Collective Bargaining Systems in Germany and Kazakhstan

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Abstract

This study provides a comparative overview of labour regulation in Germany and Kazakhstan with a focus on collective bargaining systems and emphasizing key differences and similarities considering the historical, economic and social background of the two countries.

Much has been written about the German industrial relations system in English. However, Kazakhstan's collective labour relations are basically still unknown to international scholars. There are few sources that describe the Labour Law of Kazakhstan in English, and most of them are dedicated to specific areas of labour relations.

Evidently, the most important way to achieve a better understanding of any national legal system is a comparative legal analysis along with historical perspective, comparing to the well-known legal system with long-term traditions and presenting a classical model of labour regulation.

This contribution also sheds light on the recent reforms in labour regulation in both countries that significantly affect the contours of modern Collective Labour Law.

It concludes that the German collective bargaining system is decentralized with a predominant sectoral level and bilateral structure of social partnership, while Kazakhstan has a centralized collective bargaining system with a predominant national level and tripartite structure of social partnership.

Keywords: collective labour relations, collective bargaining, Germany, Kazakhstan, legal regulation, employees, employers, representation, reforms.

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1 Overview

1.1 Historical Background

1.1.1 Germany

Although the Federal Republic of Germany as it exists today has only been around since 1990,[1] its history goes back several centuries. German democratic traditions stem from the Weimar Republic and have a long-term evolution (with a 12-year interruption in 1933-1945 during the Nazi regime) that determines the development of industrial relations and proactive trade union movement.

Germany's modern democratic parliamentary system originated in 1949 in the western part of the divided country, when the current Federal Constitution (*Grundgesetz* – hereinafter referred to as GG) was proclaimed. In this part of the country the collective labour relations model was born and was perceived by the eastern regions influenced by the 60-year regime of totalitarian Soviet Union only after the unification of Germany.

The fundamentals of the German industrial relations system, namely freedom of association and co-determination, were founded and formalized in the Weimar and after-war period respectively.

Until 1869 freedom of association was subject to penal sanctions. Since 1918, with the exception of the Nazi period, freedom of association has been fully recognized as the leading principle of Collective Labour Law, particularly, in the Weimar Constitution.[2] Labour unions established before the German Reich in the mid-nineteenth century were organized like political parties and should be considered as a predecessor of the trade union movement.[3]

The birth of the so-called collective bargaining autonomy (*Tarifautonomie*) was could be explained by the response to a close interference of the state with collective bargaining, which during the years of the Weimar Republic seemed to have paralysed the ability of unions and employers to bargain and to take responsibility for the results of bargaining.[4]

Historically, the concept of economic democracy as workers' participation in decision-making at all levels of economic life was proposed by the General Federation of German Unions (*ADGB*).[5] However, these ideas constituted no more than a slogan at the time and were realized only after the Second World War, formalized in the concept of co-determination as a response to the demand for enterprise democratization. Co-determination in the coal and steel industries, introduced in 1951, was one of the most notable milestones of this development. In 1957 and 1976, further important co-determination laws were adopted and covered all companies with more than 2,000 employees.[6]

1 *The Countries of Europe: Facts and Key Figures* (2016) Federal Ministry of Labour and Social Affairs of Germany, p. 142.
2 Weiss and Schmidt 2008, pp. 163-164.
3 Ibid., pp. 28-30.
4 Artus et al. 2016, pp. 1-2.
5 Weiss and Schmidt 2008, p. 30.
6 Dribbusch and Birke 2012.

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A comprehensive historical account of German industrial relations is provided in "M. Weiss and M. Schmidt. *Germany*, in R Blanpain (ed.) *International Encyclopedia for Labour Law and Industrial Relations* (2008). Kluwer Law International: The Hague".

Overall, the German system of industrial relations is the outcome of more than 140 years of evolutionary development that has shaped the contours and features of the contemporary collective dimension in German labour relations.

1.1.2 Kazakhstan

Modern Kazakhstan was established in 1991, following the collapse of the Soviet Union, and had, since the 1920s, been known as the Kazakh Soviet Socialistic Republic (*Kazakh SSR*).

Labour relations in Soviet Kazakhstan were for 70 years influenced by socialistic ideology and were determined by the following characteristics.

First, as private property did not exist, the state (state-owned organizations) was the sole employer.[7] Moreover, labour was both the right and duty of everyone, absolute employment was guaranteed by the centralization of labour management. Job avoidance, so-called "*tuneyadstvo*", was criminally punishable and considered as parasitism. Trade unions had monopolized power and were an integral element of the state machine, while employers' associations did not exist at all. Each dismissal required unions' approval.

Secondly, although collective agreements existed, collective bargaining was a mere formality, as the provisions of agreements were dictated by the state administration. Collective agreements were concluded at the enterprise level and essentially contained only social matters, as wages were centrally fixed by the state. In addition, strikes could be regarded as a form of sabotage against socialist property, and strikers were subject to prosecution.[8]

Only in 1991, after the proclamation of independence, did the Republic of Kazakhstan (hereinafter – Kazakhstan, RK) begin to build a market economy and a democratic civil society. Since then, independent Kazakhstan has been developing its Labour Law oriented to the demands of the emerging economy.

Five stages can be distinguished in the history of the collective bargaining system in Kazakhstan.[9]

The first stage covers 1991-1994 and concerns the restructuring of the economy and privatization processes. The role of the state has changed to one that encourages the partnership of the private sector organizations, employers as private proprietors, on the one hand, and employees, on the other.

During this period, the first Constitution of sovereign Kazakhstan was adopted in January 1993. The Constitution proclaimed the right to membership of public associations (Art. 1), the right to form public associations (Art. 16), the right to strike (Art. 20) and the right to establish trade unions (Art. 57).

7 Bronstein 2009, pp. 212-214.
8 Ibid., pp. 214-215.
9 Khassenov 2016, pp. 72-81.

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As a compromise between the old and the new political systems, reflecting attempts to introduce into the post-Soviet context a western democratic model, this Constitution initially contained some contradictions. As a result of a political crisis, the Constitution of 1993 existed until 1995, when the new Constitution was adopted after a nationwide referendum.

This period was also marked by the adoption of such regulatory acts as the Laws "On Collective Agreements" (1992-2007) and "On Trade Unions" (1993-2014), the decree of the Cabinet of ministers "On Social Partnership in Social and Labour Relations" (1992-2001), which, in fact, became the first normative legal acts regulating social partnership relations.

In 1992, the first *General Agreement* was concluded between the RK Cabinet of Ministers, the Union of Industrialists and Entrepreneurs of Kazakhstan, the Congress of Entrepreneurs of Kazakhstan and the RK Federation of Trade Unions.

Finally, Kazakhstan's accession to the International Labour Organization (ILO) in 1993 became a significant event.

The second stage (1994-1999) was determined by the adoption of a new constitutional foundation for social partnership. In August 1995, a new Constitution was promulgated, proclaiming the right to associations, including the right to form trade unions (Art. 23), the right to individual and collective labour disputes, including the right to strike (Art. 24), and guaranteeing freedom of activity of public associations, including trade unions (Art. 5)

The third stage spanned the years 1999-2007, when a completely new labour legislation was developed, including the Laws "On Labour in the Republic of Kazakhstan" (1999-2007), "On Social Partnership" (2000-2007).

During this period, the ILO's fundamental international conventions were ratified: all eight fundamental, three priority and two ILO technical conventions (more than half of all of today's ratified ILO conventions).

In 1999, *the RK Confederation of Employers* was created. In 2005, key republican and regional business associations merged into an umbrella structure, which resulted in the creation of the largest business association of the country – *the National Economic Chamber of Kazakhstan "Atameken Union"* (so-called association of private law).

The fourth stage covers 2007-2015 and was influenced primarily by the adoption of the first Labour Code of Kazakhstan, which codified all key institutions of social partnership in a single document.

The peculiarity of this period was the legislative strengthening of the status of employers' associations and trade unions.

Unprecedented measures were taken to institutionalize the employers' representation system. These included the establishment of the *National Chamber of Entrepreneurs* in September 2013 (so-called association of public law).

As a response to strengthening the position of employers, the legislation on trade unions was revised, and in 2014 a new Law "On Trade Unions" was promulgated.

The fifth stage can be considered to have begun between the end of 2015 and the beginning of 2016, when the current Labour Code was adopted, which

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differed from previous versions in that it legalized the transition to strengthening the autonomy of the parties to collective agreements. The adoption of the new Labour Code was a qualitatively new stage in the development of labour relations, in general, and a collective bargaining system, in particular.

To sum up, the history of Kazakhstan's system of industrial relations covers about 30 years of intense legislative and collective bargaining activities followed by the 70-year socialistic regime.

1.2 Economic and Social Context

1.2.1 Germany

Germany's economy is the largest in the EU and represents over 20% of the EU's gross domestic product.[10] Germany is still considered to be one of the most international economies in the world. Exports account for approximately 50% (43.8% in 2020) of annual GDP, making Germany one of the three largest trading nations in the world.[11]

However, the distinctive pattern of German economy is unbalanced development of the former western and eastern republics, determined by the different economic policies practiced: free market economy in West Germany (FRG) and centrally planned economy in East Germany (GDR). The considerably lower level of economic development of the eastern regions affects the social background and wage difference. Interestingly, the current economic and social statistics basically indicate "*West*" and "*Ost*" trends separately.

This tendency also applies to collective bargaining systems: even about 30 years after the German unification has extended the reach of west German industrial relations laws and institutions to the territory of the former GDR, differences in major practices such as bargaining coverage and also establishment-level interest representation through works councils still remain substantial.[12]

While considering brief economic trends of a modern unified Germany, relations between economic crisis and industrial relations shape should be taken into account.[13] The world economic crisis of 2008-2009 became a landmark in the development of the collective labour dimension. For example, when companies face financial difficulties, the trade unions support their demands for state bridging loans; however, at the workplace and in collective bargaining the unions face demands for wage restraint and concessions. Enterprises were able to weather the crisis owing to various options related to more flexible working time permitted by the government.

10 Gross domestic product at current market prices of selected European countries in 2020 (2022) https://www.statista.com/statistics/685925/gdp-of-european-countries/#statisticContainer. Accessed 18 February 2022.

11 Economic Key Facts Germany as of January 2022. https://home.kpmg/de/en/home/insights/2020/10/international-business/economic-key-facts-germany.html. Accessed 18 February 2022.

12 Artus et al. 2016, pp. 1-2.

13 Dribbusch and Birke 2012.

It has been said that

> German "crisis-corporatism" – that is, close cooperation between government, business, trade unions and works councils – which during the economic crisis of 2008/09 contributed considerably towards stabilizing employment levels during the period of economic downturn. Thanks to this successful crisis management, the German export economy after the end of the crisis quickly returned to its former level of performance and is now proving more competitive than ever.[14]

Another notable dimension is that Germany's extensive social security system has been a model for other countries, and therefore Germany still remains a pioneer in social security across the world. Its total expenditure on social protection (2013) constitutes 27.7% of GDP (current prices).[15]

It can be clearly seen that the German economy and social advanced security programmes directly determine the developed system of collective bargaining and the high level of collective labour rights being implemented. In turn, the close cooperation between business and trade unions cushioned the consequences of the economic crisis by enhancing employment.

1.2.2 Kazakhstan

In the Soviet Union, the state provided universal welfare, engaging in multiple roles as an owner of the means of production, the main employer and a provider of social protection. Following the collapse of the Soviet economy, the centralized social protection system was broken. The reorganization of national social protection in the 1990s included the introduction of privatization and insurance mechanisms instead of state-funded social benefits, elimination of subsidy programme and decentralization of health and education. The decline in production and closure of many enterprises led to unemployment and a sharp contraction of labour demand.[16]

Dismantling the socialistic system of welfare forced independent Kazakhstan to revise the social security system, which had led to considerable cutbacks of social benefits and weakening social protection at all.

In 1991, Kazakhstan embarked on a process of economic reform. Today, according to the classification of the International Monetary Fund, Kazakhstan belongs to the group of "Emerging and Developing Economies". It also argues that in 27 years of statehood Kazakhstan has made remarkable progress in transitioning from a command to a market-oriented economy. According to the Bertelsman Foundation, the country ranks among the most advanced countries of the former Soviet Union in terms of implementing market reforms.[17]

14 Artus et al. 2016, p. vii.

15 *The Countries of Europe: Facts and Key Figures* (2016) Federal Ministry of Labour and Social Affairs of Germany, p. 142.

16 Dugarova 2016, p. 7.

17 Vakulchuk 2014, pp. 1-2.

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From the early 2000s up to the 2008 global economic crisis, Kazakhstan, as an oil and energy producer, experienced rapid economic growth. This increased government revenues, enabling not only the payment of salaries, pensions and family benefits but also their enhancement.

In order to smooth the effect of the global financial crisis of 2008, a range of social protection measures to mitigate the impact of the crisis and support families were adopted (targeted social assistance to vulnerable groups; raising the value of family benefits, pensions, and wages in the public sector; and strengthening labour market policies through job creation and retraining programmes for the unemployed).[18]

Thus, although the country was severely hit by the economic crisis of 2008, it managed to recover faster than any other country in West Asia owing to appropriate governmental measures.[19]

Social spending in Kazakhstan was not affected by the 2008 crisis. The share of social expenditure in GDP even increased from 7.5% to 12.4% over the period 2007-2010.

The brief economic overview shows that labour reforms carried out from 1991 onwards were supported by an intensive economic transformation and restructuring of the social security system. The state is gradually promoting a regulatory framework for establishing an appropriate industrial relations system throughout the country.

2 Labour Regulation

2.1 Sources of Labour Law

2.1.1 Germany

German Labour Law is distinguished by the lack of a unified Labour Code and varieties of both statutory and non-statutory sources.

It is quite unusual for the German legal system, which has codified the Civil and Commercial Law, Social Security Law, to have fragmented labour legislation distributed among numerous statutes and rules. The *Erfurter Kommentar* (Erfurter Kommentar zum Arbeitsrecht, 15th ed. 2015), a commentary on German Labour Law, covers nearly 50 different statutory instruments.[20]

The reasons for the foregoing stem from the complicated legislative process and strong resistance of employees' and employers' associations to changing the status quo achieved by them over decades.

Despite the variety of statutory acts, the German Labour Law remains one of the most protective and advanced for employees and balances the interests of employers. Moreover, such fragmentation makes labour legislation more flexible.

The following are the important statutes related to collective labour relations:

1 Basic Law of 1949 (*Grundgesetz*);

18 Dugarova 2016, p. 7.
19 Vakulchuk 2014, p. 3.
20 Fornasier 2016, pp. 29-30.

2 Collective Agreement Act of 1969 (*Tarifvertragsgesetz*);
3 Works Council Constitution Act of 1972 (*Betriebsverfassungsgesetz – BetrVG*);
4 European Works Council Act (*Europäische Betriebsrätegesetz*);
5 One-Third Participation Act of 2004 (*Drittelbeteiligungsgesetz*);
6 Co-determination Act of 1976 (*Mitbestimmungsgesetz*);
7 Co-determination Act in the Coal, Iron and Steel Industry Act of 1951 (*Montan-Mitbestimmungsgesetz*);
8 Act on the Participation of the Employees in a European Company (*Societas Europaea*-SE) of 2004 (*SEBG*);
9 Act on a Representative Body for Executive Staff of 1989 (*Sprecherausschussgesetz – SprAuG*);
10 Labour Court Act of 1979 (*Arbeitsgerichtsgesetz*).

In addition to various legal sources at the level of domestic law, there are an increasing number of European and international instruments affecting employment relationships. The European legislature has enacted several directives designed to provide minimum standards of protection for employees throughout Europe. Moreover, the EU economic freedoms as well as the fundamental rights guaranteed under EU primary law and under the European Convention on Human Rights have a significant impact on national Labour Law.[21]

European Labour Law sets a framework, leaving substantial room for national developments. The main points covered by the European Labour Law include European works councils (1994-2009), the European Company Statute (2001), framework of information and consultation (2002) and the European Cooperative Society (2003).[22]

Along with the statutory sources, the case law developed by the courts is of great significance in Labour Law. Historically, the German Employment and Labour Law has been dominated by the case law of the Federal Labour Court and regional labour courts of the German lands, which not only ensure uniformity of judicial practice but also supplement the current legislation and even change it, using almost unlimited discretionary power to establish rules.[23]

In particular, a multiplicity of rules on trade unions and industrial actions have been adopted by the federal courts as a result of interpretation of constitutional principles and regulatory provisions of statutory law. This trend can be explained by the lack of statutory sources covering these matters as well as the ambiguities and peculiarities of the law-making mechanism, preventing their formalization and enforcement.

The reason for the foregoing is that the legislature has refrained from regulating certain politically sensitive issues such as the right to strike and other

21 Ibid., p. 30.
22 Blanpain 2014, pp. 189-190.
23 Germany: Employment & Labour Law (2017) Global Legal Insights. https://www.globallegalinsights.com/practice-areas/employment-and-labour-law/global-legal-insights---employment-and-labour-law-2017-5th-ed./germany. Accessed 18 February 2022.

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forms of industrial action, leaving it to the courts to develop rules on these issues.[24]

Other significant sources of German Labour Law are collective bargaining agreements and works agreements, as well as employment contracts and working rules.

A notable feature of German collective bargaining agreements is that they basically cover only union members employed by an employer who himself is a member of the employers' association that signed the collective agreement (except those announced as binding by the Ministry of Labour and Social Affairs),[25] while works agreement embraces all the employees of a certain establishment (company).

Thus, the strong diversification of German sources of Labour Law can be explained by the uniqueness of its legislative process and historical background.

2.1.2 Kazakhstan

The legal system of Kazakhstan is influenced predominantly by the Romanist-German legal tradition. The major sources of Labour Law in Kazakhstan are legislation and collective bargaining agreements. Kazakhstani labour legislation consists of the RK Constitution, the RK Labour Code, other statutes and normative legal acts as well as normative rulings of the RK Constitutional Council and the RK Supreme Court.

The important source of Labour Law is the RK Labour Code of 2015 (hereinafter – LC). Other laws in the sphere of collective labour relations are the RK Law of 2014 "On trade unions" and "On the RK National Chamber of Entrepreneurs" of 2013.

Although the importance of case law is recognized in Kazakhstan, it does not influence labour relations. Thus, the normative rulings of the RK Supreme Court contain explanations on judicial practice. In fact, there are only a couple of rulings of the RK Constitutional Council and one ruling of the RK Supreme Court related to labour relations.

International instruments traditionally get increasing significance for the Kazakhstan Labour Law. The Constitution stipulated that international treaties ratified by the Republic will have priority over its laws and be directly implemented except when the application of the international treaty requires the adoption of law.

To date, Kazakhstan has ratified 24 ILO conventions in the area of international labour standards, almost 12 times fewer than in Germany.

Kazakhstani labour relations are also under the influence of integration processes and supranational regulation. In 2015 Kazakhstan became a member of a supranational organization – the Eurasian Economic Union – and is bound by the Treaty on the Eurasian Economic Union (*Eurasian Treaty*), signed in 2014 in Astana by Belarus, Kazakhstan and Russia (later accessed by Armenia and Kyrgyzstan), which established the common economic market of capital, goods

24 Fornasier 2016, p. 30.
25 Weiss and Schmidt 2008, p. 40.

and labour forces. Currently, this Treaty covers only matters relating to labour migration and enforces a national regime for employees of the five member states. No other fields of supranational regulation of employment and collective labour relations are provided in the Eurasian Treaty.

Labour relations in Kazakhstan are also regulated by employment contracts and collective agreements. The distinctive feature of the LC is that a significant number of articles (56) have reference to collective agreements. Thus, the legislature laid the foundation for the autonomous regulation of labour relations with the agreement of employees and employers thereby establishing a clear "watershed" between the minimum social and labour guarantees established by the state and the guarantees established as a result of collective bargaining.[26]

Other sources of Labour Law include acts of the employer that refer to orders, directives, instructions, rules, regulations and so on issued by the employer.

To sum up, a compact labour legislation of Kazakhstan was formed three decades ago, which has been renewed significantly for the last three years.

2.2 Recent Labour Reforms

2.2.1 Germany

German Labour and Employment Law has experienced noticeable changes for the last three years. The most significant discussions were born by the adoption of the Minimum Wage Act (*Mindestlohngesetz – MiLoG*) in 2015, which introduces, for the first time, a statutory minimum wage, and the Unified Collective Bargaining Act (*Tarifeinheitsgesetz*), which prescribed that in the establishment with multiple collective bargaining agreements only the collective bargaining agreement with a trade union representing the majority of members will be applicable;[27] This means that in case of a conflict arising from several collective bargaining agreements (*CBA*) being applicable in one operation the CBA of the trade union that has fewer members in the company is supplanted.[28]

However, as experts claimed, the Minimum Wage Act might eventually have the effect of weakening collective bargaining. This is because by guaranteeing a statutory minimum wage and by extending the rights and benefits provided in collective agreements also to non-union members, the legislature actually reduces the incentives for employees to join unions. Employees may, in fact, question the benefit of union membership if union members and non-union members enjoy the same level of protection. As a result, unions may face even more difficulty in organizing employees.[29]

Referring to the Act on Uniformity of Collective Agreements, which came into force in 2015, it should be noted that the Act has been recently challenged before the Federal Constitutional Court by trade unions organizing specific

26 Nurgaliyeva and Khassenov 2017, p. 84.
27 Lingemann von Steinau-Steinruck and Mengel 2016, p. 1.
28 Kremp 2017.
29 Fornasier 2016, pp. 41-42.

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professions (*Berufsgruppengewerkschaften*) and sectoral trade unions claiming a violation of their right to freedom of association. The Act has been recognized as being mostly compatible with the Basic Law (although the decision has not been made unanimously).[30]

Other examples of reforms in Germany cover the *Working Time Act*, *Temporary Agency Work Act* and *Collective Bargaining Strengthening Act*.

The changes in the Working Time Act illustrate the trend when collective bargaining parties can deviate from statutory law to the detriment of employees. It envisages that along with the eight hours' daily duration of working time, the parties to the individual employment contract may agree to extend the working hours to a maximum of 10 hours per day provided that the average working time, calculated on the basis of a period of six months, does not exceed eight hours per day. This Act permits collective bargaining parties to derogate from the aforementioned rules, subject to certain conditions, beyond the limits imposed by that provision.[31]

According to the recently adopted German Temporary Agency Work Act (*AÜG*), the temporary work agency may exclude temporary agency workers and regular staff from the right to equal pay on the basis of a collective agreement. The AÜG determines that a collective agreement deviating from the principle of equal pay is also applicable vis-a-vis temporary agency workers who are not members of the signatory union provided that the collective agreement is incorporated into the individual contract of employment. As a result, approximately 95% of all temporary agency workers are exempted from the principle of equal pay.[32]

In 2014, Parliament adopted the Collective Bargaining Strengthening Act (*Tarifautonomiestärkungsgesetz*). The Act provides for two measures to guarantee better working conditions in the absence of a collective agreement. First, it introduces a statutory minimum wage, which was previously characterized. The second regulatory measure relates to the power of authorities to declare collective agreements universally applicable. In the new act, this power has been extended considerably. Previously, TVG stipulated that a collective agreement could be declared universally applicable on grounds of public interest provided that the employers bound by the agreement employed 50% or more of the workers falling under the personal scope of the agreement. Under the new §5 TVG, the 50% threshold has been abandoned. In addition, it is now easier to declare collective agreements universally applicable also under the framework of the Posting of Workers Act (*AEntG*). Whereas §4 AEntG, in its previous version, contained an exhaustive list of industries in which collective agreements could be declared

30 Press release No. 57/2017 of the Bundesverfassungsgericht judgment of 11 July 2017: 1 BvR 1571/15, 1 BvR 1477/16, 1 BvR 1043/16, 1 BvR 2883/15, 1 BvR 1588/15. Federal Constitutional Court of Germany. https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2017/bvg17-057.html. Accessed 16 September 2017.

31 Fornasier 2016, p. 37.

32 Ibid., p. 38.

universally applicable, the new §4 AEntG now extends to any branch of industry.[33]

We agree with scholars who consider such extension of CBA as questionable from the viewpoint of constitutional law because

> there are strong indications provided the right to be left alone by CBA forms an indispensable part of the "negative" freedom of association.[34]

Indeed, it illustrates significant interference of the state to collective autonomy undervalued the bargaining powers of social partners.

2.2.2 Kazakhstan

The Labour Law of Kazakhstan underwent radical reforms of liberalization. The main reason for such comprehensive revision of labour regulation was that the previous Labour Code did not encourage employers to create more jobs. This made it difficult to use the legal regulatory mechanisms of labour relations that are successfully performed by countries with stable market economies.[35]

In this regard, a new Labour Code was adopted in 2015. The role of the state has been limited through the establishment of minimum standards by which participants of labour relations shall enter into negotiations and conclude contracts and agreements.

In the new LC, experts' community and legislative establishment are working on a solution to the problem of flexibility of legal regulation of labour relations, the possibility to widely use not only standard labour contracts but also various contracts that regulate non-standard employment.

The LC has been adapted to possible crises; it has formed mechanisms to promote the stability of enterprises during economic instability (temporary relocation of staff to other employers with suspension of the main labour contract, a simplified introduction of part-time work, etc.). The liberty of labour relations parties (employer and employees) has been extended considerably.[36]

The key innovations of the LC are as follows:[37]

1 It introduces more flexible regulation on permanent contracts. In particular, it expands the grounds for fair dismissal, thereby making it easier for employers to (fairly) dismiss workers.
2 It liberalizes temporary contracts even further. More specifically, it allows employers to renew temporary contracts (up to two times).
3 It abolishes protection of some categories of vulnerable workers (such as youth and disabled persons). The LC extends trial periods to all workers and abolishes the recent rule according to which employers can hire youth under temporary contracts only for a minimum of two years.

33 Fornasier 2016, pp. 41-42.
34 Waas 2006, p. 20.
35 Khassenov 2015, p. 131.
36 Khassenov 2015, p. 134.
37 *Building Inclusive Labour Markets in Kazakhstan: A Focus on Youth, Older Workers and People with Disabilities (2017)* OECD Publishing, Paris, pp. 83-84.

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4 In addition, it gives more responsibilities to social partners to negotiate around wages and labour standards. For example, before the reform of the LC, overtime work was paid one and a half (during the working week) or two times (on holidays and weekends) the wage. The new LC reduces pay for overtime work to 1.5 times the wage and lets social partners negotiate for settling higher overtime wages.

As the Organisation for Economic Co-operation and Development (OECD) reported, the new LC gives social partners more responsibilities to negotiate on wages and labour standards. These steps go in the right direction because they reduce barriers to youth hiring.[38]

It should be noted that the primary lobbyist of labour reform was the National Chamber of Entrepreneurs of Kazakhstan, the nationwide umbrella organization of all employers' associations. This proves the current imbalances in the collective bargaining system, where employers' associations possess stronger and more influential positions.

3 The Actors of Collective Labour Relationship

3.1 Fundamentals and Definitions

Freedom of association enjoys protection as fundamental freedom guaranteed by the Constitutions of the two countries.

Article 9, paragraph 3 of the German Basic Law guarantees every individual the right to form or to participate in the formation of associations (whether trade unions or employers' associations), to choose to become a member of an existing association or remain in an association and to leave it.

Article 23 of the RK Constitution guarantees a fundamental right of the RK citizens to freedom of association and prescribes that the activities of public associations shall be regulated by law. Meanwhile, the Constitution prohibits the membership of military servants, servants of national security and law-enforcement bodies and judges in political parties and trade unions and their actions in support of any political party.

The most important actors in Labour Law are associations established to safeguard and improve working or economic conditions, which are also called collective industrial organizations (*Koalition*).[39] Their activities are guaranteed by the constitutional rights of freedom of association.

Whereas trade unions and employers' associations, as collective industrial organizations, hold a central position in industrial relations, in Germany, their definitions are not developed statutorily and have been determined by case law, in particular by the Federal Labour Court. Particularly, the Federal Labour Court developed detailed criteria for recognizing a trade union (association) as a collective industrial organization.

38 Ibid., p. 19.
39 Weiss and Schmidt 2008, p. 164.

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In contrast, Kazakhstan's legislature does not operate the term "collective industrial organization" and explicitly distinguishes between the definition of a trade union and that of an employer's association.

According to the RK Law "On trade unions", a trade union is recognized as a public association with a fixed membership, voluntarily created on the basis of common labour, production and professional interests of the RK citizens for the representation and protection of labour and social and economic rights and interests of its members.[40]

The RK Labour Code refers employers' associations to associations of private entrepreneurship subjects, the definition of which is set forth in the RK Entrepreneurial Code as "association (union), created by the entrepreneurship subjects for the coordination of their entrepreneurship activity as well as representation and protection of their common interests".[41]

The mentioned difference in approaches of identifying collective industrial organizations stems from the Civil Law tradition. It is a mandatory requirement to pass state registration for associations (both trade union and employers' association) to be established and to exist in Kazakhstan. In Germany, trade unions usually do not have the status of a legal entity, and no permission or registration procedure is required for their establishment. The lack of status of a legal person does not prevent trade unions from entering civil relations.

3.2 Overview of Employees' Representation System and Non-Union Representatives

3.2.1 Germany

In Germany the system of employees' representation is more institutionalized, their opportunities are more diversified and the scope of their activities is quite wide. Along with trade unions, which have exclusive rights to collective bargaining and strikes, there are separate employees' representatives, so-called works councils (*Betriebsrat*) in the private sector, decision-making bodies elected by employees for a term of four years[42] and staff councils in the public sector. This system of employees' representation is also termed "works constitution" (*Betriebsverfassung*).

The central difference between trade unions and works councils laid down is their mandate. The trade union mandate is established by a contract, and it always depends on its members (individual employee). The mandate of the works council has a statutory ground, and its term is therefore determined by the employment relationship between the employee and the employer.[43]

The works council is entitled to use two principal instruments

1 to conclude works agreements (*Betriebsvereinbarungen*) with the employer in all matters relating to labour relations in the establishment. Such agreements

40 RK Law of 27 June 2014 No. 211-V "On trade unions".
41 RK Entrepreneurial Code of 29 October 2015 № 375-V.
42 Kremp and Kirchner 2010, p. 210.
43 Waas 2006.

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have immediate and binding effect on the individual employment contract, and it is up to the employer to conclude these agreements or not;[44]

2 to enforce a so-called "social plan" (*Sozialplan*), a special works agreement to compensate or reduce disadvantages for employees in the event of a substantial alteration to the establishment or in cases of insolvency. However, there is a privilege for newly established enterprises: no social plan can be enforced in the first four years after the foundation of an enterprise.[45]

The most significant duty of works councils is to cooperate with the employer in good faith, which clearly means the prohibition of strikes and activities endangering the "peace within the establishment". However, it does not prevent works council members from participating in legal strikes called by a trade union in order to achieve a certain result in collective bargaining.[46]

Works councils are represented on different levels: works council established as a primary unit (*Betriebsrat*); company works council (*Gesamtbetriebsrat*) formed by establishment of a multiplant company; group works council at the level of the parent company (*Konzernbetriebsrat*) constituted by several company works councils in one group of enterprises; European works council established in community scale undertakings (with at least 1,000 employees in the member states and at least 150 employees in each of at least two member states); the European Companies (*SE*) or the European Cooperative Societies (*SCE*).[47]

The most important rights granted by the Works Constitution Act are co-determination rights in personal matters (hiring, transfers and dismissals of employees, personnel planning and vocational training), social matters (working and rest time, remuneration, social facilities and health protection, accommodation, prevention of industrial accidents and occupational diseases, etc.) and economic matters.

According to the statistics, works councils are established in only 10% of all companies with five employees or more, although 45% of all employees work in such companies. In the western part of Germany employees are represented by a works council in 90% of all large companies with more than 500 employees. The eastern lands are not far behind, with 85%.[48]

The German legislature does not make it mandatory for employees to form a works council. However, if the employees decide to constitute a works council they have the right to initiate elections, subject to the requirement that there are at least five regularly employed employees over the age of 18 in the establishment (which is defined as the organizational labour unit of a company), three of whom have worked there for longer than six months. The size of the works council

44 *Labor and Employment Law in Germany*. Voelker Gruppe. https://www.voelker-gruppe.com/en/services/employment/german_labor_law. Accessed 18 February 2022.

45 Weiss and Schmidt 2008, pp. 240-241.

46 Ibid., p. 233.

47 Ibid., p. 225.

48 Dribbusch and Birke 2012.

depends on the number of employees in the establishment[49] and varies from one member (for establishments with staff of 5-20 employees) to 35 members (for establishments with staff of 7,001-9,000) and 35+2 for each additional 3,000 employees after 9,000 employees.[50]

In addition to works councils, employees may also be represented by the other non-union bodies operating in conjunction with the works council:

1 It is mandatory to constitute an economic committee (*Wirtschaftsausschuss*) dealing with economic affairs in companies with more than 100 employees. Interestingly, unlike works councils, executive staff may be nominated to the economic committee in order to ensure the representation of economic experts in this consultative body.[51] An employer shall inform the economic committee in good time and comprehensively (including the submission of the relevant documents) of all economic matters relating to the company (e.g. the economic and financial situation of the company and any measures that could substantially affect employees' interests).[52]
2 A juvenile delegation (*Jugend- und Auszubildendenvertretung*) is required to be formed in each establishment employing at least five juveniles (employees under 18 years of age and apprentices under 25 years of age).[53]
3 Disabled employees are entitled to elect a representative body (*Schwerbehindertenvertretung*) that should be involved in any action taken by the employer concerning a disabled employee. An employer must appoint an authorized representative responsible for matters concerning disabled persons.
4 As the executive staff are prohibited from participating in the election of works councils and being elected to them, the statutory law enables them to constitute a representative body for executive staff in establishments regularly employing at least 10 members of such staff.

It should be mentioned that all these representative bodies are confined to information and consultation rights. They have neither rights of veto nor rights of co-determination.[54] This means that the final decision on a particular matter is up to the employer. However, all of these bodies' members, except of the latter, enjoy far-reaching protection against dismissals.

5. Moreover, the German system of industrial relations is distinguished by the employee's representation in the organization's supervisory board (*Aufsichtsrat*).

To sum up, owing to the multichannel model of employees' representation, German trade unions do not play as significant a role within companies as some

49 *Labor and Employment Law in Germany*. Voelker Gruppe. https://www.voelker-gruppe.com /en/services/employment/german_labor_law. Accessed 18 February 2022.
50 Works Constitution Act (Betriebsverfassungsgesetz BetrVG), LS 1972 – Ger. F.R. 1.
51 Kremp and Kirchner 2010, pp. 225-226.
52 *Employment Law in Germany*. Wolters Kluwer. https://app.croneri.co.uk/feature-articles/employment-law-germany?product=3. Accessed 18 February 2022.
53 Weiss and Schmidt 2008, pp. 226-227.
54 Ibid., p. 228.

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of their counterparts do in other countries owing to the general constitution of the workplace. Their most important task is to conclude collective agreements. Trade union representatives also support employees or the works council — they have certain rights and duties under the Works Council Constitution Act. These include the right to enter the premises to perform their role. As long as management is informed within a reasonable period, a visit cannot be refused except for compelling reasons.[55]

We can clearly see that the works councils serve a central role on the establishment (company) level. They enjoy a range of information, consultation and co-determination rights.

3.2.2 Kazakhstan

The range of workers' representatives in Kazakhstan is legally formalized. The LC determines two possible categories of workers' representatives:

1 trade union bodies and their associations,
2 in their absence, the elective representatives elected by a majority of votes and authorized by the employees at the general meeting (conference) of employees in case no fewer than two-thirds of employees (conference delegates) are present.

Therefore, as a general rule the legislature allows elective representatives to be elected in the absence of a trade union. The only exception is the situation when the membership of employees in trade unions is less than half of the staff of the organization, then the interests of employees may be represented by trade unions and elected representatives simultaneously.

The LC distinguishes between the notions of "trade unions bodies" ("union representatives") and "elected representatives of employees". The significant guarantees for representative rights of employees are provided by the LC:

> Employees, who are not members of a trade union, who did not take part in the election of elected representatives of employees, shall be entitled to delegate their own right to represent their interests to trade union bodies, elected representatives of employees. On the basis of an employee's written application trade union bodies, elected representatives of employees shall ensure the representation of his interests.

It can be clearly seen that although in the sphere of individual labour relations trade unions represent only their members (the principle of a special representation), they can, at the request of the employee who does not belong to the trade union, take on representation of the rights and interests of such an employee.[56]

55 *Employment Law in Germany*. Wolters Kluwer. https://app.croneri.co.uk/feature-articles/employment-law-germany?product=3. Accessed 18 February 2022.

56 Kasiliauskas 2009, pp. 174-174.

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The principles of general and special representation have been adopted by the legislature in the updated version of the LC:

> Workers who are not members of a trade union, on a contractual basis have the right to authorize a trade union body and other representatives to represent their interests in relations with the employer. In the presence of several workers' representatives in the organization they create a unified representative body for them to participate in the commission and signing of a collective agreement.[57]

Therefore, employees' representation system in Kazakhstan is dominantly unionized, and elected representatives (non-union representatives) remain subsidiary to trade unions. It should be noted that the scope of activities of trade unions and elected representatives is similar.

3.3 Trade Unions' Status

In spite of the lack of trade union law in Germany and an institutionalized process for trade union recognition, trade unions are legally entitled to negotiate CBA as well as to take legal action or to be taken to court without obtaining the status of a legal entity.[58] The lack of a legal entity status does not prevent trade unions, for example, to be a plaintiff as this right is recognized by court decisions. The legal status of a trade union is determined in the relevant trade union's standing documents (constitution).

Opposed to this trend, as noted before, there is an obligatory rule for trade unions in Kazakhstan to be established as a legal entity of a certain organizational form (public association) according to civil law. The legal capacity of the trade union as the legal entity arises from the moment of state registration. The lack of legal entity's status as well as failure to comply with statutory conditions for a specific category of trade union entails the recognition of a trade union as illegal and causes its dissolution by court decision.

The RK Law "On Trade Unions" prescribes detailed requirements for the establishment of a trade union. In particular, it may be incorporated on the initiative of no fewer than ten citizens of the RK linked by a community of their professional interests, and convening the constituent congress (conference, meeting), on which the charter (constitution) shall be approved and trade union bodies formed.

Although there is no single trade union in Germany, the existing system of trade unions is still concentrated on the trade unions affiliated to the *German Trade Union Federation* (*DGB*) – an umbrella organization for individual trade unions. The trade union members of the DGB are basically arranged on the basis of the industrial (branch) principle.

57 Nurgaliyeva and Khassenov 2016, pp. 28-35.
58 Sergio 2008, p. 67.

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Along with DGB there are numerous other trade unions such as the Federation of Christian Unions (*CGB*), the German Federation of Career Public Servants (*dbb*) and the Association of Executive Staff (*ULA*).[59]

The trade union movement in Kazakhstan is stated to be rather centralized and dominated by the nationwide umbrella organization (*Trade Unions Federation*) embracing the majority of the registered trade unions.

The Trade Unions Federation consolidates about 2 million members and includes more than 18,000 primary, 445 city and district and 180 regional organizations of trade unions.[60]

There are five levels of trade unions in Kazakhstan:

1 republican association of the trade unions;
2 territorial association of the trade unions;
3 sectoral trade union;
4 local trade union;
5 primary trade union organization.

The trade union legislation of Kazakhstan contains norms that violate the right to freedom of association. The Committee of Experts on the Application of Conventions and Recommendations of the ILO has repeatedly noted this in its reports and recommendations.

For many years, Kazakhstan has been the subject of critical reports by the ILO in connection with the violation of Conventions No. 87 and No. 98 on the right to freedom of association.

The ILO Committee on Freedom of Association has repeatedly initiated cases on complaints of violations of the right to freedom of association in relation to Kazakhstan, or rather four cases (in 1994, 1995, 2002 and 2017), of which one is active.[61]

1) Violation of the principle of the notification nature of trade union registration and the right of a trade union to organize its activities and develop its own charter established by the ILO Convention No. 87.

The law on trade unions specifies a typical structure and empowers the authorities to intervene in intra-union activities, including the requirement to change the charter. In addition, state bodies may refuse to register trade unions, citing the imperfection of the charter.

2) Increased quantitative restrictions on the creation of a trade union.

The legislation of Kazakhstan contains increased quantitative restrictions in the form of a minimum number of founding citizens to create a trade union. In accordance with Article 8 of the Law of the Republic of Kazakhstan "On Trade Unions", a trade union is created on the initiative of a group of citizens of the Republic of Kazakhstan of at least ten people connected through the commonality of their professional and industrial interests, convening a founding

59 Weiss and Schmidt 2008, pp. 171-172.

60 General confederation of trade unions. www.vkp.ru. Accessed 18 February 2022.

61 Official Internet resource of the International Labor Organization [Electronic resource] https://www.ilo.org/dyn/normlex/en/f?p=1000:20010:::NO.:::

congress (conference, meeting), at which the charter is approved, and trade union bodies are formed.

According to the Article 15 of the Law of the Republic of Kazakhstan "On Trade Unions", it is allowed to create a primary trade union organization, which is not a legal entity, created on the initiative of, at least, three people.

At the same time, employers have the right to create associations of legal entities and/or individual entrepreneurs in the form of an association (union) without any quantitative restrictions (Art. 20 of the Law of the Republic of Kazakhstan "On Non-Commercial Organizations": at least two founders). The above difference in the legal possibilities of associations of workers and employers, in addition to the right to association, violates the constitutional principle of equality before the law.

3) Limitation of forms of trade union representation of workers.

According to the law, in Kazakhstan trade unions can only be created by the industrial and sectoral principle and today only five forms of trade unions can exist *de jure*: primary organizations, local trade unions, sectoral trade unions, territorial and republican associations of trade unions. It is obvious that the legislator cannot restrict the willingness of people to unite only within the framework of these four forms. It is in no way possible to limit the principles of uniting people in trade union organizations by limiting their forms, because this fundamentally contradicts the norms of international law.

In this regard, we consider it necessary to completely revise the concept of trade union representation in Kazakhstan in accordance with international principles and norms, including the elimination of restrictions in the form of a production and sectoral principle for creating a trade union, providing for the possibility of creating other trade unions, regardless of the forms specified in the law.

3.4 Employers' Representation System

3.4.1 Germany

Representation of employers' interests are traditionally performed by employers' associations.

Unlike trade unions, employers' associations are usually organized as legal entities.[62] The associations, their formation, their work, as well as their internal democratic structures, enjoy constitutional protections. An employer's freedom to choose whether or not to join an association is an individual constitutional right pursuant to Art. 9(3) GG.

Many of the regional associations are industry based, and the same branch is finally merged in an association at the federal level. The federal associations of the different branches are unified in the two most important central confederations, the *Federal Union of German Industry* (BDI) and the *Confederation of German Employers' Associations* (*BDA*). The BDA represents the enterprises' interest as an employer, whereas the BDI seeks to further their economic and

62 Weiss and Schmidt 2008, p. 176.

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political interests. However, they are increasingly working together and trying to benefit from their synergies. This progress led to the establishment of a common steering committee.[63]

Another employers' associations group are the *Chambers of Industry and Commerce*, considered to be public entities with compulsory affiliation.[64]

Employers usually belong to both: to a national association of a branch of industry at the federal level and to a multi-industry Land association grouping all trade associations together at the Land level. These associations belong to an umbrella organization, the BDA. According to its standing rules, BDA represents the sociopolitical interests of employers beyond the scope of one land or one economic sector. Its members are not bound by its policies. Neither the BDA nor the multi-industrial associations participate in collective bargaining. Collective bargaining falls within the exclusive competence of the individual employers' trade organizations (*Arbeitgeberverband*).[65]

The membership in employer associations gives companies the guarantee of "industrial peace" for the duration of collective agreements concluded by the association to which they belong. The obligation of industrial peace means that industrial actions – in particular strikes – are not permitted during the term of the collective agreements.[66]

In order to remain attractive for firms, many professional associations have introduced a new form of membership (generally referred to as *OT-Mitgliedschaft*) by which firms continue to be part of the organization (and therefore pay their contributions) but are no longer bound by sectoral-level collective agreements signed by the organization. This practice has been approved, albeit subject to certain restrictions, by the Federal Labour Court.[67]

3.4.2 Kazakhstan

The Kazakh legislature determines that individuals or legal entities represent the interests of the employer, within their delegated authority based on the constituent documents or power of attorney. As implied by the LC, such representatives may include the head of the organization, the executive body of the organization or other authorized persons to represent their interests, including the head of a branch or representative office of a foreign legal entity.

In Kazakhstan there is a model of a single employers' union performing economic functions, associations of private business entities consolidated under the umbrella organization, namely *the RK National Chamber of Entrepreneurs* (hereinafter – NCE), which is both a non-profit organization and a legal entity carrying out public non-government functions. It was the first organization in the post-Soviet area by its legal nature and legislative base.[68]

63 Ibid., p. 177.
64 Zachert 2004, p. 36.
65 Weiss and Schmidt 2008, p. 177.
66 *German Collective Bargaining Law. An Introduction for Foreign Businesses*, Federation of German Employer's Associations in the Metal and Electrical Engineering Industries, March 2016.
67 Fornasier 2016, p. 40.
68 Nurgaliyeva and Khassenov 2016, pp. 28-35.

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Employers in Kazakhstan today are much better organized compared with their counterparts. This is a result of the reform implemented five years ago introducing NCE, which consolidates all business entities, as well as individual entrepreneurs, on the principle of compulsory (statutory) membership. By the way, the Kazakhstan legislator used the experience of the German Association of Chambers of Commerce (*DIHK*), Austrian Federal Chamber of Economics (*WKO*) and Turkish Union of Chambers of Commerce and Commodities (*TOBB*). It might seem like a mixture of the three chamber models with specific features adapted to the national culture.

Along with the NCE there are various voluntary multisectoral, sectoral (branch) and regional business associations, most of which are integrated into the system of the NCE as accredited (associated membership) organizations. In 2020 the NCE was deprived of the right to represent employers in socio-labour relations according to the ILO critical reports. Nowadays representatives of employers are business associations based on voluntary membership.

On the basis of the analysis of the legal framework of employers' and employees' representatives, we can clearly see the imbalance of legal opportunities between representatives of employers and those of workers.

4 Collective Bargaining Systems

4.1 Models of Collective Bargaining

4.1.1 Germany

Although the German Basic Law does not refer to collective bargaining, case law and the general opinion of the doctrine consider that freedom of association also implies that associations have the right to enter into collective agreements on their own initiative or, in other words, collective autonomy.[69]

In particular, according to the German Constitutional Court, "collective autonomy aims to compensate for workers" structural inferiority, individually, in the signing an employment contract, since through collective bargaining enables the parties to negotiate salary and working conditions in a more or less balanced position.[70]

Autonomy of collective bargaining (*Tarifautonomie*) plays a central role in German Labour Law compared with the tripartite partnership. In contrast to Kazakhstan, collective bargaining is an exclusive competence of the employers' association (or a single employer) and the trade unions. The state usually does not participate in the conclusion of collective agreements (except those of the civil service, where it functions as an employer).

69 Zachert 2004, p. 27.
70 Ibid., p. 28.

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Bound by the principle of neutrality, the state must uphold this constitutional principle by leaving it to the parties to regulate individual working conditions and refraining from intervening in industrial disputes.[71]

The tripartite structure of collective bargaining used to be operative in the 1960s, when the so-called Concerted Action (*Konzertierte Aktion*) was established and consisted of federal authorities, the trade unions and the employers' associations. The mission of this body was to achieve a compromise on fundamental issues of economic and labour market policies, although it was not legally binding but did play an important role in the decision-making process. This institution, however, did not exist long owing to the conflict around the Co-Determination Act (*Mitbestimmungsgesetz*) of 1976 and consequent leave of trade unions from the Concerted Action.[72]

In some cases state authorities participated in collective labour relations through so-called pacts of employment that had a binding effect and contained provisions relating to working conditions, holidays, termination of employment relationships and salaries.[73] These instruments are also non-existent today.

4.1.2 Kazakhstan

Until the recent labour reforms, Kazakhstan's industrial relations were greatly influenced by considerable interference of the state in labour regulation. The so-called model of social partnership or tripartite bargaining became the most important factor in the development of collective labour relations.

The contemporary policy of Kazakhstan in labour relations is characterized by the transition from their directive (centralized) regulation to the contractual one (decentralized), the increase in the role of employer's acts taking into account the opinion of employees' representatives. More and more Labour Law institutions are involved in the subject of competence of social partners.[74]

The concept "social partnership" found its legal formalization in the legislation. In Kazakhstan, the concept of social partnership is recognized as tripartism, the model of tripartite interaction of the state, employees and employers.[75]

Social partnership is defined in the LC as a system of relationships between employees (representatives of employees), employers (representatives of employees) and state bodies, which are aimed at coordinating their interests in issues relating to regulation of labour relations and other relations directly related to labour relations.

Nowadays, there is a unified system (levels) of social partnership – four main levels of social partnership as follows:

1 republican level;
2 sectoral level;

71 *German Collective Bargaining Law. An Introduction for Foreign Businesses (2016)* Federation of German Employer's Associations in the Metal and Electrical Engineering Industries, p. 8.
72 Weiss and Schmidt 2008, p. 35.
73 Ibid., p. 35.
74 Nurgaliyeva 2011, pp. 103-105.
75 Nurgaliyeva and Khassenov 2017, pp. 262-264.

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3 regional level;
4 level of organization (local level).

At the national level there is the republican Tripartite Commission for Social Partnership and Regulation of Social and Labour Relations; at the sectoral level there are 18 sectoral tripartite commissions; while at the regional level there are more than 200 regional commissions.

The republican, sectoral and regional commissions are constituted as permanently functioning bodies for ensuring the coordination of interests of social partnership parties by conducting consultations and negotiations that are formalized by appropriate decision binding on the parties.

The tripartite commissions play a dominant role in shaping the collective labour relations framework in Kazakhstan.

4.2 Collective Agreements

4.2.1 Germany

The term "collective agreements" under German law refers to two types of agreements:

1 collective bargaining agreements in a classical sense: agreements with trade unions (*Tarifvertrag*);
2 company agreement or works agreement: agreements between the employer and the works council (*Betriebsvereinbarung*).[76]

The Tarifvertrag are entered into either at the sectoral level with an employers' organization or at the company level with the management of an individual firm. The territorial scope of sectoral-level collective agreements varies and is generally stipulated by the collective bargaining parties. Thus, it may extend to the whole of Germany or be limited to certain regions.[77]

The right to negotiate and conclude a Tarifvertrag, although not expressly mentioned by the GG, has been recognized by the Federal Constitutional Court as an integral part of the freedom of association guaranteed by the GG. Hence, the freedom of professional organizations to determine working conditions through the mechanism of the Tarifvertrag has the status of a constitutional right.[78]

Collective agreements apply only to the collective bargaining sector for which they were concluded, i.e. a specific industry, a specific collective bargaining district or an individual company.[79]

The provisions in a Tarifvertrag are binding only on employers and employees who are members of the signatory organizations. In practice, however, most employers voluntarily agree in their employment agreements with other

76 Waas 2012, p. 71 (84).
77 Fornasier 2016, pp. 31-32.
78 Ibid., pp. 31-32.
79 *Collective Agreements for Certain Sectors in Germany*. Business Location Center. https://www.businesslocationcenter.de/en/labor-market/employment-law-and-collective-contracts-system/collective-agreements-for-certain-sectors/ . Accessed 18 February 2022.

employees that the collective bargaining agreement shall also be applicable to such non-member employees.

At the request of a party to a collective agreement, the Collective Agreements Act enables the Federal Ministry of Labour and Social Affairs to declare a collective agreement generally obligatory, under certain conditions and in agreement with a committee consisting of three representatives of each of the leading professional organizations of employers and employees.

In the summer of 2019 the website of the labour ministry (BMAS) indicated that at that point only 443 (0.6%) of the approximately 73,000 registered collective agreements, which cover a wide range of issues other than pay, were currently generally binding, and that the list of generally binding agreements was being revised.[80] The *Tarifvertrag* has a direct and binding effect, and it does not need to be incorporated into the individual employment contract in order to become effective. This means that normative provisions of collective agreement are automatically inserted into the individual relationship between employer and employee.

The Betriebsvereinbarung is regulated by the Works Constitution Act and concluded exclusively at the enterprise level. As well as the Tarifvertrag, it has a direct and mandatory effect.

There are two principal characteristics distinguishing the Betriebsvereinbarung from the Tarifvertrag. Firstly, unlike the Tarifvertrag, the Betriebsvereinbarung covers all workers employed in the respective plant, irrespective of whether or not they are unionized. Secondly, the right to conclude the former type of collective agreement is not protected as a specific constitutional right.[81]

It should be mentioned that the Tarifvertrag has precedence before the Betriebsvereinbarung. Betriebsvereinbarung may not interfere with the arrangements made by the social partners on the basis of a Tarifvertrag. According to §77(3) BetrVG, a Betriebsvereinbarung may not deal with terms of employment that are regulated in a Tarifvertrag for the relevant industrial sector. As a result of this rule, a Tarifvertrag takes precedence over a Betriebsvereinbarung even in the event that the latter is more favourable to employees.[82]

Comparable to Betriebsvereinbarung, the provisions of a Tarifvertrag do not terminate automatically but remain in force until replaced by a new agreement. Accordingly, the employer cannot deviate from the regulations of the collective bargaining agreement by simply leaving the employer's association that signed the collective bargaining agreement. If the employer cancels its membership, the current CBA will remain in force until they are superseded by a new agreement.[83]

80 Collective bargaining in Germany https://www.worker-participation.eu/National-Industrial-Relations/Countries/Germany/Collective-Bargaining. Accessed 18 February 2022.

81 Fornasier 2016, pp. 33-34.

82 Ibid., p. 34.

83 *Employment Law in Germany*, Wolters Kluwer. https://app.croneri.co.uk/feature-articles/employment-law-germany?product=3. Accessed 18 February 2022.

The German collective bargaining system distinguishes a couple of duties that are binding on the parties to a collective agreement, even if they are not explicitly mentioned in the collective agreement: the peace obligation (*Friedenspflicht*) and the duty to exert influence (*Einwirkungspflicht*).[84]

The first duty prescribes an obligation to maintain industrial peace for the duration of the agreement. This means the prohibition of any industrial action in order to alter the agreement. It does not, however, prevent industrial action aimed at achieving a collective agreement on terms and conditions not already laid down in the content of the agreement in question. Consequently, if parties to a collective agreement wish to prohibit any industrial action for the duration of the collective agreement (so-called "absolute peace obligation"), a specially agreed arrangement is necessary.

The second duty obliges parties to a collective agreement to use the means available to them under the law of associations to ensure that their respective members duly abide by the provisions of the agreement. However, it does not bind them to take steps against every individual breach of the agreement.[85]

An important feature of the German collective bargaining system is deviations (deterioration), i.e. shifting of collective bargaining away from centralization towards an "organized decentralization", deviation from the standards set in law, most often to make variations to working-time arrangements. Temporary opening clauses have become rather popular during the crisis, following the German practice that allowed firms, together with other tools such as short-time working schemes, to better adapt to the deep crisis of 2008-2009.[86]

According to statistics, the number of collective agreements (Tarifvertrag) concluded at the company level has increased substantially over the last two decades. In 1990, roughly 2,500 firms in Germany were bound by a Tarifvertrag, and by the year 2000 this number had risen to more than 6,000. In 2013, more than 10,000 companies were signatories of company-level collective agreements.[87]

However, only 58% of all employees throughout Germany were bound by collective agreements (2014).[88]

4.2.2 Kazakhstan

Currently, the procedure for collective bargaining and concluding collective agreements is regulated by Chapter 14 of the LC. The right to collective bargaining and to conclude agreements constitutes one of the fundamental rights of the social partnership parties. Any party in social partnership shall have the

84 Weiss and Schmidt 2008, p. 186.
85 Ibid., p. 186.
86 *Collective Bargaining in a Changing World of Work* (2017) OECD Employment Outlook, OECD Publishing, Paris, p. 149.
87 Fornasier 2016, p. 40.
88 *German Collective Bargaining Law. An Introduction for Foreign Businesses (2016)* Federation of German Employer's Associations in the Metal and Electrical Engineering Industries, p. 18.

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right to act as initiator of bargaining in the preparation, maintenance, conclusion, amendment and addition to an agreement.

The right of one party to make proposals for the content of the draft collective agreement corresponds to the obligation of the other party to consider and discuss this proposal. At the same time, the party is entitled to a right to include the relevant proposal in the draft collective agreement or disagree with it and indicate it in the protocol of disagreements.

Collective agreements concluded by tripartite commissions are legally called "agreements". An agreement (general, sectoral, regional) is defined by the LC as a legal act in the form of a written agreement to be concluded between the social partnership parties that determines the rights and duties of the parties in relation to establishing working conditions, employment and social guarantees for employees on the national, sectoral and regional levels.

The following are the categories of agreements depending on the level of social partnership body:

1 the General Agreement between the RK government, republican associations of employers and republican associations of trade unions (republican level);
2 sectoral agreements between authorized state bodies of relevant spheres of activities, authorized representatives of the employers and sectoral trade unions (sectoral level);
3 regional (oblast, city, district) agreements between the local executive authorities and authorized representatives of the employers and territorial associations of trade unions (regional level).

The effect of the General Agreement shall be applicable to state bodies, employers, employees and representatives thereof authorized in accordance with the established procedure.

The effect of the sectoral agreement shall be applicable to the state bodies of relevant sector, the employers, employees and representatives thereof of relevant sectors.

The effect of the regional agreement shall be applicable to local executive bodies, employers, employees and representatives thereof of relevant administrative-territorial units.

In those cases where employees are simultaneously subject to several agreements, conditions of the agreements most favourable to the employees shall apply, where written applications of employees are available.

Agreements at the level of the organization are legally called "collective contracts". The draft collective contract is being developed through the procedure of collective bargaining.

The employer and employees and representatives thereof authorized in accordance with the established procedure shall be recognized as parties to a collective contract.

A proposal on the commencement of collective bargaining and signing of the collective contract may be initiated by any of the parties. A party that received a notification from another party with a proposal to begin collective bargaining on

concluding a collective contract shall be obliged to consider it and enter collective bargaining within ten days.

A collective contract may be concluded at organizations, branches and representations of foreign legal entities. It is allowed to have only one collective contract in the organization.

Employees who are not trade union members shall have the right to authorize a trade union authority for the representation of their interests in their relations with the employer. Where the organization has several employee representatives, they shall create a single representative body to participate in the work of the commission, discuss and sign the collective agreement.

A collective contract shall apply to the employer and the employees of a given organization, on whose behalf such collective contract is concluded, and the employees who acceded to it. The accession procedure and conditions shall be defined in the collective agreement.

Evasion of the parties to participate in bargaining relating to the concluding, amending of the collective contract or an unjustifiable refusal to conclude the collective contract, violation of the terms for conducting bargaining, and failure to ensure work of a relevant commission, failure to present information necessary for conducting bargaining and exercising the control of the compliance with provisions of the collective agreement, and, equally, violation or non-fulfilment of its provisions shall entail administrative responsibility.

To date, one General Agreement, 20 sectoral (tariff) agreements and 16 regional agreements have been concluded in Kazakhstan.

According to the RK Ministry of Health and Social Development, the total number of collective agreements concluded in Kazakhstan by 1 July 2021 had reached 148 thousand, covering 47.6% of all enterprises in the country.[89]

5 Conclusion

5.1 Overview

Historical background directly determines the level of industrial relations in Germany and Kazakhstan.

As is evident, both countries had periods in history when collective bargaining and freedoms of association were totally eliminated: the Nazi period (1933-1945) in Germany and the Soviet era (1917-1991) in Kazakhstan.

Consequently, the term and origins of industrial democracy's traditions explicitly explain the current level of the collective relations system nowadays.

The 12-year interruption in the evolutionary development of the collective dimension in German labour relations did not influence it fundamentally owing to the previously laid foundations of the trade union movement and collective labour rights. At the same time Kazakhstan, which had been in the Soviet Union for 70 years and under the Russian Empire's colonial system for more than 180

89 Ministry of Labour and Social Protection of the Republic of Kazakhstan. https://www.gov.kz/memleket/entities/enbek/press/news/details/230930?lang=ru. Accessed 18 February 2022.

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years (1731-1917) began to form a modern industrial relations system only 30 years ago after independence was restored, in 1991.

It has been indicated that the collective labour relations and economic development are interconnected. Economic crises in both republics serve as a landmark of changes in the regulation of labour and shaping the contours of industrial relations.

Although the social welfare state is proclaimed in the Constitutions as a fundamental principle of polity organization, there are significant differences in the social context of contemporary labour relations and social security systems. The reasons are laid down in the history (long-term traditions of social security institutes) and economic framework (structure of economy).

5.2 Labour Regulation

The sources of German Labour Law are more versatile and characterized by a fragmented statutory law, influential case law and considerable importance of international and supranational instruments, particularly ILO conventions and EU primary and secondary law. The impact of the European supranational legislation on the labour sphere is rather significant in Germany while, in particular, the collective bargaining system is still under the dominant influence of national jurisdiction.

Kazakhstani Labour Law is codified and primarily represented by the statutory acts. Supranational regulatory acts are limited to labour migration matters within the Eurasian Economic Union. National legislation has still exclusive jurisdiction in terms of employment and collective relations matters.

A significant part of German Labour Law is "judge-made law" developed by the federal courts in their interpretations of the Constitution's rules and principles as well as statutory law. These instruments aim primarily at filling gaps in the legal regulation and serve as applicable law in numerous legal cases.

In contrast, judicial interpretation of constitutional and legislative provisions plays a secondary role in Kazakhstan, and its influence is minimal. The rulings of the RK Constitutional Council and the RK Supreme Court provide merely a legal opinion to a limited scope of issues rather than filling gaps in labour legislation.

Common features of recent labour reforms in Germany in Kazakhstan are flexibilization and decentralization trends.

However, Kazakhstan undertook more radical liberalization of labour regulation, which significantly affected the contours of Labour Law. Nevertheless, this reform has not been discussed by civil society. The current tendency exists as an imbalance between employers and employees' interests and bargaining powers. However, emphasizing the role of the bilateral relations of employers and employees' representatives through constriction of state regulation does not reduce the significance and position of government in tripartite bargaining. National, sectoral and regional agreements are still promoted and controlled by state authorities.

In contrast, German reforming processes have a long-term and more cautious and gradual character owing to relatively balanced bargaining powers of employers and trade unions, and caused nationwide debates.

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5.3 The Actors of Collective Labour Relationship

The German employees' representation system is more institutionalized and based on dual representation by trade unions (primarily on the industrial and occupational levels) and works councils (primarily on the plant and company levels), while in Kazakhstan, universal representative of employees is the trade union. Elected representatives in Kazakhstan, who can be considered as a prototype of German works councils, are subsidiary representatives and have a role only in the absence of a trade union within an organization.

The competences of trade unions and works councils in Germany are relatively distinguished and, as a rule, do not duplicate each other. In Kazakhstan the scope of activities of trade unions and those of elected representatives almost coincide. Coexistence of trade unions and elected representatives within one organization is quite rare, and mostly there is a single option for employees' representation.

In Germany trade unions have exclusive rights to collective bargaining and concluding collective agreements (in traditional sense) and right to strikes, while in Kazakhstan both trade unions and elected representatives are entitled to bargain collectively.

Through German works councils employees are entitled to specific rights of participation and co-determination. The concept of co-determination, as well as participation (economic committees etc.), which is organic for German Labour Law, is unknown for the Kazakhstan system of industrial relations.

German trade unions are established primarily on the industry (branch) principle rather than trade and occupation, while those of Kazakhstan are based equally on industrial (branch) and regional principles. The regional principle, unlike the branch principle, implies consolidation of employees on the basis of the trade or occupation to which they belong.

At the same time, although the German Federation of Trade Unions (DGB) is the largest and most significant union, there are other trade unions, such as Christian unions, the German Federation of Career Public Servants (dbb) and the Association of Executive Staff (ULA).

Contrary to the German unionized diversity, Kazakhstan has a centralized and monopolized trade union hierarchy headed by the RK Federation of trade unions, which consolidates the majority of existing trade unions. Although there are another republican associations of trade union as the Kazakhstani Confederation of labour and the Commonwealth of trade unions Amanat, the level of legislative requirements for establishing such associations remains rather high.

DGB unifies eight large trade unions (most of which are branch unions), while the RK republican associations of trade unions consolidate almost all the existing trade unions: industry and regional trade unions, local and primary trade unions.

In Kazakhstan both employers' and employees' association systems are considered to be highly centralized and monopolized, whereas in Germany there is a diversity of trade unions and employers' associations, albeit with a dominant organization within each system.

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5.4 Collective Bargaining Systems

In Germany, tripartite partnership and collective bargaining mechanisms exist rather separately from each other. Collective bargaining plays a dominant role in industrial relations based on the collective autonomy principle, while tripartite partnership performs merely consultation and information functions.

In contrast, Kazakhstan's model of collective bargaining constitutes an integral part of tripartism partnership that covers all matters concerning industrial relations (namely social partnership).

Kazakhstani collective bargaining system does not acknowledge the concept of the peace obligation and the duty to exert influence, which are at the core of collective autonomy in Germany.

In both the countries collective agreements have a direct and binding effect on individual relationships of employer and employee and do not require the introduction of their provisions into the employment contract.

In Kazakhstan, collective agreements are binding on all employers in the relative sector (industry) and region, while in Germany collective agreements are mandatory for those employers who are members or signatories, except if declared binding by the Ministry of Labour and Social Affairs. Meanwhile, nowadays it becomes easier for collective agreements to be extended to non-signatory employers after recent reforms strengthening the enforcement of collective bargaining.

The favourability principle in collective bargaining systems exists in both Germany and Kazakhstan, although in Germany, owing to recent reforms, this principle was subject to a variation ("relative favourability"), while in Kazakhstan any provisions of the agreements deteriorating the employee's rights and interests in comparison with the RK labour legislation shall be recognized as void and shall not be applied.

Finally, it may be concluded that the German collective bargaining system is decentralized with a predominant sectoral-level (in terms of OECD) and bilateral structure of social partnership, while Kazakhstan has a centralized collective bargaining system with a predominant national-level and tripartite structure of social partnership.

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