



# **Statutes, collective agreements and contracts of employment: a look into the hierarchy of labour law norms**

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## **1 Introduction**

Labour law has a number of special features compared to other areas of law. One of these peculiarities is that the sources of rights and obligations for employers and employees are diverse and that some of these sources only exist in labour law. That's no coincidence. It is paradigmatic for labour law that the individual worker is regularly in a weaker position than the employer. One of the means to overcome this is provide employees with the possibility to form trade unions which then can conclude collective agreements with employers and their organisations. Such collective agreements only exist in labour law. And they only exist in labour law because they meet a specific need for protection that exists only in this area of the law.

To look more closely at the sources of law and their relationship to each other is particularly useful for two reasons. The first reason is simply that regulations, no matter at which level they are located, all serve the overarching purpose of providing adequate protection for the individual worker. A consideration of the sources of law is therefore suitable to illuminate this central issue of labour law from different perspectives. The second reason is that the possible rule-makers, the legislator, the social partners and the parties to the employment relationship, all have specific characteristics and, as regards the latter, also different characteristics with regard to their relationship with their counterpart. As these potentially have an impact on the content of their regulations, there is every reason to be aware of the reasons for deciding how to spread the rule-making authority (and the according responsibility) among them. The answers to the relevant questions seem all the more urgent, as it is already clear today that the changes in the world of work in the context of digitisation will also influence the status of labour law sources. Also against this backdrop, there is every reason for a deeper consideration of the issue.

Taking a closer look at the legal sources of labour law, while at the same time examining the factors that determine the relationship between these sources, is the task to be tackled here. However, the relationship between different sources of law is, in principle, an open question and, accordingly, the answers may differ. A case in point is the relationship between statutory law and collective agreements: in one country, state legislation may take precedence, whereas in another country lawmakers may be happy to leave extensive powers to regulate to the social partners. The need for protection of workers is likely to be a universal paradigm of labour law, however, and this is why it looks reasonable to assume that there are fundamental values to be observed in all legal systems that answer the question of the relationship between the different legal sources of labour law.

Accordingly, it seems appropriate to take two distinctive steps for the purpose of this study. First, the sources of law will be presented before examining the basic legal considerations that possibly guide national legal systems in determining the relationship between them (section 2). Afterwards, examples will be drawn from individual countries with particular attention to recent developments and with one fundamental question in mind: How will the individual sources of law develop in the future and how will their relationship with one another develop in the future (section 3). After that discussion, the particularities of EU-labour law will be discussed (section 4). The paper ends with a short conclusion (section 5).

## **2 Possible sources of law and their relationship to each other**

### **2.1 Possible sources of law**

From which sources do the rights and obligations of employees and employers arise?

#### **2.1.1 Employment contract**

First, there is the employment contract itself, which can be described as a legal source, at least in a broader sense. A look at the European legal systems shows that only in extreme cases does an employment relationship come about without the

parties concluding an employment contract. One of these exceptions is the employment relationship that arises between the employee and the new owner in the event of a transfer of business. The fact that an employment relationship and a contract of employment usually go hand in hand reflects the fact that freedom of contract is as important in labour law as in other areas of law. This should not come as a surprise, because freedom of contract is an expression of private autonomy and, as such, an expression of a comprehensive freedom of action, which is absolutely constitutive for liberal legal systems. There is a caveat, however. If a contract is required to bring about an employment relationship, this only testifies to the fact that there is freedom of contract when it comes to decide whether a contract of employment should be concluded at all and, if so, with whom. There is freedom of contract, in other words, insofar as there is freedom to conclude a contract. Freedom to fix rights and duties is a different matter, however. In this context, it should be noted that often parties to an employment contract are reluctant to take their fate in their own hands. One example is Italy, where the employment contract often is not much more than the trigger for application of a collective agreement. In many cases, freedom of contract in that sense is even explicitly limited. Examples for that could be found in Denmark or Sweden, where the employer is not allowed to derogate from the collective agreement, even if the corresponding rules were more favourable to the employee.

### **2.1.2 State legislation**

Looking at the legislation, matters become even more complicated: Every labour lawyer who has ever looked beyond his own legal system knows that there are statutory norms elsewhere and often quite a few of them. This also applies to the common law countries, where, at least as a German lawyer, one may perhaps not expect too much in the way of employment legislation. But why is the legislature so active in most countries? The answer clearly has to do with the workers' need for protection that has already mentioned above: perhaps one does not want to go so far as to regard, for instance, a safe and healthy workplace as a fundamental right of workers (and to accept a corresponding obligation on the part of the state to ensure that workplaces are designed accordingly). It should be clear, however, that the state cannot simply shirk its responsibilities in this area, but must ensure a certain minimum level of protection for workers by means of bringing about regulation as well as monitoring and enforcing them properly. The state thus has, if not a duty, at least a mandate to protect, whereby, in order to avoid misunderstandings, it should be immediately added that lawmakers, instead of exclusively focusing on protecting workers, are not exempt from also keeping an eye on the legitimate interests of employers.

Before leaving the field of legislation, a brief look at another state actor seems necessary: the courts. That the role of the courts should not be underestimated becomes clear when one follows on from the above example of common law and merely changes the direction of view, that is, looks at German law from a common law perspective. While courts in the United Kingdom, for methodological reasons, are strongly bound by the wording of statutes, the courts in Germany have much more leeway. As a result, the case-law of the German labour courts has paramount importance: This is not to say that there is a shortage of statutory law. However, there is, for example no Labour Code or even a Labour Contract Law, in Germany and accordingly, much of the missing regulation is left to the courts. The fact that, under the German Labour Courts Act, the so-called "further elaboration of the law" is one of the express tasks of the Federal Labour Court may be an extreme position in comparative law. But it can hardly be denied that labour courts play an important role in many systems, as the example of the concept of employee shows: even if there are statutory definitions of the term, which indeed is the case in many jurisdictions, much remains always left to the courts. It is idle to argue about whether court decisions flow from a legal source or rather represent "findings gained". The importance of jurisprudence as such cannot be disputed, however.

### **2.1.3 Collective agreements**

So far, two sources of law have been examined: the employment contract and statutory law. What remains, in any event, is the collective agreement. It should be noted from the outset, however, that collective agreements sometimes come in completely different shapes: in legal systems that have a dual system of representation of workers' interests, it regularly happens that there is more than one collective agreement. Germany is such a case: collective agreements can be concluded here by trade unions, but also by works councils. Both collective agreements have a normative effect, whereby the effect of collective agreements concluded by unions is basically limited to their members, whereas collective agreements of the works councils, so-called works agreements, apply to all staff members. In Germany, both types of collective agreements are understood as the results of autonomous legislation: a so-called collective bargaining autonomy in the case of collective agreements; and a so-called enterprise autonomy in the case of company agreements. The former, however, has much more legal dignity since it is part and parcel of freedom of association as guaranteed in the form of a fundamental right by the Constitution, while the latter is only based on the fact that the Works Constitution Act has given the works council the possibility, in cooperation with the employer, to bring about agreements that take direct effect in the employment relationships of staff.

### **2.1.4 Constitution**

Last but not least: the Constitution. Much of what is in employment law can be traced back to fundamental rights which in some cases even come in the form of explicit social rights. In many countries, fundamental rights play a major role. For example, the just mentioned "quasi-statutory" case law in Germany is clearly the product of the existence of numerous fundamental rights guarantees, coupled with fairly elaborated constitutional law dogmatics and judges who are not only self-confident but at times also quite creative. Also, in many states, look, for instance, at France, an increasing "constitutionalisation" of labour law can be observed. The reasons for this could well be argued. The partly problematic effects of this "constitutionalisation" or rather "fundamentalisation" could also be discussed. Both must be omitted here for reasons of time. It is only to be noted at this stage that one should not forget the Constitution when looking at sources of labour law.

## **2.2 The relationship of the sources of law to each other**

To take a closer look at the possible sources of law is the first step. The second crucial step is now to look at the factors that determine their relationship to each other. Three thoughts come to mind: First, the idea that, as expressed in the title of this contribution, there is a hierarchy of norms in the sense of a primacy of one source of law over another. The picture that emerges here is that of a "pyramid of norms" in which higher-ranking law is built upon lower-ranking law. Then the idea that, in principle, it must be possible to cease priority, where it exists, on a case-by-case basis and, through "opening up", for law of lesser rank. And finally, the idea that the sorting of legal sources in labour law is not an end in itself, but must be geared towards ensuring the best possible protection for workers. The principle that is addressed here is the principle of favourability which ensures that workers enjoy maximum protection, even if such protection is derived from law of lesser rank.

### **2.2.1 Hierarchy of Norms**

Let's start with the hierarchy of norms. Some things are unproblematic here, such as the relationship between constitutional law and ordinary law, where the former obviously cannot simply be set aside by the latter. But what about the relationship between laws and collective agreements?

Looking at this, the picture is quite different in European countries. In some jurisdictions there is a pronounced voluntarism, characterised by the fact that the regulation of rights and obligations is in principle left to the social partners with the

state restraining itself as far as possible. Germany certainly does not belong to the countries with such a tradition. And yet, there is also the debate there on whether there is not a core area of topics, where state legislature may have to respect a priority competence of the social partners. In other states, think again of Denmark and Sweden, for example, the state, legally speaking, could intervene legislatively, but does only occasionally. Statutes are few and far between and some of the not too many laws that do exist merely reflect a consensus among the social partners, or are no more than "framework laws" that still need to be filled. Thus, the state largely leaves the field to the social partners, which by the way does not prevent occasional interventions in labour disputes, if the state has formed the view that the social partners do not live up to their responsibilities.

A special problem arises in this context, when it comes to a clash of basically equal-ranking sources of law. One can think of collective agreements with different trade unions, whereby each of them claims validity in a company, and possibly even in a concrete employment relationship. The problems that arise as a result, it seems, have gained importance recently since in many countries unions that represent specific occupational groups are increasingly appearing on the scene. To hope that the competing trade unions will figure their relationship out seems unrealistic, which leaves the state basically with two options: one is to set legal criteria, according to which a collective agreement can take precedence over the other. In Germany there has been such a regulation for some time, which is based on the majority principle. The other possibility is to let things essentially run their course; an option that may even become an obligation if one assumes that freedom of association, well understood, requires non-interference by the state.

### **2.2.2 Principle of favourability**

As outlined above, the employment contract is of central importance to the rights and obligations of employer and employee. You could put it this way: The employment contract is not everything, but without an employment contract, everything is nothing. Nevertheless, the significance of the employment contract is limited compared to legislation and collective agreements. The reason for this is that both aim to overcome the inferior position which characterises the relationship of the individual employee to the individual employer. This aim impacts on the extent to which statutory law and collective agreements take precedence over the employment contract: the law and collective agreement precede the employment contract insofar as they contain more favourable provisions for the employee. On the other hand, the contracting parties may deviate from a law or collective agreement if they make more favourable arrangements. The law and the collective agreement, in other words, only create minimum working conditions for workers.

An important question must then be answered, however: What makes one provision more favourable than another? In many cases, the answer will be obvious. If under a collective agreement, the hourly pay rate is 12 euros, the employee will refer to his employment contract if the hourly pay rate is set there as 15 euros. But it quickly becomes more difficult. Is, for example, a shorter working week with a correspondingly lower salary "more favourable" than a longer working week, in which the worker brings home more money in the end? And how is it to judge when a collective agreement obliges workers to overtime and/or a reduction in pay, but at the same time also includes a temporary suspension of dismissals? What is more serious: the extension of working hours, possibly combined with an income reduction, or the protection against a loss of employment?

### **2.2.3 Opening clauses**

The details will be argued. At heart, however, the principle of favourability should be widely recognised. This also applies to one last thought which has to be considered in the present context: the opening up of a higher-ranking regulation in favour of lower-ranking regulations. If, in one legal system, there is a primacy of one source of law

over another, such an opening must in principle be allowed provided, in any event, it is assumed that primacy can be "waived" in an individual case. Limits can then arise only to the extent that such a waiver, for whatever reason, is to be considered inadmissible. Of course, it is important to ensure that the extent of the waiver is accurately determined and that the deviation from the higher-ranking law does not exceed the limits that may be set for it.

Such opening up most probably will occur in two forms: As an opening up of statutory law in favour of either an individual contract or a collective agreement; and as an opening up of a national or branch collective agreement in favour of schemes aimed at a single company. As far as non-mandatory law is concerned, it should be borne in mind that given the imbalance between employer and employee, an opening up is far more "dangerous" if it is in favour of an employment contract rather than a collective agreement. This may be the reason why in many countries, one example being Sweden, statutory regulations are dispositive only in favour of collective agreements (so-called "half-mandatory law"). The opening up of collective agreements, on the other hand, is a "double-edged" sword, not least with regard to the employer side: while it is true that it can meet the needs of individual companies, it also "riddles" the collective agreement and impairs its binding force. The latter risk is assessed differently by the legislators in the Member States: while in France, for example, there have been clear decentralisation tendencies over the last couple of years, in others, such as Denmark, the deviation from higher-level collective agreements remains basically inadmissible and, if it occurs, is severely sanctioned.

### **3 Future issues**

#### **3.1 The individual sources of law**

##### **3.1.1 Employment contract**

As was already discussed, for all their fundamental importance, the employment contract has only a limited role to play in respect of the rights and obligations of the parties. Given the imbalance with the employer, one cannot simply refer workers to their freedom of contract. What will the future bring? Even today, there are examples of high achievers who have no trouble enforcing their interests. And perhaps, given a war for talent waging in quite a few sectors, there will be even more such examples in the future. On the whole, however, there is the fear that technological developments, think of the so-called platform economy, will lead to a "hollowing out" of the employment contract and the existing imbalance between employees and employers becoming even worse.

##### **3.1.2 Collective agreements**

Can the protection gaps that arise thereby be closed by collective agreements? Maybe. Some developments, such as the coming into existence of an "independent driver guild" at the ride-hailing service Uber, are positive. However, scepticism predominates for two reasons. First, in most countries, the willingness of employees to confide in associations is decreasing. Second, trade unions, think of the dissolution of undertakings due to digitisation and platforms, are finding it increasingly difficult to access the employees in order to organise them. Can the state help, for example by, as happened some time ago in Germany, facilitating the declaration of generally binding of collective agreements? The answer may be yes. One could even argue that, given the weakening of collective bargaining in many countries, it is simply the duty of the state to ensure that the system becomes more stable again. One thing should be considered, however, which is that making it easier to declare a collective agreement universally applicable obviously strengthens the agreement, but not necessarily the idea of autonomous rule-making by the social partners.

### **3.1.3 State legislation**

This directs the view to the state. The question is this: Will there be a need in the future for more labour laws? The answers may vary. In some countries, such as Denmark or Sweden, collective bargaining is still functioning pretty well. If that is the case, there is no reason to abandon the prevailing reluctance to take public intervention. In many countries, however, there are cracks in the framework of regulation by the social partners. Many employers and employees, by either opting-out of collective bargaining or even leaving their associations altogether, avoid the effects of collective agreements and are therefore no longer subject them. It is then plausible to call on lawmakers. But one should expect no miracles: The change in the world of work is fast, but legislation is usually slow. If you keep this in mind, then the hopes that some have for the legislator look rather naïve.

## **3.2 The relationship of the sources of law to each other**

### **3.2.1 Hierarchy of norms**

The world of work is changing quickly. Digitisation is gaining more and more momentum. The changes are so profound that some fear that internet corporations may someday take the place of nation states. But as long as these exist, little will change with regard to a certain order of legal sources. In future, too, it will be true that ordinary law cannot simply put constitutional law aside. However, one will always have to answer the question whether and, if so, to what extent a certain source of law is ultimately grounded in the Constitution. This question arises in particular with regard to the freedom to conclude collective agreements. The constitutional law of the Member States differs considerably here: in Italy, the constitutional guarantee of freedom of collective agreement is so strong that collective agreements can do without the protection afforded by a specific law. In other countries, there is virtually no constitutional protection of collective bargaining, as the considerable interference with collective bargaining systems of some Member States in the context of austerity policies have amply demonstrated.

### **3.2.2 Principle of favourability**

One of the key principles when determining the relationship of the legal sources to each other is the principle of favourability. In this context, it seems as if better use could be made of experiences in other legal systems. The questions are as fundamental as they are varied: What criteria are applied when deciding whether one provision is more favourable than another? What set of rules are to be compared: single provisions, sets of rules, entire legal instruments? From whose perspective is favourability to be judged? A look beyond the borders of the own national system could make it easier to answer these questions.

A comparative view could also help to clarify the limits of applying the principle. Lessons could be drawn, for instance, from a debate that was conducted in the 1990s in Germany about so-called "alliances for work". One lesson from this is this: Making room for agreements between the employer and works council sometimes takes account of a "decentralisation" of collective bargaining as demanded, in particular, by many economists. It may even be argued that there are often also advantages for individual employees. There is a risk in this, however, which is that it can undermine the existing system of collective bargaining and damage the representation of workers' interests in the long run. What appears to be advantageous in the short term can thus be harmful if one considers the long-term effects.

### **3.2.3 Opening clauses**

Opening clauses in favour of collective bargaining are part of a proven arsenal of legislation in many countries. Many things speak in favour of such an opening, including the expertise and proximity of the social partners and their often shorter reaction time compared to the state legislator. However, lawmakers must always check whether they put the associated responsibility in the right hands. Here, too,



observations from abroad can be helpful. For example, Italy, a country with a highly fragmented union landscape, is worth being looked at. In this country the law only opens the possibility of deviation for the "most representative" unions. That having been said, it should be added that deviations are also permissible at the company level, though so far scarcely any use has been made of such opening clauses in practice.

France presents another interesting case. For some time now, this country has become almost a "laboratory" for the use of opening clauses. In the so-called *El Khomri* legislation of 2016, opening clauses were implemented on a large scale, with the legislator providing the social partners with a series of "subsidiary" rules in the event of non-agreement on diverging standards. The *El Khomri* laws are also an expression of a certain decentralisation of collective agreements displaying a clear preference for company-related solutions. This tendency has even intensified with the so-called "*Macron* laws" of 2017. One like the other law make France a case study for decentralisation and flexibilisation which should be watched carefully.

#### **4 The position of EU-Labour law**

It remains to say a word about the position of EU-labour law in the hierarchy of norms. The pivotal point of consideration must be the primacy of application of European law. Even though the justification for this primacy is still not without controversy, there is a consensus on the existence of this primacy as such even if there is no explicit constitutional anchoring. According to the primacy of application, EU-law takes precedence over all Member State law in order to ensure the unity, functioning and effectiveness of EU law. It comprises of primary as well as secondary law.

However, it should be remembered that EU-directives under Article 288 (3) TFEU are only binding on the Member States. Due to the lack of direct (horizontal) applicability, directives differ significantly from regulations and directly applicable primary law. This means no more and no less than that there is no conflict of laws when a rule of national law is not in line with a directive. Although directives are part of Union law which takes precedence over national law, provisions of a directive cannot be classified as forming part of a hierarchy of norms. This must also be observed in relation to the case law of the ECJ substantiating directives. However, this is not the last word. For it is well known that, as a consequence of the primacy of application of EU-law, there is an obligation on national courts to interpret national law in conformity with EU law and, above all, in accordance with a directive. Consequently, an interpretation of national law contrary to EU law-ultimately constitutes an infringement of the relevant provision of TEU or TFEU.

This notwithstanding, the relationship between directives and national law is, strictly speaking, outside the scope of the issue to be addressed here. The relationship between European primary law and national law, however, is quite relevant. This relationship is characterised by the primacy of application of European law which was just mentioned. There are two things to consider in this context. First, that primacy of application refers to all primary law, including unwritten law; this has particular significance for the fundamental rights developed by the ECJ as general legal principles derived from the constitutional traditions of the Member States. And secondly, that this primacy covers the entire national law, including constitutional law. However, a restriction is appropriate in this respect, which can be illustrated by referring to the ruling of the Danish Supreme Court in the *Ajos*-case, but also by a reference to the position of the Federal Constitutional Court in Germany. According to the latter Court, there is what is called an "inviolable core content of the constitutional identity". Moreover, the Court is of the opinion that there is room for a so-called *ultra vires* review, which applies where EU-institutions, including the ECJ, transgress the boundaries of their competences. However, the court has formulated extremely strict

conditions for this ultra-vires check, which makes it extremely doubtful whether the viewpoint of the Court results in meaningful restrictions of the primacy of EU-law.

## **5 Conclusion**

Labour law rules are based in part on the obligation of the state to ensure adequate protection, in part on the autonomy of the social partners and, last but not least, on the personal responsibility of employer and employee. Responsibilities and the associated rule-making can be delegated to some extent, with a view, among other things, to ensure the greatest possible proximity and expertise in the area concerned. Insofar as rules require a consensus among different players, as is the case with collective agreements and individual contracts, the "give and take"-approach which characterises agreements is made use of; in the case of collective agreements, what is added to this mechanism is the right to strike. Each and every labour law regulation is committed to the idea of employee protection. In building this protection, the imbalance between employer and employee must always be taken into account. This is especially important when determining the extent of granting freedom of contract. But this is also to be considered when determining the room for decentralised regulation. In the end, the right mix is key. As regards EU-law, primacy of application of EU-law is key. This primacy of application of EU-law might become more and more noticeable in the Member States as there is an increasing "constitutionalisation" of labour law on the EU-level.

