

GENERAL DISCUSSION

After the foregoing discussion, the participants entered into the following dialogue:

Professor Vogel:

Professor Blanpain spoke of the mood of the times. It is true that the mood of the times is an explanation for the regressive situation occurring in the field of plant closings and job security for workers. Perhaps I am naïve, but as legal scholars, we have the duty to scrutinize legislation and international conventions from this comparative survey to see if new developments protecting workers are still possible. In this connection, I am interested in the comment Professor Blanpain made that it is possible to utilize international self-executing provisions; I know of some new developments in the field. In Europe, for example, some courts utilize such self-executing provisions.

Dean Beard:

I found this discussion most interesting. I would like to comment briefly on the possibility of international conventions, treaties, and instruments having a self-executing effect on the domestic law of the United States. There was a great controversy in the United States in the 1950's concerning the effect the United Nations Charter would have on domestic law, or for that matter what effect any kind of international legislation would have on domestic law. The controversy extended to the point where one member of the Senate, Senator Bricker from the State of Ohio, proposed a constitutional amendment dealing with the self-executing effect of international instruments. Before this development, Congress had to authorize international instruments having domestic impact. Arguments have been made that domestic law is controlled by an international instrument, but up to this point such arguments have not enjoyed great success. Would you agree with that Professor Wilner?

Professor Wilner:

I do agree and in fact, I believe that for the United States the two types of treaties, that is self-executing and non-self-executing, exist for very practical and political reasons. It would be very impractical for the Executive to enter an agreement which had effects internally and which would have to be implemented by our national and our state courts without some internal legislation. This is what you would certainly find in the labor law field.

Professor Blanpain:

On this point, we should note that the United States has ratified only a very small number of the 160 or so many ILO conventions. These ratifications occurred during the Roosevelt era. The reasons for the lack of a more impressive number of ratifications officially have to do with the fact that the United States is a confederation of states. But some of my American friends tell me that the real reason for this lack of ratification is that Americans are convinced that they themselves know best how to conduct their business. The point I was trying to make addresses the "soft law" area, such as guidelines and codes of practice, which have voluntary and morally binding impact. It may well be that there are cases where companies, because they must be responsive to consumers, do care about adverse publicity.

Dean Beaird:

I would agree that there is persuasive value in internal negotiations with respect to whatever standards have been set, and I think there have been instances where they have been used successfully. But it seems to me, unless I have misinterpreted earlier remarks, that only in the Netherlands is there legal sanction for failure to discuss the economic effects.

Professor Blanpain:

I think one has to qualify that statement; for example, in France the powers of the labor inspector in economic dismissals extends very far, but probably not so far as in the Netherlands.

Dr. Pipkorn:

I would like to comment on the German situation. In Germany, the works council has to be consulted. Since even a minority of its members have the right to go to the labor court, workers have legal remedies if the council has not been consulted. There is a clear distinction, in line with the United States, between the economic decision itself, where there is only a right to consult the works council, and the effects of the decision, for which a social plan has to be made. This social plan provides for workers on early pension schemes, for those who have to be retrained, and for those who will receive the so-called "golden handshake." This was elaborated on under the Coal and Steel System of 1951, where parity between shareholders and employee representatives exists in companies' boardrooms and where employee representatives influence the economic decision itself; the representatives said they would accept closings only if those social plans were formulated. This practice became common in the coal and steel industry. Subsequently, it was made mandatory for all enterprises under the Works Constitution Act of 1972.

What happens if the employer and the works council reach no agreement on the social planning? The law provides for arbitration in a *Einigungsstelle*, chaired by an independent arbitrator who strikes a balance between representatives of the employer and of the employees. If the employer does not respect the rules, the works council has access to the labor court, which might either impose injunctions or, in the alternative, impose a fine for each day the employer refuses to consult the workers.

Professor Vogel:

I am sure that Mrs. Blanquet has a report on the comparative application or implementation of the directive in the various countries. Is that true?

Mrs. Blanquet:

In fact, we are preparing a report on the application of the directive on collective redundancies as well as on acquired rights in cases of transfer. When the report is finished, it will be generally available. We have also recently published, in *Europe Social*, a comparative

study on information systems in all member countries of the European Communities.

Mr. Vanderschelde:

I would like to make some comments as a member of a trade union. My experience has shown that when the closing of a plant or a factory is communicated, it is too late to change anything. You can discuss effects, but workers need to be informed in advance so that they can bargain. I should emphasize also that we need that famous directive of Vredeling as soon as possible. I do not understand the reaction of the American side; it is unjustified because what we have put together is legislation which has existed for decades in most of the countries. I believe that a worker has a basic right to be informed and to bargain, but in practice there are still some problems in most of the countries of Europe. For instance, there are problems with the relationship between unions and work councils.

There are also problems on the national level; namely, should the issues be discussed on the sectoral level, or should they be discussed on the plant level? In practice this is sometimes very difficult to resolve. I am afraid that, as a consequence of its new legislation, France will have a situation as complicated as, for example, some factories in Great Britain where there are up to ten or twelve unions because the organization there is quite different from the general pattern in the continent. I am thinking also about some difficulties with codetermination in Germany. It is a fact that workers in Germany can be represented and can be heard on the board. But, on the other hand, some of these codetermination rights are being replaced by collective agreements. That is one problem we certainly have to deal with.

When I hear comments and read newspapers and magazines, I worry that perhaps employers will attempt to reduce the rights of workers to obtain information. I am also concerned by some comments from the United States Government in LCDE circles regarding the so-called "positive approach." Well, we all know what "positive" means. We should inform the public of exactly what is occurring because I have the impression that the picture that we have here in Europe, generally speaking, is one that provides information about the economic performance of the United States and ignores social difficulties. Because the United States is so far away, we have access only to those things which come to us by satellite and by very

specialized papers. We rarely hear the voice of the little man; most of the time it is the voice of the very powerful factories and companies. We need to reverse this tendency.

Professor Blanpain:

I am fascinated by the idea of harmonization of labor law at the Community level. But, Mrs. Blanquet, is this issue really being discussed? Is this an issue on which there is agreement at the European level? I wonder because if I read strategies well, labor law is, so employers say, a national or local issue rather than a subject for the time being to be harmonized at the European level.

Mrs. Blanquet:

It will, of course, be necessary to create a European social area. Mr. Desolre has indicated that in the European Parliament it has been suggested that it is necessary to create a real internal market. This will entail preparations by the Commission of another White Paper on the European social area. In fact, this White Paper is now being prepared. A rationalization of the subject is necessary because at the moment we have a "jigsaw puzzle" in Europe. Each national system of labor law creates a legal barrier because it is only valid within the territory of the member state. If there is to be a true Common Market, a general framework at the Community level is necessary for creation of a social dimension to the internal market. The accomplishment of this task will be difficult, but it is certainly necessary since a real internal market will be impossible in the absence of the harmonization of the labor laws of member states.

Permit me to add a word on the situation under Belgian law. Belgium is the only Community jurisdiction that requires disclosure of information on the situation of a group of companies taken as a whole at the international level, rather than at the national level only. Belgium cannot ensure the application of this legislation, however, because it is alone in the Community in imposing such an obligation. So long as Belgium remains isolated, even a nationalized company in France may withhold information on its business in France, since it is not compulsory in France to disclose such information at the international level. Thus, Belgian law cannot be applied effectively absent harmonization at Community level.

Mr. Desolre:

I would like to ask Mrs. Blanquet and Dr. Pipkorn about the present situation regarding the revised Vredeling Directive. I have been told that there was a third proposal being written and that there was new discussion in the European Parliament. Where are we now? At our last meeting Mrs. Blanquet stated that we are not working on these directives for ourselves, but for our children. Does her comment at this Roundtable mean that we are now working for our grandchildren?

Mrs. Blanquet:

We are not working on a third proposal. The Council of Ministers devised a "New Approach," which abandoned the starting point of the link between a "parent" and its "subsidiary" in favor of the relationship between an "employer" and its "employees." This "New Approach" is based on labor law rather than company law, but in essence the result for employees is the same. An employer has to communicate information to employee representatives, and to do that its parent must provide information to each of its subsidiaries in the Community. The Council is now discussing the "New Approach," but it is encountering attitudes similar to the amended proposal of the Commission; two member states are against all such initiatives. This is why we are not working on a third proposal; we know that reactions to a third draft would be the same. There is no point in losing two years of preparation, of translation of the text into all the Community languages, and of further consultation of the European Parliament, just to come up against the same reaction at the end of the day. Thus, there is a political problem which makes it difficult to bring about a social area in the Community.

Dr. Pipkorn:

I wish to add some further comments on the provocative question of harmonization of labor law. I can cite two scenarios which happened to occur at the same time, around 1974. Two companies, Volkswagen and Lipp-France, encountered a serious economic crisis. Lipp-France resorted to old practices when workers were confronted with plant closings. The workers occupied the premises, many committed articles appeared in the press, and other strong reactions occurred until finally the situation fell apart.

In contrast, Volkswagen's management led discussions in works councils and Supervisory Boards and successfully undertook the difficult task of convincing the employee representatives that they had to reduce their plants in Germany and to invest in the United States. Convincing the employee representatives of the need for such an investment was made possible only through the elaborate platform for discussion existing in Germany. At the European level, we do not look for certain business decisions; we look for creating a platform where workers and employees can meet. Thus, we cannot build up a Community with disparate elements resulting from the fact that some countries have institutional platforms for discussion between management and labor which work very well, but other countries do not.

Even where participatory means are available, harmonization of labor and company law is required. Take the example of Germany and the Netherlands, which have works councils and employee representation on company boards. Imagine that Volkswagen envisages a plant closing in Germany. How does it proceed? It has to consult workers, and matters go before the works council of the Volkswagen group under the German rules. In contrast, imagine that this situation arises at a plant Volkswagen or any German firm might have in the Netherlands. The plans to close would not be brought in an effective way to the attention of the works council of the German group since the plant closing will occur in the Netherlands; the German works council has no competence to deal with what happens in the Netherlands. In fact, the employee representatives would not even be entitled under Dutch law to address the German works council. This emphasizes how the territorial scope of the law impedes the proper functioning of the Common Market in such situations. Therefore, it is important for the Community to eliminate obstacles which stem from the territorial limitation of our labor law. In my opinion, nobody in the field of labor law can contest that this necessity exists and should be taken into account. This aspect of the draft Vredeling Directive cannot be underestimated and is very important in view of the Common Market as will be in 1992.

Professor Blanpain:

I want to comment on the interesting statement Mrs. Blanquet made; I do not, however, believe that the political will at the Community level is there to do as she suggested. The Commission can make an attractive proposal and some may endorse and support it,

but that is where it stops. The political will is simply missing. This is certainly the case where the proposals touch upon the distribution of power in society and involve ideologies.

Mr. Desolre:

I think that if we follow Professor Blainpain's advice, we would be very pessimistic. If we look at what the ILO is doing now — take the example of this year's ILO conference which ended a few days ago — they restrained themselves. They did not even do what you described; they just adopted two old conventions, one about labor statistics which had to be updated, and one about labor medicine. And what are they projecting for next year? A convention in a small domain, that of asbestos protection.

Dr. Pipkorn:

That is important, though.

Mr. Desolre:

It is important, but I do not think that we are speaking with the enthusiasm that the French, say, spoke of the "Espace Sociale Européen" four years ago.

Dr. Pipkorn:

It is important to distinguish the Fifth Directive on the one hand, and what we are speaking about today, on the other. The already existing directive on mass dismissals, which is very lively, is giving rise to jurisprudence and has become *un acquis communautaire*.¹ The draft Fifth Directive aims for the future at modifying business structures by affecting the power balance in big companies and bringing workers into the decisionmaking process, so as to create a new basis for the legitimacy of business decisions. In contrast, the Mass Dismissals Directive and the draft Vredeling Directive do not at all aim to affect the structure of companies in such a way. Nor do they affect the structure of worker representation. Mrs. Blanquet pointed

¹ I.e., an acquired Community attribute.

this out correctly. Under the draft Fifth Directive there are provisions to the effect that worker representatives need to be directly elected so that unions will have to compete with independent candidates.

This constitutes a modification of the structure of companies. Perhaps a certain pessimism is more understandable there than in the area of the draft Vredeling Directive, which only deals with procedures. This is quite a modern trend in trying to settle conflicts through procedures, and has been done as well under the codes of conduct. For such purposes we use means available to the Communities, namely legal obligations put on member states to create platforms where the persons involved have to meet and discuss, and where information rights are exercised. Such an endeavor for the settlement of conflict through procedures could be a forum for mutual understanding even between persons who otherwise feel that the power game between "capital" and "labor" should not be altered.

This aspect of flexibility refers back to the point I made in my earlier intervention: what happens if the negotiations between the employee and the employee representatives do not come to a conclusive end? In that case each party remains free to do what it thinks is in its best interest. German unions would arbitrate; for other unions arbitration would be quite unacceptable, so they will strike. But there is one interesting procedural element of reducing conflict, of tempering antagonism, which has to work first. Such arrangements have been elaborated in quite different contexts. Elements of reducing conflicts through procedural arrangements became necessary for resolving a basic conflict between the struggle over sharing control of budgetary matters. Now there is a so-called triologue pursuant to which the Council and the Parliament meet and discuss, trying to reach agreement. In the field of labor relations, such an obligation to negotiate and to follow procedural arrangements should be furthered and, where possible, be extended beyond national boundaries.

I think there is one provision in the Vredeling Directive which is particularly interesting as an incentive for worker representatives to enter cross-frontier negotiations and arrangements to settle the consequences of workforce reductions. This element of building incentives for transborder collective agreements may appeal even to trade unions which otherwise have ideological differences. They will find a basis there on which to get information and coherently to discuss matters of interest. This concept is appealing for many forces in Europe. We have already seen an indirect effect of harmonization of the European Communities' measures through the institution of group works councils in Germany and in France.

All these are indirect effects, and I think we will progress in that respect whether the directive is adopted as late as Mrs. Blanquet fears or as early as I hope. The important thing is that people understand that they need to extend their framework of thinking beyond national parameters. This is important and I think will be realized step by step.

Professor Wilner:

One of the participants mentioned the fact that there are ideological problems and problems of power; I take it that this reflects the tension between the workers and the employers. Another colleague mentioned that we are talking about individuals, that is, ultimately about the rights of individual workers to be protected in their jobs. This perception introduces the issue of whether they can vindicate these rights individually, collectively, nationally, or sectorially.

It would seem that a fundamental question is whether in Europe the relationship between workers and employers is a matter of finding the right balance between the existing laws which protect workers, either individually or collectively, or whether it is still a struggle, as it appears to be in the United States, for the workers to vindicate their rights against employers. In other words, the question is whether workers are considered to be partners or at least to be an essential element in the workplace, or whether workers are to be treated more like fungible raw materials or machines that can be used and thrown away. Under this latter premise workers really ought not have a part in the decisions or in the structure of industry itself. I end with a question: Suppose the United States were asked somehow to be part of the European Communities. What would we do with the philosophy behind United States labor law, vis-a-vis what is being attempted in Europe?

Professor Vogel:

That is a very important question. Who wants to respond?

Dean Beard:

One might start to respond to that question by posing what I think is a real dilemma to people who have been observing the scene in the United States for a long time. Workers' rights philosophically

are protected in the United States in a very basic level through national legislation. Examples include minimum wage laws and the like. But worker participation through an industrial, democratic mechanism is through labor organizations and the majority rule concept. The question that has always puzzled me is "why is it in the United States that only about eighteen percent of the workforce have chosen to take that avenue?" I assume that the answer lies in the nature or makeup of American workers; they are very individualistic. Maybe it is because of the United States economic situation. When I said in my early remarks that you do not have a great outcry on the part of workers for protective legislation in plant closing situations, I said a lot. If I understand the European model, works councils are mandated by government, whereas membership in labor organizations through which they participate is not mandated. The opportunity is there, but it is not mandated. Now why they do not participate, I do not know. It has always puzzled me why a group of textile workers in North Carolina, for example, would not want to join the textile workers union to negotiate basic wages. I do not think it is because of employer threats and domination. We have had several recent studies as to why election campaigns do not really change the minds of workers, as we thought they would. Maybe those studies, the Getman and Goldberg studies, are not right. Perhaps Ms. Lynch can explain why that is.

Ms. Lynch:

Well, first of all I disagree with the idea that the employer threats do not have an impact. I think it is probably a combination of some sort of ideology in the United States that "the individual" succeeds. But statistics have shown that when employees are allowed to make what is a "free choice," they opt for a union. One relevant statistic is the percentage of employees in unions under the Reagan board and policies; that percentage is decreasing. I think that even the eighteen percent Dean Beard referred to is high right now; it is really probably more like fifteen percent. One of the most basic threats that employers use is the threat of plant closing. When you combine that with what the labor board has done, employees know that the employer can shut down the plant. So it is a real threat that certainly does have an effect. It may not be *the* reason, but statistics have shown that its effect is not inconsequential.

Mr. Desolre:

If I am not mistaken, a trend downward in the unionization rates in the United States extends to the beginning of the 1960's, when there were few threats of plant closings or displacements. It began a few years after the merger of the AFL and the CIO. I think a factor that has been forgotten in both Ms. Lynch's intervention and in Dean Beard's intervention is the labor bureaucracy itself: the way it leads the union, and the lack of attractiveness of the unions to workers. This factor should also be taken into account.

Professor Jacobs:

I would like to return to a question that was raised a little bit earlier, if you will allow me. That is, what can we expect from European harmonization of laws. I want to mention that we are now perhaps heading toward some constitutional changes within the EEC. There will be a conference about how to go on with decisionmaking, because everybody is disturbed by the increase in the number of member states in the Community; it is now almost impossible to have unanimity in the Council of Ministers of the EEC. And there is talk about perhaps different speeds of harmonization and unification. I think this may also become a point for labor law. One can imagine for example, that Germany, Belgium, Holland, and Luxembourg can agree about the coordination of a works councils act because we have systems that are quite comparable, while the English stay aloof because they do not have such a system. Thus, some countries will take the lead also in the field of labor law. In my view, that is bound to happen because even bona fide employers do not want to see their enterprises undercut by the fact that labor is cheaper in another country. I think at least the German, Dutch, and perhaps also the Belgians, will agree to march ahead together. Thus, I foresee progress at different speeds.

Mr. Vanderschelde:

Perhaps I am a little more optimistic than Professor Blanpain. As you know, money rules the world; therefore, the European Monetary System [EMS] will be important in the future. If one talks with monetary specialists, they all agree that the EMS is impossible without a comprehensive social policy; that is, without more cooperation on

the European level. I think on the continent there could be more coordination with regard to the powers of work councils. Such coordination will be difficult because of the ideological splits in the various countries. The question is whether it is possible to build up something from what already exists. On the continent at least, we have works councils in the various countries; can we start from that to build something European? I agree with our American friends that we on the Continent accept that workers should have their say. The fundamental question is how they will have their say. Furthermore, there is much we can learn from the federal systems of the United States and Canada because Europe, I very much hope, is heading in that direction.

Professor Blanpain:

When one talks about *l'Espace Sociale Européen* most people get emotionally involved. We must be realistic. The mood of the times favors flexibility, less social protection, and more managerial freedom.

Mrs. Blanquet:

We have to introduce some form of what is known as "internal flexibility" because it is impossible to introduce new technologies or to bring about modernization or reductions of the workforce without the cooperation of the workers directly involved. It is impossible to do that without information and consultation, or to succeed if the workforce is opposed. We also have to distinguish among different rights. Perhaps certain individual rights may be deleted. But we must provide for more information and consultation to bring about a healthy climate for industrial relations, without which it will be impossible to succeed. So we have an area in which to work. Systems of information and consultation, which in some areas are an absolute precondition for obtaining the cooperation of the workforce, must be improved.

Professor Vogel:

I am afraid that I have no wise conclusions to give you. The economic crisis is having a strong effect on what has already been achieved from the national point of view. We have to struggle to

try to give European workers the right to participate, to bargain with, and to be consulted by the real decisionmakers in the field. Maybe it is a little bit idealistic, but we need some idealism today.