

The Regulation of Strike Law in Times of New Technologies and Deregulation: The Case of West Germany

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Résumé de l'article

Comment les phénomènes contemporains de déréglementation et de développement technologique s'insèrent-ils dans un système de rapports du travail aussi «juridifié» que celui de la R.F.A., du moins si l'on songe en particulier au développement de la négociation collective et à la participation dans l'entreprise?

Observons au départ, l'érosion, à la suite de vastes changements technologiques et organisationnels, du rapport d'emploi normal au profit du travail atypique. Pour ce qui est de la déréglementation, elle a porté essentiellement sur le droit des rapports individuels de travail et sur différents aspects de la sécurité sociale, à l'exclusion, assez bien — sous réserve d'une importante exception dont il sera question ci-après — du droit de la grève. Des changements apportés au droit de la sécurité sociale sont cependant de nature à inciter à l'acceptation du travail subordonné régulier. Le marché du travail, en somme, tend à se segmenter.

Plus spécifiquement, pour ce qui est de la grève, le droit jurisprudentiel récent demeure ambivalent. Le tribunal du travail, par exemple a, d'un côté, tenu la grève d'avertissement pour légale; de l'autre, il a prohibé la grève de solidarité. Quant au législateur, il est intervenu indirectement, par le biais d'une modification à l'article 116 de l'*Arbeitsforderungsgesetz*, ou loi de promotion de travail.

Cette modification, dont l'occasion a été la grève de 1984 dans l'industrie d'ingénierie, nous conduit au cœur de la pratique allemande des rapports collectifs du travail. Précisons que la négociation collective se déroule normalement sur un plan régional; l'accord régional établi dans une région sert en quelque sorte de matrice pour les autres, dans une industrie donnée. Les employeurs réagissent à une telle grève régionale par des lock-out dans diverses autres régions, tendance que tend à accentuer le changement technologique. Plus le conflit dure, plus nombreux sont les travailleurs ainsi privés indirectement de travail par la grève. Or, les prestations de l'assurance-chômage étatique allègent manifestement la pression sur les caisses syndicales de grève...

La modification en question nie le droit aux prestations d'assurance-chômage si les travailleurs atteints par des lock-out appartiennent au même secteur industriel que les grévistes et si, par ailleurs, leurs demandes régionales sont semblables à celles des grévistes de la région où sévit la grève. Le gouvernement s'en est tenu à une telle intervention indirecte en matière de grève; il n'a pas osé codifier le droit de la grève en y ajoutant des éléments favorables au patronat, comme le voulait une récente proposition encore plus conservatrice.

D'autres mesures récentes peuvent également exercer une influence négative sur la grève en accentuant la tendance à la segmentation du personnel. Une loi de 1988 vient ainsi, d'une part, assurer la protection des droits des courants minoritaires dans les conseils d'entreprise et, d'autre part, étendre la portée de la catégorie du personnel de direction jouissant d'une représentation indépendante de ces conseils. Ces personnes, dont l'importance s'accroît avec les nouvelles technologies, se trouvent ainsi plus à l'abri de l'influence des syndicats. Mentionnons aussi des modifications à diverses lois permettant la négociation de conditions de travail inférieures à celles prescrites par les normes étatiques. Sous le couvert d'une plus grande flexibilité dans la négociation, non seulement dévalorise-t-on ces normes, mais on accentue ainsi la segmentation du travail, ce qui influe à son tour sur la négociation collective. L'intervention législative est loin d'être incohérente...

Dans son ensemble, le droit allemand de la grève demeure jurisprudentiel et évolutif; il ne repose pas — à la différence de la France et de l'Italie — sur une affirmation constitutionnelle explicite du droit de grève. D'autre part, il y a à tenir compte de l'aspect «culturel» du conflit collectif en R.F.A., qui incline généralement le patronat à une attitude de négociation rationnelle. D'où l'importance de ces interventions indirectes relatives à la grève. Qu'en sera-t-il si les syndicats et leurs adhérents en viennent à politiser davantage les conflits, comme on a pu le voir à l'occasion de ces grèves de 1984 et 1987 au sujet de la semaine de 35 heures dans l'ingénierie et l'imprimerie?

The Regulation of Strike Law in Times of New Technologies and Deregulation

The Case of West Germany

Ulrich Mückenberger

Although the West German law of strike has remained relatively unchanged in the last decade, various specific legislative amendments, notably with respect to the payment of unemployment insurance benefits during a labour conflict, to the domain of collective bargaining and to employee representation in the undertaking, could well alter the strike practice. The cumulative effect of these changes is examined in the perspective of a labour market evolving under technological change.

That the industrial relations system of West Germany is characterised by a high degree of juridification is well known and needs no elaboration here. This assertion however refers specifically to the procedural aspect of collective bargaining and dispute, and of participation at plant and company level. Only in this respect, West Germany is markedly different from its continental neighbours and, at least up to the early eighties, Great Britain. In the areas of individual labour and social security law, the differences are far less pronounced, as numerous historical and current examples could testify (for a comparison between Germany and the UK, comp. Mückenberger, 1988). What are the implications of this development in connection with recent trends of introduction of new technologies and of deregulation?

This paper deals with one striking paradox. There have been a lot of deregulatory measures in West Germany concerning labour (Mückenberger, 1985 a and b) and social security law (Bieback, 1984 and 1985). But the law of strike has remained — with one however important exception which will be discussed later — unchanged in the last decade, at least by the legislator. Deregulation is concentrated on matters of «individual» labour and supplementary benefit and social insurance law.

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What happens there is — due to vast technological as well as organisational changes — an erosion of what we call «normal employment relationship» (Mückenberger, 1989) and thus a reorganisation of local as well as professional labour markets. In individual labour law more flexible, «a-typical», «de-standardised» forms of employment are being increasingly encouraged and legalised — such as fixed-term contracts, agency work, self-employment, part-time work, etc. In this area a process of de-standardisation is taking place.

In social security law however more and more benefits and payments depend on whether or not an employment relationship is near to the standard. «Social transfer income» serves less as an alternative to «wage income» than it used to be during the years of prosperity up to the mid-seventies. This development seems to continuously shape reform plans of the Conservative-Liberal government concerning old age pensions, sickness, and unemployment insurance. In all these pillars of the social insurance system Bills have recently passed Parliament or are going to do so putting a stronger constraint on the employees to do subordinate work rather than other publicly-funded social activities (e.g. leisure-time in the case of early retirement, re-training in the case of unemployment, healthcare in the case of sickness, etc.).

As a consequence of these two inverse developments an increasing amount of non-standard work, unsheltered by state policies, will emerge. The segmentation of the labour market will thus be reproduced, «doubled», by a segmentation of the welfare state. As I treated these developments elsewhere I shall not focus on them any further even though they form an important part of my argument.

In this paper I shall focus on collective labour law directly or indirectly shaping and influencing the right to strike. The field of collective labour law in West Germany covers two main areas (cf. for details Mückenberger, 1988). The first one is collective bargaining (mainly on national and/or regional level) including conciliation, strike, lock-out. The second one concerns the specific German pay of institutionalised bargaining on plant and on enterprise level (participation, «co-determination»). On the field of collective labour law as a whole current legislation is more in favour of indirect sorts of regulation rather than direct prohibitions or mandatory regulation as takes place in the UK.

There have been only marginal proposals, drafts, or bills directly concerning strike law. An opinion of the former president of the Federal Labour Court (*Bundesarbeitsgericht* — BAG) Müller which finally led to the amendment of s. 116 *Work Promotion Act* (*Arbeitsförderungsgesetz* —

AFG) originally was only taken up reluctantly by the conservative politicians. Plans of Liberals to empower state agencies and courts to interfere with union decision-making processes concerning disputes (somewhat similar to recent British so-called employment legislation) never found a majority even within Liberals. Quite recently four conservative and liberal labour law professors proposed a draft for a *Labour Dispute Act* mainly codifying existing case law on strikes and lock-outs, partly modifying it in favour of the employers (Birk et al., 1988). This proposal was immediately rejected by the Conservative Labour minister who argued that legislation could not contribute to social consensus in this difficult area.

As opposed to legislative «abstentionism» the judiciary who had built up the whole legal framework for the strike law throughout the 50s and 60s continued keeping an active role in recent years. But this role was ambivalent. Within the last decade the BAG restricted lock-outs, ruled in favour of the legality of «warning-strikes» on one hand, canceled the lock-out prohibition in the constitution of Hesse, prohibited «sympathy or solidarity strikes» (secondary action) on the other. There does not seem to be a coherent policy neither within this adjudication nor with that concerning new technologies, let alone a deregulatory one.

One key measure in legislation was the amendment to s. 116 AFG. As a rule, employees affected by a temporary shut-down whatever the reason of it may be are paid either wages or «wage substitutes» (benefits) from the unemployment insurance fund. However, s. 116 AFG (in its un-amended as well as amended wording) states that, in cases of labour disputes the unemployment insurance funds have to adopt a neutral stance, and must not act in such a way as to affect the bargaining balance by making financial payments.

During the 1984 strike in the engineering industry this issue was controversially taken up in the public. In order to understand the public debate one has to keep in mind the key features of how in Germany industrial disputes look like. Five of those features are paramount:

1. Collective bargaining is dominated by industry-wide operating unions with no splits according to skills or to political affiliations. Collective bargaining thus has no need neither for recognition nor for demarcation procedures or disputes.
2. In many sectors, especially in the engineering industry, collective bargaining usually takes place on regional level. After agreement has been achieved in a region (possibly after a dispute), the same or at least similar rules are made applicable in other regions of the same industry by separate agreements.

3. Within the regions a certain pattern of labour dispute has so far dominated. Unions usually start the dispute by means of a selective strike (i.e. a strike confined to few plants within the region). Employers' associations broaden the battlefield through retaliatory lock-out affecting a substantially increased amount of workers. The longer the dispute lasts the more workers will either participate in or be affected by it.
4. These dispute tactics are increasingly escalated through the impact of logistic and technological changes in modern industrial production. As modern production tends towards technological and organisational integration and, hence, interdependence of formally independent plants selective dispute action (strike as well as lock-out) immediately causes shut-downs and lay-offs in other plants (inside and outside the region, inside and outside the industry). The impact of these technological changes will usually be that many more plants and workers are affected by the dispute rather than are participating in it (Hindrichs et al., 1988, p. 199 ff.). Due to an, if controversial, series of court rulings workers who either participate in an action or are affected by lay-offs due to a strike or a lock-out in their industry lose their wage entitlement.
5. In West Germany unions pay relatively high benefits to union members affected by an industrial dispute. The longer a dispute lasts and the more members are either involved or affected, the more the union's strike funds will thus get under pressure. If the union continues normal payments the funds will soon be exhausted. If, however, the union does not do so the leaders will get under pressure from the membership to end the strike action.

During the 1984 strike in the engineering industry the issue, as mentioned above, was controversially taken up again. Before the judiciary the argument was resumed as to whether employees, belonging to the same industry but a different region, who were affected by, but not participating in, the strike led by the engineering union (IG Metall) were or were not entitled to so called «wage substitute payments», i.e. unemployment insurance benefits substituting the lost wages, from the unemployment insurance fund.

During the strike social insurance courts had ruled in favour of those employees. This is why — as an «aftermath» to the strike — a minority of small bourgeois Conservative MPs launched a bill stating that all such payments were unlawful. Only after major conflicts within the governing coalition the amended s. 116 AFG was passed by Parliament. It states that payments are unlawful only if the workers affected by a shut-down belong to the same industry as the strikers and if their regional claims are similar to those within the region on strike (for the historical and systematic implications of this sophisticated amendment, cf. Mückenberger, 1986 a and b).

Even if the public debate labeled s. 116 AFG as «the strike section» the amendment apparently deals with the strike only in an indirect way. It does not prohibit certain forms of dispute nor does it prescribe specific procedures. It confines itself to increase — simply due to the multiplying impact of the technical and organisational integration of the economy — the internal pressure on the union leaders to stop or avoid strikes. The mechanism is — as has been explained already — twofold. If the union pays strike benefits to all members affected the funds soon will be exhausted. If they do not so their members in other regions will be without financial aid and hence press their leadership to stop the strike.

One will easily identify this mechanism as «typically German» as it presupposes regional bargaining anticipating national agreements, high strike payments to union members from their union, a high degree of «rationalisation» of disputes according to costs and benefits, etc. The debate around the amendment of s. 116 AFG also showed that the largest party to the ruling coalition — the Christian Democrats — contrary to the Bavarian Christians and to the Liberals has only a limited legitimacy for direct anti-union legislation as it has not only Grand Capital, not only petite bourgeoisie as a constituency, but also the Christian wing of the labour movement which is largely affiliated to the German industry unions like IG Metall. This does not make it very probable that the coalition will enter the field of direct (anti-) strike law again soon.

There are, however, other measures influencing strike activities. New technological developments tend to make industrial dispute obsolete (e.g. printing). The segmentation of the workforce will be paramount in this respect: it seems to be increasing due to a rise of «a-typical» sorts of employment, a trend towards white collar work, and different employees' status in the public service. Another act which is interesting in this context was passed late 1988. The act does not concern strike law but collective labour law as well — amending the *Work Councils Act (Betriebsverfassungsgesetz)* and the corresponding acts for the public service. The act passed by Parliament gives minorities within works councils stronger rights against majorities. The quorum for candidature on minoritarian lists was — in line with a ruling of the Federal Constitutional Court — lowered, minorities are now mandatorily represented in works councils' committees and thus get access to confidential information.

On the other side the act extends the legal notion of «higher rank managers» (*leitende Angestellte*) who are not covered by the *Works Constitution Act* and provides for a separate plant representation of these (even junior) managers besides the works councils. This development tends towards independence of lower managers from shop floor (and, thus, trade

union) influence. From the point of view of the effectiveness of industrial action this is all the more important as this type of manager — due to the new electrical technologies — gains more and more control over the labour process.

Both changes could end up in undermining the «authority» of the works councils: towards management on one side, towards the local workforce on the other. This is why again many Conservative politicians as well as large companies' senior managers and employers' associations' representatives were reluctant to support this bill. They saw the danger of «unrest», even of «politisisation» in the plants due to a certain «particularisation» of the representative system. Despite this reluctance however this symbolic concession to the Constitutional Court as well as to middle class backbenchers was pushed through Parliament.

It may be of interest to state that the same amendment to the *Works Councils Act* extended, at least «symbolically», individual and collective rights of employees on plant level in the case of the introduction of new technologies. The aim at the back of these sections obviously was to gain more «employees' involvement» and «acceptance» and thus to eliminate militant opposition against new technologies.

Another tendency shows in the same direction. One interesting development has been the legislative re-evaluation of collective agreements (Mückenberger, 1985a). Previously the function of collective agreements has been to set standards over and above statutory minima. Legal standards were thus considered to be a base on which collective agreements could build in the process of social progress. In recent acts there has been a strict departure from this principle. For example, certain sections of the *Protection of Young People at Work Act 1984 (Jugendarbeitsschutzgesetz)*, of the *Employment Promotion Act 1985 (Beschäftigungsförderungsgesetz)* and of the *Working Hours Bill (Arbeitszeitgesetz-Entwurf)* specifically allow unions and employers' associations to negotiate agreements which depart from statutory standards to the detriment of the employees. Section 57a cl. 2 of the *Act Concerning Fixed-Term Contracts at Universities (Hochschulzeitvertragsgesetz)* prohibits the collective negotiation of more favourable standards, and thus makes statutory minimum standards into statutory maximum standards.

Deregulation then has the implication that collective agreements as more flexible regulation device actually get re-evaluated as against statutory law: Legal standards are thus being de-valued in favour of regulations subjected more to market forces rather than to political bargaining processes. Only implicitly this has to do with strike regulation. At first glance it does

not seem to touch this field at all. As the bargaining power of marginalised groups of employees in most cases is extremely low, the recourse to market principles will hit them most and will thus strengthen labour market segmentation to their detriment. Again we find an indirect way of influencing collective bargaining processes.

Together with the tendency towards erosion of the normal employment relationship this indirect way of regulation (with internal segmentation of interests rather than external oppression) seems to build a system which is much more consistent than it looks at first glance.

It would be interesting to explain this specific German way of dealing with the strike law. In Germany — as opposed to the UK — a rather strict mandatory procedural framework for industrial disputes was developed decades ago which — as opposed to France and Italy — never had a democratic base like an explicit constitutional «right to strike». It was more a flexible judge-built code of conduct rather than a publicly discussed issue. Case law is easier to handle than acts — and possibly more efficient: keeping in mind the increasing preventive role of courts via temporary injunctions. I am sure that even Conservatives in the UK would have preferred quiet adjustments in their law of industrial relations to the statutory developments of the 80s. But the precondition of such a «smooth» way is a pre-existing procedural framework such as the German one.

Another such precondition seems to be a specific «industrial culture» of German unions as well as employers. I would like to call it a «common production interest-oriented labour dispute culture». This cultural pattern may be at the back the two governmental attitudes described above which seem, at first glance, contradictory, even incompatible:

- the tendency towards an (indirect) weakening of the unions in the context of the introduction of new technologies;
- the tendency towards an (at least symbolical) strengthening of trade unions' influence on new technologies within the plant-based participatory mode of «co-determination».

On the union side this culture is a unitarian one — as opposed to particularist ones which we find quite often in Britain (as multi-unionism), but also in France and Italy (as political schisma). On management side this culture seems to be oriented towards «rational negotiation» rather than hard-liner attitudes. Such general assumptions however need further elaboration.

As to the perspective of the model described above I would like to confine myself to a hypothesis again. This model depends on a non-militant

overall situation in industrial relations. Indirect influences on strike activities consist of incentives. These incentives can lose their control power where stronger «counter-incentives» exist or emerge. This could be a weakness of the German model if unions and their members really get committed to a «political project» to be enforced by strikes. To a small but still significant extent this was the case with the dispute concerning the 35-hours-week in the engineering and the printing industries in 1984 and 1987.

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L'encadrement juridique de la grève, la déréglementation et les nouvelles technologies: la situation en R.F.A.

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