

Legal Preconditions of Valuable Work

Instead of starting systematically as you might expect it from a serious German scholar, let me **begin by an episode**. As everywhere else also in **Germany** the **nurses** came **into the limelight during the pandemic as well as their lousy working conditions**. The public pressure to improve their conditions grew and grew. The focus was on wage increase. In an **interview** where nurses were asked whether they would be happy by a significant wage increase, they made perfectly clear that this only would be a **first step but by far not enough**. What they **really need** would be **enough personnel** to be really able to take care of their patients, to have the **training and the equipment to do their job properly**, to **have much more time to devote to patients** and to have **working time patterns which save their health** and **allow for work life balance**. Only then the job might become attractive and only then our health system might get the several hundred thousand persons who badly are needed.

This spotlight confirms what we already know and what is proved by quite a few studies, namely that **remuneration is only one, even if a very important aspect of valuable work**. It is a promising sign, that in a study of 1915 conducted by the **Bertelsmann Foundation in Germany** where more than 1000 persons were interviewed the majority declared that they would continue working even if they would win a huge amount of money in the lottery.

In general one can say that work is valuable if **human dignity** is respected. Or work is valuable if the **working person can identify with** or if it **leads to job satisfaction**. These very general assessments, however, have to be broken down into **subcategories**. Of course, it goes without saying that already highly regulated topics like **respect for workers' privacy** or **prohibition of discrimination** are basic for valuable work. I take this for granted and will not go into these topics. Looking at the many studies which try to explore what workers understand by valuable work, I would like to select just **a few items** which in my few are basic and badly need regulation. This is by far **not a comprehensive list**.

(1) the possibility to get **qualified and continued training** to become skilled for the challenges of one's work, including the capacity to not only to apply technology but to fully command it in order to appropriate it;

(2) **Job security**, including the possibility to plan one's life in a mid- or long term perspective;

(3) to have the possibility **to organize a decent work life balance**;

(4) to have on the **one hand working time flexibility** and **on the other hand** the possibility to full – mental and physical - **detachment of work**;

(5) **health and safety** at work and finally

(6) not to be treated as a mere object of management's decision-making but being integrated in a **participative democratic workplace**.

Let me **briefly indicate** how in my view these few components for valuable work can legally can be guaranteed or at least improved. I limit myself to just **very few core aspects of regulation**. My suggestions might be at least partly **provocative** which may stimulate the discussion afterwards.

(1) As far as **continued or life-long training** is concerned, it formerly might have been sufficient to get trained for a job at the beginning of the career, thereby getting the skills needed throughout the professional life. This is no longer the case. Traditional skills get obsolete, as we presently not only see in the context of **digitalisation** but particular in the **ecological transformation** – the so called **decarbonisation** - of quite a few industries. Everywhere we are confronted with an ongoing rapid change of required skills. Therefore, **continuous up-skilling** has become more urgent than ever before. Its **content and its organization** have to be fundamentally **re-conceptualized**. Law has to provide the framework for such opportunities of life-long learning to a bigger extent than ever. Not only the Government but also the actors in collective bargaining are confronted with this task. **Joint efforts of all these actors are needed**. As the **report of the ILO Global**

Commission on the Future of Work as well as the **Centenary Declaration of the ILO** tell us: life-long-learning for all is the precondition for coping successfully with the challenges of the modern workplace.

However, **many regulatory questions** have to be resolved in this context, just to give very few examples:

- how shall the **problem of access** be resolved ? As the already mentioned ILO Global Commission on the Future of work tells us, so far continued training is **mainly for the happy few**. Therefore the question is whether there should be **an individual right for all employees and job seekers** to participate in such training.

- or is it more feasible and in what way to **stimulate participation by establishing incentives** for employees and employers ?

- how shall the **costs be shared** between employees, employers and the State ?

The Global Commission's report contains **many helpful recommendations** on how to answer these questions. Particularly the idea of an **entitlement to training during working hours** is to be supported. One might even go further and recommend an **individual right for training during working hours**. Then, of course, the question of **remuneration** becomes crucial. .

And as far as **financing of continuous training** is concerned, the establishment of an **"employment insurance"**, as suggested by the Global Commission's report, deserves strong support. Thereby, the costs for such a training scheme may be covered to a great extent by contributions of employers and employees together. The question, of course, remains, whether and how far such a training scheme which is **not only in the interest of workers and employers but for the society** as a whole is to be subsidized by the **system of taxation**.

The **biggest problem**, however, is the **content of continued training**. So far training has been focussing on skills required for the different well known professions. In the future it will **no longer be possible to focus on such well established skills**.

The new skills which are needed are unknown to a great extent. And they will quickly be replaced by others. Therefore, the report of the Global Commission is correct by insisting that in the future the **focus** has to be much more on “**learning how to learn**” in order to become able to adapt to new situations. This, of course, requires **institutional settings** which guarantee for quality teaching, a very ambitious regulatory challenge.

In short and to make the point: De-skilling and the need for re-skilling of workers are a characteristic phenomenon of modern working life. This needs a comprehensive strategy of continued training. Labour law has to significantly re-conceptualize the framework for such a strategy. However, all relevant problems in this context still at least **to a great extent are unresolved**.

(2) Let's shift to the next precondition for valuable work: **job security**. Hereby, I do not merely mean protection against unfair dismissal but I am pleading for a much more **restrictive approach towards external flexibility as a whole**.

In the last decades the **focus has shifted from job security to employment security**, meaning that it is more important to facilitate the transition between jobs than to guarantee job security. There is no doubt that it is important to facilitate this transition by financial support, by re-skilling and upskilling programs etc. But this flexicurity concept unfortunately has **promoted at the same time a deregulation of job security** in many countries, not only by **weakening the standards for protection against unfair dismissals**, but also **by allowing to an enormous extent fixed term contracts and temporary agency employment**. Workers in these contexts are in an instable situation.

Fixed term employees do not know what happens after the termination of the contract, they **cannot plan anything**. This leads – as we know from empirical studies – to **fears and psychological disturbances** and quite often to an attitude to do everything to **please the employer** and the supervisors in order to get a stable contract. This behavior often leads to conflicts with employees who are employed indefinitely. And as we know from what happened in the economic crises, the world

financial crisis and the crisis caused by the pandemic, the **temporary agency workers were the first who lost their job.**

To **not be misunderstood**: I am **not pleading for prohibition** of fixed term employment and temporary agency employment. But these patterns should only be allowed in a much more restrictive, **only in exceptional situations** where indefinite employment is not possible or at least very difficult. **The respective EU Directives in my view are by far not restrictive enough.** In particular the Directive on Fixed Term Employment is not really limiting fixed term employment but opening the possibility for more or less unlimited repetition of fixed term contracts.

Without going into any details let me sum up by stating that the **so called employment security is not a substitute for job security.** Instead of increasing the external flexibility it might be **commendable to rather increase mechanisms of internal flexibility** in order to give companies the possibility to adapt to market needs.

(3) As far as the **multi-dimensional item of work-life balance** is concerned, I limit myself to one regulatory aspect which is an **example of internal flexibility** which I was suggesting right now. In order to adapt work to the requirements of one's personal situation the shift between full time and part-time has to be facilitated as much as possible. This, of course, implies regulatory problems of remuneration and social security which are not easy to be resolved.

(4) Work-life-balance is also an aspect of the next topic whose problem briefly are to be sketched: working time. Since in many modern workplaces workers have to focus more on goals to be achieved in a certain time frame, it is evident that presence at the workplace will be less important. How and when within the given time-frame work is to be performed, is more or less left to the discretion of the worker. This "autonomy" leads to the question whether traditional working time regulations still are appropriate to cope with this situation. Working time regulation **so far** was focussing mainly on daily and weekly maximum working time, on breaks and rest periods between the days and providing holidays and vacations. Step by step flexibility has been built in. Daily and weekly maximum working time can be exceeded to a certain

extent if compensated by reduction of working time within a certain period. However, in spite of the flexibility element working time regulation still remains rather rigid.

In particular in the digital world, especially in the context of tele-work and all forms of mobile work up to the home-office which has become widespread in the pandemic, there is the danger that working time never ends. Workers may be supposed to remain online, to answer e-mails and phone calls also after normal working time as well as on holidays and on vacations. And even if the workers are not asked by the employer to do so, they might do it voluntarily. This has far reaching implications on health and safety of the workers as well as on their private life. Relaxation and rest, as it is supposed by traditional working time regulation, mental detachment from work, is no longer possible under these conditions. Self-exploitation is an ever increasing danger. The eight hours day, the big achievement of the labour movement in the early twentieth century, is in danger to be abolished.

The question is, whether regulations are possible at all. Even if it might be very difficult to prevent self-exploitation, it still might be regulated that the worker is not obliged to work beyond a certain time. The vividly discussed right to non-availability or right to disconnect may be a step in the right direction. Of course this right has to be combined by the employer's obligation to disconnect. Technically it might be executed by blocking the use of servers for certain times as it is already done in some companies. However this only can be a first step. And it cannot be implemented everywhere (for example not in hospitals where access to servers is needed around the clock). Things are even more complicated when workers are involved in production or service processes with workers in other time zones. Then such disconnection might be counter-productive.

Maybe the solution is not to be found in giving up daily and weekly maximum times or rest periods, but within these limits to allow more flexibility and – most important – to provide reliable tools for documentation of when and how long work is performed. In short and to make the point: the traditional working time regulation is no longer feasible. But an appropriate alternative is not yet in sight.

There is **another problem** in the area of working time which is linked to **specific forms of employment contracts**. So called **zero hour contracts** have to be prohibited, since they not even guarantee a minimum of working time. And in the context of **employment on call** it has to be made sure that there is a **decent term of notice** before each call and a certain **daily and weekly minimum time**. The recent **EU Directive on transparency of working conditions** has provided significant progress in this respect.

(5) Working time, as we have seen, is linked to the next item **health and safety**. Here again I only want to draw your attention **only to one aspect** which became already evident in the introductory interview with the nurses: the **stress implied by not having enough personnel**. In Germany we have a word for the regulatory instrument to fight this situation: **“Stellenschlüssel”** which cannot be translated into English. It means that the **minimum number of employees** who have to be employed at a certain workplace is to be prescribed. This is a highly debated issue in my country, but of course of global interest because it is the precondition for reducing stress and for allowing adequate work performance. The problem is that it might not be easy to meet this minimum condition, as in my country we particularly can see in the care sector where not enough worker are available and where more and more people even leave the job. This shows that **such a minimum standard also works as an incentive** to do everything to make the job attractive in order to get enough people.

(6) Perhaps the most important precondition for valuable work is a **democratic workplace** where workers or their representatives are not supposed to be mere objects of management’s decisions but have an **opportunity to influence this decision-making**. Already the **founding fathers of labour law** were pleading for a democratic workplace as a precondition for labour law in line with human dignity. This insight of the founding fathers of labour law is as valid today as it was in the formative era of labour law. In the context of the **EU** the actuality of this concept particularly is shown by **Art. 27 of the Charter of Fundamental Rights** where “information and consultation” for “workers or workers representatives” “in good time” and “at the appropriate levels” is guaranteed as a fundamental right.

Institutionalised patterns of workers' participation **exist in many countries**, however, there are **big differences** from country to country. These differences refer to the **degree of participation**, ranging from information and consultation via veto rights up to co-determination where management and workers' representatives are on the same footing in decision-making for a whole range of topics. They also refer to the **level of participation**, ranging from the shop-floor level up to the headquarters of companies or groups of companies. The **composition of bodies of workers' participation** is different from country to country. All systems of workers participation are **embedded in the cultural tradition and overall institutional framework** of the respective country.

Workers' participation is becoming **particularly important in an era of transformation** like the present time where measures as re-organisation, introduction of technological innovations, outsourcing or de-localisation of production and services are on the agenda. If solutions in such contexts **would be left unilaterally to the employer**, it might be **difficult or even impossible to reach legitimacy and acceptability**. Therefore, they must be developed in cooperation with representative bodies of the workforce. In other words: the working conditions fitting with the specific conditions of each company are to be **shaped and monitored together with the employees' representatives**, be it by way of information and consultation or even by co-determination. **"Cooperative turn"** has become the catchword for this approach, indicating that transformation and change only can be conducted in a legitimate and acceptable way in a democratic setting.

Instead of listing up further elements of valuable work regulation I would like to **conclude** by saying that my intention was to **simply illustrate some dimensions of valuable work** and **how possibly they are to be regulated**. I am aware that my suggestions are **controversial**. And I am also aware that **legal regulation is only one step towards valuable work**. If such regulation will not remain mere law in the books, **efficient enforcement mechanisms** are needed.

I would like to add that **not everything** which makes work valuable **can be legally regulated**. To just give you **two examples**: to make work valuable it is important to **eliminate as much as possible monotony** and to **make the worker understand**

how his or her part of work performance contributes to the product or the service as a whole. I have to admit that I do not see how this can be legally regulated. Or to put it differently: **legal promotion of valuable work has its limits.**