A European Dialogue on Strike Action

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With its decision in *Humpert and others v Germany* of 14 December 2023, the European Court of Human Rights ('ECtHR') settled a long-standing debate: The ban on strikes for German Civil Servants does not violate the rights under the European Convention on Human Rights ('ECHR'). This decision ends the strategic litigating efforts of the applicants and their union to obtain the right to strike for the approximately 1.7 million civil servants in Germany. The judgment is also the culmination of an extraordinarily intense dialogue between Strasbourg and Karlsruhe. Both courts, the ECtHR and the German Federal Constitutional Court ('FCC'), went to great lengths to decide the case before them with diligent consideration of the position of the respective other court. Against this background, I argue that the careful consideration and engagement with ECtHR case law holds potential for the FCC in future controversial cases and should also be born in mind by applicants and litigants in Karlsruhe.

A "Package Deal" for Civil Servants based on the "Traditional Principles" of the Civil Service

Historically, civil servants hold a specials tatus in the German employment market. Their status is characterized by the 'traditional principle of the career service system' ("*hergebrachte Grundsätze des Berufsbeamtentums*"), which have constitutional status under Art. 33(5) of the Basic Law (hereafter: GG). On the basis of these structural principles, civil servants benefit from constitutional guarantees regarding lifetime employment (FCC, 12 June 2018, para. 122), alimentation (paras. 113, 151), entitlement to health insurance benefits (para. 181) and pensions (para. 181). However, these rather advantageous principles come as a 'package deal' that also includes restrictions and a duty of loyalty owed by civil servants to their employer. According to the FCC, the interlinked principles are aimed to guarantee the maintaining of a stable administration (para. 157). It is against this background that civil servants a general banned from strike action in Germany.

The German State school system, however, accommodates a duality regarding the employment status of teachers. Two-thirds of the staff working in the public service are employed as contractual State employees and are therefore entitled to strike.

The status of civil servants has been politically and legally controversial for decades, and fueled in-depth legal analysis by e.g. *Ulrike Pollin*, *Richard N. Lauer* and *Laura Hering*. Several international courts and bodies have underlined the fundamental importance of the right to strike, often in direct reference to the situation in Germany (e.g. the European Court of Justice in *Laval* and *Viking;* the UN Committee on Economic, Social and Cultural Rights in its recommendations to Germany; the UN Human Rights Committee reiterating that recommendation; the International Labour

Organization's Committee of Experts in its 2012 report; the European Committee of Social Rights in its conclusions on Germany). In 2008 and 2009, the political debate on the ban for civil servants gained particular momentum following two judgments in Strasbourg. In *Demir and Baykara v Türkiye* and *Enerji Yap#-Yol Sen v Türkiye*, the ECtHR found that the general ban on strikes for all Turkish civil servants and disciplinary penalties for teachers that went on strike violated the Convention. Along these lines, the Federal Administrative Court considered the applicable German law to be incompatible with the guarantees of Art. 11 ECHR and called on the legislator to take action. Finally, four applicants filed constitutional complaints with the FCC challenging the disciplinary measures imposed on them for going on strike and for stopping teaching for a few hours to demand better working conditions. They alleged a violation of their constitutional rights and referred explicitly to the decisions of the ECtHR.

The Relationship between the courts in Karlsruhe and Strasbourg

By consequence, the FCC had to assess the legality of the strike ban for civil servants from a *constitutional* perspective, taking into account the *conventional* guarantees under the ECHR. The relationship between the two courts is complex and at times conflicted, as the saga surrounding Caroline von Hannover has shown. In Germany, the ECHR ranks as statutory federal law and thus below constitutional rank (FCC, 26 March 1987, *Presumption of innocence*, p. 370). However, the FCC decided early on that the Convention and the ECtHR's judgments must be taken into account when interpreting the constitutional rights (*ibid*, p. 370). This has rightly been described as 'confusing' regarding the hierarchy of norms. The relationship between the judgments of the ECtHR and the German courts' assessment was then most prominently established in the *Görgülü* decision. Therein, the FCC gave constitutional status under Art. 20(3) GG to the duty of German courts to consider the Conventional rights in making their decisions (FCC, 14 October 2014, *Görgülü*, para. 29). In this sense, the FCC has opted for an „international and European dialogue" between courts, with the German constitution having the „last word". (FCC, 4 May 2011, para. 89). In her excellent empirical analysis, *Raffaela Kunz* concludes that the FCC thus imposed a procedural "duty to consider" the Strasbourg jurisprudence, rather than a "duty to comply".

The Constitutionality of the ban on strikes according to the court in Karlsruhe.

While the *constitutional* considerations of the FCC's judgment in 2018 (paras. 112-188) had several important implications for the German civil service system, this piece focuses on the inter-Court dialogue and only briefly summarizes the key findings of the constitutional assessment (for more, see e.g. *Jötten/Machts* and *Buchholtz*). The FCC held that the material scope of Art. 9(3) GG includes the right to strike action (paras. 114-116) even for civil servants (para. 113). While it found the strike ban to infringe on the rights guaranteed (para. 141), the FCC considered

this infringement to be justified (paras. 142-162). It recognized the absolute strike ban as one of the 'traditional principles' of the German career civil service system (para. 144) and established that it is inseparably linked to the constitutional principle of alimentation and the duty of loyalty (para. 152). As a result, it ruled the restriction to be compensated within the 'package deal' of the constitutional concept of the civil service system (para. 158). Therefore, the strike ban for civil servants did not violate the freedom of labour coalitions ('*Koalitionsfreiheit*') under Art. 9(3) GG.

The Conventionality of the absolute ban according to the courts in Karlsruhe and Strasbourg

With regard to the relationship between the two courts, it is noteworthy that the FCC took the utmost care not to give the impression that it was openly disagreeing with the ECtHR. At the same time, it clearly indicated the limits of the adaptation of the German constitutional rights to European jurisprudence by referring to the core of the German "constitutional identity" (para. 133).

Within the constitutional requirement of the Constitution's openness to international law ("*Völkerrechtsfreundlichkeit*", paras. 126-135; paras. 163-188), the FCC undertook an in-depth examination of *conventionality* of the strike ban. It first referred to decisions of ECtHR in the applicable law section (paras. 4-6) and secondly extensively outlined recent changes to the relevant case law in its application to the present case (paras. 164-171). Finally, the FCC again referred to several Strasbourg cases to establish its position that the ban on strikes was not even in "collision" with the ECtHR jurisprudence (paras. 163-188). This extensive engagement with Strasbourg jurisprudence is rather unusual. In comparison, the same Senate just recently handed down a decision in which only a brief general section reported on the case law from Strasbourg, without engaging later on with it (FCC, 20 June 2023, *Prisoner remuneration,* paras. 23-24). Nevertheless, the ECtHR disagreed in its 2023 judgment with the FCC and found that the disciplinary measures had constituted an interference with Art. 11(1) ECHR (§ 113).

The core of both, the FCC's judgment in 2018 and the ECtHR's in 2023, is the justification of the interference, as the FCC also elaborated on this point as a subsidiary („in any case justified", paras. 176-188). Both courts agreed with the German government that for the purposes of Art. 11(2) ECHR the ban was "prescribed by law" given the consistent interpretation by German courts (ECtHR, §§ 116-117; FCC, para. 177) and that the State's pursued objective of maintaining a stable administration was a "legitimate aim" (ECtHR, § 118; FCC, para. 178).

Thirdly, and most extensively, both courts dealt with the question whether the ban on strike action is to be considered "necessary in a democratic society" (ECtHR, §§ 119- 143; FCC, paras. 179-183). Crucial determining the applicable graduated margin of appreciation is the question whether a prohibition on strikes affects an "essential element of trade-union freedom" under Art. 11(1) ECHR. Given that the ECtHR had previously left this categorization open, it was not surprising that this aspect was prominently debated in the public hearing in Strasbourg. The ECtHR

repeated that strike action was protected under Art. 11 ECHR (§ 104) and that it constituted “one of the most important means” by which trade unions can fulfil their functions (§ 108). However, as this right is not absolute (§ 107), it concluded that the classification as an essential element is “context-specific” (§ 109) and went on to consider the existing safeguards to enable unions to defend effectively occupational interests (§ 128). It seems that the FCC and the German Government have taken to heart the ECtHR’s indication in *Enerji Yapi-Yol Sen* that Türkiye had „not demonstrated“ the necessity of its ban (*Enerji Yapi-Yol Sen*, § 32, cited by the FCC in para. 179) and thus, both provided sufficient arguments to distinguish the specific German context from the Turkish cases. For the ECtHR, several aspects seem to have been decisive, which the FCC had also listed as “compensation” for the restriction in its 2018 judgment (para. 183). First, the fact that German civil servants are allowed to form and join trade unions (§ 129), which then can participate via their ‘umbrella organizations’ when relevant legal provisions are drawn up (§ 130-132) and regularly meet the competent ministry (§ 132). Second, the individual right of civil servants to adequate alimentation (§ 133), which can be enforced by effective judicial means (§ 134). In this regard, the ECtHR even took over the term of a “reciprocal system of interrelated rights and duties” (§ 136, introduced within the recital of the FCC’s judgment in §§ 24, 26, 36; FCC, para. 181) guaranteeing the effective performance of functions in the German civil service system. Notwithstanding the factual and financial difficulties raised by the applicants in this regard at the hearing, the ECtHR also relied on the fact that the applicants had the possibility of opting for a contractual status with the right to strike (§ 142). Finally, the ECtHR held that the disciplinary (financial) sanctions against the applicants were not severe (§ 143).

In summary, the ECtHR found that the effects of the strike ban could not outweigh the convincing justifications presented and agreed that the situation was different then in the previously examined cases (para. 138). In the same breath as the justifications put forward in the Government’s submissions, the Court also mentions with appreciation those “reflected in the extensive assessment” of the FCC (§ 146).

Outlook

The diligence shown by the Karlsruhe court in engaging with the Strasbourg jurisprudence on strike action, while clearly indicating the limits of the Constitution’s openness to international law, is remarkable – and its efforts have been rewarded. Despite seemingly opposing jurisprudence, the ECtHR ruled that the absolute ban in Germany did not violate the Conventional rights and accepted the FCC’s distinction from the Turkish cases. Given the emphasis of the context-specific assessment of such a ban and the reliance on specific aspects of the interrelated rights and duties of German civil servants (see also the concurring opinion of Judge Ravarani), an extension of this jurisprudence on other State parties is rather unlikely.

The lesson for the FCC when dealing with politically sensitive cases in the future is clear: the mutual influence between Strasbourg and Karlsruhe cannot be overlooked and should be taken into account in its judgments. This holds particularly true for applicants and litigants, who should not underestimate the ECtHR’s influence and

extensively engage with it in their submissions to the Karlsruhe court, as former Justice Baer urged some years ago.

It remains yet to be seen, whether the forthcoming Advisory Opinion by the International Court of Justice on the right to strike will fuel another round of disputes. Perhaps it will soon be time for an “international dialogue” of courts regarding the right to strike.

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