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Perspectives on Privatization and Plant-Level Industrial Relations: Great Britain in the 1980s, Germany in the 1990s

I. INTRODUCTION

Of the many sweeping social, political, economic and legal changes resulting from the reunification of Germany,¹ some of the most dramatic and revolutionary are likely to be those affecting labor representation and industrial relations. In the former German Democratic Republic workers and employers must contend not only with an entirely different economic and political system, they must also face entirely new systems of labor law and employer-worker interaction transplanted from the Federal Republic.² Industries in what was formally East Germany that had been state-managed for over forty years are being dismantled and/or privatized and the effects on the nature of industrial relations are yet to be known.

This Comment will analyze the changing situation in Germany and offer analogies based on a historical precedent. Though the degree of change was much less revolutionary, Great Britain in the 1980s experienced a period of industrial privatization similar to that which is presently occurring in Germany. The purpose of this Comment is to examine the effects of British privatization on plant-level labor representation and industrial relations and to show how this experience may provide insight into what is likely to happen in Germany during its period of privatization.

This Comment will briefly compare and contrast the fundamentals of British and German labor law. It will discuss the effects of privatization in the British labor relations system focusing on the changes in

¹ Examples of such challenges facing Germany after reunification include reconciling the differences between East and West in infrastructure, *see, e.g.*, Brand, *East Germany: A Doubtful Future - German Labor Faces Unification*, 1990 DISSENT at 468, 469; reconciling differences in expectations, *see, e.g.*, *Germany's Subdued Celebration*, THE ECONOMIST, Sep. 29, 1990, at 53; and reconciling differences in work habits, *see, e.g.*, Protzman, *A Worry in West Germany: Indolence in East Germany*, N.Y. Times, Apr. 4, 1990, at A1, col. 5.

² For an analysis of the respective legal participation levels of formerly East German and West German workers, *see* Markovits, *Pursuing One's Rights under Socialism*, 38 STAN. L. REV. 689 (1986).

plant-level industrial relations. Finally, bearing in mind the differences and similarities of the two countries' labor law structures and the British privatization experience, this Comment will suggest how the German Works Constitution Act may be utilized to provide for greater plant-level negotiations and to ease the transition towards private industry.

II. COMPARISON OF BRITISH AND GERMAN LABOR LAW

A. Preliminary Comments

Before comparing the British and German labor law systems generally, some preliminary comments are appropriate to keep the comparison in the proper perspective. In comparing any two separate legal systems, one must not view the law in a vacuum without considering the larger societal factors affecting the law.³ A comparison of laws is only valid when legal norms are considered in light of their social context⁴ and historical genesis.⁵ It is important to bear in mind also that different areas of the law and different legal norms are affected differently by the underlying economic and social systems.⁶ For example, a nation's criminal code is less likely to have as direct a relationship to that country's economic system as would the nation's tax code. Labor law is likely to be greatly related to a nation's social and economic goals, and, therefore, in comparing systems of labor law and industrial relations, the relative economic and social policies of the comparative nations must be considered closely.

As one point of departure, the commentator Wolfgang Daeubler theorizes that there are two broad families of labor law within the capitalist system.⁷ One family, including the Federal Republic of Germany and the Scandinavian nations, is based on the idea of compromise and partnership between labor and management.⁸ In this labor scheme, employers and laborers are expected to work together in an institutionalized atmosphere of cooperation with both sides able to communicate their concerns in an effort to build consensus and foster shared decision-making. The other group, including Great Britain and Italy, is more influ-

³ For a more detailed explication of how industrial relations can be seen as an expression of the society in which they operate, see Schregle, *Comparative Industrial Relations: Pitfalls and Potential*, 120 INT'L LAB. REV. 15, 28-29 (1981).

⁴ Daeubler, *Comparisons of Labor Law in Socialist and Capitalist Systems*, 4 COMP. LAB. L. 79, 84 (1981).

⁵ Schregle, *supra* note 3, at 24.

⁶ Daeubler, *supra* note 4, at 88.

⁷ *Id.* at 92.

⁸ *Id.*

enced by ideas of social conflict.⁹ In this system, labor and management are seen more as antagonists with both sides beginning at contrary ends of the ideological spectrum. Compromise grows out of a series of alternating concessions by each side from their opposite starting points rather than by a coordinated effort to choose a middleground initially.

B. British Labor Law

Aside from the idea of social conflict, the British labor law system is distinguished by many other factors. Perhaps the greatest distinguishing characteristic is the degree of autonomy that both British labor and management enjoy. Traditionally in Britain, regulation of collective and individual industrial relations takes place "outside the sphere of state-established and state-enforced law."¹⁰ In fact, observers of the British labor law system are likely to "gain the impression that in social reality the autonomy of the collective bargaining parties forms the core of industrial relations in Britain."¹¹ Unlike other systems which have distinct rules and legal procedures defining the scope of industrial relations, in Great Britain such a legislation-based structure does not exist at the plant or company level.¹²

Since there are fewer state-established laws, the roles of custom and practice¹³ and voluntarism¹⁴ are very important. By custom and practice it is meant that the achievements or rights gained by labor are not officially defined and codified; rather these rights exist because both management and labor have agreed to accept them. A custom is not something that can be stated in black and white terms, but it is something that must be "fought for and secured by daily vigilance and activity."¹⁵ Likewise, voluntarism means that collective bargaining agreements are accepted

⁹ *Id.*

¹⁰ Kahn-Freund, *Labour Law and Industrial Relations in Great Britain and West Germany*, in *LABOUR LAW AND INDUSTRIAL RELATIONS: BUILDING ON KAHN-FREUND*, 1, 2 (Wedderburn, Lewis, and Clark eds. 1982) [hereinafter *LABOUR LAW AND INDUSTRIAL RELATIONS*]. Otto Kahn-Freund's theories and scholarship play a prominent role in this Comment. Kahn-Freund spent the first part of his professional life in Germany and the remainder in Great Britain, and he was recognized as the pre-eminent authority on Anglo-German comparative industrial relations prior to his death in 1979. An advocate of incorporating social scientific techniques and ideas into labor law scholarship, Kahn-Freund became during the decades following World War II, "the foremost labour lawyer on both the national and international stage." *Preface* to *LABOUR LAW AND INDUSTRIAL RELATIONS*, at vi.

¹¹ Kahn-Freund, *supra* note 10, at 2.

¹² *Id.*

¹³ *Id.* at 8.

¹⁴ Roberts, *Recent Trends in Collective Bargaining Agreements in the United Kingdom*, 123 *INT'L LAB. REV.* 287 (1984).

¹⁵ Kahn-Freund, *supra* note 10, at 8.

willingly by employers and unions without the intervention of the state.¹⁶ Attempts to specifically regulate individual industrial relations in Great Britain have never been adequately implemented.¹⁷ Because of the paucity of state-established regulations in the British labor law scheme, the informal concepts of custom and practice and voluntarism are the principle ways of defining industrial relations.

C. German Labor Law

In contrast to Great Britain with its informal voluntary structure, Germany's collective labor law takes place within a dense procedural framework that is often mandatory.¹⁸ Labor law in Germany is made up almost entirely of procedural regulations.¹⁹ Whereas in Britain employer and worker representatives have a great deal of flexibility in establishing agreements, in Germany there are state-established procedures defining precisely what may and may not be done. Neither party to the collective bargaining is at liberty to alter the mandatory provisions according to its needs.²⁰

The effect of this highly regulated system is ambiguous. On one hand, the dense procedural network heightens predictability because the parties to the industrial conflict are certain that what has been agreed upon will in fact come about.²¹ On the other hand, the procedural requirements actually limit the behavior of the parties which might inhibit the sense of security.²² In the same way that the strict behavior controls define precisely what each party may expect to gain from the negotiations, the procedural requirements also prohibit and penalize any actions which fall outside the guidelines.²³

This feature of the German labor law system has been labeled by various terminology. Kahn-Freund called it a "hypertrophy of legal thinking"²⁴ or a "hypertrophy of the law and of the influence of lawyers and the bureaucracy."²⁵ Other scholars have preferred the term

¹⁶ Roberts, *supra* note 14, at 287.

¹⁷ Mueckenberger, *Juridification of Industrial Relations: A German - British Comparison*, 9 COMP. LAB. L. J. 526, 541 (1988).

¹⁸ *Id.* at 539.

¹⁹ *Id.*

²⁰ *Id.* at 540.

²¹ *Id.*

²² *Id.* at 541.

²³ *Id.*

²⁴ Kahn-Freund, *supra* note 10, at 3.

²⁵ *Id.* at 6.

"juridification."²⁶ Juridification expresses "the displacement of the contemplative by the 'activist' state and thus marks the way from the undisputed priority of contractual agreements to a 'law driven' society."²⁷ Juridification suggests a movement away from the informal, custom and practice-based labor relations which predominate in Britain, towards the more formalistic, state-defined procedures which are prevalent in Germany.

D. Differences and Similarities

There are historical bases for this fundamental difference in British and German labor relations. It has been argued that the informality of the British industrial relations system arose because a state tradition in the classic European sense never developed in Britain.²⁸ Historically, the British have been reluctant to establish a body of law regulating public activities in civil society and the British have preferred informal networks.²⁹ Another suggestion is that British labor law grew out of conditions of crisis to curb union power, whereas in Germany, the concept of labor law accompanied economic growth and was a vehicle for the integration of the working class into the political structure.³⁰ Kahn-Freund offers the idea that in Britain the trade union movement preceded the political labor movement while the reverse was true in Germany.³¹

Although there are many differences which distinguish the German labor law tradition from the British, there are also some similarities. Many of the substantive elements of both systems share common features. For example, both German and British labor law contain detailed social security systems, plant legislation establishing working condition standards, contract employment legislation and health and safety legislation.³² Also, in contrast to a Marxist breakdown, the basic distribution of power between capital and labor is very similar between the two countries.³³

²⁶ See, e.g., Mueckenberger, *supra* note 17, and Simitis, *The Juridification of Labor Relations*, 7 COMP. LAB. L. J. 93 (1986).

²⁷ Simitis, *supra* note 26, at 93.

²⁸ Gamble, *Privatization, Thatcherism and the British State*, 16 J. LAW & SOCIETY 1, 13 (1989).

²⁹ *Id.*

³⁰ Mueckenberger, *supra* note 17, at 531.

³¹ Kahn-Freund, *supra* note 10, at 2-3.

³² Mueckenberger, *supra* note 17, at 539.

³³ Kahn-Freund, *supra* note 10, at 1.

III. COMPARISON OF INDUSTRIAL RELATIONS AT THE PLANT LEVEL

A. British Plant-Level Relations

With the fundamental differences and similarities in the industrial relations systems of Britain and Germany in mind, one can see how these differences reveal themselves at the plant level of labor representation.

In the British tradition, collective bargaining has taken place at various levels of representation and has been marked by diversity in structure.³⁴ Although it has declined since World War II, industry-wide representation still exists in many industries.³⁵ These nationally-based industry-wide unions have negotiated with employers' organizations which, similarly, are nationally based along industry lines.³⁶ Below this level of bargaining, however, there is also representation and bargaining at more local levels.³⁷ This stratification of labor representation extends to local, district, and even plant-specific bodies.³⁸

The trend, however, in British labor representation since World War II has been towards greater organization at the plant level.³⁹ The representatives at the plant level are the shop stewards. Shop stewards are members of the workplace elected by the employees of the workplace, organized by the trade union and accredited by the trade union leadership.⁴⁰ Because of the diversity in the collective bargaining structure, shop stewards play an important role in negotiating with the management at the plant level.⁴¹

One of the fundamental roles of the shop stewards is to keep the national trade union hierarchy in touch with its rank and file members.⁴² In a labor organization which is nationally based, there is a bureaucracy of full-time administrative officials. The shop stewards ensure that this labor union bureaucracy is exposed to the problems and concerns of its "lay" element - the day-to-day worker.⁴³ Unlike regional or national union officials who visit the workplace infrequently, shop stewards are on the spot, able to hear the complaints, frustrations, and ideas of the rank

³⁴ Roberts, *supra* note 14, at 295.

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*; see also Kahn-Freund, *supra* note 10, at 5.

⁴⁰ Kahn-Freund, *supra* note 10, at 5.

⁴¹ *Id.*

⁴² *Id.* at 7.

⁴³ *Id.*

and file.⁴⁴ Kahn-Freund has suggested that this element of immediate and on-going contact with the workers via the shop stewards offers a guarantee against ossification in the trade union hierarchy.⁴⁵

Largely due to the existence of the shop stewards, direct industrial democracy is a very important concept in British labor representation. Direct democracy means that important trade union decisions are in many ways made and implemented by the membership itself at the workplace, as opposed to being made and imposed by distant elected representatives.⁴⁶ Since shop stewards, as local representatives, are accountable to the rank and file union members, the members have a direct voice in labor relations. This ensures that the rank and file members are constantly engaged. The shop workers can justifiably feel that they are critical to union decision-making and therefore, trade unionism retains the status of a workers' movement more than in places which do not allow for such direct democracy.⁴⁷ As the tradition of shop steward representation has become ingrained in Britain, and as the bargaining roles have become crystallized by custom and practice, decentralization of union decision-making has strengthened direct democracy.⁴⁸

As shop stewards became established and accepted by the rank and file union membership, they also won acceptance by the companies that ran the workplaces.⁴⁹ The role of the shop stewards was actually consolidated and refined by the emergence of professional personnel managers at the plant level.⁵⁰ These local managers sought to find common causes with the shop stewards to concentrate on issues that were "of primary importance to peaceful and efficient management of the plant."⁵¹ In this way, there was an opportunity for greater interaction and discussion of plant-specific issues at the local level.

Because these negotiations are decentralized, Kahn-Freund suggested that the effectiveness of collective bargaining could be enhanced: "One of the principal aspects of this decentralisation . . . is that it can make collective bargaining more comprehensive and give it richer content."⁵² Since the negotiators were locally based and had direct knowl-

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ Clegg, *Otto Kahn-Freund and British Industrial Relations* in *LABOUR LAW AND INDUSTRIAL RELATIONS*, 14, 25 (Wedderburn, Lewis and Clark eds. 1982).

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ Roberts, *supra* note 14, at 296.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² Clegg, *supra* note 46, at 24-25 (quoting KAHN-FREUND, *LABOR RELATIONS: HERITAGE AND ADJUSTMENT* 8 (1979)).

edge of the situation at the plant, agreements could address more accurately the specific needs of the plant. Similarly, these negotiations could prove to be more easily and efficiently accomplished than negotiations at higher levels of union and employer representation.⁵³

While the shop steward system grew more popular in Great Britain, it did not come under any greater legal scrutiny. Like the vast majority of British industrial relations, the shop steward system grew and became established through tradition and custom, not through statutes or state-created procedures.⁵⁴ Because the British prefer informal structure in collective bargaining and labor representation, an attempt to place shop stewards on a "legal" footing could be detrimental.⁵⁵ If there were a formalistic legal structure defining the shop steward system, the shop steward's role as a counterbalance to union bureaucratization would be undermined as the shop stewards themselves would become more bureaucratized.⁵⁶

B. German Plant-Level Relations

As compared to the British system, Germany's system of labor representation at the local level has developed differently. The contrasting systems are in large part a reflection of the fundamental distinctions between the two countries' industrial relations schemes.

The German system of collective bargaining has greater structure than its British counterpart. In Germany, bargaining takes place at two levels.⁵⁷ Negotiation of collective bargaining per se normally takes place at the industry level between regional bodies representing labor and management.⁵⁸ At the plant level, bodies called works councils are responsible for employee representation.⁵⁹ Works councils' negotiations with management at the plant level do not constitute collective bargaining agreements in the legal sense of the term.⁶⁰ However, these localized discussions involve certain issues that are subject to co-determination by workers and management and are enumerated in the Works Constitution Act of 1972.⁶¹ It is proper to compare the works councils in Germany

⁵³ Clegg, *supra* note 46 at 25.

⁵⁴ Kahn-Freund, *supra* note 10, at 5-6.

⁵⁵ Kahn-Freund, *supra* note 10, at 7.

⁵⁶ *Id.*

⁵⁷ Fuerstenberg, *Recent Trends in Collective Bargaining in the Federal Republic of Germany*, 123 INT'L LAB. REV. 615 (1984).

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.* The local agreements between works councils and management affect only the individual plant, whereas collective bargaining agreements affect the entire industry.

⁶¹ *Id.*; see also *infra*, text accompanying notes 85-90.

with the shop stewards in Britain because they both serve as the plant-level representational bodies and they both fulfill the function of voicing workers ideas in an effort to influence management decisions.⁶²

The commentator Friedrich Fuerstenberg offers three reasons why union policy tends to be highly centralized in Germany.⁶³ The first reason is that historically, collective bargaining has taken place at the industry and regional level.⁶⁴ The collective negotiations are centralized and tend to be held at the higher levels of representation, so it is natural that union policy reflects this.⁶⁵ The second reason is that unions usually have policies which include broad societal goals felt to be best implemented by the highest trade union officials who are able to take a more general view than their local counterparts.⁶⁶ The third reason for these centralized policies most clearly highlights the differences with the British tradition. Commentators suggest that Germany's legalistic and bureaucratic labor relations structure requires experts to approach labor problems most efficiently.⁶⁷ These experts engage in detailed, centralized negotiations which affect a great many workers throughout the union organization nationwide. Fuerstenberg maintains that through the combination of the centralized collective bargaining negotiations and the localized works councils procedures, there is an effective balance in the system of worker participation.⁶⁸

As representational duties are distributed between the national and local bodies, many characteristics are shared. An examination of the works council's structure and role shows it to be a microcosm of the general tendency of German labor law towards juridification.⁶⁹ While the works council is held to be an element of cooperation and integration between management and labor, it is still subject to legally acknowledged, binding rules.⁷⁰ Kahn-Freund describes the works council structure as follows:

The German system of works councils, with its systematic organization of election procedures regulated down to the finest details, and its clear definition (subject to the strictest legal control) of the rights and duties of the

⁶² Schregle, *supra* note 3, at 23.

⁶³ Fuerstenberg, *supra* note 57, at 618.

⁶⁴ *Id.*

⁶⁵ This is also one of the historical reasons why works councils were able to develop in Germany. Because of the industry level collective bargaining, works councils arose to fill the vacuum in representation at the enterprise level. See Schregle, *supra* note 3, at 23.

⁶⁶ Fuerstenberg, *supra* note 57, at 618.

⁶⁷ *Id.*

⁶⁸ *Id.* at 626.

⁶⁹ See *supra* text accompanying notes 24-27.

⁷⁰ Mueckenberger, *supra* note 17, at 551.

works councillors, is perhaps the extreme example of the hypertrophy of the law and the influence of lawyers and the bureaucracy which, seen from the outside, is the central characteristic of German industrial relations.⁷¹

The formalism which is characteristic of the works councils is also reflected in the Works Constitution Act of 1972.⁷² The Act mandates that all establishments employing five or more employees with voting rights elect works councils.⁷³ The Act further provides that "the employer and the works council shall work together in a spirit of mutual trust . . . for the good of the employees and of the establishment."⁷⁴

In Part II of the Act, there are detailed regulations concerning the election and term of the works council members. These regulations include a specific schedule of how many members are to be elected in relation to the number of establishment employees,⁷⁵ what time elections are to occur,⁷⁶ and how the elections are to be carried out.⁷⁷ Much of the language in the Act is imperative.⁷⁸ The procedural rules that are outlined are specific, comprehensive and usually mandatory.

Part IV of the Act, entitled "Collaboration by Employees and Co-Determination," outlines the substantive duties of the works councils. As its initial principle, the Act requires that the employer and works councils shall meet at least once a month to "discuss the matters at issue with an earnest desire to reach agreement and make suggestions for settling differences."⁷⁹ This part of the Act calls for a conciliation committee to be set up specifically to settle differences between management and labor and chosen in equal numbers by employers and the works councils.⁸⁰ Employers and works councils then negotiate and record works agreements affecting the operation of the plant.⁸¹ As stated in the Act, the works councils' general duties include seeing that effect is given to regulations and arrangements for the benefit of employees,⁸² making rec-

⁷¹ Kahn-Freund, *supra* note 10, at 6.

⁷² Works Constitution Act, 1972 Bundesgesetzblatt [BGBl] I 13 (W. Ger), reprinted in 1972 INTERNATIONAL LABOUR OFFICE LEGISLATIVE SERIES, Ger.F.R. 1 [hereinafter Works Act].

⁷³ Works Act, *supra* note 72, part I, § 1.

⁷⁴ Works Act, *supra* note 72, part I, § 2(1).

⁷⁵ Works Act, *supra* note 72, part II, div. 1, § 9.

⁷⁶ Works Act, *supra* note 72, part II, div. 1, § 13.

⁷⁷ Works Act, *supra* note 72, part II, div. 1, §§ 14, 16-20.

⁷⁸ For example, "[n]ot less than eight weeks before the end of its first term of office the works council shall appoint an electoral board of three persons with voting rights one of whom shall be chairman." Works Act, *supra* note 72, part II, div. 1, § 16(1).

⁷⁹ Works Act, *supra* note 72, part IV, div. 1, § 74(1).

⁸⁰ Works Act, *supra* note 72, part IV, div. 1, § 76(1) and (2).

⁸¹ Works Act, *supra* note 72, part IV, div. 1, § 77.

⁸² Works Act, *supra* note 72, part IV, div. 1, § 80 (1).

ommendations to the employer for further action,⁸³ and receiving suggestions from the rank and file workers and bringing these suggestions up in negotiations if they are found to be justified.⁸⁴

Listed in Part IV, division III are the matters in which works councils have a right of co-determination with the employers. These include the distribution of working hours and breaks,⁸⁵ leave arrangements,⁸⁶ and the fixing of bonuses and performance related remuneration.⁸⁷ There is also a subdivision dealing specifically with individual staff movements⁸⁸ including the works council's role in regrading and transferring employees,⁸⁹ and also its co-determination role in the case of dismissal.⁹⁰

It is obvious from this cursory overview of the Works Constitution Act that it is a comprehensive and highly-detailed piece of legislation defining the roles and responsibilities of the plant-level representational body, the works councils. Like any administrative routine, it offers the advantages of guaranteed, regulated, daily conduct which may diminish the friction caused by an informal and more unpredictable code of interaction.⁹¹ In its rigidity, however, it also loses the flexibility that a more informal system would allow.⁹²

C. Differences and Similarities

The distinction between custom and practice-based labor practices and formalized, codified labor statutes is the fundamental difference between British and German industrial relations. While Germany has the detailed provisions and exacting regulations of the Works Constitution Act, the British tradition shows "a complete absence of a statutorily regulated system of employee representation at the plant and company level."⁹³ In Great Britain there is no counterpart to the German Works Constitution Act. In fact, there is no statutory regulation of the sphere of management and labor communication at the plant level at all.⁹⁴

⁸³ Works Act, *supra* note 72, part IV, div. 1, § 80(2).

⁸⁴ Works Act, *supra* note 72, part IV, div. 1, § 80(3).

⁸⁵ Works Act, *supra* note 72, part IV, div. III, § 87(2).

⁸⁶ Works Act, *supra* note 72, part IV, div. III, § 87(5).

⁸⁷ Works Act, *supra* note 72, part IV, div. III, § 87(11).

⁸⁸ Works Act, *supra* note 72, part IV, div. V, subd. III.

⁸⁹ Works Act, *supra* note 72, part IV, div. V, subd. III, § 99.

⁹⁰ Works Act, *supra* note 72, part IV, div. V, subd. III, § 102.

⁹¹ Kahn-Freund, *supra* note 10, at 6.

⁹² For a discussion of the advantages and disadvantages of such rigidity *see supra* text accompanying notes 21-23 and *infra* text accompanying notes 182-194.

⁹³ Kahn-Freund, *supra* note 10, at 5.

⁹⁴ Mueckenberger, *supra* note 17, at 529. As Kahn-Freund points out, what is characteristic in this area for Germany is the exact opposite of the British situation. Kahn-Freund, *supra* note 10, at 3.

Not only is there no formal structure to labor-management relations at the plant level in Britain, but neither labor unions nor management want one.⁹⁵ The shop stewards in Britain believe that they are performing the same representational function as the works councils in Germany, but they are able to operate without the "oppressively gigantic legal apparatus of the works council system" as outlined in the Works Constitution Act.⁹⁶ In Britain, such a formalistic system is seen as actually diminishing the value of the shop stewards because it is perceived to entail an unproductive bureaucracy as opposed to the present system of unstructured and informal industrial democracy.⁹⁷ In Britain, proposals to formalize the labor-management interaction system have failed not only because of labor union opposition, but also because of general management conservatism, which has yielded a lukewarm response to the suggestion of a change.⁹⁸

Commentators perceive three main advantages to the British system. First, there are no statutory rules with which to contend, and thus shop stewards and management are bound only to the more flexible, less legalistic constraints of custom and practice.⁹⁹ Second, shop stewards counteract the alienation between the trade union hierarchy and the rank and file constituents.¹⁰⁰ Partly due to their informality, the shop stewards represent an alternative to the strict trade union structure and serve as an "integration factor."¹⁰¹ Third, since the shop steward system is based on tradition and tacit agreement between labor and management, the shop stewards are deemed to promote industrial peace as opposed to industrial conflict.¹⁰² Since both sides of the relationship are bound by unwritten rules, the theory is that both sides will eventually adopt positions closer to the center of the parameters without testing the extremes. Steadfastly maintaining extreme positions would be more likely to undermine trust and invite reciprocity.

In the decades after World War II, Otto Kahn-Freund observed that the role of the workplace representatives in Britain was becoming more and more important and they were supplanting more of the duties of the negotiators at the industry-wide level.¹⁰³ Informality and a lack of

⁹⁵ Kahn-Freund, *supra* note 10, at 5.

⁹⁶ *Id.*; see also Schregle, *supra* note 3, at 26 ("Many British trade unionists would regard the Federal Republic's approach to industrial relations as imposing a legalistic straight-jacket . . .").

⁹⁷ Kahn-Freund, *supra* note 10, at 5-6; see also Schregle, *supra* note 3, at 16.

⁹⁸ Mueckenberger, *supra* note 17, at 542.

⁹⁹ Kahn-Freund, *supra* note 10, at 5-6.

¹⁰⁰ *Id.* at 7.

¹⁰¹ *Id.*

¹⁰² *Id.* at 6.

¹⁰³ Clegg, *supra* note 46, at 17.

codification were typical of the negotiations between the plant representatives and local management.¹⁰⁴ Shop stewards were drawing their power from below - being directly elected from the rank and file workers, rather than from above - being delegated by the national trade union hierarchy.¹⁰⁵

Nevertheless, Kahn-Freund and some of his colleagues believed that the role of the shop stewards should be recognized and codified.¹⁰⁶ They felt that it was important to "embody the agreements in clearly written documents instead of relying on custom and practice, oral agreements, informal understandings and nods and winks."¹⁰⁷ Kahn-Freund realized that this would be difficult for the trade unions to accept because the roots in custom and practice were so deep.¹⁰⁸ Although he recognized that such restrictive measures could inhibit direct democracy,¹⁰⁹ Kahn-Freund still endorsed more centralized authority in the Trades Unions Congress and more centralized collective bargaining negotiations at the national level.¹¹⁰

Kahn-Freund's ideas, however, are inapplicable to the present time. One commentator has maintained that, "[i]t is impossible to believe that Otto Kahn-Freund would have maintained this prescription in the 1980s. Today the idea that the trade unions can save society by an offer to engage in centralized bargaining has become not so much Utopian as laughable."¹¹¹ In both Britain and Germany, flexibility in representation and negotiation, not rigidity, is required to meet the challenges of the 1990s.

IV. PRIVATIZATION AND PLANT-LEVEL LABOR RELATIONS

A. Introduction

The British experience with privatization has demonstrated the necessity for flexibility in plant-level representation and there have been indications of the need for deregulation of the rigid structure in Germany even before denationalization started.¹¹² In Germany, by the mid 1980s,

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 18.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 25-26.

¹⁰⁹ *Id.* at 26.

¹¹⁰ *Id.* at 27.

¹¹¹ Wedderburn, *Otto Kahn-Freund and British Labour Law* in *LABOUR LAW AND INDUSTRIAL RELATIONS* 29, 66 (Wedderburn, Lewis and Clark eds. 1982).

¹¹² The terms "flexibility" and "deregulation" have been used differently by different industrial relations scholars. See, e.g., Standing, *Meshing Labour Flexibility with Security: An Answer to British*

unions were recognizing that works councils were better equipped to deal with localized issues such as partial lay-offs and incentive pay schemes than were national union representatives.¹¹³ German unions have tried to strengthen their representation at the shop-floor level.¹¹⁴ Even before the ramifications of denationalizing the state-run industries in Eastern Germany, there was an awareness that German labor and management must devise innovative approaches to handle economic and technological change.¹¹⁵ The need for such innovation stems from many factors, including volatility in economic conditions and diversity in workers' status and life styles.¹¹⁶ Privatization will be one more factor contributing to the need for flexibility in the German industrial relations structure. The British experience with privatization is helpful in highlighting that need for flexibility and innovation.

B. Privatization in Britain

By 1980 a substantial number of the major industries in Great Britain were owned by the state.¹¹⁷ There were two main reasons for the increase in public ownership of industry in Britain in the years following the Second World War. First, in Britain, the Labour Party governments were ideologically committed to the common ownership of the means of production.¹¹⁸ Second, there was a desire to "use state control of these industries as a means for national economic planning and postwar reconstruction."¹¹⁹ In the aftermath of the war there was the need to revive

Unemployment?, 125 INT'L LAB. REV. 87, 88 (1986) ("The essence of labour flexibility is, first, speed of adjustment to changes in production and patterns of labour use and, second, adaptability and availability of workers to the type of production taking place."); Vranken, *Deregulating the Employment Relationship: Current Trends in Europe*, 7 COMP. LAB. L. 143 (1986) ("The principle of deregulation has generated governmental initiatives to reform substantially or even abolish major forms of basic social legislation molding the employment relationship . . . The idea is to promote flexibility by removing rigidities, with an ultimate goal to encourage investment and, therefore, employment."); and Cordova, *From Full-Time Wage Employment to Atypical Employment: A Major Shift in the Evolution of Labour Relations?*, 125 INT'L LAB. REV. 641, 651 (1986) ("terms such as flexibility and deregulation have cropped up. The former concerns contractual arrangements, while the latter is a more general term that implies the elimination of certain regulatory and protective aspects of labour legislation."). For the purposes of this Comment, flexibility should be understood to be used in the broader, vernacular sense, i.e., capability to respond and change, while deregulation will refer specifically to an amendment in industrial relations legislation to remove rigidity.

¹¹³ Fuerstenberg, *supra* note 57, at 620.

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 629.

¹¹⁶ *Id.*

¹¹⁷ Veljanovski, *Privatization in Britain - The Institutional Constitutional Issues*, 71 MARQ. L. REV. 558, 560 (1988).

¹¹⁸ *Id.*

¹¹⁹ *Id.*

and reinvigorate the British economy. Due to the ideological bent of the administrations in power in the decades following the war, government officials chose a policy of industrial nationalization.¹²⁰

In Britain, nationalization did not take the form of state-ownership and state-management.¹²¹ Rather than have the nationalized industries run by public officials, the industries were to be run by a professional class of managers operating at arm's length from the government.¹²² Workers were not afforded any say in the management of the industries, but they were seen as custodians of the public interest.¹²³ The role of workers in the nationalization scheme was to ensure that the industries were fulfilling the ideological purposes for which they were developed, that is, maintaining public as opposed to private control of the means of production.¹²⁴

Nationalization, however, was always subject to criticism from various fronts in Britain. Business leaders argued that the nationalized industries presented artificial barriers to entry and thereby undermined competition.¹²⁵ Public officials feared that nationalization gave undue power to the labor unions.¹²⁶ Public sector industries were represented by unions which were not subject to challenges by other competitive labor organizations, due in part to the high barriers to entry in those industries. In effect, the unions had a monopoly on collective bargaining positions and they were able to exploit this situation to their advantage.¹²⁷

In addition to this outside criticism, there were attacks on nationalization from within the government itself. As the nationalized industries evolved, administrations became increasingly uneasy about their efficiency.¹²⁸ During the 1960s and 1970s a series of government White Papers described the movement of the nationalized industries away from the original idea that they should operate at arm's length from the gov-

¹²⁰ *Id.*

¹²¹ *Id.* at 561.

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ Beesley and Littlechild, *Privatisation: Principles, Problems and Priorities* in PRIVATISATION AND REGULATION: THE U.K. EXPERIENCE, 35, 40 (Kay, Mayer and Thompson eds. 1986).

¹²⁶ Thomas, *The Union Response to Denationalisation* in PRIVATISATION AND REGULATION: THE U.K. EXPERIENCE, 299 (Kay, Mayer and Thompson eds. 1986).

¹²⁷ *Id.*; see also Prime Minister Margaret Thatcher, Remarks in the House of Commons No Confidence Debate (Nov. 22, 1990) (reported by Federal News Service, Federal Information Systems Corp.) ("Mr. Speaker, over the last decade, we have given power back to the people on an unprecedented scale . . . We've done it by curbing the monopoly of trade unions to control, even victimize the individual worker.").

¹²⁸ Veljanovski, *supra* note 117, at 561.

ernment.¹²⁹ By 1978, financial targets set by the government became the primary instrument of control over the nationalized industries.¹³⁰ It was felt that this development was in direct conflict with the purposes of the nationalized industries as originally conceived. The change in attitude towards public control over the nationalized industries had become so great that by the end of the 1970s, "the principle that the nationalized industries should operate independently of the government had been replaced with one premised on comprehensive, detailed, and direct regulation of their activities."¹³¹

The situation in Britain was ripe for change when the Conservative government came to power in 1979.¹³² The Thatcher government saw the nationalized industries as lagging behind in productivity, it viewed public ownership as largely a failure, and it maintained a general distrust for state intervention into markets.¹³³ The government, therefore, adopted the policy of privatization.¹³⁴

Privatization may be defined most basically as "the transfer of activities and production from the public sector to the private sector."¹³⁵ But privatization involves much more in practice. Often it involves liberalization of markets and changes in regulatory structures.¹³⁶ It also involves changes in the concepts of property and incentive: "It [privatization] involves the transfer and redefinition of a complex bundle of property rights which creates a whole new penalty / reward system which alters the firm's incentives as well as its performance."¹³⁷ Privatization does not simply mean selling stock in a formerly state-owned enterprise, rather it involves an ideological commitment to improve productivity by increasing the role of free market forces.¹³⁸

The commentator Veljanovski lists many objectives of privatization which all fit under the general goal of promoting efficiency.¹³⁹ Specifi-

¹²⁹ *Id.* at 561-562.

¹³⁰ *Id.*

¹³¹ *Id.* at 563.

¹³² Lorenz, *Thatcher's Industrial Revolution*, *The Sunday Times* (London), Nov. 25, 1990 ("When she (Thatcher) was elected on May 3, 1979, British industry seemed to be in terminal decline. It was wallowing in corporatism, hooked on inflation, and crippled by union power which had filled the vacuum left by weak management. The slide in Britain's share of world trade seemed irreversible. Not only was Britain the sick man of European industry, it was getting steadily sicker.").

¹³³ Gamble, *supra* note 28, at 5.

¹³⁴ *Id.* at 7.

¹³⁵ Veljanovski, *supra* note 117, at 558.

¹³⁶ *Id.*

¹³⁷ *Id.* at 570.

¹³⁸ Beesley and Littlechild, *supra* note 125, at 55.

¹³⁹ Veljanovski, *supra* note 117, at 566.

cally, privatization goals include creating an enterprise culture, increasing competition, reducing government involvement in industry decision-making and encouraging worker share-ownership in their companies.¹⁴⁰ Other objectives identified include elimination of waste, reducing public sector funding of industry, enlarging an active citizenry, and contracting state dependency.¹⁴¹ As a generalization, privatization methods should be designed "to maximise net consumer benefits, measured primarily by lower prices and improved quality of service, rather than stock-market proceeds."¹⁴²

In Britain, the privatization scheme was seen not as one strictly structured program, but rather as a set of various initiatives.¹⁴³ There was no comprehensive plan for how privatization should proceed, rather it took place through a series of ad hoc decisions and experiments.¹⁴⁴ Although the Thatcher government maintained that its privatization policy incorporated a coherent and well thought-out program, commentators have suggested that there really have been a variety of themes often with conflicting implications.¹⁴⁵

One theme which clearly emerged from the privatization policy was labor union opposition. An additional goal of privatization was the control of public sector pay and the weakening of the public sector unions' power,¹⁴⁶ and this was obviously not in the interest of the labor unions. During nationalization, unions had gained benefits, including a greater consultative role with management in the nationalized industries and greater collective bargaining power.¹⁴⁷ With privatization, unions stood to lose these advantages. Also, unions opposed privatization because in practice, privatization usually did not include consultation with employees, nor were employees' rights given top priority by the government in

¹⁴⁰ *Id.*

¹⁴¹ Gamble, *supra* note 28, at 11.

¹⁴² Beesley and Littlechild, *supra* note 125, at 55.

¹⁴³ Gamble, *supra* note 28, at 4.

¹⁴⁴ *Id.* at 7. Gamble explains this idea earlier in his article at 4. "[T]here was no public commitment to denationalization either before the election or in the 1979 manifesto. The Conservatives were committed to reforming industrial relations, and to running nationalized industries as commercial concerns, but not to selling them off. The government seems to have stumbled into the policy. Having successfully piloted the sale of a few small publicly-owned industries and assets, ministers began to realize that the principle could be extended. It was not until 1983 and 1984 that ministers began to set out the principles behind privatization and to justify the measures that had already been taken as part of a coherent programme."

¹⁴⁵ See, e.g., Graham and Prosser, *Privatising Nationalized Industries: Constitutional Issues and New Legal Techniques*, 50 MOD. L. REV. 16, 18-20 (1987) (themes included increased competition, fewer financing restrictions, and development of share ownership).

¹⁴⁶ Gamble, *supra* note 28, at 11.

¹⁴⁷ Thomas, *supra* note 126, at 299-300.

its decisions.¹⁴⁸

Faced with the threat of privatization, the unions reacted by following two general policies. First, unions drew much closer to the Labour Party.¹⁴⁹ The unions solidified their ties to Labour and kept in close touch with Labour spokesmen on specific issues which arose because of privatization.¹⁵⁰ Second, the unions enhanced their professional press and public relations capabilities.¹⁵¹ The unions, through their public relations arms, built alliances with consumer groups, lobbied Parliament, and produced literature to publicize their opposition to privatization.¹⁵²

C. The Effect of Privatization on British Labor Relations

Despite union opposition, however, privatization did occur and it led to changes in industrial relations in Britain. With the alternative being the complete closure of plants resulting in the loss of jobs, unions pragmatically accepted privatization as the lesser of two evils.¹⁵³

The biggest change wrought by privatization was a shift in power away from the national labor leaders and towards the localized bodies. In the nationalized industries, collective bargaining was highly centralized.¹⁵⁴ After privatization, many industries shifted to concentrate more power in the hands of local managers and greater importance was placed on local management's right to initiate change.¹⁵⁵ The cozy, centralized management-labor understandings gave way to a greater emphasis on local negotiations.¹⁵⁶ Bargaining skills, therefore, had to be learned by labor officials at lower levels of representation, and this increased the role of the shop stewards.¹⁵⁷ The unions recognized that they needed to in-

¹⁴⁸ Graham and Prosser, *supra* note 145, at 28.

¹⁴⁹ Thomas, *supra* note 126, at 302.

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.* at 302-303.

¹⁵³ *Id.* at 308.

¹⁵⁴ *Id.* at 300.

¹⁵⁵ *Id.* at 314.

¹⁵⁶ *Id.* at 320. Otto Kahn-Freund recognized the beginnings of this decentralization in negotiations long before privatization. See Clegg, *supra* note 46, at 23 ("Kahn-Freund's perception of British industrial relations had undoubtedly undergone radical change by the time the Donovan Report was written (1968). He had looked below the surface and become aware that intergroup relations counted for much less than he had supposed in 1954. The 'permanent joint institutions' at industry level were less influential in formulating and adopting standards than he had supposed. They did not deserve the description 'mature' so much as 'decaying', undermined by the development of uncontrolled workplace bargaining which bred unofficial strikes.") Privatization would reinforce this trend which Kahn-Freund had perceived some years before.

¹⁵⁷ Thomas, *supra* note 126, at 319; see also Roberts, *supra* note 14, at 296 (more plant-level negotiations by British Steel Corporation in the early 1980s). Cf. Standing, *supra* note 112, at 96 (general decentralization of production to smaller establishments).

vest more resources at the local level because more of the important negotiations were being done there and not at the centralized national level.¹⁵⁸

The shop steward's role was enhanced by these developments and the informal structure became one of the greatest benefits of the shop steward system. In many ways, communication between management and labor improved because the negotiations were at local instead of at remote national levels.¹⁵⁹ Some companies found that the antagonistic union-management attitudes actually began to fade as consultation, co-operation, and information flow increased.¹⁶⁰

Since statutory regulation played a less important role in Britain, greater flexibility had to be achieved through an altering of the balance of power in labor-management relations.¹⁶¹ Fortunately, in Britain this could be done relatively easily. On the employer's side, more responsibility was given to the plant management to make local decisions and to carry on localized negotiations.¹⁶² And on the labor side, the shop steward system was already in place and the shop steward role was not so strictly defined and regulated as to inhibit its ability to adapt and accommodate the changed situation. Because of the informal structure, which had allowed for a great breadth of experience in playing different roles, shop stewards could step into their new roles without being constrained by mandatory regulations and procedures. Such flexibility was of critical importance in ensuring that all of the workers' representational needs were being met in the new negotiating framework.

Privatization in Britain brought about a decentralization in industrial relations. This trend increased the role of the shop stewards. Because the shop steward role was not strictly regulated, shop stewards were able to play the new representational roles required. The question arises whether the same will be true in Germany.

D. Projected Effect of Privatization on German Industrial Relations

The German labor law system, marked by precise and limiting procedural regulations, will present obstacles during the privatization period. The strictly defined rules and regulations are likely to inhibit responsiveness by negotiators on both the management and labor sides.

¹⁵⁸ Thomas, *supra* note 126, at 319-320.

¹⁵⁹ *Id.* at 317.

¹⁶⁰ *Id.*

¹⁶¹ Vranken, *supra* note 112, at 159.

¹⁶² Thomas, *supra* note 126, at 314.

Because of the tendency towards juridification in German labor law, flexibility is systemically impaired.

Wage bargaining may be cited as one prominent example of such inflexibility. In Germany, collective bargaining negotiations on wages are still centralized at the industry level.¹⁶³ These contracts bind all employers in that industry, and in effect prevent the evolution of a wider variety of wage rates via localized agreements.¹⁶⁴ These wage rate contracts allow for great stability in the work force, but the costs of stability are high because there can be no regional or local adjustments in wages to meet changing economic circumstances.¹⁶⁵ The rigidity in such wage contracts can be a distinct disadvantage in an economy adjusting to the kind of changes Germany faces with reunification.¹⁶⁶

Focusing on plant-level labor relations illustrates further potential problems in the privatization of German industry. The British experience with privatization showed how industrial relations at the local level became increasingly important while relations at the national level diminished in significance.¹⁶⁷ More responsibility was taken and more bargaining decisions were made by plant-level representatives of management and labor after privatization in Great Britain. The role of the shop stewards became more important in this decentralized negotiating system.

A similar decentralization process is likely to occur in Germany as the state-run industries of the East are dismantled. Signs of decentralization have already begun¹⁶⁸ and privatization should reinforce this trend just as it did in Britain.¹⁶⁹ Goals of privatization, like the creation of an enterprise culture, reducing government involvement in industry decision-making, and engaging the citizenry,¹⁷⁰ will be effected more easily by allowing for greater freedom in industrial relations at lower levels.

With decentralization, the role of the German plant-level labor representation body, the works council, will be enhanced just as the role of the shop steward was in Britain.¹⁷¹ The difference, though, is that in Britain the shop stewards have no statutory impediments with which to

¹⁶³ Fuerstenberg, *supra* note 57, at 615, 619-620; *see also* Brand, *supra* note 1, at 471.

¹⁶⁴ Brand, *supra* note 1, at 471.

¹⁶⁵ *Id.*

¹⁶⁶ The wage rate contract is only one example of the overall tendency in German labor law towards highly regulated agreements. *See supra* text accompanying notes 18-27, 57-92.

¹⁶⁷ *See supra* text accompanying notes 154-158.

¹⁶⁸ *See supra* text accompanying notes 113-116.

¹⁶⁹ *See supra* text accompanying notes 155-162.

¹⁷⁰ *See supra* text accompanying notes 139-142.

¹⁷¹ *See supra* text accompanying notes 159-162.

contend, whereas in Germany, the works councils are constrained by the detailed procedures of the Works Constitution Act.¹⁷² While shop stewards are restricted to a degree by custom and practice, they do not face the rigid, legalistic framework which governs plant-level industrial relations in Germany. In Britain, the informality of the shop steward role allowed shop stewards to adapt to meet the new requirements that privatization demanded, like a greater role in wage bargaining.¹⁷³ In Germany, there is a danger that the formalism and detail of the Works Constitution Act may not allow the works councils to be as flexible as they will need to be.

The Works Constitution Act does not normally allow works councils to participate in wage negotiations or any other conditions fixed by centralized collective negotiations.¹⁷⁴ The only exception provided is when collective agreements specifically authorize the making of supplementary works agreements.¹⁷⁵ This principle of supplementary, localized works agreements, already recognized in the Works Constitution Act, is one that must be expanded so that more decentralized negotiations are allowed. Using the British experience with privatization as a guide, there will be pressure on management and labor to increasingly decentralize the collective bargaining process. As plant-level negotiations become more important, works councils must be given a role in negotiations, like wage bargaining, regardless of what the centralized agreements say.

The German system needs to utilize flexible and less legalistic plant-level industrial relations to meet the demands of privatization.¹⁷⁶ Privatization will bring changes and problems which nobody can anticipate now. These problems will need to be addressed, and if the British example holds true, these problems will most likely be addressed at the plant level. As unknowns, these problems are not subject to enumeration and codification. Yet, the Works Constitution Act carries strict guidelines defining what is subject to co-determination by the works councils.¹⁷⁷

The works councils are not completely constrained, however. In the Works Constitution Act there is a provision allowing for some additional

¹⁷² See *supra* text accompanying notes 93-94.

¹⁷³ See, e.g., Thomas, *supra* note 126, at 319 (localization of pay bargaining in British hotel industry).

¹⁷⁴ Works Act, *supra* note 72, part IV, div. I, § 77(3).

¹⁷⁵ *Id.*

¹⁷⁶ See, e.g., Cordova, *supra* note 112, at 651 (discussion of "adapting labour institutions and industrial relations systems to current socio-economic pressures").

¹⁷⁷ Works Act, *supra* note 72, part IV, div. III, § 87.

works council rights of co-determination. Part IV, Division IV, § 91 states:

Where a special burden is imposed on the employees as a result of changes in jobs, operations, or the working environment that are in obvious contradiction to the established findings of ergonomics relating to the tailoring of jobs to meet human requirements, the works council may request appropriate action to obviate, relieve, or compensate for the additional stress thus imposed. If no agreement can be reached, the matter shall be decided by the conciliation committee. The award of the conciliation committee shall take the place of an agreement between the employer and the works council.

The conciliation committee is set up to settle differences of opinion between management and labor and is composed of an equal number of assessors chosen by the employer and the works council with an independent chairman accepted by both sides.¹⁷⁸ The conciliation committee hears oral arguments and then votes, with the chairman casting a ballot only in the event of a tie.¹⁷⁹

This provision, section 91 of the Works Constitution Act, must become the primary vehicle by which more negotiations reach the plant level. As the effects of privatization become felt, works councils will need to draw on this provision and use it as a means to empower themselves to effectuate local solutions to local problems. Section 91 provides to the works councils the opportunity to seek relief from "special burdens" imposed by fundamental changes in the industrial environment. Privatization of state-run industries, with the ensuing dislocations and stress imposed on both labor and management, is precisely the kind of fundamental change which this section envisions. Rather than rely on formalized collective bargaining which probably will not address the specific local needs, works councils must seize section 91 of the Works Constitution Act and use it to ensure the negotiating flexibility that they will require.

This section of the Works Constitution Act is critical because it places the decision-making authority with the conciliation committee at the local level. It is also imperative, however, that the conciliation committees agree to allow bargaining decisions to be made at the plant level if there is an impasse between the employer and the works councils. If the conciliation committees refuse to allow local bargaining, flexibility will remain inhibited.

Employers should applaud efforts to increase plant-level bargaining flexibility. German employers already recognize the need for flexibility

¹⁷⁸ Works Act, *supra* note 72, part IV, div. I, § 76(1)(2).

¹⁷⁹ Works Act, *supra* note 72, part IV, div. I, § 76(3).

and they fear that rigid rules will constrain their actions making the road to privatization rockier.¹⁸⁰ The challenges of privatization will apply to employers and employees alike and cooperation will be critical. Newer production techniques resulting from privatization will require more flexible work organization and more flexible labor representation.¹⁸¹ Such changes will affect both sides of the bargaining table.

It is true that such flexibility may carry problems with it. For example, unemployment, especially in former East Germany, may be exacerbated if there is too little structure to labor-management relations.¹⁸² Total deregulation could lead to "a return to the principles of unrestrained competition and the most primitive notions of the labour market."¹⁸³ Flexibility in wage structure is likely to lead to a downward adjustment in wages.¹⁸⁴ Displacement of workers in Germany is less likely to be mitigated by low-wage service jobs as it might in the United States.¹⁸⁵ These factors all may erode social solidarity leading to greater societal and systemic problems in Germany.¹⁸⁶ Union power may also be weakened.¹⁸⁷

Such problems, though, all militate in favor of using section 91 of the Works Constitution Act to increase flexibility at the plant level. Surely, there will be upheavals in German industrial relations. But, ex-

¹⁸⁰ Brand, *supra* note 1, at 470. Brand cites a high ranking official of Adam Opel, the German subsidiary of General Motors, as saying, "We hope to gain considerable advantages in the East, not from lower wages, but from more flexible rules, Japanese-style teamwork and less strict job classification. There is great risk that our rigid union regulations could be imposed on the East." (Quoted from Washington Post, June 30, 1990).

¹⁸¹ Brand, *supra* note 1, at 470.

¹⁸² *Id.* Brand further suggests that unemployment will result from three developments: "(1) Establishments unprofitable to rehabilitate will be closed; (2) where productivity can be improved by modern technology, better management, and so on, workers will be dismissed; and (3) as imports of merchandise from West Germany and other countries displace indigenous products, workers will be let go."

¹⁸³ Cordova, *supra* note 112, at 651. *But cf.* Vranken, *supra* note 112, at 146 (financially burdensome termination restrictions may exacerbate high unemployment rates).

¹⁸⁴ Brand, *supra* note 1, at 472. Although initially West German unions have been able to maintain the level of wages, commentators concede that there will continue to be downward pressures on wages due to competitive markets and excess labor availability. *See*, Passell, *Economic Scene: East Germany's Morning After*, N.Y. Times, Aug 1, 1990, D2, col. 1.

¹⁸⁵ Brand, *supra* note 1, at 470.

¹⁸⁶ *Id.* at 468. Brand also notes the "segmentation of labor markets" leading to decreased solidarity among workers, at 472.

¹⁸⁷ Brand, *supra* note 1, at 472. Brand points out that, unlike in other countries, East German trade unions did not play a leading role in the events precipitating the downfall of the Communist regime. Similarly, the trade unions throughout Germany did not play a large role in the first all German election in November, 1990: "With ill-concealed anxiety, Ernst Breit, the head of the German Trade Union Federation, states (after an apology for past relations with his East German counterparts), 'There remains the fact that the November elections took place at best without, at worst against the trade unions of the East and West.'"

isting labor law structures can be used as a stabilizing force. By maintaining some adherence to established and proven systems, social upheavals can be mitigated. Unlike in Britain where the tradition is entirely based on custom and practice, German industry, workers and employers alike, is accustomed to a statutory framework. Both workers and management are comfortable with detailed procedures and statutory underpinnings. Such a framework should not be entirely abandoned.

By using the existing Works Constitution Act, management and labor will keep most of the structure and organization to which they have become accustomed. Yet, by utilizing section 91, they can inject more flexibility into the structure. What is needed is to use the existing framework to ensure flexibility in handling unanticipated problems and to allow greater decision-making and negotiating at the plant level.

The new Germany will not be a bigger version of the Federal Republic.¹⁸⁸ It will be more focused on the East, "more eastward-looking, thanks to its growing economic involvement with the Soviet Union and Eastern Europe and to the pull of Berlin as the new German capital, even if it does not become the seat of government."¹⁸⁹

This new feature of the German state also suggests a need for flexibility in plant-level industrial relations. In former East Germany, decades of exposure to a highly centralized trade union bureaucracy created dissatisfaction, skepticism and distrust in workers.¹⁹⁰ Such distrust in bureaucracy is likely to affect workers' impressions of the new labor system.¹⁹¹ A bitterness left over from Stalinist times is likely to affect workers' attitudes towards authoritarian, centralized labor representation.¹⁹² The idea of a centrally managed "welfare state" may be associated with mismanagement and repression and therefore workers' desires may turn more towards individual rather than "collective" development.¹⁹³ Socialism promised industrial democracy but that promise was empty in the face of economic failure. Eastern workers' desires to realize industrial democracy may manifest themselves in demands for responsive, attentive representatives at the local level rather than detached

¹⁸⁸ *Germany's Subdued Celebration*, *supra* note 1, at 53.

¹⁸⁹ *Id.*

¹⁹⁰ Brand, *supra* note 1, at 472; see also Bernstein, *Labor: How New Germany Affects U.S.*, L.A. Times., Oct. 9, 1990, D3, col. 4. ("In theory, East German workers through their unions had a meaningful role in managing the state-owned companies. In practice, the unions were only 'transmission belts' used by the Communist government to control workers and prevent strikes").

¹⁹¹ Brand, *supra* note 1, at 472.

¹⁹² *Id.* at 471.

¹⁹³ *Id.*; see also Markovits, *supra* note 2, at 757-758 (West German workers more likely to use court system to assert individual autonomy, East German workers more likely to experience frustration due to their dependency on socialist state).

and remote bureaucratic figureheads.¹⁹⁴

V. CONCLUSIONS

When British industry was privatized in the 1980s, more industrial bargaining took place at the plant level rather than the national level. This decentralization increased the role of the shop stewards, the British plant-level labor representational body. British industrial relations structures at the plant level were not bound by formal, legalistic regulations. Therefore, the shop stewards were able to adapt to the new bargaining structure and facilitate improved collective negotiations.

Germany is facing a similar period of privatization in the 1990s. In Germany, there should also be a decentralization of collective bargaining placing more emphasis on discussions at the plant level. As in Britain, the role of the plant-level labor representation bodies, the works councils, will be enhanced. However, unlike in Britain, the works councils are constrained more by the formal procedures embodied in the Works Constitution Act. To ensure the flexibility in negotiations that will be needed to accommodate the changes wrought by privatization, the works councils must employ the provisions in the Works Constitution Act that enable them to participate more fully in plant-level bargaining.

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¹⁹⁴ Commentators have recognized the need for socialist labor law to also allow greater participation at the enterprise level. See, e.g., Ivanov, *Labor Law in Socialist Countries: Three Issues of General Theory*, 11 COMP. LAB. L. 81 (1989) ("The labor field must become democratic to the extent of creating opportunities for individual enterprises to establish their own legal norms," at 85; "[I]ndustrial democracy must permit workers to become their own managers in solving problems at the enterprise level," at 88).