Streikrecht bedroht - rechtliche Gegenstrategien

Europäische Arbeitsrechtskonferenz, 28. Februar und 1. März 2025,

Right to strike under attack – legal counterstrategies

European Labour Law Conference, 28 February and 1 March 2025

DGB, Ingeborg-Tönnesen-Saal, Keithstraße 1, 10787 Berlin

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Teilnehmer*innen Unterlage - Conference Handout

Programm auf Deutsch - Programme in English

Kurzbiografien und Kurzfassung der Präsentation

Short biographies and summary of the presentation

Das Programm

Freitag, 28. Februar 2025, 09.00 - 18.00 Uhr

09.30 - Eröffnung und Panel 1

- **Eröffnung, Esther Lynch** (EGB, Generalsekretärin)

09.45 Panel 1: Internationales Arbeitsrecht - Relevanz des IAO-Übereinkommens Nr. 87 für das Streikrecht, insbesondere: Verfahren für ein Gutachten des IGH, die nationale Ebene und Lieferketten

Moderation: Dimitrios Vassiliou (Rechtsanwalt, Athen)

- Hintergrund des Rechtsstreits und Stand des Verfahrens
  Jeffrey Vogt (ILAW, Direktor, Washington DC)
- Vereinigungsfreiheit und Streikrecht
  Lord John Hendy KC (Rechtsanwalt und Honorarprofessor, London)
- Streik entlang der Lieferkette
  Dr. Reingard Zimmer (Professorin, Berlin)

11.15 - Panel 2: Europäisches Arbeitsrecht - das Streikrecht nutzen und verteidigen

Moderation: Dr. Ernesto Klengel (HSI, Wissenschaftlicher Direktor, Frankfurt)

- Erfahrungen mit der gerichtlichen Durchsetzung des Streikrechts vor dem EGMR und EuGH
  Rudolf Buschmann (Gewerkschaftsjurist und Dozent, DGB, Kassel)
- Erfahrungen mit der Durchsetzung des Streikrechts vor dem Europäischen Ausschuss für soziale Rechte (ECSR)
  Klaus Lörcher (Gewerkschaftsjurist, Frankfurt)
- Das Streikrecht in der EU verteidigen
  Isabelle Schömann (EGB, Stellvertretende Generalsekretärin, Brüssel)

13.45 - Panel 3: Erfolgreiche juristische Gegenstrategien gegen Einschränkungen und Kriminalisierung des Streikrechts in verschiedenen europäischen Ländern

Moderation: Tamar Gabisonia (Koordinatorin Europa, ILAW, Tiflis)

- Schutz des Streikrechts durch strategische Prozessführung
  Dr. Jan Buelens (Rechtsanwalt und Professor, Antwerpen)
- Streik unter Haftungsdruck
  Dr. Rüdiger Helm (Rechtsanwalt, München)
- Streikrecht bei Dienstleistungen von öffentlichem Interesse
  Dr. Giovanni Orlandini (Professor, Siena)

15.15 - Panel 4: Streikrecht - Neue Herausforderungen und mögliche [rechtliche] Reaktionsmöglichkeiten auf nationaler Ebene

Moderation: Thomas Schmidt (Rechtsanwalt, EJDM Co-Generalsekretär und VDJ Beiratsmitglied, Düsseldorf)

- Überwindung der Einschränkungen des Streikrechts in Irland
  Declan Owens, (Rechtsanwalt, Irland)
- Politischer Streik in Deutschland - Rechtslage und jüngste Klimaproteste
  Dr. Theresa Tschenker (Rechtsanwältin, Berlin)
- Erfolgreiche Fälle in Spanien
  Armando García López (Rechtsanwalt, CCOO, Madrid)

16.45 Schlusswort, Isabel Eder, Abteilungsleiterin Recht und Vielfalt, DGB

The Conference Programme

Friday, 28 February 2025, 09.00 - 18.00

09.30 – Opening and Panel 1

Opening Esther Lynch (ETUC, General Secretary, Brussels)

09:45 - Panel 1: International labour law - Relevance of ILO Convention No. 87 for the right to strike, in particular: proceedings for an Advisory Opinion of the ICJ, national level and supply chains

Moderation: Dimitrios Vassiliou (Lawyer, Athens)

- Background to the dispute and the current status of the proceedings
  Jeffrey Vogt (ILAW Director, Washington DC)
- Freedom of Association and the Right to Strike
  Lord John Hendy KC (Barrister and honorary professor, London)
- Supply chain strikes
  Dr. Reingard Zimmer (Professor, Berlin)

11.15 - Panel 2: European Labour Law – Using and defending the right to strike

Moderation: Dr. Ernesto Klengel, (HSI, Scientific Director, Frankfurt)

- Experience with right to strike litigation before the ECtHR and CJEU
  Rudolf Buschmann (Trade union lawyer and lecturer, DGB, Kassel)
- Experiences with right to strike litigation before the European Committee of Social Rights (ECSR)
  Klaus Lörcher (Trade union lawyer, Frankfurt)
- Defending the right to strike in the EU
  Isabelle Schömann (ETUC, Deputy General Secretary, Brussels) tbc

13.45 - Panel 3: Successful legal counterstrategies against restrictions and criminalisation of the right to strike in different European countries

Moderation: Tamar Gabisonia (European Coordinator ILAW, Tbilisi)

- How to use strategic litigation to protect / defend the right to strike
  Dr. Jan Buelens (Lawyer and Professor, Antwerp)
- Striking under the sword of Damocles with the threat of liability
  Dr. Rüdiger Helm (Lawyer, Munich)
- Right to strike in public interest services
  Dr. Giovanni Orlandini (Professor, Siena)

15.15 - Panel 4: Right to Strike - New challenges and possible [legal] reactions at national level

Moderation: Thomas Schmidt (Lawyer, ELDH Co-Secretary General and VDJ Advisory Council, Düsseldorf)

- Overcoming restrictions on the right to strike in Ireland
  Declan Owens, (Lawyer, Ireland)
- Political strike in Germany - legal situation and recent climate protests
  Dr. Theresa Tschenker (Lawyer, Berlin)
- Successful cases in Spain
  Armando García López (Lawyer, CCOO, Madrid)

16.45 Closing remarks: Isabel Eder, Head of the Legal and Diversity Department, DGB, Berlin

Opening

Esther Lynch, ETUC General Secretary

CV

Esther Lynch is the General Secretary of the European Trade Union Confederation. Previously, Ms Lynch was Deputy General Secretary at the ETUC from 2019 to 2022, following four years as Confederal Secretary. Esther led on social dialogue, collective bargaining and wage policy, trade union rights, gender equality. She has extensive trade union experience at Irish, European and international levels, starting with her election as a shop steward in the 1980s. Before coming to the ETUC, she was the Legislation and Social Affairs Officer with the Irish Congress of Trade Unions (ICTU), where she took part in negotiations on Ireland's National Social Partner Agreements.

As Deputy General Secretary and as Confederal Secretary she led successful actions aimed at improving workers and trade union rights in legislative initiatives such as the Directive on Adequate Minimum Wages, the Transparent and Predicable Working Conditions Directive and the Whistleblowing Directive, she also ran a successful campaign that mobilised support for the European Pillar of Social Rights and the ETUC's 'Europe Needs a Pay Rise' campaign. In addition to securing the adoption of 15 legally binding occupational exposure limits to protect workers from exposure to carcinogens, as well as concluding social partners' agreements on digitalisation and on reprotoxins. A lifelong feminist, Esther is pushing for measures to end the undervaluing of work predominantly done by women.

Panel 1: International labour law – Relevance of ILO Convention No. 87 for the right to strike, in particular: proceedings for an Advisory Opinion of the ICJ, national level and supply chains

Moderator

Dimitrios Vassiliou

CV

Dimitrios Vassiliou wurde 1967 in Deutschland geboren und absolvierte 1990 seine Examen an der Juristische Fakultät der Nationalen-Kapodistrias-Universität Athen. Er ist Rechtsanwalt, Mitglied der Athener Anwaltskammer und zugelassen beim Areopag (Oberster Zivilgerichtshof Griechenlands). Er ist ausschließlich im Rechtsbereich des Arbeitsrechts tätig und veröffentlicht dazu regelmäßig Beiträge in führenden griechischen juristischen Zeitschriften.

Background to the dispute and the current status of the proceedings

Jeffrey Vogt (ILAW Director, Washington DC)

CV

Jeffrey Vogt is the Rule of Law Director of the Solidarity Center and co-founder of the International Lawyers Assisting Workers (ILAW) Network, which brings together 800 worker rights lawyers from around the globe. In 2022, Jeff also was appointed to the International Labor Organization (ILO) Governing Body and serves on the ILO Committee on Freedom of Association. From 2011 through 2016, he was the legal director of the International Trade Union Confederation (ITUC), where he coordinated the organization's legal advocacy before the International Labor Organization and other international institutions, advised trade unions on labor law and policy, and supported claims before national and international tribunals. Before joining the ITUC in 2011, Jeff served as the AFL-CIO deputy director of the International Department and as its global economic policy specialist. He has published extensively on international labor law and has testified before executive, legislative and judicial bodies around the world. He is a graduate of Cornell Law School, where he earned his J.D. and L.L.M. in international and comparative law, and studied international law at the University of Paris I–Sorbonne. Jeff is co-author of the book, The Right to Strike in International Law (Hart Publishing 2020).

Abstract

At the first of the special sessions at the November 2023 ILO Governing Body, a majority was reached with the full support of the voting members of the Workers Group and a majority of the Government Group (36 governments in all, including titular and non-titular members) to refer the dispute on the right to strike to the International Court of Justice. By May 16, 2024, the International Trade Union Confederation filed its brief, along with two employer organizations (the International Organization of Employers and Business Africa), the International Cooperative Alliance and 24 governments (and one government group – the Organisation of African, Caribbean and Pacific States). The arguments for the proposition that ILO Convention 87 protects the right to strike can be summarized as follows: Workers have argued that Article 3(1) of Convention No. 87 (read together with Article 10) encompasses the right of workers' organisations to organise and plan for strikes, and submits that, as a corollary, this necessarily protects the right of workers to take part in the strikes so organised by their organisations. The practice of States Parties confirms the fact that the right to strike is an inherent element of freedom of association. The relevant rules of international law applicable in the relations between the parties to Convention No. 87, including human rights instruments, as interpreted and applied in decisions of global and regional human rights bodies and commissions, all confirm that the "activities" "organise[d]" by workers' organisations "furthering and defending" the interests of workers referred to in Convention No. 87 include exercising the right to strike. Indeed, the right to strike has emerged as a rule of customary international law. As such, Article 31 of the VCLT leads to the clear conclusion that the right to strike is inherent to Convention No. 87, and that any contrary interpretation is unreasonable and would deprive the convention of any practical effect. Furthermore, any supplementary means of interpretation, including the 1919 ILO Constitution and the preparatory work of Convention No. 87 confirm and corroborate the fact that the right to strike is inherent to Convention No. 87. As of this date, the ICJ has yet to render its advisory opinion.

My presentation will discuss the process of referring the matter to the ICJ, summarize the major arguments, and what this dispute means for the ILO.

Freedom of Association and the Right to Strike

Lord John Hendy KC (Barrister and honorary professor, London)

CV

Lord Hendy KC is an advocate based in London, UK. He was called to the Bar of England and Wales in 1972 and made Queen's Counsel (an award in recognition of seniority and eminence - now, of course, King's Counsel) in 1977. He has specialised in trade union law and has represented the unions in most of the industrial action cases in the UK in the last 45 years. He has appeared in the UK Supreme Court and all courts and tribunals below, the European Court of Human Rights, the Court of Justice of the EU, the Industrial court of New South Wales, and the Irish Labour Court. He has prepared cases to the ILO Committee of Experts and Committee on Freedom of Association and to the European Committee on Social Rights. He was Standing Counsel to 8 British trade unions and has represented or advised unions in Australia, Ireland, Norway, Latvia, and Namibia. He has represented the Irish Confederation of Trade Unions and advised the TUC, ITUC and the ETUC. He is part of the ITUC team in the litigation in the International Court of Justice on the right to strike brought by the ILO.
He is an honorary professor in the Faculty of Law, University College, London. He writes and lectures extensively on labour law (including on the Employment rights Bill).
He is Chair of the Institute of Employment Rights, President of the International Centre for Trade union Rights, a vice president of the Campaign for Trade Union Freedom, and was recently elected President of the Industrial Law Society.

Abstract

This paper begins by repeating the old adage that labour laws are defined not by any objective evaluation of the need to protect workers but by the capacity of workers to resist or ignore the encroachment of the law.
Against this background, the paper considers the origins of strikes and the processes which led to their legitimation in the 19th and 20th centuries, in particular the two World Wars. It considers the function of strikes under capitalism. It notes the attack on strikes led by neo-liberalism from 1980, an attack accelerated by the collapse of the Soviet Union and further accelerated by the financial crisis of 2008. It observes the failure of social democratic parties to defend Keynesianism, the post war settlement, working class living standards, and the right to strike which has led to the increasing dominance of right wing parties distracting working voters from the real cause of their declining standards of living.
The paper concludes by cataloguing judgments on the right to strike in the ECtHR against these milestones.

Supply chain strikes

Professor Dr. Reingard Zimmer (Professor, Berlin)

CV

Dr. Reingard Zimmer ist seit 2015 Prof. für deutsches, Europäisches und internationales Arbeitsrecht an der Hochschule für Wirtschaft und Recht Berlin. Sie begann Ihre wissenschaftliche Karriere 2009 als Leitung des Forschungsreferates Arbeits- und Sozialrecht am WSI in der Hans-Böckler-Stiftung (HBS), war dann einige Jahre Vertretungsprofessorin für Arbeitsrecht an der Universität Hamburg (FB Sozialökonomie), danach kurzzeitig Leiterin des deutschen Tarifbüros der ITF (zuständig für Tarifverhandlungen mit deutschen Reedern für die international fahrenden Schiffe).
Zimmer ist Vertrauensdozentin der HBS und in der Jury für den Hugo-Sinzheimer Dissertationspreis des Hugo-Sinzheimer Instituts.
Forschungsscherpunkte: kollektives Arbeitsrecht, insb. Internationales ArbR, aber auch best. Aspekte des Individualarbeitsrechtes wie bspw. Entgeltdiskriminierung. In den letzten Jahren verstärkte Forschung zu Fragen der Lieferkettenregulierung (mit zahlreichen Publikationen).

Abstract

Die Internationalisierung der Wirtschaft und das Outsourcing im Zuge der Globalisierung haben zu umfassenden Änderungen der Wertschöpfungskette geführt. Unternehmen arbeiten international mit zahlreichen Vertragspartnern und Subunternehmern zusammen, sodass es zu einer intensiven inhaltlichen Verzahnung juristisch unabhängiger Unternehmen gekommen ist – was mit der neueren Lieferkettenregulierung Berücksichtigung findet. Diese Veränderungen müssten sich auch in der Rechtsprechung zum Solidaritätsstreik wiederfinden. Zu diesem Thema liegt von der ILO eine umfassende Judikatur vor, die jedoch in einige Ländern nur bedingt perzipiert wird. Vorliegend wird die Spruchpraxis des Ausschusses für Vereinigungsfreiheit vorgestellt und unter Berücksichtigung der aktuellen Strukturen der Wertschöpfungsketten exemplarisch auf das Recht des Solidaritätsstreiks in Deutschland angewandt.

Panel 2: European Labour Law – Using and defending the right to strike

Moderator

Dr. Ernesto Klengel (HSI, Scientific Director, Frankfurt)

CV
Dr. Ernesto Klengel (*1986 in Zwenkau, Sachsen) ist im März 2024 zum wissenschaftlichen Direktor des Hugo Sinzheimer Instituts für Arbeits- und Sozialrecht der Hans-Böckler-Stiftung berufen worden. Er ist seit 2019 als Rechtswissenschaftler am HSI tätig und ist Autor von Fachveröffentlichungen auf dem Gebiet des deutschen, europäischen und internationalen Arbeitsrechts. Er lehrt an der University of Labour und der Europäischen Akademie für Arbeit in Frankfurt a.M. Ernesto Klengel ist außerdem ehrenamtlicher Richter.
Ernesto Klengel hat an der Europa-Universität Viadrina promoviert (Thema der 2020 erschienen Doktorarbeit: Kollektivverträge im EU-Betriebsübergangsrecht). Er war promotionsbegleitend in Forschung und Lehre am Lehrstuhl für Wirtschaftsprivat- und Arbeitsrecht an der Universität Duisburg-Essen tätig. Das juristische Referendariat hat er am Landgericht Essen absolviert und war nebenberuflich anwaltlich tätig.

Dr. Ernesto Klengel (*1986 in Zwenkau, near Leipzig) has been appointed as Scientific Director of the Hugo Sinzheimer Institute in January 2024. He has been a legal scholar at the institute since 2019 and is the author of several academic publications in the field of German, European and international labour law. He lectures at the University of Labour and the European Academy of Labour in Frankfurt/Main. Ernesto Klengel is also an honorary judge and a member of the supervisory board of various research projects.
Ernesto Klengel holds a doctorate from the European University Viadrina (thesis published in 2020: Collective agreements in EU law on the transfer of undertakings). During his doctorate, he held research and teaching positions at the Chair of Private Business and Labour Law at the University of Duisburg-Essen (Prof. Dr. Wolfgang Hamann). Ernesto Klengel completed his legal clerkship at the Regional Court of Essen and worked part-time as a practising lawyer. He studied law at the Humboldt University in Berlin.

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Experience with right to strike litigation before the ECtHR and CJEU

Rudolf Buschmann (Trade union lawyer and lecturer, DGB, Kassel)

CV

Erfahrungen mit der gerichtlichen Durchsetzung des Streikrecht vor dem EGMR und EuGH, abstrakt
Die Rechtsgrundlagen im Recht der EU und der EMRK wirken auf den ersten Blick positiv; die Rechtsprechung hält aber nicht das, was die Rechtsgrundlagen versprechen.
1. Zur Europäischen Union
Art. 28 der Charta der Grundrechte der EU garantiert das Streikrecht für alle Arbeitnehmer oder ihre jeweiligen Organisationen. Die Konsequenzen der Vorschrift sind gering. Nach Art. 51 gilt die Charta für die Mitgliedstaaten ausschließlich bei der Durchführung des

Unionsrechts. Zum Streikrecht kann die Union aber kein Recht setzen, da ihr diese Kompetenz nach Art. 153 Abs. 5 AEUV ausdrücklich versperrt wird. So kommt das Grundrecht nur zum Tragen innerhalb der Organisationen der Union sowie in den Mitgliedstaaten reflexhaft in Opposition zu wirtschaftlichen Grundfreiheiten der Arbeitgeber. Die Rechtsprechung des EuGH seit Viking und Laval gab bisher diesem Wirtschaftsfreiheiten den Vorrang, und es ist zu befürchten, dass dies so bleibt. Deswegen besteht Anlass zur Vorsicht bei Vorlagen an den EuGH in Bezug auf die Garantie des Streikrecht.
2. Zur europäischen Menschenrechtskonvention
Art. 11 EMRK garantiert die Versammlungs- und Vereinigungsfreiheit. Dazu gehört das Streikrecht. In der Rechtsprechung des EGMR wurde aber eine progressive Phase durch eine restriktive Phase abgelöst. Seit den Urteilen Demir u. Baykara und Enerji Yapi-Yol Sen /Türkei ist der Streikrecht als Bestandteil der Vereinigungsfreiheit anerkannt und in folgenden Urteilen für zahlreiche Berufsgruppen bestätigt worden. Seit einigen Jahren ist die Tendenz eher negativ, vor allem in Verfahren gegen einflussreiche Länder wie Deutschland und das Vereinigte Königreich. Der EGMR nutzt Begriffe wie „Kontextualisierung“ und „Beurteilungsspielraum“, um zur Legitimierung staatlicher Eingriffe Elemente außerhalb des eigentlichen Streikgeschehens einbeziehen zu können. Die Theorie des Living instrument ist zwar noch nicht offiziell aufgegeben; im Einzelfall stellt sich jedoch der EGMR in einen Gegensatz zum gesamten Mehrebenensystem des Arbeitsvölkerrechts.

Experiences with the right to strike litigation before the ECtHR and ECJ, abstract
The legal bases in EU law and the ECHR appear positive at first glance; however, the case law does not fulfil the promises made by the legal bases.
1. Litigation before the ECJ
Art. 28 of the Charter of Fundamental Rights of the EU guarantees the right to strike for all workers or their respective organisations. The consequences of this provision are minor. Pursuant to Art. 51, the Charter applies to Member States only when implementing Union law. However, the Union cannot legislate on the right to strike, as this competence is expressly denied to it under Art. 153 (5) TFEU. Thus, the fundamental right only comes into play within the organisations of the Union and in the member states reflexively in opposition to the fundamental economic freedoms of employers. The case law of the ECJ since Viking and Laval has so far prioritised these economic freedoms, and it is to be feared that this will remain. There is therefore reason to be cautious when it comes to referrals to the ECJ in relation to the guarantee of the right to strike.

2. Litigation before the ECtHR

Art. 11 ECHR guarantees freedom of assembly and association. This includes the right to strike. In the case law of the ECtHR, however, a progressive phase has been replaced by a restrictive phase. Since the judgments Demir and Baykara and Enerji Yapi-Yol Sen v. Turkey, the right to strike has been recognised as a component of freedom of association and has been confirmed in subsequent judgments for numerous occupational groups. For some years now, the trend has become more negative, especially in cases against Influential countries such as Germany and the UK. The ECtHR uses terms such as contextualisation and margin of appreciation in order to be able to include elements outside the actual strike action in order to legitimise state intervention. Although the theory of the living instrument has not yet

been officially dismissed, in individual cases it places the ECtHR in opposition to the entire multi-level system of international labour law.

Abstract

In deutsch
Erfahrungen mit der gerichtlichen Durchsetzung des Streikrecht vor dem EGMR und EuGH, abstrakt
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In English
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Experiences with right to strike litigation before the European Committee of Social Rights (ECSR)

Klaus Lörcher (Trade union lawyer, Frankfurt)
CV
English
Professional/trade union career

- Trade union lawyer representing members in labour law tribunal and social security tribunal as well as court of appeal cases, German Confederation of Trade Unions (Deutscher Gewerkschaftsbund, DGB);
- Legal advisor of the German Postal and Telecommunications Workers' Union (Deutsche Postgewerkschaft, DPG);
- Head of Department of European and International Law in the United Services Union (Vereinte Dienstleistungsgewerkschaft, ver.di);
- Legal advisor of the European Trade Union Confederation (ETUC);
- Legal Secretary of the Civil Service Tribunal of the European Union;
- Human Rights Advisor of the ETUC.
- Further activities
- UN: Expert for the International Trade Union Confederation (ITUC) on two General Comments (Nos. 18 and 23) for the International Covenant on Economic, Social and Cultural Rights (ICESCR):
- ILO: Trade union representative in the Committee on Application of Standards (CAS) of the International Labour Conferences:
- Council of Europe: ETUC Representative in the Governmental Committee on the European Social Charter and in the ad hoc Committee ('Charte-Relance') on its new instruments adopted in the 1990s; ETUC representative in the Steering Committee of Human Rights (CDDH) of the Council of Europe as observer;
- EU: Expert for the European Economic and Social Committee's Opinion on the Strategy for the effective implementation of the Charter of Fundamental Rights by the European Union.

Deutsch
Beruflicher/gewerkschaftlicher Werdegang

- Rechtssekretär des DGB, Vertretung von Gewerkschaftsmitgliedern vor dem Arbeitsgericht und dem Sozialgericht sowie in Berufungsverfahren;

- Justiziar der Deutschen Postgewerkschaft (DPG);
- Leiter des Bereichs für Europäisches und Internationales Recht in der Vereinten Dienstleistungsgewerkschaft (ver.di);
- Justiziar des Europäischen Gewerkschaftsbundes (EGB):
- Rechtsreferent des Gerichts für den öffentlichen Dienst der Europäischen Union;
- Berater des EGB für Menschenrechtsfragen.
- Sonstige Tätigkeiten
- UN: Experte für den Internationalen Gewerkschaftsbund (IGB) im Rahmen der Erarbeitung von zwei Allgemeinen Bemerkungen (Nr. 18 und 23) zum Internationalen Pakt über wirtschaftliche, soziale und kulturelle Rechte (IPwskR);
- ILO: Gewerkschaftsvertreter im Normenanwendungs-Ausschuss (CAS) der Internationalen Arbeitskonferenzen;
- Europarat: EGB-Vertreter im Regierungsausschuss für die Europäische Sozialcharta und im Ad-hoc-Ausschuss („Charte-Relance“) für die in den 1990er Jahren angenommenen neuen Instrumente; EGB-Vertreter im Lenkungsausschuss für Menschenrechte (CDDH) des Europarats als Beobachter;
- EU: Experte für die Stellungnahme des Europäischen Wirtschafts- und Sozialausschusses zum Thema „Strategie zur wirksamen Umsetzung der Charta der Grundrechte durch die Europäische Union“.

Abstract Klaus Lörcher

German

Die Präsentation will zunächst in einem 1. Teil einen kurzen Überblick über die verschiedenen Verfahren vor dem Europäischen Ausschuss für soziale Rechte (ECSR) geben (Berichts- und Beschwerdesystem). Darauf aufbauend sollen im 2. Teil die Ergebnisse zu Auseinandersetzungen zu verschiedenen Aspekten des Streikrechts dargestellt werden. Besonderes Augenmerk wird dabei auf positiv ausgegangenen Beschwerden gelegt, ohne die negativ ausgegangenen Beschwerden zu vernachlässigen. Auch werden wesentliche Ergebnisse aus der Spruchpraxis im Rahmen des Berichtssystems dargestellt.
Im folgenden 3. Teil werden diese Ergebnisse bewertet. Dabei wird der insbesondere Frage nachgegangen, wie in den verschiedenen Verfahren am ehesten positive Ergebnisse erreicht werden können. Dies leitet dann zum abschließenden 4. Teil über, in dem konkretere Empfehlungen zum Vorgehen gemacht werden.

English

The first part of the presentation will provide a brief overview of the various procedures before the European Committee of Social Rights (ECSR) (reporting and complaints system). Building on this, the second part will present the results of disputes on various aspects of the right to strike. Particular attention will be paid to complaints with a positive outcome, without neglecting complaints with a negative outcome. Significant results from the adjudication practice within the framework of the reporting system are also presented. These results are evaluated in the following 3rd part. In particular, the question of how positive results are most likely to be achieved in the various procedures is examined. This then leads to the concluding 4th part, in which more specific recommendations are made on how to proceed.

Defending the right to strike in the EU

Isabelle Schömann (ETUC, Deputy General Secretary, Brussels)

CV

Isabelle Schömann, has been elected Deputy General Secretary at the ETUC 15. Congress in Berlin, in May 2023.
Isabelle heads ETUC policies on Democracy at Work with a focus on Workers' Information, Consultation and Participation, on Legal Affairs with a focus on Trade Unions, Workers' and Human Rights, the ETUC legislative, legal and litigation strategy (the ETUCLEX), including Corporate Sustainability Due Diligence and Corporate Sustainability Reporting, on Gender Equality, on Single Market, and on Human Centric Digitalisation with a focus on Artificial Intelligence in the world of work. In addition, Isabelle has hold the position of Deputy General Director of the ETUI from October 2023 to September 2024.
Isabelle served as ETUC Confederal Secretary between 2019 to 2023. Key achievements in setting and implementing ETUC agenda materialise in her leadership in Corporate Sustainability Due Diligence, European Works Councils, Artificial Intelligence, Right to Disconnect; in guaranteeing access for self-employed to collective bargaining, on fighting Gender-based violence, in equipping the ETUC with Human Rights Legal and Strategic Litigation, in positioning the ETUC on the Social Progress Protocol, on EU Open Strategic Autonomy, Industrial Strategy that deliver for workers, on sustainable and inclusive EU Competition Policy.
Isabelle, affiliated to the DGB, is member of IG Metall. As former ETUI researcher, she was ETUI staff representative and member of the ETUC works council, affiliated to the FGTB.
Isabelle is a former Principal Adviser to the Regulatory Scrutiny Board of the European Commission, worked as ETUI senior researcher, research fellow at the Berlin Social Science Center (WZB - Germany). Isabelle holds a postgraduate degree in Social and Labour Law from the Sorbonne University in Paris (France).

Abstract

Panel 3: Successful legal counterstrategies against restrictions and criminalisation of the right to strike in different European countries

Moderation: Tamar Gabisonia (European Coordinator ILAW, Tbilisi)

CV

Since August 2020 Tamar Gabisonia has been coordinator of the International Lawyers Assisting Workers' Network (ILAW Network) for Europe and Central Asia. She graduated with a law degree from Tbilisi State University in Georgia and earned a master's degree in international human Rights Law from the University of Essex in the UK. Tamar is the chairperson of the Labour Rights Committee at the Georgian Bar Association and also teaches labour law at the European University, Georgia. With over 20 years of experience in human rights, she has litigated cases at both the national level and before the European Court of Human Rights. Tamar is also a co-author of numerous publications on human rights and workers' rights issues.

How to use strategic litigation to protect / defend the right to strike

Dr. Jan Buelens (Lawyer and Professor, Antwerp)

CV

Main occupation:
Lawyer with PROGRESS LAWYERS NETWORK, Antwerp-Brussels, 2002 – present
Highly specialized in industrial relations and employment law. Appeared as a lawyer in most of the leading Belgian cases on collective labour law over the last 23 years before the Constitutional Court, the Council of State and the Court of Cassation.
Special focus on high-profile inquests and inquiries (human trafficking, labour exploitation, work accidents,…)
Academic position:
Lecturer in Advanced Collective Labour Relations Law, University of Antwerp, Faculty of Law, 2017 – present
Ph D on subcontracting and collective labour law, 2012
Other functions:
Vice-president, International Center for Trade Union Rights, Member of Coordination Committee, European Lawyers for Workers, Member of the ETUC Fundamental Rights and Litigation Advisory Group, Member of several Boards of Directors and Working Groups
Additional information
Speaker in academic seminars and expert seminars of the European Trade Union Institute (on strategic litigation, confidentiality in the framework of EWC agreements,...)
Author of different books and articles, in English, French and Dutch (https://www.uantwerpen.be/en/staff/jan-buelens/publications/)

Abstract

Striking under the sword of Damocles with the threat of liability

Dr. Rüdiger Helm (Lawyer, Munich)

CV

Rüdiger Helm studierte als gewerkschaftlich orientierter Betriebsrat in München mit Stipendium der Hans-Böckler-Stiftung, promovierte in Hamburg zur mitbestimmten Umsetzung des europäischen Arbeitsschutzrechts und schrieb seinen LL.M. an der University of Cape Town zu Möglichkeiten der Überwindung des Apartheid Wage Gaps. Er lebte acht Jahre in Kapstadt und ist seit 1994 als Rechtsanwalt in München zugelassen.

Neben seiner anwaltlichen Tätigkeit engagierte sich Dr. Helm früh als Betriebsrat und in den Gewerkschaften. Er spielte eine zentrale Rolle in der strategischen Prozessführung, insbesondere als Architekt des "Mangold-Helm-Falls" (EuGH, C-144/04). Zudem vertrat er die Crowd-Worker-Entscheidung des Bundesarbeitsgerichts (9 AZR 102/20), und vertritt aktuell Gewerkschaften bei der Sicherstellung des Arbeitskampfrechts und der Abwehr von Haftungsklagen. Er ist außerdem Gründungsmitglied des deutschen Netzwerks Arbeitnehmeranwaelte.de, der ELW-Networks (2001) und von ILAW (2018).

Seine praktische juristische Arbeit ergänzt er durch Veröffentlichungen in Zeitschriften und Fachbüchern. Rüdiger ist Research Affiliate an der University of Cape Town (SALDRU.uct.ac.za) und der University of the western Cape (Centrow.org) befasst sich dort insbesondere mit neuen Formen der Abriet, arbeitsrechtlicher Gleichbehandlung und Diskriminierungsrecht. Seine Veröffentlichungen umfassen sowohl praxisorientierte als auch theoretische Arbeiten zu arbeitsrechtlichen Themen.

Abstract

Right to strike in public interest services

Dr. Giovanni Orlandini (Professor, Siena)

CV

Giovanni Orlandini (PhD at the EUI) is full professor of Labour Law at the Department of Political and International Sciences, University of Siena (Italy).
His research activity has been devoted in particular to the study of European and international labour law. In these areas he has contributed to several projects of the European Commission and participated in international research groups. An expert on trade union rights, he is legal advisor to the CGIL and member of the TTUR-group (ETUI).
He has published books on the right to strike and on free movement of workers and several articles on European and Italian labour law issues. He is the scientific director of the online newsletter “Diritti&Lavoro Flash”.
He is a member of the Editorial Board of the Giornale di diritto del lavoro e di relazioni industriali and of the Scientific Committee of Rivista giuridica del lavoro.

Abstract

Right to strikes in public interest services
The Italian case provides an emblematic example of how the right to strike can be severely restricted even in a system where this right has a solid constitutional basis.
The right to strike in Italy is expressly recognised by the Constitution (Article 40) and is protected by the jurisprudence of the high courts (Constitutional Court and Court of Cassation) as an individual right of the workers that can be restricted only if its exercise violates other fundamental rights

recognised by the Constitution. It was on this basis that Law 146/90 (reformed in 2000) was adopted to regulate the exercise of the right to strike in essential public services, with the aim of balancing it with users' rights.. Thanks to this law, in the various public service sectors, the rules on strikes are determined through a procedure involving the social partners and an administrative authority (Commissione di Garanzia), which has the task of assessing the content of collective agreements identifying the minimum services ('prestazioni indispensabili') to be guaranteed during strikes.
The application of this legislation has resulted in a framework of rules that severely limit the exercise of the right to strike, due to the incisive powers that the law attributes to the Commissione. The law also gives the government authority (Minister or prefect) an extra-ordinem power to adopt a back-to-work order, to which the current right-wing government has frequently resorted to.
To legally counter these restrictions, Italian trade unions have followed different strategies. The main trade unions confederations (CGIL; first) challenged the acts of the Commissione and the Minister before the administrative courts, contesting that they were contrary to Law 146 and Article 40 of the Constitution. In some cases this strategy was successful, even if only on grounds of 'formal procedural' flaws.
The main Italian grassroots trade union (USB) filed a collective complaint before the European Committee of Social Rights contesting that law 146/90, as applied in practice, is contrary to Article 6§4 of the European Social Charter (rev). Many aspect of the existing rules are challenged: the establishment of minimum services; the possibility to adopt 'back to work' orders; the ban on strikes for a certain period after a previous strike; the requirement to indicate the duration of a strike; the requirements of cooling off periods and conciliation procedures; the difficulty of reviewing strike restrictions before a court. The government's defence is mainly based on Article G of the Charter. The complaint is still pending, but the recent decision concerning the Netherlands (ETUC, FNV and CNV v. the Netherlands, Complaint No. 201/2021) raises many doubts as to its possible success. Indeed, the Committee makes a distinction between on the one hand, regulation of the right to strike, which may be permissible under Article 6§4 of the Charter per se, and, on the other hand, any further restriction which must meet the conditions set out in Article G of the Charter. Such a distinction could legitimise many of the limitations provided for in Law 146/90.

Panel 4: Right to Strike – New challenges and possible [legal] reactions at national level

Moderation: Thomas Schmidt (Trade union lawyer and ELDH Co-Secretary General, member of the VDJ Advisory Council)

Overcoming restrictions on the right to strike in Ireland

Declan Owens, (Lawyer, Ireland)

CV

Declan Owens is the International Secretary of the Socialist Lawyers Association of Ireland. He is a lawyer advocating for climate justice and human rights in Ireland, Britain and internationally, consulting with communities, trade unions and campaign groups for a Just Transition, including through his environmental nonprofit organisation, Ecojustice Ireland. Declan specialises in strategic litigation and provides expert advice in planning law and environmental law. He is an associate member of the Centre for Sustainability, Equality and Climate Action at Queen's University Belfast, a member of the Environmental Law Association of Ireland, the UK Environmental Law Association, and the Climate Justice group of the Law Society of Northern Ireland. Declan also acts as a director of the Northern Ireland Human Rights Consortium and sits on the Executive Committee of the Haldane Society of Socialist Lawyers in the UK. He is a member of the Executive Committee of the European Lawyers for Democracy and Human Rights; a member of the Bureau of the International Association of Democratic Lawyers, and an expert adviser with the UN's Harmony with Nature agency.

Abstract

The cause of labour is the cause of Ireland

Declan Owens is the International Secretary of the Socialist Lawyers Association of Ireland and his speech provides an analysis of the law regarding right to strike in Ireland from a socialist perspective. Accordingly, he considers the impact of the law regarding the right to strike in Northern Ireland and the Republic of Ireland without accepting the legitimacy of partition or ongoing British occupation of part of the country. The similarities and differences of the law in both jurisdictions on the island of Ireland are explored and Declan highlights the ongoing absurdity of partition of the country, including the legal complexity imposed upon Northern Ireland through Brexit, especially in relation to labour law.

Political strike in Germany – legal situation and recent climate protests

Dr. Theresa Tschenker (Lawyer, Berlin)

CV

Dr. Theresa Tschenker studierte Rechtswissenschaften an der Humboldt-Universität zu Berlin. Sie promovierte bei Prof. Dr. Eva Kocher am Lehrstuhl für Bürgerliches Recht, Europäisches und Deutsches Arbeitsrecht, Zivilverfahrensrecht der Europa-Universität Viadrina Frankfurt (Oder) und war dort als wissenschaftliche Mitarbeiterin tätig. Neben der Promotion arbeitete sie für das Forschungsprojekt „Modelle der Live-in-Pflege" der Hans-Böckler-Stiftung und forschte am Department of Mercantile and Labour Law, University of the Western Cape, South Africa. Sie absolvierte ihr Referendariat am Kammergericht Berlin unter anderem mit Stationen bei einer Kanzlei für Arbeitnehmer*innen und am Arbeitsgericht Berlin. Seit Juni 2024 ist sie Rechtsanwältin in Berlin bei dka Rechtsanwälte Fachanwälte.

Abstract

Die Klimaproteste und die Streiks der Vereinten Dienstleistungsgewerkschaft (ver.di) in dem Bündnis mit Fridays for Future fordern die Illegalisierung des sogenannten politischen Streiks heraus. Deutsche Gerichte bewerten den „politischen“ Streik als rechtswidrig, weil er nicht (nur) an den Arbeitgeber und auf den Abschluss von Tarifverhandlungen gerichtet sei. Eine kritische Betrachtung dieser Rechtsprechung ist angezeigt, denn staatliche Maßnahmen und Tarifpolitik bedingen sich als gestaltende Faktoren der Arbeitsbedingungen gegenseitig. Die restriktive Rechtsprechung gründet auf der juristischen Auseinandersetzung um den Zeitungsstreik aus dem Jahr 1952. Die juristische Debatte unmittelbar nach Inkrafttreten des Grundgesetzes war geprägt von konservativen Stimmen, die den Klassengegensatz negierten und gewerkschaftliche Einflussnahme auf staatliche Entscheidungen so gering wie möglich halten wollten. Die Referentin argumentiert dafür, dass eine vom Tarifbezug unabhängige Begründung des Streikrechts möglich und der politische Streik aufgrund völkerrechtsfreundlicher Auslegung des Grundgesetzes auch in Deutschland als rechtmäßig bewertet werden kann.

Successful cases in Spain

Armando García López (Lawyer, CCOO, Madrid)

CV

Armando García is the Coordinator of the Legal Advisory Department at the Federation of Services of the Workers' Commissions. (CCOO-Services)
He works as a labor lawyer and specializes in collective bargaining law and labor law, providing advice on corporate restructuring processes (collective dismissals, substantial modifications of working conditions, etc.) and on the negotiation of collective agreements.

Abstract

The right to strike is recognized in Article 28.2 of the Spanish Constitution and is classified as a fundamental right. However, in Spain, companies continue to interfere with the exercise of this right in various ways.

The Supreme Court ruling of February 12, 2013, examines the case of a company that threatened workers with dismissal, not only those who went on strike but also other workers, due to the potential loss of customers.

The Supreme Court ruling of April 20, 2015, serves as an example to address the so-called improper strikebreaking, which consists of using the labor of other companies in the same group to make up for the lack of production by striking workers.

The Supreme Court ruling of May 5, 2021, studies a controversial issue: deciding whether or not the right to strike has been violated in a case where various middle managers replaced the work of employees who went on strike on their own initiative, without the employer's authorization, but without the employer opposing or preventing such replacement.

Another example of pressure on workers not to strike is given by the Supreme Court ruling of April 13, 2023, which deals with a case in which the company issued various communications pressuring workers not to go on strike, encouraging workers to replace their striking colleagues, which is known as internal strikebreaking, and offering benefits to workers who did not strike.

The recent Supreme Court ruling of November 14, 2024, confirms that companies continue to violate the right to strike with all kinds of stratagems. In this case, the main company diverted service orders to other subcontractors in the face of a strike called in one of them.

In all these rulings, fundamental rights such as the right to freedom of association or the right to strike of workers have been declared violated, but companies continue to interfere with the exercise of these rights, so we must continue to fight to defend these rights.

Closing remarks:

Isabel Eder, Head of the Legal and Diversity Department, DGB, Berlin

CV

Isabel Eder is the Head of the Legal and Diversity Department at the German Trade Union Confederation since the end of 2023. She previously worked for 14 years at the Mining, Chemical and Energy Industrial Union in various roles, most recently as Head of the Co-determination Department and Deputy Legal Advisor, and previously also as Data Protection Officer. She is also an author on co-determination and data protection, a member of the advisory board of the Federal Anti-Discrimination Agency (Antidiskriminierungsstelle des Bundes), a member of the supervisory board and an honorary judge.
The DGB, the Confederation of German Trade Unions, is committed to a society based on solidarity. Work and income must be distributed fairly and people must be given the same opportunities regardless of their origin, skin color or gender. It represents the trade union movement nationally and internationally and is the political voice of its member unions with around 6 million organized employees. This makes the DGB one of the largest trade union confederations in the world.