LEGAL OPINION ON

THE PROTECTION OF WORKERS

AND THE RIGHT TO STRIKE

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EXECUTIVE SUMMARY

In 2014, the Centre d'étude des relations de travail (CERT) at the University of Neuchatel was commissioned by the DEFR and DFJP to undertake a study to analyse the protection offered to workers who exercise their right to strike. This followed a complaint submitted to the International Labour Organisation (ILO) by the Syndicat Suisse des services publics (SSP) concerning the protection under Swiss law against dismissals on grounds related to the right to strike. The present study, carried out by the Swiss Institute for Comparative Law, is designed to complement that study by examining the legal frameworks and practices in this field of other European States.

The right to strike is guaranteed by the respective constitutions of the majority of the countries examined in this study. Others refer instead to the freedom of association, and all have ratified the most important international and European treaties and conventions which guarantee the freedom of association, including the European Convention of Human Rights. For countries such as the Austria and the UK however, a freedom of association does not necessarily include a specific 'right to strike' deserving of particular legal protection.

What constitutes a legitimate strike is not something defined by State rules in the majority of the countries concerned. Although some legislatures do set out the conditions needed in order for a strike to benefit from legal protection, in many cases, it has been left to the courts to define what will, or rather, what will not, amount to a lawful strike. Some countries place great emphasis on the purpose of the action: whether it is a 'trade dispute' or rather a political or other protest not directly related to a dispute with the immediate employer. In three of the legal systems studied, a strike must be launched by a trade union in order for it to be deemed lawful. Other differences concern the form of the action qualifying for protective treatment: for example, most allow 'solidarity' or 'sympathy' strikes, but there is a more mixed approach on the lawfulness of 'rotating' strikes.

Conditions for exercising the right to strike vary considerably across the jurisdictions examined. Collective agreements, and in particular obligations to keep the peace during the course of such agreements play an important role in maintaining smooth industrial relations in most of the countries looked at. Others, such as France, do not permit 'peace obligations' and like Italy, ensure that, in the private sector at least, the constitutional right to strike is furthermore not constrained by any procedural requirements. Some countries, such as Germany and Slovakia, apply the *ultima ratio* principle, and expect other measures to be explored before strike action can be considered lawful. Obstacles to striking in the UK come instead from strict formal requirements for launching strike action.

This range of approaches towards the right to strike is reflected in the role of strikes in practice. A relatively liberal approach in countries like France and Italy would appear to translate into regular industrial action by workers. Restrictive procedural rules in others, such as the UK and Slovakia, would point to the opposite result. However, the importance of collective bargaining traditions cannot be ignored, and in most countries, it is this, rather than legal rules which may better explain good industrial relations.

It is perhaps no surprise, therefore, that countries where strikes are more common not only put in place fewer legal obstacles for workers to take industrial action, but also offer strongest employment protection for strikers. France, for example, prohibits any dismissal of a striking worker for any reason during a strike, save for gross misconduct, while Italian legislation provides for severe punishment of employers who engage in anti-trade union conduct. A second grouping of States ensure that strong employment protection laws broadly continue during strike action, while offering more severe sanctions for strike-related discrimination and dismissals by the employer. Enhanced protection and

sanctions can also be provided for in collective agreements, particularly in States such as Germany and Sweden, where collective bargaining is a part of traditional industrial relations. In both groups of countries, the principal sanction for breach by an employer is nullity of the offending act.

Weakest employment protection, however, is arguably that found in a third category of countries, where available sanctions are weak and strikers will, by law, generally be acting in breach of contract in taking strike action. Unlike most legal systems, where the employment contract is suspended for the duration of the action, in Austria and the UK, such a cessation of work can, in theory at least, amount to a dismissible offence, with no recourse available to the dismissed employee.

I. BACKGROUND AND QUESTIONS

1. Context

On 26th March 2014, the Federal Council asked the DEFR and DFJP to commission a study on the protection offered to workers who exercise their right to strike. This step was taken in light of the complaint submitted to the International Labour Organisation (ILO) by the Syndicat Suisse des services publics (SSP) concerning the protection under Swiss law against dismissals on grounds related to the right to strike. The working group acting on behalf of the OFJ and of SECO, responsible for the earlier study on the protection of workers representatives, will also oversee the present study.

The complaint before the ILO does not concern the conditions of the right to strike, but rather the effective exercise of this right. In particular, the sanction for a dismissal for a reason related to a legitimate strike (compensation equivalent to up to 6 months' pay) is said not to allow the proper exercise of the right to strike and as such violates rules of the ILO, namely conventions no. 87 and no. 98. Swiss law, it is argued, should provide for the re-instatement of an employee dismissed for reasons related to a legal strike. Moreover, the existing protection from dismissal (under Articles 336 al.1 and 336a of the Code des Obligations) is fixed and does not permit more favourable conditions, such as in collective agreements.

2. Mandate

This study is designed to complement the study being undertaken by the Centre d'étude des relations de travail (CERT) at the University of Neuchatel. The central question posed in the main study is as follows:

> *What, under Swiss law, is the protection afforded to workers who decide to strike in a way which conforms to the law? Does this protection guarantee the effective exercise of the right to strike, considering that this right has constitutional status related to the freedom of association and which may therefore be understood in terms of collective labour relations?*

The OFJ wishes to better understand the protection afforded in foreign states in cases of legitimate strike. This will allow for points of comparison with the situation in Switzerland and should contribute to the reflections and discussions of social partners.

3. Questions

The Swiss Institute of Comparative Law (SICL) is asked to respond to the following questions:

1. What is the legal status of the right to strike in the countries concerned?

   1.1 Legal basis:

   1.1.1 Is the right guaranteed, if applicable, in the Constitution or under other legal rules?

   1.1.2 What role does international law play, notably the conventions of the ILO, the European Convention on Human Rights and the European Social Charter or other law of the European Union?

1.2 Substantive law:

1.2.1 How is the concept of a strike and the right to strike defined (political strike, strikes not organised by trades unions, etc.)?

1.2.2 What are, if applicable, the conditions for exercising the right to strike?

1.2.3 What effects does a strike have on contracts of employment?

2. What role does the right to strike play in collective labour relations:

2.1 Its function in relation to other forms of action and its role in connection with collective negotiations?

2.2 How is it used in practice?

2.3 Do strikes play a role in sectors which have little or no tradition of formal collective work relations (i.e., an absence of employers' organisations or trades unions)?

3. Protection of workers on strike:

3.1 What protection is afforded to those exercising a right to strike lawfully, in particular, against dismissal (on notice or with immediate effect, for fair reasons)?

3.2 How is this protection distinguished from the general protection against unlawful dismissal or against other detrimental treatment?

3.3 Do the requirements of international law, notably, ILO conventions or the European Social Charter play a role in the level of protection afforded?

4. Is there a minimum penalty for violating such protection, and is the effectiveness and/or appropriateness of this sanction considered adequate or not in the country concerned?

5. Is there scope for providing more extensive protection in collective agreements? Is such an option considered useful, and to what extent is it relied on?

The above questions are to be addressed in relation to the following countries: Austria, France, Germany, Italy, Slovakia, Sweden and the United Kingdom.

II. COUNTRY REPORTS

A. AUSTRIA

1. Legal status of the right to strike

1.1. Legal basis

Der österreichische **Gesetzgeber** war bei der Erlassung von rechtlichen Regelungen zum Streik sehr zurückhaltend bzw. verhält sich neutral. Es gibt nur punktuell Regelungen, die (aus anderer Perspektive) auf den Streik Bezug nehmen. Eine umfassende Regelung des Streikes gibt es nicht, auch nicht für bestimmte Berufe, wo ein Streik die Daseinsvorsorge beeinträchtigen würde (z.B. Ärzte[1]). Dies ist ein Ausdruck der **Neutralität** des Staates zum Arbeitskampf. Ein Streik wird von der österreichischen Rechtsordnung weder geschützt noch gefördert. Ein Streik kann auch nicht als Rechtfertigung für die Verletzung anderer öffentlich-rechtlicher oder privatrechtlicher Normen dienen.

Da es in Österreich praktisch kaum oder nur sehr wenige Streiks gibt, hatte auch die **Rechtsprechung** kaum Gelegenheit, diese gesetzgeberische Lücke durch Rechtsprechung zu füllen. Es gibt in den letzten fünf Jahrzehnten nur vier österreichische Entscheidungen des OGH, die sich in weiterer Form mit Fragen zu einem Streik befassen.[2] Anders als in **Deutschland**, finden sich dazu also nur sehr wenige Gerichtsurteile.

Als eine Folge daraus wird gesagt, das österreichische Streikrecht sei in erster Linie **Gelehrten**- bzw. **Professoren**-**Recht** und werde nur in der Wissenschaft diskutiert.[3]

Geschichtlich betrachtet gab es Normen, die Teilnahme an Streiks unter **Strafe** stellten. Durch Gesetze aus den Jahren 1870 und 1919 wurden solche Normen aufgehoben.

Für **Staatsbedienstete** (Beamte) bestand früher eine Sondersituation. Sie werden in Österreich aufgrund spezieller Ernennung tätig und stehen in einem ganz besonderen Pflichtenverhältnis zum Staat. Für diese Gruppe von Beschäftigten war ein Streik bis 1999 gesetzlich durch die sogenannte Streik-Verordnung[4] verboten. Diese Streikverordnung wurde aber im Jahr 1999 aufgehoben.[5]

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1 Im Jahr 2015 kam es wegen neuem Arbeitszeitrecht und Verdiensteinbussen bei Spitalsärzten zu kleineren Streiks bzw. Streikdrohungen (z.B. http://www.oe24.at/oesterreich/politik/Aerzte-Streik-fuer-mehr-Gehalt/172808000).

2 Diese Aussage findet sich bei Rebhahn in Neumayr-Reissner, Zeller Kommentar zum Arbeitsrecht, Band 1, Manz, Wien 2011, § 1151, Rn. 250. Sie scheint im Jahr 2015 nach wie vor richtig zu sein. Die einzige Entscheidung jüngeren Datums ist dabei OGH 8 ObA 23/05y, SZ 2005/187, wo es um das Entgelt von Dienstnehmern ging, die sich nicht an einem Streik beteiligten.

3 So ausdrücklich Marhold/Friedrich, österreichisches Arbeitsrecht, Springer, Wien 2006, S. 448 et seqs. Für diesen Bericht wird in der Folge keine vollständige Diskussion der verschiedenen Lehrmeinungen vorgenommen. Das erscheint in diesem Rahmen nicht zweckmässig.

4 RGBl. 1914/155. Dieses Streikverbot erging unmittelbar vor dem 1. Weltkrieg (Floretta/Spielbüchler/Strasser, Arbeitsrecht II, 4. Aufl., Manz, Wien 2001, S. 192. In der Kriegszeit sollte das Streikverbot wohl den inneren Zusammenhalt schützen und Schwächungen des Staates vermeiden.

5 Marhold/Friedrich, loc. Cit., S. 454.

1.1.1. Constitutional

Das österreichische **Bundesverfassungs-Gesetz** (B-VG) enthält keine Aussage zu Streiks, bzw. die Vereinsfreiheit schützt nur die Koalition, nicht den Streik an sich.

Die Europäische Menschenrechtskonvention (**EMRK**) steht in Österreich im Verfassungsrang. Sie wurde also in das österreichische Recht im Verfassungsrang integriert.[6] Die in Art. 11 EMRK enthaltene Koalitionsfreiheit wird nach traditionellem, ganz überwiegendem Verständnis so interpretiert, dass sie den einfachen Gesetzgeber nicht zur Anerkennung eines „Rechts auf Streik" verpflichtet. Im Jahr 2006 wurde diese Ansicht als mit der Rechtsprechung des EGMR vereinbar angesehen. Es wurde auch gesagt, dass die österreichische Sichtweise in diesem Punkt vom **deutschen Recht** abweicht, wo Art. 11 EMRK den Arbeitskampf „garantiert".[7]

Es wird in Österreich diskutiert, wie einige jüngere Urteile des EGMR den Streik betreffend wirken.[8] Dass in diesen die **Türkei** betreffenden Fällen regelmässig der Staat als Arbeitgeber betroffen war, soll keinen Unterschied machen. Art. 11 EMRK beinhalte in der Lesart durch den EGMR auch Schutz für Arbeitnehmer im privaten Sektor. Näher dazu unten, 3.3.

Die europäische Grundrechtscharta (**GRC**) enthält ein Recht auf Streik, auch im privatrechtlichen Sinne (Art. 28 GRC). Diese Norm ist aber nach österreichischer Ansicht für das nationale, österreichische Streikrecht nicht verbindlich, da sie nur gilt, soweit österreichische Behörden oder Gericht Unionsrecht durchführen (Art. 51 Abs. 1 GRC).[9]

1.1.2. Role of international law

Die ILO Konvention Nr. 87 und 98 sind in Österreich seit 1950 bzw. 1952 in Kraft.[10] Deren praktische Bedeutung wird aber eher nicht als hoch eingeschätzt.

Eine Anerkennung des Streiks erfolgt in Art. 6 Abs. 4 der **Europäischen Sozialcharta** (ESC). Österreich hat aber zu dieser Norm einen **Vorbehalt** abgegeben.[11] Damit ist diese Norm für Österreich nicht bindend.

Das Europäische Übereinkommen über den **Schutz von Tieren beim internationalen Transport**[12] sieht folgendes vor: Jede Vertragspartei wird die notwendigen Maßnahmen ergreifen, um im Falle von **Streik** oder sonstigen nicht voraussehbaren Umständen, die eine strenge Anwendung der Bestimmungen dieses Übereinkommens auf ihrem Hoheitsgebiet verhindern, Leiden der Tiere zu vermeiden oder auf ein Mindestmaß zu beschränken. Interessanter Weise scheint es keine vergleichbaren Regelungen zu geben, wenn Menschenleben in Gefahr sind. Es ist aber auch kein Fall bekannt, wo ein ärztestreik tatsächlich ein Menschenleben gefährdet hätte.

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6 KONVENTION ZUM SCHUTZE DER MENSCHENRECHTE UND GRUNDFREIHEITEN, BGBl. Nr. 210/1958. Die Europäische Menschenrechtskonvention ist gemäß BVG BGBl. Nr. 59/1964 mit Verfassungsrang ausgestattet.

7 Marhold/Friedrich, loc. cit., S. 453, Fn. 28.

8 Z.B. EGMR 34503/97 Demir and Baykara/Turkey; EGMR 68959/01, Enerji Yapi-Yol/Turkey; EGMR 30946/04, Kaya Turquie Diese Aufzählung findet sich bei Rebhahn in Neumayr-Reissner, Zeller Kommentar zum Arbeitsrecht, Band 1, Manz, Wien 2011, § 1151, Rn. 246.

9 Majoros, Gewerkschaftliche Zutrittsrechte zum Betrieb, DRdA 2014, 544, 549.

10 Übereinkommen (Nr. 87) über die Vereinigungsfreiheit und den Schutz des Vereinigungsrechtes, BGBl. Nr. 228/1950; Übereinkommen (Nr. 98) über die Anwendung der Grundsätze des Vereinigungsrechtes und des Rechtes zu Kollektivverhandlungen, BGBl. Nr. 20/1952.

11 BGBl. 1969/460, Erklärung der Republick österreich gem Art. 20 Abs. 2 ESC.

12 BGBl. Nr. 597/1973. Art. 1 Nr. 4.

1.2 Substantive law

Wie bereits eingangs erwähnt, gibt es keine zentrale gesetzliche Regelung des Streiks und es wird in österreichischen, einfachgesetzlichen Normen der Streik nur indirekt behandelt.

Eine einfachgesetzliche Norm, die den Streik behandelt, findet sich z.B. in § 2 des Koaltionsgesetzes (1870[13]): „Verabredungen von Arbeitgebern (Gewerbsleuten, Dienstgebern, Leitern von Fabriks-, Bergbau-, Hüttenwerks-, landwirtschaftlichen oder anderen Arbeitsunternehmungen), welche bezwecken, mittelst Einstellung des Betriebes oder Entlassung von Arbeitern diesen eine Lohnverringerung oder überhaupt ungünstigere Arbeitsbedingungen aufzuerlegen; - sowie Verabredungen von Arbeitnehmern (Gesellen, Gehilfen, Bediensteten, oder sonstigen Arbeitern um Lohn), welche bezwecken, mittelst gemeinschaftlicher Einstellung der Arbeit von den Arbeitgebern höheren Lohn oder überhaupt günstigere Arbeitsbedingungen zu erzwingen; - endlich alle Vereinbarungen zur Unterstützung derjenigen, welche bei den erwähnten Verabredungen ausharren, oder zur Benachteiligung derjenigen, welche sich davon lossagten, haben **keine rechtliche Wirkung“**. Diese Norm soll die Freiwilligkeit der Streikteilnahme sichern und ist Ausdruck der staatlichen Neutralität zu einem Streikgeschehen.

Diese **Neutralität** zeigt sich auch in § 13 Arbeitslosenversicherungs-Gesetz (AlVG): „Wenn die Arbeitslosigkeit die unmittelbare Folge eines durch Streik verursachten Betriebsstillstandes ist, gebührt während dessen Dauer **kein Arbeitslosengeld**; das gleiche gilt für den Fall einer Aussperrung in einem Betrieb, sofern sie als Abwehrmaßnahme gegen einen Teilstreik, eine passive Resistenz oder eine sonstige die Fortführung der Arbeit in diesem Betrieb vereitelnde Kampfmaßnahme erfolgt“.

Eine Beschäftigung ist einem Arbeitslosen zumutbar, wenn sie in einem **nicht von Streik** oder Aussperrung betroffenen Betrieb erfolgen soll.[14]

Gemäss dem Arbeitsmarkt-Förderungs-Gesetz (AMFG) ist die Vermittlung in einen von Streik oder Aussperrung betroffenen Betrieb sowie die **Vermittlung** von streikenden oder ausgesperrten Dienstnehmern unzulässig.[15]

Gemäss § 9 **Arbeitskräfteüberlassungs**-Gesetz ist die Überlassung von Arbeitskräften (durch Leiharbeits-Firmen) in Betriebe, die von Streik oder Aussperrung betroffen sind, verboten.

Gemäss § 10 **Ausländer-Beschäftigungs**-Gesetz (AuslBG) dürfen für die Beschäftigung auf Arbeitsplätzen in einem von Streik oder Aussperrung betroffenen Betrieb[16] Beschäftigungsbewilligungen nicht erteilt werden.[17]

Ebenso sieht § 8 Abs. 5 **Zivildienst**-**Gesetz** vor, dass Einrichtungen, die von einem Streik oder einer Aussperrung betroffen sind, keine Zivildienstpflichtigen zugewiesen werden dürfen.

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13 RGBl. Nr. 43/1870.

14 § 9 Abs. 4 AlVG.

15 § 3 Nr. 10 AMFG. So auch § 40 Abs. 2 Landarbeitsgesetz 1984 (für in der Landwirtschaft Arbeitende).

16 Dies gilt gemäss § 20d AuslBG auch für das Zulassungsverfahren für besonders Hochqualifizierte, Fachkräfte, sonstige Schlüsselkräfte, Studienabsolventen und Künstler.

17 In diese Richtung ging auch das Abkommen zwischen der Republik Österreich und der Bundesrepublik Deutschland über Gastarbeitnehmer samt Schlussprotokoll (BGBl. Nr. 10/1953): „Die Gastarbeitnehmer dürfen keine Beschäftigungen in Betrieben antreten, die von Streik oder Aussperrung betroffen sind. Bricht eine solche Streitigkeit während der Dauer des Arbeitsverhältnisses aus, so sind dem Gastarbeitnehmer, soweit möglich, alle Erleichterungen zur Auffindung eines entsprechenden anderen Arbeitsplatzes zu gewähren“. Das Abkommen dürfte aber wohl durch den EU-Beitritt Österreichs obsolet geworden sein. Formell ist es aber noch in Kraft (Stand: Juli 2015). Ein entsprechender Staatsvertrag besteht auch mit den Niederlanden: BGBl. Nr. 176/1955.

In diesen Normen zeigt sich jeweils die **Neutralität** des Staates bzw. die **Arbeitskampffreiheit** auf Arbeitnehmer- und Arbeitgeber-Seite.

1.2.1 Definitions

Eine gesetzliche Definition des Streikes gibt es nicht. In der Lehre wird gesagt, ein Streik ist die planmässige Arbeitseinstellung von einer Mehrzahl von Arbeitnehmern, um einen bestimmten Zweck zu erreichen.[18] Es werden verschiedene Typen unterschieden (z.B. Streik im engeren und weiteren Sinn, Totalstreik, Teilstreik), ohne dass freilich daran rechtliche Konsequenzen geknüpft wären.

1.2.2 Conditions for exercising the right to strike

Da es kein gesetzliches Streikrecht gibt, gibt es auch keine klaren Vorgaben für die Ausübung eines (nicht existierenden) Streikrechts.

In der österreichischen Lehre werden jene Voraussetzungen diskutiert, die in Deutschland dafür entscheidend sind, ob ein rechtmässiger Streik vorliegt (z.B. Führung durch Kollektivvertragsparteien, durch KV regelbares Ziel, kein Verstoss gegen Friedenspflicht, Verhältnismässigkeit). Für Österreich wird diese Frage aber ganz überwiegend so gesehen, dass diesen Faktoren keine Bedeutung zukommt, da traditioneller Weise der sogenannten Trennungslösung gefolgt wird (im Gegensatz zur deutschen Einheitslösung). Gerade die österreichische Wirklichkeit zeige, dass **auch bei Fehlen eines Arbeitskampfrechts sozial ausgewogene Kollektivverträge zustande kommen können** und ferner die Austragung von Arbeitskämpfen eben nicht typische Voraussetzungen für einen Kollektivvertrags-abschluss sei.[19]

Abgesehen davon stellt sich die Frage, ob ein Streik aus der Perspektive des kollektiven Arbeitsrechts rechtswidrig ist oder nicht. Diese Diskussion wird aus der Perspektive des Schadensersatzrechts geführt. Diese Frage wird unter 2.1. behandelt.

1.2.3 Effect on contracts of employment

Österreich folgt der sog. **Trennungslösung** (und nicht der Einheitslösung, wie in Deutschland). Das bedeutet, dass die kollektivvertragliche Rechtmässigkeit eines Streikes keinen Einfluss auf die individual-vertragliche Ebene hat.

Ein Streikender verliert seinen Anspruch auf **Entgelt**. Dies wurde vom OGH entschieden.[20] Die Unterstützung aus dem **Streikfonds** des österreichischen Gewerkschaftsbundes beträgt 50 % des Bruttolohns.[21] (Da es zwar keine Streiks, aber einen Streikfonds gibt, kommt es immer wieder zu Problemen und Diskussionen um die Verwendung der Mittel.[22])

Ein **Nicht-Streikender** Arbeitnehmer muss dem Arbeitgeber seine **Leistungsbereitschaft** erklären. Das tut er in der Regel dadurch, dass er zur Arbeit erscheint. Dann ist auch Entgelt geschuldet. Auch wenn der Arbeitgeber für den konkreten Arbeitnehmer aufgrund des Streikes keine Einsatzmöglichkeit hat. Arbeitswillige nicht streikende Arbeitnehmer, die aufgrund des Streiks an ihrer Arbeitsverrichtung gehindert sind, müssen daher gegenüber dem Arbeitgeber ihre Leistungsbereitschaft erklären, um ihren Entgeltanspruch während der Arbeitsverhinderung zu wahren. An die Erklärung der

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18 Marhold/Friedrich, loc. cit., S. 449.

19 Marhold/Friedrich, loc. cit., S. 456.

20 OGH 17.01.1990, 9 ObA 347/89, publiziert in EvBl 1990/94, S. 467, RdW 1990,321, ZAS 1994/1, S. 20 (mit Anmerkung von Aigner). RIS-Rechtssatznummer RS0050967.

21 Rebhahn, loc. Cit., Rn. 259.

22 Z.B. http://diepresse.com/home/politik/innenpolitik/85469/OGBStreikfonds_Gesamtes-Vermogen-verpfaendet.

Arbeitsbereitschaft durch den Arbeitnehmer sind strenge Anforderungen zu stellen sind: Er muss seine Dienste dem Dienstgeber ausdrücklich anbieten, seine Arbeitsbereitschaft also klar zu erkennen geben.

Wenn der Arbeitgeber die Dienste des arbeitsbereiten Arbeitnehmers offensichtlich und erkennbar nicht annimmt oder nicht annehmen kann, ist dieser nicht mehr verpflichtet, sich zur jederzeitigen Aufnahme der Arbeit bereit zu halten und andere Angebote auszuschlagen. Dieser Fall ist § 1155 ABGB zu unterstellen. Der Arbeitnehmer muss sich daher von dem Zeitpunkt an, in dem unmissverständlich klar war, dass der Arbeitgeber seine Dienste nicht in Anspruch nehmen wird, ja eine Dienstleistung geradezu verhindert, anrechnen lassen, was er bei Annahme von Angeboten Dritter verdient hätte. Dies gilt auch bei Streiks.[23] Wenn aber nichts Entgangen ist, so wird das normale Entgelt geschuldet. Dies kann dazu führen, dass in einem Betrieb nur Schlüsselpositionen bestreikt werden und andere Arbeitnehmer ihr Entgelt fordern. Das Fehlen der Beschäftigungsmöglichkeit fällt in die Sphäre des Arbeitgebers. § 1155 ABGB wäre aber (auch durch AGB) vertraglich ausschliessbar.[24]

2. Role of the right to strike in collective labour relations

2.1. Relation with other forms of action and role in collective negotiations

Es besteht eine sog. **kollektivvertragliche Friedenspflicht**. Dies bedeutet ein Arbeitskampfverbot zwischen den Parteien eines Kollektivvertrages. Es gilt für die Dauer und den sachlichen Umfang eines KV (relative Friedenspflicht). Die Friedenspflicht ist im KV abdingbar. Sie wirkt nur zwischen den Parteien eines KV, die aber auf ihre einzelnen Mitglieder einzuwirken haben. Daraus ergibt sich auch, dass ein Streik nur im Zusammenhang mit dem Abschluss eines (neuen) KV durchgeführt werden darf, um eine Verbesserung zu erkämpfen oder Vermeidung einer Verschlechterung der Arbeitsbedingungen zu verhindern.

Eine ähnliche Wirkung wie KV für bestimmte Branchen haben sog. **Betriebsvereinbarungen** (BV) für einzelne Betriebe. Auch aus einer BV ergibt sich inhärent eine Friedenspflicht. Diese Friedenspflicht ist aber durch den Inhalt des Arbeits-Verfassungsgesetzes (ArbVG) beschränkt, ja gewissermassen an dieses und dessen Inhalt gekoppelt (z.B. Unzulässigkeit eines Arbeitskampfes zur Erweiterung von Mitbestimmungsrechten, die im ArbVG durch BV geregelt werden; Unzulässigkeit der Stellung als Betriebsrat zur Organisation von Streiks).

Verletzungen dieser Friedenspflichten machen einen Streikorganisator (Gewerkschaft) schadenersatzpflichtig.

Das blosse Vermögen ist nach dem Deliktsrecht des Allgemeinen Bürgerlichen Gesetzbuches (ABGB 1811) nicht geschützt. Ein Streik kann aber wegen vorsätzlich **sittenwidriger** Schädigung rechtswidrig sein (§ 1295 Abs. 2 ABGB). Der blosse **Aufruf** zum Streik ist aber nicht sittenwidrig. Zu den rechtswidrigen Streiks zählen Streiks ohne Bezug zum Kampfgegner (z.B. politischer Streik bzw. Sympathie-Streiks[25], wenn davon unterschiedliche KV betroffen sind), sittenwidrige oder verbotene Streikziele (z.B. Mitgliedschafts-Zwang in der Gewerkschaft für Arbeitnehmer) oder Sittenwidrigkeit der konkreten Durchführung des Streiks (Verletzung der **Verhältnismässigkeit** zwischen Ziel und Mittel bzw. sog. Vernichtungs-Arbeitskampf).

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23 OGH 19.12.2005 8 ObA 23/05y, SZ 2005/187 (zu einem Bahnstreik).

24 Rebhahn, loc. Cit., Rn. 271 et seqs.

25 Die Abgrenzungen sind hier in der österreichischen Lehre streitig (Rebhahn, loc. Cit., Rn 256). Der EuGH ging in seinem Fall Laval (C-241/05) sehr weit und schloss auch Sympathie-Massnahmen und Boykott ein. Das ist aber nur für grenzüberschreitende Fälle relevant.

Es gibt keine zwangsweise, durch den Staat organisierte **Schlichtung**. In diesem Rahmen wird aber das sog. Bundeseinigungsamt tätig. Die Einleitung eines Schiedsverfahrens bedarf Unterwerfungserklärungen von beiden Parteien. Ein Schiedsspruch wirkt wie ein KV. Ein Streik muss (nach einer Mindermeinung) *ultima ratio* sein. Ein Streik, der vor einer möglichen **Schlichtung** begonnen wird, ist ebenfalls rechtswidrig. Verhandlungen können aber einseitig als gescheitert erklärt werden,[26] womit diesem Punkt keine materielle Bedeutung zukommt.

Aus der Verletzung der Friedenspflicht können sich **Unterlassungs**- und **Schadenersatzansprüche** ergeben. Die Friedenspflicht wird als ein Vertrag mit Schutzwirkung zugunsten Dritter gesehen. Einzelne Arbeitnehmer und Arbeitgeber sind also in die Schutzwirkung einbezogen. Schadenersatzsprüche gibt es auch bei rechtswidrigen Streiks. Wird z.B. von der Gewerkschaft ein deliktsrechtlich „rechtswidriger" Streik eingeleitet, so haftet diese den bestreikten Arbeitgebern für Schäden.

Es gibt aber keine einzige Entscheidung eines österreichischen Gerichts, die zur Frage der Rechtmässigkeit eines Streiks eine Aussage beinhalten würde.[27]

2.2. Use of the right to strike in practice

In Österreich wird praktisch betrachtet sehr **wenig** gestreikt, viel weniger als in Deutschland.

Es wird gesagt, dass die Trennungslehre viel zum **erfolgreichen Sozialmodell** in Österreich beigetragen hat, weil es zu wenigen bzw. keinen Streiks kommt und nur gestreikt wird, wenn ein sehr gravierender Anlassfall vorläge.[28] Die Trennungslehre wirkt wie eine Hemmschwelle für Streiks.[29]

Es wird z.B. gesagt, Österreich sei, was Streiks betrifft, nach wie vor ein internationaler Ruhepol. In den Jahren 2005 bis 2012 seien im Jahresdurchschnitt nur zwei Arbeitstage je 1000 Beschäftigten durch Streiks ausgefallen. Nur in der **Schweiz** würde in Europa weniger gestreikt als in Österreich (nämlich einen Tag).[30]

Auch wenn es in seltenen Fällen zu einem Streik kommt, so liegen die Dinge nicht so, dass Arbeitgeber die Mitarbeiter tatsächlich entlassen, auch wenn dies möglich wäre. Dies ist auch der Grund, warum Anlassfälle für die Rechtsprechung fehlen. Es gibt keine einzige Entscheidung eines österreichischen Gerichts, die zur Frage der Rechtmässigkeit eines Streiks und die Wirkung auf den Arbeitsvertrag eine Aussage beinhalten würde. In der Praxis war es meist so, dass Streiks sehr mit Bedacht gemacht wurden, und die Interessen des Arbeitgebers nicht zu sehr in Mitleidenschaft gezogen wurden.

Es wird gesagt, dass der österreichische Gewerkschaftsbund mit den bestreikten Arbeitgebern vor Streikbeginn **ausverhandelt**, dass es zu keinen Entlassungen und Kündigungen kommt.[31] Dann kommt es zu einer Abstimmung über den Streik. Nur wenn diese beiden Voraussetzungen vorliegen, wird überhaupt gestreikt.

Wurde tatsächlich aufgrund von Streik entlassen, so kommt es häufig nach Ende des Streiks sofort zu **Wiedereinstellungen**. Diskutiert werden aber die **Bedingungen** der Wiedereinstellung.[32]

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26 Marhold/Friedrich, loc. Cit., S. 456-461. § 153 ArbVG.

27 Rebhahn, loc. Cit., Rn. 250.

28 Rebhahn, loc. Cit.

29 Grillberger, Europäische Grundrechte auf Arbeitskampf, wbl 2013, 252, 253.

30 http://diepresse.com/home/wirtschaft/international/1574757/Nur-die-Schweiz-streikt-weniger-als-Osterreich (Artikel vom März 2014).

31 Rebhahn, loc. Cit., Rn. 261.

32 Dazu z.B. Rebhahn, loc. Cit., Rn. 262. Dort wird auch die Frage behandelt, ob und wie die neuen Bedingungen des Arbeitsvertrages abweichen dürfen.

2.3. Role of the right to strike in non-organised sectors

In Österreich sind praktisch alle Arbeiter und Angestellten von einem KV erfasst, es gibt damit praktisch keinen nicht-organisierten Sektor.

3. Protection of workers on strike

3.1. Special protection against dismissal and other unfair treatment

Die traditionelle österreichische **Trennungslehre** unterscheidet streng die kollektivrechtliche und die individualrechtliche Rechtsebene. Auch ein aus kollektivrechtlicher Perspektive rechtmässiger Streik (also keine Schadenersatzpflicht für die Organisatoren), kann dazu führen, dass ein einzelner Arbeitnehmer durch die Teilnahme am Streik seine vertraglichen Pflichten (insb. die Arbeitspflicht) gegenüber dem Arbeitgeber verletzt. Eine einseitige **Suspendierung** der Pflichten aus dem Arbeitsverhältnis kennt das österreichische Recht nicht. Es gibt nach der traditionellen Ansicht kein „Recht auf Streik" und keinen rechtlichen Schutz für Streikende durch die Rechtsordnung. Der Streik ist kein Rechtfertigungsgrund für die Verletzung der Arbeitspflicht durch den Arbeitnehmer. Es wird regelmässig durch den Streik ein Entlassungstatbestand erfüllt sein.[33]

Einige Autoren wollen aber in diesen Fällen einen **entschuldbaren Rechtsirrtum** im Zivilrecht sehen. Es sei das Verschulden des Arbeitnehmers fraglich, „weil die noch immer nicht völlig geklärte Rechtslage in Bezug auf die Arbeitsvertragswidrigkeit einer an sich rechtmässigen Gesamtaktion leicht zu einem relevanten Irrtum des Arbeitnehmers über die Rechtswidrigkeit seines Verhaltens führen kann".[34]

Anders wird dies nur für **sehr kurze Warnstreiks** gesehen. Vereinzelt wird auch das Verschulden an der Pflichtverletzung verneint, wenn die Arbeitenden einem Streikaufruf der Gewerkschaft gefolgt sind.[35]

Man kann daher für Österreich sagen, dass (anders als in den meisten EU-Staaten) **kein Recht auf Streik** besteht. Der **OGH** hat sich dazu aber noch nicht geäussert,[36] da kein Anlassfall vorlag.

Anders wird dies nur für **Betriebsratsmitglieder** sein, die nicht entlassen werden können (sog. Entlassungsschutz). Für diese wird aber durch den Streik regelmässig ein Kündigungsgrund verwirklicht sein (Einhaltung von Kündigungsfristen). Voraussetzung ist aber, dass dem Arbeitgeber die Weiterbeschäftigung des Betriebsrates aus Gründen der betrieblichen Disziplin nicht zugemutet werden kann. Daraus wird gefolgert, dass eine Kündigung des Betriebsrates nur zulässig ist, wenn auch gegen andere streikende Arbeitnehmer mit Sanktionen vorgegangen wird. Damit wird verhindert, dass Sanktionen nur gegen die besonders exponierten Betriebsräte ergriffen werden.

Streikende **Betriebsräte** sind also gegenüber streikenden, normalen Arbeitnehmern **privilegiert**. Dies wird durchaus als ein verfassungsrechtliches Problem gesehen. Diese Privilegierung könne nicht durch den Mandatsschutz gerechtfertigt werden.[37]

3.2. Comparison with general protection

Es besteht folglich nach österreichischem Recht für Streiks kein besonderes Regime im Vergleich zum sonst bestehenden Entlassungs- und Kündigungsschutz.

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33 Marhold/Friedrich, loc. cit., S. 462.

34 Floretta/Spielbüchler/Strasser, loc. Cit., S. 227.

35 Dann mangelt es an der « Beharrlichkeit » der Pflichtverletzung (Rebhahn, loc. Cit., Rn. 262).

36 Rebhahn, loc. Cit., Rn. 261.

37 Marhold/Friedrich, loc. cit., S. 463.

3.3. Role of international law on protection afforded

Die ILO Konvention Nr. 87 und 98 sind in Österreich seit 1950 bzw. 1952 in Kraft.[38]

Zu (allen) **internationalen Abkommen** wird in der österreichischen Arbeitsrechts-Literatur (im Jahr 2001) allgemein gesagt, dass auch die zahlreichen von Österreich ratifizierten Abkommen auf dem Gebiet der sozialen Sicherheit keine Regelung zum Arbeitskampf enthielten, die die Rechtslage unmittelbar gestalten würde. Wohl zielten die einschlägigen Abkommen auf eine Art Absicherung des Arbeitskampfes, insbesondere des Streiks ab. Zu der eindeutigsten entsprechende Bestimmung in der ESC habe Österreich einen Vorbehalt abgegeben. Andere Abkommen (wohl inklusive der ILO-Abkommen) enthielten entweder keine hinreichend deutliche Absicherung des Arbeitskampfes und/oder sind in Österreich nicht unmittelbar anwendbar.[39] Es wird auch gesagt, diese Abkommen sicherten nur die Koalitionsfreiheit als solche, nicht aber direkt das Streikrecht.[40]

Es wird für Österreich aber auch klar gesagt, dass sich aufgrund von Entwicklungen auf internationaler Ebene (insbesondere **Rechtsprechung des EGMR**[41]) die Trennungslehre neu zu diskutieren ist.

Rebhahn meint z.B. im Jahr 2011, dass auch die österreichische Judikatur in Zukunft wohl die **Einheits**- bzw. Suspendierungsthese vertreten wird.[42]

Krömer meint hingegen (2012), der EGMR sei in seiner jüngeren Rechtsprechung von seiner bisherigen zögerlichen Ableitung gewerkschaftlicher Rechte aus Art. 11 EMRK abgegangen. Der Gerichtshof erkenne nunmehr ein Recht auf Kollektivverhandlungen an und habe auch aussergewöhnlich deutliche Worte über ein Recht auf Streik gefunden. Zusammenfassend würden aber wohl zum Beurteilungs-zeitpunkt 2012 die gewichtigeren Argumente **gegen** eine Anerkennung des **Streikrechts** durch den **EGMR** sprechen.[43]

Grillberger meint dazu 2013, die traditionelle österreichische Trennungsthese sei durch die jüngere Rechtsprechung des EGMR[44] und das Inkrafttreten von Art. 28 GRC „nachhaltig" in Frage gestellt. Es werde zu einer **Preisgabe der Trennungslehre** kommen „**müssen**". Die Grenzen des neuen Streikrechts seien unklar. Jedenfalls werde es sich aber nicht auf Gewerkschaften und auf den Abschluss von KV beschränken können.[45] Was die Rechtsprechung des **EuGH** betrifft, so meint Grillberger, die Erfindung eines europarechtlichen Grundrechts auf kollektive Maßnahmen der Arbeitnehmer durch den EuGH habe den Arbeitnehmern freilich im Ergebnis nichts genützt. Die **Sicherung des Binnenmarktes** sei dem EuGH mehr wert gewesen als die Ausübung eines Grundrechtes zur Abwehr von Verschlechterungen der Arbeitsbedingungen.[46] „Organisation oder Teilnahme an Streiks dürfen daher keinen Grund für arbeitsrechtliche Sanktionen durch Arbeitgeber abgeben". Dies gelte jedenfalls für Streiks mit grenzüberschreitendem Bezug. Es wäre aber rechtspolitisch und rechtsdogmatisch nicht vertretbar,

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38 Übereinkommen (Nr. 87) über die Vereinigungsfreiheit und den Schutz des Vereinigungsrechtes, BGBl. Nr. 228/1950; Übereinkommen (Nr. 98) über die Anwendung der Grundsätze des Vereinigungsrechtes und des Rechtes zu Kollektivverhandlungen, BGBl. Nr. 20/1952.
C098 - Right to Organise and Collective Bargaining Convention, 1949 (No. 98) 10 Nov 1951 In Force

39 Floretta/Spielbüchler/Strasser, loc. cit., S. 193. Die ILO Abkommen werden aber nicht explizit genannt. Die anderen zugänglichen Lehr- und Handbücher gehen in den entsprechenden Kapiteln gar nicht auf internationale Abkommen ein.

40 Krejci, Recht auf Streik, Manz 2015, S. 83 et seqs.

41 Siehe dazu oben 1.1.1. Und sogleich in der Fussnote zu Grillberger.

42 Loc. cit., Rn. 261 am Ende.

43 Krömer, Das Ende der Trennungstheorie, ZAS 2012/37, S. 200, 206.

44 EGMR 34503/97 Demir and Baykara/Turkey; EGMR 68959/01, Enerji Yapi-Yol/Turkey; EGMR 30946/04, Kaya Turquie.

45 Grillberger, Europäische Grundrechte und Arbeitskampf, wbl 2013, 252.

46 Zur Entscheidung Viking (C-438/05) und Laval (C-341/05).

rein nationale Streiks anders zu behandeln. Viele Fragen seien offen. Es sei zu hoffen, dass der EuGH und EGMR **Zurückhaltung** üben. Mit Spannung sei zu erwarten, „welchen Einfluss die Judikatur des EGMR auf den Vorrang der Dienstleistungsfreiheit haben wird" (wie in den Rechtssachen Laval und Viking des EuGH). Hier könnte sich also eventuell auch ein Konflikt zwischen EGMR und EuGH anbahnen.

Jüngst (2015) beschäftigt sich sogar eine eigene Buch-Publikation von **Krejci** mit dem „Recht auf Streik" (ca. 400 Seiten). Es heisst zu dieser Publikation: Ein neu importiertes Recht auf Streik kippe die traditionelle österreichische Arbeitskampfdoktrin. „Der österreichische Gesetzgeber hat den Arbeitskampf nicht geregelt. Die Rechtsprechung ist spärlich, die Lehre überwiegend restriktiv. Streikfreiheit: ja - Recht auf Streik: nein; trotz anders lautender staatsvertraglicher und unionsrechtlicher Bekenntnisse. Vor allem ist Österreich seit Inkrafttreten der Grundrechtscharta der Europäischen Union an das Unionsgrundrecht auf Kollektivverhandlungen und Kollektivmaßnahmen einschließlich des Rechts auf Streik gebunden. In Verbindung mit der jüngeren Rechtsprechung des Europäischen Gerichtshofes für Menschenrechte und des österreichischen Verfassungsgerichtshofes, der Unionsgrundrechte bei äquivalenter österreichischer Rechtslage verfassungsrechtlich gewährleistet, ist ein **Paradigmenwechsel** im **Arbeitskampfrecht** Österreichs eingetreten. Dieser Paradigmenwechsel beeinflusst auch bisher tradierte Antworten auf so manche Rechtsfragen zum österreichischen Arbeitskampf".[47]

Nach Krejci gilt das Streikrecht der **GRC** auch über den Anwendungsbereich der GRC hinaus. Sie entwickle ein Expansionspotential, das den im österreichischen Arbeitskampfrecht durch die GRC eingeleiteten Paradigmenwechsel über den Anwendungsbereich des Unionsrechts hinaus vorantreibe. Das Recht auf Streik ergebe sich aber auch aus der Rechtsprechung des EGMR.

Das Buch von Krejci bietet auch einen kurzen **rechtsvergleichenden Überblick** (S. 13-18), der allerdings auf anderen rechtsvergleichenden Arbeiten aufbaut[48] und damit schliesst, dass aus der Rechtsvergleichung zum Streikrecht für das österreichische Recht nur wenig gewonnen werden kann, da die arbeits- und sozialrechtlichen Bedingungen und die wirtschaftlichen Rahmenbedingungen eines jeden Landes sehr spezifisch sind.

Die Folgerungen Krejcis auf der Ebene des **privatrechtlichen Arbeitsvertrages** sind wohl weitreichend:

„Selbst dann, wenn man ein Recht auf Streik ablehnt, finde sich in Fällens eines kollektivrechtlich gerechtfertigten Streiks Argumente, die gegen die Trennungstheorie sprechen. Daher ist in Fällen kollektivrechtlich gerechtfertigter Streiks der **Einheitstheorie** zu folgen. Das gilt erst recht bei Anerkennung eines verfassungsrechtlich gewährleisteten Rechts auf Streik. … Nach der Einheitstheorie wirkt ein kollektivrechtlich gerechtfertigter Streik auch auf die individuellen Arbeitsverhältnisse insofern ein, als eine endgültige fristlose Entlassung der Streikenden unzulässig ist. Stattdessen werden die individuellen Arbeitsverhältnisse lediglich für die Dauer des Streiks suspendiert, also ausgesetzt" (S. 314).

Ein Beharren auf der tradierten österreichischen Arbeitskampf-Doktrin bezeichnet Krejci als „**Vogel-Strauss-Politik**". Er sieht aber auch die Gefahr einer „Unkultur" ausufernder Arbeitskämpfe, die auf lange Sicht wieder zu einer restriktiveren Haltung der Staaten führen könnte (S. 408). Krejci führt auch aus, dass grosse Teile der österreichischen Lehr- und Handbücher zum Streikrecht neu geschrieben werden müssten (S. 411-413).

Schliesslich heisst es bei Krejci: „Der Einfluss der **deutschen** Rechtsprechung zum Arbeitskampfrecht auf die österreichische Rechtsprechung und die österreichische Arbeitskampfdoktrin wird steigen; hat

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47 http://www.manz.at/list.html?inline=1&back=b7d826c70cc37b5f0ebf602732921ac6&isbn=978-3-7046-7004-5&xid=1799301.

48 Insbesondere Warneck, Streikregeln in der EU27 und darüber hinaus – ein rechtsvergleichender überblick (2008).

doch Deutschland den Paradigmenwechsel, der uns Österreichern erst in jüngster Zeit mehr und mehr bewusst wird, längst vollzogen“ (S. 413).

Jene Stimmen, die einen solchen Paradigmen-Wechsel annehmen, werden wohl immer lauter werden.

4. Enforcement and effectiveness of available sanctions

Bei rechtswidrigen Streiks kann es in erster Linie zu Schadenersatz- oder Unterlassungsansprüchen kommen. Diese werden im normalen zivilen Rechtsweg durchgesetzt.

Wenn ein Streik rechtswidrig war, so kann ein Arbeitgeber Schadenersatzansprüche gegen die Organisation (Gewerkschaft) geltend machen. Es besteht zwar in Österreich eine eigene Arbeits- und Sozialgerichtsbarkeit. Diese ist für solche Schadenersatzansprüche aber nicht zuständig. Die Zuständigkeit fällt vielmehr in den Bereich der allgemeinen Zivilgerichte.

Für die Organe haftet die Gewerkschaft je nach verletzter Pflicht unterschiedlich (Stichwort: Erfüllungs- und Verrichtungsgehilfe). Nicht alle Funktionäre oder Streikposten sind aber automatisch Organe oder Machthaber der Organisation.

Da keine besonderen Schutzmechanismen für die Streikenden eingreifen, kann die Frage der Sanktionen für deren Schutz auf sich beruhen.

Wenn ein Streik rechtswidrig war, so kann die KV-Partei auf Arbeitgeberseite einen unter Zwang (§ 870 ABGB) eingegangenen KV anfechten.

Wenn **Begleitmassnahmen** des Streiks Schäden verursachen, so haften im Prinzip nur die Handelnden. In einem Fall des OGH aus dem Jahr 1963 wurde die Haftung der Gewerkschaft nur bejaht, wenn ein Kollektivvertreter der Gewerkschaft zu der Begleitmassnahme (hier Verhinderung des Ausladens von **Bananen**) zugestimmt hat. Die Haftung wurde aber abgelehnt, wenn die Funktionäre die Übergriffe zwar kannten, dazu aber passiv blieben.[49] Die Übergänge zwischen Massnahme der Organisation des Streiks und Begleitmassnahme sind aber fliessend.

Nach einem Urteil eines Untergerichts (LG Salzburg) soll eine **einstweilige Verfügung** gegen eine rechtswidrige Begleitmassnahme eines Streiks zulässig sein. Gegen die Gesamtaktion wäre aber wohl keine einstweilige Verfügung zulässig.[50]

Im Prinzip kann ein bestreikter Arbeitgeber auch einen Schadenersatzanspruch gegen den einzelnen, streikenden Arbeitnehmer geltend machen. Es besteht aber wohl keine solidarische Haftung zwischen den Streikenden, sodass jeder Streikende nur für den für ihn verursachten Schaden haftet. Der Kausalitätsnachweis für diesen Schadensteil wird als schwierig betrachtet.[51]

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49 OGH, 14.05.1963, 8Ob75/63, ZAS 1966,161, mit Kritik von Bydlinski, Gschnitzer und Nipperdey. Ebenso OGH 18.01.1966 8 Ob 344/65, als dritter Rechtsgang zu 8 Ob 75/63, JBl 1967,1 (mit Kritik von Mayer - Maly). Siehe auch RS0028392: Keine Haftung des Österreichischen Gewerkschaftsbundes für Ausschreitungen Dritter bei einem von ihm genehmigten Streik, keine Pflicht seinerseits dagegen einzuschreiten. Keine allgemeine Verpflichtung zum Tätigwerden zum Schutz eines überwiegenden, fremden Interesses. Keine Haftung für Delikte eines Angestellten aus dem Vertrauen auf den äußeren Tatbestand. Eine Haftung des Österreichischen Gewerkschaftsbundes für Ausschreitungen bei einem von ihm genehmigten Streik ist aber dann anzunehmen, wenn ein Kollektivvertreter des Gewerkschaftsbundes **zugestimmt** hat, dass die Streikposten die Ausschreitungen begehen (Unterbindung des Ausladens von Bananen). Es handelt sich dann um ein Verleiten der Streikposten zu Ausschreitungen.

50 Rebhahn, loc. cit., Rn. 267.

51 Rebhahn, loc. cit., Rn. 268.

5. Possibility to extend protection in collective agreements

Im Prinzip wäre es möglich, in Kollektivverträgen ein Recht auf Streik vorzusehen. Derartige Fälle sind aber nicht bekannt bzw. werden in der einschlägigen Literatur soweit ersichtlich nicht erwähnt.

B. FRANCE

Le droit de grève est considéré en France comme un droit individuel d'exercice collectif, qui est protégé par la Constitution et différents instruments juridiques internationaux, tels que les conventions de l'Organisation internationale du travail (ci-après « O.I.T. »).

Le droit de grève est un droit constitutionnel très peu réglementé par la loi française, le Code du travail (ci-après « C. trav. ») se limitant à en décrire les effets et les limites dans le secteur public. Le droit de la grève est par conséquent essentiellement jurisprudentiel. De plus, une convention collective ne peut pas restreindre l'exercice du droit de grève pour un salarié d'une entreprise privée. En revanche, les chefs de services publics peuvent réglementer le droit de grève sous contrôle judiciaire.

La jurisprudence française définit la grève comme une « cessation collective et concertée du travail en vue d'appuyer des revendications professionnelles ». Une abondante jurisprudence dessine les contours de la notion, ce qui aboutit à interdire certains types de grèves, notamment les grèves « perlée » et « purement politique », et en autoriser d'autres, comme la grève « tournante » dans le secteur privé ou la grève « surprise ».

Les conditions d'exercice du droit de grève consistent en ce que le gréviste doit être titulaire du droit de grève en vertu de la loi, ne pas en abuser ni participer à un mouvement illicite, et enfin, respecter les limitations au droit de grève existant le cas échéant.

Ainsi, les titulaires du droit de grève en France sont les salariés des entreprises privées ainsi que les fonctionnaires et agents publics. Certaines professions sont privées du droit de grève par la loi, notamment les militaires, les fonctionnaires de police et les magistrats.

Ensuite, si le salarié participe à un mouvement illicite, ce qui est le cas lorsque l'un des éléments de la définition d'une grève fait défaut, ou que son comportement constitue un abus du droit de grève, il ne bénéficie pas de la protection accordée aux salariés grévistes.

Enfin, dans le secteur public, la loi limite le droit de grève par la mise en place d'un préavis obligatoire, l'interdiction des grèves tournantes ainsi que l'instauration d'un service minimum dans certains secteurs. Les secteurs du transport terrestre et du transport aérien de passagers sont en outre soumis à des règles particulières.

La grève est liée aux négociations collectives, qui peuvent l'engendrer ou y mettre fin par un protocole de fin de conflit ; toutefois cette relation n'est pas réglée dans la loi. La France fait partie des pays comptant le plus grand nombre de journées de travail perdues ; le nombre de grèves y étant à la hausse depuis quinze ans. La plupart des grèves ont lieu dans les grandes entreprises, concernent notamment les salaires, l'emploi et les conditions de travail, sont amorcées par des salariés du service public et dans des environnements syndiqués.

La grève a pour effet de suspendre le contrat de travail : sauf dans certaines situations particulières, l'employeur n'est pas obligé de verser le salaire au gréviste. Par ailleurs, ce dernier est protégé à plusieurs égards. Il l'est tout d'abord contre toute mesure discriminatoire, notamment en matière de rémunération et d'avantages sociaux, fondée par exemple sur la participation ou la non-participation à la grève.

Ensuite, sauf faute lourde, le gréviste ne peut pas être licencié ou sanctionné pour avoir exercé son droit de grève. La faute lourde apparaît lorsque l'acte est commis dans l'intention de nuire à l'employeur ou de désorganiser l'entreprise. Le gréviste doit avoir participé à l'acte de manière personnelle, active et volontaire. Constituent par exemple une faute lourde, la violence physique ou la séquestration. Tout licenciement prononcé en l'absence de faute lourde est nul de plein droit et le salarié peut prétendre à sa réintégration ainsi qu'à une indemnité. Les grévistes bénéficient ainsi d'une

protection plus importante que la protection de droit commun contre le licenciement sans cause réelle et sérieuse qui n'est pas frappé de nullité mais donne uniquement droit à la réparation du préjudice.

Les conventions internationales, telles que les conventions de l'O.I.T., la Charte sociale européenne, la Convention européenne des droits de l'homme ou encore la législation de l'Union européenne, permettent le renforcement de la protection accordée aux grévistes, en particulier parce qu'elles ont une autorité supérieure à celle des lois. Cette influence est toutefois discrète, notamment parce qu'il est difficile d'identifier une mesure protectrice qui résulterait directement d'une exigence de droit international, en raison du manque de référence expresse à ces textes dans les normes et la jurisprudence françaises.

En cas d'atteinte au droit de grève, en droit national, il n'y a pas d'autres sanctions que les sanctions civiles incombant à l'employeur pour non-respect du statut protecteur du gréviste. En effet, la violation du droit de grève n'est pas constitutive d'une infraction pénale.

Enfin, les conventions collectives peuvent en principe étendre la protection accordée aux grévistes.

1. Legal status of the right to strike

1.1. Legal basis

1.1.1. Constitutional

A travers la répression du **délit de coalition** par la Loi Chapelier, la grève en France était totalement interdite jusqu'à ce que la loi du 25 mai 1864 abolisse celui-ci en le remplaçant par le délit d'atteinte à la liberté du travail. La grève restait donc civilement illicite et la jurisprudence lui attachait l'effet de rupture du contrat de travail jusqu'à la loi du 11 février 1950, qui en fit une cause de suspension du contrat de travail. Entre temps, le droit de grève avait été reconnu par la Constitution de 1946[52].

En effet, le droit de grève est un **droit constitutionnel** en France depuis son apparition dans le Préambule de la Constitution de 1946 à l'alinéa 7 : « Le droit de grève s'exerce dans le cadre des lois qui le réglementent».[53]

Malgré cette invitation du constituant à réglementer le droit de grève, **la loi française se limite** à traiter des effets de la grève (articles L. 2511-1 et L. 1132-2 C. trav., auxquels s'ajoutent les articles L. 1242-6 et L. 1242-10 ainsi que l'article L. 2261-22 C. trav.) et à instaurer des règles particulières pour les grèves dans le service public (articles L. 2512-1 à L. 2512-5 C. trav.). Enfin, il existe des **règles particulières** plus contraignantes dans les secteurs du transport terrestre et du transport aérien[54]. Le Conseil constitutionnel a orienté l'action législative[55].

Ainsi, le droit français de la grève est **essentiellement jurisprudentiel**.

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52 Auzero G. & Dockès E., Droit du travail, 28ème éd., Paris 2014, N 1359 ss.

53 La Constitution française actuelle fait référence au Préambule de la Constitution de 1946 et lui donne ainsi valeur constitutionnelle.

54 Voir la loi n° 2007-1224 du 21.08.2007 sur le dialogue social et la continuité du service public dans les transports terrestres réguliers de voyageurs (JO 22.08) ainsi que la loi n° 2012-375 du 19.03.2012 relative à l'organisation du service et à l'information des passagers dans les entreprises de transport aérien de passagers et à diverses dispositions dans le domaine des transports (JO 20.03).

55 Auzero & Dockès, Droit du travail, *op. cit*., N 1360, n. 1.

En outre, depuis la décision Dehaene, **en l'absence de loi applicable, les chefs de services publics peuvent réglementer le droit de grève, sous contrôle judiciaire**[56] : « la reconnaissance du droit de grève ne saurait avoir pour conséquence d'exclure les limitations qui doivent être apportées à ce droit, comme à tout autre, en vue d'en éviter un usage abusif ou contraire aux nécessités de l'ordre public ; […] en l'état actuel de la législation il appartient au gouvernement, responsable du bon fonctionnement des services publics, de fixer lui-même, sous le contrôle du juge, en ce qui concerne ces services, la nature et l'étendue desdites limitations».

Enfin, les droits économiques et sociaux sont considérés en France comme des droits individuels, même lorsqu'ils sont exercés collectivement. Ainsi, la Cour de cassation a tranché : « tout salarié a un droit personnel à la grève »[57] et « une convention collective ne peut avoir pour effet de limiter ou réglementer l'exercice pour les salariés du droit de grève»[58]. Le droit de grève en France est donc un **droit individuel d'exercice collectif**[59].

1.1.2. Role of international law

Le droit de grève est mentionné dans **divers textes de droit international ratifiés par la France**. La Charte sociale européenne du Conseil de l'Europe, en son article 6, a été le premier texte international à reconnaître le droit de grève. De plus, l'article 11 de la Convention européenne des droits de l'homme consacre la liberté de réunion et d'association. Depuis 2000, l'article 28 de la Charte des droits fondamentaux de l'Union européenne énonce que « les travailleurs et les employeurs, ou leurs organisations respectives, ont […] le droit de négocier et de conclure des conventions collectives aux niveaux appropriés et de recourir, en cas de conflits d'intérêts, à des actions collectives pour la défense de leurs intérêts, y compris la grève ». Le droit de grève est également consacré à l'article 8 du Pacte international relatif aux droits économiques, sociaux et culturels des Nations unies. Enfin, bien qu'il ne soit pas expressément mentionné dans les conventions de l'O.I.T., celles-ci reconnaissent un droit d'action collective aux syndicats et se réfèrent au droit de grève.

1.2. Substantive law

1.2.1. Definitions

Comme mentionné[60], la loi française ne réglemente que les effets de la grève et pose des règles spécifiques pour les grèves dans le secteur public. Les remarques qui suivent sont valables **pour le secteur privé ainsi que pour le secteur public**. Les limitations du droit de grève relatives au secteur public seront analysées ensuite[61].

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56 Conseil d'Etat (ci-après « CE »), Assemblée, du 07.07.1950, n° 01645, publié au recueil Lebon. Voir Auzero & Dockès, Droit du travail, *op. cit*., N 1401 ; A. Mazeaud., Droit du travail, 7e éd., Paris 2010, N 507.

57 Cour de cassation, Chambre sociale (ci-après « Cass. Soc. »), 10.10.1990, no 88-41.427 (non publié au bulletin).

58 Cass. Soc., 07.06.1995, no 93-46.448 : Bull. Civ. V, n° 180 p. 132. *Infra* 1.2.2.3.

59 Auzero & Dockès, Droit du travail, *op. cit*., N 1362 ; Mazeaud, Droit du travail, *op. cit*., N 504 ; Mémento pratique Francis Lefebvre, Social, Levallois 2014, N 10800.

60 *Supra* 1.1.1..

61 *Infra* 1.2.2.3..

La jurisprudence définit la grève comme tout « **arrêt collectif et concerté du travail en vue d'appuyer des revendications professionnelles** »[62]. Toute forme de grève est en principe licite à condition que les trois éléments décrits ci-dessous soient réunis.

1.2.1.1. Arrêt de travail

Le travail **doit cesser complètement**[63]. La grève « perlée », qui se caractérise par un ralentissement volontaire de la production ou du rythme de travail sans toutefois arrêter l'activité (travail au ralenti), n'entre pas dans la définition de la grève[64]. Ne sont pas non plus considérés comme des cessations de travail l'arrêt limité à une obligation particulière du contrat[65] ou l'exécution du travail volontairement défectueuse[66]. En effet, le droit de grève n'autorise pas le salarié à « exécuter son travail dans des conditions autres que celles prévues par son contrat ou pratiquées dans la profession »[67].

La grève ne peut avoir lieu que **durant les périodes de travail effectif**, pas durant un congé ou une pause[68]. La grève « à rebours », qui a lieu lorsque l'entreprise est déjà fermée, n'est pas une grève[69].

Il n'y a pas de minimum requis quant à la **durée de l'arrêt de travail**[70]. Une heure suffit. Des arrêts répétés de courte durée sont donc considérés comme une grève tant qu'ils ne font que désorganiser la production et n'entraînent pas une désorganisation totale de l'entreprise[71]. La durée de la grève peut être prédéterminée ou non[72].

Quant au **lieu de la grève**, les grévistes peuvent rentrer chez eux ou rester sur leur lieu de travail[73]. L'occupation des locaux[74] ainsi que les piquets de grève sont licites[75], sous réserve de l'abus de droit[76] et de l'expulsion par le juge des référés en cas de risque pour la sécurité des personnes et des biens[77].

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62 Auzero & Dockès, Droit du travail, *op. cit*., N 1372 ; Mémento pratique Francis Lefebvre, Social, *op. cit*., N 10790 ; Teyssié, Droit du travail, Relations collectives, 8e éd., Paris 2012, no 1523 ; Mazeaud, Droit du travail, *op. cit*., N 500 ainsi que les nombreuses références citées.

63 A. Dupays (dir.), Lamy Social, en ligne 2015, no 4911 ; Mémento pratique Francis Lefebvre, Social, *op. cit*., N 10820 ; Mazeaud, Droit du travail, *op. cit*., N 514.

64 Cass. soc., 18.02.1960 : Bull. civ. IV, no 199 ; Dupays (dir.), Lamy Social, *op. cit*., N 4902 ; Auzero & Dockès, Droit du travail, *op. cit*., N 1384.

65 Mémento pratique Francis Lefebvre, Social, *op. cit*., N 10820 ; Teyssié, Droit du travail, *op. cit*., N 1527.

66 Cass. soc., 22.04.1964 : Bull. civ. IV, no 320 ; Dupays (dir.), Lamy Social, *op. cit*., N 4905 ; Auzero & Dockès, Droit du travail, *op. cit*., N 1385.

67 Cass. soc., 23.03.1953, no 53-01.398 : Bull. soc. no 253 p. 188.

68 Cass. soc., 18.12.2001, no 01-41.036 : Bull. civ. V, no 387 p. 311 ; Auzero & Dockès, Droit du travail, *op. cit*., N 1378 ; Mémento pratique Francis Lefebvre, Social, *op. cit*., N 10825.

69 Teyssié. , Droit du travail, *op. cit*., N 1531.

70 Cass. soc., 07.04.1993, no 91-16.834 : Bull. civ. V, no 111 p. 77; Mémento pratique Francis Lefebvre, Social, *op. cit*., N 10835.

71 Cass. soc., 25.02.1988, no 85-43.293 : Bull. Civ. V, no 133 p. 88 ; Dupays (dir.), Lamy Social, *op. cit*., N 4901 ; Auzero & Dockès , Droit du travail, *op. cit*., N 1375 ; Mémento pratique Francis Lefebvre, Social, *op. cit*., N 10835 ; Teyssié, Droit du travail, *op. cit*., N 1572 ; Mazeaud , Droit du travail, *op. cit*., N 515.

72 Auzero & Dockès, Droit du travail, *op. cit*., N 1375.

73 Auzero & Dockès, Droit du travail, *op. cit*., N 1378.

74 Dupays (dir.), Lamy Social, *op. cit*., N 4914.

75 Dupays (dir.), Lamy Social, *op. cit*., N 4915.

76 *Infra* 1.2.2.1..

77 Mémento pratique Francis Lefebvre, Social, *op. cit*., N 10845. Voir ég. Teyssié, Droit du travail, *op. cit*., N 1582 ss.

Enfin, concernant la **forme de l'arrêt de travail**, une grève « tournante »[78], qui affecte successivement les différents secteurs d'une entreprise, est autorisée dans le secteur privé si elle n'entraîne pas la désorganisation de l'entreprise. Elle est en revanche interdite dans les services publics[79]. Quant aux grèves « bouchon », consistant en l'arrêt d'un petit nombre d'ouvriers occupant une situation stratégique afin de paralyser l'entreprise, elles sont aussi autorisées tant qu'elles n'entraînent pas la désorganisation de l'entreprise[80]. Toutefois, n'est pas considérée comme une grève, la grève « du zèle » qui a lieu lorsque les employés accomplissent le travail de manière exagérément consciencieuse afin de paralyser l'entreprise[81]. Enfin, une grève « d'autosatisfaction », dans laquelle les travailleurs exécutent le travail dans les conditions qu'ils revendiquent, n'est pas non plus autorisée[82].

1.2.1.2. Collectif et concerté

Le droit de grève étant un droit individuel exercé collectivement[83], il faut que **plusieurs salariés** soient en grève. Toutefois, toute l'entreprise ne doit pas nécessairement participer à celle-ci : une minorité de salariés, deux ou trois par exemple, suffit[84]. La grève peut en effet ne toucher qu'un secteur ou service d'une entreprise[85]. Cependant, un salarié seul ne peut faire grève, sauf lorsqu'il est le seul salarié de l'entreprise ou qu'il participe à un mouvement général ou national[86].

Les salariés doivent en outre avoir la **réelle et commune intention** de faire grève ainsi que la motivation d'appuyer des revendications professionnelles. La simple rencontre des volontés individuelles suffit, même si celle-ci est spontanée ; il n'est pas requis de réunion syndicale préalable, la grève « sauvage » est donc licite en France[87]. A noter que l'élément intentionnel n'apparaît pas lors d'une simple réunion syndicale d'information[88].

1.2.1.3. A l'appui de revendications professionnelles

Les revendications non satisfaites des grévistes doivent avoir un **caractère professionnel**[89]. Ont par exemple ce caractère des revendications relatives à la rémunération (telles qu'une demande d'augmentation de salaire) ou aux conditions de travail (concernant les horaires, la sécurité, l'hygiène, etc.) ou ayant pour but de contraindre l'employeur à respecter ses engagements, de s'opposer à un licenciement de personnel, de défendre l'exercice du droit syndical, ou même de défendre l'emploi en général. A noter que la manifestation d'une crainte des salariés, par exemple la crainte de

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78 Cass. soc., 14.01.1960, n° 58-40.009 : Bull. civ. IV, n° 43 p. 35 ; Dupays (dir.), Lamy Social, *op. cit*., N 4904 et 4913 ; Auzero & Dockès, Droit du travail, *op. cit*., N 1377 ; Mémento pratique Francis Lefebvre, Social, *op. cit*., N 10840 ; Teyssié, Droit du travail, *op. cit*., N 1575 s.

79 *Infra* 1.2.2.3..

80 Dupays (dir.), Lamy Social, *op. cit*., N 4913 ; Mémento pratique Francis Lefebvre, Social, *op. cit*., N 10840.

81 Mémento pratique Francis Lefebvre, Social, *op. cit*., N 10820 ; Teyssié, Droit du travail, *op. cit*., N 1530.

82 Mémento pratique Francis Lefebvre, Social, *op. cit*., N 10820 et 10860 ; Teyssié, Droit du travail, *op. cit*., N 1538.

83 *Supra* 1.1.1..

84 Cass. soc., 03.10.1963, n° 62-40.059 : Bull. civ. V, n° 645 ; Dupays (dir.), Lamy Social, *op. cit*., N 4906 ; Mémento pratique Francis Lefebvre, Social, *op. cit*., N 10800.

85 Auzero & Dockès, Droit du travail, *op. cit*., N 1376.

86 Cass. soc., 29.03.1995, n° 93-41.863 : Bull. civ. V, n° 111 p. 79 ; Auzero & Dockès, Droit du travail, *op. cit*., N 1376 ; Mémento pratique Francis Lefebvre, Social, *op. cit*., N 10800.

87 Auzero & Dockès, Droit du travail, *op. cit*., N 1374 ; Mémento pratique Francis Lefebvre, Social, *op. cit*., N 10810.

88 Teyssié, Droit du travail, *op. cit*., N 1539.

89 Dupays (dir.), Lamy Social, *op. cit*., N 4908 ; Auzero & Dockès, Droit du travail, *op. cit*., N 1379 ; Mémento pratique Francis Lefebvre, Social, *op. cit*., N 10855 ; Teyssié, Droit du travail, *op. cit*., N 1544.

licenciements suite à l'annonce d'un plan de restructuration ou d'un licenciement économique, peut aussi constituer une revendication professionnelle[90].

De plus, les revendications doivent porter sur des **droits intéressant directement les grévistes**[91]. Une grève de solidarité[92] interne à l'entreprise, ayant pour but de défendre les intérêts d'autrui, n'est autorisée que si les grévistes défendent également leurs intérêts. Il n'est par exemple pas permis de faire grève par solidarité pure contre le licenciement d'un salarié. En revanche, une grève de solidarité externe à l'entreprise est autorisée, notamment pour protester contre une politique patronale, par solidarité professionnelle, dans le cadre d'une grève pour l'emploi ou le pouvoir d'achat, etc.. Les grèves générales sont autorisées en France. En effet, elles concernent des revendications sociales et professionnelles communes à beaucoup de travailleurs[93].

La grève **purement politique** n'est pas autorisée. Toutefois, si les revendications politiques sont mêlées à des revendications professionnelles et économiques, elle est permise[94].

La Cour de cassation a jugé qu'il ne pouvait y avoir de revendication « déraisonnable ». Le **juge n'a pas à apprécier le caractère légitime** ou non de la décision des salariés de recourir à la grève et il ne peut pas apprécier le bien-fondé ou la légitimité des revendications[95].

Aucun préavis à la grève n'est requis dans le secteur privé. La grève « surprise », déclenchée à tout moment et sans formalité, est donc licite[96]. **L'employeur doit cependant avoir connaissance des revendications** au moment de l'arrêt de travail. Les salariés n'ont pas besoin de les présenter eux-mêmes : la transmission orale, par écrit, à l'aide d'un tract ou d'un syndicat suffit[97]. Il n'est pas requis que l'employeur ait rejeté ces revendications. En outre, « la capacité de l'employeur à satisfaire les revendications des salariés est sans incidence sur la légitimité de la grève »[98].

1.2.2. Conditions for exercising the right to strike

1.2.2.1. Mouvement illicite et abus du droit de grève

Si l'un des éléments constitutifs d'une grève décrits ci-dessus[99] manque, le mouvement n'est pas qualifié de grève : le salarié participe alors à un **mouvement illicite**[100].

Il peut également arriver que les éléments constitutifs d'une grève soient réunis mais qu'il y ait **abus du droit de grève**, notamment lorsque cette dernière entraîne la **désorganisation de l'entreprise** elle-

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90 Mémento pratique Francis Lefebvre, Social, *op. cit*., N 10855.

91 Mémento pratique Francis Lefebvre, Social, *op. cit*., N 10855.

92 Dupays (dir.), Lamy Social, *op. cit*., N 4909 ; Auzero & Dockès, Droit du travail, *op. cit*., N 1380 ; Mémento pratique Francis Lefebvre, Social, *op. cit*., N 10865 ; Teyssié, Droit du travail, *op. cit*., N 1559 ss.

93 Auzero & Dockès, Droit du travail, *op. cit*., N 1379 ss.

94 Dupays (dir.), Lamy Social, *op. cit*., N 4909 ; Mémento pratique Francis Lefebvre, Social, *op. cit*., N 10870 ; Teyssié, Droit du travail, *op. cit*., N 1544.

95 Cass. soc. 02.06.1992, n° 90-41.368 : Bull. civ. V, n° 356 p. 223 ; Auzero & Dockès, Droit du travail, *op. cit*., N 1382 ; Mémento pratique Francis Lefebvre, Social, *op. cit*., N 10880.

96 Auzero & Dockès, Droit du travail, *op. cit*., N 1373 ; Mémento pratique Francis Lefebvre, Social, *op. cit*., N 10880 ; Teyssié, Droit du travail , *op. cit*., N 1566 ss.

97 Mémento pratique Francis Lefebvre, Social, *op. cit*., N 10880.

98 Cass. soc. 23.10.2007, n° 06-17.802 : Bull. civ. V, n° 169.

99 *Supra* 1.2.1.

100 Dupays (dir.), Lamy Social, *op. cit*., N 4911 ; Mémento pratique Francis Lefebvre, Social, *op. cit*., N 11020. A noter que les actes illicites commis à l'occasion d'une grève n'ont pas d'incidence sur la qualification de celle-ci. Ils tombent sous le coup de la responsabilité individuelle (pénale et/ou civile).

même et pas uniquement de sa production[101]. Il y a « désorganisation » lorsque la sécurité des personnes ou des biens est menacée, que l'entreprise est complétement coupée du monde extérieur ou que la grève aboutit à lui faire perdre des clients. La grève devient alors illicite. Ce n'est toutefois pas le cas lorsque l'entreprise subit de simples difficultés d'exploitation.

Ces deux cas de grève illicite peuvent avoir de lourdes répercussions pour le travailleur, car celui-ci **ne pourra pas se prévaloir de la protection** accordée par l'article L. 2511-1 C. trav.[102] et l'employeur n'aura pas besoin d'invoquer une faute lourde pour le licencier ou le sanctionner (quel que soit le degré de sa faute) en vertu d'une exécution défectueuse du contrat ou d'une faute professionnelle[103].

1.2.2.2. Titulaires du droit de grève

Le droit de grève est un droit **réservé aux salariés**, c'est-à-dire à l'ensemble des travailleurs subordonnés. Il concerne les salariés des **entreprises privées et publiques**. Toutefois, les fonctionnaires et agents publics voient l'exercice de leur droit de grève encadré[104].

Par ailleurs, la loi **prive certaines professions** du droit de grève : les militaires, les fonctionnaires de police et les membres d'une compagnie républicaine de solidarité (C.R.S.), le personnel de l'administration pénitentiaire, les magistrats, le personnel du service des transmissions du ministère de l'Intérieur et les ingénieurs des études et de l'exploitation de l'aviation civile[105].

1.2.2.3. Limitations du droit de grève

Le droit de grève dans le secteur privé n'est pratiquement pas réglementé dans la loi[106]. De plus, les partenaires **sociaux ne peuvent pas réglementer ou limiter** l'exercice du droit de grève par les salariés d'une entreprise privée **à travers une convention collective**[107]. Cependant, il n'est pas interdit aux organisations syndicales de négocier ce type de clauses. Un délégué syndical peut par exemple signer une clause par laquelle il s'engage à ne pas appeler à la grève pendant une certaine période limitée afin de négocier avec l'employeur[108].

Contrairement à ce qui est le cas dans le secteur privé, le législateur a fixé des règles limitant le droit de grève pour le secteur public, en vertu du **principe de continuité nécessaire des services publics**[109]. Le **secteur public** comprend tous les fonctionnaires et agents publics, ainsi que les salariés de droit

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101 Cass. soc. 04.11.1992, nº 90-41899 : Bull. soc. V, nº 529 p. 335 ; Dupays (dir.), Lamy Social, *op. cit*., N 4912 ss.

102 C. trav., article L. 2511-1 : « L'exercice du droit de grève ne peut justifier la rupture du contrat de travail, sauf faute lourde imputable au salarié. Son exercice ne peut donner lieu à aucune mesure discriminatoire telle que mentionnée à l'article L. 1132-2, notamment en matière de rémunérations et d'avantages sociaux. Tout licenciement prononcé en absence de faute lourde est nul de plein droit. ». *Infra* 3.1.1. et 3.1.2..

103 Dupays (dir.), Lamy Social, op. cit., N 4911 ; Auzero & Dockès, Droit du travail, op. cit., N 1383 ; Mémento pratique Francis Lefebvre, Social, *op. cit*., N 11020.

104 *Infra* 1.2.2.3..

105 Auzero & Dockès, Droit du travail, *op. cit*., N 1368 et les réf. citées.

106 *Supra* 1.1.1..

107 *Supra* 1.1.1.. Sauf dans le domaine du transport aérien de passagers. Voir ég. Mémento pratique Francis Lefebvre, Social, *op. cit*., N 11010 et les réf. citées.

108 Par exemple, Air-France avec le syndicat national des pilotes. Ce genre de clause ne lie toutefois que le syndicat représenté par le délégué signataire : elle ne peut en aucun cas être opposée aux salariés. En revanche, le délégué ou le syndicat qui viole la clause qu'il a signée engage sa responsabilité contractuelle sur le fondement de l'article 1147 du Code civil.

109 Auzero & Dockès, Droit du travail, *op. cit*., N 1401 ; Teyssié, Droit du travail, *op. cit*., N 1696 ; Mazeaud, Droit du travail, *op. cit*., N 506.

privé d'établissements, organismes ou entreprises (privées ou publiques) chargés de la gestion d'un service public[110].

Tout d'abord, il existe deux règles limitant l'exercice du droit de grève pour les services publics dans le Code du travail. La première est celle du **préavis** préalable à la grève obligatoire (article L. 2512-2 C. trav.)[111]. Celui-ci doit émaner d'un syndicat représentatif sur le plan national, dans la catégorie professionnelle de l'entreprise ou du service intéressé. L'initiative de la grève appartient donc au syndicat. Le préavis doit préciser les motifs, le lieu, la date et l'heure du début de la grève ainsi que sa durée. Il doit être adressé cinq jours avant le déclenchement de la grève à l'autorité hiérarchique ou à la direction. Pendant ce délai, les parties négocient. Deuxièmement, les **grèves tournantes**[112] **sont interdites** dans le secteur public (article L. 2512-3 C. trav.).

De plus, un **service minimum** peut être exigé des agents des services publics, par la loi ou une décision de l'autorité hiérarchique[113], qui peut par exemple désigner les salariés qui devront rester à leur poste en raison du caractère indispensable de leur tâche. Ces règlementations spécifiques peuvent donc limiter l'exercice du droit de grève en imposant des obligations supplémentaires à celles énoncées par le Code du travail. Cela est notamment le cas dans le secteur de la radiodiffusion et de la télévision ainsi que de la navigation aérienne.

Dans les secteurs du **transport terrestre et du transport aérien de passagers**, l'exercice du droit de grève est soumis à des obligations spécifiques, comme la négociation préalable, l'interdiction pour les syndicats de déposer un nouveau préavis pour les mêmes motifs que le préavis en cours et l'obligation pour les salariés de se déclarer grévistes au moins 48 heures avant de cesser le travail ou d'informer l'employeur 24 heures à l'avance de la décision de reprendre le travail[114]. L'absence d'information ne rend pas illicite la participation du salarié à la grève, mais ce dernier s'expose à des sanctions disciplinaires.

1.2.3. Effect on contracts of employment

La grève a pour effet de **suspendre l'exécution du contrat de travail**[115], ce qui libère le travailleur gréviste[116] et l'employeur de leurs obligations respectives. Le gréviste bénéficie alors d'un statut privilégié: il est protégé contre le licenciement ou des sanctions ainsi que contre toute discrimination en matière de rémunération ou d'avantages sociaux. Quant à l'employeur, il n'a pas à payer le salaire. Le statut privilégié du gréviste étant analysé dans la partie 3 de cet avis, seule la conséquence du non-paiement du salaire est traitée ici.

Durant la suspension du contrat, l'employeur est **délié de son obligation de payer le salaire**, étant donné que l'employé n'exécute plus son travail. Il faut pour cela que le mouvement soit effectivement

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110 Dupays (dir.), Lamy Social, *op. cit*., N 4958 ; Teyssié, Droit du travail, *op. cit*., N 1695 ; Mazeaud, Droit du travail, *op. cit*., N 506.

111 Voir Dupays (dir.), Lamy Social, *op. cit*., N 4959 ; Teyssié, Droit du travail, *op. cit*., N 1704 ss ; Mazeaud, Droit du travail, *op. cit*., N 508.

112 Voir Dupays (dir.), Lamy Social, *op. cit*., N 4960. *Supra* 1.2.1.1..

113 *Supra* 1.1.1..

114 Loi n° 2007-1224 du 21.08.2007 sur le dialogue social et la continuité du service public dans les transports terrestres réguliers de voyageurs (JO 22.08) ; loi n° 2012-375 du 19.03.2012 relative à l'organisation du service et à l'information des passagers dans les entreprises de transport aérien de passagers et à diverses dispositions dans le domaine des transports (JO 20.03). Voir Mémento pratique Francis Lefebvre, Social, *op. cit*., N 11030 ; Mazeaud, Droit du travail, *op. cit*., N 509 ss.

115 Auzero & Dockès, Droit du travail, *op. cit*., N 1388 et réf. citées ; Mémento pratique Francis Lefebvre, Social, *op. cit*., N 11100 ; Mazeaud, Droit du travail *op. cit*., N 532.

116 Le contrat des salariés non-grévistes n'est en revanche pas suspendu. Voir Mémento pratique Francis Lefebvre, Social, *op. cit*., N 11300 ss.

qualifié de « grève »[117]. La retenue opérée sur le salaire doit être proportionnelle à la durée de l'interruption de travail et calculée sur l'horaire mensuel du travailleur[118]. Il existe des dispositions particulières dans le secteur public, mentionnées à l'article L. 2512-5 C. trav.

L'employeur ne doit pas de rémunération à l'employé **pour toute la période de la grève**, peu importe si celle-ci contient des jours fériés habituellement rémunérés. Le gréviste est en effet considéré comme tel pendant toute la durée du mouvement[119]. Cependant, le travail accompli de façon normale avant ou après la grève doit être rémunéré, même s'il s'agit par exemple de remettre en marche des machines[120].

En principe, **l'employé ne peut pas récupérer les heures** de travail perdues suite à une grève interne, sauf si un accord de fin de grève le prévoit[121]. En revanche, la grève extérieure à une entreprise qui provoque des perturbations dans le fonctionnement de celle-ci peut justifier une récupération.

Dans certaines situations, l'employeur peut quand même être amené à devoir payer le salaire : lorsqu'un **accord de fin de grève** a été trouvé et énonce que les journées de grève seront payées ou lorsque les salariés ont été **contraints de se mettre en grève** pour faire respecter leur droits essentiels suite à un **manquement grave et délibéré de l'employeur**[122]. Les grévistes ayant assuré un **service minimum sur demande** de l'employeur ou en vertu d'un accord d'entreprise ont également droit à une rémunération pour le travail effectué[123].

A noter que la suspension du contrat a aussi pour effet que les **périodes de grève ne sont pas assimilées à un temps de travail effectif pour l'appréciation du droit au congé annuel** et que les **accidents survenus au cours de la grève n'ont pas un caractère professionnel**, même s'ils se sont produits sur le lieu de travail[124].

Enfin, quant à l'**incidence de la grève sur l'indemnisation de la maladie**, si la grève commence durant une période de maladie, le salaire est maintenu en l'absence de preuve établissant que l'employé aurait participé à la grève. En revanche, si la maladie survient pendant la grève, alors le salarié en grève ne peut prétendre à l'indemnisation au titre de sa maladie ; il est présumé qu'il aurait continué la grève s'il était resté en bonne santé[125].

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117 *Supra* 1.2.1..

118 Cass. soc. 10.07.1991, n° 89-43.147 : Bull. civ. V, n° 349 p. 216 ; Dupays (dir.), Lamy Social, *op. cit*., N 4936 et réf. citées ; Auzero & Dockès, Droit du travail, *op. cit*., N 1393 ; Mémento pratique Francis Lefebvre, Social, *op. cit*., N 11110.

119 Cass. soc. 24.06.1998, nos 96-44.234 et 96-44.235 : Bull. civ. V, n° 335 p. 253 ; Dupays (dir.), Lamy Social, *op. cit*., N 4939 et réf. citées ; Mémento pratique Francis Lefebvre, Social, *op. cit*., N 11145.

120 Cass. soc. 06.06.1989, n° 85-46.435 : Bull. civ. V, n° 426 p. 258 ; Lamy Social, *op. cit*., N 4936 et réf. citées ; Mémento pratique Francis Lefebvre, Social, *op. cit*., N 11110.

121 L'article L. 3122-27 C. trav. liste exhaustivement les cas de récupérations. Voir ég. Dupays (dir.), Lamy Social, *op. cit*., n° 4952 et réf. citées ; Auzero & Dockès, Droit du travail, *op. cit*., N 1414 ; Mémento pratique Francis Lefebvre, Social, *op. cit*., N 11170.

122 Dupays (dir.), Lamy Social, *op. cit*., N 4941 et réf. citées ; Auzero & Dockès, Droit du travail, *op. cit*., N 1394 ; Mémento pratique Francis Lefebvre, Social, *op. cit*., N 11115 ; Teyssié, Droit du travail, *op. cit*., N 1633 s. ; Mazeaud, Droit du travail, *op. cit*., N 535.

123 Cass. soc. 20.02.1991, nos 89-40280 à 89-40286 : Bull. civ. V, n° 81 p. 50 ; Dupays (dir.), Lamy Social, *op. cit*., N 4941 et réf. citées.

124 Dupays (dir.), Lamy Social, *op. cit*., N 4934.

125 Dupays (dir.), Lamy Social, *op. cit*., N 4937 et réf citées.

2. Role of the right to strike in collective labour relations

2.1. Relation with other forms of action and role in collective negotiations

2.1.1. Règlement des conflits collectifs

Le Code du travail prévoit, en plus de la médiation judiciaire (article 131-1 à 131-15 du Code de procédure civile), différentes **procédures facultatives de règlement des conflits collectifs** aux articles L. 2521-1 ss et R. 2521-2 ss. Ces dernières s'appliquent aussi bien au secteur privé qu'au secteur public. Il s'agit de la conciliation (article L. 2522-1 ss C. trav.), de la médiation (article L. 2523-1 ss C. trav.) et de l'arbitrage (article L. 2524-1 ss C. trav.)[126]. Cependant, ces trois méthodes légales de résolution des conflits collectifs sont peu mises en œuvre[127]. C'est pourquoi les parties peuvent également conclure un protocole (ou accord, procès-verbal) de fin de grève après une négociation.

2.1.2. Rôle de la grève dans la négociation collective

L'article L. 2521-2 C. trav. prévoit en effet que les conflits collectifs **font l'objet de négociations**, soit lorsqu'une convention collective le prévoit, soit lorsque les parties intéressées en prennent l'initiative.

La **négociation collective** est entendue comme « un processus par lequel des représentants de la direction et des représentants des salariés se réunissent dans le but de parvenir à un accord collectif, que ce processus aboutisse ou non »[128]. La tenue de telles négociations dépend de la présence d'instances représentatives du personnel, telles que les délégués syndicaux. Les négociations ont ainsi plutôt lieu dans les grandes entreprises[129].

La **grève et les négociations collectives**, deux aspects du dialogue social, ne sont pas en opposition. Au contraire, elles sont complémentaires : le taux de négociations est par exemple nettement plus élevé dans les entreprises ayant connu une ou plusieurs grèves[130]. Les grèves peuvent alors constituer pour les salariés et leurs représentants un moyen de faire pression durant la tenue de négociations. A l'inverse, une grève peut amener à des négociations collectives en vue d'un accord de fin de conflit. Dans les faits, négociations collectives et grèves sont ainsi **très liées**, bien que le droit français ne propose aucune « articulation fonctionnelle » entre elles[131].

Rappelons ici qu'une convention collective ne peut pas limiter ou règlementer l'exercice du droit de grève des salariés[132]. Cependant, certains acteurs sociaux mettent en place des **procédures conventionnelles d'anticipation des conflits**, par exemple en instaurant une négociation préalable ou en cours de conflit. La loi du 21 août 2007 ainsi que la loi du 19 mars 2012 ont par exemple instauré le

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126 Voir Dupays (dir.), Lamy Social, *op. cit*., N 4955 ss ; Auzero & Dockès, Droit du travail, *op. cit*., N 1431 ss ; Mémento pratique Francis Lefebvre, Social, *op. cit*., N 11605 ss ; Teyssié, Droit du travail, *op. cit*., N 1779 ss ; Mazeaud, Droit du travail, *op. cit*., N 527 ss.

127 P.-H. Antonmattei (dir.), Le Lamy Négociation Collective, Lamy, en ligne 2015, N 1087 ; Auzero & Dockès, Droit du travail, *op. cit*., N 1430 et 1434.

128 G. Desage & E. Rosankis, Négociation collective et grèves en 2012, in : Dares – Analyses, novembre 2014, n° 089, p. 1.

129 Desage & Rosankis, Négociation collective et grèves en 2012, *op. cit*., p. 2 ; Desage & Rosankis, Négociation collective et grèves en 2011, in : Dares – Analyses, septembre 2013, n° 059, p. 1 ss ; Mazeaud, Droit du travail, *op. cit*., N 340.

130 Desage & Rosankis, Négociation collective et grèves en 2012, *op. cit*., p. 9 ; Desage & Rosankis, Négociation collective et grèves en 2011, *op. cit*., p. 11.

131 Antonmattei, Le Lamy Négociation Collective , *op. cit*., N 1087 ; Desage & Rosankis, Négociation collective et grèves en 2011, *op. cit*., p. 11.

132 *Supra* 1.1.1..

dialogue social entre les différents acteurs sociaux aux articles L. 1324-1 ss, R. 1324-1 ss et L. 1114-1 ss du Code des transports[133].

La **négociation de fin de conflit** est un type particulier de négociation qui est souvent mené de façon informelle et constitué de compromis. Le but n'est pas de créer un règlement ou un engagement à long terme, mais plutôt de mettre fin au conflit et de déterminer les conditions de reprise du travail dans un **protocole de fin de conflit**[134].

La grève ne suspendant pas les mandats des représentants du personnel[135], l'employeur est tenu de réunir ces derniers. Ainsi, le protocole de fin de grève est en général **négocié et signé par les délégués** syndicaux ou les délégués du personnel ; il peut aussi être signé par un comité de grève[136].

Il **règle souvent les questions** du paiement du salaire pour les jours de grève, des heures récupérables après la grève, de la reprise du travail dans des conditions régulières, du renoncement à l'usage de son pouvoir disciplinaire par l'employeur ou de l'abandon des poursuites judiciaires initiées durant le conflit[137].

D'après la jurisprudence, ce protocole de fin de grève est une **transaction** au sens de l'article 2044 du Code civil[138] ; il n'est pas considéré comme une convention collective de travail[139] et n'engage que les salariés grévistes[140]. Un protocole de fin de grève peut toutefois avoir les effets d'une convention collective au sens des articles L. 2221-1 ss C. trav. sous certaines conditions, notamment lorsque les délégués syndicaux l'ont signé. Mais l'acte présentera toujours un aspect transactionnel : l'employeur s'engage à exécuter l'accord conclu à condition que les salariés reprennent le travail dans les conditions convenues[141].

2.1.3. Relation entre la grève et les autres formes d'action

La grève est **l'une des modalités d'un conflit de travail** : c'est une forme d'action[142], tout comme le *lock-out*[143], réponse patronale à la grève, l'occupation[144], le lancement d'une pétition, le boycott, etc.

Ces **différentes formes d'action** peuvent avoir lieu avant, durant ou après la grève. En 2012, les grèves furent souvent associées à d'autres formes de mobilisation, telles que des rassemblements, manifestations et pétitions[145].

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133 Antonmattei, Le Lamy Négociation Collective, *op. cit*., N 1087.

134 Lamy Négociation Collective, *op. cit*., N 1087. A noter que si la grève entraîne la révision d'une convention collective existante, la procédure relève alors du droit commun de la négociation collective.

135 Dupays (dir.), Lamy Social, *op. cit*., N 4942.

136 Antonmattei, Le Lamy Négociation Collective, *op. cit*., N 1088.

137 Antonmattei, Le Lamy Négociation Collective, *op. cit*., N 1091.

138 Auzero & Dockès, Droit du travail, *op. cit*., N 1434 s. Voir ég. Dupays (dir.), Lamy Social, *op. cit*., N 4953. Désormais, la jurisprudence préfère toutefois le terme d'«engagement unilatéral de l'employeur». L'acte ne lie que l'employeur, sans distinction entre les salariés grévistes et non-grévistes. Voir Antonmattei, Le Lamy Négociation Collective, *op. cit*., N 1090.

139 Auzero & Dockès, Droit du travail, *op. cit*., N 1237.

140 Antonmattei, Le Lamy Négociation Collective, *op. cit*., N 1090.

141 Antonmattei, Le Lamy Négociation Collective, *op. cit*., N 1087 et 1090.

142 Auzero & Dockès, Droit du travail, *op. cit*., N 1357.

143 Au sujet du *lock-out*, voir Dupays (dir.), Lamy Social, *op. cit*., N 4951 ; Auzero & Dockès, Droit du travail, *op. cit*., N 1415 ss ; Mémento pratique Francis Lefebvre, Social, *op. cit*., N 11500 ; Teyssié, Droit du travail, *op. cit*., N 1740 ss.

144 *Supra* 1.2.1.1..

145 Desage & Rosankis, Négociation collective et grèves en 2012, *op. cit*., p. 9.

2.2. Use of the right to strike in practice

D'après diverses études et statistiques, la France fait partie des pays d'Europe qui **comptent le plus grand nombre de journées de travail perdues**[146]. Quant à l'évolution du nombre de grèves ces dernières années : « En additionnant les conflits locaux et généralisés dans les différents secteurs (ce que ne fait aucune source officielle), il s'avère que le nombre de jours de grève est passé par un point bas au début des années 90 et remonte depuis. Mais ce qui frappe le plus est l'irrégularité des conflits. Trois pics apparaissent : en 1989 (grande grève au ministère des Finances, notamment), en 1995 (opposition aux changements proposés de la protection sociale) et en 2003 (opposition au changement des régimes de retraite). Ces trois années, le nombre de jours de grève remonte au niveau atteint dans les années 70. Mais il le fait à chaque fois sous l'impulsion du secteur public, ce qui n'était pas le cas par le passé. Au total, le nombre de jours de grève est moins élevé que dans les années 70, mais la **tendance est à la hausse** depuis quinze ans et les grèves sont plutôt plus fréquentes en France que dans les autres pays développés. »[147]

La plupart des grèves ont lieu dans des **grandes entreprises**[148] et **portent des revendications concernant principalement les salaires, l'emploi, les conditions de travail et le temps de travail**[149]. Le secteur de l'industrie, avec celui de la construction, est le plus touché par les grèves[150], suivi par les secteurs du commerce de gros et de détail, l'hébergement et la restauration ainsi que les services et transports[151]. En pratique, il existe une grande **inégalité dans l'exercice du droit de grève**. Ce dernier est surtout utilisé par les travailleurs qui bénéficient d'un emploi stable, notamment les fonctionnaires et autres salariés du secteur public, bien que leur droit de grève soit soumis à des conditions plus strictes que dans le secteur privé. Or les salariés les plus vulnérables, tels que les salariés intérimaires ou à temps partiel, sont ceux qui ont le moins de chances de se défendre à travers l'action collective[152].

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146 L. Fauconnier, Grève en Europe : qui détient le record du nombre de jours de travail perdus ?, disponible sous http://www.metiseurope.eu/gr-ves-en-europe-qui-detient-le-record-du-nombre-de-jours-de-travail-perdus_fr_70_art_28900.html (dernière consultation le 18.05.15) ; D. Andolfatto, La grève est-elle un sport national ?, disponible sous http://istravail.com/article354.html (dernière consultation le 18.05.15) ; A. Parienty, Grève en France : les mythes et les chiffres, disponible sous http://www.alternatives-economiques.fr/greves-en-france---lesmythes-et-les-chiffres_fr_art_633_40749.html (dernière consultation le 18.05.15).

147 Parienty, Grève en France : les mythes et les chiffres, *op. cit*.. En revanche, les différentes études Dares mentionnent le pic de 1995, ensuite une certaine stabilité jusqu'à une augmentation entre 1999 et 2001, avant une diminution entre 2002 et 2012, sauf une augmentation en 2010 (ayant notamment pour principale cause la réforme des retraites). Voir aussi : Andolfatto, La grève est-elle un sport national ? *op. cit*..

148 Desage & Rosankis, Négociation collective et grèves en 2012, *op. cit*., p. 5 ; A. Carlier & V. De Oliveira, Les conflits du travail en 2004, in : Dares – Premières synthèses, novembre 2005, n° 45.1, p. 1.

149 Desage & Rosankis, Négociation collective et grèves en 2012, *op. cit*., p. 6 ss ; Desage & Rosankis, Négociation collective et grèves en 2011, *op. cit*., p. 8 ; Carlier & De Oliveira, Les conflits du travail en 2004, *op. cit*., p. 2 ; Carlier & De Oliveira, Les conflits du travail en 2002 et 2003, in : Dares – Premières synthèses, mai 2005, n° 18.4, p. 3 ; Bureau NC1 & R. Merlier, Les conflits en 2001, in : Dares – Premières synthèses, août 2003, n° 34.1, p. 3 ss ; Bureau NC1 & R. Merlier, Les conflits en 2000, in : Dares – Premières synthèses, février 2002, n° 09.1, p. 4 ss.

150 Desage & Rosankis, Négociation collective et grèves en 2011, *op. cit*., p. 9 ; Carlier & De Oliveira, Les conflits du travail en 2004, *op. cit*., p. 3 ; Carlier & De Oliveira, Les conflits du travail en 2002 et 2003, *op. cit*., p. 4 ss.

151 Desage & Rosankis, Négociation collective et grèves en 2011, *op. cit*., p. 10.

152 Auzero & Dockès, Droit du travail, *op. cit*., N 1362 et 1368 et réf. citées.

2.3. Role of the right to strike in non-organised sectors

Comme mentionné[153], les **délégués syndicaux** sont les interlocuteurs habituels des négociations collectives : en 2011, 84% des entreprises dotées de délégués syndicaux ont ouvert au moins une négociation, tandis que les entreprises qui n'en ont pas ne sont que 7% à l'avoir fait[154].

Dans les secteurs non-organisés, des instances peuvent être élues afin de représenter les salariés lors des négociations : les possibilités de négociation avec des élus dans les entreprises qui n'ont pas de délégués syndicaux ont été étendues dans la dernière décennie[155]. Toutefois, « comme plus des trois quarts des entreprises de 10 à 49 salariés ne disposent d'aucune instance représentative du personnel, la part de celles qui négocient reste très faible, le dialogue social se limitant le plus souvent à des discussions informelles et peu encadrées par la loi »[156]. Par conséquent, il y a également **peu de grève sans présence syndicale**[157].

3. Protection of workers on strike

3.1. Special protection against dismissal and other unfair treatment

L'exécution du contrat de travail étant suspendue durant la grève[158], le travailleur gréviste bénéficie d'une **protection particulière** : « il ne doit subir aucune mesure discriminatoire (…) notamment en matière de rémunération et d'avantages sociaux. De plus, sauf faute lourde, il ne peut être ni sanctionné ni licencié à raison de l'exercice normal » du droit de grève[159].

A noter que pour que le gréviste bénéficie de cette protection, le mouvement auquel il participe **doit être qualifié de « grève »,** c'est-à-dire qu'il doit remplir les conditions mentionnées ci-dessus. En outre, **il ne doit pas y avoir abus du droit de grève**[160].

3.1.1. Protection contre les mesures discriminatoires

En vertu de l'article L. 2511-1 C. trav., l'exercice du droit de grève « ne peut donner lieu à **aucune mesure discriminatoire** telle que mentionnée à l'article L. 1132-2, notamment en matière de rémunérations et d'avantages sociaux ».

Ainsi, et également en vertu de l'article L. 2141-5 C. trav., l'employeur ne peut pas établir une **discrimination en matière de rémunération** entre employés **fondée sur leur participation ou leur non-participation à la grève**. Constitue une telle discrimination l'avantage supplémentaire octroyé aux non-grévistes en raison de leur non-participation à la grève[161].

Cependant, l'employeur peut accorder aux non-grévistes une **gratification « particulière et occasionnelle »** en raison du surcroît de travail qu'ils ont dû gérer[162]. De plus, il conserve le droit de

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153 *Supra* 2.1.2.

154 Desage & Rosankis, Négociation collective et grèves en 2011, *op. cit*., p. 2.

155 Desage & Rosankis, Négociation collective et grèves en 2012, *op. cit*., p. 3 ; Desage & Rosankis, Négociation collective et grèves en 2011, *op. cit*., p. 2 ; Mazeaud, Droit du travail, *op. cit*., N 408 ss.

156 Desage & Rosankis, Négociation collective et grèves en 2012, *op. cit*., p. 3.

157 Mazeaud, Droit du travail, *op. cit*., N 340.

158 *Supra* 1.2.3.

159 Mémento pratique Francis Lefebvre, Social, *op. cit*., N 11100.

160 *Supra* 1.2.2.1..

161 Cass. soc. 02.03.1994, n° 92-41.134 : Bull. civ. V, n° 75 p. 53. Voir ég. Dupays (dir.), Lamy Social, *op. cit*., N 4936.

162 Cass. soc. 08.01.1981, n° 79-441.253 : Bull. civ. V, p. 6.

réduire ou de supprimer une prime ayant pour condition la présence du travailleur dans l'entreprise, telle qu'une prime d'assiduité ou de fin d'année, à la condition que toutes les absences, autorisées ou non, donnent lieu à une telle réduction ou suppression, afin de ne pas discriminer les grévistes[163].

La prise en compte de la période de suspension du contrat dans le but de **retarder l'ancienneté** du salarié et ainsi l'augmentation du salaire de celui-ci constitue également une mesure discriminatoire[164].

De plus, l'article L. 1331-2 C. trav. **interdit de manière générale les sanctions pécuniaires**. L'employeur ne peut donc pas opérer de retenues en raison de la grève alors qu'il n'applique pas ces retenues à d'autres absences[165].

3.1.2. Protection contre les sanctions et le licenciement

L'exécution du contrat de travail étant suspendue pendant la grève, le salarié **conserve son emploi** tout en étant libéré de ses obligations contractuelles.

D'après l'article L. 2511-1 C. trav., « l'exercice du droit de grève ne peut justifier la rupture du contrat de travail, sauf faute lourde imputable au salarié » et « tout licenciement prononcé en absence de faute lourde est nul de plein droit ». Ainsi, le licenciement en raison de l'exercice du droit de grève est prohibé sauf en cas de faute lourde.

La jurisprudence a étendu l'exigence d'une faute lourde à **toutes les sanctions inférieures au licenciement**. Ainsi, selon la Cour de cassation, toute sanction disciplinaire (par exemple l'avertissement) dans ce contexte est également nulle, sauf en cas de faute lourde du travailleur[166]. La preuve de la faute lourde incombe à l'employeur.

La « **faute lourde** » apparaît lorsque l'acte en cause est commis dans l'intention de nuire à l'employeur ou de désorganiser l'entreprise[167]. Elle ne peut être invoquée que contre les grévistes ayant personnellement, activement et volontairement participé aux actes fautifs[168]. Il y a également faute lourde lorsque le salarié participe à une grève illicite ou abusive[169]. Le fait de savoir s'il y a faute lourde s'analyse au cas par cas. Celle-ci peut par exemple être retenue[170] en cas de violences physiques, de séquestration, d'entrave à la liberté du travail, de blocage du matériel ou des accès, etc.. Elle n'est en revanche pas retenue lorsqu'un gréviste participe passivement à un piquet de grève maintenu en dépit d'une ordonnance d'expulsion ou profère des injures sans violence[171]. Enfin, la jurisprudence a établi que le **règlement intérieur** est inapplicable aux grévistes durant la grève[172].

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163 Cass. soc. 26.02.1981, n° 79-41.562 : Bull. civ. V, n° 162 s. Voir ég. Dupays (dir.), Lamy Social, *op. cit*., N 4936 et réf. citées ; Auzero & Dockès, Droit du travail, *op. cit*., N 1409 ; Mémento pratique Francis Lefebvre, Social, *op. cit*., n° 11120.

164 Cass. soc. 09.02.2000, n° 97-40.724 : Bull. civ. V, n° 58 p. 47.

165 Cass. soc. 17.04.1991, n° 89-43.127 : Bull. civ. V, n° 198 p. 121. Voir ég. Cass. soc. 18.01.1995, n° 91-42.476 (non publié au bulletin).

166 Cass. soc. 07.06.1995, n° 93-42.789 : Bull. civ. V, n° 181 p. 133 ; Auzero & Dockès, Droit du travail, *op. cit*., N 1408 ; Mazeaud, Droit du travail, *op. cit*., N 533.

167 Cass. soc. 29.11.1990, n° 88-40.618 : Bull. civ. V, n° 599 p. 360.

168 Dupays (dir.), Lamy Social, *op. cit*., N 4918 ; Mémento pratique Francis Lefebvre, Social, *op. cit*., N 11175 ; Mazeaud, Droit du travail, *op. cit*., N 540.

169 Auzero & Dockès, Droit du travail, *op. cit*., N 1407 ; *supra* 1.2.2.1..

170 Dupays (dir.), Lamy Social, *op. cit*., N 4919 et réf. citées.

171 Voir exemples Mémento pratique Francis Lefebvre, Social, *op. cit*., N 11175.

172 Dupays (dir.), Lamy Social, *op. cit*., N 4935.

A noter que les **responsabilités civile et pénale** du gréviste peuvent aussi être engagées en vertu du droit commun[173].

Si une faute lourde est établie, elle constitue un motif de résiliation du contrat. Cependant, le licenciement ne se fait pas automatiquement et **l'employeur reste libre** de prononcer une autre sanction ou des sanctions différentes s'il y a plusieurs fautifs, en prenant garde toutefois à l'interdiction de la discrimination[174]. L'employeur doit en outre **respecter la procédure disciplinaire** ou de licenciement ainsi que la procédure spéciale de licenciement pour le représentant du personnel ou le représentant syndical[175].

Tout licenciement prononcé en l'absence de faute lourde est **nul de plein droit**. Le salarié dont le licenciement est nul peut exiger sa **réintégration**. Il peut en outre exiger une **indemnité** égale au montant de rémunération due à compter du jour de son éviction jusqu'au jour de sa réintégration (au terme de la procédure judiciaire), et ce, sans déduction de ce qu'il aurait pu percevoir au cours de cette période[176].

3.2. Comparison with general protection

Le licenciement en droit français peut avoir lieu pour un motif personnel ou un motif d'ordre économique. Il faut une **cause réelle et sérieuse pour que le licenciement** soit justifié (articles L. 1232-1 et L. 1233-2 C. trav.). Le terme de « cause réelle et sérieuse » n'ayant pas été défini par le législateur, on trouve des indices sur son contenu dans la jurisprudence et la doctrine développée sur la base des travaux préparatoires. Ainsi, par cause « réelle », le législateur a voulu désigner les clauses qui font preuve d'objectivité, qui sont existantes et qui sont exactes. En outre, la cause est « sérieuse » lorsque les faits invoqués rendent impossible la continuation du travail et rend nécessaire le licenciement[177].

Le licenciement sans cause réelle et sérieuse **n'est pas frappé de nullité** : l'employeur n'est donc pas tenu de réintégrer le salarié. Cependant, il donne lieu au versement de dommages-intérêts, voire d'une indemnité en réparation du préjudice moral[178]. Les salariés travaillant dans une entreprise de moins de onze salariés ou ayant moins de deux ans d'ancienneté ne bénéficient pas des dispositions des articles L. 1235-3 et L. 1235-5 C. trav., mais ont droit à une indemnité calculée en fonction de leur préjudice réel causé par le licenciement. Quant aux autres salariés, ayant au moins deux ans d'ancienneté dans une entreprise occupant au moins onze salariés, les articles L. 1235-3 et L. 1235-5 C. trav. mentionnent trois sanctions : la réintégration, l'indemnité minimale de six mois de salaires ainsi que la condamnation de l'employeur au remboursement des allocations de chômage[179]. Ces sanctions ne sont pas toujours toutes applicables. Ainsi, le droit du travail français retient le principe de l'indemnisation du licenciement illégitime[180].

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173 Dupays (dir.), Lamy Social *op. cit*., N 4925 ss.

174 Dupays (dir.), Lamy Social *op. cit*., N 4921.

175 Dupays (dir.), Lamy Social *op. cit*., N 4917 et 4920 ; Mémento pratique Francis Lefebvre, Social, *op. cit*., N 11175.

176 Dupays (dir.), Lamy Social*op. cit*., N 4917 ; Mémento pratique Francis Lefebvre, Social, *op. cit*., N 11185 ; Mazeaud, *op. cit*., N 542.

177 Auzero & Dockès, Droit du travail, *op. cit*., N 440 ss.

178 Mazeaud, Droit du travail, *op. cit*., N 762 ss.

179 Auzero & Dockès, Droit du travail, *op. cit*., N 453 ss. ; Mazeaud, Droit du travail, *op. cit*., N 763 ss.

180 Le Projet de loi pour la croissance, l'activité et l'égalité des chances économiques (texte adopté n° 565) du 10.07.2015 proposait, en son article 266, d'encadrer le montant que le juge peut octroyer pour indemniser le salarié, en cas de refus de sa réintégration (sauf en cas de faute de l'employeur d'une particulière gravité). Mais cet article a été invalidé par le Conseil constitutionnel (décision n° 2015-715 DC du 05.08.2015) ; il a jugé inconstitutionnel l'un des critères choisis pour fixer le montant de l'indemnité plafonnée, en l'occurrence la taille de l'entreprise en nombre de salariés, en ce qu'il

Cependant, il existe de nombreux cas pour lesquels la nullité du licenciement est prévue par la loi, expressément ou implicitement. Il existe en effet des **cas particuliers dans lesquels le licenciement est prohibé**. Il est tout d'abord interdit de licencier certaines personnes protégées sans autorisation administrative, notamment les délégués du personnel, les délégués syndicaux, les membres du comité d'entreprise et les conseillers prud'homaux[181]. Le Code du travail prévoit également d'autres interdictions de licenciement, comme celles liées à l'état de santé du salarié, pour les salariés victimes d'un accident du travail ou d'une maladie professionnelle (article L. 1226-9 C. trav.) ainsi que pour les salariées en état de grossesse (article L. 1225-4 C. trav.).

En outre, le droit français énumère des cas dans lesquels la **discrimination est interdite** aux articles 1132-1 ss C. trav. : « Aucune personne ne peut être écartée d'une procédure de recrutement ou de l'accès à un stage ou à une période de formation en entreprise, aucun salarié ne peut être sanctionné, licencié ou faire l'objet d'une mesure discriminatoire, directe ou indirecte, […] notamment en matière de rémunération, […] de formation, de reclassement, d'affectation, de qualification, de classification, de promotion professionnelle, de mutation ou de renouvellement de contrat en raison […] de ses activités syndicales ou mutualistes […]. » (article L. 1132-1 C. trav.). A noter que le texte protège également les personnes ayant témoigné sur des agissements de discrimination (article L. 1132-3 C. trav.). Les traitements discriminatoires et les licenciements discriminatoires sont donc prohibés. En outre, le Code du travail réprime aussi les licenciements de personnes ayant subi, refusé de subir ou témoigné d'agissements de harcèlement moral ou sexuel (articles L. 1152-2, L. 1153-2 et L. 1153-3 C. trav.) ainsi que les licenciements de personnes ayant introduit une action en justice afin de faire respecter l'égalité professionnelle entre hommes et femmes (article L. 1144.-3 C. trav.)[182].

La sanction pour un licenciement (ou une sanction) prononcé(e) en violation de l'une de ces dispositions est la **nullité**. Le salarié a le choix entre sa **réintégration** ou une **indemnisation**[183]. Les conséquences financières de la nullité varient selon la cause de la nullité[184].

Comme évoqué plus haut (voir section 3.1.2), le salarié gréviste jouit, quant à lui, d'une **protection plus étendue** que celle applicable en cas de licenciement sans cause réelle et sérieuse car la loi prévoit que son licenciement est prohibé, sauf en cas de faute lourde. S'il ressortait d'une procédure judiciaire qu'un employé a été licencié pour exercice du droit de grève sans qu'il y ait eu faute lourde de sa part, un tel licenciement serait nul, l'employé pouvant alors exiger sa réintégration ainsi qu'une indemnisation (voir section 3.1.2).

3.3. Role of international law on protection afforded

L'article 55 de la Constitution française actuelle dispose que « **[l]es traités** ou accords régulièrement ratifiés ou approuvés ont, dès leur publication, **une autorité supérieure à celle des lois**, sous réserve, pour chaque accord ou traité, de son application par l'autre partie ». Cette règle s'applique que la loi

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instituait une différence de traitement injustifiée entre les salariés. Loi disponible sous http://www.assemblee-nationale.fr/14/ta/ta0565.asp (11.08.2015); décision du Conseil constitutionnel disponible sous http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/acces-par-date/decisions-depuis-1959/2015/2015-715-dc/decision-n-2015-715-dc-du-05-aout-2015.144229.html (11.08.2015).

181 Dupays (dir.), Lamy Social, *op. cit*., N 3104 ; Auzero & Dockès, Droit du travail, *op. cit*., N 456.

182 *Supra* 3.1.2.

183 Dupays (dir.), Lamy Social, *op. cit*., N 3115 ; Auzero & Dockès, Droit du travail, *op. cit*., N 459 ss. Au sujet de la réintégration : Dupays (dir.), Lamy Social, *op. cit*., N 3117 ss. Au sujet de l'indemnisation : Dupays (dir.), Lamy Social,*op. cit*., N 3124 ss.

184 Voir à ce sujet Dupays (dir.), Lamy Social, *op. cit*., N 3116, 3124 et 7654.

soit antérieure ou postérieure au texte international[185]. En outre, la condition de réciprocité ne s'applique que pour les traités bilatéraux. L'application des traités internationaux protecteurs du droit de grève énumérés au paragraphe 1.1.2. de cet avis n'est donc pas soumise à une condition de réciprocité. Enfin, le régime français est de type moniste ; il n'est ainsi pas nécessaire que les traités internationaux soient transposés dans le droit national pour que les dispositions qu'ils prévoient soient applicables par les juges nationaux. Par conséquent, l'hypothèse selon laquelle les exigences du droit international jouent un rôle sur le niveau de protection accordé aux grévistes est crédible. Il convient toutefois de nuancer ces affirmations : si « la Charte sociale européenne influence les décisions de la Cour de cassation [, instance judiciaire suprême], […] il ne s'agit pas à proprement parler d'application directe, du moins en l'état actuel de la jurisprudence »[186] et le Conseil d'Etat, instance administrative suprême, « continue à refuser l'application directe de la Charte sociale »[187].

Malgré le placement des traités internationaux presque au sommet de la hiérarchie des normes**, il est difficile d'identifier une mesure protectrice des grévistes qui soit le fruit direct d'une exigence du droit international**. Plusieurs raisons expliquent cette observation. Tout d'abord, l'origine normative du droit de grève en France est antérieure à la conclusion des traités internationaux qui le protègent[188]. Ensuite, il est parfois souligné par la doctrine que : « la France a toujours eu le […] souci de ne ratifier qu'après mise de la législation interne en conformité avec la convention »[189]. Enfin, en matière de grève, les décisions d'instances internationales constatant la non-conformité du système français restent rares et leurs conséquences sur le niveau de protection des grévistes en droit national sont uniquement indirectes si pas inexistantes.

Le développement de ce dernier point permet de mesurer partiellement le rôle joué par les exigences du droit international sur le niveau de protection accordé aux grévistes :

- En ce qui concerne **l'influence de l'Organisation internationale du travail**, une condamnation[190] de sa part a conduit la France à ne plus pratiquer la réquisition de salariés grévistes au nom du nécessaire maintien de l'ordre public[191].

- **Les conclusions du Comité européen des droits sociaux intervenant à l'issue des procédures des rapports étatiques font apparaître deux tendances différentes** : les décisions mettant en lumière des cas de non-conformité à la Charte sociale européenne peuvent être suivies de corrections nationales ou bien ignorées. D'une part, en ce qui concerne la retenue sur salaire d'1/30ème pour la participation d'un fonctionnaire de l'Etat ou d'un agent d'autres services publics nationaux à une grève même si son absence est inférieure à une journée, le Comité conclut systématiquement depuis 1990 à la violation de l'article 6 § 4 de la Charte sociale européenne en ce que cette mesure représente une contrainte financière susceptible de dissuader l'exercice du droit de grève[192]. La France n'a pas tenu compte des conclusions répétées du Comité pour changer cette pratique. Il faut cependant préciser que, dans son

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185 Cass. mixte, 24.05.1975 (*Jacques Vabre*), Recueil Dalloz 1975.497, concl. A. Touffait ; Conseil d'Etat, 20.10.1989 (*Nicolo*), Recueil Dalloz 1990.135, note P. Sabourin ; Cass. soc. 29.03.2006, Droit social 2006.636, avis Duplat.

186 Auzero & Dockès, Droit du travail, *op. cit.*, N 34.

187 *Idem*.

188 *Supra* 1.1.1 du présent avis.

189 J.-M. Verdier, L'apport des normes de l'OIT au droit français du travail, in Les transformations du droit du travail, Etudes offertes à G. Lyon-Caen, Dalloz, Paris 1989, p. 51 ss.

190 CA de l'OIT, 17.11.2011.

191 Auzero & Dockès, Droit du travail, *op. cit*., p. 1445.

192 Comité européen des droits sociaux, Conclusions 2010, 2006, 2004, 2002, XV-1, XIV-1, France, article 6-4, respectivement 2010/def/FRA/6/4/FR, 2006/def/FRA/6/4/FR, 2004/def/FRA/6/4/FR, 2002/def/FRA/6/4/FR, XV-1/def/FRA/6/4/FR, XIV-1/def/FRA/6/4/FR.

dernier rapport de 2014, le Comité semble revenir en arrière puisqu'il réserve sa position en attendant de plus amples informations de la part des autorités[193]. En ce qui concerne l'exigence française du caractère représentatif des syndicats dans le secteur public pour qu'ils puissent déposer un préavis de grève, le Comité conclut systématiquement à la violation de l'article 6 § 4 de la Charte, sans que les autorités nationales entreprennent de modifier cette norme[194]. D'autre part, le Comité conclut à la non-conformité du système français concernant le lock-out dans sa conclusion de 1979[195], avant de saluer une évolution jurisprudentielle corrigeant cette violation dans sa conclusion de 1986[196]. D'après nos recherches, la jurisprudence nationale en question ne se réfère toutefois pas expressément à la Charte sociale européenne ou aux décisions du Comité pour fonder cette modification. Il n'est donc pas établi que la mise en conformité de la France avec la Charte soit la conséquence directe des conclusions du Comité sur ce point.[197] Aucune réclamation collective n'a été portée devant le Comité européen des droits sociaux sur cette question.

- La Cour européenne des droits de l'homme évalue si les limitations portées au droit de grève sont proportionnées. Dans l'affaire Ezelin contre France[198], la Cour conclut à la violation de l'article 11 de la Convention et répare elle-même le dommage subi par ce seul constat. Le requérant avait participé pacifiquement à une manifestation et il ne pouvait pas subir de sanction *a posteriori* pour des infractions commises par d'autres personnes parce que sa fonction d'avocat lui aurait imposée une désolidarisation du mouvement. Dans les affaires Barraco contre France[199] et Cisse contre France[200], la Cour prend en considération la période suffisamment longue laissée aux requérants pour manifester leur revendication et les justifications étatiques de protection de l'ordre public et de salubrité pour conclure à la non-violation de l'article 11 lorsque les autorités nationales ont mis fin aux grèves et manifestations[201]. Dans ces trois affaires, **la Cour n'appelle pas à la modification de la législation nationale mais corrige des évaluations inconventionnelles de la proportionnalité des limites posées au droit de grève.**

- La Cour de justice de l'Union européenne joue également un rôle en ce qui concerne le niveau de protection des grévistes. Dans un arrêt du 28 octobre 1975[202], la Cour répond au juge français que la participation d'un ressortissant italien à une grève ne saurait constituer une menace à l'ordre public justifiant son interdiction du territoire. **La Cour ne constate pas une**

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193 Comité européen des droits sociaux, Conclusion 2014, France, article 6-4, 2014/def/FRA/6/4/FR.

194 Comité européen des droits sociaux, Conclusions 2014, 2010, 2006, 2004, 2002, XV-1, France, article 6-4, respectivement 2014/def/FRA/6/4/FR, 2010/def/FRA/6/4/FR, 2006/def/FRA/6/4/FR, 2004/def /FRA/6/4/FR, 2002/def/FRA/6/4/FR, XV-1/def/FRA/6/4/FR.

195 Comité européen des droits sociaux, Conclusion VI, France, article 6-4, VI/def/FRA/6/4/FR.

196 Comité européen des droits sociaux, Conclusion IX-2, France, article 6-4, IX-2/def/FRA/6/4/FR.

197 Il convient de rappeler que le Comité ne dispose pas de moyens pour contraindre les Etats à l'exécution de ses décisions ; elles sont juridiquement obligatoires, mais dépourvues de sanction ; voir Auzero & Dockès, Droit du travail, *op. cit*., p. 40. Par ailleurs, cela n'est pas corrigé par les juridictions nationales car certaines refusent encore de reconnaitre un effet direct à la Charte ; voir Auzero & Dockès, Droit du travail, *op. cit*., p. 41.

198 Cour européenne des droits de l'homme, Ezelin c. France, n° 11800/85, 26.04.1991.

199 Cour européenne des droits de l'homme, Barraco c. France, n° 31684/05, 05.03.2009.

200 Cour européenne des droits de l'homme, Cisse c. France, n° 51346/99, 09.04.2002.

201 Voir notamment Cour européenne des droits de l'homme, Barraco c. France, n° 31684/05, 05.03.2009, § 42, 47 et 49.

202 Cour de justice de l'Union européenne, Rutili c. Ministère de l'intérieur, demande de décision préjudicielle du Tribunal administratif de Paris, n° 36-75, 28.10.1975.

non-conformité du droit national au droit européen ; elle interprète ce dernier dont l'application en droit national est directe.[203]

Nos recherches sur d'éventuelles références de la **législation nationale** aux traités internationaux **n'ont pas conduit à observer une influence explicite des textes internationaux**.

Par ailleurs, le droit national en matière de grève est essentiellement prétorien[204]. Nos recherches dans la **jurisprudence** des différentes juridictions nationales n'ont **pas permis de recenser de décisions faisant application d'exigences de droit international en matière de droit de grève**.[205]

4. Enforcement and effectiveness of available sanctions

L'atteinte au droit de grève n'est pas constitutive à elle seule d'une infraction pénale[206], contrairement à la discrimination fondée sur l'appartenance syndicale[207]. L'employeur n'encourt **que les sanctions civiles** énoncées s'il licencie ou sanctionne de manière abusive le salarié gréviste ou s'il opère une discrimination entre les grévistes et les non-grévistes[208], c'est-à-dire qu'il peut être amené à réintégrer le salarié, à lui verser des indemnités, des dommages-intérêts, ou voir sa sanction disciplinaire annulée.

Nos recherches n'ont pas permis de définir un courant doctrinal sur la question de l'efficacité ou la pertinence des sanctions pour violation du droit de grève.

5. Possibility to extend protection in collective agreements

L'article L. 2251-1 du Code du travail dispose qu' « **une convention ou un accord peut comporter des stipulations plus favorables aux salariés que les dispositions légales** en vigueur. Ils ne peuvent déroger aux dispositions qui revêtent un caractère d'ordre public ».

Le droit de grève relève de l'ordre public social. Contrairement à l'ordre public absolu, **l'ordre public social permet aux conventions collectives plus protectrices du droit de grève de l'emporter sur la loi**.[209]

Une partie de la **doctrine** s'interroge sur la question de savoir s'il est alors nécessaire qu'une loi soit intervenue sur un point dont une convention collective souhaiterait renforcer la protection, ou bien si une convention collective peut prévoir une protection plus favorable alors qu'elle est en rapport direct avec la Constitution, c'est-à-dire sans cadre législatif.[210] L'état actuel du droit positif français ne permet pas de trancher la question.

A titre d'**exemple**, la Convention collective nationale du golf du 13 juillet 1998 stipule, dans son chapitre VII sur les congés payés, que « sont notamment assimilées à un temps de travail effectif les absences pour […] grève ». Il s'agit d'une disposition plus favorable que la loi, car cette dernière prévoit

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203 Voir notamment H. Sinay & J.-C. Javillier, G. H. Camerlynck (dir.), Droit du travail la grève, 2ème éd., Paris 1984, p. 151 et 152.

204 Auzero & Dockès, Droit du travail*, op. cit*., N 1360.

205 Recherches jurisprudentielles effectuées sur le site : www.legifrance.gouv.fr (22.06.2015).

206 Cass. crim. 19.06.1979, n° 78-91.308 : Bull. crim., n° 217 p. 594.

207 A ce sujet voir Dupays (dir.), Lamy Social, *op. cit*., N 4009 ss.

208 *Supra* 3.1..

209 Auzero & Dockès, Droit du travail*, op. cit*., N 1247.

210 Voir par ex. C. Radé, Exercice du droit de grève et négociation collective, Droit social, 1996, p. 37 ss ; Antonmattei, Le Lamy Négociation Collective, *op. cit*., N 42.

que les périodes de grève ne sont pas assimilées à un temps de travail effectif pour l'appréciation du droit au congé annuel.Cependant, nos recherches ont permis de constater que les conventions collectives étendent rarement la protection des grévistes [211].

[211] Nos recherches ont porté sur les conventions collectives en vigueur accessibles sur le site: www.legifrance.gouv.fr (07.07.2015).

C. GERMANY

1. Legal status of the right to strike

1.1. Legal basis

Although the right to strike itself is not regulated under German law, the German constitution protects the freedom of association as a fundamental right. With this, the constitution implicitly also protects labour disputes und guarantees the right to strike. However, nearly no information on strike and labour dispute can be found in German law. As a consequence, case law especially by the Federal Labour Court plays an important role in this context.

International law on the other hand only is of less importance. Although Germany ratified the most important international treaties with regard to the right to strike, only the European Social Charter provides of a better protection of striking employees than German law, as established in case law. The European Social Charter is in force in Germany, its direct applicability is however unclear.

This legal opinion on German law only deals with worker's right to strike. Civil servants do not have a right to strike. Although this is not regulated by law, it is deduced from the Constitution[212], stating that "[t]he law governing the public service shall be regulated and developed with due regard to the traditional principles of the professional civil service."[213] Also employees working for the churches are not allowed to strike.[214]

1.1.1. Constitutional

The right to strike itself is **not expressly guaranteed** under German law, neither in the constitution nor in other laws. However, the **German constitution protects labour disputes** against certain measures and with them strike as the most important instrument of labour dispute.

Article 9 of the German constitution guarantees freedom of association as a fundamental right. The article's third paragraph protects trade unions in general by stating that "[t]he right to form associations to safeguard and improve working and economic conditions shall be guaranteed to every individual and to every occupation or profession."[215] In this context, Article 9 furthermore prohibits directing certain measures against those labour disputes that are led by trade unions and who aim at safeguarding and improving working and economic conditions.[216] These forbidden measures namely include deploying or conscripting military or civil services[217] as well as accepting legal and administrative assistance by the German Federal Police or by police forces of another federal state (*Bundesland*)[218]. Trade unions have different labour dispute instruments at their disposal,[219] but strike is the most commonly used and thus the most important one.[220] Hence, although the right to strike

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212 Art. 33 para. 5 Constitution (*Grundgesetz*, GG).

213 D. Hensche, in W. Däubler et al. (eds.), Arbeitsrecht – Individualarbeitsrecht mit kollektivrechtlichen Bezügen: Handkommentar, 3rd ed., Baden-Baden: Nomos 2013, art. 9 GG, para. 123.

214 For the Catholic Church: art. 7 para. 2 s. 2 Catholic Church's Basic Order of Employment (*Arbeits-verhältnisse-Grundordnung der Katholischen Kirche*, rkArbVGrO).

215 Art. 9 para. 3 s. 1 Constitution (*Grundgesetz*, GG).

216 Art. 9 para. 3 s. 3 Constitution (*Grundgesetz*, GG).

217 Arts. 12a, 87a para. 4 in conjunction with art. 9 para. 3 s. 3 Constitution (*Grundgesetz*, GG).

218 Arts. 91, 35 paras. 2, 3 in conjunction with art. 9 para. 3 s. 3 (*Grundgesetz*, GG).

219 See below, question 2.1. of this legal opinion on German law.

220 B. Waas, in C. Rolfs et al. (eds.), Beck'scher Online-Kommentar Arbeitsrecht, 35th ed., Munich: C.H. Beck 2015, art. 9 GG, para. 6; W. Linsenmaier, in R. Müller-Glöge et al. (eds.), Erfurter Kommentar zum

itself is not expressly mentioned in German constitutional law, labour disputes in general are protected by the German constitution and with them strike as the most important means of labour dispute.

In addition to that, **single regulations regarding labour disputes** can be found scattered throughout different laws.[221] Only very few of these provisions are relevant in the context of this legal opinion. It is to note that § 25 Employment Protection Act is not applicable. This norm states that the same Act does not apply to dismissals used as an instrument of labour dispute. However, the Federal Labour Court decided already in 1955 that dismissals solely due to taking part in a strike are not allowed, since lawful strike is no violation of the employment contract.[222] Since then the Federal Labour Court followed this line of reasoning which made § 25 Employment Protection Act inapplicable.[223] As a consequence, the Employment Protection Act also has effect on dismissals solely due to labour dispute, so that notably socially unjustified termination is prohibited[224] as well as dismissals of works council members without specific circumstances[225].

In some provisions, German law even mentions strike itself. These norms however do not concern the right to strike, but aspects of **insurance or damages for third parties**, in case they were affected by strike, for example if goods arrived late because transport companies were strike-bound.[226]

1.1.2. Role of international law

In this context, international law seems to play a rather **minor role**, although the courts have to **respect** it.

According to the German constitution, **international treaties** dealing with a subject matter which has to be regulated by law **need approval** or other participation by the two German legislative bodies, namely the Parliament ("*Bundestag*") and the Federal Assembly ("*Bundesrat*"), **in the form of a law**.[227] Parliament and Federal Assembly thus enact a law ("***Vertragsgesetz***" or "***Zustimmungsgesetz***") which has two functions at the same time: First, it authorises the Federal President ("*Bundespräsident*") as

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Arbeitsrecht, 15th ed., Munich: C.H. Beck 2015, art. 9 GG, para. 161; R. Scholz, in T. Maunz & G. Dürig (eds.), Grundgesetz: Kommentar, 73rd ed., Munich: C.H. Beck 2014, art. 9, para. 311; J. Kirchner & E. Mittelhamm, in J. Kirchner et al. (eds.), Key Aspects of German Employment and Labour Law, Berlin & Heidelberg: Springer 2010, p. 199 et *seq*, p. 200.

221 E.g. § 74 para. 2 Works Constitution Act (*Betriebsverfassungsgesetz*, BetrVG), § 2 para. 1 n° 2 Labour Court Act (*Arbeitsgerichtsgesetz*, ArbGG), § 11 para. 5 Supply of Temporary Workers Act (*Arbeitnehmerüberlassungsgesetz*, AÜG), § 25 Employment Protection Act (*Kündigungsschutzgesetz*, KSchG), § 91 para. 6 Social Code Ninth Book (*Sozialgesetzbuch Neuntes Buch*, SGB IX), § 36 para. 3 Social Code Third Book (*Sozialgesetzbuch Drittes Buch*, SGB III), § 100 paras. 1-3 SGB III, § 160 paras. 1-6 SGB III.

222 Federal Labour Court (*Bundesarbeitsgericht*, BAG), decision of 28.01.1955 – GS 1/54; amplified in BAG, decision of 21.04.1971 – GS 1/68.

223 Federal Labour Court (*Bundesarbeitsgericht*, BAG), judgement of 26.04.1988 – 1 AZR 399/86; N. Volkening, in C. Rolfs et al. (eds.), Beck'scher Online-Kommentar Arbeitsrecht, 35th ed., Munich: C.H. Beck 2015, § 25 KSchG, para. 1; G. Pfeiffer, in S. Fiebig et al. (eds.), Kündigungsschutzrecht: Handkommentar, 4th ed., Baden-Baden: Nomos 2012, § 25 KSchG, paras. 1 *et seq*.

224 § 1 Employment Protection Act (*Kündigungsschutzgesetz*, KSchG).

225 § 15 para. 1 Employment Protection Act (*Kündigungsschutzgesetz*, KSchG).

226 E.g. § 7a para. 3 n° 2 Road Haulage Act (*Güterkraftverkehrsgesetz*, GüKG), § 499 para. 1 s. 1 n° 4 Commercial Code (*Handelsgesetzbuch*, HGB), § 4 n° 7 Insurance Tax Act (*Versicherungssteuergesetz 1996*, VersStG 1996), § 2 n° 4 lit. c) Contractor's All Risk Insurance Terms and Conditions Input by the Entrepreneur (*Bauwesenversicherungsbedingungen Unternehmerleistungen*, ABU), § 2 n° 4 lit. c) Contractor's All Risk Insurance Terms and Conditions New Construction Buildings (*Bauwesen-versicherungsbedingungen Gebäudeneubauten*, ABN).

227 Art. 59 para. 2 s. 1 Constitution (*Grundgesetz*, GG).

part of the executive to ratify the international treaty. Second, the law also already implements the content of the international treaty into German law, although this content will only then come into force, when both this law and the respective international treaty are in force and when the Federal President has ratified the treaty. The content of the international treaty will, as a consequence, have the standing of any other federal law, as it was implemented through a federal law.[228]

Yet, although the treaties are then **in force**, their **application may vary** depending upon how detailed and enforceable its regulations are. The European Convention on Human Rights is considered to be detailed enough to provide rights enforceable by an individual,[229] the legal binding of other treaties as the European Social Charter and some conventions of the International Labour Organization (ILO) is however unclear.[230] They are said not to contain individual rights and hence not to apply directly to individual cases. At the same time, they bind the German state and with it also judges. If a judge has to decide a case in which these treaties play a certain role, (s)he will have to respect the international treaty insofar as there is room for interpretation of the German law.[231] If there is such room for interpretation, then German law is intended to accommodate international law and to be interpreted according to it. ("**völkerrechtsfreundlich**").[232]

The **European Convention on Human Rights** is thus the only international treaty relevant in this context which is not only in force in Germany, but also directly applicable. However, article 11 of this convention does not provide more protection of employees' right to strike than German law does, notably article 9 paragraph 3 of the German constitution.[233] Therefore, the convention does not play an important role in this regard.

More often referred to is the **European Social Charter**. Although its article 6 n° 4 is not directly applicable,[234] the charter is in force in Germany, meaning that courts have to interpret German law in accordance with the charter, in case there is room for interpretation. This may especially be of interest regarding the trade union's monopoly on strike[235] and the fact that strike is only allowed if it aims at regulating a subject matter in a collective bargaining agreement[236].

Finally, the **ILO-conventions**, notably conventions **87** and **98**, only play a minor role in this context in Germany. As the European Social Charter, also these conventions are not directly applicable.

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228 S. U. Pieper, in V. Epping & C. Hillgruber (eds.), Beck'scher Online-Kommentar Grundgesetz, 25th ed., Munich: C.H. Beck 2015, art. 59, paras. 38 *et seq*.

229 Federal Constitutional Court (*Bundesverfassungsgericht*, BVerfG), decision of 14.10.2004 – 2 BvR 1481/04; S. U. Pieper, in V. Epping & C. Hillgruber (eds.), Beck'scher Online-Kommentar Grundgesetz, 25th ed., Munich: C.H. Beck 2015, art. 59, paras. 42.1.

230 W. Linsenmaier, in R. Müller-Glöge et al. (eds.), Erfurter Kommentar zum Arbeitsrecht, 15th ed., Munich: C.H. Beck 2015, art. 9 GG, para. 105; B. Waas, in C. Rolfs et al. (eds.), Beck'scher Online-Kommentar Arbeitsrecht, 35th ed., Munich: C.H. Beck 2015, art. 9 GG, para. 24.

231 S. U. Pieper, in V. Epping & C. Hillgruber (eds.), Beck'scher Online-Kommentar Grundgesetz, 25th ed., Munich: C.H. Beck 2015, art. 59, paras. 42 *et seq*.

232 S. U. Pieper, in V. Epping & C. Hillgruber (eds.), Beck'scher Online-Kommentar Grundgesetz, 25th ed., Munich: C.H. Beck 2015, art. 59, paras. 43.

233 B. Waas, in C. Rolfs et al. (eds.), Beck'scher Online-Kommentar Arbeitsrecht, 35th ed., Munich: C.H. Beck 2015, art. 9 GG, para. 25.

234 Left open in Federal Labour Court (*Bundesarbeitsgericht*, BAG), judgement of 10.6.1980 – 1 AZR 168/79.

235 See question 1.2.2.1. of this legal opinion on German law.

236 See question 1.2.2.1. of this legal opinion on German law.

Furthermore, their content does not provide more protection to employees with regard to strike than German law does.[237]

1.2. Substantive law

1.2.1. Definitions

German law does not provide of a **definition of the term "strike"**. However, the Federal Labour Court (*Bundesarbeitsgericht*, BAG) has developed a definition which has since been used and which is commonly referred to in the commentary.[238] According to this, a strike is characterised by a collective and planned walkout by a larger number of employees in order to achieve a specific aim.[239] It has to be the aim to exert pressure on a specific pay scale area's employers in order to influence their willingness to negotiate. To achieve this, the employees withdraw their manpower needed by the employers, so that operations cannot go on and the employers will thus suffer loss.[240]

1.2.1.1. Lawful strikes

Different types of strike exist, although these are not defined by law, but rather by jurisprudence and commentary. Therefore, several designations exist for some of the types of strike.

The most extensive kind of strike is the so-called **general strike („*Generalstreik*")**. During a general strike, all employees of a specific economic area will go on strike and as a consequence, the entire economic life in this sector will come to a standstill.[241]

An **across-the-board or total strike („*Flächenstreik*" or „*Vollstreik*")** is not as comprehensive as a general strike but still very extensive. Although not all employees will stop working during such a strike, employees of every employer in this economic area will participate at the strike, so that every employer will be affected by it.[242]

Less far goes the **partial or pinpoint strike („*Teilstreik*" or „*Schwerpunktstreik*")**. This strike can have diverse shapes: It can either concern different subareas of a pay scale area or just single companies or

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237 W. Linsenmaier, in R. Müller-Glöge et al. (eds.), Erfurter Kommentar zum Arbeitsrecht, 15th ed., Munich: C.H. Beck 2015, art. 9 GG, para. 107; B. Waas, in C. Rolfs et al. (eds.), Beck'scher Online-Kommentar Arbeitsrecht, 35th ed., Munich: C.H. Beck 2015, art. 9 GG, para. 27.

238 H. Wilms, in K. Hümmerich et al. (eds.), Arbeitsrecht, 2nd ed., Baden-Baden: Nomos 2010, art. 9 GG, para. 107; W. Linsenmaier, in R. Müller-Glöge et al. (eds.), Erfurter Kommentar zum Arbeitsrecht, 15th ed., Munich: C.H. Beck 2015, art. 9 GG, para. 161; B. Waas, in C. Rolfs et al. (eds.), Beck'scher Online-Kommentar Arbeitsrecht, 35th ed., Munich: C.H. Beck 2015, art. 9 GG, para. 90.

239 Federal Labour Court (*Bundesarbeitsgericht*, BAG), decision of 28.01.1955 – GS 1/54: „*gemeinsame und planmäßig durchgeführte Arbeitseinstellung durch eine größere Anzahl von Arbeitnehmern zu einem bestimmten Kampfziel*".

240 Federal Labour Court (*Bundesarbeitsgericht*, BAG), judgement of 22.03.1994 – 1 AZR 622/93: „*gemeinschaftliche Ausübung von Druck auf die Arbeitgeber des Tarifgebiets, deren Verhandlungsbereitschaft beeinflusst werden soll. Diesen Druck versucht die Arbeitnehmerseite zu erreichen, indem sie den bestreikten Arbeitgebern die benötigte Arbeitskraft entzieht in der Absicht, sie vorübergehend an der Weiterführung des Betriebs zu hindern und ihnen damit wirtschaftliche Nachteile zuzufügen*".

241 H. Wilms, in K. Hümmerich et al. (eds.), Arbeitsrecht, 2nd ed., Baden-Baden: Nomos 2010, art. 9 GG, para. 108; W. Linsenmaier, in R. Müller-Glöge et al. (eds.), Erfurter Kommentar zum Arbeitsrecht, 15th ed., Munich: C.H. Beck 2015, art. 9 GG, para. 162.

242 W. Linsenmaier, in R. Müller-Glöge et al. (eds.), Erfurter Kommentar zum Arbeitsrecht, 15th ed., Munich: C.H. Beck 2015, art. 9 GG, para. 162; H. Wilms, in K. Hümmerich et al. (eds.), Arbeitsrecht, 2nd ed., Baden-Baden: Nomos 2010, art. 9 GG, para. 108.

even only specific parts of a company.[243] Through this, trade unions attempt to have a maximum effect with a minimum effort („*Minimax*"). Especially in areas where Just-in-Time-Production is used, meaning that goods are produced at the last possible moment before they are needed in order to avoid storage costs, striking against just one part of a company can have expensive consequences for the employer.[244]

As a way of increasing this maximum effect at minimum effort, two further forms of strike are being used: During an **alternation strike („*Wechselstreik*")** different short strikes within a short period of time take place against different employers of the same economic area.[245] At a **wave strike („*Wellenstreik*")** on the other hand, only one company is being struck against, but there, employees of the different departments and different shifts go on strike at varying times without informing the employer about duration and number of participants of this strike.[246]

1.2.1.2. Unlawful strikes

There are two types of strike that are considered unlawful.

First, this regards the **political strike („*politischer Streik*")**. Such a strike is characterised by the fact that it does not aim at influencing collective bargaining between the two parties of labour dispute, trade union and employer, but it is supposed to put pressure on the government, jurisprudence or another public authority.[247] Under German law, this is considered unlawful, since labour dispute has to be tariff-related and my thus only concern the parties of the respective collective bargaining agreement and only subject matters that can be regulated in the agreement.[248]

Second, a so-called **wild strike („*wilder Streik*")** is unlawful. During a wild strike, employees or groups of employees go on strike without the trade union having approved of this beforehand or afterwards. As labour dispute may only be conducted by trade unions or employers,[249] a strike organised by employees and not adopted by the respective trade union is unlawful.[250]

1.2.1.3. Marginal types of strike

Finally there are two kinds of strike that are generally lawful, but only within a narrow scope. Their illegitimacy will thus be decided upon on a case by case basis.

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243 H. Wilms, in K. Hümmerich et al. (eds.), Arbeitsrecht, 2nd ed., Baden-Baden: Nomos 2010, art. 9 GG, para. 108.

244 B. Waas, in C. Rolfs et al. (eds.), Beck'scher Online-Kommentar Arbeitsrecht, 35th ed., Munich: C.H. Beck 2015, art. 9 GG, para. 91; W. Linsenmaier, in R. Müller-Glöge et al. (eds.), Erfurter Kommentar zum Arbeitsrecht, 15th ed., Munich: C.H. Beck 2015, art. 9 GG, para. 162.

245 B. Waas, in C. Rolfs et al. (eds.), Beck'scher Online-Kommentar Arbeitsrecht, 35th ed., Munich: C.H. Beck 2015, art. 9 GG, para. 91.

246 H. Wilms, in K. Hümmerich et al. (eds.), Arbeitsrecht, 2nd ed., Baden-Baden: Nomos 2010, art. 9 GG, para. 108; W. Linsenmaier, in R. Müller-Glöge et al. (eds.), Erfurter Kommentar zum Arbeitsrecht, 15th ed., Munich: C.H. Beck 2015, art. 9 GG, para. 162; B. Waas, in C. Rolfs et al. (eds.), Beck'scher Online-Kommentar Arbeitsrecht, 35th ed., Munich: C.H. Beck 2015, art. 9 GG, para. 91.

247 W. Linsenmaier, in R. Müller-Glöge et al. (eds.), Erfurter Kommentar zum Arbeitsrecht, 15th ed., Munich: C.H. Beck 2015, art. 9 GG, para. 119; H. Wilms, in K. Hümmerich et al. (eds.), Arbeitsrecht, 2nd ed., Baden-Baden: Nomos 2010, art. 9 GG, para. 126.

248 See question 1.2.2.1. of this legal opinion on German law.

249 See question 1.2.2.1. of this legal opinion on German law.

250 H. Wilms, in K. Hümmerich et al. (eds.), Arbeitsrecht, 2nd ed., Baden-Baden: Nomos 2010, art. 9 GG, para. 128.

Since a judgement by the Federal Labour Court given in June 2007 is a **sympathy strike („*Sympathiestreik*"), also called supporter strike („*Unterstützerstreik*") or solidarity strike („*Solidaritätsstreik*")**, in general lawful and only in specific cases unlawful.[251] Such a strike does not aim at influencing the own employer, but at supporting a strike against another employer. As then an employer has to suffer loss without being part of the actual labour dispute in question, stricter rules apply to a sympathy strike. In order to be lawful, it may generally only support another lawful strike. More importantly, there needs to be a close link as for example economic interlocking between the companies struck against. Furthermore, a sympathy strike may become unreasonable if the focus of this labour dispute is not on the main strike anymore, but on the sympathy strike. As a consequence, the latter loses its nature as a mere supporting strike, but has to be treated as an individual strike and is therefore not aimed at a valid goal, namely collective bargaining between the trade union and the employer who are part of the respective collective bargaining agreement.[252]

Another type of strike that has been dealt with repeatedly by German tribunals[253] is the **warning strike („*Warnstreik*")**. A warning strike is a very short strike taking place still during collective bargaining, but after the duty not to engage in labour dispute has ended. Warning strikes often take place at many different companies, at different times of day and just for a short period. Their aim is to show the trade union's readiness to combat. There was a debate whether warning strikes are lawful, because instruments of labour dispute shall only be used after peaceful bargaining has been declared inconclusive and not while collective bargaining is still going on.[254] However, the Federal Labour Court decided in June 1988 that warning strikes were in general lawful, but as to any other strike, the so-called *ultima ratio*-principle applied, meaning that strike had to be a last resort after negotiations have failed.[255] At the same time, the court argues that these negotiations did not have to be declared as failed expressly. One of the parties using means of labour dispute such as a strike expressed the party's free and non-verifiable view that it considered peaceful negotiations as inconclusive.[256] As a consequence, both jurisprudence and commentary apply the criteria for strikes also to warning strikes and consider them as generally lawful.[257]

1.2.2. Conditions for exercising the right to strike

For exercising the right to strike or any other instrument of labour dispute, there are **three main conditions**: The strike has to be **tariff-related**, it has to respect the **duty not to engage in labour dispute while the collective bargaining agreement is still valid** and it has to be **proportional**.

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251 Federal Labour Court (*Bundesarbeitsgericht*, BAG), judgement of 19.06.2007 – 1 AZR 396/06.

252 Federal Labour Court (*Bundesarbeitsgericht*, BAG), judgement of 19.06.2007 – 1 AZR 396/06; H. Wilms, in K. Hümmerich et al. (eds.), Arbeitsrecht, 2nd ed., Baden-Baden: Nomos 2010, art. 9 GG, para. 127; W. Linsenmaier, in R. Müller-Glöge et al. (eds.), Erfurter Kommentar zum Arbeitsrecht, 15th ed., Munich: C.H. Beck 2015, art. 9 GG, para. 121.

253 Especially four decisions by the Federal Labour Court (*Bundesarbeitsgericht*, BAG): judgement of 17.12.1976 – 1 AZR 605/75; judgement of 12.09.1984 – 1 AZR 342/83; judgement of 29.01.1985 – AZR 1 179/84; judgement of 21.06.1988 – AZR 1 651/86.

254 W. Linsenmaier, in R. Müller-Glöge et al. (eds.), Erfurter Kommentar zum Arbeitsrecht, 15th ed., Munich: C.H. Beck 2015, art. 9 GG, para. 163; H. Wilms, in K. Hümmerich et al. (eds.), Arbeitsrecht, 2nd ed., Baden-Baden: Nomos 2010, art. 9 GG, para. 108.

255 For more details on the *ultima ratio*-principle see question 1.2.2.3. of this legal opinion on German law.

256 Federal Labour Court (*Bundesarbeitsgericht*, BAG), judgement of 21.06.1988 – AZR 1 651/86.

257 J. Burkard-Pötter, Warnstreiks – aktueller denn je, in Neue Juristische Wochenschrift (NJW) Spezial 2013, p. 370 *et seq*, p. 371; B. Waas, in C. Rolfs et al. (eds.), Beck'scher Online-Kommentar Arbeitsrecht, 35th ed., Munich: C.H. Beck 2015, art. 9 GG, paras. 93 *et seq*; W. Linsenmaier, in R. Müller-Glöge et al. (eds.), Erfurter Kommentar zum Arbeitsrecht, 15th ed., Munich: C.H. Beck 2015, art. 9 GG, para. 163; H. Wilms, in K. Hümmerich et al. (eds.), Arbeitsrecht, 2nd ed., Baden-Baden: Nomos 2010, art. 9 GG, para. 108.

1.2.2.1. Tariff-relatedness

A strike has to be **tariff-related**. This implies two different aspects, which have already been mentioned:[258]

First, the respective means of labour dispute, namely strike, has to be led **by a party having collective-bargaining capacity**.[259] This means that only parties to collective bargaining can take measures of labour dispute, i.e. only trade unions, employers and associations of employers as well as umbrella organisations of trade unions and of associations of employers, as enumerated in the Collective Bargaining Agreement Act.[260] As a consequence, it is said that trade unions have a so-called **monopoly on strike ("*gewerkschaftliches Streikmonopol*")**.[261] As already mentioned, strikes neither initiated nor adopted by a trade union are called wild strikes and are considered unlawful.[262] A wild strike thus constitutes a violation of the striking employee's labour contract by the employee.

Second, a strike's or other instrument of labour dispute's **purpose** has to be to **influence collective bargaining** with regard to a subject matter that can be regulated in the collective bargaining agreement in question. This means that the strike has to aim at concluding a collective bargaining agreement and it has to concern issues that can lawfully be part of this agreement.[263] A strike for mere political reasons is hence and as already mentioned not lawful, since this aim cannot be regulated in a collective bargaining agreement.[264] The same is true for a strike aiming at affirmation or implementation of a legal position, as this may only be done by the jurisprudence or through the means of enforcement proceedings law and cannot be part of a collective bargaining agreement.[265] Regarding sympathy strikes, the court will decide on a case by case basis whether the strike is lawful, whereat the court will start from the general point of view that the sympathy strike is indeed lawful. Only in cases where the sympathy strike becomes more important than the supported strike will the court judge the strike not to be a mere supporting strike, but an individual strike aiming at an invalid goal, namely at a collective bargaining agreement on which the respective employer does not have any influence.[266]

1.2.2.2. Duty not to engage in labour dispute while the collective bargaining agreement is still valid

As a second condition, strike is only allowed when the actual collective bargaining agreement is not valid anymore. Employees have to respect this **duty to maintain industrial peace while the collective bargaining agreement is still in force ("*Friedenspflicht*")**.

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258 See question 1.2.1.2. of this legal opinion on German law.

259 W. Linsenmaier, in R. Müller-Glöge et al. (eds.), Erfurter Kommentar zum Arbeitsrecht, 15th ed., Munich: C.H. Beck 2015, art. 9 GG, para. 97; B. Waas, in C. Rolfs et al. (eds.), Beck'scher Online-Kommentar Arbeitsrecht, 35th ed., Munich: C.H. Beck 2015, art. 9 GG, para. 31.

260 § 2 paras. 1, 2 Collective Bargaining Agreement Act (*Tarifvertragsgesetz*, TVG). This can also be seen in § 74 para. 2 s. 1 Works Constitution Act (*Betriebsverfassungsgesetz*, BetrVG), stating that "[i]ndustrial action between the employer and the works council shall be unlawful; the foregoing shall not apply to industrial action between collective bargaining parties."

261 V. Rieble, Arbeitsniederlegung zur Standorterhaltung, in Recht der Arbeit (RdA) 2005, p. 200 *et seq*, p. 204

262 See question 1.2.1.2. of this legal opinion on German law.

263 H. Wilms, in K. Hümmerich et al. (eds.), Arbeitsrecht, 2nd ed., Baden-Baden: Nomos 2010, art. 9 GG, paras. 123 *et seq*; B. Waas, in C. Rolfs et al. (eds.), Beck'scher Online-Kommentar Arbeitsrecht, 35th ed., Munich: C.H. Beck 2015, art. 9 GG, para. 35.

264 Federal Labour Court (*Bundesarbeitsgericht*, BAG), judgement of 14.02.1987 – 1 AZR 76/76. See also question 1.2.1.2. of this legal opinion on German law.

265 B. Waas, in C. Rolfs et al. (eds.), Beck'scher Online-Kommentar Arbeitsrecht, 35th ed., Munich: C.H. Beck 2015, art. 9 GG, para. 39.

266 See question 1.2.1.3. of this legal opinion on German law.

According to this principle, in every collective bargaining agreement there is a so-called **relative duty not to engage in labour dispute** inherent while the agreement is still valid. This is due to the fact that the legislator has not regulated this area of law, but left it as part of the autonomy in collective bargaining ("*Tarifautonomie*") to the parties; the agreement hence constitutes itself an instrument to maintain peace in order to guarantee both parties planning reliability. Employees may thus only go on strike after the duration of the actual collective bargaining agreement has ended. However, this only concerns matters that are regulated in this agreement. If the strike aims at regulating a subject matter which is not part of the agreement in force, may it be explicitly or at least implicitly, the duty to maintain industrial peace does not apply.[267]

It is also possible to have an **absolute duty not to engage in labour dispute**, prohibiting any kind of measures of labour dispute. Such an absolute duty has to be agreed upon in the collective bargaining agreement and is very rare in Germany.[268]

1.2.2.3. Proportionality

Lastly, strike and other means of labour dispute also have to be **proportional (*"Verhältnismässigkeitsprinzip"*)**. Applying the general principle of proportionality, this means that the respective strike as a measure of labour dispute has to be appropriate to achieve its purpose, it has to be necessary and it has to be proportional.[269] A strike is particularly disproportional, if the damages resulting from the strike are unreasonable in relation to the target outcome. It may notably **not touch the employer's means of existence**. Consequently, trade unions have to guarantee that work can go on after strike has ended in order to prevent the employer from ruin. They therefore may have to provide a certain amount of work, for example for preserving goods needed when work is being resumed.[270] This notion is widely accepted also by the trade unions.[271] Similarly, a strike is disproportional, if the trade unions do not **guarantee emergency supply of indispensable goods or services** in order to provide for the people. This condition is deduced from the unwritten, but generally accepted principle that all labour dispute is subject to public welfare ("*Gemeinwohlbindung*").[272]

With regard to labour dispute, the principle of proportionality, which constitutes a basic principle of German law, has been substantiated by the so-called ***ultima ratio*-principle**. According to this, labour dispute is only then lawful, if all other reasonable and peaceful measures to find an agreement are exhausted without result.[273] This most importantly means that negotiations for a new collective

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267 Federal Labour Court (*Bundesarbeitsgericht*, BAG), judgement of 10.12.2003 – 1 AZR 96/02; H. Wilms, in K. Hümmerich et al. (eds.), Arbeitsrecht, 2nd ed., Baden-Baden: Nomos 2010, art. 9 GG, paras. 130; W. Linsenmaier, in R. Müller-Glöge et al. (eds.), Erfurter Kommentar zum Arbeitsrecht, 15th ed., Munich: C.H. Beck 2015, art. 9 GG, para. 124.

268 W. Linsenmaier, in R. Müller-Glöge et al. (eds.), Erfurter Kommentar zum Arbeitsrecht, 15th ed., Munich: C.H. Beck 2015, art. 9 GG, para. 125; B. Waas, in C. Rolfs et al. (eds.), Beck'scher Online-Kommentar Arbeitsrecht, 35th ed., Munich: C.H. Beck 2015, art. 9 GG, para. 46.

269 B. Waas, in C. Rolfs et al. (eds.), Beck'scher Online-Kommentar Arbeitsrecht, 35th ed., Munich: C.H. Beck 2015, art. 9 GG, para. 50.

270 W. Linsenmaier, in R. Müller-Glöge et al. (eds.), Erfurter Kommentar zum Arbeitsrecht, 15th ed., Munich: C.H. Beck 2015, art. 9 GG, para. 180.

271 Federal Labour Court (*Bundesarbeitsgericht*, BAG), judgement of 31.01.1995 – 1 AZR 142/94; W. Linsenmaier, in R. Müller-Glöge et al. (eds.), Erfurter Kommentar zum Arbeitsrecht, 15th ed., Munich: C.H. Beck 2015, art. 9 GG, para. 180.

272 Federal Labour Court (*Bundesarbeitsgericht*, BAG), judgement of 21.04.1971 – GS 1/68.

273 Federal Labour Court (*Bundesarbeitsgericht*, BAG), judgement of 20.12.1963 – 1 AZR 157/63; BAG, judgement of 21.04.1971 – GS 1/68; H. Wilms, in K. Hümmerich et al. (eds.), Arbeitsrecht, 2nd ed., Baden-Baden: Nomos 2010, art. 9 GG, paras. 131.

bargaining agreement have to have taken place and have to have failed.[274] According to the Federal Labour Court, the parties also have to conduct arbitration as a peaceful instrument of negotiation, before peaceful negotiations can be considered as failed.[275] However, the end of negotiations does not have to be announced explicitly. The Federal Labour Court decided that taking up instruments of labour dispute such as strike are an implicit sign that peaceful negotiations have failed.[276] This is particularly interesting in the scope of warning strikes, as discussed above.[277] There is also no need for a strike ballot before going on strike in order to make the strike lawful, as the requirement of a strike ballot is only necessary for internal aspects within the respective trade union. It does not have any influence on the strike's lawfulness towards the employer or a third party.[278] What is necessary though is an official decision or call to go on strike. This call needs to be made public, although there are no specific requirements how this has to be done. It merely has to inform about who is organising the strike, which measures of labour dispute exactly are being taken, who is called upon to go on strike as well as begin and duration of the strike.[279] Yet, it is unclear whether this information given retroactively instead of at the beginning of the strike can render the strike lawful.[280]

1.2.3. Effect on contracts of employment

Under German law, participating in a lawful strike is allowed, but leads to **suspension of the individual employment contract**. Strike is no breach of contract in the sense that the employer could dismiss the striking employee.

From the moment on an employee goes on strike, the individual employment contract's **main obligations are suspended**. As a consequence, the employee is not obliged to fulfil her/his principal contractual duty to work while (s)he is on strike. At the same time, the employer is not obliged to pay the striking employee any salary for the working time the employee was on strike. With regard to these principal obligations, the employment contract is thus on hold as long as the employee is still on strike. Yet, this does not apply to any **ancillary obligations**, which **stay in force**. The striking employee will hence still have to respect certain contractual duties, as for example her/his obligation to confidentiality regarding business information.[281]

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274 B. Waas, in C. Rolfs et al. (eds.), Beck'scher Online-Kommentar Arbeitsrecht, 35th ed., Munich: C.H. Beck 2015, art. 9 GG, para. 52; W. Linsenmaier, in R. Müller-Glöge et al. (eds.), Erfurter Kommentar zum Arbeitsrecht, 15th ed., Munich: C.H. Beck 2015, art. 9 GG, para. 132; H. Wilms, in K. Hümmerich et al. (eds.), Arbeitsrecht, 2nd ed., Baden-Baden: Nomos 2010, art. 9 GG, paras. 131.

275 Federal Labour Court (*Bundesarbeitsgericht*, BAG), decision of 21.04.1971 – GS 1/68.

276 Federal Labour Court (*Bundesarbeitsgericht*, BAG), judgement of 21.06.1988 – 1 AZR 651/86.

277 See question 1.2.1.3. of this legal opinion on German law.

278 B. Waas, in C. Rolfs et al. (eds.), Beck'scher Online-Kommentar Arbeitsrecht, 35th ed., Munich: C.H. Beck 2015, art. 9 GG, para. 55.

279 Federal Labour Court (*Bundesarbeitsgericht*, BAG), judgement of 31.10.1995 – 1 AZR 217/95; BAG, judgement of 23.10.1996 – 1 AZR 269/96; W. Linsenmaier, in R. Müller-Glöge et al. (eds.), Erfurter Kommentar zum Arbeitsrecht, 15th ed., Munich: C.H. Beck 2015, art. 9 GG, para. 133; B. Waas, in C. Rolfs et al. (eds.), Beck'scher Online-Kommentar Arbeitsrecht, 35th ed., Munich: C.H. Beck 2015, art. 9 GG, para. 57.

280 W. Linsenmaier, in R. Müller-Glöge et al. (eds.), Erfurter Kommentar zum Arbeitsrecht, 15th ed., Munich: C.H. Beck 2015, art. 9 GG, para. 140; B. Waas, in C. Rolfs et al. (eds.), Beck'scher Online-Kommentar Arbeitsrecht, 35th ed., Munich: C.H. Beck 2015, art. 9 GG, para. 58.

281 Federal Labour Court (*Bundesarbeitsgericht*, BAG), judgement of 18.05.2006 – 6 AZR 615/05; B. Waas, in C. Rolfs et al. (eds.), Beck'scher Online-Kommentar Arbeitsrecht, 35th ed., Munich: C.H. Beck 2015, art. 9 GG, para. 118.

This **suspension** of principal duties **begins** not with the call for strike, but when the individual employee goes on strike and it **ends** as soon as (s)he resumes work again. In case the employee may use flexible working hours and clocks out before participating in a strike in her/his free time, this does not affect the employment contract. As such an employee is not obliged to work at a specific time, there are no consequences to the contract if (s)he clocks out and thus uses her/his free time to participate at the strike. The employer will not be allowed to reduce the respective salary for this time.[282] Another issue might arise if the worker is not fit for work because of illness at the time of the strike. In this case, the question whether the employer has a duty to pay the respective salary according to the Continued Remuneration Act[283] depends on whether the employee gets ill while being on strike or whether (s)he was already sick before the strike started. While the former has as a consequence that the worker will be considered on strike also during the time of her/his illness, the latter means that (s)he does not perform the contractual duties for other reasons than strike and the employment contract thus stays fully in force. This may however change, if the sick worker explicitly or tacitly participates in the strike.[284] Finally, also regarding public holidays it has to be decided on a case by case basis, whether the employee did not work because of the holiday or because of the strike. If the employee did not work only because of the public holiday, (s)he has a right to receive full payment for this day.[285] Yet, it may notably constitute an abuse of right, if the trade union decides to suspend the strike only for the duration of the public holiday(s) and to go on with the strike as soon as the public holiday is over. The court will in this case consider the strike to go on during the holiday.[286]

Similarly to the salary, any bonuses and **special payments** can proportionally be reduced, too. However, this only applies to payments that are linked to the worker's actual performance or to the suspension of the employment contract and that are thus affected by the strike.[287]

2. Role of the right to strike in collective labour relations

2.1. Relation with other forms of action and role in collective negotiations

Strike is the most important instrument of labour dispute for employees.[288] Although also other means of labour dispute exist, trade unions mostly choose strike instead. Our research did not show any statistics or other information relating to the different instruments of labour disputes. There is however case law on certain other means than strike, namely on slow-down strike ("*Bummelstreik*"), boycott and flash-mobs.

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282 Federal Labour Court (*Bundesarbeitsgericht*, BAG), judgement of 26.07.2005 – 1 AZR 133/05.

283 § 3 para. 1 s. 1 Continued Remuneration Act (*Entgeltfortzahlungsgesetz*, EFG).

284 Federal Labour Court (*Bundesarbeitsgericht*, BAG), judgement of 01.10.1991 – 1 AZR 147/91; Regional Labour Court (*Landesarbeitsgericht*, LAG) Rhineland-Palatinate, judgement of 26.07.2012 – 10 Sa 137/12.

285 § 2 para. 1 Continues Remuneration Act (*Entgeltfortzahlungsgesetz*, EFG).

286 Federal Labour Court (*Bundesarbeitsgericht*, BAG), judgement of 01.03.1995 – 1 AZR 786/94.

287 Federal Labour Court (*Bundesarbeitsgericht*, BAG), judgement of 03.08.1999 – 1 AZR 735/98; B. Waas, in C. Rolfs et al. (eds.), Beck'scher Online-Kommentar Arbeitsrecht, 35th ed., Munich: C.H. Beck, 2015, art. 9 GG, para. 122.

288 B. Waas, in C. Rolfs et al. (eds.), Beck'scher Online-Kommentar Arbeitsrecht, 35th ed., Munich: C.H. Beck 2015, art. 9 GG, para. 6; W. Linsenmaier, in R. Müller-Glöge et al. (eds.), Erfurter Kommentar zum Arbeitsrecht, 15th ed., Munich: C.H. Beck 2015, art. 9 GG, para. 161; R. Scholz, in T. Maunz & G. Dürig (eds.), Grundgesetz: Kommentar, 73rd ed., Munich: C.H. Beck 2014, art. 9, para. 311; J. Kirchner & E. Mittelhamm, in J. Kirchner et al. (eds.), Key Aspects of German Employment and Labour Law, Berlin & Heidelberg: Springer 2010, p. 199 et *seq*, 200.

A **slow-down strike** means that the individual employees agree to all report sick at the same time or to fulfil their work very slowly or not as they are supposed to.[289] As to this instrument, the Federal Court of Justice found it unlawful due to not being a fair instrument of labour dispute towards the employee. The court found that by not acting on a collective level, but on the individual level, the employees acted unfairly. They did not set clear borders, but established an anonymous wall against which the employer had no way of fighting back.[290]

A **boycott** on the other hand is, according to the Federal Labour Court, generally a lawful means of labour dispute.[291]

And finally also **flash-mobs** have been considered lawful by the Federal Labour Court. Accompanying an ongoing strike, a trade union had organised flash-mobs during which employees were asked to all buy something that costs not much in order to block a shop's cash desk or to all put huge amounts of goods in a shopping trolley and leave it in the shop's corridors in order to block these. As these operations were meant to support the ongoing strike and to put pressure on the employer, the court considered it as a lawful means of labour dispute.[292]

All in all, use of these other means of labour dispute seems to be rather rare, leaving the different forms of strike the most important action.

2.2. Use of the right to strike in practice

Our research did not show any statistical data that is up to date. According to a report of 2006 by the Federal Statistical Office, **strike is not used as often in Germany as in other countries**, but the document does not provide more detailed information.[293] In the following reports in 2008, 2011 and 2013, the Federal Statistical Office did not mention strike or labour dispute at all.[294] Also the information available on the website of the ILO does not provide any details regarding the use of strike in practice. It does however give information on the amount of working days lost due to strike, but only until 2008. According to this information, the **number of days of strike varies heavily** between

289 J. Kirchner & E. Mittelhamm, in J. Kirchner et al. (eds.), Key Aspects of German Employment and Labour Law, Berlin & Heidelberg: Springer 2010, p. 199 et *seq*, p. 203; B. Waas, in C. Rolfs et al. (eds.), Beck'scher Online-Kommentar Arbeitsrecht, 35th ed., Munich: C.H. Beck 2015, art. 9 GG, paras. 8 *et seq*.

290 Federal Court of Justice (*Bundesgerichtshof*, BGH), judgement of 31.01.1973 – VI ZR 32/77.

291 Federal Labour Court (*Bundesarbeitsgerich*t, BAG), judgement of 19.10.1976 – 1 AZR 611/75.

292 Federal Labour Court (*Bundesarbeitsgericht*, BAG), judgement of 22.09.2009 – 1 AZR 972/08.

293 Federal Statistical Office (ed.), Datenreport 2006: Zahlen und Fakten über die Bundesrepublik Deutschland, Bonn: Bundeszentrale für politische Bildung 2006, available at https://www.destatis.de/DE/PresseService/Presse/Pressekonferenzen/2006/Datenreport/Datenreport_pdf.pdf?__blob=publicationFile (10.07.2015), p. 172.

294 Federal Statistical Office (ed.), Datenreport 2008: Ein Sozialbericht für die Bundesrepublik Deutschland, Bonn: Bundeszentrale für politische Bildung 2008, available at https://www.destatis.de/DE/Publikationen/Datenreport/Downloads/Datenreport2008.pdf?__blob=publicationFile (10.07.2015); Datenreport 2011: Ein Sozialbericht für die Bundesrepublik Deutschland, Band I, Bonn: Bundeszentrale für politische Bildung 2011, available at https://www.destatis.de/DE/Publikationen/Datenreport/Downloads/Datenreport2011.pdf?__blob=publicationFile (10.07.2015); Datenreport 2013: Ein Sozialbericht für die Bundesrepublik Deutschland, Bonn: Bundeszentrale für politische Bildung 2013, available at https://www.destatis.de/DE/Publikationen/Datenreport/Downloads/Datenreport2013.pdf?__blob=publicationFile (10.07.2015).

2004 and 2008: It starts rather low at 50'673 days in 2004, down to only 18'633 in 2005, high up to 428'739 in 2006, down to 286'368 in 2007 and finally down again to 131'679 in 2008.[295]

2.3. Role of the right to strike in non-organised sectors

As only parties to a collective bargaining agreement, namely trade unions and employers, are allowed to take part in labour dispute,[296] **strike does not play any role in sectors, in which trade unions do not exist**.

3. Protection of workers on strike

3.1. Special protection against dismissal and other unfair treatment

A worker lawfully on strike is fully protected by German law. Legal countermeasures of the employer must be proportionate and must not disadvantage the striking worker vis-à-vis other non-striking workers in any way.

3.1.1. Dismissal with due notice

A dismissal with due notice based on a lawful strike is **invalid**. This follows from the Dismissal Protection Act[297], from § 612a Civil Code and from article 9 of the Constitution[298].

In a general way, **all dismissals** have to fulfil certain criteria in order to be valid. A termination has to be declared in written form[299] and the employer has to inform the works council ("*Betriebsrat*") of the termination and its reason before giving notice of the termination.[300]

Furthermore German law protects workers against dismissal through the **Dismissal Protection Act**. This Act is applicable to employees who have been employed for more than six months[301] and if more than ten employees are employed in the business[302].

According to the Dismissal Protection Act, a dismissal with due notice has to be **warranted in social terms** in order to be valid. This means a dismissal is only possible if there are specific reasons to justify it, based on the worker's conduct, the person itself or operational grounds.[303] The social justification of a conduct-related dismissal is to be determined by four criteria. First there has to be an objective reason, meaning that the employee has significantly breached the contractual duties. Second, it must be likely that the employee will breach the working duties again in the future. Third, the employer's interest to terminate the relationship must outweigh the interest of the employee. Finally, the termination must be *ultima ratio*, meaning the last resort.[304] The participation in a lawful strike *per se*

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295 LABORSTA Internet, Strikes and lockouts - 9C Days not worked, by economic activity: Germany, available at http://laborsta.ilo.org/ (10.07.2015).

296 See question 1.2.2.1. of this legal opinion on German law.

297 § 1 para. 1 Dismissal Protection Act (*Kündigungsschutzgesetz*, KSchG).

298 Art. 9 para. 3 s. 2 Constitution (*Grundgesetz*, GG).

299 § 623 Civil Code (*Bürgerliches Gesetzbuch*, BGB).

300 § 102 Works Constitution Act (*Betriebsverfassungsgesetz*, BetrVG).

301 § 1 para. 1 Dismissal Protection Act (*Kündigungsschutzgesetz*, KSchG).

302 § 23 para. 1 s. 2 Dismissal Protection Act (*Kündigungsschutzgesetz*, KSchG).

303 § 1 paras. 1, 2 s. 1 Dismissal Protection Act (*Kündigungsschutzgesetz*, KSchG).

304 J. Kirchner et al. (eds.), Key aspects of German Employment and Labour Law, Heidelberg: Springer 2010, p. 141.

cannot justify a dismissal based on conduct for lack of violation of contractual obligations. During a lawful strike all major contractual obligations as the employee's duty to work are suspended.[305] A dismissal based on that reason is therefore socially unjustified and invalid. It also violates § 612a Civil Code. § 612 a Civil Code regulates the "prohibition of sanction" ("*Massnahmeverbot*") in general, without particular reference to strike or labour dispute. According to this, an employer shall not disadvantage or take negative measures like dismissals against an employee exercising her/his rights in a lawful way.[306] Lawful striking is one of those rights.[307] If the reason for a dismissal is that the employee exercised her/his rights, the dismissal is considered null.[308] This can also be based on article 9 of the German Constitution[309] that regulates a general protection against discrimination in the area of collective activities. Contrary to the other fundamental rights only binding the State, this regulation has direct third-party effect between the employer and the employee.[310] Only the violation of specific contractual obligations on occasion of the strike as for example property damage, physical violence or insult can therefore constitute grounds for dismissal.[311]

Outside the scope of the Dismissal Protection Act, no specific reason is necessary to terminate the employment. Yet, § 612a Civil Code as well as article 9 of the Constitution remain applicable,[312] as they are not linked to the applicability of the Dismissal Protection Act.

3.1.2. Dismissal with immediate effect

A lawful strike cannot be the reason for a dismissal with immediate effect either.[313]

The **Dismissal Protection Act is not applicable** to dismissals with immediate effect. [314] This termination is laid down in § 626 Civil Code.

Similar to the dismissal on notice based on conduct-related reasons, the dismissal without notice is **only possible for a compelling reason** and has to be ***ultima ratio***, i.e. the last resort. A compelling reason exists if it were unreasonable for the employer to employ the employee until the end of the notice period. The threshold for terminations for a compelling reason is very high. For instance consumption of drug like cannabis during working hours cannot justify a dismissal, if it does not affect the employee's performance.[315] The requirements are also not met if the employee claims wrongly

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305 See question 1.2.3. of this legal opinion on German law.

306 U. Preis, in R. Müller-Glöge et al. (eds.), Erfurter Kommentar zum Arbeitsrecht, 15th ed., Munich: C.H. Beck 2015, § 612a BGB para. 13.

307 U. Preis, in R. Müller-Glöge et al. (eds.), Erfurter Kommentar zum Arbeitsrecht, 15th ed., Munich: C.H. Beck 2015, § 612a BGB para. 6.

308 Regional Labour Court (*Landesarbeitsgericht*, LAG) Hamm, judgement of 18.12.1987 – 17 Sa 1225/87 (dismissal because of union activity); J. Joussen, in C. Rolfs et al. (eds.), Beck'scher Online-Kommentar Arbeitsrecht, Munich: C.H. Beck 2015, § 612a BGB, para. 25.

309 Art. 9 para. 2 s. 3 Constitution (*Grundgesetz*, GG).

310 W. Linsenmaier, in R. Müller-Glöge et al. (eds.), Erfurter Kommentar zum Arbeitsrecht, 15th ed., Munich: C.H. Beck 2015, art. 9 GG, para. 43.

311 S. Fiebig & R. Zimmermann, in S. Fiebig et al. (eds.), Kündigungsschutzrecht, 2nd ed., Baden-Baden: Nomos 2012, § 1, para. 453; B. Waas, in C. Rolfs et al. (eds.), Beck'scher Online-Kommentar Arbeitsrecht, Munich: C.H. Beck 2015, art. 9 GG, para. 123.

312 P. Öğüt, in W. Däubler (ed.), Arbeitskampfrecht: Handbuch für die Rechtspraxis, 3rd ed., Baden-Baden: Nomos 2011 , § 19, para.46.

313 §§ 626, 612a Civil Code (*Bürgerliches Gesetzbuch*, BGB) in conjunction with art. 9 para. 3 s. 2 Constitution (*Grundgesetz*, GG).

314 § 13 para. 1 Dismissal Protection Act (*Kündigungsschutzgesetz*, KSchG).

315 Regional Labour Court (*Landesarbeitsgericht*, LAG) Baden-Württemberg, judgement of 19.10.1993 – 11 Ta BV 9/93.

the execution of tasks, if those tasks do only constitute a part of her/his activities and have to be executed only sporadically.[316]

Furthermore, **notice** must be given within **two weeks of receiving knowledge** of the facts qualifying as such a reason.[317] As participating in a lawful strike is part of the employee's rights, it cannot be unreasonable for the employer to employ the worker until the end of the notice period, as this would undermine the worker's right to go on strike. As a consequence, participating in a lawful strike cannot justify a dismissal.[318] This also follows from § 612a Civil Code in conjunction with article 9 of the Constitution.[319]

3.1.3. Other unfair treatment

Workers that are lawfully on strike have to be put on an **equal footing with non-striking workers** in every way, to prevent the employer from undermining the employee's right to strike. Permitted countermeasures like defensive lock-outs ("*Abwehraussperrung*") must comply with the principle of proportionality.

German law regulates **certain protection against discrimination** in the General Equal Treatment Act. However, it only provides protection against discrimination on grounds of race or ethnic origin, gender, religion or beliefs, disability, age or sexual identity.[320] All other reasons for unfair treatment or disadvantages are outside the scope of the General Equal Treatment Act. There are also other legal regulations that provide protection in specific cases, as notably article 33 of the German Constitution, guaranteeing every German citizen equal access to each public office.[321] Furthermore, there is to mention § 75 Works Constitution Act (*Betriebsverfassungsgesetz*-BetrVG): It imposes an obligation for the employer to ensure that every employee is treated according to the principles of fairness and equity. But this regulation does not create an individual legally enforceable right of the employee. It only states official duties.[322] These regulations cannot protect workers against unfair treatment because of a participation in a legal strike.

§ 612a Civil Code does not only apply to dismissals, but also to other negative measures, like the transfer of a worker[323] or strike-related payments: The employer effects **special strike-breaker payments ("*Streikbruchprämie*")** to those workers not participating in strikes to reward them for not participating. This can be a forbidden measure, depending on the time of the granting. During labour disputes, it is a lawful means of action for the employer. The same is true for payments granted before the beginning of a labour dispute. If the employer takes that measure once this specific dispute is over, such strike-breaker payments cannot influence the dispute anymore and are therefore unlawful. They

316 Federal Labour Court (*Bundesarbeitsgericht*, BAG), judgement of 09.06.2011 – 2 AZR 284/10.

317 § 626 para. 2 s. 1 Civil Code (*Bürgerliches Gesetzbuch*, BGB); J. Kirchner et al. (eds.), Key aspects of German Employment and Labour Law, Heidelberg: Springer 2010, p. 152 *et seq*.

318 T. Ubber, in M. Grobys & A. Panzer (eds.), StichwortKommentar Arbeitsrecht, 2nd ed., Baden-Baden: Nomos 2014, „Arbeitskampf", para. 15; B. Waas, in C. Rolfs (eds.), Beck'scher Online-Kommentar Arbeitsrecht, Munich: C.H. Beck 2015, art. 9 GG, para. 123.

319 W. Linsenmaier, in R. Müller-Glöge et al. (eds.), Erfurter Kommentar zum Arbeitsrecht, 15th ed., Munich: C.H. Beck 2015, art. 9 GG, para 212.

320 § 1 General Equal Treatment Act (*Allgemeines Gleichbehandlungsgesetz*, AGG).

321 Art. 33 para. 2 Constitution (*Grundgesetz*, GG).

322 G. Thüsing, in F. J. Säcker & R. Rixecker (eds.), Münchener Kommentar zum BGB, 6th ed., Munich: C.H. Beck 2012, § 1 AGG, para. 20.

323 M. Franzen, in B. Dauner-Lieb & W. Langen (eds.), BGB: Schuldrecht, 2nd ed., Baden-Baden: Nomos 2012, § 612a BGB, para. 11.

may only be admissible if the purpose of the payment is to compensate particular disadvantages of non-striking workers resulting from the strike.[324]

The employer **cannot require** from her/his employee to work **overtime to compensate the period of strike** either.[325] This would be inconsistent with the suspensory effect of the strike.

The employer can respond to a lawful strike with a so-called **defensive lock-out (*"Abwehraus-sperrung"*)**. A lock-out consists in refusing the employee's offer to work and not paying any salary.[326] It is only lawful if the principle of proportionality is respected. This is the case if the lock-out is used to achieve balanced negotiations.[327] If the lock-out is unlawful, the employment relationship remains unchanged with all the related rights and obligations.

3.2. Comparison with general protection

German law **does not distinguish** between invalid dismissals or unfair treatment based on the fact that an employee participated in a lawful strike on the one hand and other grounds on the other. The instruments at the employee's disposal are always the same when it comes to invalid termination notices or other discrimination. Participating in a strike is just one example amongst many others for not being a valid reason for any kind of unfair treatment. § 612a Civil Code is not only applicable to the right of strike but also when other rights of employees are at issue.

3.3. Role of international law on protection afforded

All international committees consider that lawful strikes may not be sanctioned and that participating in a lawful strike does not violate any contractual duties. The legal situation in Germany essentially meets these requirements through its jurisprudence and mainly through the protection offered by § 612a Civil Code in conjunction with the constitutional guarantee in article 9 paragraph 3 of the Constitution.

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324 M. Franzen, in B. Dauner-Lieb & W. Langen (eds.), BGB: Schuldrecht, 2nd ed., Baden-Baden: Nomos 2012, § 612a BGB paras. 19 and 21.

325 Federal Labour Court (*Bundesarbeitsgericht*, BAG), judgement of 26. 7. 2005 – 1 AZR 133/04.

326 W. Linsenmaier, in R. Müller-Glöge et al. (eds.), Erfurter Kommentar zum Arbeitsrecht, 15th ed., Munich: C.H. Beck 2015, art. 9 GG, para. 236.

327 W. Linsenmaier, in R. Müller-Glöge et al. (eds.), Erfurter Kommentar zum Arbeitsrecht, 15th ed., Munich: C.H. Beck 2015, art. 9 GG, para. 240.

3.3.1. Conventions of the International Labour Organization

The ILO's freedom of Association Committee views **sanctions for going on strike as "serious discrimination"** or even as an "extremely serious measure" that violate article 1 of ILO-Convention n° 98[328].[329]
The Association also states that an employer cannot require from the employee to **work overtime to compensate** the period of strike, as this would be an undue possibility to influence the employee's decision whether to go on strike.[330] A preferential treatment of non-striking workers, for example by **paying strike-breaker bonuses**, shall also be forbidden, since such discriminatory practices constituted a major obstacle to the right of trade unionists to organise their activities.[331] German law provides an overall protection of the rights of employees by § 612a Civil Code and therefore meets these requirements.

Regarding the difficulties for the employee to gather evidence, the ILO's Expert Committee requests an **inversion of the burden of proof**. According to the Committee, one of the main difficulties resulted from placing on workers the burden to prove that the act in question occurred as a result of anti-union discrimination, which may constitute an insurmountable obstacle to compensation for the prejudice suffered.[332] The regulations of German law on protection against dismissals are in favour of employees. Pursuant to § 1 Dismissal Protection Act[333] it is up to the employer to prove the preconditions of a termination. This also applies to dismissals outside the scope of the Dismissal Protection Act, where the employer bears the burden of proof as well. All the employee has to do is to claim the invalidity of the termination.[334] On the other hand, if the employee claims compensation for damages, it is her/his

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328 Art. 1 of ILO-Convention n° 98:
"1. Workers shall enjoy adequate protection against acts of anti-union discrimination in respect of their employment.
2. Such protection shall apply more particularly in respect of acts calculated to
(a) make the employment of a worker subject to the condition that he shall not join a union or shall relinquish trade union membership;
(b) cause the dismissal of or otherwise prejudice a worker by reason of union membership or because of participation in union activities outside working hours or, with the consent of the employer, within working hours."

329 International Labour Organization, Freedom of Association: Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO 2006, 5th ed., Geneva: International Labour Organization 2006, available at http://www.ilo.org/public/libdoc/ilo/2006/106B09_305_engl.pdf (10.07.2015), paras. 658 and 661.

330 International Labour Organization, Freedom of Association: Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO 2006, 5th ed., Geneva: International Labour Organization 2006, available at http://www.ilo.org/public/libdoc/ilo/2006/106B09_305_engl.pdf (10.07.2015), para. 665.

331 International Labour Organization, Freedom of Association: Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO 2006, 5th edition, Geneva: International Labour Organization 2006, available at http://www.ilo.org/public/libdoc/ilo/2006/106B09_305_engl.pdf (10.07.2015), para. 675.

332 International Labour Organization, Freedom of association and collective bargaining: International Labour Conference, 81st Session 1994 – General Survey of the Reports, Geneva: International Labour Organization 1994, available at http://www.ilo.org/public/libdoc/ilo/P/09661/09661(1994-81-4B).pdf (10.07.2015), para. 217.

333 § 1 para. 2 s. 4 Dismissal Protection Act (*Kündigungsschutzgesetz*, KSchG).

334 C. Kerwer, in C. Rolfs et al. (eds.), Beck'scher Online-Kommentar Arbeitsrecht, Munich: C.H. Beck 2015, § 4 KSchG, para. 32.

obligation to prove the employer's breach of duty. Compensation of damages is regulated in § 280 and § 823 Civil Code, where the claimant has to provide proof of the facts on which her/his claim is based.[335]

3.3.2. European Social Charter

Article 6 n° 4 of the European Social Charter of 18 October 1961[336] obliges the member states to recognise the right to strike.[337]

The European Social Charter assumes just like German jurisprudence that a lawful collective action leads to a **suspension of the contractual duties**.[338] Regarding the protection of lawfully striking workers, the European Committee of Social Rights requires that any deduction from strikers' wages should not exceed the proportion of their wage which would be attributable to the duration of their strike participation.[339] A deduction proportional to the period of the strike is authorised by article 6 n° European Social Charter.[340] This is in line with German jurisprudence: As the contractual duties during a lawful strike are suspended, the employee is not remunerated during that time.[341]

The European Committee of Social Rights also demands that **dismissals based on strikes shall be forbidden**[342], even effective deterrent regulations to avoid forbidden terminations are requested.[343] By its regulation in § 612a Civil Code, German law protects employees against strike-related dismissals. There are no further rules regarding measures to avoid such dismissals.

Regarding **lock-outs**, the Committee declared German jurisprudence compatible with the European Social Charter, so-called defensive lockouts being lawful for reasons of parity of means between the two parties.[344]

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335 H. Unberath, in H. G. Bamberger & H. Roth (eds.), Beck'scher Online-Kommentar BGB, Munich: C.H. Beck 2011, § 280 BGB para. 79; C. Katzenmeier, in B. Dauner-Lieb & W. Langen (eds.), BGB: Schuldrecht, 2nd ed., Baden-Baden: Nomos 2012, § 823 BGB, para. 550.

336 Art. 6 n° 4 European Social Charter:
"With a view to ensuring the effective exercise of the right to bargain collectively, the Parties undertake:
[…]
4. the right of workers and employers to collective action in cases of conflicts of interest, including the right to strike, subject to obligations that might arise out of collective agreements previously entered into."

337 J. Meyer-Ladewig, in J. Meyer-Ladewig (ed.), Europäische Menschenrechtskonvention, 3rd ed., Baden-Baden: Nomos 2011, art. 11 EMRK, paras. 19 and 22.

338 M. Dumke, Streikrecht i.S. des Art. 6 Nr. 4 ESC und deutsches Arbeitskampfrecht, Frankfurt a.M.: Peter Lang 2013, p. 352.

339 ESC-Digest 2008 page 58.

340 M. Dumke, Streikrecht i.S. des Art. 6 Nr. 4 ESC und deutsches Arbeitskampfrecht, Frankfurt a.M., Peter Lang, 2013, p. 352.

341 Federal Labour Court (*Bundesarbeitsgericht*, BAG), judgement of 26. 7. 2005 - 1 AZR 133.

342 Council of Europe, Digest of the Case Law of the European Committee of Social Rights, 2008, available at http://www.coe.int/t/dghl/monitoring/socialcharter/Digest/DigestSept2008_en.pdf (10.07.2015), p. 58; M. Dumke, Streikrecht i.S. des Art. 6 Nr. 4 ESC und deutsches Arbeitskampfrecht, Frankfurt a.M.: Peter Lang 2013, p. 357.

343 Council of Europe, European Social Charter: European Committee of Social Rights, Conclusions XVIII-1 (Belgium) - Articles 1, 5, 6, 12, 13, 16 and 19 of the Charter, 2006, p. 9.

344 Council of Europe, European Social Charter: European Committee of Social Rights, Addendum to Conclusions XV-1 (Germany), Strasbourg: Council of Europe Publishing 2001, p. 27.

3.3.3 European Convention of Human Rights

The European Court of Human Rights had to deal with the admissibility of strike-related sanctions in the recent past. It comes to the conclusion that **article 11 of the European Convention of Human Rights**[345] offers an overall protection of striking workers.

In November 2006 the court decided that the transfer of an employee because of union activities violated article 11 of the European Convention of Human Rights.[346] In another decision the court came to the conclusion that a disciplinary action ("*avertissement*") because of the participation in a one-day strike ("*journée de grève*") was also contrary to this regulation. Any measure to sanction a lawful strike was not compatible with this regulation. However minimal such a sanction may have been („*si minime qu'elle aît été*"), it could have kept a worker from exercising her/his right to participate in a lawful strike.[347] This is in accordance with the legal situation in Germany, where **§ 612a Civil Code forbids all negative consequences of a lawful strike**.

4. Enforcement and effectiveness of available sanctions

Violating the protection granted to workers for going on strike leads to the worker's right to claim **compensation for damages**. The amount of the claim depends on the extent of the damage suffered, which must be determined individually in each case.[348] In the case of invalid dismissals (s)he can take legal action in order to get judicial assessment that the employment relationship has not been terminated.

The violation of **criminal law** pursuant to the Criminal Code or committing administrative offenses pursuant to the Administrative Offences Act would also lead to the imposition of penalties. According to our research the behavior of an employer violating the protection of a worker on strike does not have such consequences.

4.1. Wrongful dismissals

If an invalid dismissal notice is given to the worker legally on strike, (s)he may take legal action in the form of a **wrongful dismissal claim (*"Kündigungsschutzklage"*)**.[349] The subject matter of the proceeding is the judicial assessment that the employment has not been terminated by the dismissal at the indicated date.[350] This claim has to be filed within three weeks after receipt of notice of

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345 Art. 11 European Convention of Human Rights:
"1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.
2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State."

346 European Court on Human Rights (ECHR), judgement of 14.11.2006 – 20868/02 (*Metin Turan*), paras. 8 and 30.

347 European Court on Human Rights (ECHR), judgement of 27.3.2007 – 6615/03 (*Karaçay*), para. 37.

348 W. Ernst, in W. Krüger (ed.), Münchener Kommentar zum BGB, 6th ed., Munich: C.H. Beck 2012 , § 280 BGB, para. 104.

349 § 4 s. 1 Dismissal Protection Act (*Kündigungsschutzgesetz*, KSchG).

350 R. Zimmermann, in W. Mestwerdt et al. (eds.), Kündigungsschutzrecht, 1st ed., 2015, § 4, para. 12.

termination.[351] If this action is brought out of time, the notice of termination is considered legally effective right from the outset.[352] In case the court decides in favour of the plaintiff, it is determined judicially that the employment relationship has not been terminated by the dismissal at the indicated date and that an employment relationship existed at the date of receipt of the notice of termination and still does at the time of expiry of the notice period.[353]

4.2. Strike-breaker Bonuses ("*Streikbruchprämie*")

In case **strike-breaker payments** are made unlawfully to non-striking workers, the disregarded worker can claim to be granted the same advantage.[354]

4.3. Unlawful lock-outs

If the employer **unlawfully locks out** an employee, the former is in **default in acceptance**.[355] S(h)e is obliged to pay wages as if the employee had worked during the time of the lock-out. In case any further damage is caused to the employee, the employee can claim these damages.[356] S(h)e can also bring preventive action for an injunction and give notice of termination for a compelling reason.[357]

4.4. Other unfair treatment

The worker can claim that **any negative measure is taken back**. If there are reasonable grounds to suspect the measure might be taken again, (s)he can ask for an injunction. If the measure causes pecuniary losses, the employee can claim for damages.[358]

Regarding the question whether these instruments are considered adequate and effective, we have to assume that they are. Our research did not lead to any different conclusion.

5. Possibility to extend protection in collective agreements

Further protection than granted by law and developed by jurisprudence **can be provided by collective bargaining agreements**. In practice, protection is mainly extended in the cases of strike-breaker bonuses ("*Streikbruchprämien*"), wage reductions and sanctions for illegal action during a lawful strike.

Pursuant to the Collective Bargaining Act[359] a **collective bargaining agreement regulates the rights and obligations of the parties** of the agreement and determines the content of the employment relationship. Its function lies in the protection of the worker's interests ("*Schutzfunktion*") and in

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351 § 4 Dismissal Protection Act (*Kündigungsschutzgesetz*, KSchG*)*.

352 § 7 Dismissal Protection Act (*Kündigungsschutzgesetz*, KSchG).

353 F. Schmitt, in W. Däubler et al. (eds.), Arbeitsrecht: Handbuch für die Rechtspraxis, 3rd ed., Baden-Baden: Nomos 2013, § 4, para. 83.

354 § 612 Civil Code (*Bürgerliches Gesetzbuch*, BGB); M. Franzen, in B. Dauner-Lieb & W. Langen (eds.), BGB: Schuldrecht, 2nd ed., Baden-Baden: Nomos 2012, § 612a BGB paras. 19 and 21.

355 § 615 Civil Code (*Bürgerliches Gesetzbuch*, BGB).

356 §§ 280 para. 1, 241 para. 2 Civil Code (*Bürgerliches Gesetzbuch*, BGB).

357 § 626 Civil Code (*Bürgerliches Gesetzbuch*, BGB); W. Linsenmaier, in R. Müller-Glöge et al. (eds.), Erfurter Kommentar zum Arbeitsrecht, 15th ed., Munich: C.H. Beck 2015, art. 9 GG, para. 267.

358 § 280 Civil Code (*Bürgerliches Gesetzbuch*, BGB); M. Franzen, in B. Dauner-Lieb & W. Langen (eds.), BGB Schuldrecht, 2nd ed., Baden-Baden: Nomos 2012, § 612a BGB, para. 15.

359 § 1 Collective Bargaining Act (*Tarifvertragsgesetz*, TVG).

defusing social conflicts between employers and employees ("*Friedenspflicht*").[360] Collective bargaining agreements can contain all regulations that are related to the employment relationship, including obligations of protection ("*Schutzpflichten*").[361]

The parties of collective agreements generally agree on a so-called **general prohibition of sanction ("*allgemeines Massregelungsverbot*")** providing more protection than § 612a Civil Code.[362] Usually the wording of such an agreement is as follows: "Sanctions based on or related to the labour dispute shall not be imposed or shall be taken back again." ("*Jede Massregelung von Beschäftigten aus Anlass oder im Zusammenhang mit dem Arbeitskampf unterbleibt oder wird wieder rückgängig gemacht.*")[363]

Regarding the payment of **strike-breaker bonuses** to non-striking workers, § 612a Civil Code only forbids to effect such payments once the labour dispute is over. During a labour dispute, it is a lawful measure for an employer to respond to a strike.[364] Collective bargaining agreements however have further-reaching consequences. The aforementioned clause forbids differentiations between striking and non-striking workers in a general way, even during a labour dispute, as long as such a differentiation is not prescribed by law. Such a differentiation could endanger the restoration of labour peace after the dispute. This labour peace is precisely what should be guaranteed by forbidding such measures.[365] So if non-striking workers receive such strike-breaker bonuses during a labour dispute, striking workers can claim the same bonus once the dispute is over.[366]

During a lawful strike the **contractual duties are suspended** so that no wages are paid[367], but parties of collective agreements are free to agree on a back pay once the strike is over.[368] The details are being discussed controversially in the commentary.[369]

Even if a worker participating in a strike commits **illegal actions during a strike**, (s)he is protected by this general prohibition of sanction in collective bargaining agreements. In the interest of social peace once the strike is over, the employer cannot take any negative measures against the employee, as for example dismissals or written warnings.[370] It is disputed in literature if this applies to dismissals having

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360 B. Waas in C. Rolfs et al. (eds.), Beck'scher Online-Kommentar Arbeitsrecht, Munich: C.H. Beck 2015, § 1 TVG, para. 12.

361 M. Franzen, in R. Müller-Glöge et al. (eds.), Erfurter Kommentar zum Arbeitsrecht, 15th ed., Munich: C.H. Beck 2015, § 1 TVG, para. 41.

362 U. Reim & M. Ahrendt in W. Däubler (ed.), Tarifvertragsgesetz, 3rd ed., Baden-Baden: Nomos 2012, § 1 TVG, paras. 1273 *et seq*.

363 U. Reim & M. Ahrendt in W. Däubler (ed.), Tarifvertragsgesetz, 3rd ed., Baden-Baden: Nomos 2012, § 1 TVG, para. 1273.

364 M. Franzen, in B. Dauner-Lieb & W. Langen (eds.), BGB Schuldrecht, 2nd ed., Baden-Baden: Nomos 2012, § 612a BGB paras. 19 and 21

365 Federal Labour Court (*Bundesarbeitsgericht*, BAG), judgement of 13.07.1993 – 1 AZR 676/92.

366 M. Löwisch & V. Rieble, Tarifvertragsgesetz, 3rd edition, Munich: Franz Vahlen 2012, § 1 TVG, para. 2026.

367 B. Waas, in C. Rolfs (eds.), Beck'scher Online-Kommentar Arbeitsrecht, Munich: C.H. Beck 2015, art. 9 GG, para. 117.

368 U. Reim & M. Ahrendt, in W. Däubler (ed.), Tarifvertragsgesetz, 3rd ed., Baden-Baden: Nomos 2012, § 1 TVG, para. 1276.

369 U. Reim & M. Ahrendt, in W. Däubler (ed.), Tarifvertragsgesetz, 3rd ed., Baden-Baden: Nomos 2012, § 1 TVG, para. 1276 with further references.

370 Federal Labour Court (*Bundesarbeitsgericht*, BAG), judgement of 27.6.2002 – 2 AZR 367/01; U. Reim & M. Ahrendt, in W. Däubler (ed.), Tarifvertragsgesetz, 3rd ed., Baden-Baden: Nomos 2012, § 1 TVG, para. 1274.

immediate effect.[371] Law does not provide such an extensive protection, for it allows such measures in case of illegal actions committed by a worker on strike.[372] Terminations declared after assigning the agreement are invalid. If an initially valid termination has been declared prior to the agreement, it cannot become invalid with retroactive effect, because the relevant date for the validity or invalidity of a dismissal is the date of its receipt. In this case, the prohibition of giving notice turns into a right of reinstatement of the employee, which can even be claimed if the period of three weeks for bringing an action against this dismissal[373] has expired.[374]

This agreement on a **general prohibition of sanction** is common and **frequently used in practice**.[375] Our research did not lead to any different conclusion.

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371 M. Löwisch & V. Rieble, in M. Löwisch & V. Rieble, Tarifvertragsgesetz, 3rd ed., Munich: C.H. Beck 2012, § 1 TVG, para. 2029.

372 S. Fiebig & R. Zimmermann, in S. Fiebig et al. (eds.), Kündigungsschutzrecht, 2nd ed., Baden-Baden: Nomos 2012, § 1, para. 453; B. Waas in C. Rolfs et al. (eds.), Beck'scher Online-Kommentar Arbeitsrecht, Munich: C.H. Beck 2015, art. 9 GG, para. 123

373 § 4 Dismissal Protection Act (*Kündigungsschutzgesetz*, KSchG).

374 U. Reim & M. Ahrendt, in W. Däubler (ed.), Tarifvertragsgesetz, 3rd ed., Baden-Baden: Nomos 2012, § 1 TVG, para. 1287.

375 U. Reim & M. Ahrendt, in W. Däubler (ed.), Tarifvertragsgesetz, 3rd ed., Baden-Baden: Nomos 2012, § 1 TVG, para. 1273.

D. ITALY

1. Legal status of the right to strike

1.1. Legal basis

1.1.1. Constitutional

L'art. 40 de la **Constitution** italienne de 1948 déclare : « **Le droit de grève s'exerce dans le cadre des lois qui le réglementent**. ». Le droit de grève est constitutionnellement garanti en Italie depuis 1948.

Avant cette date, la grève était illégale du point de vue du droit civil et du droit pénal. Sur le plan du droit civil, la grève était une violation du contrat et les grévistes pouvaient subir la **réaction disciplinaire** de l'employeur. Sur le plan du **droit pénal**, les grévistes étaient soumis aux sanctions pénales déjà en vertu du Code Zanardelli de 1889. Avec l'avènement du fascisme, la grève est qualifiée par une loi du 3 avril 1926, n ° 563, d'infraction pénale. Par la suite, c'est le nouveau code pénal de 1931, le code **Rocco**, qui identifie plusieurs types de crime de « grève », selon les objectifs poursuivis.

Ainsi, parmi les crimes contre l'administration publique, le Code pénal comprenait le crime **d'abandon collectif et individuel des bureaux publics, des emplois, des services ou des travaux** (art. 330 et 333). En particulier, l'art. 330 du Code pénal punissait expressément les dirigeants, les promoteurs et les organisateurs de grèves affectant les emplois publics, les services et les travaux.

D'autre part, le code distingue **les crimes de grève et de lock-out pour des buts contractuels** (art. 502), pour des **buts non-contractuels**, c'est-à-dire politiques (art. 503), comme moyen de **pression contre les pouvoirs publics** (art. 504), pour **solidarité ou protestation** (art. 505).

Ces normes sont en **contraste avec la Constitution de 1948** qui contient une nouvelle conception de la grève, maintenant devenue un droit des travailleurs. Le système italien ne permettant pas une abrogation implicite des normes pénales contraires à la Constitution, il a fallu attendre que la Cour constitutionnelle soit saisie pour une abrogation explicite. Ainsi, l'abrogation des articles 330 et 333 du Code pénal n'a eu lieu que 42 ans plus tard, grâce à la loi n. 146/1990.

La Cour constitutionnelle a éliminé la répression pénale par plusieurs décisions abrogatives ou bien interprétatives: ainsi elle a **déclaré non conforme à la Constitution la législation pénale** sur le droit de grève en entier (art. 502); ou bien elle l'a déclarée **non conforme en partie** à la Constitution (art. 503, 504 et 330), et encore, sans déclarer d'une façon explicite les normes pénales non conformes à l'art. 40, elle les a «**réécrites**» à la lumière des nouvelles normes constitutionnelles (art. 505).

Une autre chose à retenir est que, dans le système juridique italien, ce n'est que la grève qui est protégée par la reconnaissance d'un droit constitutionnel: aucune règle ne reconnaît un droit de lock-out. Ce dernier peut entraîner une **mise en demeure** du créancier (art. 1206 du Code civil) voire une **non-exécution** du contrat, et pourrait également être interprété comme une conduite antisyndicale (art. 28 Stat. lav.). Dans des cas spécifiques, le **lock-out** peut toutefois être légitime et est considéré comme **l'exercice d'une liberté** appartenant à l'employeur.

En effet, **le crime de lock-out** prévu (avec la grève) par l'art. 502 du Code pénal pour des buts contractuels a été **supprimé** par la déclaration de non-conformité de cette norme à la Constitution (Cour constitutionnelle n. 29/1960). En d'autres termes, aujourd'hui le lock-out est légitime pour le droit pénal et il se présente comme une «liberté». En revanche, le lock-out pour des buts politiques (art. 503), ou pour faire pression contre les pouvoirs publics (art. 504), ou bien pour solidarité ou

protestation (art. 505), reste encore un crime selon le droit pénal en vigueur en Italie même si, à notre connaissance, aucune condamnation pénale sur la base de ces normes n'a été prononcée.

1.1.2. Role of international law

À la même époque que la promulgation de la Constitution italienne, la liberté d'association contre l'autorité publique est déclarée par **la Convention OIT No. 87 de 1948.**

En application de ces règles, telles qu'elles sont interprétées en Italie, sont possibles seulement des **restrictions limitées au droit de grève dans le secteur public et dans les services essentiels *stricto sensu***. Dans ces deux cas, les organes de surveillance veillent à ce que ces restrictions ne privent pas les travailleurs d'un moyen essentiel de défense de leurs intérêts.

La Convention européenne pour la protection des droits de l'homme et des libertés fondamentales de 1950 prévoit, à l'art. 11, à côté du droit de réunion pacifique et d'association, «le droit de participer à la formation de syndicats et d'y adhérer pour la protection de ses intérêts ».

La première règle à caractère international qui mentionne explicitement le droit de grève est le dernier alinéa de l'art. 6 de la **Charte sociale européenne** de 1961 qui énonce: « les Parties contractantes reconnaissent «le droit des travailleurs et des employeurs à des actions collectives en cas de conflits d'intérêts, y compris **le droit de grève**, sous réserve des obligations qui pourraient résulter des conventions collectives » (Charte sociale européenne 1961, 521 ff.).

Des règles sur la liberté d'association sont en outre contenues dans le **Pacte international relatif aux droits économiques, sociaux et culturels, adopté par l'ONU en 1966**, dont les dispositions, cependant, offrent une protection plus limitée par rapport à celles de la Convention 87 de l'OIT. En effet, le Pacte prévoit la possibilité d'imposer des restrictions législatives à l'exercice des droits qui y sont prévus pour les membres des forces armées et de la police, et pour les fonctionnaires. En outre, l'exercice du droit à la liberté d'association, à la fois pour l'individu et pour les associations, peut être limité si nécessaire afin de protéger « la sécurité nationale ou l'ordre public ou […] des droits et libertés d'autrui ». D'autre part, le Pacte protège expressément le droit de grève, à condition que ce droit soit "exercé en conformité avec les lois de chaque pays" (Lai 1992, par. II. 5.A.).

Selon les règles internationales que nous venons de rappeler il est possible pour le législateur, à certaines conditions, de réglementer l'exercice du droit de grève. Ainsi, la Loi italienne du 12 juin 1990 n. 146 a pour principal objectif la conciliation de l'exercice du droit de grève dans les services publics essentiels à la jouissance des autres droits de la personne protégée par la Constitution.

1.2. Substantive law

1.2.1. Definitions

1.2.1.1. General definition

En Italie, **la loi ne donne pas une définition du «droit de grève»** reconnu par l'art. 40 de la Constitution. Cette norme était programmatique, dans le sens où elle préfigurait une réglementation législative de son exercice. Cependant des **lois sur la grève** n'ont jamais été promulguées, si l'on fait exception de la grève dans les services publics essentiels (pour laquelle on a promulgué la **loi n. 146/1990, modifiée par la loi n. 83/2000**). D'autres hypothèses spécifiques de règlementation de grève existent: la grève des officiers au **contrôle du trafic aérien** (loi 23 mai 1980, n. 242), celle des travailleurs des **installations nucléaires** (art. 48, décret législatif 17 mars 1995, n. 230), celle de la **police d'État** (art. 84, loi du 1er avril 1981, n. 121), celle de la **police pénitentiaire** (art. 19, alinéa 13, loi 15 décembre 1990, n. 395) et celle des **militaires** (art. 8, loi 11 Juillet 1978, n. 382). Aucune de ces lois, toutefois, ne contient de

définition de la grève. En vertu des lois mentionnées, **la grève est interdite aux militaires et à la police** (d'Etat et pénitentiaire). Pour ce qui concerne les **installations nucléaires**, la sûreté et la protection de la santé exigent la **permanence du personnel**, ce qui limite l'exercice du droit de grève. Dans des domaines tels que la sidérurgie et la chimie (les **installations à cycle continu**), des limitations exigent qu'un certain nombre de travailleurs soit présent pour continuer l'activité.

En dehors de ces exceptions, l'absence d'un cadre législatif sur la grève est liée en partie aussi à la circonstance que la deuxième partie de l'art. 39 de la Constitution sur la reconnaissance juridique des syndicats et sur l'efficacité *erga omnes* des conventions collectives est restée « lettre morte ».

En l'absence d'une définition législative, c'est dans la **jurisprudence** qu'il faut chercher une définition de la notion de grève. Celle-ci se résume dans l'abstention collective et concertée du travail pour la protection d'un intérêt économico-professionnel.

Plus précisément, on peut observer que, dans un premier temps, il était courant d'affirmer que le droit de grève n'appartient qu'aux **travailleurs salariés** («technique de définition»).[376] En ce sens, la Cour constitutionnelle a eu l'occasion de relever que l'abstention du travail est un moyen de pression **sur l'employeur, pour obtenir des biens qui se trouvent à la disposition** de ce dernier.[377]

De plus, on considérait que **l'abstention devait être « totale ».** Ainsi, pendant de nombreuses années (jusqu'en 1980) la jurisprudence a considéré illégitimes les formes de grève anomales, comme la « grève tournante » (dite grève-hoquet en italien – sciopero a singhiozzo) ou celle « perlée » (dite grève-échiquier, en italien – sciopero a scacchiera).

Aujourd'hui, selon le droit italien, le droit de grève est le droit à l'« abstention du travail décidé et mise en œuvre par un groupe de travailleurs employés, afin d'obtenir des biens économiques et sociaux, que le système met en relation avec les exigences de protection et de développement de leur personnalité ».[378]

La notion est très vaste.

Par ses arrêts relatifs à l'abrogation de normes pénales italiennes sur la grève, **la Cour constitutionnelle a esquissé un régime de la grève qui s'appuie sur les «buts» de la protestation** (Cour constitutionnelle n. 29/1960 sur la grève pour des buts contractuels; Cour constitutionnelle n. 123/1962 sur la grève de solidarité; Cour constitutionnelle n. 290/1974 sur la grève politique).

La Cour constitutionnelle a aussi admis la légitimité de la grève des exploitants de petites industries et des entreprises, qui ne disposent pas de travailleurs.[379]

En revanche, la jurisprudence **de la Cour de Cassation a identifié les limites de «l'exercice du droit» de grève** (Cass. n. 711/1980). Par exemple, la Cassation a déclaré que sont également titulaires du droit de grève les travailleurs indépendants en régime de « parasubordination »

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376 Cfr. Toutefois C. cost. 17 luglio 1975, n. 220, cit., p. 1569 ss., à p. 1570 où la Cour évoque que l'on pourrait inclure dans le droit de grève le droit de "lock-out" des employeurs.

377 C. cost. 28 dicembre 1962, n. 123, in *Giur. cost.*, 1962, 1506, spec. point. 6.

378 C. cost. 17 marzo 1969, n. 31, in *Giur. cost.*, 1969, 410.

379 C. cost. 17 luglio 1975, n. 220, cit.

(« *parasubordinazione* »).[380] Une question particulière s'est posée en Italie à la suite de la « grève des avocats ».[381]

La Cour de cassation a par la suite précisé que la «grève» est «l'abstention collective du travail, organisée par une pluralité de travailleurs, pour atteindre un but commun».[382]

1.2.1.2. Elements of the right to strike

En résumé, la notion de grève comprend deux éléments essentiels :

1) **abstention collective** du travail. Selon l'orientation qui prévaut actuellement, la grève est un droit « à exercice collectif»: le droit appartient à chaque employé, mais pour que nous puissions parler de «grève», il est nécessaire que l'exercice du droit soit fait de manière collective. Ainsi, la grève ne peut pas être déclarée par un seul individu, mais par un certain « nombre de travailleurs ». Même une **coalition spontanée ou occasionnelle** de travailleurs peut déclarer une grève. En d'autres termes, il n'est pas nécessaire que ce soit une entité collective spécifique, notamment le syndicat, qui déclenche une grève et en organise la mise en œuvre. **On exclut de manière unanime que la grève puisse être proclamée exclusivement par les syndicats, en raison de la liberté d'organisation syndicale reconnue par l'art. 39, alinéa 1er, de la Constitution.** La grève est ouverte à tous les travailleurs qui désirent y adhérer, indépendamment de l'adhésion aux syndicats qui l'ont déclarée ou à d'autres syndicats. Selon d'autres définitions, la grève est un droit d'égalité sociale.[383] Nul doute, cependant, que même les catégories les plus privilégiées ont la titularité du droit de grève – par exemple les dirigeants et les cadres (Pera 1989, n. 7).
2) La grève doit avoir pour but la protection d'un **intérêt collectif** : la négociation d'un accord collectif, la solidarité, la protestation etc.. À ce propos, comme on vient de le voir, il n'est pas nécessaire que la grève soit **dirigée contre un employeur**, la pression pouvant être dirigée vers d'autres centres de pouvoir. Egalement les grèves de nature **économico-politique** sont légitimes. La Cour constitutionnelle a inclus cette forme de « grève » dans la notion de l'article 40 et par conséquent déclaré la non-conformité à la Constitution italienne des art. 504 et 505 du Code pénal, qui punissaient la «grève visant à exercer une coercition sur les pouvoirs publics, à exprimer une protestation, ou la solidarité avec les autres travailleurs». [384] Un exemple concret de la première forme évoquée est la grève générale du 16 avril 2002, contre la réforme de l'article 18 Stat. Lav. proposée par le gouvernement Berlusconi. La **grève de solidarité** est la grève effectuée à l'appui de revendications de nature économique d'autres travailleurs, appartenant à la même catégorie et déjà en grève. Compte tenu de l'existence indiscutable d'intérêts communs à des catégories entières de travailleurs, la Cour a examiné l'exercice de cette forme de lutte dans une loi sur une détermination des besoins d'affinité qui motivent l'agitation de l'un ou l'autre. La **grève de protestation** est celle par laquelle les grévistes ont l'intention d'exprimer leur désaccord avec certains comportements de l'employeur (par exemple une violation des obligations de sécurité; le paiement retardé des salaires). Plus tard la Cour a aussi déclaré la non-conformité à la Constitution de l'art. 503 du Code pénal « dans la mesure où cet article punit également la **grève politique** qui ne vise pas à porter atteinte à l'ordre constitutionnel ou à empêcher ou entraver le libre exercice des

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380 Cass. 29 giugno 1978, n. 3278, in *Foro it.*, 1980, I, 25 ss.

381 La C. cost. 27 maggio 1996, n. 171. considère que la grève des avocats est soumise à la législation spéciale sur les services publics essentiels *(infra*).

382 Cass. 30 gennaio 1980, n. 711, in *Foro it.*, 1980, I, 25 ss.

383 SIMI, Il diritto di sciopero, Milano, 1956, p. 83 ss.

384 C. cost. 28 dicembre 1962, n. 123, in *Giur. cost.*, 1962, 1506, spec. point. 6.

pouvoirs légitimes dans laquelle est exprimée la souveraineté du peuple ».[385] Un exemple de ce type de grève sont les grèves déclarées dans le but d'empêcher la participation de l'Italie à des actions belliqueuses telles celles contre l'ex-Yougoslavie ou en Irak dans les années 1990.

1.2.1.3. Atypical strikes or new forms of strike

Initialement, la Cour a déclaré la légitimité de la grève pour des **raisons économico-politiques** c'est-à-dire ayant en vue de mesures « qui peuvent affecter directement le domaine de l'emploi ». Ce faisant, elle confirmait l'illégitimité de grèves « dans le but de faire pression contre la direction générale de la politique du gouvernement ». Après un revirement, une autre forme de grève, non purement «politicoéconomique» a été admise. Il s'agit de la grève par laquelle des travailleurs se donnent pour but d'influencer les politiques générales du gouvernement (grève «**politique pure**» ou «politique au sens strict»). **Comme pour le lock out légitime, ce type de grève, ne constitue pas l'exercice d'un droit, mais l'exercice d'une liberté**. Ainsi la grève purement politique pourrait entrainer une non-exécution du contrat selon la Cour. En outre, la grève politique doit respecter **l'interdiction de subvertir l'ordre constitutionnel et d'empêcher ou entraver le libre exercice des pouvoirs légitimes qui permettent à la souveraineté populaire de s'exprimer**.[386]

Par la suite, la Cour de cassation a affirmé la **légitimité de la grève politique pure même sur le plan civil**.[387]

Pendant longtemps la jurisprudence a considéré toutes les formes de **grève articulée** illégales. Cependant, la Cour de cassation[388] a par la suite précisé que dans le contexte social italien le mot grève ne signifie rien de plus qu'une abstention collective de travail, préparée par un certain nombre de travailleurs pour atteindre un but commun, et a exclu qu'une délimitation liée aux dimensions de l'abstention soit possible.

Par conséquent, les seuls profils d'illégitimité qu'une abstention pourrait avoir sont liés aux éventuels « **dommages à la productivité** » causés par le comportement irresponsable de grévistes. Comme nous l'avons relevé le **dommage à la production** – sacrifice économique à la charge de l'employeur pendant la période de grève – demeure légitime, alors que une atteinte à la productivité, qui diminue irréversiblement la capacité de production même une fois que la grève est terminé et les travailleurs ont repris le travail, est illégitime.

Ces mêmes principes s'appliquent à deux formes de protestation impliquant une occupation des locaux /de l'entreprise : la « **grève sur le tas** », qui consiste à arrêter le travail sans quitter les lieux et la « **grève à l'envers** », qui se réalise quand les travailleurs se rendent au travail sans respecter les horaires fixés dans leur contrat avec l'effet d'interrompre la production. Cette dernière forme de lutte a parfois conduit à une occupation de l'entreprise avec expulsion de l'employeur.

Le **piquet de grève** est illégal s'il est réalisé par la violence ou s'il entraîne des menaces à l'encontre des travailleurs non-grévistes.[389]

Une forme atypique de grève est la «**grève des fonctions**», qui consiste à refuser de s'acquitter de certaines obligations de la prestation de travail mais à continuer à en exécuter d'autres. Cette forme de lutte syndicale, ne concrétisant pas une suspension du travail a été considérée tantôt comme une

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385 C. cost. 27 dicembre 1974, n. 290.

386 Cour constitutionnelle n. 290/1974, cit.

387 Cass. n. 16515/2004.

388 Cass. n. 711/1980, cit.

389 Cass. 10 mars 1983.

expression de l'exercice du droit de grève,[390] tantôt comme une inexécution illégitime du contrat de travail, mais cette affirmation n'est pas partagée unanimement.[391]

La « **grève de rendement** », une grève qui entraîne un ralentissement de la production, ne rentre pas dans la notion de grève de l'art. 40 de la Constitution. Cette forme de protestation entraîne une inexécution partielle du contrat de travail, autorisant l'employeur à prendre des **sanctions disciplinaires** pouvant même entraîner le licenciement pour faute de l'employé. La Cour de cassation a également admis la possibilité de réduire la rémunération de l'employé, proportionnellement à la réduction de son rendement.[392]

Une autre forme atypique illégitime est la « **grève de zèle** », qui survient lorsque les travailleurs, au lieu d'exécuter les directives de l'employeur, se limitent au strict respect des lois et des règlements qui régissent leur contrat : ce comportement viole le devoir de coopération, de diligence et d'exactitude qui est à la base du contrat de travail.[393] Les conséquences décrites pour la grève de rendement peuvent se produire également pour la grève de zèle.

Légitime et expression du droit de grève est la « **grève du travail supplémentaire** », qui consiste à refuser d'effectuer des heures supplémentaires.[394]

1.2.2. Conditions for exercising the right to strike

Le droit de grève, comme tous les droits constitutionnellement garantis, n'est pas un droit « absolu » mais relatif, dans le sens où sa protection est **contrebalancée** par la nécessité de protéger les autres droits fondamentaux. Pour ce faire il est soumis à des conditions générales et à des conditions qui sont spécifiques aux professions susceptibles d'affecter les droits de citoyens.

1.2.2.1. General Conditions: Limits aimed at protecting the employer

Le droit de grève a connu une évolution qui a porté à un élargissement de la notion, visant à inclure toute forme de grève et à **nier l'existence de limites « internes »** à son exercice (Pera 1989, n. 9).

En Italie la grève est généralement de «courte» durée, les abstentions sont programmées sur certains jours pendant toute la période du différend avec l'employeur (*ibidem*). Fréquente est la grève «articulée» en différentes variantes, typiquement la grève tournante (sciopero a singhiozzo), qui prévoit une alternance continue de courtes périodes de travail et de courts arrêts de travail et la « **grève-perlée**» (sciopero a scacchiera), qui prévoit la grève des travailleurs des différents départements qui ont des relations fonctionnelles entre eux, avec pour résultat global de désorganiser la production (les travailleurs sont au travail mais il leur est temporairement impossible de travailler dans le département en aval parce que le matériel ne parvient pas de l'amont en grève etc.). L'objectif déclaré de ces formes est de causer le maximum de dommages à l'entreprise avec un minimum d'abstention de travailleurs: ils souffrent d'une diminution de salaire relativement modeste parce-que les périodes d'abstention sont moindres; l'entreprise, cependant, subit des dommages très importants et même plus graves que ceux qui seraient causés par une grève totale prolongée: les frais sont presque les mêmes, mais la production est désorganisée ou partiellement défectueuse, etc. (*Ibidem*).

390 Cass. 6 octobre 1999, n. 11147.

391 Cass. 2 septembre 1995, n. 9280.

392 Cass. n. 6850/1982.

393 Cf. les arts. 1175, 1176, 1375, 2104 et 2094 du Code civil de l'Italie.

394 Cass. 13 mars 1986, n. 1701.

Dans un arrêt de 1980,[395] la Cour de cassation a affirmé que ces formes de grève sont légitimes; l'entreprise peut toutefois refuser l'exécution du contrat de travail offerte par les grévistes « tournants » lorsque cette exécution est, dans la réalité de la situation, seulement apparente et d'aucune utilité à la production. En supposant que, en fait, l'impossibilité de travail dans les différents départements résulte de la mise en œuvre d'un plan de lutte qui affecte tous les travailleurs, il devrait être conclu que les employés d'un département qui sont apparemment inactifs pour le fait de tiers, le sont en réalité en raison «de leur grève», ce qui détermine la perte de salaire même s'ils se sont rendus sur le lieu de travail.

Cet arrêt réaffirme en tout cas la pleine légitimité du droit de grève avec les seules limites « extérieures » qui consistent à prévenir des **risques pour le personnel** et pour la **liberté d'initiative économique « dans un sens dynamique»**.[396]

Les premières deux limites ne font pas de doutes : le droit de grève ne pouvant pas avoir l'effet de mettre en **danger la vie et la sécurité des personnes** (en provoquant par exemple des catastrophes écologiques).

La troisième est plus difficile à saisir puisqu'elle demande de mettre en œuvre une distinction entre les dommages causés par les travailleurs à la production et les **dommages causés à la productivité** de l'entreprise (Pera 1989, n. 9). Les premiers étant la conséquence normale de l'exercice du droit de grève, les deuxièmes représentants une limite externe à ce droit.

Cette distinction, déjà présente dans une décision précédente de la Cour constitutionnelle, [397] apparaît difficile à tracer quand les appareils d'entreprises souffrent en cas d'usure anormale et accélérée, entraînant la nécessité de les renouveler prématurément.

À ce propos, pour concilier les exigences opposées des travailleurs et de l'employeur (les dommages à la production pour l'entreprise et l'absence de dommages pour les machines employées pour la production), dans un cas particulier il a été convenu, que la production continue à pleine vitesse de manière à ne pas endommager les machines, mais que le produit soit détruit par la suite (Pera 1989, n. 9). Dans ce même ordre d'idées, il est parfois décidé que les systèmes de production fonctionnent au minimum, sans que la production soit significative.

1.2.2.2. Specific conditions for strikes in the « essential public services »: limits aimed at protecting citizens from the consequences of strikes

Des limites plus strictes sont prévues pour la grève des employés dans les services publics considérés essentiels. Ces limites sont fixées par la loi 146/1990.

Le droit de grève, garanti par l'art. 40, doit ici trouver un équilibre avec les autres droits protégés par la Constitution. Ainsi, le droit de grève ne peut pas empêcher qu'un **hôpital** soit opérationnel, ni admettre que la liberté de mouvement soit obstruée par une grève illimitée des **transports publics**, etc. La loi qualifie les services publics essentiels comme étant les services qui visent à la jouissance de droits/des droits qu'elles mentionnent/ des droits présentés ci-dessous, **indépendamment de la nature juridique de l'emploi** (public ou privé, salarié ou non salarié).

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395 Cass. 30 gennaio 1980, n. 711, in *Foro it.*, 1980, I, 25 ss.

396 Cass. 30 gennaio 1980, n. 711, cit., p. 32.

397 Cfr. C. cost. 28 dicembre 1962, n. 124, *Foro it.*, 1963, I, 1 ss., p. 3: qui a affirmé qu'il est « inammissibile, e contrario allo stesso interesse cui tende l'autotutela di categoria, che lo sciopero abbia per effetto di compromettere la futura ripresa del lavoro».

1.2.2.3. Definition of essential public services

Les services publics essentiels sont tous les services qui sont destinés à protéger : le **droit à la vie, à la santé, à la liberté et à la sécurité, à la liberté de mouvement, à la santé et la sécurité sociale, à l'éducation et à la liberté de communication**. Ainsi l'art. 1 de la loi les définit en son par. 1er. Le par. 2 en donne des exemples.

Art. 1.

1. Ai fini della presente legge sono considerati servizi pubblici essenziali, indipendentemente dalla natura giuridica del rapporto di lavoro, anche se svolti in regime di concessione o mediante convenzione, quelli volti a garantire **il godimento dei diritti della persona, costituzionalmente tutelati, alla vita, alla salute, alla libertà ed alla sicurezza, alla libertà di circolazione, all'assistenza e previdenza sociale, all'istruzione ed alla libertà di comunicazione.**

2. Allo scopo di contemperare l'esercizio del diritto di sciopero con il godimento dei diritti della persona, costituzionalmente tutelati, di cui al comma 1, la presente legge dispone le regole da rispettare e le procedure da seguire in caso di conflitto collettivo, per assicurare l'effettività, nel loro contenuto essenziale, dei diritti medesimi, in particolare nei seguenti servizi e limitatamente all'insieme delle prestazioni individuate come indispensabili ai sensi dell'articolo 2:

a) per quanto concerne la tutela della vita, della salute, della libertà e della sicurezza della persona, dell'ambiente e del patrimonio storico-artistico: la sanità; l'igiene pubblica; la protezione civile; la raccolta e lo smaltimento dei rifiuti urbani e di quelli speciali, tossici e nocivi; le dogane, limitatamente al controllo su animali e su merci deperibili; l'approvvigionamento di energie, prodotti energetici, risorse naturali e beni di prima necessità, nonché la gestione e la manutenzione dei relativi impianti, limitatamente a quanto attiene alla sicurezza degli stessi; l'amministrazione della giustizia, con particolare riferimento a provvedimenti restrittivi della libertà personale ed a quelli cautelari ed urgenti, nonché ai processi penali con imputati in stato di detenzione; i servizi di protezione ambientale e di vigilanza sui beni culturali;

b) per quanto concerne la tutela della libertà di circolazione: i trasporti pubblici urbani ed extraurbani autoferrotranviari, ferroviari, aerei, aeroportuali e quelli marittimi limitatamente al collegamento con le isole;

c) per quanto concerne l'assistenza e la previdenza sociale, nonché gli emolumenti retributivi o comunque quanto economicamente necessario al soddisfacimento delle necessità della vita attinenti a diritti della persona costituzionalmente garantiti: i servizi di erogazione dei relativi importi anche effettuati a mezzo del servizio bancario;

d) per quanto riguarda l'istruzione: l'istruzione pubblica, con particolare riferimento all'esigenza di assicurare la continuità dei servizi degli asili nido, delle scuole materne e delle scuole elementari, nonché lo svolgimento degli scrutini finali e degli esami, e l'istruzione universitaria, con particolare riferimento agli esami conclusivi dei cicli di istruzione;

e) per quanto riguarda la libertà di comunicazione: le poste, le telecomunicazioni e l'informazione radiotelevisiva pubblica.

1.2.2.4. Limits: the need for advance warning of strike and guaranteeing essential public services

Les limites du premier type sont exprimées par deux règles: la grève doit être précédée par un **préavis** adressé à l'autre partie au moins **dix jours** avant sa mise en œuvre,[398] et la grève doit être limitée dans le temps. Ces deux limites ne sont pas impératives toutefois : une possibilité de dérogation est prévue pour deux formes de grève : pour les grèves "pour la défense de l'ordre constitutionnel", et pour celles "de protestation pour les événements graves pour la sécurité en général ou pour la sécurité des

[398] Un préavis plus long peut être contracté, soit dans les accords sur les services essentiels, soit dans des codes d'autorégulation. *Infra.*

travailleurs» (accidents ayant entraîné la mort d'un travailleur ou d'un ou plusieurs bénéficiaires du service public).[399]

En ce qui concerne le préavis, les parties ont **l'obligation de notifier, par écrit,** la **durée** de la période de préavis, le **mode de mise en œuvre** et les **raisons** de la grève.

Le préavis ne doit pas être inférieur à 10 jours (la limite peut être augmentée par la négociation collective), mais l'obligation ne s'applique pas dans le cas d'une **grève déclarée pour défendre l'ordre constitutionnel** ou pour protester contre des **événements graves qui touchent l'intégrité et la sécurité des travailleurs**.

Le préavis permet à l'administration d'annoncer la grève aux utilisateurs du service : à sa charge il y a **l'obligation de "donner l'avis de grève aux utilisateurs** d'une manière appropriée, au moins cinq jours avant le début de la grève » et d'indiquer quelles seront les modalités et la durée de l'interruption/la restriction de la prestation de services au cours de la grève, ainsi que les mesures pour la réactivation intégrale du service (article 2, paragraphe 6). La même information doit également être fournie aux utilisateurs par les médias, ainsi qu'à une « **Commission de garantie** »[400] législativement établie pour surveiller le respect de la loi.

En outre la grève doit être précédée par des procédures de refroidissement et de conciliation. Le résultat négatif de ces procédures n'affecte pas la possibilité de déclarer la grève, à condition qu'on respecte les autres règles prévues par la loi.

La deuxième limite, prévue à l'article 2, paragraphe 2, prévoit que le gouvernement et les industries fournissant des services établissent conjointement avec les organisations de travailleurs, dans le cadre d'une convention collective ou d'autres accords collectifs ou dans le cadre de règlements, quels sont les **services indispensables** qui s'avèrent nécessaires à assurer pendant et nonobstant la grève.

La loi a été par la suite réformée par la loi du **11 avril 2000 n. 83**, qui a accru les pouvoirs de la Commission de garantie en prévoyant que, dans tous les cas où l'autonomie collective ne permettrait pas de négocier les conditions de légitimité de la grève dans les services publics essentiels,[401] la Commission adopterait un règlement provisoire :

> Art. 2.
>
> Qualora le prestazioni indispensabili e le altre misure di cui al presente articolo **non siano previste** dai contratti o accordi collettivi o dai codici di autoregolamentazione, **o se previste non siano valutate idonee**, la Commissione di garanzia adotta, nelle forme di cui all'articolo 13, comma 1, lettera a), la **provvisoria regolamentazione** compatibile con le finalità del comma 3. Le amministrazioni o le imprese erogatrici dei servizi di trasporto sono tenute a comunicare agli utenti, contestualmente alla pubblicazione degli orari dei

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399 D'Atena 1999, n. 9 et la note 87.

400 La Commission a été instituée par l'article. 12 de la Loi 12 Juin 1990 n. 146 (tel que modifié par la loi n. 83/2000). Il s'agit d'une administration indépendante qui assure la mise en œuvre de la loi sur les grèves dans les services publics essentiels. La commission se compose de sept membres nommés par les présidents de la Chambre des députés et le Sénat parmi des experts de droit constitutionnel, droit du travail et des relations industrielles. La nomination se fait par décret du Président de la République. Le site web de cette administration est le suivant : http://www.cgsse.it/web/guest;jsessionid=s-hTtH4HcUvMKCDTPMf-5Q

401 Un cas d'impasse avait déjà été porté devant la Cour constitutionnelle, qui avait dit pour droit que, faute d'accord au niveau de l'entreprise (donc faute de règlement négocié dans le cadre de l'autonomie collective), les services essentiels - que l'employeur est tenu d'assurer en toute circonstances – doivent être déterminés unilatéralement par lui au cas par cas : C. cost. 18 ottobre 1996, n. 344,

servizi ordinari, **l'elenco dei servizi che saranno garantiti comunque in caso di sciopero e i relativi orari,** come risultano definiti dagli accordi previsti al presente comma.

1.2.2.5. La « precettazione » : injunctions requiring parties to desist from industrial action

La Loi no. 83/2000 a modifié l'article 2, paragraphe 2 de la loi n. 146/90, en vue d'atténuer l'impact négatif du bras de fer parmi les parties sociales sur les utilisateurs. Plus précisément, il prévoit que les contrats et/ou les conventions collectives "doivent prévoir des procédures de « refroidissement » et de « conciliation », obligatoires pour les deux parties et précédant la proclamation de la grève [...]". Aussi, les parties peuvent demander une tentative de conciliation: a) si la grève a une importance locale, devant la préfecture, ou dans la municipalité en cas de grève dans les services publics municipaux ; b) si la grève a une importance nationale, devant le ministère du Travail et de la Sécurité sociale.

En cas de permanence du conflit en dépit de ces procédures, il est encore possible d'éviter ou bien de différer la grève par l'émission d'une injonction (« precettazione »).

La *precettazione* est un acte de nature administrative, assorti de sanctions administratives et que les parties peuvent attaquer devant le Tribunal administratif régional compétent (cf. art. 9 et 10 loi n. 146/90).
Le pouvoir d'émettre cette injonction appartient :

- au Président du Conseil (ou à un ministre nommé par lui), si le conflit est national ou interrégional;
- au préfet ou à l'organe correspondant dans les régions administratives spéciales, dans tous les autres cas.

Ce pouvoir est prévu par l'art. 8 de la loi n. 146/90, tel que modifié par l'art. 7, al 1, l. 11 avril 2000, n. 83.

Art. 8.

1. Quando sussista il **fondato pericolo di un pregiudizio grave e imminente ai diritti della persona** costituzionalmente tutelati di cui all'articolo 1, comma 1, che potrebbe essere cagionato dall'interruzione o dalla alterazione del funzionamento dei servizi pubblici di cui all'articolo 1, conseguente all'esercizio dello **sciopero** o a forme di astensione collettiva di lavoratori autonomi, professionisti o piccoli imprenditori, su segnalazione della Commissione di garanzia ovvero, nei casi di necessità e urgenza, di propria iniziativa, informando previamente la Commissione di garanzia, **il Presidente del Consiglio dei ministri** o un **Ministro da lui delegato**, se il conflitto ha rilevanza nazionale o interregionale, ovvero, negli altri casi, **il prefetto o il corrispondente organo nelle regioni a statuto speciale**, informati i presidenti delle regioni e delle province autonome di Trento e di Bolzano, **invitano le parti a desistere dai comportamenti che determinano la situazione di pericolo**, esperiscono un **tentativo di conciliazione**, da esaurire nel più breve tempo possibile, e se il tentativo non riesce, adottano con ordinanza **le misure necessarie a prevenire il pregiudizio ai diritti della persona costituzionalmente tutelati** di cui all'articolo 1, comma 1.
2. L'ordinanza può disporre il differimento dell'astensione collettiva ad altra data, anche unificando astensioni collettive già proclamate, la riduzione della sua durata ovvero prescrivere l'osservanza da parte dei soggetti che la proclamano, dei singoli che vi aderiscono e delle amministrazioni o imprese che erogano il servizio, di misure idonee ad assicurare livelli di funzionamento del servizio pubblico compatibili con la salvaguardia dei diritti della persona costituzionalmente tutelati di cui all'articolo 1, comma 1. Qualora la Commissione di garanzia, nella sua segnalazione o successivamente, abbia formulato una proposta in ordine alle misure da adottare con l'ordinanza al fine di evitare il pregiudizio ai predetti diritti, l'autorità competente ne tiene conto. L'ordinanza è adottata non meno di quarantotto ore prima dell'inizio dell'astensione collettiva, salvo che sia ancora in corso il tentativo di conciliazione o vi siano

ragioni di urgenza, e deve specificare il periodo di tempo durante il quale i provvedimenti dovranno essere osservati dalle parti.

3. L'ordinanza viene portata a conoscenza dei destinatari mediante comunicazione da effettuare, a cura dell'autorità che l'ha emanata, ai soggetti che promuovono l'azione, alle amministrazioni o alle imprese erogatrici del servizio ed alle persone fisiche i cui nominativi siano eventualmente indicati nella stessa, nonché mediante affissione nei luoghi di lavoro, da compiere a cura dell'amministrazione o dell'impresa erogatrice. Dell'ordinanza viene altresì data notizia mediante adeguate forme di pubblicazione sugli organi di stampa, nazionali o locali, o mediante diffusione attraverso la radio e la televisione.
4. Dei provvedimenti adottati ai sensi del presente articolo, il Presidente del Consiglio dei ministri dà comunicazione alle Camere (1) (2).

Le fondement du pouvoir d'injonction est l'existence d'une «menace bien fondée, grave et imminente, pour les droits de la personne protégés par la Constitution et visés à l'article 1er, paragraphe 1, qui découlerait de l'interruption ou la modification du fonctionnement des services publics visés à l'article 1er, en conséquence de la grève, à des formes d'abstention collective des professionnels indépendants ou des propriétaires de petites entreprises ". La modification de l'art. 8 vise à augmenter les possibilités de « precettazione ».

La *precettazione* intervient à la suite d'un *processus* assez articulé et comportant une première phase où les parties sont invitées à cesser les comportements qui menacent des droits constitutionnellement protégés, une tentative de conciliation, l'injonction et sa communication officielle.

L'injonction est à contenu variable : elle peut prévoir un ajournement de l'abstention collective déjà proclamée, une diminution de la durée de l'abstention, des mesures concrètes et aptes à assurer l'équilibre entre les exigences collectives et les droits individuels des utilisateurs.

1.2.3. Effect on contracts of employment

La participation à une grève légitime implique la simple **suspension de la relation de travail**, ainsi que la **perte de salaire** pour toute la période de l'abstention (ou bien pour une période supérieure si la reprise du travail est seulement apparente : *supra sub* 1.3.). Cette perte est justifiée en raison de la nature réciproque du contrat de travail : l'obligation de chaque partie est le fondement de l'obligation de l'autre.

La jurisprudence admet que la perte de salaire ne concerne pas que le salaire mensuel et que l'employeur ait le droit de **réduire proportionnellement toute forme de rémunération différée** (Cass., sez. lavoro, 26 ottobre 1984, n. 5506, in *Mass. giur. lav.*, 1984, 569; Cass., sez. lavoro, 12 gennaio 1984, n. 256, in *Notiziario di giurisprudenza del lavoro*, 1984, 441).

La doctrine, cependant, observe qu'il faut faire à ce propos **une distinction entre «rémunération différée» et « acomptes »**. Ainsi les gratifications, tout comme les vacances, et les indemnisations doivent être attribuées sur la base du salaire actuel au moment de la maturation du droit à les obtenir, ce qui entraîne l'imperméabilité de cette partie du salaire à la perte conséquente à la grève (GHEZZI et ROMAGNOLI, 1987, 235 s).

La participation à une grève illégitime, en revanche, peut entraîner un licenciement disciplinaire **en cas d'extrême gravité** (autrement l'employeur risque de s'exposer à l'accusation de discrimination antisyndicale (Pera 1989, n. 10)).[402]

402 *Infra* par. 3.

1.2.4. Other Effects in case of « illegal strikes » in the sector of public services

Des conséquences spécifiques sont prévues par la loi n. 146/1990 pour les services publics essentiels. Quand les syndicats violent les obligations légales prévues par cette loi, les **permis syndicaux payés** et/ou les **cotisations syndicales retenues** sur le salaire sont suspendus pour toute la période de l'abstention. A cela s'ajoute le paiement d'une **somme déterminée en fonction de l'importance** de l'association syndicale, de la **gravité** de la violation commise, du caractère **récidiviste** du comportement des grévistes, ainsi que des **effets que la grève** a eu sur le service public.

Une autre sanction est celle qui prévoit **l'exclusion temporaire des syndicats des négociations collectives**.

Si les syndicats ne jouissent pas d'avantages financiers (cotisations et permis) et/ou s'ils ne participent pas aux négociations, ces sanctions deviennent inapplicables.

Dès lors le syndicat peut être condamné à payer une sanction administrative, dont le montant est calculé de manière hypothétique (par exemple, la somme correspondant à celle qui découlerait de l'application de sanctions, si celles-ci avaient été applicables). Les personnes qui, selon la loi et le statut des associations syndicales, **représentent l'association sur le plan civil**, sont tenues par l'obligation de payer.

2. Role of the right to strike in collective labour relations

2.1. Relation with other forms of action and role in collective negotiations

Jusqu'à l'adoption de la loi n. 146/1990, les codes de conduite adoptés unilatéralement par les syndicats confédéraux contenaient une **autoréglementation de la grève** dans les services publics essentiels **pour protéger les droits constitutionnels des usagers des services**, même dans le cas de grève de travailleurs indépendants et des professionnels, dans la mesure où leur activité affecte le fonctionnement des services publics considérés essentiels. Il s'agit notamment des **avocats, des pharmaciens privés, des chauffeurs de taxi, des chauffeurs de camion, des exploitants des installations de distribution de carburant**, etc. La loi n. 146/1990, modifiée par la suite par la Loi n. 83/2000 n'a pas changé cet état de choses et a confié à ces codes d'autoréglementation la tâche d'identifier les prestations indispensables qui doivent être assurées en cas d'abstention collective des travailleurs.

En général, on a pu observer que les limites à l'exercice du droit de grève posées par la loi n. 146/1990 sont largement respectées dans les services essentiels exploités par les administrations publiques et pas respectés dans le cas de services essentiels exploités par des privés.

Il semble que, dans la première hypothèse, le respect des règles de la loi de 1990 est assuré en raison du fait que le **système syndical est régi par la loi**.

En revanche, des problèmes d'application de la loi de 1990 ont été enregistrés dans le domaine du transport aérien et du transport ferroviaire après la « privatisation » de ces services.

Ces problèmes sont la conséquence de **l'incertitude des règles de représentation syndicale** et de **la haute conflictualité entre les parties sociales**.

À ce propos, des **grèves de « légitimation »** ont été enregistrées, c'est-à-dire des grèves proclamées par de petits syndicats indépendants dont le but principal était de se faire reconnaître par l'employeur en tant que partenaires pour la négociation de conventions collectives.

2.2. Use of the right to strike in practice

Le droit de grève est depuis toujours très utilisé en Italie.

L'Istat a publié, de 1948 à 2010,[403] des tables sur les « Conflitti di lavoro, lavoratori partecipanti e ore non lavorate per settore di attività economica - Anni 1949-2009 » sur le site : www.seriestoriche.istat.it.

Selon l'Annuaire des statistiques italiennes 2010 de l'ISTAT, en 2009 les causes les plus fréquentes des conflits qui ont été déclarées étaient : le **renouvellement du contrat de travail**, les **réclamations économico-normatives**, les **licenciements et arrêts** et la **solidarité**.

Une liste des grèves effectuées par les travailleurs en Italie est offerte par la revue italienne « Internazionale »[404]:

- 1900 Lo sciopero a Genova fa cadere il governo Saracco. Il deputato socialista Pietro Chiesa afferma: "Lo sciopero di Genova resterà famoso e farà epoca negli annali dei lavoratori di tutto il mondo per la grandezza, la solennità e la serietà della dimostrazione".
- 1904 È il primo sciopero generale in Italia. È indetto contro l'eccidio dei minatori sardi di Burregu (Cagliari): l'esercito ha sparato sui minatori durante lo sciopero e ne ha uccisi quattro. L'Italia resta paralizzata dal 16 al 21 settembre. Aderiscono i lavoratori di tutte le categorie.
- 1911 Il grande sciopero degli ottomila operai di Portoferraio e Piombino è organizzato contro il neonato consorzio Ilva che ha deciso la diminuzione del compenso. Gli operai cominciano la lotta, a Piombino arrivano 300 soldati, ma alla fine la mobilitazione ha successo.
- 1914 Quella dal 7 al 14 giugno è ricordata come la "settimana rossa". Si svolgono alcuni scioperi che sembrano un'insurrezione contro lo stato dovuta alle riforme introdotte da Giovanni Giolitti. Dopo la morte di tre giovani manifestanti ad Ancona, uccisi dalla polizia, è proclamato lo sciopero generale. Le proteste si propagano dalle Marche alla Romagna alla Toscana e ad altre parti d'Italia.
- 1919-1920 Una serie di lotte operaie e contadine culmina con l'occupazione delle fabbriche. Tra gli eventi più significativi, lo sciopero agricolo a Novara, Vercelli, Casale Monferrato, Mortara, Pavia e Voghera che dura cinquanta giorni tra il marzo e l'aprile del 1920 con oltre 180mila lavoratori che danno vita a uno dei conflitti sindacali più lunghi e radicali di tutta la storia del proletariato italiano.
- 1944 L'adesione allo sciopero generale è superiore a ogni aspettativa ed è il più grande movimento di massa organizzato in Europa durante la guerra nei territori occupati dai tedeschi. Milano e Torino restano paralizzate per otto giorni. Partecipano in tutta l'Italia del nord due milioni di operai. Le rivendicazioni economiche alla base dello sciopero non hanno successo.
- 1948 Lo sciopero generale è organizzato dalla Cgil per il 14 luglio contro l'attentato a Palmiro Togliatti. Dal letto dell'ospedale Togliatti invita alla calma. Il paese si ferma, il governo schiera l'esercito. I dirigenti dei partiti di sinistra chiedono le dimissioni del governo.[405]
- 1953 La riduzione della manodopera nelle fabbriche che lavoravano il ferro e il licenziamento di molti operai sono tra le cause dello sciopero della Magona, a Piombino. Dopo l'annuncio il 9 febbraio del licenziamento di 500 operai alla Magona, è proclamato uno sciopero di quarantott'ore. Il giorno dopo, i lavoratori che hanno partecipato allo sciopero vengono licenziati.

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403 http://www3.istat.it/dati/catalogo/20120118_00/cap_10.pdf

404 http://www.internazionale.it/notizie/2014/12/12/gil-scioperi-in-italia

405 Cf. aussi Sabino Labia, Lo sciopero, storia di una protesta, http://www.panorama.it/news/politica/sciopero-storia-protesta/

- 1956 Il 14 marzo a Barletta la polizia spara su una manifestazione di lavoratori e disoccupati. Muoiono due braccianti. Il giorno dopo, si sciopera per protestare contro quelle morti. Comincia uno sciopero che durerà 42 giorni.
- 1959 Lo sciopero di Torre del Greco è ricordato come la "rivolta dei marittimi torresi". Per un'eccedenza di personale sulle navi sono stati istituiti turni di avvicendamento, con lunghi periodi di disoccupazione. Lo sciopero è proclamato a partire dall'11 giugno e provoca un fermo di 125 navi. Dopo aver protestato a bordo delle navi i lavoratori spostano la protesta nelle piazze: la rivolta causa più di 300 feriti tra i dimostranti e circa 60 arresti.
- 1960 La camera del lavoro proclama uno sciopero generale nella provincia genovese per il 30 giugno. Nel clima delle proteste per la convocazione a Genova del congresso del Movimento sociale italiano, Sandro Pertini dice: "La polizia sta cercando i sobillatori di queste manifestazioni, non abbiamo nessuna difficoltà a indicarglieli. Sono i fucinatori del Torchino, di Cravasco, della Benedicta, i torturati della casa dello studente".
- 1968 L'anno è attraversato da scioperi e manifestazioni e finisce nel sangue. Il 2 dicembre ad Avola, in Sicilia, è indetto uno sciopero generale. Si ferma tutto a sostegno del rinnovo del contratto dei braccianti. Gli studenti raggiungono i blocchi dei braccianti sulle strade. La polizia carica, comincia il lancio dei lacrimogeni, poi gli agenti aprono il fuoco contro i braccianti. Ne muoiono due.
- 1969-1970 Il ciclo conflittuale raggiunge la sua massima forza politica. Tra i tanti scioperi, quello della Fiat nel 1969. Il 6 luglio 1970 tutto culmina nella caduta anticipata del governo di Mariano Rumor dopo la proclamazione di un nuovo sciopero generale unitario per il 7 luglio.
- 1972 Per la prima volta, a Reggio Calabria, i sindacati metalmeccanici organizzano una grande manifestazione di solidarietà a fianco dei lavoratori calabresi. Gli operai del nord e del centro vanno a manifestare al sud. I neofascisti tentano di impedire l'arrivo dei manifestanti con otto attentati ma più di 50mila manifestanti raggiungono Reggio Calabria con treni speciali.
- 1982 Il 25 giugno Cgil, Cisl e Uil decretano lo sciopero generale per protestare contro la decisione di Confindustria di eliminare la scala mobile.
- 2002 Il 16 aprile l'Italia si ferma per il primo sciopero generale dopo vent'anni. Lo sciopero è annunciato da Sergio Cofferati contro la riforma dell'articolo 18.

Pendant les années soixante-dix et quatre-vingt la violence de la lutte syndicale et le nombre de grèves ont conduit à décrire le phénomène en cours en tant que « **automne chaud** », qui désigne la lutte syndicale « contre tout et tous », au point que, en octobre 1980 on assistera à une manifestation *contre* une grève appelée la marche de quarante mille.[406]

C'est dans ce contexte que – pour garantir la paix sociale en répondant aux exigences des travailleurs et en protégeant leur droit de grève et en évitant la paralysie du pays contre les grèves « sauvages » - sera promulguée la **loi sur la grève dans les services publics essentiels**.

Cette loi vise à réglementer le droit de grève et introduit des procédures visant à l'institutionnalisation du conflit entre parties sociales.

2.3. Role of the right to strike in non-organised sectors

On a déjà eu occasion de relever que la Cour constitutionnelle a estimé qu'on doit qualifier comme droit de grève **le lock-out des petits entrepreneurs** et commerçants n'ayant pas de travailleurs dépendants, en considération de la faible position socio-économique de ces sujets.[407]

Pour cette même raison, la jurisprudence a reconnu le droit de grève aussi aux travailleurs **parasubordonnés**.[408]

406 *Ibidem.*

407 *Supra*, n. 1.2.1.

408 *Ibidem.*

Il faut encore préciser que l'abstention concertée et collective du travail des travailleurs indépendants et des professionnels – tels que les avocats,[409] les pharmaciens privés, les chauffeurs de taxi, les chauffeurs de camion, les exploitants des installations de distribution de carburant – ne s'interprètent pas en tant qu'exercice du droit de grève (aux termes de l'art. 40 de la Constitution). Il s'agit plutôt, dans ce cas, de **l'exercice de la liberté d'association**, qui bénéficie aussi d'une **protection de rang constitutionnel**. Cependant, du moment que l'abstention du travail peut affecter le fonctionnement des services publics essentiels, la loi n. 146/1990, telle que modifiée par la loi n. 83/2000, s'applique.

3. Protection of workers on strike

3.1. Special protection against dismissal and other unfair treatment

La poursuite pénale des dirigeants syndicaux était explicitement prévue par l'art. 330 du Code pénal qui était encore en vigueur, même après que la Cour constitutionnelle l'eût déclaré partiellement inconstitutionnel (Cour constitutionnelle n. 31/1969). Cet article a finalement été abrogé par la loi 146/1990. Cependant, même lorsqu'il était en vigueur, la possibilité de poursuite n'était que théorique.

En effet, spécialement depuis l'entrée en vigueur de la loi n. 300 de 1970 dénommée « statuto dei lavoratori », les travailleurs bénéficient d'une haute protection en Italie. Selon l'art. 15 de cette loi, **les actes discriminatoires visant à limiter l'activité ou l'action syndicale d'un travailleur sont nuls**.

En particulier, l'article édicte :

> "E' nullo qualsiasi patto od atto diretto a:
>
> a) subordinare l'occupazione di un lavoratore alla condizione che aderisca o non aderisca ad una associazione sindaca le ovvero cessi di farne parte;
>
> b) **licenziare un lavoratore**, **discriminarlo nella assegnazione di qualifiche o mansioni**, nei **trasferimenti**, nei **provvedimenti disciplinari**, o **recargli altrimenti pregiudizio** a causa della sua affiliazione o attività sindacale ovvero della sua partecipazione ad uno **sciopero**. Le disposizioni di cui al comma precedente si applicano altresì ai patti o atti diretti ai fini di discriminazione politica o religiosa."

La **discrimination antisyndicale** fait aussi l'objet de l'art. 28 de la loi n. 300 de 1970, qui la réprime en ces termes :

> « Qualora il datore di lavoro ponga in essere comportamenti diretti ad impedire o limitare l'esercizio della libertà e della attività sindacale nonché del diritto di sciopero, **su ricorso degli organismi locali delle associazioni sindacali** nazionali che vi abbiano interesse, il pretore del luogo ove è posto in essere il comportamento denunziato, nei **due giorni successivi**, convocate le parti ed assunte sommarie informazioni, qualora ritenga sussistente la violazione di cui al presente comma, **ordina al datore di lavoro**, con decreto motivato ed immediatamente esecutivo, la cessazione del comportamento illegittimo e la rimozione degli effetti.
>
> L'efficacia esecutiva del decreto non può essere revocata fino alla sentenza con cui il tribunale definisce il giudizio instaurato a norma del comma successivo.
>
> Contro il decreto che decide sul ricorso è ammessa, entro 15 giorni dalla comunicazione del decreto alle parti, opposizione davanti al tribunale che decide con sentenza immediatamente esecutiva.
>
> Il datore di lavoro che non ottempera al decreto, di cui al primo comma, o alla sentenza pronunciata nel giudizio di opposizione è punito ai sensi **dell'articolo 650 del codice penale**.
>
> L'autorità giudiziaria ordina la pubblicazione della sentenza penale di condanna nei modi stabiliti dall'articolo 36 del codice penale.»

409 Cour constitutionnelle n. 171/1996.

Le comportement antisyndical se caractérisent par deux éléments : un élément objectif qui est l'aptitude, même potentielle, du comportement de l'employeur à violer les intérêts protégés par l'article 28 et en premier lieu le droit de grève; un élément subjectif qui est l'intention de l'employeur d'avoir un comportement antisyndical.

Le comportement de l'employeur est considéré dans ce cas ***plurioffensif***, c'est-à-dire que l'employeur viole par sa seule conduite les droits du travailleur et ceux du syndicat. Les deux peuvent donc demander au juge la répression de la conduite antisyndicale. L'employé peut se prévaloir des voies de recours normales, tandis que le syndicat va profiter de l'instrument de procédure offert par l'art. 28 du Statut.

Le point le plus innovateur de l'article 28 concerne la **titularité de l'action**, attribuée directement aux **syndicats**. Grâce à cette disposition le syndicat peut faire déclarer la légitimité de la grève par l'autorité judiciaire et les discriminations envers les travailleurs concernés sont qualifiées de « conduites antisyndicales ».

L'ampleur de la protection de la grève est confirmée par la circonstance que l'art. 28 est structurellement ouvert et seulement téléologiquement déterminé (TREU 1974, 40 ss): ainsi il inclut **en plus des actes typiques** spécifiquement mentionnés **tout comportement préjudiciable à l'employé**, y compris des comportements matériels de l'employeur, qu'ils intègrent ou pas un véritable *mobbing*. Ainsi, même si l'employeur a le droit de décider un « **lock-out de rétorsion** », par lequel il ferme son entreprise et il libère les employés qui ne participent pas à la grève, cette conduite peut intégrer un comportement antisyndical s'il empêche les employés non-grévistes de remplir leur obligation de travail sans que le lock-out soit **nécessaire pour la protection des installations** et de la productivité de l'entreprise. Cependant, un travailleur n'est pas considéré « non-gréviste » quand il offre son service entre l'une et l'autre phase d'une grève perlée à laquelle il participe. En ce cas, le lock-out est considéré légitime si le service offert à l'employeur est « au-dessous de son unité technique-temporelle minimale », de sorte que le travail n'est pas totalement inutile, ne se réduit pas à un apport d'énergies sans but véritable.

Le « lock-out » peut être soumis à une évaluation de légitimité par le juge.

À ce propos, il faut souligner que, si les décisions judiciaires se fondent rarement sur les art. 15 et 16, la « conduite antisyndicale » par l'employeur a été presque toujours contrée par une action collective à l'aune de l'art. 28 (TREU 2014, 184).

L'art. 28 a permis aux syndicats de porter toute sorte de violation du principe de non-discrimination devant le juge, ce qui a permis à ce dernier d'exercer, d'une manière qui a pu même être jugée excessive, un pouvoir de **contrôle de grande ampleur sur les actes de gestion de l'employeur** (TREU 1990). Cette pratique a porté principalement sur les licenciements, le défaut de progressions de carrière et d'autres mesures préjudiciables aux employés.

3.2. Comparison with general protection

La protection du travailleur **est la même dans les deux cas** (nullité de tout acte de réaction, restauration du statu quo, y compris l'éventuelle réintégration du travailleur dans son poste en cas de licenciement), mais **les sanctions envers l'employeur** sont différentes, étant donné que l'Italie connait le régime spécifique de l'art. 28, visant à la répression de toute conduite antisyndicale, y compris et en premier lieu, une conduite qui puisse potentiellement **violer le droit de grève**.

En outre, l'art. 3 du décret législatif n. 368/2001 **interdit le remplacement de grévistes par des travailleurs à durée déterminée**. Une interdiction similaire concerne le travail intérimaire (art. 20 du décret législatif 10 septembre 2003, n. 276) et le **travail intermittent** (art. 34 du même décret).
En revanche, il est possible de remplacer les grévistes par des employés temporairement disponibles à occuper les postes laissés libres par les grévistes. On parle à ce propos de « dissidence intérieure dans une grève », utilisée pour atténuer les conséquences de la grève sur la production. Le pouvoir de changer l'organisation de la structure productive rentre dans la liberté d'entreprise assurée par l'art. 41 de la Constitution mais il faut que les limites prévues par la loi concernant le changement des fonctions soient respectés (art. 2103 du Code civil).

3.3. Role of international law on protection afforded

La protection garantie par le "Statut de travailleurs" dépasse largement le niveau prévu dans le contexte international (réintégration dans l'emploi etc.).

4. Enforcement and effectiveness of available sanctions

La conduite antisyndicale est réprimée par l'art. 28 de l. n. 300/1970 par le biais d'un système de sanctions qui ont aussi un caractère pénal.

En premier lieu, si le juge considère, après une première vérification provisoire, que la conduite de l'employeur est antisyndicale, **il peut ordonner à l'employeur de terminer son comportement illicite** et d'en éliminer les effets directs et indirects.

Cette ordonnance a immédiatement force exécutoire. Il en va de même pour la décision du tribunal qui décide sur l'éventuelle opposition de l'employeur à l'ordonnance.

Le premier objectif du législateur est la **restauration du *statu quo ante***, sans d'autres conséquences sur le plan pénal.

La sanction pénale n'intervient qu'en guise d'astreinte ; elle sert, si l'on peut dire, de moyen indirect de coercition. Afin de renforcer la protection du droit de grève et, en général également de l'action syndicale, il est prévu que l'employeur qui ne se conforme pas à la décision judiciaire se rend coupable du crime prévu par **l'art. 650 du Code pénal italien**, libellé « non-respect des ordres de l'autorité ».

Une éventuelle condamnation est en outre soumise à la sanction accessoire de la **publication dans les médias de la décision**, en vertu de l'art. 36 du Code pénal.

Une autre sanction a été ajoutée par l'art. 7, par. 7 de la loi 23 décembre 2000, n. 388 et consiste à **révoquer les subventions fiscales** éventuellement obtenues pour la création de nouveaux emplois **accordées à l'employeur** :

> 7. **Qualora vengano definitivamente accertate violazioni non formali**, e per le quali sono state irrogate sanzioni di importo superiore a lire 5 milioni, alla normativa fiscale e contributiva in materia di lavoro dipendente, ovvero violazioni alla normativa sulla salute e sulla sicurezza dei lavoratori, prevista dai decreti legislativi 19 settembre 1994, n. 626, e 14 agosto 1996, n. 494, e loro successive modificazioni, nonché dai successivi decreti legislativi attuativi di direttive comunitarie in materia di sicurezza ed igiene del lavoro, commesse nel periodo in cui si applicano le disposizioni del presente articolo e **qualora siano emanati provvedimenti definitivi della magistratura contro il datore di lavoro per condotta antisindacale ai sensi dell'articolo 28 della legge 20 maggio 1970, n. 300**, le agevolazioni sono revocate. Dalla data del definitivo accertamento delle violazioni, decorrono i termini per far luogo al recupero delle minori imposte versate o del maggiore credito riportato e per l'applicazione delle relative sanzioni.

5. Possibility to extend protection in collective agreements

Certaines conventions collectives contiennent des **clauses de paix syndicale** qui **limitent** – **plutôt que d'augmenter** – le droit de grève.
Un devoir de paix syndicale « absolue » (***absolute Friedenspflicht***) n'est toutefois admissible que si des clauses de la convention collective le prévoient de façon explicite en soulignant que ce devoir couvre toutes les questions y compris celles que le contrat ne règle pas.

De même, il n'existe pas d'obligation **implicite** de paix syndicale (***relative Friedenspflicht***).

Cette conclusion s'impose à la lumière de la circonstance que le **droit de grève est indisponible**: les représentants des travailleurs n'auraient donc pas la possibilité d'y renoncer avec l'effet d'en priver le travailleur.

Ainsi, l'obligation de paix syndicale est valable uniquement dans le cas où elle a été expressément convenue.[410]

En définitive, **des limites** à l'exercice du droit de grève ne pourraient pas être tirées de la circonstance que l'objectif de la lutte de grévistes a déjà fait l'objet d'une clause dans une **convention collective en vigueur**. Cependant ce droit peut être **limité si cela est explicitement convenu**. Si l'obligation de paix sociale a été expressément convenue, l'employeur peut théoriquement en exiger le respect. Dans ce cas, la grève en dehors de limites convenus pourrait donner lieu à une réaction de l'employeur (sanction disciplinaire).[411]

Une autre conséquence de l'absence de *relative Friedenspflicht* implicite est que les **grèves *ante tempus*** (c'est-à-dire avant toute possibilité de modifier une convention collective) sont **légitimes**.

En outre, à la lumière des expériences récentes de négociation, on ne peut pas exclure *a priori* un **intérêt au respect de la clause par les syndicats** qui l'ont signée et qui la respectent, vis-à-vis du syndicat qui l'a signée et qui l'a violée.
En d'autres termes, le syndicat qui a signé une clause de paix syndicale est tenu au respect de la clause: le syndicat sera obligé de ne pas déclarer l'abstention collective de travail si la clause le lui interdit. Aussi le syndicat devra mettre en œuvre les mesures nécessaires pour faire en sorte que la clause soit respectée par les travailleurs, y compris ceux qui n'y sont pas inscrits.

La **durée de l'obligation de paix syndicale** dépend de la clause qui la prévoit explicitement. En l'absence d'indication contraire dans la clause, on considère l'obligation soumise à la même durée que la convention collective dans laquelle elle est insérée.

Le contentieux relatif aux clauses de paix syndicale est cependant tellement limité qu'il ne permet pas d'en déduire une réglementation jurisprudentielle additive.

410 Cass. 10 février 1971, n. 357.

411 *Ibidem.*

E. SLOVAKIA

1. Legal status of the right to strike

1.1. Legal basis

The right to strike is **guaranteed in Slovakia by constitutional provisions**, binding international law and statutory law.

The Slovak legal system provides a positive right to strike, which may be executed in situations and on conditions specified in the **Slovak Act on Collective Bargaining (the CBA)**.[412] The CBA regulates two types of strikes: strikes in a dispute over entering into a collective agreement; and solidarity strikes called to support the requirements of the employees in a strike concerning a dispute over entering into a different collective agreement.

The definition of strikes other than these are not clear due to a **lack of statutory regulation**. Constitutional and international law provides the right to strike, but only on conditions specified in statutory law.[413] There is no general subsidiary act dealing with strikes, and only strikes in disputes over entering into a collective agreement and related solidarity strikes are regulated by law. Therefore, political and economic strikes are, for example, not regulated at all, and their legality remains unclear (a part of Slovak legal theory says that such strikes are illegal due to the lack of regulation; other legal theory points to a constitutional right to strike strong enough to provide legal grounds for all types of strike).[414]

1.1.1. Constitutional

According to **Article 37 para 4 of the Constitution of the Slovak Republic**,[415] the right to strike is guaranteed. Article 37 of the Constitution[416] states that everyone has the right to freely associate with others in order to protect his economic and social interests, and trade union organizations are established independently of the state. The right to strike is guaranteed and the conditions should be

412 Act on Collective Bargaining(No. 2/1991, Coll. of Laws).

413 The European Social Charter guarantees the right to strike only in connection with a view to ensuring the effective exercise of the right to bargain collectively.

414 Drgonec, J.: Základné právo na štrajk: rozsah a podmienky jeho uplatnenia v právnom poriadku Slovenskejrepubliky. In: Justičná revue, 59/2007, No. 6-7, pp. 759-780; Ľalík, M.: Problematika štrajku v právnom poriadku Slovenskej republiky. In: Práca a personalistika, No. 6/2003, p. 8; Galvas M. ,Stávka a právo na stávku, 1993, MU Brno; Vladárová M., Kódex kolektívneho vyjednávania, EPOS, 1996, Bratislava, Adamus V.,. Právo na stávku podle úmluvy mezinárodní organizace práce č. 87 osvobodě sdružování, Správní právo, 1998, No. 2, pp. 97 – 108 Barancová, H.: Právna úprava štrajku vo svete. In: Justičná revue No. 11/1991, pp. 32 – 40, Barancová, H. a kol.: Základné práva a slobody v pracovnom práve. Plzeň: Aleš Čenek s.r.o., 2013, p. 40 ff.

415 Slovak Constitution No. 460/1992 Coll. Of Laws.

416 Art. 37 of the Slovak Constitution: "(1) *Everyone has the right to freely associate with others in order to protect his economic and social interests. (2) Trade union organizations are established independently of the state. It is inadmissible to limit the number of trade union organizations, as well as to give some of them a preferential status in an enterprise or a branch of the economy. (3) The activity of trade union organizations and the founding and operation of other associations protecting economic and social interests can be restricted by law, if such measure is necessary in a democratic society to protect the security of the state, public order, or the rights and freedoms of others. (4) The right to strike is guaranteed. The conditions shall be laid down by law. Judges, prosecutors, members of the armed forces and armed corps, and members and employees of the fire and rescue brigades do not have this right*."

laid down by law.[417] Judges, prosecutors, members of the armed forces and armed corps, and members and employees of the fire and rescue brigades do not have this right. According to Article 54 of the Slovak Constitution, the law may also **restrict the right to strike** for persons in professions that are vital for the protection of life and health.

1.1.2. Role of international law

According to Art. 7 of the Slovak Constitution, international treaties on human rights and fundamental freedoms, international treaties, the execution of which do not require a law, and **international treaties** which directly establish rights or obligations of natural persons or legal persons and which were ratified and promulgated in a manner laid down by law **have primacy over Slovak laws**.

Since 1976, Slovakia is, like other countries, bound by the **International Covenant on Economic, Social and Cultural Rights** and since 1999 by the Revised **European Social Charter**. Section 8(1)(d) of the International Covenant on Economic, Social and Cultural Rights[418] states that the right to strike should be exercised "in conformity with the laws of the particular country." Section 6(4) of the European Social Charter and Revised European Social Charter[419] states that, with a view to ensuring the effective exercise of the right to bargain collectively, the parties recognize the right of workers and employers to collective action in cases of conflicts of interest, including the right to strike, subject to obligations that might arise out of collective agreements previously entered into.

1.2. Substantive law

1.2.1. Definitions

In Slovakia, the **CBA defines how collective disputes between employers and trade unions can arise**, regulates the conduct of industrial action, and provides for mediation and arbitration procedures prior to any action. The parties involved in collective disputes are sectoral or company-level trade unions and sectoral employers' organizations or enterprise management.

A strike is defined in Section 16 of CBA as ***a partial or full interruption of work by the employees***. A strike may be called only as a last resort ***(ultima ratio)*** in a dispute over entering into a collective agreement.

A **solidarity strike** is defined as a strike in support of employees on strike in a dispute on the conclusion of another collective agreement.

A **participant in a strike** is, throughout its duration, defined as an employee who has agreed with it; an employee who has joined the strike will be regarded as a participant in the strike from the day he/she has joined the strike.

Under Slovak law, a strike can be called and **launched only by a trade union**. A trade union may only call and launch a strike after a vote by employees, who may be affected by the collective agreement. The strike is approved only if at least one half of all employees, who may be affected by the collective agreement, participate in the voting, of which at least two thirds must approve the strike. Sections 16-26 of the CBA define and guarantee the right to strike and set out conditions under which it can be used.

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417 Until now not adopted.

418 No. 120/1976 Coll. Of Laws.

419 No. 14/2000 Coll. of int. treaties.

1.2.2. Conditions for exercising the right to strike

A strike is expressly referred to in the CBA as an extreme measure,[420] to be held when, in the course of a dispute over the conclusion of a collective agreement, **all other possibilities have been exhausted**. Collective disputes may concern the conclusion of a collective agreement or the fulfilment of commitments originating from such an agreement.[421] Disputes regarding rights arising from existing agreements and disputes of interest, or claims for a new collective agreement must, as mentioned above, pass through an intermediary and, when necessary, also through arbitration proceedings.

The Ministry of Labor, Social Affairs and Family of the Slovak Republic selects **intermediaries and arbitrators** at the request of a citizen of the Slovak Republic or by proposal of authorities of the State, scientific institutions, universities, representatives of employers and representatives of trade union bodies.

1.2.2.1. Selection of intermediaries and arbitrators

A person meeting the following conditions can be eligible as an intermediary or as an arbitrator: (a) with capacity to perform legal acts in full scope, (b) with permanent residence on the territory of the Slovak Republic, (c) personal integrity,[422] (d) graduation at a university and (e) professional competence.[423]

The Ministry of Labor, Social Affairs and Family of the Slovak Republic notifies the selection of intermediaries and arbitrators and verifies their professional competence by publishing in the daily press the date of commencement of such selection and verification at least four weeks in advance. The Ministry **verifies the professional competence of intermediaries and arbitrators** at three-year intervals, and publishes the results of such verification.

The professional competence of intermediaries and arbitrators is verified by a **selection commission** appointed and recalled by the Minister of Labor, Social Affairs and Family of the Slovak Republic. The members of the selection commission are representatives of the State, representative of employees and representative of employers.[424] The intermediary or arbitrator appointed by the Ministry to act in a specific dispute may, within seven days from appointment, notify the Ministry that he/she is prejudiced, in which case the Ministry appoints a different intermediary or arbitrator without undue delay.

1.2.2.2. Proceedings before an Intermediary

The contractual parties may agree on an intermediary to resolve the collective dispute. **Proceedings before an intermediary** begin on the day of receipt of the request for resolving the dispute by an intermediary. When the contractual parties fail to agree on an intermediary, the intermediary will, by request of any of the contractual parties, be appointed by the Ministry from the list of intermediaries maintained by the Ministry of Labor, Social Affairs and Family of the Slovak Republic. Proceedings before an intermediary begin upon delivery of the decision appointing an intermediary. Such request

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420 CBA Section 16.

421 CBA Section 10.

422 For the purposes of CBA the person who was not lawfully condemned for a wilful criminal offence has personal integrity. The person supplies proof of personal integrity in the form of a clean extract from the Criminal Register issued three months earlier at most.

423 For the purposes of CBA the person possessing professional knowledge mainly in the field of labour law and in the social field, and possessing the necessary capacity of performing intermediating activities and arbitration activities is professionally competent.

424 CBA Section 10a.

may not, in a dispute regarding the conclusion of a collective agreement, be submitted before the lapse of at least 60 days from submission of the written proposal to conclude the agreement.

The **request to resolve such dispute** specifies the subject of the dispute and substantiates it with written documentation delivered in duplicate to the intermediary. The contracting parties and intermediary are obliged to provide mutual cooperation.[425]

The intermediary prepares a written record of the **proposed solution of the dispute before the intermediary** within 15 days from the date receiving the request for resolving dispute by an intermediary or as of the delivery date of the decision appointing an intermediary and the contractual parties are entitled to endorse the record, upon verification of its accuracy, without undue procrastination unless agreed otherwise with the contractual parties.[426] The intermediary hands over the record to the contractual parties and to the Ministry in case of the intermediary having been appointed by the latter.[427]

Proceedings before the intermediary are **deemed a failure unless the dispute has been settled within 30 days** since the day receiving the request for resolving dispute by an intermediary or as of the delivery date of the decision appointing an intermediary, unless the contractual parties have agreed on a different period.[428]

1.2.2.3. Proceedings before an Arbitrator

If proceedings before an intermediary have failed, the contractual parties may agree to **request an arbitrator** to make a decision in the dispute. The proceedings before the arbitrator commence on the date of acceptance of the request by the arbitrator.[429] The arbitrator will draw up a protocol of acceptance with the contractual parties of their request to resolve the dispute.

If the contractual parties have failed to agree and if the dispute concerning conclusion of the collective agreement arose at a workplace where striking is forbidden, or a dispute concerning fulfilment of obligations arising from the collective agreement is involved, the **arbitrator will be appointed at the request of any of the contractual parties** by the Ministry of Labour, Social Affairs and Family of the Slovak Republic; proceedings before the arbitrator commence by delivery of the decision to the arbitrator.

A person having functioned as the intermediary cannot be eligible as the arbitrator in the same dispute.[430]

The arbitrator **informs the contractual parties in writing about the decision within 15 days** from the initiation of proceedings. The **decision of the arbitrator** contains the following: (a) identification of the contractual parties, (b) description of the facts on which agreement could not be reached by the

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425 CBA Section 11.

426 The written record contains the following: (a) identification of the contractual parties, (b) description of the facts on which agreement could not be reached by the contractual parties, (c) the proposed solution of the dispute and its substantiation, (d) date of drawing up of the record, (e) name, surname and signature of the intermediary.

427 CBA Section 12.

428 The costs of proceedings before the intermediary are halved and reimbursed by either party. Part of the costs of intermediation are made up especially of the intermediary remuneration and travel expenses.

429 The request to resolve the dispute contains the following: (a) precise specification of the subject of the dispute, substantiated by written documentation which shall be delivered in duplicate to the arbitrator, (b) the position of the other contractual party.

430 CBA Section 13.

contractual parties, (c) the arbitration award of the arbitrator and its substantiation, (d) date of issue of the decision, and (e) name, surname and signature of the arbitrator.[431]

The **regional court repeals**, at the request of a contractual party, the arbitrator's decision concerning fulfilment of obligations arising from the collective agreement if the decision is contrary to legal regulations or collective agreements.[432]

1.2.2.4. Strike in a dispute on the conclusion of a collective agreement

Provided a collective agreement has not been concluded even after proceedings before the intermediary, and the contractual parties have not requested a solution to the dispute through an arbitrator, a **strike may be declared as an extreme measure** in a dispute on conclusion of the collective agreement.[433]

A strike in a dispute on the conclusion of a company collective agreement is declared and commences by a decision of the respective trade union body where the strike is approved by an **absolute majority of the employer's employees** who are participating in the strike ballot whom the collective agreement concerns, provided also that at least an absolute majority of employees counted out of total employees participate in strike ballot.

A strike in a dispute on the conclusion of a **collective agreement of a higher degree** will be declared by the respective superior trade union body. The commencement of the strike decided by the respective trade union body will go ahead if the strike is approved by the absolute majority of the employer's employees who are participating in strike ballot whom the collective agreement of a higher degree concerns, provided that at least absolute majority of employees counted out of total employees participate in strike ballot.[434]

A **respective trade union body retains records of the results** of the vote as well as collects and keeps documentation related to the ballot records on strike for a period of three years. These also apply, as appropriate, to the declaration of a solidarity strike and on its commencement.

A respective trade union body **notifies an employer in writing at least three working days prior** commencement the strike about: (a) date of commencement of the strike, (b) reasons and objectives of the strike, and (c) a list with names of representatives of the respective trade union body, authorized to represent participants in the strike.

A respective trade union body provides an employer with the information relating to strike, which it is aware of and which helps an employer to introduce work plans at least two working days before the commencement of strike to ensure **essential activities and essential services during the strike**; essential activities and essential services are such activities and services which in case of their interruption or stoppage endangers the life and health of employees or other persons and causes damage to machines, equipment and apparatuses the operation of which must not be interrupted or stopped during the strike.[435]

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431 The agreement is concluded once the arbitrator's decision has been delivered to the parties in the dispute concerning the conclusion of a collective agreement. The costs of proceedings before arbitrators including of arbitrators remuneration and travel compensations are reimbursed by the Ministry.

432 CBA Section 14.

433 CBA Section 16.

434 CBA Section 17.

435 Ibid.

According to Section 18 of CBA, an employee may not be prevented from participating in the strike, nor may he/she be forced to participate in it. Representatives of the respective trade union body, authorized to represent participants in the strike, must allow adequate and safe access by the employer to the workplace and **may not prevent employees, wishing to work**, from access to the workplace and departure from it, or to threaten them with detriment of any kind; they may only negotiate on the interruption of work with them. Due to Section 19 of CBA, it is the duty of the respective trade union body that has decided to commence a strike, to **provide the employer with the necessary collaboration** throughout the duration of the strike in securing protection of the equipment against damage, loss, destruction or misuse and in securing the necessary activities and operation of equipment whose character or purpose demands so with respect to the safety and protection of health, or the possibility of damage occurring to this equipment.

In the course of a strike, the **employer must not admit, as a replacement of participants in the strike**, other persons to their workplaces.[436] A **strike is terminated** if so decided by the trade union body declaring it or deciding on its launch. It is the duty of the respective trade union body to notify the employer in writing without undue delay of the termination of the strike.[437]

1.2.2.5. Illegal strike

Pursuant to CBA Section 20, an **illegal strike** is defined as a strike:

a. not preceded by the proceedings before an intermediary (this does not apply in the case of a solidarity strike),

b. that has been declared or continues following the start of proceedings before an arbitrator,

c. that has not been declared or commenced under conditions specified in CBA,

d. declared or commenced for reasons other than those specified in CBA,

e. a solidarity strike, provided the employer of participants in strike, especially with regard to economic continuity, cannot influence the course or result of the strike of employees, in the support of whose demands the solidarity strike has been declared,

f. during the case of military action by the state and in a period of emergency precautions,[438]

g. of employees of the health-care facilities or social services institutions, where their participation in a strike might endanger the life or health of citizens,

h. of employees operating equipment of nuclear power stations, facilities with fissionable material and equipment of crude oil or gas pipelines,

i. of judges, prosecutors, members of the armed forces and armed corps, members and employees of firefighting corps and rescue corps and employees in charge of air traffic control and operation,

j. of employees ensuring telecommunications operation and employees servicing and operating public water pipelines, provided their participation in a strike would jeopardise the life and health of citizens,

k. of employees working in areas inflicted by natural disasters in which emergency precautions have been declared by the respective state bodies.

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436 CBA Section 25.

437 CBA Section 26.

438 According to Articles 2 to 5 of the Constitutional Act No. 227/2002 Coll. on State Security at a Time of War, State of War, Martial Law or State of Emergency.

Also illegal is the strike of civil employees appointed as superiors of **civil employees discharging service duties directly aimed at the protection of life and health**, should their participation in the strike endanger the life or health of the population.

The employer, alternatively the employers' organizations or the prosecutor, may submit **a proposal to declare the strike illegal** to the regional court situated in the same district as the respective trade union against which the proposal is directed; the proposal does not have dilatory effect. In adjudicating the matter, the regional court proceeds in accordance with provisions of the civil court procedure governing first degree proceedings.[439]

1.2.3. Effect on contracts of employment

All employees who may be affected by the collective agreement may **participate in a strike**, regardless of membership in the trade union. This means also that employees who are members of other trade unions but still may be affected by the collective agreement, may participate in a strike.

According to Art. 141 para 8 of the Slovak Labour Code,[440] an **employer must excuse the absence of employees from work** if he/she is taking part in a strike relating to the exercise of their economic and social rights; an employee is not entitled to pay or wage compensation. If an employee takes part in a strike after a court has ruled it to be unlawful, his/her absence from work shall not be considered to be authorised. For the period of participation in a strike, the participant in a strike is **not entitled to wages or wage replacement**.[441] Participation in a strike in the period before the court's decision concerning the illegal status of the strike has taken legal effect is considered as authorized leave of absence. Participation in strike after the court's decision concerning the illegal status of the strike has taken legal effect will be considered as unauthorized leave of absence.[442] Employees not participating in the strike are allowed by the employer to perform work.

1.2.3.1. Liability for damage

Under the Civil Code,[443] a participant in a strike is liable to the employer, or the employer is liable to the participant in strike, for **damage due to an event in the course of the strike**. However, if the damage occurred as a result of pursuing the activities specified in Section 19 of CBA,[444] the liability will be determined pursuant to the Labour Code.[445]

The participants in a strike are **not liable** to the employer, and the employer is not liable to the participant in strike for **damage caused exclusively by an interruption of work due to strike**.[446] The trade union organization whose body decided on commencing the strike, shall be liable under separate

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439 CBA Section 21.

440 Labour Code No. 311/2001 Coll. of Laws.

441 CBA Section 22.

442 If an employee takes part in a strike after a court has ruled it to be unlawful, his/her absence from work is not considered to be excusable. § 141 (8) of Labour Code No. 311/2001 Coll. of Laws.

443 § 420 and subsequent provisions of the Civil Code No. 40/1964 Coll. of Laws.

444 Section 19 CBA: "(1) It shall be the duty of the respective trade union body that has decided to commence a strike, to provide the employer with the necessary collaboration throughout duration of the strike in securing protection of the equipment against damage, loss, destruction or misuse and in securing the necessary activities and operation of equipment whose character or purpose demands so with respect to the safety and protection of health, or the possibility of damage occurring to this equipment. (2) Employees performing work on securing the activities specified in paragraph 1, must follow the instructions of the employer."

445 § 177 to § 219 of the Labour Code No. 311/2001 Coll. of Laws.

446 CBA Section 23.

regulations[447] to the employer for damage that has occurred due to failure to provide the necessary collaboration under § 19, paragraph 1 (see below). If the court decides the strike was illegal, the trade union organization whose body declared the strike, would be liable, under the separate regulations,[448] to the employer for the damage sustained by the employer as a result of the strike.

2. Role of the right to strike in collective labour relations

2.1. Relation with other forms of action and role in collective negotiations

A strike may, under Slovak law, be **called and launched only by a trade union as a result of a dispute** between a trade union and an employer over entering into (and contents of) a collective agreement. **A strike called during a life of a collective agreement is illegal**.[449] The right to strike under Slovak law is subject to the following procedural requirements: exhaustion of certain means of negotiation, approval of the strike and notice (see above).

Before executing the right to strike, the parties must try to resolve their dispute with a **mediator**. Only if such mediation fails and the parties do not agree on arbitration, the right to strike may be executed. Under Section 16(1) of CBA, a strike is treated as an ***ultima ratio*** solution to a dispute. Other principles are not regulated by law but general rules of the Slovak legal system applies also on strikes.

2.2. Use of the right to strike in practice

The right to strike is used in Slovakia very exceptionally, so there is not enough information on the practice of striking to provide further details. **Strikes are rather infrequent in Slovakia**. In comparison with other European countries, strikes in Slovakia are (after Lichtenstein) probably the least common.[450] Usually, the parties tend to settle their disputes peacefully. The rare strikes which do occur are usually calm, with relevant laws respected.

2.3. Role of the right to strike in non-organised sectors

Not regulated.

3. Protection of workers on strike

3.1. Special protection against dismissal and other unfair treatment

No employee may be harmed for (1) participating in a strike, (2) not participating in a strike. According to Art. 141 para 8 of the Slovak Labor Code, the employer must excuse the absence of employees from

447 § 373 and subsequent provisions of the Commercial Code No. 513/1991 Coll. of Laws and § 420 and subsequent provisions of the Civil Code No. 40/1964 Coll. of Laws.

448 § 373 and subsequent provisions of the Commercial Code No. 513/1991 Coll. of Laws and § 420 and subsequent provisions of the Civil Code No. 40/1964 Coll. of Laws.

449 CBA Section 20 (b).

450 See the profound research Švec M., a kol., Kultúra světa práce, Právo na štrajk, Fridrich Ebert Stiftung, Bratislava 2013, pp. 130 ff. Available also on line: http://library.fes.de/pdf-files/bueros/slowakei/10663.pdf (14.07.2015).

work if they are taking part in a strike relating to the exercise of their economic and social rights; an employee is not entitled to pay or wage compensation.[451]

The trade union may not be sanctioned with fines or deprived of other rights. The leaders of the trade union cannot be prosecuted under penal laws (there is no special crime relating to strikes).

The strikers cannot be individually summarily dismissed, but if they do not voluntarily return to work after the strike has been declared illegal, their absence is treated as unexcused, and such absence may provide the employer with grounds to dismiss such an employee.

3.2 Comparison with general protection

Protection of strikers as opposed to non-strikers is regulated as a protected characteristic; in other words, strikers cannot be harmed for participating in a strike in the same way that a woman cannot be harmed by her employer in relation to her pregnancy.

3.3. Role of international law on protection afforded

There is no direct impact of international law on the protection of strikers.[452] Of course, acceptance of the right to strike in international and national law (see above 1.1.2. "Role of international law") anticipates implicitly the protection of those who exercise this right.

4. Enforcement and effectiveness of available sanctions

There is no penalty (in the narrow penal sense) for violating the protection of strikers. To harm employees for participating in a strike is simply illegal and the **act of the employer is invalid**. If, e.g. an employer gave invalid notice to an employee, or terminated the employment relationship with the employee on the ground of her/his participation in strike immediately, and if the employee informed the employer that he/she insists on keeping employment with the employer, his/her **employment relationship will not terminate**, with the exception of a court decision that it cannot be justly required of the employer to further employ the employee. The employer is obliged to provide the employee with **wage compensation**. The employee is entitled to such compensation in the amount of average earnings from the day he/she announced to the employer that he/she insists on remaining in employment, to such time for which the employer enables him/her to keep working, or until a court rules on termination of the employment relationship.

Where an employer terminated the employment relationship in an invalid manner and the employee does not insist on keeping employment with the employer, unless the employee and employer agree in writing otherwise, it will be deemed that the employment relationship was terminated by agreement.[453]

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451 Slovak Labour Code, Article 141, para. 8: "*Employer must excuse the absence of employees from work if he/she is taking part in a strike relating to the exercise of their economic and social rights; employee shall not be entitled to pay or wage compensation. If an employee takes part in a strike after a court has ruled it to be unlawful, his/her absence from work shall not be considered to be excusable*."

452 This impact is not mentioned in any leading commentary to the Slovak labor law (See: Barancová H., Zákonník práce, Komentár, 2. vydanie, C.H.Beck, Praha 2012.

453 Art. 79 of the Slovak Labor Code.

5. Possibility to extend protection in collective agreements

Collective agreements in Slovakia regulate individual and collective relations between the employers and the employees and the rights and duties of the contractual parties. The contractual parties are (with some exceptions)[454] **free to negotiate an extension to protection of strikers in collective agreement**. This extended protection will be valid if both parties agree.

[454] According to Section 4 of CBA the collective agreement is invalid in the part which: a) contravenes generally binding legal regulations, and b) regulates claims by employees to an extent smaller than done by the collective agreement of a higher degree.

F. SWEDEN

1. Legal status of the right to strike

1.1. Legal basis

1.1.1. Constitutional

The fundamental right to strike is **protected by the Swedish Constitution**; chapter 2 section 14 of the Instrument of Government (*Regeringsformen)* provides that a trade union, an employer, or employers' association shall be entitled to take industrial action unless otherwise provided in an act of law or under an agreement.[455] The fundamental right of association is protected under chapter 2 section 1 of the Instrument of Government.

Additional protection for employees exercising their right of association and their right to resort to collective actions are provided for in section 7 to 9 of the Co-Determination in the Workplace Act (*Lag (1976:580) om medbestämmande i arbetslivet)* (hereinafter the "**Co-determination Act**"). The most important restriction of the right to take collective action, the so called "peace obligation" which applies when an employer and a trade union are bound by a collective agreement, is regulated in section 41 of the Co-determination Act.

1.1.2. International law

The right to strike is also protected under EU law. Article 28 of the **Charter of Fundamental Rights of The European Union** provides that the "workers and employers, or their respective organizations, have, in accordance with Union law and national laws and practices, the right to negotiate and conclude collective agreements at the appropriate levels and, in cases of conflicts of interest, to take collective action to defend their interests, including strike action". It may also be mentioned that the European Court of Justice had, prior to the adoption of the Charter, established that the right to take collective action, including the right to strike, is a fundamental right which forms an integral part of the general principle of Community law.[456]

Furthermore, the basic right to take collective action as expressed in Article 11 of the **European Charter of Fundamental Rights** and in the case law of the European Court of Fundamental Rights must be respected. Chapter 2 section 19 of the Instrument of Government provides that no act of law or other provision may be adopted which contravenes Sweden's undertakings under the European Convention for the Protection of Human Rights and Fundamental Freedoms. Sweden has ratified the **European Social Charter** in 1962 and the Revised Charter in 1998. The country has accepted 83 of the revised Charter's 98 paragraphs, inter alia Article 5 and 6 which concern the right to organize and the right to bargain collectively.[457]

Sweden has ratified a considerable number of **ILO Conventions**, including the eight fundamental Conventions, the four priority Conventions, as well as 81 of the 177 technical Conventions.[458]

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455 The Instrument of Government is available in English at https://www.riksdagen.se/en/How-the-Riksdag-works/Democracy/The-Constitution/The-Instrument-of-Government/ (09.06.2015).

456 See for example case C-438/05 *Viking Line* and Case C-341/05 *Laval*.

457 http://www.coe.int/t/dghl/monitoring/socialcharter/CountryFactsheets/Sweden_en.pdf (09.06.2015).

458 http://www.ilo.org/wcmsp5/groups/public/---dgreports/---exrel/documents/genericdocument/wcms_243793.pdf (09.06.2015).

The role of international law in Swedish labour law is rather limited since generally the national legal framework has granted corresponding or more far-reaching protection than the standards in international law. Therefore, several ILO Conventions, for example no. 87, have been ratified without taking any legislative measures.[459]

It may be noted, however, that the **right to take collective action has been subject to certain limitations** following the judgment of the Court of Justice of the European Union in the so called *Laval* case[460] and the subsequent "Lex Laval" amendment to the Co-determination Act.[461] The effect of the amendment is that the prohibition - applicable *only* in relation *to* Swedish collective agreements - to take industrial action against an employer in order to force the employer not to apply a collective agreement with another union, was extended to apply, with certain exceptions related to minimum protection, also to foreign collective agreements.[462] Both the ILO Expert Committee and the European Committee of Social Rights have criticized the amendment.[463] In 2012, the Swedish Government appointed a Parliamentary Committee tasked to review possible options to solve the conflict between EU labour law and Swedish labour law and to prevent social dumping. The Parliamentary Committee will report in September 2015.[464]

1.2. Substantive law

1.2.1. Definitions

Chapter 2 section 14 of the Instrument of Government provides that a trade union, an employer, or employers' association shall be entitled to take industrial action unless otherwise provided in an act of law or under an agreement. The right to strike is thus protected by the constitution to the extent that it is exercised by unions, not by individuals. In other words, collective action must have a **collective concerted character** and must exert pressure on the opposite party in a work-related dispute.[465]

Although the action is of a collective nature, it may comprise only a single employee, for instance a messenger who is the only one of that category in the enterprise. It is thus the organization behind the decision that gives the action its collective nature. Concerted action by a group of employees without participation of any organization is illegal and the participants may be liable to pay damages to the employer.[466]

Section 41 of the Co-Determination Act mentions, as **non-exhaustive examples of collective actions**, stoppage of work blockade, boycotts including solidarity action, or other industrial action comparable

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459 A. Adlercreutz & B. Nyström, Labour Law in Sweden, Kluwer Law International (2014), p. 163.

460 Case C-341/05 *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avd. 1, Byggettan, Svenska Elektrikerförbundet* [2007] ECR I-11767.

461 Amendments were made to section 41c, 42 and 42 a of the Co-Determination Act.

462 For further reading see for example A. Adlercreutz och B. J. Mulder, Svensk Arbetsrätt, 14th edition, Norstedts Juridik AB 2013, p. 179 and A. Adlercreutz & B. Nyström, Labour Law in Sweden, Kluwer Law International (2014), p. 73.

463 As regards the ILO Expert Committee see http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:13100:0::NO::P13100_COMMENT_ID:3085286 (17.06.2015) and as regards the European Committee of Social Rights http://www.coe.int/T/DGHL/Monitoring/SocialCharter/Complaints/CC85AdmissMerits_en.pdf (17.06.2015).

464 A. Adlercreutz & B. Nyström, Labour Law in Sweden, Kluwer Law International (2014), p. 74.

465 A. Adlercreutz och B. J. Mulder, Svensk Arbetsrätt, 14th edition, Norstedts Juridik AB 2013, p. 173. See also http://www.asi.is/media/7581/Strike_rules_in_the_EU27.pdf (09.06.2015), p. 68.

466 A. Adlercreutz & B. Nyström, Labour Law in Sweden, Kluwer Law International (2014), p. 217.

therewith.[467] Further, deliberately slow work (go-slow) and limiting the work to what is strictly regulated (work-to-rule*)* may be used as collective action.[468] Thus, the concept of a strike and the right to strike has been defined in rather broad terms in Swedish law.

1.2.2. Conditions for exercising the right to strike

Industrial action is not prohibited as long as the means used are not in contravention of law or contractual obligations. All members of the trade union calling the strike are entitled to participate, as well as non-unionized workers and members of other trade unions.[469] I should also be noted that industrial relations have been kept outside the scope of the Criminal Code and punitive sanctions.

There are some basic rules of conduct that must be observed when exercising the right to strike. According to section 45 in the Co-Determination Act, a trade union has a **duty to notify the other party and the Mediators' Office** in Stockholm of an industrial action, for example a strike, at least seven working-days in advance. The notice shall contain information of the reason for the industrial action and the scope of the industrial action. Failure to notify the Mediator's Office entails a penalty fine to the State. Neglecting to notify the employer may result in liability to pay general damages to the employer. However, failure to notice does not make the industrial action illegal.

Special restrictions are placed on **conflict in the public sector**, although the freedom to resort to industrial action also applies to this sector. These restrictions are of a very limited nature, and the most important prohibit those exercising public authority to use different kinds of partial actions, and their sympathy actions must be in sympathy with other public employees. It may be noted that there are no additional restrictions for judges, military personnel, etc.[470]

When the parties are not bound by a collective agreement, the **right of Swedish unions to take collective action appears extensive in an international comparison**. There are no rules on general restriction in Swedish law, for example a proportionality requirement similar to the one applied in Germany concerning the extent and form of conflict measures.[471]

Whether an industrial action is unlawful when intended to enforce an illegal act, for example a dismissal in contravention of the Employment Protection Act (*Lag (1982:80) om anställningsskydd),* has never been decided. The Labour Court discussed the question in case AD 1977 nr 38 without taking a position, but the Court seemed inclined to think it would be unlawful. In case AD 1989 nr 120 (the so-called *Britannia* case) it was deemed unlawful to use industrial action to compel an employer to set aside or alter a collective agreement of which he was bound (in this case in relation to a foreign trade union).[472] The Labour Court's judgment lead to changes in the Co-determination Act, the so called "Lex Britannia" the aim of which was to combat social dumping by allowing collective agreements concluded under the Co-determination Act to set aside agreements concluded under foreign law. Hence, a foreign collective agreement was not protected against industrial action which would have been unlawful if directed against a Swedish collective agreement. The law was later amended following

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467 http://www.riksdagen.se/sv/Dokument-Lagar/Lagar/Svenskforfattningssamling/Lag-1976580-om-medbestamman_sfs-1976-580/ (09.06.2015).

468 http://www.regeringen.se/rattsdokument/kommittedirektiv/2015/06/dir.-201557/ (17.06.2015). See also A. Adlercreutz och B. J. Mulder, Svensk Arbetsrätt, 14th edition, Norstedts Juridik AB 2013, p. 169.

469 J. Malmberg & C. Johansson, The Right to Strike: Sweden, in B Waas, The Right to Strike A Comparative Overview, Wolter Klwer 2014, p. 527.

470 A. Adlercreutz & B. Nyström, Labour Law in Sweden, Kluwer Law International (2014), p. 216.

471 R. Eklund et al., Swedish Labour and Employment Law: Cases and Materials, Uppsala: Iustus Förlag AB 2008, p. 33.

472 A. Adlercreutz & B. Nyström, Labour Law in Sweden, Kluwer Law International (2014), p. 215.

the *Laval* case (see section 1.1.1 above), since it was considered to treat foreign employers in a discriminatory manner.

1.2.2.1 The peace obligation

The most important legal restrictions on the right to take industrial action, for example to resort to strike, are those prescribed in the provisions on the so called peace obligation in the Co-determination Act (sections 41-45). These rules **apply when a collective agreement is binding on the disputing parties**, or when there is a dispute over the validity of a collective agreement. The peace obligation is therefore regarded as a legal effect of the collective agreement.[473] The wide majority of employers (about 90 percent) are bound by a collective agreement, which they must apply in relation to all employees, not only those who are members of a trade union (about 70 percent).[474] Hence, the rules concerning the peace obligation are of great importance.

The main provision concerning the peace obligation is section 41 in the Co-determination Act which provides that an employer and an employee who are bound by a collective bargaining agreement may not initiate or participate in an industrial action (for example a strike), where an organization is party to that agreement and that organization has *not duly sanctioned the action*, where the action is in *breach of a provision regarding a labour-stability obligation* in a collective bargaining agreement or where the action has as its aim: (1) to exert pressure in a dispute over the validity of a collective bargaining agreement, its existence, or its correct interpretation, or in a dispute as to whether a particular action is contrary to the agreement or to this Act; (2) to bring about an amendment to the agreement; (3) to effect a provision that is intended to enter into force upon termination of the agreement; or (4) to aid someone else who is not permitted to implement an industrial action. An industrial action prohibited under section 41 of the Co-determination Act is considered unlawful.

The prohibition against taking industrial action in section 41(1) is based on the principle that issues regulated in the collective agreement or in the Co-determination Act, and thus justifiable on the basis of existing rules, should not cause industrial conflict. In practice, it is however not uncommon that the parties disagree over whether the matter is regulated in the agreement. This situation often occurs as a result of the fact that the collective agreement does not always clearly express everything that it regulates. It may contain so called “invisible” clauses. The Labour Court may rule that the question is regulated because of what has occurred in the course of negotiations. This approach by the Labour Court is referred to as “negative regulation”. The Labour Court may also consider the question to be resolved by a complementary legal rule when the collective agreement contains nothing to the contrary.[475] A party considering that the disputed issue has been regulated in the agreement may make a peace objection (*fredspliktsinvändning)* with the effect that an industrial action will be illegal until the Labour Court has decided the case. The peace objection must be made in good faith. The Labour Court may render an interim decision on this issue and thus decide the lawfulness of the planned action.[476]

Where an unlawful industrial action has been taken by employees who are bound by a collective bargaining agreement, the employer and the employees' organization concerned shall immediately enter into discussions as a consequence of the industrial action and jointly work for its cessation (Co-determination Act section 43).

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473 A. Adlercreutz och B. J. Mulder, Svensk Arbetsrätt, 14th edition, Norstedts Juridik AB 2013, p. 172.

474 Avtalsrörelsen och lönebildningen 2014 - Medlingsinstitutets årsrapport (2014), Taberg Media Group (2014), s. 32, tillgänglig på http://www.mi.se/publicerat/arsrapporter/arsrapport2014/ (02.06.2015).

475 A. Adlercreutz & B. Nyström, Labour Law in Sweden, Kluwer Law International (2014), p. 218.

476 A. Adlercreutz och B. J. Mulder, Svensk Arbetsrätt, 14th edition, Norstedts Juridik AB 2013, p. 176.

1.2.2.2 Sympathetic strikes in support of foreign workers and for political purposes

When the Co-determination Act was prepared in the 1970s it was debated whether industrial action in support of workers or train unions abroad, or for political purposes should be permissible. Although the general opinion was that a certain freedom of action was considered appropriate, there was no express resolution to these questions. As a result, there is, with the exception of the public sector, no general restriction of political collective actions, either in statutory law or in most basic agreements on the labour market.[477]

In a case prior to the Co-determination Act, AD 1961 nr 30, the Labour Court ruled that a sympathy action in support of a Danish trade union was permissible, as the primary action had been lawful; but the Court also declared that the prerequisite of a lawful primary action might be dispensed with if the primary conflict took place in a country with a different system of labour law and industrial relations. In the Labour Court's decision in case AD 2001 nr 89 the Court ruled that a two hour protest and demonstration strike was permissible, because it did not interfere with the employers' right to conduct his business. The background was an international harbour workers' protest against a planned EC Directive regarding labour law questions affecting harbour work.

In AD 1984 no. 91 a national political action was at stake. A boycott against a Swedish company whose owner had taken a political initiative with which the trade unions were unsatisfied was ruled illegal. The Court confirmed that such actions must be a short protest and demonstration action, and the action in question was initially of an unlimited duration. Thus, the Labour Court has considered that a strictly political action of limited duration that does not interfere with the employers' right to conduct his business is not covered by the peace obligation in the Co-determination Act, even when the parties are bound by collective agreements. However, if the action concerns the relationship between employee and employer, it lawfulness shall be scrutinized under the applicable rules in the Co-determination Act.[478]

In the **public sector**, strikes aiming at influencing domestic political affairs are prohibited under section 23 of the Public Employment Act (lag (1994:260) om offentlig anställning). Public employees that administrate public authority are only allowed to take sympathy action in favour of other public employees.[479]

1.2.3. Effect on contracts of employment

During the strike, work is not carried out following the decision by the trade union. The employer has no duty to pay salaries to the workers for the time corresponding to the strike. The contracts of employment remain the same during and after the strike, unless the negotiations following the strike results in an agreement by the two parties which amending the contracts. Thus, the usage has been established that the employment continues; only the main duties on either side, to perform work and to pay remuneration respectively, are suspended.[480]

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477 J. Malmberg & C. Johansson, The Right to Strike: Sweden, in B Waas, The Right to Strike A Comparative Overview, Wolter Klwer 2014, p. 528.

478 A. Adlercreutz och B. J. Mulder, Svensk Arbetsrätt, 14th edition, Norstedts Juridik AB 2013, p. 182.

479 A. Adlercreutz & B. Nyström, Labour Law in Sweden, Kluwer Law International (2014), p. 222.

480 A. Adlercreutz & B. Nyström, Labour Law in Sweden, Kluwer Law International (2014), p. 213.

2. Role of the right to strike in collective labour relations

2.1. Relation with other forms of action and role in collective negotiations

Collective bargaining and co-operation between employers, employees and unions has since the beginning of the 20th century played a central role in Swedish labour law. This long tradition of dialogue and collective bargaining between employers' organizations and trade unions (the social partners) was later to become known as **"The Swedish Model"** and it is characterized by a high degree of autonomy for the social partners and by their social responsibility.

The principal rules of Swedish labour law were articulated by the social partners themselves, and subsequent legislation was a mere codification of the social practice made generally applicable to important parts of the labour market. In the 1970s, the trade unions turned to the legislator to guarantee both industrial democracy and important labour market conditions. Following the introduction of the Co-determination Act in 1976, the main principle in Swedish labour legislation has been that the same legal rules should apply to the entire labour market, irrespective of whether the employee is in private or public employment.[481]

The above mentioned historical developments are reflected in current Swedish collective labour law, which is still characterized by the special role assigned to the social partners. It has resulted in that there is no single "labour code", but merely a set of different statutes on disparate issues along with numerous collective agreements. Further, many of the rules laid down in the different statutes are so-called "semi-mandatory rules". It means that they may be overridden by collective agreements. Thus, collective agreement serves as a compulsory law within its scope.

The important role played by the social partners in Swedish labour law is reflected by a **high degree of organization density** on the labour market. About 70 percent of the employees are members of a trade union and 90 percent of the employers are bound by a collective agreement.[482] The collective agreements are concluded on three levels: national level, industry level and local level. Generally, the relationship between employers' organization and the union is firm and long-standing. Orderly and peaceful ways for parties to meet, to bargain and to settle disputes can be said to characterize "the Swedish model" for industrial relations.[483]

An important principle in Swedish collective labour law is the **general right to negotiation**. Section 10 of the Co-determination Act provides that an employeess organization has the right to negotiate with an employer on any matter relating to the relationship between the employer and any member of the organization who is, or has been, employed by the employer. An employer has an equivalent right to negotiate with an employees' organization. This general right to negotiation implies a **corresponding duty to negotiate** for the other party. The duty to negotiate entails the obligation to, personally or through an agent, appear at a negotiation meeting. However, it does not create any obligation on the part of an unwilling party to reach an agreement. If the parties cannot agree during negotiations to conclude a collective agreement, they are normally free to take collective action. The rationale behind the system is thus to strongly encourage the parties to solve their conflicts by negotiations and that collective action such as strike shall be a last resort. The right of negotiation or collective bargaining is

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481 A. Numhauser-Henning, *Labour Law*, in M. Bogdan, Swedish legal system, Stockholm: Norstedts Juridik AB 2010, p. 346.

482 Avtalsrörelsen och lönebildningen 2014 - Medlingsinstitutets årsrapport (2014), Taberg Media Group (2014), s. 32, tillgänglig på http://www.mi.se/publicerat/arsrapporter/arsrapport2014/ (02.06.2015).

483 A. Numhauser-Henning, *Labour Law*, in M. Bogdan, Swedish legal system, Stockholm: Norstedts Juridik AB 2010, p. 347.

closely connected with the right to strike; without having the right to resort to collective action as a mean to put pressure on the other party, the right of negotiations would be of little value.[484]

In order to have a smooth transition from a current to a future collective agreement, negotiations generally start when the current agreement is still in force. It is however prohibited under section 41 para. 3 of the CO-determination Act to take an action which has as its aim affecting a provision that is intended to enter into force upon termination of the agreement. Hence, a party cannot during the course of a peace obligation take industrial action in order to force the other party to make concessions as regards the content of a future collective agreement.[485]

2.2. Use of the right to strike in practice

As described above, social partners not mutually bound by a collective agreement, are entitled to take collective action in the form of a strike, lockout or boycott or any other similar measure against each other, failing any provision to the contrary by law. There are two situations where most collective actions occur. The first case is during the period following the expiration of a collective agreement and where the trade union and the employer or employers' organization negotiate in order to reach a new agreement. The second case is where an industry-wide collective agreement exists but where there are un-organised employers that have not signed a collective agreement. In such cases, the trade union primarily tries to make the employer sign an agreement with equivalent conditions to the general agreement concluded by the trade union confederation and the confederation of employers' organizations. However, during the last five years, the number of disputes leading to industrial action in the second situation has decreased.[486]

There are no specific provisions describing which kind of collective actions may be taken nor provisions prohibiting certain kinds of actions. The most important method of industrial action is the stoppage of work by means of a strike. However, due to changes in organization, production, transport, etc. the labour market has grown more vulnerable and **the number of general strike actions is decreasing**. Instead, the use of restrictive actions is more common, that is, only a few key persons go out on strike trying to cause the employer as much trouble as possible without great cost for the trade union, or several types of more limited actions are used together, for example a ban on overtime work in combination with a few people striking. In the public sector it is very important to get support from the public. Nurses and doctors, for example, therefore try to move short actions between different hospitals, different parts of the country etc. in order not to cause too much trouble for the public.[487]

During the 1970s and the 1980s, the Swedish labour market was characterized by a large number of strikes, in particular, unlawful strikes. This changed however in the beginning of the 1990s, and in **recent years, there have been relatively few strikes**; 2 strikes in 2014, 5 in 2013, 6 in 2014, 0 in 2011, 4 in 2010 and 5 in 2009.[488] Hence, the social parties tend to resolve their conflicts by negotiations rather than resorting to industrial actions.

Both sides in the labour market have, in cases of conflict, often used **solidarity or sympathetic actions** in order to put more pressure on the opposing party. A trade union on strike may, for example, ask the Transport Workers' Union to order its members to refuse transportation of products to and from the work places that have been blockaded, to refuse to handle 'infected' goods. Sympathetic actions

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484 A. Adlercreutz & B. Nyström, Labour Law in Sweden, Kluwer Law International (2014), p. 182.

485 A. Adlercreutz och B. J. Mulder, Svensk Arbetsrätt, 14th edition, Norstedts Juridik AB 2013, p. 177.

486 J. Malmberg & C. Johansson, The Right to Strike: Sweden, in B Waas, The Right to Strike A Comparative Overview, Wolter Klwer 2014, p. 535.

487 A. Adlercreutz & B. Nyström, Labour Law in Sweden, Kluwer Law International (2014), p. 214.

488 http://www.ekonomifakta.se/sv/Fakta/Arbetsmarknad/Avtalsforhandlingar/Konflikter/ (17.06.2015).

usually hit those with no immediate interest involved in the dispute. If such interests are involved, the action is no longer a pure sympathetic action, which may affect its legality.[489]

2.3. Role of the right to strike in non-organised sectors

The important role played by the social parties in Swedish labour law is reflected by a **high degree of organization density** in the labour market Sweden (70 percent of workers are members of a trade union and 90 percent of the employers are bound by a collective agreement). As a result, there appear to be no sectors characterized by having little or no tradition of formal collective work relations.

3. Protection of workers on strike

3.1. Special protection against dismissal and other unfair treatment

The general rules on protection of unlawful dismissal and other unfair treatment laid down in the Employment Protection Act apply also in the case of strike measures. According to those rules, an **employer must have just cause/objective grounds in order to lawfully dismiss an employee**. Valid causes for dismissals are generally divided into two groups, (1) redundancy (shortage of work), which is a circumstance related to the enterprise, and (2) circumstances relating to the employee, so-called personal reasons. It is the latter that may come into play in relation to unlawful strikes which in certain circumstances may be a valid cause for dismissal.[490] Obviously, an employer may not dismiss or sanction an employee that has participated in a lawful strike by reason of their participation.

Additional protection for employees exercising their **right of association** and their right to resort to collective actions are provided for in the Co-determination Act section 7 to 9. According to section 7, the term “right of association” means the right of employers and employees to belong to an employers’ organization or an employees’ organization, to exercise the rights of membership in such organization, and to participate in such organization or the establishment thereof. Section 8 of the Act provides that infringement of the right of association shall be deemed to have occurred where an employer or employee, or the representative of either, takes action that is detrimental to the other party as a consequence of such party's exercise of its/her/his right of association or where an employer or employee, or the representative of either, takes action directed at the other party for the purpose of inducing that party not to exercise its/her/his right of association. In the former case, the measure must be shown to have been to the detriment of the person affected, whereas in the latter case, characterized by the aim of influencing the employee, the measure may just as well be in the employee’s favor with the purpose of inducing him or her to refrain from joining the union.[491] A measure is usually an act, for example a notice of dismissal, discharge, removal to another workplace etc. However, a threat to take a measure is also deemed sufficient as well as an omission; for example failure to promote an employee when promotion would otherwise have been normal or failure to raise a salary when such a raise would have been normal.[492] The “measure” is the objective requisite and it must be accompanied by a motive, that is, the subjective requisite.

To prove that a measure is determined by a motive connected with the employee’s trade union membership or activity is often impossible or at least very difficult. The Labour Court has therefore

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489 A. Adlercreutz & B. Nyström, Labour Law in Sweden, Kluwer Law International (2014), p. 214.

490 A. Adlercreutz & B. Nyström, Labour Law in Sweden, Kluwer Law International (2014), p. 125.

491 In case AD 1980 nr 160 the employee had been offered an increase in salary on condition that he quit the union.

492 See cases AD 1948 nr 68, AD 1955 nr 16 II and AD 2004 nr 72 commented in A. Adlercreutz & B. Nyström, Labour Law in Sweden, Kluwer Law International (2014), p. 167.

considered if fair and appropriate to **divide the burden of proof**. Hence, it is sufficient for the trade union to prove the probability that the motive for a measure was of a prohibited nature, which may be inferred *inter alia* from the employer's general attitude towards the union. If the evidence is sufficient to establish such probability, the burden of proof is transferred to the employer's side. The employer must then prove that the measure has been undertaken for other reasons than those established as probable by the employee side. A very common fact referred to as proof or probability has been a very short lapse of time between, for instance, an employee's threat to turn to his union for assistance and the employer's notice of dismissal or other measure. If this does not fully prove a causal link, it at least indicates and makes such a causal link probable.[493]

A **notice of dismissal and any other act of legal significance** as well as any clause in an individual contract or a collective agreement that in itself or when put into effect constitutes a violation of the right of association is **null and void** (Co-Determination Act section 8, para. 3). Thus, an employee who has been dismissed or laid off **may claim to be reinstated at work** if there are no special reasons against it.[494] If a dispute arises concerning the validity of a notice of termination, the employment shall not terminate as a consequence of the notice prior to the final adjudication of the dispute. Hence, the employee shall during this time be entitled to his or her pay including other benefits (Employment Protection Act, section 34). These rights to reinstatement and entitlement to pay during the time of the dispute apply in the same way to an employee unlawfully dismissed under the general rules in the Employment Protection Act.

3.2. Comparison with general protection

As described in section 3.1 above, the general protection awarded in the Employment Protection Act apply also to workers on strike. Additional protection concerning the right of association are granted in section 7 to 9 of the Co-determination Act (see section 3.1 above). Hence, the protection against dismissal and other unfair treatment is more extensive in a context where an employee exercises his or her right of association. Since the general protection awarded in the Employment Protection Act and the additional protection related to right of association are not exclusive in relation to each other, a dismissal or other unfair treatment may be a breach of both the Employment Protection Act and the rules on the right of association in the Co-determination Act. Such "double breach" may have the effect of an increase in the amount of damages awarded to the employee and the union.[495]

3.3. Role of international law on protection afforded

The role of international law in Swedish labour law as regards the protection afforded is rather limited since the **national legal framework has generally granted corresponding or more far-reaching protection** than the standards in international law. Therefore, several ILO Conventions, for example no. 87, have been ratified without taking any legislative measures.[496]

4. Enforcement and effectiveness of available sanctions

It may first be reiterated that a notice of dismissal and any other act of legal significance as well as any clause in an individual contract or a collective agreement that in itself or when put into effect constitutes a violation of the right of association is **null and void** (Co-Determination Act section 8, para. 3). Thus, an employee who has been dismissed or laid off may claim to be reinstated at work if there

493 A. Adlercreutz & B. Nyström, Labour Law in Sweden, Kluwer Law International (2014), p. 168.

494 A. Adlercreutz & B. Nyström, Labour Law in Sweden, Kluwer Law International (2014), p. 135.

495 A. Adlercreutz & B. Nyström, Labour Law in Sweden, Kluwer Law International (2014), p. 168.

496 A. Adlercreutz & B. Nyström, Labour Law in Sweden, Kluwer Law International (2014), p. 163.

are no special reasons against it.[497] If a dispute arises concerning the validity of a notice of termination, the employment shall not terminate as a consequence of the notice prior to the final adjudication of the dispute.

Damages and other sanctions are regulated in section 54 to 62 in the Co-determination Act. An employer who violates the right of association may be **liable to pay damages** (section 54 of the Act). Only civil sanctions are applied. The employee can claim damages for financial loss and for the violation as such (general damages) and the union may be awarded damages for interference in its activity. In case AD 2004 nr 49 concerning a violation of Article 7 and 8 of the Co-determination Act, the Labour Court awarded 100,000 SEK to the employee and the trade union respectively. The amounts vary however considerably. Sometimes increased damages are awarded for simultaneous violation of other rules such as those contained in the Employment Protection Act and the Workplace Union Representation Act (*Lag (1974:358) om facklig förtroendemans ställning på arbetsplatsen*).[498]

Specific legislation has been enacted to provide **more complete protection for union representatives**[499] and safety representatives[500]. The amount of damages increases when the right of association of such union officers has been violated. In case AD 2005 nr 68, an employer had dismissed a worker's representative following a statement made by the representative in a news article in which he criticized the company for not being willing to adhere to a collective agreement. The Labour Court found that the company thereby had violated the worker's representative right to association protected under sections 7 and 8 of the Co-determination Act. The court ruled that the company was liable to pay damages amounting to 80,000 SEK to the worker's representative and the same amount to the local union. In case AD 2002 nr 6, the Labour Court found that a company had violated the worker's representative's and the union's right to association by giving notice of termination without having just cause for dismissal. Similar to case AD 2005 nr 68, the court ruled that the company was liable to pay damages to the worker's representative amounting to 80,000 SEK and the same amount in damages to the local union.

5. Possibility to extend protection in collective agreements

The social parties are **free to extend protection in collective agreements**. For example, section 4 of the Co-determination Act states that a collective bargaining agreement may prescribe more extensive liability for damages than prescribed by the Act. We are not aware to what extent this possibility to extend protection in collective agreements is used in practice. However, considering that the right to strike is far-reaching in Sweden it is likely that it is not common practice to extend this right in collective agreements, but rather, to restrict it.

497 A. Adlercreutz & B. Nyström, Labour Law in Sweden, Kluwer Law International (2014), p. 170.

498 A. Adlercreutz & B. Nyström, Labour Law in Sweden, Kluwer Law International (2014), p. 170.

499 Lag (1974:358) om facklig förtroendemans ställning på arbetsplatsen, available in English (with amendments up to 1990) at http://www.naturvetarna.se/Global/English/Act1974358_union_representatives.pdf (09.06.2015).

500 Arbetsmiljölag (1977:1160), available at https://www.riksdagen.se/sv/Dokument-Lagar/Lagar/Svenskforfattningssamling/Arbetsmiljolag-19771160_sfs-1977-1160/ (09.06.2015).

G. UNITED KINGDOM

1. Legal status of the right to strike

1.1. Legal basis

1.1.1. Constitutional

The UK does **not have a written constitution** under which the right to strike is capable of being protected. Furthermore, industrial action, whatever its cause, has traditionally been viewed not as a right, but instead, as unlawful interference with the rights of the employer.[501] Unlike other legal systems, labour law is not set out in a clear and structured fashion: there is **no principled concept of 'lawful' or 'unlawful' industrial action**; at collective level, whether industrial action attracts legal liability depends on a complex and not always predictable interaction between the common law and statute.[502] As to the law of strike, this derives principally from judge-made norms of the common law such as the law of tort and the system of injunctions, and from statute, in the form of Part V of the **Trade Union and Labour Relations (Consolidation) Act 1992 ("TULRCA 1992")**, as interpreted by the courts and developed in official guidance notes.[503]

Up until towards the end of the nineteenth century, it was the criminal law which provided the most important source of constraint against industrial action. However, 1875 marked the repeal of much of this legislation, and the courts stepped in to regulate industrial action, principally as matter of civil law. The scope of **civil liability of trades unions** was expanded by the common law through a series of judicial decisions between 1891 and 1906, with new "torts" of conspiracy to injure and the tort of inducing breach of contract being applied to industrial action.[504]

The strict common law position which survives to the present day is that in calling on their members to refuse to turn up to work or to otherwise interfere with the normal operation of the employer's business, trade unions prima facie commit a series of civil or private wrongs. It is the **statutory immunities provided from these common law liabilities** which constitutes the legal basis on which trade unions may organize industrial action without violating the law. Moreover, potentially lawful strike action may only be called by a trade union following the organization of a full strike ballot, where the majority of those voting have expressed their support for the proposed action.

Such statutory immunity was first introduced by the Trade Disputes Act 1906. This accorded comprehensive immunity to trade unions against tortious liability as well as immunity to any person who '*in contemplation or furtherance of a trade dispute*' committed the new tort of conspiracy, induced some other person to breach a contract of employment, or interfered with the trade, business

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501 Although it should nevertheless be noted that in light of recent case law, there is some judicial recognition of a "right to strike" deriving from Article 11 of the European Convention on Human Rights. The right to freedom of association under Article 11 is incorporated into UK domestic law by the Human Rights Act 1998. In March 2011, the Court of Appeal acknowledged for the first time the existence of a right to strike under Article 11, and the significance of that right for the interpretation of UK statutory provisions: *NURMT v SERCO, ASLEF v London & Birmingham Railway Ltd [2011] England and Wales Court of Appeal Civil Division 226 ("RMT and ASLEF")*. See Ruth Dukes, *The Right to Strike under UK Law: Something More Than a Slogan? NURMT v SERCO, ASLEF v London & Birmingham Railway Ltd,* Industrial Law Journal, Vol. 40, No. 3, September 2011.

502 See Simon Deakin and Gillian S. Morris, *Labour Law*, 6th ed., 2012, Hart Publishing, Oxford, pp. 1032-1032.

503 See Jeremias Prassl in Berd Waas (ed.), *The Right to Strike – a comparative view*, 2014, Kluwer Law International, The Netherlands, p. 554.

504 Simon Deakin and Gillian S. Morris, *Labour Law, op. cit.,* p. 1034.

or employment of another. Today, it is statutory provisions of TULRCA 1992[505] which contain the specific listed immunities against legal actions in tort where industrial action is contemplated.

1.1.2. Role of international law

In light of the absence of a right to strike *per* se under UK law, the influence of international law on UK law is limited and UK the domestic system may be said to **fall short of international standards** in a number of respects. In 2004, the UK Parliamentary Joint Committee on Human Rights reported the following:[506]

> "*132. The [UN Committee on Economic, Social and Cultural Rights – "CESCR"] has repeatedly identified UK law as incompatible with the right to strike, as it is protected under Article 8 of the [International] Covenant [of Economic, Social and Cultural Rights]. Article 8(1)(d) guarantees "the right to strike, provided that it is exercised in conformity with the laws of the particular country". This reflects similar guarantees of the right to strike, in the Conventions of the ILO, and in the European Social Charter, international instruments to which the UK is party.*
> *[…]*
>
> *136. In its concluding observations, the CESCR found, referring to its earlier concluding observations of 1997, that the failure to incorporate the right to strike in [United Kingdom] domestic law breached Article 8. Reiterating its 1997 recommendations on this point, it recommended that the right to strike should be incorporated in legislation and that strike action should no longer entail the loss of employment.*
>
> *137. These conclusions are echoed in successive findings of the ILO Committee of Experts, in its reviews of UK compliance with ILO Convention 87, as well as in the findings of the Council of Europe European Committee of Social Rights. The Institute of Employment Rights cited repeated findings by these bodies that the UK law fails to protect the right to strike.*"

Recommending that the UK Government should review the existing law in light of the successive findings of the authoritative international bodies overseeing these treaties, the Committee nevertheless noted the position of the Government that the existing legal framework was sufficient to comply with the UN CESCR and that with regard to protection against loss of employment following strike action, its statement that,[507]

> "*…giving protection against loss of employment is one means by which national legislatures can secure or at least assist in securing, compliance with the Covenant. But [the government] does not consider that the Covenant, which does not refer explicitly to the dismissal of strikers, makes such a protection essential in all circumstances or requires, where the protection is given, that it must be indefinite.*"

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505 Namely TULRCA 1992, sections 219(1) and (2). TULRCA 1992 available at http://www.legislation.gov.uk/ukpga/1992/52/contents (08.07.2015).

506 House of Lords and House of Commons Joint Committee on Human Rights, *The International Covenant on Economic, Social and Cultural Rights, Twenty-first Report of Session 2003-4*, published 20 October 2004, available at http://www.publications.parliament.uk/pa/jt200304/jtselect/jtrights/183/183.pdf (30.06.2015).

507 *Ibid,* at para. 140.

1.2. Substantive law

1.2.1. Definitions

In the absence of an explicit "right to strike", the position of the common law is that **industrial action violates the rights of the employer**, including its right to conduct his or her business without interference and his or her rights arising from the contracts of employment with his or her employees. Moreover, a clear intention on the part of the employee not to do any of the work for which he or she had been engaged amounts to a fundamental breach of contract, permitting the employer to treat the employee as dismissed.

A legitimate strike, namely one where the union and striking workers may eligible for statutory protection, is therefore **defined very narrowly under UK law**. It is limited to a strike or other industrial action which is, "***in contemplation of or furtherance of a trade dispute***."[508] This reduces the definition of legitimate strike action to that which is used as an economic tool only and not, for example, for social or political objectives. Section 244 of TULRCA 1992 delineates the meaning of trade dispute further, providing an **exhaustive list of issues which the trade dispute may concern**.[509] Immunity for trade unions against liability for common law torts and, in turn, protection for employees against dismissal from employment can only be possible if the strike or other industrial action concerns such a conflict.

1.2.2. Conditions for exercising the right to strike

Given that the organization of industrial action will almost always result in civil liability under the common law, the first condition to exercising the right to strike is securing statutory immunity for the tortious acts in question. Section 219 of **TULRCA 1992 effectively provides a defence for unions against certain tort liabilities** if several criteria are met.

First, the **action must come within a specific list of economic torts** set out in the statute, these principally being [the trade union] inducing another person to break a contract or interfering or inducing another person to interfere with the performance of that contract or a threat to do the same. Striking workers invariably breach their contracts of employment by withdrawing their labour, and so this condition will therefore normally be met in the context of a strike or threatened strike.

Secondly, the act must fall within the formula which sets the boundaries of legitimate industrial action: it **must have been done "*in contemplation of or furtherance of a trade dispute*"**. Seven categories of purpose are set out for a trade dispute in TULRCA 1992, including terms and conditions of employment, engagement or termination of employment, allocation of work or duties and matters of discipline.[510]

Thirdly, the **trade union must have complied with a series of formality requirements** in relation to balloting and notifications. Balloting requirements include the appointment of independent scrutineers, the contents of the voting paper and that entitlement to vote is strictly extended to all members of the trade union who it is reasonable for the union to believe will be induced to take part in the industrial action in question.[511] Moreover, the union is under a duty to properly inform and communicate with the employer and those entitled to vote. A strike can only be called and launched

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508 TULRCA 1992, s. 219.

509 TULRCA 1992, s. 244(1). For more detail, see section 1.2.2. of this country report below.

510 *Ibid*.

511 TULRCA 1992, s. 227(1).

by a trade union which has complied with all of the above provisions and in accordance with the time limits set out in Part V of TULRCA 1992.[512]

1.2.3. Effect on contracts of employment

Courts have always taken the view that a strike, being a total cessation of work, **will always amount to a breach of contract of employment,** regardless of the circumstances which provoked it. Even if the strike can be considered as legitimate (namely, where the trade union organising the strike is able to avail itself of a statutory immunity defence), those participating in the strike action will generally be regarded as having committed a so-called fundamental breach of contract of employment.

This enables the employer, in theory, to regard the contract as having come to an end, and allows them to sue for damages arising from the breach.[513] In practice, it is very rare for employers to sue individual workers; in general they prefer to pursue a remedy in tort against those organising the industrial action.[514]

2. Role of the right to strike in collective labour relations

2.1. Relation with other forms of action and role in collective negotiations

Other forms of industrial action which have been commonly witnessed in the UK include the following:[515]

- ***The Work-to-Rule and Go-Slow***: this is where employees meticulously follow work rules, slowing down the rate of work in a way which is wholly unacceptable to employers;
- ***Overtime ban***: Most frequently occurring in newspapers, local government and the electricity supply industry, this is where there a concerted refusal to carry out overtime;
- ***Ban on particular duties***: this is where employees work normally except in relation to particular duties about which they are complaining;]
- ***Sit-in***: where employees literally sit-in their employer's workplace and refuse to work; this gives occupiers control over the employer's machinery, tools and stock and can be more effective than a strike in maintaining morale, where the striking workforce are often spread in different towns and communication is less immediate.

The latter will, like a strike, almost certainly amount to a fundamental breach of contract by striking employees, but for the other methods of industrial action, the position depends on the particular circumstances. Given the tortious liability arising for trade unions which organise strike action, it is these other limited forms of industrial action which **can ironically present a greater risk to employers**. Such tactics not only make it more difficult to identify the culprits, but also make it more difficult for the employer to identify the union as having 'authorised and endorsed' such action, which is essential for the union to be liable under TULRCA.[516] Such action may also be more likely to be compatible with employees' professional code of ethics; a full-scale strike by hospital staff is almost impossible to imagine, whereas a work-to-rule or overtime ban are regular features of industrial relations in the

512 See Jeremias Prassl in Berd Waas (ed.), *The Right to Strike – a comparative view*, *op. cit.*, pp. 557-558.

513 *Ibid*, p. 560. This is now subject to the statutory protection offered against dismissal. See section 3.1 of this country report below, for further information.

514 Simon Deakin and Gillian S. Morris, *Labour Law*, pp. 1128-1129.

515 As noted in John Bowers QC, Michael Duggan and David Reade, *The Law of Industrial Action and Trade Union Recognition*, Oxford University Press, Chapter 6, p.123.

516 *Ibid.*

health service. Finally, forms of industrial action falling short of strikes may not alienate public sympathy for those involved.[517]

Workers employed at another establishment of the employer may be called upon for support in strike action, as may workers employed by a supplier or customer of the employer in the dispute. This is known as **secondary action**, and a refusal of workers elsewhere to handle goods produced by or destined for a strike-bound plant is sometimes referred to a secondary boycott. Such 'secondary action' however **does not attract statutory immunity** for the organising trade union given that collective organisation is deemed to be potentially legitimate only if carried out at the level of the enterprise.[518]

In the UK, industrial action in the form of a strike is, as in many other countries, **relied on as a way of providing bargaining power to workers in collective negotiations**, enabling them collectively to put pressure on an employer. This is consistent with the principles of the European Social Charter, Article 6(4) of which recognises the right of workers to strike under the 'rubric' of the right to bargain collectively. It is said that proposals for courts or arbitral bodies for providing a procedure for the peaceful resolution of disputes, although made from time to time, have not been looked upon favourably in the UK. Neither trade unions nor employers are willing to contemplate the loss of control which bodies of this kind would entail.[519]

2.2. Use of the right to strike in practice

Industrial action in the UK, including **strike activity, has diminished considerably in recent decades**. This is for a number of reasons. First, there has been a sharp decline in the number of trade union members, this being almost halved since 1980. Secondly, economic restructuring since 1980, particularly in light of the decline of the manufacturing and extraction industries, has meant the worker and **trade union militancy associated with these domains has also fallen significantly**. Thirdly, the law itself has resulted in **considerable limits on trade union behaviour**, providing employers with more confidence in using the courts to challenge strike action and to enforce injunctions issued against trade unions.[520]

Indeed, it is reported that the restrictions of industrial action are strongly respected in practice in light of the system of injunctive relief backed up by sanctions on trade unions for contempt of court.[521] Although strikes are today much less common, they do continue to take place but on a smaller scale than previously. The Office for National Statistics reports that in **2013, 443,600 working days were lost in the UK from 114 stoppages of work** arising from labour disputes. There were 50 stoppages in the public sector, compared with 64 in the private sector. These involved 395,400 workers. Insofar as industries are concerned, latest statistics show that the **education sector accounted for 50% of all working days lost** (although only 25% of all strikes), with public administration and defence accounting for a further 41% of the working days lost. Strike rates for all industries, it is reported, are generally very low, except in the areas of public administration and defence and education. 94% of working days

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517 *Ibid*, p.124.

518 Simon Deakin and Gillian S. Morris, *Labour Law*, *op. cit.,* p. 1070.

519 See Hugh Collins, K.D. Ewing and Aileen McColgan, *Labour Law Text and Materials*, 2005, 2nd ed., Hart Publishing, Oxford, p. 864

520 See *ibid*, p. 868.

521 Jeremias Prassl in Berd Waas (ed.), *The Right to Strike – a comparative view*, *op. cit.*, pp.565. "Contempt of court" refers to disobedience of a court order or process.

lost were due to disputes over pay, accounting for 60% of all stoppages. In the field of education however, the majority of strikes concerned redundancies.[522]

2.3. Role of the right to strike in non-organised sectors

There is **no known statistical or other anecdotal evidence** of the role of strike action in non-organised sectors. The author, who worked for six years as a lawyer specialised in UK employment law, can however confirm that among his clients in the sectors where formal collective working relations rarely exist, there were no known incidences of threatened or actual strike action.

3. Protection of workers on strike

3.1. Special protection against dismissal and other unfair treatment

Legislation has not, until recently, accorded employees involved in industrial action any additional protection. To the contrary, **those taking industrial action risk prejudicing many of their statutory rights**. Given that industrial action, whether legitimate or not, is likely to constitute a breach of contract, there are a number of steps which the employer may lawfully take against those workers involved in the action. There is no right to be paid by the employer during the period of a strike, statutory sick pay is lost where the employee is directly involved in the industrial action and entitlements to social security benefits are also curtailed.[523] The employer may also wish to dismiss and replace those taking part in the strike in order to ensure continuity of production.

Until recently (see below), an employee dismissed with or without notice for taking part in a strike, whether it could be described as "legitimate" or not, had no right to bring a claim for unfair dismissal. In fact, questions over the **fairness of dismissals during strikes have historically been excluded from the jurisdiction of employment tribunals**. This is enshrined in sections 238(1) and (2) of TULRCA 1992. The only **two exceptions** to this are: (i) where the dismissal is said to be because of one of the exhaustively listed "**automatically unfair reasons**"[524] such as on the grounds of pregnancy or child birth, activities in relation to health and safety or acting as or standing for election as an employee representative;[525] or (ii) where the employee in question **had been selectively dismissed** or that other employees had been selectively re-engaged – in other words, where employees taking part in the action have not been treated in the same way.[526]

The **Employment Relations Act 1999**[527] introduced into TULRCA 1992 a new provision which rules that in certain circumstances, it will also be **automatically unfair to dismiss an employee for the reason of**

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522 All data obtained from Office for National Statistics, *Labour Disputes – Annual Article, 2013*, published 17th July 2014, available at http://www.ons.gov.uk/ons/dcp171766_371313.pdf (02.07.2015).

523 See Simon Deakin and Gillian S. Morris, *Labour Law*, *op. cit.,* pp. 1134-1155.

524 As seen in section 3.2. of this country report below, a dismissal can be defended by an employer as being fair where it is both for a fair reason and where the employer has acted fairly in dismissing the employee for that reason. Where an employee succeeds in showing that the reason for a dismissal was "automatically" unfair, the employment tribunal will make a finding of unfair dismissal without further enquiry as to reasonableness, because even if the employer can show it acted fairly in dismissing the employee for that reason, the reason alone makes the dismissal unfair.

525 TULRCA, section 238(2A).

526 TULRCA, section 238(2)(a). For example, one or more striking employees have been dismissed, where others involved in the strike have not been dismissed, or a striking employee is not re-engaged after dismissal during a strike whereas other colleagues have been so re-engaged.

527 Employment Relations Act 1999, available at http://www.legislation.gov.uk/ukpga/1999/26/contents (08.07.2015).

having taken part in a strike or other industrial action.[528] Where the trade union is protected from liability in tort (having met the conditions for satisfying the statutory immunity defence under section 219 of TULRCA 1999),[529] the **worker is protected from dismissal during a "protected period"** (see below). The scope of this protection is heavily circumscribed however:

First, the employee **only** takes '*protected industrial action*' if he or she commits an act **where the trade union is protected from liability in tort**. Such protection from liability in tort, means of course that the union must have also met all the stringent requirements relating to ballots and notices to employers.

Secondly, protection does not arise simply because the employee was dismissed while protected industrial action was being taken. The fact that the employee was involved in **such action must be *the* reason or *principal reason* for dismissal** (or, in a 'redundancy case', for selection for dismissal).[530] This means an employer who wishes to dismiss a striking employee for other reasons, such as poor performance or absence records, may dismiss without following disciplinary or performance procedures. It also means that an employer may dismiss those chosen on grounds of their union activities, enabling employers to dismiss with impunity the 'ringleaders' behind the industrial action.[531]

Thirdly, the protection against dismissal for having taken protected industrial action requires that the **date of dismissal falls within a 12-week period**[532] beginning with the first day of protected industrial action. There is therefore no guaranteed protection for the whole length of the dispute, should it exceed 12 weeks. There are however, limited circumstances in which the protected period may be extended.[533]

On the other hand, unlike normal unfair dismissal claims[534] there is **no minimum period of employment required by a striking employee** in order to bring such a claim for automatic unfair dismissal. Protection, in effect, applies from day one of the employee's employment.

Apart from the limited dismissal protection, the only other additional protection available to striking employees is in relation to what is known as their continuous employment. "**Continuous employment**" refers to the period for which a person's employment in the same business has subsisted. Under the Employment Rights Act 1996 (the "ERA 1996"), employees have the right to claim certain statutory remedies only if they have been continuously employed for certain minimum periods. In contrast to the usual position in relation to a cessation of work (which can result in continuous employment being broken and reset to zero on returning to work), periods during which an employee is on strike do not serve to break continuous employment. Such periods of inactivity during a strike are

528 TULRCA, sections 238A and 238B.

529 See section 1.2.2. of this country report, above.

530 TULRCA 1992, s.238A(2); Employment Rights Act 1996, s.105(7C)

531 See Simon Deakin and Gillian S. Morris, *Labour Law*, *op. cit.,* p. 1150.

532 Extended, under the Employment Relations Act 2004, section 26(2) from 8 to 12 weeks.

533 Under TULRCA 1992, section 238A, these are: where the employer has "locked out" from premises those employees who are, for example, working to rule, with such period of "lock out" being added on to the duration of the 12-week protected period; where dismissal takes place after the end of the protected period and the employee had stopped taking protected industrial action before the end of that period; finally, when dismissed after 12 weeks and the employee has not ceased action before the end of that 12-week period and the employer has not taken such procedural steps as would have been reasonable for the purpose of resolving the dispute in question.

534 See section 3.2. of this country report, below.

however excluded from his or her total period of continuous employment when determining how much continuous employment an employee has.[535]

Indirectly, striking workers are, while on strike, currently afforded some protection against their roles being lost to agency workers. The Regulation 7 of secondary legislation, the Conduct of Employment Businesses Regulations 2003,[536] **prohibits businesses from providing agency workers to cover the jobs of those involved in strike or other industrial action**. It has however, just been announced that the UK government is consulting on removing such prohibition, notwithstanding that this is seemingly in breach of ILO Convention 181.[537]

Where an employee is dismissed while taking part in **"*unofficial*"[538] industrial action**, there is no such protected period, and an **employment tribunal has no jurisdiction to consider a claim for unfair dismissal**. The only exception to this is where the reason for the dismissal is one of the automatically unfair reasons referred to above (such as on the grounds of pregnancy or child birth, activities in relation to health and safety or acting as or standing for election as an employee representative) or, additionally, where they were dismissed for having made what is known as a "*protected disclosure*" (also known as "*whistleblowing*").[539]

3.2. Comparison with general protection

The first observation to be made is that rather than receiving enhanced protection when taking part even in what might be termed as a "legitimate" strike, **employees, in fact, lose a number of rights** which they would otherwise be entitled to under general employment protection laws. In addition to rights not to suffer an unlawful deduction from wages, the right to claim statutory sick pay and other social security benefits, a statutory redundancy payment and statutory minimum periods of notice, otherwise eligible employees are no longer protected against the right not to be "ordinarily" unfairly dismissed.[540]

"Ordinary unfair dismissal" is the right available to all employees with a minimum of two years' service to challenge their dismissal and to claim a remedy for having been unfairly dismissed. Once it has been established that an employee has been dismissed, an unfair dismissal will be decided in **two stages**: the first consists of establishing what the **reason(s) for dismissal** are; the second stage is **procedural fairness**. Where an employee brings a complaint of unfair dismissal, the employer must show that the reason for the dismissal falls within one of the specific categories set out in section 98(2) of the ERA 1996:

(1) capability or qualifications;
(2) the employee's conduct;
(3) redundancy;

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535 Employment Rights Act 1996, section 216(1) and (2). ERA 1996 available at http://www.legislation.gov.uk/ukpga/1996/18/contents (08.07.2015).

536 Available at http://www.legislation.gov.uk/uksi/2003/3319/pdfs/uksi_20033319_en.pdf (21.07.2015).

537 See Staffing Industry Analysts, *UK – Government proposes allowing use of agency workers during strikes,* 17th July 2015, available at http://www.staffingindustry.com/eng/Research-Publications/Daily-News/UK-Government-proposes-allowing-use-of-agency-workers-during-strikes-34736 (21.07.2015).

538 Defined by TULRCA 1992, section 237(1).

539 TULRCA 1992, section 237(1A).

540 Except where, as described in section 3.2. of this country report, the employee has been "selectively dismissed" or others have been selected for re-engagement.

(4) due to a statutory requirement. [541]

There is also a further category which the statute describes as "*some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held*."[542] After a potentially fair reason under the ERA 1996 has been established, it is then necessary, as a second step, for the employment tribunal to consider whether the employer acted fairly in dismissing the employee for that reason.[543]

In light of sections 238(1) and 238(2) of TULRCA 1992 (namely, where the employee is engaged in industrial action), a **tribunal does not have jurisdiction to entertain such a complaint** unless the complainant has been selectively chosen for dismissal (or selection for redundancy) or not offered re-engagement following dismissal, where other relevant colleagues have. Even where one of these exceptions applies, the complaining employer may still be able to successfully defend the dismissal by showing a fair reason and that it acted fairly.

The only enhanced protection a striking worker can be said to receive beyond general protection against unfair dismissal is that he or she is entitled to claim **automatic unfair dismissal**[544] where the reason or principal reason for dismissal during the 'protected period' is that the employee took protected industrial action. In these very limited circumstances, not only is the employer unable to defend its actions by saying that it acted fairly in dismissing the employee for that reason, but it is also exposed to such claims from striking employees with less than the two years' qualifying service needed to bring an ordinary unfair dismissal claim.

3.3. Role of international law on protection afforded

Prior to the introduction by the Employment Relations Act 1999 of protection against dismissal during the 'protected period' of a strike, striking employees could be dismissed for taking part in a strike even where the complex conditions of trade union immunity were complied with: the action could be in furtherance of a trade dispute, supported by a ballot, with proper notice given to the employer. Yet those taking part in the action could still be dismissed.[545] Various international supervisory bodies, including the Social Rights Committee of the Council of Europe and the Freedom of Association Committee and the Committee of Experts of the International Labour Organisation ("ILO") condemned UK legislation as being in violation of international labour standards.

In 1988, a complaint had been raised before the ILO about a dispute involving 2000 seafarers dismissed by P&O European Ferries after a strike. The **ILO Freedom of Association Committee had recommended that British law should be amended**, "*to give effective protection to workers who have been dismissed for having participated in a strike and in particular to enable workers who are dismissed in the course of, or at the conclusion of, a strike or other industrial action to challenge their dismissal*

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541 ERA 1996, section 98(2).

542 ERA 1996, section 98(1)(b).

543 Section 98(4) of the ERA 1996 states that: "*Where the employer has fulfilled the requirements [of showing a fair reason for dismissal], the question whether the dismissal was fair or unfair (having regard to the reason shown by the employer) – (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably in treating it as a sufficient reason for dismissing the employee, and (b) shall be determined in accordance with equity and the substantial merits of the case.*"

544 See 3.1. above of this country report for definition of "automatically unfair".

545 Hugh Collins, K.D. Ewing and Aileen McColgan, *Labour Law Text and Materials, op. cit.,* p. 945.

before a judicial authority."[546] This sentiment was reiterated on various occasions by the ILO Committee of Experts and the Committee of Independent Experts of the Council of Europe, who continued to point out that UK law was in breach of international obligations.

It was with the election of the Labour Government in 1997 that a new statutory approach was taken to the treatment of strikers dismissed for taking part in industrial action. The Employment Relations Act 1999, which incorporated into TULRCA the new statutory provision protecting employees from unfair dismissal by reason of their participation in a strike was **explained by Government ministers as a response to ILO concerns**. As one commentator notes, however, the time-limited 'protected period' is a, "*threshold not contemplated by international standards,*" and that although, "*the Labour Government has taken a step towards the protection from dismissal on which the ILO insists….**this does not amount to full compliance**.*"[547] In 2004, the Joint Committee on Human Rights, a committee of the UK Parliament, supported this analysis, concluding that the Government should, "*take seriously the successive findings of the authoritative international bodies overseeing treaties to which the UK has become party, and should review the existing law in the light of them.*" [548]

4. Enforcement and effectiveness of available sanctions

The available remedies for a finding of automatic unfair dismissal where the reason or principal reason for dismissal was the taking of strike action during the protected period are the same as those available for ordinary unfair dismissal.

It was originally intended by the legislation that the main remedies for unfair dismissal would be reinstatement and re-engagement orders. Statistics indicate, however, that very few re-employment orders are made in practice.[549] The **most common sanction is compensation**.

If the employment tribunal decides to consider making a re-employment order, it must first consider whether to make a reinstatement order;[550] if it decides not to do so, it must then consider whether to make a re-engagement order.[551] If it decides not to make any order, it must make an order of compensation.[552] It should be noted that section 239(4) of TULRCA 1992 provides for a particular rule in relation to re-employment orders concerning those who have been dismissed by reason of having taken part in an industrial dispute, namely, that no order shall be made for reinstatement or re-engagement until after the conclusion of the protected industrial action.

A reinstatement order is an order to the employer to treat the applicant as if he or she had not been dismissed. In deciding whether to make an order, the tribunal must comply with the requirements of the Employment Rights Act 1996 ("ERA 1996"), and take into account the following factors: (1) the

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546 ILO, Official Bulletin, 1991, Volume 74, Series B, Case No. 1540 (277th Report of the Freedom of Association Committee).

547 Tonia Novitz, *International Promises and Domestic Pragmatism: To What Extent will the Employment Relations Act 1999 Implement International Labour Standards Relating to Freedom of Association* (2000) 63 Modern Law Review 370 at pp. 387-388.

548 House of Lords and House of Commons Joint Committee on Human Rights, *The International Covenant on Economic, Social and Cultural Rights, Twenty-first Report of Session 2003-4, op. cit.,* para 142.

549 Employment Tribunal and Employment Appeals Tribunal statistics published by the Ministry of Justice and Tribunals Service for 2010-2011 show that re-employment orders were made in 1% of all cases (6 cases in total).

550 ERA 1996, section 116(1).

551 ERA 1996, section 116(2).

552 ERA 1996, section 112(4), as amended.

complainant's wishes, (2) the practicability for the employer of compliance with the order; and (3) where the complainant caused or contributed to some extent to the dismissal, whether it would be just to order reinstatement.[553]

A re-engagement order must be considered where the tribunal decides not to order reinstatement. A re-engagement order is an order that the employee should be engaged by the employer in employment comparable to that from which he or she was dismissed. It must broadly apply the factors to be considered for a reinstatement order.[554]

Where a re-employment order is not made, the employment tribunal must award **compensation**. In most cases, compensation usually **consists of a basic award and a compensatory award**. The **basic award** is based on the complainant's age, length of continuous employment at the date of termination, and the amount of gross weekly pay.[555] Gross weekly pay is currently capped at £475, and maximum number of years' service that may be taken into account is 20.[556] The maximum basic award is £14,250.[557]

A **compensatory award** is, "*such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer.*"[558] This will usually consist of immediate loss of wages, future loss of wages, a figure representing the loss of protection for unfair dismissal and loss of pension rights. It does not include injury to pride or feelings.[559] The maximum compensatory award is capped at the lower of one year's pay or, at present, £78, 335.

The **effectiveness of this protection is considered limited**, particularly given the rare use, in practice, of re-instatement: something described as, "*arguably the only satisfactory remedy to counter the absence of a doctrine of suspension of the contract during industrial action*."[560] This is a particular issue in the case of strikes where an employer may have recruited replacement labour during the course of the dispute, meaning it may be impossible for dismissed workers to take up their posts again.

A further issue which serves to highlight the **potential inadequacy of available remedies** is that illustrated by case law. In 2002, 86 members of a trade union, successfully claimed under s.238A of TULRCA 1992 that they had been automatically unfairly dismissed by their employer, *Friction Dynamics*, for having taken part in a legitimate strike.[561] However, the owner of *Friction Dynamics* placed the company in voluntary liquidation after the tribunal made an award for compensation to the claimant employees. This, said one commentator, "*was almost inevitable in any event, because as soon as compensation for 86 unfair dismissal claims became payable (which would certainly have run well into seven figures), the company would have had no real alternative other than liquidation.*"[562] The

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553 ERA 1996, section 116(1).

554 ERA 1996, section 115(1).

555 Calculated in accordance with ERA 1996, sections 220-229.

556 ERA 1996, section 119(3).

557 This is based on a formula of Number of years' service (capped at 20) x Weekly gross salary (capped at £475) x Multiplying age factor [of 0.5 (for employees aged 18-22), 1 (for employees aged 22-41) or 1.5 (for employees aged 41 or more)].

558 ERA 1996, section 123(1).

559 *Dunnachie v. Kingston upon Hull City Council* [2004] Industrial Cases Reports 1052.

560 Simon Deakin and Gillian S. Morris, *Labour Law, op. cit.,* p. 1149.

561 *Davis v. Friction Dynamics*, Liverpool Employment Tribunal, case no. 6500432/02, unreported.

562 A. Chamberlain, *The Role of the 'Eight-Week Rule' in the Friction Dynamics Dispute,* The Lawyer, 3 November 2003, cited in Hugh Collins, K.D. Ewing and Aileen McColgan, *Labour Law Text and Materials, op. cit.,* p. 951-3.

successful employees only received minimal basic award compensation as a result of the company being in liquidation. The owner, however, allegedly then bought back the assets and set up a new business under a new name – something which was suggested by the Union as being a tactical manoeuvre designed to avoid making the compensation payments. Although legislative changes have since been introduced[563] to ensure that sums owed to employees (as unsecured creditors) will have a better prospect of being recovered, the possibility of an employer adopting such a tactic still remains.[564]

5. Possibility to extend protection in collective agreements

Under the UK system, **collective agreements are generally not legally enforceable** between the collective parties (employers and unions). Moreover, unlike other EU countries, even where negotiations between representatives of employer associations and trade unions at the national level lead to collective agreements, there is no statutory mechanism for enforcing the terms agreed collectively against a particular employer.

Although most collective agreements are not legally enforceable by the union against the employer (and vice-versa), they may, and **in most cases in practice, do, have legally binding consequences as between the employer and individual employee**. Their terms can be incorporated into individual contracts of employment either because the contract expressly provides for such incorporation, or because incorporation is an implied term of the contract deriving from custom and practice in the industry.[565]

TULRCA 1992 defines a collective agreement in section 178 as one relating to a range of matters, including "*…engagement or non-engagement, or termination or suspension of employment or the duties of employment…..*" as well as other terms and conditions of employment. Although such issues are therefore **capable of being regulated** – and even enhanced in an employee's favour - by a collective agreement, their potential legal enforceability will rely on their incorporation into an individual employee's contract of employment. However, even if such terms are incorporated into an employment contract, as noted above,[566] participating even in legitimate strike action is regarded under UK common law as a **fundamental breach of the protesting employee's contract of employment**. Accordingly, from the moment the employee joins any strike action, an employer would be **under no obligation to respect any enhanced rights otherwise incorporated** into his or her contract of employment.

Indeed, there is no empirical evidence reported of collective agreements providing enhanced protection to striking employees, and it may be inferred that this is because such protection would not be legally enforceable against employers in any event.

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563 Under the Enterprise Act 2002, section 252.

564 See IER, *The right to strike: Has the law moved on since the Friction Dynamics,* Institute of Employment Rights, June 26th 2012, available at http://www.ier.org.uk/sites/ier.org.uk/files/IER%20Friction%20Dynamics%20Briefing.pdf (09.07.2015).

565 Mrs Justice Slade DBE and members of 11 King's Bench Walk (eds.), *Tolley's Employment Handbook*, 27th ed. 2013, Lexis Nexis, London, para. 5.5.

566 See section 1.2.3. of this country report, above.

III. ANALYSIS

A. Country summaries

In **Austria**, where there is no recognised "right to strike" as such, there is no special protection for workers on strike. Even where a strike might be considered "legitimate" according to collective labour law, the worker will still be in breach of contract and could be dismissed from employment. In practice however, both industrial action, and such a response by employers, are rare.

The preamble to the **French** Constitution recognises the right to strike, but law concerning industrial action is principally found in jurisprudence. Although the contract of employment is suspended during periods of strike, enhanced protection is provided to striking workers, and this may be extended through collective agreements. Standard safeguards include protection against discrimination and against unfair dismissal during such industrial action.

In **Germany**, the right to strike is effectively guaranteed through freedom of association, enshrined in the Constitution. Striking does not amount to a breach of contract, but the contract is nevertheless suspended, resulting in no right to salary. There is no additional dismissal protection for striking workers, although further safeguards are often provided through collective agreements.

The **Italian** Constitution recognises the right to strike alongside ratification of various international conventions, and is supported further by legislation providing specific sanctions against anti-union conduct. The employment contract is suspended during strike action, but is not breached by the striking worker. General protection and sanctions for unfair dismissal are no different during periods of strike, but employers face stiff penalties for engaging in anti-union conduct.

In **Slovakia**, where strikes are rare, the right to strike is contained in the Constitution. Although striking workers are not entitled to pay during periods of strike, they are protected from unfavourable strike-related treatment by the employer and cannot be held liable for damage caused by the interruption to work during a strike. Striking workers may also be dismissed where they fail to return to work after a strike is declared as being unlawful. Extra protection may be provided in collective agreements.

Sweden recognises the right for unions to take industrial action in its Constitution and this is supplemented by further protections in the Co-determination Act. The right to strike is protected to the extent that it is organised by a trade union and striking in practice is curtailed by peace obligations in collective agreements. Unfair dismissal protections continue during strikes and additional protections apply when the right of association is exercised.

There is no express recognition of the right to strike in the **UK**; to the contrary, trade unions are exposed to civil liability in relation to unlawful strike action unless they follow strict statutory rules, including complex balloting procedures. Workers involved in lawful strikes invariably act in breach of contract, and although they are protected for a time-limited period from dismissal due to the industrial action, other unfair dismissal protection and contractual safeguards are lost.

B. Comparative tables

1. Legal status of right to strike and its role in collective relations

COUNTRY	LEGAL STATUS OF RIGHT TO STRIKE – LEGAL BASIS	LEGAL STATUS OF RIGHT TO STRIKE – SUBSTANTIVE LAW	ROLE OF RIGHT TO STRIKE IN COLLECTIVE RELATIONS
Austria	- **No recognised right to strike**. - State and the law have a so called "**neutral**" attitude towards strike, i.e. not forbidding a strike or punish strikers, but also not protecting workers on strike	- No direct legal "recognition" of strikes - **Aalmost no procedural obstacles** to strike as a result - "**Peace obligations**" in collective agreements are common and principal obstacle to strike - Effect: contract is probably breached	- **Strikes are rare**, partly due to inherent "peace obligations" in general collective agreements with sole trade union
France	- **Droit constitutionnel** (Préambule de la Constitution de 1946) - Le **Code du travail** règlemente uniquement les effets de la grève et pose des règles spécifiques pour les grèves dans le secteur public - Le droit français de la grève est essentiellement **jurisprudentiel**	- **Définition** de la grève : arrêt collectif et concerté du travail en vue d'appuyer des revendications professionnelles - **Titulaires** du droit de grève : les salariés des entreprises privées et les fonctionnaires et agents publics, certaines professions sont privées du droit de grève - **Critères** à respecter pour la qualification de grève licite et bénéficier de la protection - Limitations légales spécifiques dans **le secteur public** en vertu du principe de continuité (ex. : service minimum, préavis) - Pas de possibilité pour les **conventions collectives** de **limiter** le droit de grève dans les entreprises privées, mais permission de le	- Les grèves sont **très fréquentes** - Les **négociations collectives** peuvent engendrer, éviter ou mettre fin à la grève ; cette relation n'est pas réglée par la loi - **Revendications** : salaires, emploi, conditions de travail - Les grèves ont surtout **lieu** dans les grandes entreprises ; elles sont souvent amorcées par les salariés du secteur public et dans des environnements syndiqués

		faire dans les services publics sous contrôle judiciaire - **Effet** : la grève suspend le contrat de travail : le salaire n'est pas versé	
Germany	- Right to strike not explicitly mentioned, but **part of freedom of association**, which is protected as a basic right by the constitution - Only **few laws mention strike or labour dispute**, nearly none of them relevant in this legal opinion - Mostly **regulated by case law** (Federal Labour Court)	- Civil servants are not allowed to strike - **Lawful strikes**: general, across-the-board, partial, alternation and wave strike - **Unlawful strikes**: political and wild strike - Marginal types of strike (mostly lawful): sympathy and warning strike - **Conditions for lawfulness**: tariff-relatedness, duty not to engage in labour dispute while collective bargaining agreement is still valid, proportionality (esp. *ultima ratio*) - Effect on contract: **contract suspended** during strike (no obligation to work, no right to salary), no breach of contract	- Relatively **few working days lost** due to strike than in other countries - Strike is most important instrument of labour dispute
Italy	- Droit **constitutionnellement** protégé (Art. 40) - Le Statuto dei lavoratori – loi n. 300 de 1970 - pose des sanctions spécifiques pour toute « **conduite antisyndicale** » y compris tout comportement « punitif » envers de travailleurs en grève - La loi 146/1990 règle la grève dans les services publics essentiels afin de	- Définition : **abstention collective** du travail pour la protection d'un **intérêt collectif** - Notion très vaste, **pas de limites intrinsèques** : légitimité de grèves économiques-politiques, grèves de solidarité, grèves purement politiques - Toute modalité d'exercice de la grève est admise	- Les grèves sont **fréquentes** et peuvent être décidées (et normalement sont décidées) à l'occasion de négociations **collectives** - Dans la majorité des cas, les **parties au conflit** sont les syndicats confédéraux et les syndicats autonomes. Par ailleurs, plus récemment, des grèves sont

	trouver la balance entre le droit de grève de tout citoyen et les droits **à la vie, à la santé, à la liberté et à la sécurité, à la liberté de mouvement, à la santé et la sécurité sociale, à l'éducation et à la liberté de communication**	- Plusieurs tentatives de tracer de **limites externes** au droit de grève en se polarisant sur deux éléments :
		  - le droit de grève s'arrête là où son exercice mets en **danger la vie et la sécurité des personnes ;**
		  - ou bien mets en danger **la productivité** (et non pas seulement la production pendant la période de grève) **de l'entreprise.**
		- **Limitations spécifiques dans le secteur de services publiques essentiels**
		- **Effets** : la grève suspend le contrat de travail
			organisées par des coalitions spontanées (e.g. comités de lutte des salariés dans le secteur des services publics essentiels principalement)
			- Tout type de **revendication** est connu et admis : salaires, emploi, conditions de travail, solidarité avec d'autres travailleurs, protestations politiques etc

Slovakia	- The right to strike is **guaranteed in the Constitution** (Article 37 para 4)
	- There is no general subsidiary act dealing with strikes and only strikes in disputes over entering into a collective agreement and related solidarity strikes are regulated by the **Act on Collective Bargaining**
		- A strike is defined as a partial or full interruption of work by the employees. It may be called only by a trade union **as a last resort** *(ultima ratio)* in a dispute over entering into a collective agreement
		- A strike called during a life of a collective agreement is illegal
		- The right to strike is subject to the following procedural requirements:
		  - the parties must try to resolve their dispute at a **mediator**
		  - qualified approval of employees who may be affected by the collective agreement
			- The right to strike is **used very rarely**.
			- Usually the parties tend to settle their disputes peacefully.
			- The experience of the strikes witnessed is usually calm and relevant laws are respected.

		- formal notice to employer in writing at least three days prior commencement the strike - Contract is effectively **suspended** for duration of strike	
Sweden	- The right for unions to take industrial action (including resort to strike) is **protected by the Constitution**. - Additional protection for employees exercising their right of association and their right to resort to collective actions are provided for in the **Co-determination Act.**	- The concept of a strike is **described in rather vague terms** by the use of non-exhaustive examples of collective actions - Collective action is not prohibited as long as the means used are not in contravention of law or contractual obligations - The right to strike is protected by the constitution **to the extent that it is exercised by unions,** not by individuals - Certain limitations of the right to strike for employees in the **public sector** - Considerable restriction of the right to strike when parties are **bound by collective agreements** (peace obligation) - The strike does not, during as well as after the strike, entail any modification of the work contract. Duty to perform work and to pay remuneration are however **suspended**	- **Relatively few strikes** in recent years since social parties have resolved conflicts by negotiations - The social parties' right and corresponding duty to negotiate limits the use of strike measures - Strikes mostly occur in two situations: (1) following the expiration of a collective agreement or (2) where an industry-wide collective agreement exists but where there are un-organised employers that have not signed a collective agreement
United Kingdom	- No single written constitution - **No legislative recognition of a "right to strike"** but strike is instead viewed as	- For a strike to be launched "legitimately", it must be done so **by the union** and be "**in contemplation or furtherance of a trade dispute**"	- **Strikes are not described as rare but are less common than in the 1970s and 1980s**, consistent with declining trade union members; in 2013, there 114 stoppages of work, with 50% of

	unlawful interference with rights of the employer - Judicial interpretation of domestic laws is likely to be consistent with a right to strike due to **UK Human Rights Act** incorporating ECHR into UK law - Consensus that **UK law does not fully comply with international standards** despite ratification of ILO conventions, European Social Charter and CESCR	- **Conditions for a union to launch a legitimate strike** (i.e., one where they are immune from civil liability) are: - (1) the action must amount to a specific economic tort; - (2) the strike must be for a listed purpose relating to the dispute; - (3) strict balloting and notification requirements must have been met by the union - A strike will generally amount to a **fundamental breach of contract**	all working days loss attributed to the education sector - Striking is **just one of a number of forms of industrial action** commonly witnessed in the UK, including: work-to-rule or go-slow, overtime bans, bans on particular duties and sit-ins

2. Protection of workers on strike and effectiveness of sanctions

COUNTRY	PROTECTION OF WORKERS ON STRIKE (COMPARED WITH GENERAL PROTECTIONS)	ENFORCEMENT AND EFFECTIVENESS OF AVAILABLE SANCTIONS	POSSIBILITY FOR EXTENDING PROTECTION IN COLLECTIVE AGREEMENTS
Austria	- **No special protection** for workers on strike - In a so called "justified" strike (i.e. a lawful strike according to collective labour law) the individual worker violates his contract and can be fired (although happens very rarely)	- No special protection of workers on strike, and hence there is no enforcement of such protection - Nevertheless, it cannot be said that this is be a particular **practical** problem in Austria given the infrequency of strikes	- Could be possible but there is no evidence that this is the case.
France	- Contre les **discriminations** (par ex. : rémunération), les **sanctions** et le **licenciement** (sauf faute lourde, et en respectant la procédure disciplinaire) - **Comparaison** avec la protection générale : le licenciement peut en général avoir lieu pour des raisons de moindre gravité ; il n'est alors pas frappé de nullité, alors que le licenciement d'un gréviste, si	- La violation du droit de grève n'entraine que des **sanctions civiles** et non pas pénales.	- Oui
Germany	- **No difference** between dismissal due to strike or to other grounds - Dismissal has to be **socially justified**, 4 criteria: objective reason (significant breach of contract), new breach of contract in the future likely, employer's interests outweighs employee's interests, *ultima ratio*	- General unfair treatment: result is that any negative measure is **voided** - Strike-breaker bonus: claim to be granted same advantage - Unlawful lock-out: claim for salary for the time of the unlawful lock-out	- Yes - Parties generally agree on "general prohibition of sanction", meaning that sanctions due to labour dispute shall not be imposed or shall be taken back

	- No discrimination against strikers allowed in comparison to workers not on strike		
Italy	- **No substantial difference** between dismissal due to strike or to other grounds **as regards to the worker** (applicability of art. 15 of the *Statuto dei lavoratori*, that was not significantly used because the general protection is sufficient) - Very differently, **as regards to the employer**, dismissal due to strike, if it is not justified (e.g. because of the risks created during the strike or grave damages etc. objectively censorable conducts) entails **sanctions** on the employer under **art. 28 of the *Statuto dei lavoratori*** prohibiting "anti-trade unions conduct"	- Unfair dismissal entails **reintegration** of the worker in his/her previous position - **Trade unions** have been taking great advantage of article 28 of the *Statuto dei Lavoratori* and have often **sued employers under art. 28,** blaming them of anti-trade unions conduct. - Employers are very careful in dismissing trade-unions members in order to avoid any possible art. 28 sanction	- Yes, although it is not necessary due to existing extensive protection
Slovakia	- **No employee may be harmed** for participating, or for not participating in a strike - **According to the Labor Code employer must excuse the absence of employees from work** if he/she is taking part in a "strike relating to the exercise of their economic and social rights" - The strikers **cannot be summarily dismissed**, but if they do not voluntarily return to work after the strike is declared illegal, their absence is treated as unexcused and **such absence may provide the employer grounds to dismiss** such employee - The **trade union may not be sanctioned with fines** or deprived of other rights	- Unfair treatment and wrongful dismissal may be challenged under **general rules** - Usual sanction is **declaration of nullity** of offending action/dismissal	- Yes

	- The **strikers cannot be prosecuted** under penal laws (there is no special crime relating to strikes)		
Sweden	- **General protection for dismissal** apply. - **Additional protection afforded when exercising right of association** and resorting to collective action. Division of burden of proof: sufficient for the trade union to prove the probability that the motive for a measure was of a prohibited nature in order to shift the burden of proof to employer.	- **Only civil sanctions**: employee can claim damages for financial loss and for the violation as such (general damages) and the union may be awarded damages for interference in its activity. - Amount of damages increases when right of association of a union representative has been violated.	- Yes
United Kingdom	- Protection for all striking employees against dismissal **for first 12 weeks of the strike** (subject to extension in certain cases) where it is for the reason of taking industrial action; no qualifying period of employment is needed unlike for ordinary unfair dismissal - Potential protection against ordinary unfair dismissal for employees with 2+ years' service only **where "selectively" dismissed or re-engaged** (i.e., not all striking staff are treated in the same way) - Even legitimate strike amounts to a **fundamental breach of contract**, meaning no entitlement to contractual benefits (including pay), no ordinary unfair dismissal protection and no sick pay.	- Dismissal during the protected period by reason of being on strike is **automatically unfair dismissal** - **Capped compensation** is the usual remedy; re-employment orders are possible but very rare in practice	- **Unlikely**. Although technically possible to include such additional protection, collective agreements normally only have legal effect to the extent that they are incorporated into employees' contracts. The act of going on strike however, amounts to a fundamental breach of contract, meaning any **obligations on the employer fall away**, including, therefore, any additional protection for the employee incorporated through a collective agreement.

C. Comparative examination

1. Legal status of the right to strike

1.1. Legal basis

The majority of the countries examined in this study **expressly guarantee the right to strike at the constitutional level**. This is the case in France, Italy, Slovakia and Sweden.

Although not formally protected under German law, the German constitution does **instead recognise the freedom of association as a fundamental right**, and this has been interpreted as including a right to collective action. In Austria, on the other hand, where its constitution also includes freedom of association, this right has not been understood by the courts as guaranteeing private or public sector employees the right to engage in industrial stoppages. In the UK, industrial action has traditionally been viewed not as a right, but as unlawful interference with the rights of the employer. In the absence of a written constitution, it is only through references in recent case law to the European Convention of Human Right's (ECHR) freedom of association that any concept of a right to strike may be inferred under UK law.

The most important **international and European treaties and conventions protecting the freedom of association have been ratified by each of the countries** concerned. Of particular relevance are the following: Conventions no. 87 and no. 98 of the International Labour Organisation, Article 11 of the ECHR, Article 6 of the European Social Charter (which expressly includes the right to strike) and Article 8 of the International Covenant of Economic, Social and Cultural Rights (which includes the right to strike to the extent that it is exercised in conformity with the laws of the particular country).

For many of the countries studied, it is reported that the **practical significance of international law is limited** given that domestic constitutional guarantees already afford protection which respect or go beyond that found in international treaties and conventions. In other countries however, this lack of practical significance is instead attributed to a disregard for international norms. The UK Government, in particular, is accused of acting in breach of its international obligations. Although Austria and the UK incorporate the ECHR into domestic law, there is a distinct reluctance by domestic courts to interpret the principles of freedom of association as providing an express right to strike.

1.2. Substantive law

1.2.1. Definitions

What constitutes a legitimate strike is **not something determined by government-made rules in most of the countries** examined. In France, Germany and Italy in particular, the absence of a legal definition has resulted in the judiciary delineating the boundaries of legitimate industrial action through case law. Unusually, in Austria, a principle of state neutrality towards industrial disputes is said to apply, and neither the constitution nor national law provides a definition of the term "strike". This means that although there are no particular guarantees afforded to those on strike, there are, equally, no specific rules capable of declaring strike action as illegal.

In the UK, the common law has traditionally held that strike action amounts to tortious behaviour on the part of the trade union which organises it. In this context, legitimate strike action has been defined by legislation which sets out when a trade union may obtain immunity from tortious liability. Sweden and Slovakia, on the other hand, provide clearer legislative rules on what amounts to legitimate strike action, complementing their respective constitutional protections of the right to strike.

The designations of legitimate strike action vary from country to country, but a number of common characteristics can be identified which are used to define, in particular, what does not amount to lawful strike action. For example, the lawfulness of a strike in certain countries will depend on the **involvement of a trade union or other employee body** in the decision to strike. Collective action led by a trade union is required in Sweden, Slovakia and the UK, whereas lawful strike action organised by workers themselves is permissible in countries such as Austria, France, Germany and Italy.

Certain types of strike are prohibited according to their aim. Legislation in the UK, for example, demands that a strike concern only a '*trade dispute*', while case law in Germany has established that a strike must be aimed at influencing collective bargaining, and that political and wildcat strikes are expressly prohibited. In France, where there is considerably more regulation of the public sector than the private sector, a constitutional right to strike means there are relatively few limitations as to legitimate purposes of strikes. Political strikes are nevertheless prohibited, and it is furthermore required that the aims of the strike directly concern the *grévistes*.

For most of the countries concerned however, the aim of a strike is not confined to matters relating to an industrial dispute. In Austria, Italy and Sweden in particular, there are **very few limitations on the legitimacy of a strike according to its purpose**. In Italy, the courts have permitted political strikes aimed not just at the adoption by the government of measures directly affecting workers' interests, but also (from a civil law point of view at least), purely political strikes targeting general government policies. Sweden, similarly, takes a very liberal approach, and in the private sector at least, there is not even a restriction on collective actions aimed generally at government policy.

The **form of the industrial action can also affect the lawfulness of a strike**. Broadly similar definitions of the form of a strike can be found in legislative instruments and case law of the countries studied: in Italy, a "*collective abstention*" from work, in France, an "*arret collectif et concerté du travail en vue d'appuyer des revendications professionelles*", in Germany, a, "*collective and planned walkout by a large number of employees in order to achieve a specific aim*."

There are many **different types of strike or industrial action**, some recognised as constituting legitimate strike action in some countries and not in others. For example, a **wave (or "rotating") strike** ("*wellenstreik"* in German, or, "*grève tournante*" in French), where employees in different departments and on different shifts go on strike at different times is, according to case law, to be considered as lawful in countries such as Austria, Germany, Sweden, Slovakia and Italy; in France, it is permitted in the private sector but expressly prohibited by the *Code du Travail* in the public sector; in the UK, case law has established that action can only be directed by workers against their immediate employer. Equally, **"sympathy" or "solidarity" strikes**, where employees support a strike by other workers against another employer are generally considered lawful in those countries where the right to strike is protected at the constitutional level, and in Austria, where a "neutral" approach is taken by the State to industrial relations. Again, in the UK, the requirement on strikers to strike over an industrial dispute only with their immediate employer means such industrial action is not considered lawful.

1.2.2. Conditions for exercising the right to strike

Conditions for exercising the right to strike, and in particular, the procedural requirements which must be met before a worker may engage in legitimate strike action, vary considerably across the jurisdictions examined.

Before considering generally applicable legal conditions for exercising the right to strike, it should be noted that in a number of countries, and in particular, Austria, Germany, Slovakia and Sweden, strike action cannot legitimately be taken while a collective agreement (or one containing a "**peace obligation**") remains in force between the parties concerned. In these States, it is this which remains

the principal obstacle to exercising the right to strike, regardless of whether there are also generally applicable legal requirements for taking strike action. In Austria, almost all collective agreements contain "no-strike" clauses, in Germany, "peace obligations" are understood to be inherent in all collective agreements, and in Slovakia and Sweden, strike action is, in effect, prohibited while a collective agreement between the disputing parties remains in force in relation to the issues regulated in the agreement.

As to generally applicable legal conditions for exercising the right to strike, there are, in some countries of the countries examined, **almost no procedural obstacles**. Austria, for example, has no special procedural requirements and there is no *ultima ratio* principle in law (although it may be said to exist in practice). There are also no strike limitations based upon abuse of rights, fairness, reasonableness or other similar concepts. Although the French *Code du Travail* subjects public sector workers to various procedural requirements in exercising their right to strike (including a strike ban for certain public servants), private sector strikes are not subject to any restrictions, and workers have no obligation to given notice of a strike or to exercise their right only as a last resort. A similar distinction between the conditions applying to the private and public sectors can be found in Italy: legislation demands advance notice and other procedural steps to be taken in relation to strikes in essential public services, but in the private sector, there are no such procedural obstacles; the right to strike must simply be balanced with the protection of other relevant constitutional interests.

Protected as a constitutional freedom in Sweden and Germany, regulation of the right to strike in these jurisdictions remain fairly light-touch, although there are nevertheless certain legal conditions which must be respected for strike action to remain lawful. In Sweden, basic **rules of conduct must be observed**, including advance notice to the employer and the Mediators' Office of strike action; a failure to provide notice does not however render the strike illegal, but can result in an obligation on the union to pay general damages to the employer. In Germany and Slovakia, the ***ultima ratio* principle** is applied, meaning that industrial action is only lawful if all other reasonable and peaceful measures to find agreement have been exhausted without resolution. In Germany, this is also a manifestation of the general principle of proportionality, whereby a strike will only be lawful if it is appropriate and necessary for achieving its purpose. Although not legally required, many trade unions apply guidelines which provide for a vote to be held by members before a strike may be called.

Slovakia's Act on Collective Bargaining furthermore demands that **an intermediary, and sometimes also an arbitrator, are involved to resolve a dispute** before recourse is had to strike action. Given the peace obligation status of a collective agreement, it is generally only disputes regarding the entering into of a collective agreement which offer the possibility to strike. This is further restricted by strict balloting requirements on trade unions in relation to the decision to strike: Slovakia's Collective Bargaining Act demands that at least half of all employees who may be affected by the collective agreement participate in voting, of which at least two-thirds must approve the strike. Although such stringent thresholds do not apply in the UK, industrial relations legislation similarly requires **balloting procedures** before strike action may be taken. Formality requirements include the appointment of independent scrutineers, the contents of the voting paper and entitlement to vote. Minor infractions of these rules have consistently been upheld by courts as rendering subsequent strike action unlawful.

1.2.3. Effect on contracts of employment

In all countries examined, except for Austria and the UK, the effect of lawful strike action on individual contracts of employment is broadly the same: **the main obligations for the employer and employee are formally suspended for the duration of the strike**. This generally means that the employee does not have to carry out the duties of his or her role while the **employer does not have to provide him or her with remuneration**.

In the **UK**, courts have traditionally taken the view that a total cessation of work by an employee will amount to **a breach of the employment contract**, regardless of the circumstances which provoked it. In theory, the employer may regard the contract as having come to an end and will be entitled to sue for damages arising from the breach; this, however, is unlikely in practice. Similarly, Austria's **theory of segregation** ("*Trennungslösung*") means that the legitimacy of the collective act does not impact on the individual position. In theory, an employee may be required to breach their contract in order to take part in strike action. In practice however, industrial action may be regarded as a conscious disruption of workplace peace, with the contractual situation being broadly the same as for other countries: namely, mutual obligations will be put on hold and the employee will, for the strike period, lose their entitlement to remuneration from the employer.

2. Role of the right to strike in collective labour relations

2.1. Relation with other forms of action and role in collective negotiations

To varying degrees across the countries studied, the right to strike acts as a valuable tool for encouraging successful industrial relations. Collective bargaining traditions in **Austria, Germany, Slovakia and Sweden** mean that **strike action is unlikely during the course of a live collective agreement** thanks to the "peace obligation" which arises by law or through express or implied incorporation into the agreement itself. The extent to which strike action is prohibited altogether will depend on whether the obligation is relative (concerning only matters settled within the agreement) or absolute (explicitly ruling out any form of industrial action during the course of the collective agreement).

In Austria, where relative peace obligations are inherent in collective agreements, strikes are rare, and will usually be confined to those aimed at bringing about a collective agreement or about matters not covered by an existing agreement. Given that no particular forms of industrial action are considered unlawful, the peace obligation enhances the efficacy of collective bargaining and plays an important part in averting industrial action. The low number of strikes witnessed in Germany might also be attributed to (relative) **peace obligations**, which are said to be inherent in all collective agreements. This is reinforced by the constitutional affiliation of collective bargaining with the right to strike: namely, that German law guarantees the right to strike only insofar as the right is understood as being necessary to ensure proper collective bargaining. Other forms of industrial action, such as boycotts, sit-ins, and flash-mobs have generally been found by the Federal Labour Court to be lawful, although strikes remain the most important instrument of labour dispute.

The resolution of disputes through collective bargaining is strongly encouraged by **legislative rules in Slovakia**. These provide that strike action may only be called for in a dispute over the proposed contents of a collective agreement, that strikes called during the life of a collective agreement are unlawful and, in accordance with the *ultima ratio* principle, that other means of negotiation, including mandatory mediation, must be exhausted, before strike action is initiated. In Sweden, too, a general duty to negotiate, peace obligations and mandatory procedures for taking strike action contained in collective agreements mean that strikes are, in practice, a last resort. With around 90% of employees bound by a collective agreement, disputes are regularly resolved before collective action becomes necessary. Other forms of industrial action, such as violent and/or obstructive picketing, occupations or blockades are not permitted.

In both **France and Italy**, where the number of strikes is relatively high, there is **no concept of an implied peace obligation** or of industrial action being generally prohibited during the course of a collective agreement. Available procedures for conciliation, mediation and arbitration, contained in the French *Code du Travail* are little used, and direct negotiations between the unions and employers

are usually favoured. **Collective agreements often contain agreed procedures for resolving conflicts**, and negotiations to end a dispute, known as an end of conflict agreement ("*protocole de fin de conflit*"), which include the conditions for strikers returning to work, are commonplace. In the absence of legislative rules applying to the private sector **in Italy, codes of conduct and other protocols** have been developed at the national level in order to provide conventions for resolving industrial disputes. For essential public services, Law 146/1990 requires that a cooling-off and conciliation process has taken place before strike action may be called.

In the absence of specific legislation, **court cases in both France and Italy** have addressed different emanations of strike and other forms of industrial action in order to determine whether they may be classified as a lawful exercise of the right to strike. Jurisprudence in both countries has for example, considered the legitimacy of picketing, blockades and sympathy strikes. In both countries, **go-slow action ("*sciopero di rendimento*" or "*grève perlée*")** will not qualify as a lawful strike, and will entitle employers to treat such a move as a disciplinary offence. For other types of industrial action, similar principles of freedom to work and proportionality are applied. In France, action which amounts to interference with the freedom to work or which is deemed excessive in relation to the claims of the protesting workers can amount to an abuse of the right to strike; in Italy, actions which threaten the performance of work by non-strikers will be illegal, and will often be assessed to determine whether they result in damage to 'production' or to 'productivity': the former considered lawful, the latter, unlawful, due to its impact on the employer's own economic initiative.

The **UK** stands alone among the countries examined in that **collective bargaining plays a relatively minor role in labour relations**. Collective agreements are not generally enforceable and there is no general concept of an 'industrial peace' obligation under English law. Despite statutory provisions offering the possibility of mechanisms for arbitration, mediation and conciliation, this is seldom embraced in practice. There has historically been little appetite by either the unions or employer associations for such methods, and any collective negotiations generally occur directly between employer and union. The extent to which other forms of union-initiated industrial action will not be deemed unlawful will usually depend on whether it amounts to an economic tort, such as breach of contract, which may then allow a union to benefit from statutory immunity. According to legislation, secondary action such as sympathy strikes are not lawful, whereas peaceful picketing can be.

2.2. Use of the right to strike in practice

Statistics on strike action across the countries studied are not complete nor recorded in a uniform way, and must therefore be treated with caution. On the evidence available however, a **varied picture is revealed**. As will be seen, the data appears to indicate a pattern which to some degree, shows a correlation with the level of legal protection offered to striking workers.

It is in **France and Italy**, more so than in the other jurisdictions examined, that **strikes are a common feature of industrial relations**. Across Europe, France records the greatest annual number of working days lost to industrial action, with figures in recent years comparable with those last witnessed in the 1970s. Public sector action remains common despite stricter procedural rules, although in both States, laws designed to guarantee the continuity of essential public services are generally respected.

Strikes in the UK, and in Sweden in particular, are relatively less common, but for different reasons. In the UK and Sweden, incidences of industrial action have diminished significantly since the 1980s: in the UK, partly due to dwindling trade union membership, but also because of stricter balloting rules introduced in the early 1990s. Collective actions in Sweden are broadly limited to times when a collective agreement has expired or where un-organised employers have not signed up to a live industry-wide collective agreement. Given the collaborative nature of Swedish industrial relations, any restrictions on strike action which are contained in collective agreements are generally well-respected.

The limited statistics available in **Austria, Germany and Slovakia** indicate that these countries **experience very few strikes in practice**. In all three States, collective agreements containing peace obligations are a common feature of industrial relations, and there is evidence of industrial disputes often being successfully resolved before strike action becomes necessary. The low incidence of cases of industrial action can perhaps also be attributed to the ***ultima ratio*** principle, which formally applies in Germany and Slovakia, and, in practice, also in Austria.

2.3. Role of the right to strike in non-organised sectors

The frequency of strikes in sectors which have little or no formal collective work relations is **low in all of the countries concerned**, but is naturally more common in those jurisdictions where legitimate strike action does not need to be led by a trade union.

Wide-reaching collective bargaining arrangements in **Austria, Germany and Sweden** in particular, mean that a significant **majority of all employees are covered by collective agreements** which either prohibit strike action or provide for trade-union-led industrial action in the event of dispute.

In **Slovakia and the UK**, potentially legitimate strike action can, by law, **only be led by a recognised trade union**, and so the right to strike is very much a preserve of industries characterised by trade union representation.

Considered as an '**individual' rather than a 'collective' right in France and Italy**, wider definitions of what constitutes a legitimate strike mean that, in the private sector at least, even spontaneous (or "wildcat") strikes by groupings of workers in both traditionally organised and non-organised sectors are not legally prohibited. In Italy, such spontaneous protests are even said to be on the rise, particularly in the public services sector, where there is growing discontent over privatisation of public functions.

3. Protection of workers on strike

3.1. Special protection against dismissal and other unfair treatment

The legal protection afforded to those exercising a right to strike lawfully can be said to fall broadly into **three categories**: those States where protection is provided to striking workers which goes beyond that provided to workers generally; those States where legal protection afforded generally to workers continues to apply even where those workers are taking strike action; and those States where legal protection is diminished or even lost altogether during the period of a strike.

Of the legal systems examined, the **French *Code du Travail* and Italy's *Statuto dei Lavoratori*** perhaps offer the **strongest protection to striking workers**, reflecting their respective treatment of strike action as a fundamental and freely exercisable right. Both establish specific legislative protection against discriminatory or arbitrary acts of the employer in respect of workers and trade union representatives who exercise the right to strike. Although the right to remuneration is suspended along with other contractual rights for the duration of strike action, laws in both France and Italy, supported by jurisprudence, makes it clear that there is to be equal treatment as between strikers and non-strikers in respect of wages and other fringe benefits.

Italy's *Statuto dei Lavoratori* specifically **prohibits any dismissal or other detrimental treatment related to participation in a strike,** although the existing robust general unfair dismissal protection for workers continues to apply to striking workers and is more usually relied on in practice by employees. The most radical legal recourse in response to such treatment is not available to the striking

employees, but rather, the trade union: any such detrimental treatment by the employer towards employees exercising the right to strike may be deemed as '**anti-trade union conduct**' and, upon urgent application by the union to a court, can result in severe judicial action against the employer, including injunctions and orders for specific performance. At the level of the individual worker, however, it is arguably France which offers greatest protection with regards to dismissal and action short of dismissal. Here, any **dismissal of a striking worker for any reason (except cases of gross misconduct) is prohibited** and rendered null and void. Case law has extended this rule beyond dismissal to any disciplinary sanction by the employer.

In other countries, particularly with strong employment protection laws, those **general rules continue to protect workers against dismissal and discrimination during strike action**. This is the case in **Sweden, Germany and Slovakia**, where dismissals are generally only justified if the employer has a fair and objective reason for dismissing the employee and has followed prescribed procedures in taking the decision to dismiss. All three countries also however provide some additional enhanced protection aimed at reinforcing a worker's right to strike.

In Sweden, the Co-Determination Act protects employees exercising their right to freedom of association which may manifest itself in strike action. Any acts or omissions by the employer which are proved to be by reason of the employee exercising this right will be declared null and void. Case law has further established that the burden of proof will shift to the employer once the trade union has shown that it was probable that the motive for the employer's measure was of a prohibited nature. The Slovakian Labour Code, which requires employers to excuse the absence of employees from work for taking part in certain strike action, additionally protects employees from any detrimental treatment by reason of their participation in a strike. In Germany it is general provisions under the Civil Code which offer striking workers protection beyond those contained in the Dismissal Protection Act: an employer is prohibited from disadvantaging or taking negative measures against an employee exercising his rights in a lawful way; lawful striking is considered to be one of these rights, and any dismissal connected to the exercise of such a right will be deemed null.

Of the legal systems examined, the **weakest employment protection for striking workers is arguably that found in the UK and Austria**, where, regardless of the lawfulness of the strike action, participating employees will invariably be acting in violation of their contractual duties. Rather than additional special protection, striking employees in these jurisdictions, to the contrary, **experience less protection overall than non-striking employees**. The separation, under both systems, of the lawfulness of the collective action from the position of the individual, means that the refusal to work by the striking employee, can, in theory, be treated by the employer as a fundamental breach of contract, warranting immediate dismissal. It is suggested that in practice however, this happens rarely. In the UK, legislation was introduced at the end of the 1990s to prevent, by law, the **dismissal of striking workers by reason of their participation in the strike for the first 12 weeks of the action**. In Austria however, the principle of neutrality of the State means that no such legislative protection is offered.

3.2. Comparison with general protection

In the majority of the European legal systems studied, **general employment protection rules for striking workers simply continue to apply during the strike period**. At the level of the individual employee, this is the case in Italy, Germany, Slovakia and Sweden. Broadly speaking, the only significant additional protection awarded is that strikers are also protected from dismissal by reason of their participation in the strike action, either owing to a specific rule, or under more general provisions prohibiting detrimental treatment related to the exercise of legal rights or fundamental freedoms.

In France, it is the prohibition of the dismissal (and other detrimental treatment) of any striking worker, regardless of the reason, that sets it apart from other legal systems. Only for *faute lourde* can a dismissal of a striker participating in a legitimate strike be potentially lawful, whereas for non-strikers, fair dismissal is a possibility for *raisons de moindre gravité*. Moreover, a violation of this protection will, in the case of strikers, result in the offending act being declared null and void; for non-strikers, the remedy may only be financial compensation.

At the other end of the spectrum, the greatest gap in legal protection afforded to those on strike and those not, would appear to be in Austria, where violation of the obligation to work – a natural consequence of strike action - in theory, simply amounts to a dismissible offence.

In the UK, the difference in the level of protection is arguably more nuanced, although clearly much diminished for employees on strike. Ordinary rules of unfair dismissal protection are only preserved for those strikers with a qualifying period of service of at least two years who are treated less favourably than other striking workers, for example, by being selected for dismissal or refused for re-instatement. Apart from this, employment tribunals do not have jurisdiction to consider the fairness of a dismissal unless it is for what is known as an automatically unfair reason, such as pregnancy or whistleblowing, or, amounts to a strike-related dismissal falling in the limited window of enhanced protection offered by legislation. The only other benefit for strikers is that, unlike ordinary rules on unfair dismissal, protection against termination of employment by reason of strike action during the 12-week protective period does not require that they have a minimum of two years' employment service; instead, protection is potentially available from day one of employment.

3.3. Role of international law on protection afforded

For the majority of the countries examined, **international law cannot be said to have had a direct impact on the protection offered at the national level** to workers participating in lawful strike action. Domestic protection of strikers is, however, in most States, generally regarded as respecting relevant international treaties and covenants. The protective rules seen in the systems of France, Italy, and Sweden are even said to exceed the protection demanded by international law, it being suggested that many of the underlying principles of striker protection pre-dated the conclusion of international treaties on the same topic.

Two countries where the **compatibility of domestic law with international accords on the right to strike remains a live issue**, are **Austria and the United Kingdom**. Following long-standing criticism by various international bodies of the UK's failure to give effective protection from dismissal to workers involved in strike action, legislation introduced in 1999 providing strikers with a 12-week protection period was said by the UK Government to be a direct response to concerns of the International Labour Organisation. It is still nevertheless widely considered that such limited protection continues to fall short of international standards. The same is true of Austria, where, although the freedom of association is generally understood to be guaranteed, the right to strike, *per se*, is not. Despite being a signatory to the main international conventions and treaties under which the right to strike is understood as central to the freedom of association, the absence of legal rules in Austria protecting strikers from dismissal and other detrimental treatment has called into question the compatibility of Austria's domestic laws with international norms. Many commentators argue that the neutrality of the State and the doctrine of segregation or separation (largely protecting collective, but not individual, rights) are simply irreconcilable with obligations arising from ratification of international conventions and treaties.

4. Enforcement and effectiveness of available sanctions

Declaring the dismissal or action short of dismissal as void is the usual consequence of a breach, by an employer, of striker protection rules in the all of the countries examined, save for Austria and the UK. Such sanction is naturally considered highly effective, allowing the employee concerned, where dismissed, to immediately return to work, and in most cases, to be compensated for any lost salary during absence.

In Italy, trade unions also benefit from tough penalties on employers whose conduct towards striking employees can be considered as anti-trade union behaviour under Article 28 of the *Statuto dei Lavoratori*. Where found guilty, sanctions against the employer include **withdrawal of fiscal advantages and even criminal penalties** in cases of non-compliance with court orders.

In the UK, where sanctions for unfair dismissal, including dismissals related to industrial action, comprise re-employment and compensation, statistics show that re-employment occurs in less than 1% of all successfully brought unfair dismissal claims. **The usual penalty, capped compensation**, is criticised by politicians and academics as being inadequate for cases of strike-related dismissal.

This relative lack of effective sanctions for reinforcing the right to strike is also witnessed in Austria, another country where the individual and collective aspects of strikes are generally addressed separately. Even where collective strike action is lawful (and, thanks to the State's neutrality in industrial relations, it is not anticipated under Austrian law that a strike could be declared unlawful), employees participating in the strike are not protected by enforceable legal sanctions against an employer who chooses to react. To the contrary, the absence of formal employment protection during strike action means that it is **rather the employees who are, in theory at least, potentially exposed to sanctions sought by their employer** in respect of damage to the employer's business activities which arise from employees' breaches of their employment contracts. This is nevertheless difficult to prove in practice, and rarely, if ever pursued by employers.

5. Possibility to extend protection in collective agreements

Although there is considerable commentary on the incorporation of peace obligations in collective agreements, statistics and other **anecdotal evidence of the inclusion of extended protection for striking workers is limited**. However, given that it is widely the case that collective bargaining arrangements may potentially contain any provision related to the employment relationship, the possibility for social partners to include in collective agreements protection which exceeds that available under domestic laws, is something not specifically prohibited in any of the countries examined.

Examples of clauses providing enhanced protection are given for Germany and Sweden, and include the prohibition of sanctions by employers against employees which go beyond domestic law (Germany), permitting the payment of back-pay for strikers once they return to work and the suspension of their contract is lifted (Germany) and the negotiation of more extensive liability for compensation to strikers whose rights are breached (Sweden).

Given the already extensive protection afforded to strikers in countries such as France and Italy, it is understood that further enhancements agreed under collective bargaining arrangements are not common in practice. Similarly, there is no known evidence of enhanced protection being incorporated into collective agreements in the UK, but most likely for other reasons: collective agreements are only generally legally enforceable, not between social partners, but by incorporation into individual

employment contracts; given that strike action will invariably amount to a breach of the employment contract, any obligations on the part of the employer to respect enhanced protection for the striking employee, incorporated through a collective agreement, would likely no longer be enforceable.

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