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Bogoeski, V.

DOI
10.1093/indlaw/dwac020

Publication date
2023

Document Version
Final published version

Published in
Industrial Law Journal

Industrial Law Journal, Vol. 52, No. 1, March 2023
https://doi.org/10.1093/indlaw/dwac020

Nonwaivability of Labour Rights, Individual Waivers and the Emancipatory Function of Labour Law

VLADIMIR BOGOESKI*

Acceptance Date June 28, 2022; Advanced Access publication on July 22, 2022.

ABSTRACT

This paper intervenes in ongoing discussions on emerging legislation and jurisprudence across jurisdictions offering employees the possibility to renounce established labour rights through individual labour rights waivers. Building on discussions about consent and coercion in the employment relationship, the paper argues that individual labour rights waivers in most cases undermine labour law's overall emancipatory potential, as they reverse the decommodifying effects of nonwaivable labour rights by re-appropriating the capitalist market logic that those very rights seek to offset. The paper's intervention is twofold. It first develops the argument about the emancipatory function of labour law, and uses it to examine the negative effects of individual waivers on labour law's capacity to emancipate working people and society at large. Second, the paper introduces a jurisdiction that until now has not been considered in the discussions on individual waivers, namely Germany. Although discussions on individual waivers in the scholarly discourse in Germany are marginal, the paper examines what current exceptions to nonwaivability might qualify as waivers, and argues that the reasons why individual labour rights waivers are

*Amsterdam Centre for Transformative Private Law (ACT), Amsterdam Law School, The Netherlands, email: v.bogoeski@uva.nl.

Acknowledgements: This project was completed during my time as a postdoctoral fellow at the Law Faculty of the Hebrew University of Jerusalem in 2020. The research was supported by the Israel Science Foundation (grant no. 1611/19, PI Guy Davidov). I am very grateful to Guy Davidov for mentoring me during the postdoctoral fellowship in difficult times (the outbreak of the Covid-19 pandemic) and for continuously providing very helpful feedback and support. I would further like to thank the participants in the roundtable 'Consent, coercion and choice in labour law – of old dilemmas and new challenges', Labour Law Research Network 5 Conference, 29 June 2021, for engaging with ideas based on the first draft of this article. I would particularly like to thank Eva Kocher, Nastazja Potocka-Sionek, Miriam Kullmann, Andrea Iossa, Theresa Tschenker and the two anonymous reviewers for valuable comments on earlier drafts. All errors of fact and interpretation remain my own.

less present lie in the strong collective dimension of the ideational framework that underpins German labour law.

1. INTRODUCTION

A large share of work globally happens outside the standard employment relationship which has traditionally been in the focus of labour law.[1] Even in the Global North, where institutionalised labour relations and employment regulation not so long ago used to cover the majority of the workforce, in the past few decades we have witnessed a rapid increase of different forms of precarious work outside the standard employment relationship.[2] Aside from such external pressure due to the growing variety of options for exit from a regulated employment relationship created by (bogus) self-employment,[3] platform-mediated work arrangements,[4] other alternative forms of precarious or atypical work[5] and overall 'informal' work,[6] labour law also endures constant pressure by regulatory changes and practices addressing the employment relationship directly. Such 'internal' pressure on already established labour rights and standards within the regulated employment relationship has been demonstrated by emerging legislation and jurisprudence across jurisdictions offering employees the possibility to renounce established labour rights through individual waivers.

There are various examples of individual labour rights waivers. As observed by Davidov, for example, we have seen working time regulations become a subject to opt outs and waivers in several jurisdictions, where employees can voluntarily (in theory at least) increase their working time

[1] ILO, 'Women and Men in the Informal Economy: A Statistical Picture. Third Edition' (Geneva: ILO, 2018), ILO Report, http://www.ilo.org/global/publications/books/WCMS_626831/lang--en/index.htm (accessed 12 July 2022).

[2] See P. Schoukens and A. Barrio, 'The Changing Concept of Work: When Does Typical Work Become Atypical?' (2017) 8 *European Labour Law Journal* 306.

[3] See F. Behling and M. Harvey, 'The Evolution of False Self-Employment in the British Construction Industry: A Neo-Polanyian Account of Labour Market Formation' (2015) 29 *Work, Employment and Society* 969.

[4] See R. B. Collier, V. Dubal and C. Carter, 'Labor Platforms and Gig Work: The Failure to Regulate' (Berkeley: IRLE, 2017). IRLE Working Paper No. 106-17, http://irle.berkeley.edu/files/2017/Labor-Platforms-and-Gig-Work.pdf (accessed 12 July 2022).

[5] See the discussions in L. Ratti and A. García-Muñoz Alhambra, 'In-Work Poverty in the EU' (EU Law Live Special Issue (I), 3 December 2021), https://orbilu.uni.lu/handle/10993/48816 (accessed 30 November 2021).

[6] See n.1.

beyond the generally applicable limits.[7] This has already been the case in the UK, Hungary and Brazil among others.[8] Further examples include the case of arbitration agreements in the USA through which employees can waive their right to take labour law claims to court.[9] While in the latter case it might be relatively clear that employees are waiving their right to access to court for no clear benefit in return, except for keeping the job at any price under both systemic and direct pressure by employers, this might be seen differently in the case of waiving the right to work a maximum of working hours per week or day, where the immediate increase in income in return for more working hours might be considered a desirable trade-off by an employee.

Following these examples, individual labour rights waivers can be understood as contractual arrangements between an employee and their employer, resulting in a consensual renunciation of existing labour rights in exchange for some other benefits explicitly desired by the employee.[10] It is important to make clear that the article does not engage with collective waivers invoked by trade unions or work councils to usually set aside statutory labour rights.[11] The waivers that we discuss are individual requests made by the employee expressing the wish that otherwise applicable labour rights granted by law or collective agreements shall no longer apply to them. Most importantly, individual waivers can only be considered both legal and 'legitimate' only if they are invoked under no direct or indirect pressure by the employer.[12] In this sense, the individual waivers in the focus of this inquiry,

[7] G. Davidov, 'Non-Waivability in Labour Law' (2020) 40 *Oxford Journal of Legal Studies* 482, 483–4.

[8] Ibid., at 484.

[9] Ibid.

[10] A recent example where the employee's individual benefits and the overall voluntary consent base of the waiver are clearly absent occurred after the outbreak of the Covid-19 pandemic in some states in the USA. This example opened discussions about the enforceability of waivers, through which workers could waive claims to compensation and/or medical benefits relating to illness that occurred through exposure to Covid-19 at the workplace: see T. Marnin, C. Moore and P. Shelburne, 'Returning to Work: COVID-19, Workers' Compensation, and Employee/Consultant Waivers' (*White & Case LLP*, 10 August 2020), https://www.whitecase.com/publications/alert/returning-work-covid-19-workers-compensation-and-employeeconsultant-waivers (accessed 30 November 2021).

[11] See the discussion on 'union waivers' in M. W. Finkin, 'Union Dispossession of Labour Protection: A Paradox in Two Legal Systems' (2020) 36 *International Journal of Comparative Labour Law and Industrial Relations* 1.

[12] For example, this has clearly not been the case in Hungary, where, as observed by Kun, recent changes in regulation have made possible for employers to either waive labour rights singlehandedly or to easily coerce their employees into waiving their labour rights themselves.

where allowed, are legal per se and are generally framed as opt-outs from existing laws and regulation. In other words, individual waivers are granting employees a right (to decide) not to have labour rights.[13]

What does it mean to have a right to waive your labour rights and what the effects of such a right could be? In spite of the growing set of examples for recognised individual labour rights waivers in some jurisdictions, through both legislation and jurisprudence, the effects of such individual waivers on the general nonwaivability principle in labour law and workers themselves have not been widely discussed.[14] Yet it is crucial to understand what effects on the overall legal and political position of workers in society such waivers could have and what their place in a progressive vision for the future of labour law might be. We might think that discussions on the purpose or justifications of waivers that enable workers to 'freely' decide what is best for them and thus waive labour protection standards established through law and regulation, might evoke and awaken debates on protection and private autonomy from the *Lochner* era in the USA.[15] Davidov's recent intervention, for example, explores precisely that relationship between labour law's nonwaivability principle, individual waivers and workers' private autonomy to invoke them, searching for justifications for restricting private autonomy through the nonwaivability principle mainly in worker protection and prevention of harm to others.[16]

Considering the potential of such waivers to weaken labour law's capacity to protect workers overall, but at the same time recognising the pressure by

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See A. Kun, 'HUNGARY—The Impact of the Labour Law Measures Taken by the Authorities: Reflections One Year after the Official Recognition of Covid-19 as a Pandemic' (CIELO Laboral, 2021), http://www.cielolaboral.com/wp-content/uploads/2021/04/kun_noticias_cielo_n3_2021.pdf (accessed 12 July 2022). See also Davidov, 'Non-Waivability in Labour Law' (n.7), at 484.

[13] An analogy to Arendt's 'right to have rights' in H. Arendt, *Imperialism: Part Two of The Origins of Totalitarianism* (Boston: Houghton Mifflin Harcourt, 1968 [1951]), at 177.

[14] Davidov (n.7), at 482. Based on examples from various jurisdictions in Europe, Israel and the USA, Davidov offers such theoretical discussion on waivers through an exploration of the theoretical foundations of the nonwaivability principle in labour law, juxtaposing imposition of nonwaivable, mandatory labour rights on workers and workers' autonomy to make own choices in their own best interest. Another contribution focuses on nonwaivability as foreclosure for individual waivers in the Latin American context, in S. Gamonal C. and C. F. Rosado Marzán, *Principled Labor Law: U.S. Labor Law through a Latin American Method* (Oxford: Oxford University Press, 2019), see Ch 4. See also L. Wedderburn, 'Inderogability, Collective Agreements, and Community Law' (1992) 21 ILJ 245.

[15] See S. R. Bagenstos, 'Consent, Coercion, and Employment Law' (2020) 55 *Harvard Civil Rights-Civil Liberties Law Review* 409, 410ff.

[16] See Davidov (n.7).

the currently existing variety of options for exit from the regulatory domain of labour law, individual labour rights waivers invite theoretical discussions and also pose an existential choice for labour law scholarship and practice. Which of them, and under what conditions could they possibly be tolerated within the labour law framework? Or should they simply not be tolerated at all? This dilemma echoes familiar discussions about the survival of labour law in the modern workplace, framed as a choice between deepening labour law's material scope or expanding its coverage at the cost of stronger rules.[17]

This paper attempts to complement the few previous explorations of the relationship between individual labour rights waivers and the general principle of nonwaivability in labour law,[18] in two steps. First, it examines the effects of individual waivers on labour law's emancipatory function. Second, the paper expands the current discussions by introducing insides from a jurisdiction that has not been discussed in this context before, namely Germany.

In this regard, the paper proposes a shift from approaching individual waivers through the contractual lens putting workers' private autonomy at the centre, to exploring the impact of waivers through their effect on the collective dimension and the societal function of labour law, which the paper argues is, to emancipate working people and society at large. Taking the structural subordination of labour to capital as a starting point, the paper seeks to exceed the lens of worker protection, and examines the meaning of the nonwaivability principle and individual labour rights waivers for the emancipatory purpose of labour law and the political power of organised labour, materialised in labour's collective capacity to democratically set, regulate and influence the regulation of social objectives. Understanding labour law and collective forms of worker organisation as an effective way to decommodify and thus to emancipate labour,[19] the paper seeks to explore the ways in which individual labour rights waivers, even when explicitly requested by employees and based on formal informed consent, have a commodifying rather than emancipatory effect.

[17] See N. Zatz, 'The Impossibility of Work Law' in G. Davidov and B. Langille (eds), *The Idea of Labour Law* (Oxford: Oxford University Press, 2011). See also G. Davidov, M. Freedland and N. Countouris, 'The Subjects of Labor Law: "Employees" and Other Workers' in M. W. Finkin and G. Mundlak (eds), *Comparative Labor Law* (Northampton: Edward Elgar Publishing, 2015).

[18] For example, Davidov, 'Non-Waivability in Labour Law' (n.7); Gamonal C. and Rosado Marzán (n.14), Ch 4.

[19] The notion of 'commodification' of labour in the sense of K. Polanyi, *The Great Transformation: The Political and Economic Origins of Our Time* (Boston: Beacon Press, 2001 [1944]).

Although we are currently witnessing various jurisdictions introducing individual labour rights waivers as the ones mentioned earlier, the article complements the theoretical discussion with a glimpse into a jurisdiction where possibilities for such waivers barely exist and the discussion around them is marginal, namely Germany. While this choice might sound counterintuitive at first, it is justified through the learning potential in understanding why in this particular jurisdiction waivers might be less likely to occur. The article searches for answers in the ideational framework that underpins German labour law and incorporates a strong collective dimension.

The paper is structured as follows. Section 2 conceptualises labour law as an emancipatory endeavour; Section 2A defines the labour law's emancipatory function as 'decommodification' through labour law; Section 2B brings the concept of emancipation together with individual waivers of labour rights, explaining why individual waivers reduce the emancipatory potential of labour law, thus reinstating the relevance of labour law's foundational nonwaivability principle. The remaining part of the paper examines the background of the general opposition to the idea of (individual) labour rights waivers in a concrete national context, namely German labour law. Section 3 provides contextual background, briefly tracing the 'collective' in the transition of the of German labour law. Section 3A situates individual labour rights waivers in the German labour law context. Section 3B examines current possibilities to individually waive different labour rights and entitlements. The final section (Section 4) offers some concluding remarks.

2. THE EMANCIPATORY FUNCTION OF LABOUR LAW

Emancipation is a broad notion that requires clarification and specification in order to be applied in a labour law context. Could we at all centre a discussion as the one here around 'emancipation'—one of the most political of all concepts—in the context of labour law? Is the notion of 'human emancipation' in the Marxist tradition, recently revived by scholars identifying themselves with the Frankfurt School,[20] not too powerful and too broad to

[20] R. Jaeggi, 'Wir sollten wieder von Emanzipation reden' (*DER STANDARD*, 24 October 2018), https://www.derstandard.de/story/2000089940706/rahel-jaeggiwir-sollten-wieder-von-emanzipation-reden (accessed 9 April 2020); H. Bethke, 'Tagung über Emanzipation: Dialektik ohne Aufklärung' (*FAZ.NET*, 29 May 2018), https://www.faz.net/1.5611863 (accessed 9 April 2020); 'Emanzipation' (*ktb*), http://criticaltheoryinberlin.de/emanzipation/ (accessed 25 October 2021). One could argue that non-work can be the only form of true emancipation.

be associated with a 'project' such as labour law, with clear limitations regarding its scope of application and the forms of work to which it applies? After all, labour law is law, and thus is part of the structures of our capitalist social order, which might raise the question if any kind of law, including labour law, can ever be emancipatory.[21]

While some labour lawyers and labour law scholars might think that their field of legal practice or scholarly discipline self-evidently has an emancipatory function, it has rarely been articulated in those terms. One exception has been Blackett, who, for example, has discussed labour law through the lens of emancipation, referring to emancipation as a crucial starting point for the idea of labour law, reminding us where labour law comes from as the language of emancipation 'evokes historical, structural inequality – forms of unfreedom'.[22] According to her,

> To the extent that labour law helps to resist commoditization, its regulatory response should not only be protection, but emancipation. In other words, it recognizes resistance and creates/preserves space (capabilities) for the effective exercise of agency.[23]

This statement by Blackett offers a valuable starting point for our enquiry into the meaning of emancipation in the context of labour law. Through this, she already brings in five definitional concepts related to emancipation in the context of labour law, namely 'commoditization' (hereinafter referred

Arendt, for example, states that 'only when labour is abolished can the realm of freedom supplant the realm of necessity': H. Arendt, *The Human Condition: Second Edition* (Chicago: University of Chicago Press, 2013), at 104. In Arendt's reading, 'the most human and productive of man's activities—the revolution, has not the task of emancipating the labouring classes but of emancipating man from labour.' Arendt sees this as a major contradiction in Marx's writing as he defines man as animal laborans and at the same time his goal is having a society in which this greatest and most human power is no longer necessary, ibid., at 105.

[21] On the role of law in capitalism, see E. B. Pashukanis, *The General Theory of Law & Marxism* (Piscataway: Transaction Publishers, 2001 [1929]); M. Dimick, 'Pashukanis' Commodity-Form Theory of Law' in P. O'Connell and U. Özsu (eds), *Research Handbook on Law and Marxism* (Northampton: Edward Elgar Publishing, 2021); Z. Adams, 'A Structural Approach to Labour Law' (2022) 46 *Cambridge Journal of Economics* 447; Z. Adams, *Labour and the Wage: A Critical Perspective* (Oxford: Oxford University Press, 2020).

[22] A. Blackett, 'Emancipation in the Idea of Labour Law' in G. Davidov and B. Langille (eds), *The Idea of Labour Law* (Oxford: Oxford University Press, 2011), at 420.

[23] Ibid., at 431. It is important to note that often, and in the North-American context in particular, the notion of emancipation relates strongly to the emancipation from slavery and is thus strongly tied to questions of racial injustice.

to as 'commodification'),[24] protection, resistance, capabilities and agency. In her view, the role of labour law should be understood as more than merely offering protection to working people,[25] but emancipating them from the commodifying structures of the capitalist mode of production and moreover, capitalism as a social order.[26]

Within the capitalist mode of production, any work relationship based on wage labour will inherently be hierarchical, where labour is structurally subordinated to capital and is thus just another commodity 'free to circulate to the highest bidder'.[27] This formal freedom for labour power to be sold or exchanged on a market by its owners, circulating freely according to the economic rationality of capitalist markets, does not allow labour to impact the 'bid' itself, as the structural and existential dependence of labour on capital yields the imbalance of negotiating power that renders labour systemically subordinated to capital.[28] In the words of Offe and Wiesenthal, 'asymmetry of power and freedom emerges between the supply and demand sides as soon as labour power is allocated through markets, i.e., as soon as it is institutionally treated as if it were a commodity'.[29] The structural subordination

[24] Commodity and commodification are mostly used in the Marxist and Polanyian tradition, see Polanyi (n.19). See 'the argument from noncommodification' in H. Spector, 'Philosophical Foundations of Labor Law' (2005) 33 *Florida State University Law Review* 1119, 1136ff.

[25] Langille differentiates between the 'emancipated approach' and labour law's conventional objective of offering workers protection, in B. Langille, 'Human Development: A Way out of Labour Law's Fly Bottle' in H. Collins, G. Lester and V. Mantouvalou (eds), *Philosophical Foundations of Labour Law* (Oxford: Oxford University Press, 2019), at 87.

[26] For a discussion of capitalism as a social order, see N. Fraser and R. Jaeggi, *Capitalism: A Conversation in Critical Theory* (Medford, MA: Polity: 2018).

[27] J. D. Schmidt, *Free to Work: Labor Law, Emancipation, and Reconstruction, 1815–1880* (Athens, GA: University of Georgia Press, 1998), at 5. See Polanyi (n.19). On the contradiction between the ILO foundational principle 'labour is not a commodity' and labour being indeed treated as a special kind of commodity, see the discussion in F. Hendrickx, 'Foundations and Functions of Contemporary Labour Law' (2012) 3 *European Labour Law Journal* 108.

[28] Davidov, for example, differentiates between individual and collective subordination. The former is understood as the direct subordination of an individual employee to a concrete employer in a given employment relationship, while the latter is understood as the subordination of labour as a group or a category to capital, which is a structural relationship of power rather than an individual constellation as the former. This distinction is, however, rather analytical than factual, because the two dimensions of subordination are empirically interrelated as the structural subordination of labour to capital determines the subordination in a concrete employment relationship. See G. Davidov, 'Subordination vs Domination: Exploring the Differences' (2017) 33 *International Journal of Comparative Labour Law and Industrial Relations* 365.

[29] C. Offe and H. Wiesenthal, 'Two Logics of Collective Action: Theoretical Notes on Social Class and Organizational Form' (1980) 1 *Political Power and Social Theory* 67, at 70. Sinzheimer has used the concept of dependency in a similar fashion as structural subordination is used here. See the discussion in Davidov, 'Subordination vs Domination' (n.28), 370ff.

and overall dependence of workers on their employers arises from labour's exclusion from access to the means of production owned exclusively by capital and results in the subsistence of waged workers being existentially dependent on the award they receive in return for their labour power traded with capital owners.[30] The essence of the formality of this freedom of working people to sell their labour power within the capitalist mode of production is reflected in the formal freedom of workers to choose to renounce their labour rights through invoking individual labour rights waivers.

Against this background, the question is what labour law can do for working people given the structural conditions underpinning labour and work in our capitalist social order, where exploitation is innate to the wage relation allowing employers to always extract surplus from the value that labour has produced. These conditions and the structural extraction of surplus labour have only been further exacerbated through financialisation, racialised production processes spanning throughout obscure global value chains, imperialism, colonialism and digital disruption. In Blackett's view, for example, labour law intents to resist such structures through creating (collective) capabilities and opening up space within the capitalist social order, enabling labour to exercise some agency collectively and individually.[31] Contrary to such a primarily emancipatory vision of labour law, the conventional labour law narrative centred around the employment contract sees labour law's purpose in 'protecting workers from the injustice that is sure to arise from the contract of employment given the inequality of bargaining power between an employer and an employee',[32] inherent to a relationship resting on subordination, domination and exploitation.[33] In contrast to this, 'emancipation through labour law' is a broader approach that goes beyond the inequality of bargaining power in relation to the individual employment

[30] H. Arthurs, 'Labor Law As the Law of Economic Subordination and Resistance: A Thought Experiment' (2013) 34 *Comparative Labor Law & Policy Journal* 585; cited in Davidov (n.28), at 369. Alternatively, Hale sees the income as a reward for labourers not using their actual powers of withholding their labour services: R. L. Hale, 'Coercion and Distribution in a Supposedly Non-Coercive State' (1923) 38 *Political Science Quarterly* 470, at 474.

[31] Blackett (n.22).

[32] Critiqued in Langille (n.25), at 90. See further the discussion in M. Kullmann, 'Work-Related Securities: An Alternative Approach to Protect the Workforce?' (2018) 34 *International Journal of Comparative Labour Law and Industrial Relations* 395; A. Iossa, 'Anti-Authoritarian Employment Relations? Labour Law from an Anarchist Perspective' in A. Blackham, M. Kullmann and A. Zbyszewska (eds), *Theorising Labour Law in a Changing World: Towards Inclusive Labour Law* (Oxford: Bloomsbury Publishing, 2019).

[33] On the difference in meaning between the notions of 'subordination' and 'domination' in the context of labour law, see Davidov (n.28).

contract. In this broader understanding, labour law's role as an emancipatory project consists in providing resistance to the structural process of commodification of labour through the very mode of production, capital accumulation and capitalist (labour) markets, which has an impact on the overall human condition and the capacity of working people (through creating/preserving space/capabilities)[34] to effectively exercise agency, both at the workplace and beyond. This is not merely a wishful thinking and solely a normative vision about what labour law should become, but it is an invitation to reflect on what labour law has historically striven for and what possibilities it currently offers when perceived beyond the contractual framework.

What can then labour law do in order to effectively resist such commodifying forces and injustice that arises from them? According to Marxist (inspired) critique of capitalism, in capitalism as a social order, 'experiences of injustice emerges along three trajectories of domination', namely structural, relational and systemic domination.[35] The structural domination rests on class structure as a basis of capitalism as a system of institutions and social relations, shaped by the private ownership of productive assets secured via property rights.[36] In Azmanova's words, 'relational domination consists in the subordination of one group of actors to another due to power asymmetries', which are usually addressed through strategies of redistribution and inclusion.[37] One could argue that labour law could partly be considered such a strategy, 'returning to workers bigger share of the value they produce in the form of higher wages and other benefits', which would reduce but not terminate exploitation (employers/capital will continue to appropriate a disproportionately bigger chunk of surplus labour), therefore not sufficiently

[34] In line with Blackett's understanding of the emancipatory role of labour law cited above, Blackett (n.22), at 431.

[35] A. Azmanova, 'The Paradox of Emancipation: Populism, Democracy and the Soul of the Left' (2019) 45 *Philosophy & Social Criticism* 1186, at 1199.

[36] Ibid. On the constitutive role of the right of property for the overall societal framework and socio-economic relations (without using the class language), see Hale (n.30).

[37] Ibid., Azmanova (n.35), at 1199. On how these might downplay class conflict, see K. Klare, 'Labor Law as Ideology: Toward a New Historiography of Collective Bargaining Law' (1981) 4 *Berkeley Journal of Employment & Labor Law* 450, 462–3; 'In the traditional theory of collective bargaining law [liberal collective bargaining theory], industrial conflict has been denuded of political or class-based content and recast as the struggle of countervailing pressure groups solely over issues of economic distribution' (ibid. at 465). Commenting on Klare, emphasising the problem of development of conservative labour law as a demobilising ideology in the US American context of the early 80s, see D. Kennedy, 'Critical Labor Law Theory: A Comment' (1981) 4 *Berkeley Journal of Employment & Labor Law* 503, at 504.

tackling structural domination in a way that might lead to full (human) emancipation.[38] Such full human emancipation will require breaking with exclusive ownership of the means of production by capital and the inherent subordination of labour deriving from there. Finally, 'systemic domination is the subordination of all members of society to the operational logic of capitalism … including those who escape structural and relational domination (owners of means of production and well-paid labour market insiders)'.[39]

Within this framework, one might argue that current labour law's emancipatory efforts would likely remain trapped in what Azmanova describes as the 'paradox of emancipation'.[40] This paradox means that the emancipatory effort of seeking equality and inclusion validates the model within which the emancipation is being sought in the first place—accepting systemic domination for the sake of reducing structural and relational domination.[41] The growth foundation of the capitalist economic model, based on profit maximisation through competitive production, extraction, exploitation and capital accumulation, remains intact, further producing social harms.[42]

However, recognising this 'paradox of emancipation' does not mean that labour law holds no emancipatory potential that can be progressively developed beyond its current dominant imaginary. The multitude of labour movements that coproduced labour law across national contexts and the different kinds of labour and social struggles which historically found support in labour law and transformed societies improving living and working conditions for many, are the evidence of labour law's historic origin as a product of emancipation struggles as well as of its current emancipatory potential.[43] Moreover, reducing present labour law's emancipatory efforts to its protective dimension and systemic complacency as part of the 'industrial peace agreement'[44] fails to capture this history and labour law's presence as

[38] Ibid., Azmanova (n.35).

[39] Ibid., at 1199.

[40] Ibid.

[41] Ibid., at 1200. For a similar critique, see also Klare, 'Labor Law as Ideology' (n.37), at 452. Collective bargaining bearing guilt for accepting the authoritarian nature of the employment relationship, in ibid., at 461. For a critique on the conceptualisation of labour law and collective bargaining as a regulation of class conflict, see also S. Lynd, 'Government Without Rights: The Labor Law Vision of Archibald Cox' (1981) 4 *Industrial Relations Law Journal* 483, at 487.

[42] Ibid., Azmanova (n.35), at 1200.

[43] See K. Marx, 'The Working-Day' in *Capital: Volume I* (London: Penguin, 1992), Ch 10. See also G. Ioannou, 'The Communicative Power of Trade Unionism: Labour Law, Political Opportunity Structure and Social Movement Strategy' (2020) 27 *Industrielle Beziehungen* 286.

[44] See Klare, 'Labor Law as Ideology' (n.37).

a legal discipline emanating from and continuously evolving as a result of a class struggle.[45]

The most robust emancipatory achievement that labour law has to offer in the present capitalist social order is its capacity to carve out spaces for collective action and endow collectively organised labour with real political agency to set, regulate and define social objectives that often have a decommodifying effect.[46] Thus, by constituting labour as a collective political actor with real agency, labour law intervenes and disturbs the innate systemic tendency of the capitalist social order to conceptualise the relationship between labour and capital as an interpersonal contractual relationship,[47] constituting labour power as a commodity.[48] While labour law admittedly assumes the same commodity form of law in capitalism that is constitutive of labour power as commodity[49] and it thus has clear limits when it comes to tackling the structures behind capitalist social relations, it does more than addressing the 'surface-level conflicts' that those structure generate.[50] Namely, a significant part of labour law beyond the employment contract exposes the structures that constitute labour as a commodity and the illusion of formal inequality under law. Addressing those through constituting labour as a collective political actor able to at least partly influence material outcomes of the structures in place, leads to at least a partial emancipation and constitutes a starting point for developing further more progressive imaginaries of emancipation that might ultimately question labour law's legal form itself.

We need to bear in mind, however, that aside from Azmanova's 'paradox of emancipation', at least three additional caveats stand in the way of further exploring the emancipatory potential of labour law. While addressing these caveats in-depth remains beyond the scope of this article, they at least

[45] Spector (n.24), at 1128. To the critique of labour law being accomplice in sustaining the capitalist model by simply making it more bearable (thus legitimising it), Spector refers to as 'cynical leftist (socialist) critique of labour law', which accuses labour law of having an impeding effect on the working class social struggle, being a 'strategic device adopted by the ruling classes and their political allies to calm down social discontent and appease the working class's revolutionary impetus'.

[46] As discussed earlier, see Blackett (n.22).

[47] Adams, *Labour and the Wage* (n.21), at 54.

[48] Offe and Wiesenthal (n.29), at 70.

[49] S. Deakin and F. Wilkinson, *The Law of the Labour Market: Industrialization, Employment, and Legal Evolution* (Oxford: Oxford University Press, 2005), Ch 1; on Commodity-Form Theory of Law, see Pashukanis (n.21) and Dimick (n.21).

[50] Adams, 'A Structural Approach to Labour Law' (n.21), at 454.

need to be briefly mentioned. First, most workers globally fall outside the domain of regular labour law as understood in the Global North.[51] Even in the global North, workers falling outside the scope of labour law already belong to vulnerable societal group such as migrants, people of colour or other minority groups (Blackett's 'South within the North').[52] Second, labour law remains foreign to a big portion of workers in the Global South,[53] in addition to the regular insiders-outsiders divide yielding a North-South division line.[54] Third, the traditional labour framework fails to account for reproductive labour and reinforces the artificial separation of productive and re/non-productive labour which forges different layers of gender and racial injustice.[55] These three caveats might leave us in a somewhat defensive position when arguing about the emancipatory strength of labour law, particularly when it comes to achieving human emancipation in a broader sense and emancipation of society at large. Most of these concerns are captured in this framing by Hardt and Negri:

> Gone are the days – and thankfully so – when the working class or, more specifically, the segment of the class most central to capitalist production could claim to represent the others in struggle. Gone are the days when industrial workers could claim to represent peasants, when male workers could claim to represent women in the reproductive sphere, when white workers could claim to represent black workers, and so worth.[56]

In this regard, any attempt to search for further emancipatory potential in labour law shall account for the possibilities of overcoming its shortcomings to emancipate societal groups other than employees within the standard

[51] See n.1.

[52] Blackett (n.22), at 435.

[53] See S. Routh, *Enhancing Capabilities through Labour Law: Informal Workers in India* (New York: Routledge, 2014).

[54] See R. Dukes, 'Insiders, Outsiders and Conflicts of Interest' in D. Ashiagbor (ed.), *Re-Imagining Labour Law for Development: Informal Work in the Global North and South* (London: Bloomsbury, 2018); G. Mundlak, 'The Third Function of Labour Law: Distributing Labour Market Opportunities among Workers' in G. Davidov and B. Langille (eds), *The Idea of Labour Law* (Oxford: Oxford University Press, 2011). See sociologist L. Pettinger, *What's Wrong with Work?* (Bristol and Chicago: Policy Press, 2019), at 99: 'labour aristocracy of unionised (male) manufacturing in countries with decent welfare state settlements', cited in A. Horgan, *Lost in Work: Escaping Capitalism* (London: Pluto Press, 2021), at 55.

[55] See S. Federici, *Caliban and the Witch* (New York: Autonomedia, 2004); M. Duffy, 'Doing the Dirty Work: Gender, Race, and Reproductive Labor in Historical Perspective' (2007) 21 *Gender and Society* 313.

[56] M. Hardt and A. Negri, *Assembly* (Oxford: Oxford University Press, 2017), at 66.

employment relationship. Nevertheless, while these recognitions reveal current challenges for labour law and demand different strategies from organised labour, scholarship and overall labour law and regulation, they still do not invalidate labour law's potential to emancipate working people through various degrees of decommodification of labour.[57] Thinking of labour law as an emancipatory endeavour is to see emancipating working people not as the end goal but rather a starting point, which shall then spiral 'social unionism' (creating alliances and hybrid structures between working people's unions and social movements in the broadest sense, economic and political struggles),[58] fostering emancipation throughout polities and societies more broadly.

A. Emancipation as Decommodification: Confronting Commodifying Market Forces Through Labour Law

The previous section argued that labour law has historically had and currently has an emancipatory function. While over the past decades under neoliberal ideology[59] that emancipatory function has been significantly overshadowed by discursive and political centring of the individual employment relationship as an interpersonal contractual relationship at the cost of labour law's collective dimension, the article seeks to switch the attention to labour law's current emancipatory role and its future potential.

The destructive effects on working populations of the previously described relations of exploitation due to labour's structural subordination to capital and the allocation of labour power through capitalist labour markets have become evident during nineteenth-century industrialisation at the latest. It has become clear that labour power, being inseparable from the working person and thus always under the physical control of the worker,[60] can be a commodity for sale only in a fictitious sense.[61] As labour power has little use-value to its propertyless 'owners' with no access to the means

[57] The idea that 'labour is not a commodity' and labour law's functions centring around resistance of commodifying market forces is explored in Hendrickx (n.27).

[58] Hardt and Negri (n.56), 148ff.

[59] See C. Crouch, *The Strange Non-Death of Neo-Liberalism* (Medford, MA: Polity, 2011).

[60] Offe and Wiesenthal (n.29), at 73.

[61] Within the capitalist mode of production, labour is fictitiously treated as it would be produced for sale on capitalist (labour) markets, thus subordinating the human substance of society to the market mechanism, ultimately having destructive consequences for both humans and society at large. See Polanyi (n.19), at 72.

of production, they are forced to enter into a wage contract with capital owners.[62] However, because of this structural inequality in position and negotiating power between the two sides of the transaction concerning selling, i.e. buying labour power, individual working people have no meaningful leverage on deciding on the conditions under which their labour power is being traded for wages. This results in subordination of labour to capital and subjugation of the owners of labour power to the rationality of capitalist markets, expressed in imperatives of profit maximisation and constant economic growth. This structural position of labour in the capitalist social order does not only affect working people within the employment relationship, but in the entirety of their livelihoods.[63] Contemporary production coproduces and influences the multitude of social relations and is thus central to the human condition of the working person.[64] It determines one's working as much as non-working existence, as time off work is inherently related to and influenced by the conditions of the working process itself.[65]

The developments of the industrialisation period unveiled the human being as the object of the employment contractual transaction,[66] which gave impetus for the emergence of organised labour movements seeking to partly insulate or decommodify the labour process from the effects of mere market rationality. For Polanyi, for example, the subjugation of working people to the rationality of capitalist markets was a process of disembedding labour from social relations and institutions in which it is inherently embedded.[67] The market expansion into the social sphere of society, to which labour belongs, triggered, according to Polanyi, a countermove as a self-defence of society against the market.[68] In this sense, the organised labour movement of the nineteenth and twentieth centuries has yielded 'non-market' institutions such as trade unions and labour law with purpose to not only protect labour from the effects of commodification,

[62] Offe and Wiesenthal (n.29), at 70.

[63] Langille (n.25), at 87; Horgan (n.54), 33ff.

[64] Hardt and Negri (n.56), at 147.

[65] See Arendt (n.20), Ch III Labour, 79–135; Langille (n.25), at 96.

[66] B. Langille referring to Sinzheimer in 'Labour Law's Theory of Justice' in G. Davidov and B. Langille (eds), *The Idea of Labour Law* (Oxford: Oxford University Press, 2011), at 114.

[67] See F. Block, 'Polanyi's Double Movement and the Reconstruction of Critical Theory' (2008) 38 *Le renouveau de la pensée polanyienne* 1; V. Bogoeski, 'The Revision of the Posted Workers Directive as a Polanyian Response to Commodification of Labor in Europe' (2021) 2 *Global Perspectives* 1.

[68] Polanyi (n.19).

but to subject it to a different kind of rationality than the one of the supply-demand mechanism of the market.[69]

In this sense, the article advances the argument that labour law's emancipatory function consists of improving labour's structural position in capitalism as a social order, constantly seeking to reduce the commodity properties of labour power. While labour law can't escape the commodifying effects of the legal form as such,[70] labour law's own form embodies consciousness about capitalism's structural and systemic injustices that its emancipatory function seeks to address. Emancipation as decommodification starts from a gradual transformation of the labourer from a seller of the commodity labour power into a political actor with collective agency to democratically set and regulate social objectives with material effects both at the workplace and in general.[71] This collective political power earned by labour and its capacity to be part of law-making processes at and beyond the workplace is the starting point towards envisioning greater individual emancipation of the working person and subsequently society as a whole.[72]

Moreover, at the interstice between private and public regulation,[73] relying on nonwaivable rights and institutional apparatus of collective bargaining and collective action, labour law develops into its own legal discipline at the beginning of the twentieth century.[74] Labour law, in this sense, as a recognised discipline itself has sought to 'emancipate' from the narrow premises of private law underlying the market rationality of formal equality and interpersonal contractual relations, establishing rules and principles that would otherwise be seen as contradictory to that rationality, as opposed to, for example, private property and contracts.[75] In this regard, the

[69] On the notion of 'non-market' institutions in the context of Polanyi's fictitious commodities, see S. Klein, 'The Power of Money: Critical Theory, Capitalism, and the Politics of Debt' (2020) 27 *Constellations* 19; S. Klein, 'European Law and the Dilemmas of Democratic Capitalism' (2020) 1 *Global Perspectives* 1; Bogoeski (n.70).

[70] Adams, 'A Structural Approach to Labour Law' (n.21); Adams, *Labour and the Wage* (n.21), Chs 2 and 3.

[71] Collective agency in the sense of constructing a 'collective subjectivity', see E. Christodoulidis, *The Redress of Law: Globalisation, Constitutionalism and Market Capture* (Cambridge, UK: Cambridge University Press, 2021), at 503.

[72] See W. Abendroth, *Sozialgeschichte der europäischen Arbeiterbewegung* (Berlin: Suhrkamp, 1969).

[73] See K. Klare, 'The Public/Private Distinction in Labor Law' (1982) 130 *University of Pennsylvania Law Review* 1358.

[74] See R. Dukes, *The Labour Constitution: The Enduring Idea of Labour Law* (Oxford: Oxford University Press, 2014).

[75] A. I. Ogus, 'Law and Spontaneous Order: Hayek's Contribution to Legal Theory' (1989) 16 *Journal of Law and Society* 393.

role of labour law is not to merely legitimise the social order that it claims to change, as it cannot be understood as only a correction of the imbalance of power in interpersonal contractual relations, but as an intervention in class relations as structural social relations.

Against this background, the article sees the emancipatory function of labour law as threefold. The first one is labour law's own emancipation from the liberal private law logic that sustains the illusion of formal equality and frames the relationship between labour and capital as an interpersonal contractual relation.[76] While neoliberal politics globally has increasingly narrowed labour law's focus on the individual contractual relationship, in its gradual constituting as a *sui generis* discipline labour law has initially overcome the liberal understanding of the institutes of contractual liberty and market freedom.[77] This could be understood as the societal dimension of labour law as an emancipatory project, which directly, by regulating work and employment conditions in a way that recognises the structural position of labour in capitalism, influences and shapes the ordering of the market and overall its relationship to society.[78] Second, labour law's individual emancipatory potential consists of (partially at least) reversing the full subjugation of working people to the selling logic of capitalist markets, through constituting 'non-market' institutions such as unions, work councils and legislation that address the structural unfreedom of working people and increase their agency. Third and most importantly, as elaborated earlier in this and the previous section, labour law has a collective emancipatory dimension. Labour law's collective emancipatory function, aside from its protective function,

[76] See D. Kennedy, 'The Structure of Blackstone's Commentaries' (1979) 28 *Buffalo Law Review* 205. There is a rich scholarly tradition that recognises and promotes the social functions of private law, in the tradition of the American realists, or the German tradition exemplary in O. von Gierke, *Die soziale Aufgabe des Privatrechts* (Frankfurt am Main: Vittorio Klostermann, 1943); K. Renner, *Die Rechtsinstitute des Privatrechts und ihre soziale Funktion: ein Beitrag zur Kritik des bürgerlichen Rechts* (Tübingen: Mohr Siebeck, 1929).

[77] Only to a certain extent, because there is still clear entanglement between labour law and private law logics. In continental Europe, the employment contract and many rights connected to it are still very much part of the civil codes or at least follow a civil code logic. Yet because of the employment contract's peculiar institution (subordination and protection in return), it has been regulated on its own, but general civil law concepts still are relevant where labour law provisions fall short in regulating the employment relationship (I am grateful to Miriam Kullmann for raising this point). On 'contractualism' in the context of US labour law in the early years after the Wagner act, see K. Klare, 'Traditional Labor Law Scholarship and the Crisis of Collective Bargaining Law: A Reply to Professor Finkin' (1985) 44 *Maryland Law Review* 731, at 767.

[78] See Klare, 'Labor Law as Ideology' (n.37), at 472.

consists in its role of constituting organised labour as political actor.[79] This transforms the labourer from an individual seller of labour power into an industrial citizen,[80] increasing its chances for having influence over the conditions under which labour power is being traded and the overall work process is being materialised. One might argue that all this still remains within Azmanova's 'emancipation paradox' and labour law's co-optation in industrial peace compromises, but as Horgan notes, 'while these rights are fragile and are sometimes ignored by employers even if they would be held up at tribunals, they are much better than having no possibility of legal recourse. As such, many current labour campaigns are focused on fighting for the legal recognition of certain activities as work'.[81] Hence, through its three emancipatory dimensions labour law offers a strong starting point for an emancipation of the working person and emancipation of society at large through building alliances with other social and liberation movements, that might ultimately overcome the structures constituting the commodity labour power.

B. On Emancipation and Individual Autonomy: How Individual Waivers Question the Idea of Emancipation Through Labour Law

As stated earlier, the aim of this inquiry was to examine the impact of individual waivers on the emancipatory potential of labour law as a collective social endeavour. Since we framed labour law's purpose to be the emancipation of dependent labourers (which admittedly could only be partial due to the commodifying aspects of any kind of waged labour), this section enquires whether we could conceptualise a justification for individual waivers based on their individual emancipatory potential.[82]

[79] For an exposure of the flaws of the political subjectivity of organised labour under neoliberalism, see R. J. Knox, 'Law, Neoliberalism and the Constitution of Political Subjectivity: The Case of Organised Labour' in H. Brabazon (ed.), *Neoliberal Legality: Understanding the Role of Law in the Neoliberal Project* (Abingdon: Routledge, 2017).

[80] See, for example, G. Mundlak, 'Industrial Citizenship, Social Citizenship, Corporate Citizenship: I Just Want My Wages' (2007) 8 *Theoretical Inquiries in Law* 719.

[81] Horgan (n.54), at 42. She points out that much of the gig economy literature has focused on classification, but 'also ongoing organising by sex workers which seeks to secure safety, including through their legal rights as workers by the decriminalisation of sex work'. See also I. K. Thiemann, 'Beyond Victimhood and Beyond Employment? Exploring Avenues for Labour Law to Empower Women Trafficked into the Sex Industry' (2019) 48 ILJ 199.

[82] Individual labour rights waivers are essentially contracts; contracts have been discussed from a perspective of their emancipatory potential, see H. Dagan and M. Heller, 'Can Contract Emancipate? Contract Theory and The Law of Work' (forthcoming, 2022) 23 *Theoretical Inquiries in Law*. Available at: https://scholarship.law.columbia.edu/faculty_scholarship/2754 (accessed 12 July 2022).

For an individual waiver to be worth of even subjecting it to some legitimacy scrutiny or weighing it against the broader goals of labour law as an overall emancipatory endeavour, first and foremost, it needs to be invoked with no direct coercion exercised by the employer in a concrete employment relationship.[83] The absence of direct coercion does not directly translate into establishing genuine free will. Based on the previously outlined structural subordination to and dependence of labour on capital, it would be difficult to argue that, in capitalism, waiving of collectively hard-won labour rights could be prescribed to the free will of the worker.[84] The formation of such free will in the case of dependent labour (also in the case of all market actors in the sense of systemic domination) is significantly constrained by the relations of structural dependency, subordination and domination. Although one might confirm that a worker's individual decision was ensued free from direct coercion by their employer in a concrete employment relationship, that decision cannot be free from the epistemic and material constraints inherent to those structural relations.[85]

Lindebaum, for example, identifies three qualities of what makes the emancipated state different from the prior state of oppression, these being the following: (i) increased freedom, (ii) increased satisfaction and (iii) a more accurate view of the workers' true interests and needs.[86] Most importantly, the emancipated state is reached through resistance to and struggle against socially unnecessary restrictions informing the status quo.[87] From this understanding of emancipation, Lindebaum differentiates the concept of 'existential liberation', warning of the deceptive character of the notion. Compared to the struggle and transformative nature of emancipation, in the existential liberation, 'workers are encouraged to seek opportunities for the fulfilment of their needs'.[88] This distinction is relevant for the study of individual waivers, as it might help understand them as individual, seemingly emancipatory, but in essence further commodifying acts. This understanding of emancipation as existential liberation would not fulfil the ambition of

[83] See Davidov (n.7).

[84] See on coercion as developed by Hale (n.30).

[85] See T. Brass and M. van der Linden (eds), *Free and Unfree Labour: The Debate Continues* (Berlin: Peter Lang, 1997).

[86] D. Lindebaum, *Emancipation Through Emotion Regulation at Work* (Cheltenham: Edward Elgar Publishing, 2017), at 11.

[87] Ibid.

[88] Ibid., at 84; referring to M. Alvesson and H. Willmott, 'On the Idea of Emancipation in Management and Organization Studies' (1992) 17 *Academy of Management Review* 432, at 433.

emancipation as making history (Blackett's association with the notion), but would reduce human self-realisation to 'leading an obedient life of production and consumption'.[89] Such understanding of emancipation hampers any real emancipatory ambition, and understanding the emancipatory potential of waivers within this framework would do nothing but impeding the slightest emancipatory ambition of labour law as a whole.

Let us take the working time example. Within free market rationality, allowing workers to voluntarily increase their working time for the benefit of eventually earning a higher income would mean accommodation of a worker's free will, which might, in theory at least, be considered an individual emancipatory act (at least in the sense of existential liberation). Particularly if the higher income serves the goal of realising some mid- or long-term plan, undertaking or ambition of the working person (for example, buying a home or supporting the education of children), the act of waiving working time limits could be considered, in theory at least, to have an emancipatory potential. However, even if this would be the case, the waiver of the right to regulated working time limit would not emancipate the worker from the pressure of the logic and rationality inherent to the capitalist mode of production, namely constant profit maximisation for employers. Even arguments about the emancipatory potential of markets and how success on markets could lead to decommodification (market-facilitated emancipation or entrepreneurial emancipation),[90] certainly do not lead to a human emancipation understood as 'common control over economic dealings' in Marxist sense, but in the words of Somek, would mean 'an economic absorption of the idea of emancipation itself'.[91] Following Somek's reading of Marx, politically emancipated economy (economy emancipated from politics) constitutes a threat to freedom, meaning that capitalism is such a threat to freedom.[92] Emancipation removes unfreedoms, but the individual waivers might retrench these unfreedoms as they subjugate the individual to further coercion innate to the structure of social relations in capitalism based on profit maximisation through exploitation of labour.

[89] A. Somek, 'The Individualisation of Liberty: Europe's Move from Emancipation to Empowerment' (2015) 4 *Transnational Legal Theory* 258, at 264.

[90] Ibid., 265–6. Or even critical feminists have pointed out contradictions about the emancipatory potential of markets in spite of commodification, see N. Fraser, 'A Triple Movement?' (2013) 81 *New Left Review* 119.

[91] Somek (n.89), at 266.

[92] Ibid., at 268.

An additional aspect to consider when thinking about the benefits and trade-offs of individual labour rights waivers is their relationship with the concept of 'false necessity'.[93] While a labour rights waiver might be considered occurring based on a free choice of the worker, voluntarily and without coercion, the goals pursued by such a labour waiver are likely dictated by (false) necessities generated by the consumerist logic inherent to capitalism as a social order.[94] One of the main principles of capitalist ideology is competition among all market participants,[95] which results in an overall domination of the competitive conditions over people's choices, skills or plans (even human capabilities are valued in terms of employability),[96] because our overall livelihood and the materialisation of any noble conception of the good life we might have is entirely dependent on our success on the market and whatever sub-market we are participating in. Although production in capitalism is in fact entirely based on social cooperation,[97] the capitalist ideology implies the idea that in order for market participants to be successful, they need to be competitive, which leads to domination of human agency and experiences by competitive market logic.[98] The destructiveness of the state of constant competition among workers is what has led to the emergence of the organised labour movement and labour law in the first place.[99]

The problem with the individual labour rights waivers as such in a competitive capitalist system, even when considering them as exception and assuming they are entirely voluntarily and desired by a limited amount of workers, is that one could expect that the 'incidence of the originally smaller

[93] In the context of political institutions, most extensively by Unger (n.20). See also S. Marks, 'False Contingency' (2009) 62 *Current Legal Problems* 1.

[94] On discussions about false consciousness and limitations to the possibility for workers (or people in general) to know what is in their best interest, see B. E. Harcourt, 'Radical Thought from Marx, Nietzsche, and Freud, through Foucault, to the Present: Comments on Steven Luke's *In Defense of False Consciousness*' (2011) 2011 *University of Chicago Legal Forum* 29.

[95] This is, of course, the illusion project through capitalist ideology, in fact, all value and wealth creation occurs through cooperation rather than competition, see Hardt and Negri (n.56).

[96] See A. Del Percio and S. W. V. Wong, 'Resetting Minds and Souls: Language, Employability and the Making of Neoliberal Subjects' in L. Martin Rojo and A. Del Percio (eds), *Language and Neoliberal Governmentality* (Abingdon and Oxford: Routledge, 2019).

[97] Hardt and Negri (n.56).

[98] Somek (n.89), 265ff.

[99] See the previous discussion based on M. Weiss, 'Re-Inventing Labour Law?' in G. Davidov and B. Langille (eds), *The Idea of Labour Law* (Oxford: Oxford University Press, 2011); Langille (n.68). Also Polanyi (n.19).

number will raise the bar of achievement for everyone'.[100] This would mean acceptance of the conditions under which such achievement is possible and realistic, which leads market participants to internalise and appropriate the conditions dictated by the market rather than resisting them.

More importantly, the individual labour rights waivers might diminish the value of having achieved such labour rights in the first place, with the effect of undermining both labour rights as such but also the social struggles of which these have emerged. The possibility to waive them might take away the decommodifying effect as the greatest value of these rights,[101] as the signal would be, borrowing Klare's words, that 'the very sale of these rights indicates that they are more valuable to workers when cashed in for improved benefits and working conditions than they are simply as rights held'.[102] In the most general sense, all these concerns speak against individual labour rights waivers having a genuine emancipatory potential, offering an understanding of the opposite, namely that they are mostly dictated by the market rationality as an ideology of competition and profit maximisation based on labour exploitation that labour law strives to resist.

3. LABOUR LAW AS A CORRECTION OF THE MYTH OF PRIVATE AUTONOMY AND FORMAL CONTRACTUAL FREEDOM

Against this conceptualisation of labour law as an emancipatory project, the second part of the paper offers a glimpse of a particular national labour law context. Hence, the remainder of the paper explores the general understanding of individual waivers of labour rights in the context of German labour law. Germany as a labour law jurisdiction is particularly suitable for an exploration of the effects and role of individual labour rights waivers due to four main reasons. First, the history of labour law thought in Germany offers relevant insights about the necessity for labour law and nonwaivable labour rights and protection standards,[103] the origins of which are usually

[100] A. Somek, 'Europe: From Emancipation to Empowerment' (2013) LEQS Paper 60/2013, at 25.

[101] As rights address structural vulnerability and objective exploitation, see J. Wolff, 'Structures of Exploitation' in H. Collins, G. Lester and V. Mantouvalou (eds), *Philosophical Foundations of Labour Law* (Oxford: Oxford University Press, 2019).

[102] K. Klare, 'Traditional Labor Law Scholarship and the Crisis of Collective Bargaining Law' (n.77), at 769.

[103] See J. Beerwerth, *Die faschistischen Wurzeln des Arbeitsrechts* (Forum Recht, March 2019), https://forum-recht-online.de/wp/wp-content/uploads/2020/03/FoR_319_Beerwerth_neu.pdf

traced back to the work of progressive jurists and scholars of the Weimar republic.[104] These ideas have been received and have significantly influenced and shaped labour law nationally and transnationally.[105] Second, the foundational conceptions of the discipline that these (Weimar) scholars have originally developed were shaped and influenced by insights from economic sociology,[106] the German Historical School of Jurisprudence[107] and Marxist thought, which led them to conceive of labour law as a critical discipline,[108] underpinned by the understanding of the structurally and systemically subordinated position of labour to capital making exploitation innate to the structure. The relevance of this insight is that the 'struggle for emancipation' of labour law from general private law (*Zivilrecht*)[109] and its establishment as a separate field of law and legal discipline was based on the necessity for mandatory norms of labour protection, secured by both laws and collective agreements. Third, the German variety of capitalism is also specific,[110] and being embedded within its post-war tradition of social market economy[111] with ordoliberal influences[112] significantly defers from the Anglo-American

(accessed 12 July 2022); H. Sinzheimer, *Rechtsfragen des Arbeitstarifvertrags: Brauchen wir ein Arbeitstarifgesetz?* (Berlin: Fischer, 1913).

[104] See Ruth Dukes, 'Conflict and the Crisis in Labour Law: From Weimar to Austerity' in Poul F Kjaer and Niklas Olsen (eds), *Critical Theories of Crisis in Europe: From Weimar to the Euro* (London: Rowman & Littlefield International, 2016); Ruth Dukes, 'Otto Kahn-Freund: A Weimar Life' (2017) 80 Modern Law Review 1164; Ruth Dukes, 'Hugo Sinzheimer and the Constitutional Function of Labour Law' in Guy Davidov and Brian Langille (eds), *The Idea of Labour Law* (Oxford: Oxford University Press, 2011). See Beerwerth (n 106).

[105] See R. Dukes, 'Otto Kahn-Freund and Collective Laissez-Faire: An Edifice without a Keystone?' (2009) 72 *The Modern Law Review* 220; Dukes, 'Otto Kahn-Freund: A Weimar Life' (n.104).

[106] See R. Dukes, 'The Economic Sociology of Labour Law' (2019) 46 *Journal of Law and Society* 396; R. Dukes, 'From the Labour Constitution to an Economic Sociology of Labour Law' (2018) 9 *Jurisprudence* 418.

[107] See Beerwerth (n.103).

[108] See R. Dukes, 'Critical Labour Law: Then and Now' in E. Christodoulidis, R. Dukes and M. Goldoni (eds), *Research Handbook on Critical Legal Theory* (Cheltenham: Edward Elgar Publishing, 2019).

[109] At German law schools, labour law is often part of the same chair with civil or private law, so this 'emancipation' certainly has its limits. On the relationship between private (civil) law and labour law, see B. Rehder, *Rechtsprechung als Politik: der Beitrag des Bundesarbeitsgerichts zur Entwicklung der Arbeitsbeziehungen in Deutschland* (Frankfurt am Main: Campus Verlag, 2011).

[110] See P. A. Hall and D. Soskice (eds), *Varieties of Capitalism: The Institutional Foundations of Comparative Advantage* (Oxford: Oxford University Press, 2001).

[111] See A. Ebner, 'The Intellectual Foundations of the Social Market Economy: Theory, Policy, and Implications for European Integration' (2006) 33 *Journal of Economic Studies* 206.

[112] On the contours of German ordoliberalism, see J. Hien and C. Joerges, 'Dead Man Walking? Current European Interest in the Ordoliberal Tradition' (2018) 24 *European Law Journal* 142.

context, which is usually explored in relation to nonwaivability and individual waivers in international labour law scholarship. Finally, in spite of the idiosyncratic features of the German socio-economic model, the global shift towards neoliberalism that started from the 1980s has affected German labour law profoundly,[113] particularly through the reforms undertaken by chancellor Schröder's agenda 2010.[114] In this sense, previously mandatory norms set by either laws or collective agreements have gradually become flexible, leading to opt-outs and (collective) waivers being discussed in the coalition negotiations of the current German government following the elections in September 2021.[115]

Reflecting on the position of German labour law as a discipline, thereby overcoming the narrow lens of the public-private dichotomy, in the immediate post-war years Bührig remarked that labour law conceives of the individual as a part or an element (*ein Glied*) of the social whole,[116] and is therefore not individual (private) law, but a social law (*Soziales Recht*) resonating with von Gierke's seminal 'social role of private law' or Karl Renner's social function of private law.[117] This foundational paradigm of German labour law present in progressive labour law scholarly circles during the early post-war years in Western Germany provides us with an overture into the conception of the relationship between 'the individual' and 'the collective' in the underlying

[113] For a discussion of this neoliberal shift in labour law, see Dukes, 'Conflict and the Crisis in Labour Law: From Weimar to Austerity' (n.104). For a discussion in the Austrian context, see K. Firlei, 'Flucht Aus Dem Arbeitsrecht' (1987) 191 DRdA 271.

[114] See A. Hassel and C. Schiller, *Der Fall Hartz IV: Wie es zur Agenda 2010 kam und wie es weitergeht* (Frankfurt am Main: Campus Verlag, 2010).

[115] See 'Respekt und Chancen in der modernen Arbeitswelt' from the Negotiations between the parties of the new Government Coalition in Germany, https://polen.diplo.de/pl-de/04-news/04-2-Aktuelles/-/2493170#content_2 (accessed 29 October 2021).

[116] On the concept of the 'social whole' coming from the sociological literature on social imaginaries, see C. Taylor, *Modern Social Imaginaries* (Durham, NC: Duke University Press, 2004). On the social embeddedness of labour, see Polanyi (n.19); Bogoeski (n.67).

[117] E. Bührig, 'Die Stellung Des Arbeitsrechts in Der Rechtsordnung' (1953) 1 *Arbeit und Recht* 2, at 2. 'Sicher ist, dass das Arbeitsrecht den einzelnen als Glied eines sozialen Ganzen erfasst und damit nicht Individualrecht, sondern Sozialrecht im Sinne Gierkes ist'. A relevant side note would be that Ehrich Bührig was not a labour law scholar in a narrow sense, but a trade unionist, dedicating himself to labour law thought after he left his function in the federal board of the German Trade Union Confederation (DGB) in 1952. For further detail, see S. Blanke, *Soziales Recht oder kollektive Privatautonomie? Hugo Sinzheimer im Kontext nach 1900* (Tübingen: Mohr Siebeck, 2005); T. Blanke, 'Die Auflösung Des Arbeitnehmerbegriffs: Von Der Bekämpfung Zur Förderung von Scheinselbständigkeit Und Geringfügiger Beschäftigung' (2003) 36 *Kritische Justiz* 7, at 8. See E. McGaughey, 'Otto von Gierke: The Social Role of Private Law' (2018) 19 *German Law Journal* 1017; Renner (n.76).

thought of the discipline. This is not to say that this way of thinking might lead to promotion of the collective at the expense of the individual,[118] but it rather exposes the illusion behind formal equality, rights and liberties, and alludes at an understanding that the structural impossibility for the individual wage labourer to assert their interests against capital could only be mitigated through collective action.[119] This goes together with an understanding that the right of association and the right to act collectively, first had to be won in a struggle against the state and capital and the same goes to the recognition of collective agreements by the law,[120] which enabled social partners to autonomously set and regulate social objectives. Hence, the emergence of legal consciousness within the discipline[121] rested on the awareness of this genesis of labour law as part of an emancipatory class struggle that led to the presently established 'primacy' of the collective protection over the individual contractual freedom of the employment contract.[122] This logic of general primacy of statutory law and collective agreements over individual contractual freedom to negotiate the employment contract and related arrangements informs the nonwaivability principle in German labour law.

Although earning such recognition for labour law was certainly not easy, and the contestation between private autonomy, contractual freedom and mandatory labour laws protections has persisted until today,[123] the recognition of the economic, but also the personal dependence and exploitability of the wage worker as the central and foundational characteristic of the employment relationship, has challenged the individualistic private law doctrine.[124] The recognition of this structural dependence yielded the understanding

[118] Bogg thoughtfully grapples with this inherent dialectic and delicate balance between the individual and the collective, see A. Bogg, '"Individualism" and "Collectivism" in Collective Labour Law' (2017) 46 ILJ 72.

[119] See the discussion in C. Szücs, *Verzicht und Vergleich im österreichischen, deutschen und schweizerischen Arbeitsrecht* (Vienna: Springer, 2006), at 61; U. Simon, *Unabdingbarkeit und vertraglicher Verzicht: ein Beitrag zu Reichweite und Grenzen der Vertragsfreiheit im Arbeitsrecht* (Berlin: Duncker & Humblot, 2008).

[120] See G. A. Ritter and K. Tenfelde, *Arbeiter im deutschen Kaiserreich, 1871 bis 1914* (Bonn: JHW Dietz, 1992).

[121] On legal consciousness, see the discussion in K. E. Klare, 'Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937–1941' (1977) 62 *Minnesota Law Review* 265.

[122] Bührig (n.117), at 4.

[123] Not only the coupling of labour law and private law in the university context, but many aspects of the employment relationship as a special kind of a contractual relationship are regulated by the Civil Code (BGB).

[124] Blanke, 'Die Auflösung Des Arbeitnehmerbegriffs' (n.117), at 7. See also M. Löwisch, 'Privatautonomie und Arbeitsrecht' (2014) 36 JURA—Juristische Ausbildung 131.

of the lacking autonomy of the individual worker, leading to a lack of substantive freedom and equality of bargaining power, which was considered to have further exposed the fundamental legitimacy and justice deficit of the individual employment contract conceived under the private law paradigm.[125] That lack of substantive freedom and equality of the individual worker could only be addressed through the workers' right to organise in unions that would represent the collective interests of workers, materialised in collective agreements with mandatory and nonwaivable normative effect.[126] The statutory rights and protective state regulation are also part of this story, as well as Codetermination (*Mitbestimmung*)[127] and the opportunity to workers to collectively assert their interests in workplace politics through work council representation.[128] It is, however, important to be mindful about the break with progressive labour law thought of the Weimar period during the thirties and the time under Nazi Germany, and the overall conservative reformation of labour law through some scholarship and the activities of the Federal Labour Court in the years after WW2.[129]

However, global neoliberal tendencies of weakening labour rights and regulations have not escaped Germany.[130] Starting from the 1980s, but particularly during the early 2000s when Germany was considered to be 'the sick man of Europe',[131] with unprecedented unemployment rates in its post-war history, the purpose of labour law as a correction of the structurally subordinated position of labour to capital was questioned.[132] The narrative of the privileged status of the employee *vis a vis* the expanding group of

[125] Blanke, 'Die Auflösung Des Arbeitnehmerbegriffs' (n.117), at 8.

[126] Ibid.

[127] W. Däubler, 'Privatautonomie oder Demokratische Tarifautonomie?' (2014) 47 *Kritische Justiz* 372, 380. See also E. McGaughey, 'The Codetermination Bargains: The History of German Corporate and Labour Law' (2016) 23 *Columbia Journal of European Law* 135.

[128] See J. Rogers and W. Streeck, *Works Councils: Consultation, Representation, and Cooperation in Industrial Relations* (Chicago: University of Chicago Press, 1995), Ch 3.

[129] See Beerwerth (n.103).

[130] On the defining contours of growing neoliberal policies globally, see the discussion in Crouch (n.60); C. Crouch, 'Entrenching Neo-Liberalism: The Current Agenda of European Social Policy' in M. Freedland and N. Countouris (eds), *Resocialising Europe in a Time of Crisis* (Cambridge, UK: Cambridge University Press, 2013).

[131] On the phrase Germany being 'the sick man of Europe', see the discussion in S. Lehndorff and others, 'From the "Sick Man" to the "Overhauled Engine" of Europe? Upheaval in the German Model' in G. Bosch, S. Lehndorff and J. Rubery (eds), *European Employment Models in Flux: A Comparison of Institutional Change in Nine European Countries* (Basingstoke: Palgrave Macmillan, 2009).

[132] On the processes of flexibilisation of work and labour law ongoing globally and in Germany since the 1980s, see the discussion in U. Zachert, 'Hintergrund Und Perspektiven Der

unemployed and persons in atypical (precarious) employment emerged,[133] which served to justify readjustments of labour law bringing it closer to contract law through opening wider possibilities for contracting for work.[134]

Recognising this systemic trend, however, Möhring-Hesse argued that in conditions of increasing subjectivisation of work, workers themselves are increasingly rejecting labour law created for the sake of their protection.[135] In his view, this makes workers become 'rights violators of their own rights' (*Rechtsbrecher ihrer eigenen Rechte*).[136] His ultimate thesis is that labour law fails due to 'the ignorance of workers themselves', misguided by the liberal ideology of contract law according to which they—as individual workers—could know and represent their best interests related to the sale of their own labour power.[137] The self-driven motivation of achieving short-term goals at the cost of long-term sustainability of one own's labour capacity (*Arbeitsvermögen*) might also hurt others,[138] and eventually labour law as a mechanism of protection of society at large (the societal dimension of labour law's emancipatory potential). Therefore, Möhring-Hesse argues that stakeholders and work councils should be equipped with effective rights to defend workers' welfare (of individuals as well as the collective) from the pursuit of workers' own (short-term) self-interests.[139] Of course, this shift and tendency described by Möhring-Hesse is systemic and it is not the individual workers who suddenly reject labour law protection in order to pursuit individual entrepreneurial endeavours ending up in precariousness in the gig economy, but the changing economy and the overall culture of 'social neoliberalism'[140] which provides the structural conditions for workers to be pushed from employment contracts into contracting for work. However, identifying this development is important, because it precisely showcases

"Gegenreform Im Arbeitsrecht"' (1984) 17 *Kritische Justiz* 186; T. Blanke, 'Thesen Zur Zukunft Des Arbeitsrechts' (2014) 37 *Kritische Justitz* 2, 3ff.

[133] On how law and policy can create and structure conflict within labour, see the discussion in Dukes, 'Insiders, Outsiders and Conflicts of Interest' (n.54).

[134] M. Möhring-Hesse, 'Wie Rechtsbrechern Zu Ihrem Recht Verhelfen? Arbeitsrecht Unter Den Bedingungen Subjektivierter Arbeit' (2007) 40 *Kritische Justiz* 347, at 347. On the notion of 'contracting for work', see the discussion in Dukes, 'The Economic Sociology of Labour Law' (n.106).

[135] Möhring-Hesse (n.134), at 347.

[136] Ibid.

[137] Ibid.

[138] This aspect of 'hurting others' is explicitly explored in Davidov (n.7).

[139] Möhring-Hesse (n.134), at 357.

[140] Hardt and Negri (n.56), 144–5.

the narrative through which individual labour right waivers are ultimately justified.

Similar to the debates ongoing in the 1980s and particularly in the 1990s, fostering redefinition of the concept of the employee through discursive and legal elimination of its constitutive elements, namely the structural dependence (*Fremdbestimmung*),[141] the debate on nonwaivability of statutory and collective labour rights revolves around the questions of the function of statutory and collective protective norms in relation to private autonomy.[142] The next two sections explore some of the questions on nonwaivability and the possibility for individual labour rights waivers according to German law.

A. Situating Individual Waivers in German Labour Law

Nonwaivabilty is an established principle in German labour law (*Unabdingbarkeit im Arbeitsrechts*).[143] The most common explanations and justifications in the literature are anchored in the contractual framework and the recognition of the worker as the weaker party in the employment contract susceptible to pressure by the employer.[144]

As a preliminary point before looking into the possibility for invoking individual labour rights waivers, German labour law, similar to US labour law, distinguishes between the possibility to waive mandatory labour rights collectively via trade unions and individually.[145] In this sense, it is sometimes possible that a company-level collective agreement prevails over a generally binding collective agreement via the principle of *lex specialis derogate legi generalis*, even though company-level agreements might not offer better conditions for the workers affected.[146]

The principle of general nonwaivability in German labour law has been explicitly established in the Collective Bargaining Act (*Tarifvertragsgesetz* or

[141] Blanke, 'Thesen Zur Zukunft Des Arbeitsrechts' (n.132), at 8.

[142] As noted by Blanke, such opposition not rarely has emerged in the writings of prominent labour law scholars, in ibid., at 9.

[143] See the extensive discussion in Szücs (n.119); Simon (n.119).

[144] In German speaking scholarship to this justification is refered as the 'pressure theory' (Drucktheorie), see the discussion in Szücs (n.119), 39ff.

[145] See the discussion in Finkin (n.11).

[146] This is also one reason why, in Germany, via the AEntG (The Posted Workers Law, or the Law implementing the Posted workers directive: Directive 96/71/EC and amending directives), the possibility of a general binding collective agreement that cannot be pushed away by a lower-level collective agreement has been introduced. See W. Däubler, 'Reform Der Allgemeinverbindlicherklärung – Tarifrecht in Bewegung?' (2012) 65 *WSI-Mitteilungen* 508.

TVG) of 1949[147] and the Works Constitution Act (*Betriebsverfassungsgesetz*) of 1972,[148] respectively. The exceptions to the general nonwaivability rule are regulated as follows. According to paragraph 4 (4) TVG, generally nonwaivable labour rights established through a collective agreement could be waived individually only in a formal settlement (*Vergleich*) between the employee and the employer, approved by the concluding parties of the collective agreement at stake. It is important to note that the possibility to waive rights or rather entitlements (*Ansprüche*) in such an approved settlement refers only to existing entitlements that are already due, not to future ones.[149] An employee cannot waive non-existing or future entitlements beforehand.[150] A waiver of rights entailed in a company-level agreement (*Betriebsvereinbarung*) requires an approval of the responsible work council (*Betriebsrat*).[151] For nonwaivable (*unabdingbare*) rights and entitlements stipulated in laws, at a higher hierarchical level in the legal order, there are no explicit rules on waiving neither through unilateral waivers nor settlements.[152] *Argumentum a fortiori* implies that there is no way for them to be waived individually by the employee.

An important discussion on the possibility of waiving labour rights collectively took place in the 1990s in the context of so-called 'Company Alliances for Work' (*Betriebliches Bündnisse für arbeit*). These 'alliances' were basically agreements between employers and work councils that could offset rights and protection standards set by collective agreements. The debate has been settled with the *Burda* decision of the German Federal Labour Court from 20 April 1999, speaking against individual waivers.[153] The overall discussion was partly fuelled by the demand of the FDP (the German liberal democratic party) to enable a company-level voting mechanism to offset collective agreement arrangements.[154] This discussion has partly reappeared in recent debates around the coalition agreement of the current German government which includes the FDP.[155]

[147] Das Verzichtsverbot des § 4 Abs 4 Tarifvertragsgesetz (TVG).
[148] § 77 Abs 4 Betriebsverfassungsgesetz (BetrVG).
[149] Szücs (n.119), at 122.
[150] Ibid. See § 4 Abs 1 TVG.
[151] § 77 Abs 4 BetrVG.
[152] Szücs (n.119), at 8.
[153] BAG, Beschluss vom 20. April 1999 - 1 ABR 72/98.
[154] See A. Höland and U. Reim, 'Die Zukunft Betrieblicher Bündnisse Für Arbeit' (2002) 50 *Arbeit und Recht* 127.
[155] See n.115.

However, in the context of individual waivers *stricto sensu*, the intellectual tradition established during the Weimar republic and later the German social market economy emerging after the WW2 have influenced the development and the understanding of a limited private autonomy in the context of labour law and thus the development of the nonwaivability principle itself.[156] While based on the principle of most favourable condition (*Günstigkeitsprinzip*)[157] workers can individually negotiate better conditions than those negotiated collectively in a collective agreement or the statutory minimum provisions contained in laws,[158] the possibility for workers to individually negotiate less favourable conditions, even in case when they would be compensated through other benefits, is generally foreclosed. Therefore, the discussion on nonwaivability in German labour law mainly focuses on the protection of the employee from being forced by the employer to involuntarily renounce labour rights and entitlements, rather than on the case of consensually and voluntarily waiving labour rights in exchange for other benefits. The main discussion is focused on the protection of the employee within the meaning of the 'pressure doctrine' rather than on the potential reclaiming of genuine private autonomy and agency of the employee against the constraints of nonwaivable labour rights.

The vocabulary and etymology of the conceptual framework in the German context itself are worth commenting. '*Unabdingbar*' rather means *sine qua non*, non-derogable in English or 'inderogable'—a term coined by Lord Wedderburn,[159] which possibly has even a stronger meaning compared to nonwaivable, whereas '*Verzicht*' rather alludes to a renouncement or giving up on something. While the idea behind the arguably 'empowering waiver' implies a certain level of agency and self-assertion on the side of the employee, the '*Verzicht*' appears more modest in that sense, rather inviting a discussion on the necessary protective measure for employees not to have to 'give up' on existing rights and entitlements.

As individual waivers of rights and entitlements in an existing employment relationship are generally foreclosed, the discussion in German labour law jurisprudence and scholarship focuses on the waiving of such rights and

[156] For the liberal perspective, see W. Zöllner, 'Privatautonomie Und Arbeitsverhältnis: Bemerkungen Zu Parität Und Richtigkeitsgewähr Beim Arbeitsvertrag' (1976) 176 *Archiv für die civilistische Praxis* 221.

[157] § 4 Abs. 3 TVG. See Rehder (n.109).

[158] W. Däubler, 'Privatautonomie Oder Demokratische Tarifautonomie?' (2014) 47 *Kritische Justiz* 372, at 373.

[159] Wedderburn (n.14).

entitlements upon the ending of the employment relationship. In terms of form, there are two possibilities to waive rights and entitlements that are due at the time the employment relationship has ended, namely the unilateral waiver (*Verzicht*) by the employee and the judicial or out-of-court settlement (*Vergleich*). The exceptions that exist are often contested, but some space for individual assessment on a case by case basis exists.

B. Other Options to Functionally Waive Individual Labour Rights

The cases where labour rights could be 'waived' individually upon the termination of an employment relationship under certain conditions could be analogically discussed through the lens of individual labour rights waiver. Most frequently though, individual rights and claims arising from statutory or collective agreement norms are being waived through either (i) mutual termination agreements (*Aufhebungsvertrag*)[160] or a (ii) labour court settlement upon termination (*Gerichtsvergleich*), where the employer and employee agree on so-called compensation clauses (*Ausgleichsklauseln*).[161]

The compensation clauses agreed by the parties of an employment relationship at the stage of its termination foreclose successful articulation of further demands by either party after an employment contract is terminated. However, not all claims and rights could be waived and even though some of them are waived in a mutual agreement between both parties, they can still be practically void. For those considered 'waivable', the behaviour and intentions of the parties are essential.[162] This would suggest that the labour law practice assumes and accepts quite some level of agency on the side of the worker, accepting the possibility for the worker to consciously waive particular claims that they would otherwise be entitled to. General compensation clauses are quite common, stating that both parties agree and recognise that with the settlement or the termination agreement, any claims or entitlements that might be asserted in relation to a particular employment contract are considered to be settled. Such settlements should practically foreclose and disable any possible

[160] See more in K. Winter, *Aufklärungspflichten Beim Aufhebungsvertrag* (Baden-Baden: Nomos, 2010).

[161] § 799 BGB.

[162] R. Polzin, 'Der Verzicht Auf Ansprüche Durch Ausgleichsklauseln' (*Arbeitsrecht Aktiv*, 2003), http://www.ra-polzin.de/wordpress2016/wp-content/uploads/2011/10/Ausgleichsklauseln.pdf (accessed 12 July 2022), at 114.

(court) dispute after the termination of the employment relationship. The foreclosure of a lawsuit at a labour court could hardly be taken as emancipatory or beneficial for the employees, but sometimes the employee could waive rights and entitlements in exchange for other benefits that might be more favourable to them, such as for example, quicker access to part of the expected compensation instead of waiting until the court proceedings have finished.

Another example that might be considered an analogy to individual waivers is the possibility to 'waive' the right to file a lawsuit concerning protection against dismissal (*Kündigungsschutzklage*).[163] It has become from a legal, but not less from a sociological point of view, relevant for the overall governance of the German world of work. Already in the 1970s, it became evident that as much as 80% of the workers confronted their employers for perceived injustices at work only once the employment relationship was terminated.[164] It is not surprising, as the *concrete* dependence on and subordination to the employer is significantly smaller for the employee upon termination of the employment relationship. However, since the structurally conditioned reluctance to confront employers is predominantly present in smaller firms and is a result of the particular intensity of the economic and personal dependence of the employee on the employer, the current German law on protection against dismissal falls short to consider these particularities on the ground. The present German dismissal law has a restricted application, as it applies only to companies employing more the 10 employees as well as the full protection against dismissal applies only to employees who have passed the threshold of six months, normally considered as a probation period.[165]

Since the beginning of the 1980s, at the onset of the neoliberal future globally, the protection against dismissal has been pointed out as one of the reasons for increasing unemployment and a factor impeding firms' productivity and flexibility.[166] That discourse gradually led to the practice, where employees could waive the right to a lawsuit against a dismissal through a mutual termination agreement with their employer.[167] Although the

[163] Kündigungsschutzgesetz (KSchG) (Dismissal Protection Law) from 10.08.1951, new version of Bek. v. 25.8.1969 I 1317, last amended through para 2 G v. 14.6.2021 I 1762.

[164] T. Ramm, 'Zur Bedeutung Der Rechtssoziologie Für Das Arbeitsrecht' (1970) 3 *Kritische Justiz* 175, at 180.

[165] § 23, Kündigungsschutzgesetz (KSchG) (n.163).

[166] Zachert (n.132), at 189.

[167] BAG, Judgement from 19.04.2007 – 2 AZR 208/06.

above-mentioned neoliberal developments have weakened the overall protection through dismissal lawsuits in front of the German labour courts, the validity of the waiver of the dismissal protection through a mutual termination agreement is dependent on particular conditions. First, the validity is questioned when it is clear that such a waiver does not reflect the 'genuine' will of the employee, but is rather a *mala fide* act from the side of the employer. Particularly, if the employee is not compensated through any other benefits for waiving its right to a dismissal lawsuit, it is very likely that the validity of such a waiver will be contested in front of a labour court on the basis of a lacking corresponding compensation, usually the so-called *dismissal wage* (*Abfindung*).[168]

Other issues concerning individual waivers often discussed in labour courts' jurisprudence and scholarship include the waiving of the continued remuneration in the event of sickness (*Entgeltfortzahlung*), annual leave compensation upon termination of the employment relationship,[169] the right to a recommendation letter (*Arbeitszeugnis*) upon termination etc. However, none of these could be discussed from the perspective of the exchange of labour rights and entitlements for other benefits, but are rather mostly discussed from the perspective of worker protection within the framework of the 'pressure doctrine'.[170]

4. CONCLUDING REMARKS

The article took issue with the question of the meaning of individual labour rights waivers for the emancipatory function of labour law. As the option for individual labour rights waivers often directly contradicts the nonwaivability principle as a foundational principle of labour law, the article examined the function of nonwaivability for sustaining labour law as a project aspiring to emancipate working people and subsequently society as a whole. Particularly, since the start of the pandemic, as we see rising attempts to dismantle labour rights through introducing various flexible terms

[168] R. Wunderlich, 'Arbeitsrecht: Verzicht auf Kündigungsschutzklage per Aufhebungsvertrag' (*SCHENK LECHLEITNER KRÖSCH Rechtsanwälte Steuerberater*, 8 August 2018), https://www.slk-rechtsanwaelte.de/aktuelles/arbeitsrecht-verzicht-auf-kuendigungsschutzklage-per-aufhebungsvertrag/ (accessed 27 June 2020). See BAG, Urteil vom 06.09.2007 – 2 AZR 722/06 und BAG, Urteil vom 24.09.2015 – 2 AZR 347/14.

[169] Deviations from § 13 BUrlG.

[170] See the discussion in Szücs (n.119); Simon (n.119).

for employers and optouts under pressure of collective redundancies and overall job losses, it is crucial to understand the meaning of granting employees the possibility to waive labour right otherwise applicable to them. Moreover, it is crucial to situate individual waivers in the broader meaning of labour law, as they often do touch upon old theoretical debates around tensions between individual autonomy and worker protection through mandatory and nonwaivable labour rights. In line with neoliberal ideology, individual labour rights waivers could often be presented as means to grant employees ownership over their actions and namely greater agency, making them guardians of employees' best interests. While these narratives could have their appeals and might sound 'emancipatory' within the neoliberal ideological framework that individualises social responsibility and risks, the article asked what such waivers could mean for labour law as a collective emancipatory endeavour that has historically aimed to emancipate working people and society at large.

The article first located the emancipatory function of labour law in its potential to decommodify labour and working people from structural commodifying forces of capitalist (labour) markets, through labour law's capacity to constitute and sustain collective political agency enabling labour to set and regulate social objectives with significant material implications. This collective agency increases the individual agency of individual working people far beyond what their individual negotiating power, structurally constrained through property and contract, could ever achieve. Examined through the framework of labour law as an emancipatory endeavour, the article formulates an understanding of individual labour rights waivers as acts of a 'false emancipation' of the individual driven by market rationality, most often having an overall commodifying rather than emancipatory effect. The essential role the nonwaivability principle plays in the materialisation of the emancipatory function of labour law was further explored through a glimpse into the ideational framework around nonwaivability in German labour law. The paper argued that the strong ideas about the collective dimension of labour law beyond contractualism that underpin the idea of German labour law make individual labour rights waivers less likely in the German context compared to the developments we have been seeing in the UK and other countries. However, neoliberal developments that brought flexibilisation of work and dismantled unionism, collective bargaining and strong nonwaivable labour rights, have not skipped Germany. Discussions around opt outs and waivers are currently present in the context

of renegotiating working time regulations during the coalition agreement negotiations of the current German government.[171]

While the paper is neither a comprehensive nor a complete discussion of nonwaivability and individual labour rights waivers through the lens of 'emancipation through labour law', it has attempted to start a conversation which will shift the focus of the debate. This focus should be on the significance of such individual waivers and nonwaivability for the greater ambitions of labour law to emancipate the working person and society as a whole. It is important to recognise the limits of emancipation through labour law; labour law can challenge the basic structure of capitalism only in a limited sense, and it also applies only to a restricted segment of the population across societies (namely employees and other workers with protected status). However, strengthening labour law would mean strengthening the standing of organised labour as a political actor, enabling it then to build alliances with other social movements and thereby support other emancipation struggles. By these means, labour law reform can contribute to a progressive imaginary of emancipation for society at large.

[171] See n.115.