 employees – calculated *pro rata temporis*. Furthermore, the positive effects of an extension of the threshold on the labor markets are more than unclear. There is no empirical evidence so far that a "deregulation" of the dismissal protection in small businesses tends to promote job creation. [155] A reform of the small-business clause in the proposed sense therefore is problematic.

VIII. CONCLUSIONS

In theory, the German model of dismissal protection aims at reinstating wrongfully dismissed employees on their former workplace. However, this aim is not realized in most of the dismissal cases coming before the Labor Courts. Only a small minority of dismissed employees is reinstated on their former job after the Labor Courts have decided that the dismissal was wrongful. Instead, many of them receive severance pays. As we have seen, this practice mainly is attributed to the high legal uncertainty, the statutory dismissal protection is producing for employers as well as for employees and for the duration of the Labor Court procedures that increases the willingness on both sides to settle the dispute. Moreover, the argument is widespread that the strict dismissal protection in Germany tends to augment the unemployment rate.

The reform debate that has been enhanced by this practice and by the criticisms mainly refers to the small business clause and to the establishing of a compensation model. By this, the critics of the existing dismissal protection want to reduce costs and to promote job creation, in particular in small and medium-sized enterprises. However, as we have pointed out, there is no empirical evidence for the assumption that a strict dismissal protection causes unemployment. A total change of the system, in particular a paradigm shift to a compensation model or a radical "deregulation" of the dismissal protection (e.g., the small business clause), therefore, is not likely to realize the suggested cost

reductions for employers and the insinuated positive impact on the labor markets. However, the legal uncertainty that is characterizing the existing system should be considerably reduced: Elements of such a reform could be a clarification of the rules on the "social selection" or a concretization of the principle of proportionality.
As far as the political prospects of the German statutory dismissal protection fo
r the near future are concerned, the federal elections of September 18, 2005 haven't clarified the situation. At the moment (October 22, 2005) a so-called "grand coalition" (*große Koalition*) between Christian-democrats (CDU/CSU) and the Social-democrats (SPD) seems probable. Although the Christian-democrats have favored a "deregularization" of the Act on the Protection against Dismissal in their campaign manifesto, it has to be doubted whether they will be strong enough to put these reforms on the agenda of a new federal government.

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[1] See Entscheidungen des Bundesverfassungsgerichts [Federal Constitutional Court] [BVerfGE] Judgment of 27 Jan. 1998 – 1 BvL 15/87, BVerfGE 97, 169 (175); Judgment of Apr. 24, 1991 – 1 BvR 1341/90, BVerfGE 84, 133 (146); Judgment of Mar. 10, 1992 – 1 BvR 454/91, BVerfGE 85, 360 (372); Judgment of Feb. 21, 1991 – 1 BvR 1397/93, BVerfGE 92, 140 (150).

[2] Grundgesetz (federal German constitution) GG art. 12 para. 1.

[3] Betriebsrätegesetz, Reichsgesetzblatt [RGBl] I, 147 (Feb. 4, 1920). For further details about the dismissal protection according to the Works Council Act of 1920 see Georg Flatow & Otto Kahn-Freund , Kommentar zum Betriebsrätegesetz , § 84 (Berlin, 13th ed.).

[4] *See* Flatow & Kahn-Freund, *supra* note 3, § 87.

[5] One prominent example for this collectivist view of labor law is Hugo Sinzheimer who was one of the "fathers" of the *Weimar* Republic labor law. *See* Hugo Sinzheimer, *Die Fortbildung des Arbeitsrechts* , in 1 Arbeitrecht und Rechtssoziologie 78, 83 (Otto Kahn-Freund & Thilo Ramm eds., 1976).

[6] For a fuller analysis of the transition from the Weimar Republic to National Socialism in labor law see Andreas Kranig et al ., Zur Arbeitsverfassung des Dritten Reiches , 20 (1983).

[7] Gesetz zur Ordnung der nationalen Arbeit, RGBl. I, 45 (1934).

[8] For further details regarding the notion of undue hardship see Alfred Hueck, Hans Carl Nipperdey & Rolf Dietz, Kommentar zum Gesetz über die Ordnung der nationalen Arbeit , § 56 n. 7 and following (2d ed 1937).

[9] Section 57, para 1 of the Act on the Order of National Labor.

[10] *See* Kranig et al., *supra* note 6, at 218.

[11] See Wolfgang Däubler , 2 Das Arbeitsrecht , n. 966 with further references (11 th ed. 1998).

[12] The so-called Agreement of Hattenheim of January 1950 had been concluded between the German Trade Union Confederation [DGB] and the Federal Association of German Employers' Associations [BDA]; *see* RdA 1950, 63, 65 with the commentary of Alfred Hueck.

[13] *See infra* section *C* .

[14] The small business clause will be analysed more in detail, *infra* section III.B.i

[15] Neufassung des Kündigungsschutzgesetzes [Act on Protection Against Dismissal] [KSchG], v 25.8.1969 BGBl. I 83 S.1317.

[16] Betriebsverfassungsgesetz v. 11.10.1952 BGBl. I 43 S.681.

[17] The participation rights with regard to dismissals are now provided in section 102 of the Works Constitution Act. Betriebsverfassungsgesetz [Works Constitution Act], v. 15.1.1972 BGBl. I 2 S.13 For further details see *infra* , section III.A.

[18] *See supra* section II.

[19] A general overview on the statute and the participation rights of the works council is given in Manfred Weiss & Marlene Schmidt, Labour Law and Industrial Relations in the Federal Republic of Germany , 168-190 (2000).

[20] In establishments of the public sector, workers are represented by staff representatives (*Personalräte*), defined by the Federal Staff Representatives Act and the Staff Representative Acts of the States. As far as the dismissal procedure is concerned, they have nearly the same participation rights as the works council. *See,* e.g., § 79 Federal Staff Representatives Act.

[21] This legal separation between the "neutral" works councils on the one hand and trade unions represented in the establishment on the other hand, is softened by the legal duty of the works councils to cooperate with the trade unions that are represented within the establishment (section 2 para. 1 of the Works Constitution Act 1972). This cooperation is carried out by several means. In practise, more than 80 percent of the members of all works councils are organized in one of the unions belonging to the German Federation of Trade Unions [DGB]. Hence, unions have a considerable influence on the decision-making in works councils. Furthermore, the Works Constitution Act gives some rights to the unions represented in the establishment in order to effectuate the participation of the works council: one important example is the right of the union represented in the establishment to sue the employer if he or she has seriously violated participation rights of the works council. *See* Works Constitution Act, *supra* note 17, at § 23 para 3.

[22] *See* Works Constitution Act, *supra* note 17, § 102

[23] *Id* . para. 1.

[24] *Id* para. 3.

[25] *Id* para. 4.

[26] According to Armin Höland, Ute Kahl & Nadine Zeibig, Kündigungspraxis und Kündigungsschutz im Arbeitsverhältnis – Zwischenbericht über die Ergebnisse der Aktenanalysen und der Richterbefragung an den Arbeits- und Landesarbeitsgerichten in Deutschland 2003/2004 24(forthcoming), in only 2% of the dismissal cases coming before the Labor Courts in 2003 and 2004, the information and consultation procedure provided by section 102 Works Constitution Act was not respected.

[27] *See* 1^BVL 2/83 BVerfGE 82, 126 (126-156).

[28] Section 622, para. 5 BGB.

[29] See *infra* section E; § 622, para 5 BGB.

[30] Section 1, para. 1 Act on Protection against Dismissal.

[31] Part-time employees with a regular weekly working time of not more than 10 hours have to be taken into account as 0.25, part-time employees with a regular weekly working time of not more than 20 hours as 0.5 and part-time employees with a regular weekly working time of not more than 30 hours as 0.75.

[32] See Abbo Junker, *Arbeitsrecht zwischen Markt und gesellschaftspolitischen Herausforderungen, Gutachten B für den* 65. Deutschen Juristentag, 70-72 (2004).

[33] Arbeitsrechtliches Beschäftigungsförderungsgesetz, v. 25.9.1996 BGBl. I, S.1476.

[34] Judgment of Jan. 27, 1998 1 BVL 15/87, in BVerfGE 97, 169 (169-186).

[35] GG art. 3, para. 1.

[36] See *Gesetz zu Reformen am Arbeitsmarkt [Act on Reforms on the Labor Market]* v. 24.12.2003 BGBl. I, S.1476).

[37] Section 138 Bürgerliches Gesetzbuch [hereinafter BGB].

[38] Section 242 BGB

[39] GG art. 12, para. 1

[40] See BVerfGE 97, 169 (178).

[41] Judgment of Feb.21, Entscheidungen des Bundesarbeitsgerichts [Federal Labor Court] [BAG] 2 AZR 15/00, Arbeitsrechtliche Praxis [AP] No. 25 zu § 23 Kündigungsschutzgesetz 1969; judgment of Feb.6, 2003, BAG, 2 AZR 672/01, AP No. 30 zu § 23 Kündigungsschutzgesetz 1969.

[42] *See* judgment of May 30, 1978, BAG, 2 AZR 630/76, EzA § 626 BGB No. 66 with further references. *See also* Gerhard Etzel, § 1 KSchG, *in* Gemeinschaftskommentar zum Kündigungsschutzgesetz und zu sonstigen kündigungsschutzrechtlichen Vorschriften [hereinafter Gemeinschaftskommentar] n.214 (Friedrich Becker et al. Eds., 7th ed 2004).

[43] *See* judgment of Aug. 9, 1984, BAG, 2 AZR 400/83, AP No. 12 zu § 1 KSchG Verhaltensbedingte Kündigung.

[44] Section 1, para.2, s.1, No. 1, lit. b Act on Protection against Dismissal.

[45] *Id.* Section 1, para. 2, s.2.

[46] *See* judgment of Sept.27, 1984, BAG, 2 AZR 62/83, AP No. 8 zu § 2 KSchG 1969.

[47] *See* section 3 Act on the Continuation of Remuneration (*Entgeltfortzahlungsgsetz*).

[48] E.g. frequent short sicknesses: judgment of Nov. 7, 2002, BAG, 2 AZR 599/01, Der Betrieb 724 (2003). Long-lasting or chronic sicknesses: judgment of April 12, 2002, BAG, 2 AZR 148/01, Betriebsberater 2675 (2002).

[49] *See* judgment of Feb.27, 1997, Entscheidungen zum Arbeitsrecht [EzA] No. 51 zu § 1 Kündigungsschutzgesetz Verhaltensbedingte Kündigung.

[50] *See* Etzel, *supra* note 42, at n.501 with further references.

[51] *See* judgment of Nov.23, 1972, EzA No. 23 zu § 626 BGB.

[52] *See* section 2, para. 3 Beschäftigtenschutzgesetz [Act on the Protection of Persons Employed].

[53] *See* judgment of June 21, 2001, BAG, 2 AZR 30/00, NJOZ 2001, 508 (515); judgment of July 1, 1999, 2 AZR 676/98, DB 1999, 2216, (2217); Rudi Müller-Glöge, § 626 BGB, in: Erfurter Kommentar zum Arbeitsrecht n.48-49 (Thomas Dieterich et al. eds., 5 th ed. 2005).

[54] The empirical study of Höland, Kahl & Zeibig, supra note 26, at 17, which analyzed Labor Court decisions of the years 2003 and 2004, reveals that 75% of all dismissals with notice are declared for economic reasons.

[55] *See e.g.* judgment of Sept. 26, 1996, EzA § 1 KSchG Betriebsbedingte Kündigung No. 86; judgment of Nov.10, 1994, EzA § 1 KSchG Betriebsbedingte Kündigung No. 77. For a more indepth analysis of the jurisdiction of the Federal Labor Court see Etzel, *supra* note 42, at n.521.

[56] Section 1, para. 2, No. 1, lit. b Act on Protection against Dismissal.

[57] *See* Wolfgang Hromadka, *Kündigungsschutz und Unternehmerfreiheit*, in Muß der Kündigungsschutz reformiert werden?, 11, 12 (Otto-Brenner-Stiftung ed., 2003).

[58] Section 1, para. 3, Act on Protection against Dismissal.

[59] *See* Eberhard Dorndorf, § 1 in Kündigungsschutzgesetz n.1081 with further references (Eberhard Dorndorf et al. Eds., 3d ed. 1999).

[60] Section 1, para. 3 Act on Protection against Dismissal.

[61] *See* Etzel, supra note 42, at n.645 with further references.

[62] *See* judgment of Jan.18, 1990, BAG 2 AZR 357/89, NZA 1990, 729 (732).

[63] Works agreements (*Betriebsvereinbarungen*) are concluded between the employer and the works council. Their provisions have binding effect for all employment relationships within the establishment, Works Constitution Act, supra notes 17, §§ 77 para. 4.

[64] Section 1, para. 4 Act on Dismissal Protection.

[65] See *supra* section A.

[66] Judgment of Feb. 27, 1985, BAG GS 1/84, AP No. 14 zu § 611 BGB Beschäftigungspflicht.

[67] GG art. 9, para. 3; s *ee* Manfred Löwisch & Volker Rieble, *Koalitionsfreiheit des Einzelnen*, in: Münchener Handbuch des Arbeitsrechts , § 245 n.67 (2d ed. 2000); see also Achim Seifert , *Koalitionsfreiheit*, in Handbuch des Arbeits- und Sozialrechts , § 28 n.112 (Manfred Weiss & Alexander Gagel eds. 2002).

[68] Section 134 BGB. See judgment of Nov.30, 1956, BAG, 1 AZR 260/55, AP § 1 KSchG, No. 26; judgment of Sept.28, 1972, BAG, 2 AZR 469/71, EzA § 1 KSchG, No. 25; see also Gemeinschaftskommentar, *supra* note 42, § 13 n.183-84.

[69] Council Directive 76/207, 1976 O.J. (L 39/40).

[70] Section 611a, para. 2-5 of the Civil Code provides that, in cases of violation of this principle of equal treatment, the employee is entitled to an “adequate compensation” up to a maximum of three months' wages. However, the doctrine holds that the employee has only a compensation right in cases of discrimination with regard to recruitment decisions, directions of the employer and promotion decisions, since the employee would sufficiently be protected by the invalidity of the dismissal violating section 611a

Civil code and by his right to be reinstated according to the conditions of his employment contract. *See* Thomas Pfeiffer, § 611a BGB, in Gemeinschaftskommentar, *supra* note 42, at n.115.

[71] Council Directive 2000/78/EC, 2000 O.J. (L 303/16).

[72] Council Directive 2000/43/EC, 2000 O.J. (L 180/22).

[73] *See* Council Directive 2000/43/EC, 2000 O.J. (L 180/22), art. 3, para. 1 ; Council Directive 2000/78/EC, 2000 O.J. (L 303/16), art. 3 para 1..

[74] Until now (Oktober 2005), there is only a draft Anti-discrimination Act of the Federal Government (Entwurf eines Gesetzes zur Umsetzung europäischer Antidiskriminierungsrichtlinien), in: Bundestagsdrucksachen 15/4538.

[75] *See* Art. 16 Directive 2000/43/EC O.J. (L 180/22), art. 16; see also Council Directive 2000/78/EC, 2000 O.J. (L 303/16), art. 18. This inactivity of the German legislature is the reason why the European Court of Justice condemned the Federal Republic of Germany for violation of the Treaty in Case 329/04, Commission v. Germany (Apr. 28, 2005).

[76] Achim Seifert, *Federal Labor Court strengthens religious freedom at the workplace*, in 4 German Law Journal , No. 6 (2003), available at: http://www.germanlawjournal.com/article.php?id=280 .

[77] A minimum of statutory dismissal protection is even constitutionally guaranteed. *See* the references in *supra* note 1.

[78] Tarifvertragsgesetz [Collective Agreements Act], v. 9.4.1949 BGBl. I, S.1323.

[79] *See* Herbert Wiedemann, Kommentar zum Tarifvertragsgesetz, § 1, n.534 (6th ed 1999).

[80] *See* judgment of Feb.28, 1990, BAG, 2 AZR 425/89, AP, § 1 Kündigungsschutzgesetz 1969 Wartezeit No. 8; *see also id.* at n. 535; Manfred Löwisch & Volker Rieble, Kommentar zum Tarifvertragsrecht, § 1, n.319 (2d ed. 2004); O .E. Kempen & U. Zachert, Kommentar zum Tarifvertragsrecht , § 1, n.32 (3d ed. 1997).

[81] Some collective agreements even reduce the statutory period of notice that is given in section 622, para. 4 of the Civil Code [BGB].

[82] See § 53, para. 2 Federal Agreement for Employees (*Bundesangestelltentarifvertrag*). Contrary to the wording, "undismissibility" does not mean that the employee cannot be dismissed at all. It only means that he or she only can be dismissed if the severe requirements of an extraordinary dismissal (§ 626 BGB) – *inter alia* the existence of an important reason (*wichtiger Grund*) – are fulfilled; see judgment of Feb. 28, 1990, BAG, 2 AZR 425/89, AP, § 1 Kündigungsschutzgesetz 1969 Wartezeit No. 8.

[83] Often these collective agreements are called „Alliances for Jobs" (*Bündnisse für Arbeit*), „Collective Agreements for the Employment Protection" (*Beschäftigungssicherungstarifverträge*) or "Pacts for the Safeguard of Production Sites" (*Standortsicherungsverträge*). For a more in depth analysis of these collective agreements see Achim Seifert, *Employment Protection and Employment Promotion as Goals of Collective Bargaining in the Federal Republic of Germany* , 15 INT´L J. COMP. LAB.L. & INDUS. REL. 343, 347 (1999).

[84] These wage cuts can also result from temporary reductions of the working hours without (full) wage compensation, as it has been the case in the Volkswagen agreement of Dec. 15, 1993 ("28-hours-week"). For further details on that model agreement see *id.* at 349.

[85] Section 85 Part IX SGB [Social Security Code].

[86] *See* Etzel, *supra* note 42, at n.82.

[87] Section 9, para. 1 Act on the Protection of Mothers

[88] *Id.* section 9, para. 3.

[89] Section 626 BGB

[90] Section 15, para 2 Act on Professional Training.

[91] Section 103 Works Constitution Act.

[92] Section 15, para 4 Act on the Protection against Dismissal

[93] Section 15 par. 4 Act on the Protection against Dismissal.

[94] *Id.* section 15, para. 5

[95] *See* judgment of June, 13, 2002, BAG, 2 AZR 391/01, AP Nr. 97 zu § 615 BGB; judgment of Oct.18, 2000, BAG, 2 , AP Nr. 49 zu § 15 KSchG 1969.

[96] See Federal Ministry of Economy and Labor, Tätigkeit der Arbeitsgerichte Deutschland (2003), available at: http://www.bmwa.bund.de/Redaktion/Inhalte/Pdf/S-T/Statistik-Arbeitsgerichtbarkeit-2003,property=pdf.pdf. Beside dismissals, this number also includes all other disputes about the termination of the employment contract such as disputes about the legality of cancellation contracts or of fix-term contracts.

[97] *See* Silke Bothfeld & Karen Ullmann, *Kündigungsschutz in der betrieblichen Praxis: Nicht Schreckgespenst, sondern Sündenbock*, 57 in: WSI-Mitteilungen 262, 264 (2004).

[98] Section 4 Act on Protection against Dismissal.

[99] Section 1a has been established by the above mentioned Act on Reforms on the Labor Market of Dec. 24, 2003.

[100] *See* Jobst-Hubertus Bauer, Ulrich Preis & Achim Schunder, *Der Regierungsentwurf eines Gesetzes zu Reformen am Arbeitsmarkt vom 18. 6. 2003* , Neue Zeitschrift für Arbeitsrecht [NZA] 2003, 704, 705 (2003).

[101] Section 16, para. 2 Labor Courts Act [Arbeitsgerichtsgesetz], 1979 BGBl. I 853.

[102] *See* § 35, para 2 Labor Courts Act

[103] Section 41, para. 2 Labor Courts Act.

[104] The amount of the Court fee depends on the value in dispute. As to applications for protection against dismissals, the Labor Courts Act provides that in these cases the maximum dispute value are three months´ wages (severance pays that eventually have been granted by the employer, are not to be added). § 11, para. 7 Labor Courts Act.

[105] The Court fees have to be paid at the end of the procedure in one instance See § 12 para. 4 S. 1 Labor Courts Act.

[106] Section 12a Labor Courts Act.

[107] Section 11, para. 1 S. 1 Labor Courts Act. However, in 82 % of the cases decided by Labor Courts of first instance during 2003, employees were represented by a lawyer, whereas in 1979 52% of the acting employees had a lawyer; for further details see Höland, Kahl & Zeibig, *supra* note 26, at 39, tbl. 8-1. Hence, representation of employees by a lawyer has become normal before the Labor Courts.

[108] Section 11, para. 2, s. 1 Labor Courts Act.

[109] Section 11, para. 1, s. 2; section 11, para. 2, s. 2 Labour Courts Act. According to the statutes of all unions confederated in the German Confederation of Trade Unions (DGB), union members have a right to legal advice.

[110] According to Günther Grotmann-Höfling, the number of Labor Court cases in which legal insurances have been involved has increased from 17-20% in the late 1970s to 25% in 1990. Günther Grotmann-Höfling, Strukturanalyse des arbeitsgerichtlichen Rechtsschutzes – Konfliktlösung durch eine Betriebliche Einigungsstelle (BEST), 76, 80 (1995).

[111] Section 114 Civil Procedure Code; section 11a, para. 3 Labor Courts Art.

[112] Section 4 Act on Protection against Dismissal

[113] *Id.* section 7.

[114] *Id.* section 5.

[115] Section 61a, para. 2 Labor Courts Act.

[116] Section 615 BGB.

[117] Section 61a Labor Courts Act.

[118] *See* Höland, Kahl & Zeibig, *supra* note 26, at 42.

[119] They are not included in the official statistics of the Federal Ministry of Economy and Labor, Tätigkeit der Arbeitsgerichte (Deutschland) 2003.

[120] *See* Höland, Kahl & Zeibig, *supra* note 26, at 58

[121] Section 9, para 2 Act on Protection against Dismissal.

[122] *See* judgment of March 7, 2002, BAG, 2 AZR 158/01, NZA 2003, 261 (263).

[123] Section 10 Act on Protection against Dismissal.

[124] The maximum severance pay amounts to the wage sum of twelve months. *See* section 10 para. 1 Act on Protection against Dismissal.

[125] See the Press release of the Federal Ministry of Economy and Labor from May 13, 2005, *available at:* http://www.bmwa.bund.de/Navigation/Presse/pressemitteilungen,did=63962.html .

[126] *See* Bernd Rüthers, *Vom Sinn und Unsinn des geltenden Kündigungsschutzrechts* , Neue Juristische Wochenschrift [NJW] 1601 (2002); Herbert Buchner, *N otwendigkeit und Möglichkeiten einer Deregulierung des Kündigungsschutzrechtes* , NZA 533, 534 (2002); Jobst-Hubertus Bauer, *Ein Vorschlag für ein modernes und soziales Kündigungsschutzrecht* , NZA 529, 530 (2002); Klaus Neef, *D as Kündigungsschutzrecht zur Jahrtausendwende* , NZA 7, 8 (2000); Heinz-Josef Willemsen, *Kündigungsschutz – vom Ritual zur Rationalität*, NJW, 2779, 2780 (2000).

[127] *See* Ralf Busch, *Vorschläge zur Reform des Arbeitsrechts*, Betriebsberater 470, 471 (2003); Bernd Rüthers, *Mehr Beschäftigung durch Entrümpelung des Arbeitsrechts*? NJW 546, 547 (2003).

[128] See Rüthers, *supra* note 126, at 1608.

[129] Section 23, para. 1 of the Act on Protection against Dismissal.

[130] See *supra* note section III.C.1.

[131] OECD, Employment Outlook, Employment Protection and Labour Market Performance ch 2 (Paris 1999).

[132] *Id.*

[133] *Id.*

[134] *Id.*

[135] *Id.*

[136] *Id.* at 82 .

[137] *See* David Young, *Employment Protection legislation: its economic impact and the case for reform* , in: E. C. Directorate-General for Economic and Financial Affairs, Economic Paper No. 186, July 2003, p. 33. available at: http://europa.eu.int/comm/economy_finance/publications/economic_papers/2003/ecp186en.pdf

[138] The research project is called „Regulation on the Labor Markets“ (REGAM). *See* Heide Pfarr et al., REGAM-Studie: *Hat der Kündigungsschutz eine prohibitive Wirkung auf das Einstellungsverhalten der kleinen Betriebe*?, Betriebsberater 2286-2289 (2003).

[139] Section 23, para. 1 Act on Protection against Dismissal.

[140] *See* Gerhard Kleinhenz, *Welche arbeits- und ergänzenden sozialrechtlichen Regelungen empfehlen sich zur Bekämpfung der Arbeitslosigkeit?* , Report at 63d Conference of German Jurists [Deutscher Juristentag], Leipzig, Germany, Sept. 2000, in Deutsche Juristentag B-66 (München 2000); see also Dieter Sadowski, *Arbeitsrecht zwischen Markt und gesellschaftspolitischen Herausforderungen: Differenzierung nach der Unternehmensgröße?*, Report at 65th Deutschen Juristentag A. II (München 2005, forthcoming).

[141] *See* Kleinhenz, *supra* note 140, at 66; Sadowski, *supra* note 140.

[142] *See* Jobst Hubertus Bauer, *K ündigungsschutz – vom Ritual zur Rationalität*, NZA 1100, 1102 (2002); Jobst Hubertus Bauer & Katrina Haussmann, *D ie Verantwortung des Arbeitgebers für den Arbeitsmarkt*, NZA 1100 (1997).

[143] Jobst Hubertus Bauer, *Ein Vorschlag für ein modernes und soziales Kündigungsrecht*, NZA 529 (2002); Buchner, *supra* note 126, at 573; Neef, *supra* note 126, at 7; Bernd Schiefer, *Kündigungsschutz und Unternehmerfreiheit – Auswirkungen des Kündigungsschutzgesetzes auf die betriebliche Praxis*, NZA 770 (2002); Willemsen, *supra* note 126, at 2779; *see also different* Preis, NZA 252 (2003).

[144] Buchner, *supra* note 126 at 533. See also Bauer, *supra* note 143 at 532 in § 9 of his proposal to a new Act on Protection against Dismissal.

[145] *See* Wolfgang Hromadka, *Kündigungsschutz und Unternehmerfreiheit* in Muß der Kündigungsschutz reformiert werden? 11, 19 (Otto-Brenner-Stiftung et al. Eds., 2003).

[146] *See* Peter Hanau, *Welche arbeits- und ergänzenden sozialrechtlichen Regelungen empfehlen sich zur Bekämpfung der Arbeitslosigkeit?* Deutscher Juristentag, *supra* note 140, at C-90.

[147] See Bothfeld & Ullmann, *supra* note 97 at 264.

[148] *See* Eberhard Dorndorf, *Abfindung statt Kündigungsschutz*?, Betriebsberater 1938,1943 (2000); Ulrich Preis, *Reform des Bestandsschutzrechts im Arbeitsverhältnis*, Recht der arbeit [RdA] 65, 71 (2003); *see also* Armin Höland, *Muß der Kündigungsschutz reformiert werden? Kündigungspraxis und Kündigungsschutz im deutschen Arbeitsrecht - Überlegungen zur Kritik am Kündigungsschutz*, in Muß der Kündigungschutz reformiert werden? 23, 52 (Michael Blank ed., 2003).

[149] Of course, the employee will receive a higher severance pay for a socially unjustified dismissal. *See* Willemsen, *supra* note 126 at 2784.

[150] For a fuller analysis of this function of the dismissal protection *see* Eberhard Dorndorf,, Betriebsberater 1938, 1942 (2000); *id .*, *Eine Mindestmoral des Arbeitsrechts*, in: Zur Autonomie des Individuums. Liber Amicorum Spiros Simitis, 69, 78-82 (Dieter Simon & Manfred Weiss eds., 2000).

[151] Bauer, *supra* note 143 at 532; Junker, *supra* note 32 at 70-72.

[152] *Gesetzesentwurf des Landes Sachsen*, *in*: Bundesratsdrucksachen No. 158/03 of March 6, 2003.

[153] 1 BvL 15/87, BVerfGE 97, 169 (177-178).

[154] Judgment of Jan. 27, 1998 – 1 BvL 22/93, BVerfGE 97, p. 186 (194).

[155] According to the research project “Regulation at the labor market” (REGAM) of the Institute for Economic and Social Research (Wirtschafts- und Sozialwissenschaftliches Institut) of the Hans-Böckler-Stiftung – the institute belongs to the German Trade Union Federation (DGB) –, it is the economic situation of the company and not its size that plays the significant role for job creation. *See* Pfarr et al. Supra note 138, at 2288-89.