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International Right to Strike Under Stress[i]

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A Thousand Deaths

The right to strike, the femme fatale of labor law, adheres to both national and international standards and jurisprudence. In the Netherlands, the right is governed by the European Social Charter, the EU Charter of Fundamental Rights, the ILO (International Labor Organization) Convention 87 , the national doctrine of tort, and—above all—copious jurisprudence. Dutch strike legislation as such is nonexistent. The European Union (EU) and ILO rights to strike have both recently come under fire. In the EU, the right is tied to controversial jurisprudence primarily of the European Court of Justice, in which fundamental principles clash: the free movement of persons and services with the workers' right to strike. In the ILO, employers dispute the mandate and status of the Committee of Experts (CoE) that elucidates ILO conventions. The CoE at times interprets the right to strike more broadly than national governments do. Recent EU and ILO debates on the right to strike demonstrate the fierce struggles between international employers' organizations and trade unions. The right also continues to be a sensitive issue for the authorities concerned. The connection between this issue and corporate social responsibility (CSR) and what are referred to as business and human rights makes the issue even more contentious.

Current events also contribute to these tensions. On 24 April this year, disaster struck when a Bangladeshi textile factory, the Rena Plaza building, collapsed, killing more than a thousand workers (mostly young girls). Sadly, extremely unsafe working conditions are still commonplace in many countries. In China, for example, the coal mines are infamous. The presence of trade unions, as observers, can be enough to help end these abuses. Collective action, such as strikes, may also be called for.

The Playing Field: ILO, EU, Council of Europe, UN, OECD

The right to strike is closely connected with the right to unionize and the right to collective bargaining, and can be found in international treaties and national constitutions. The soft law is also a force to be reckoned with in light of the relevant codes of the UN and OECD (Organisation for Economic Co-operation and Development). The ILO regards the rights to unionize and to free collective bargaining, which may lead to a strike, as among the fundamental rights and principles of international labor law. Conventions 87, the free formation of employers' organizations and trade unions, and 98, the freedom of collective bargaining, both relate to this topic. So far, they been ratified by the vast majority—152 and 163 respectively—of the 185 member states. Moreover, these conventions are part of the ILO Declaration on Fundamental Principles and Rights at Work (1998), also known as the core labor standards. To monitor how the conventions are applied in law and practice, the ILO has a proven, successful supervision and monitoring mechanism at its disposal, and has had it for many years. This supervision is dual.

First, member states are expected to report regularly on the implementation of ratified ILO conventions in their national regulations and on their adherence to the conventions practice. These reports are examined and commented on by the Committee of Experts, which is made up of independent experts—usually professors or judges—from the member states. CoE findings are submitted to the International Labor Conference (ILC), which is the ILO's annual meeting

and is attended by a tripartite delegation of governments, employers, and employees from each member state. The ILC Committee on Application of Standards (CAS) examines these reports and draws its conclusions from the findings. Both the CAS conclusions and the CoE report are made public. Each often request that the member states adjust their provisions or practices if either are found to be at odds with ratified ILO conventions. Controls are carried out to ensure that the ILO's recommendations are actually implemented. The ILO often offers technical assistance because not every member state has the necessary manpower to do so. This is the first part of the monitoring mechanism. In this context, the CoE, and subsequently the CAS has in recent decades often provided an explanation and judgment about the right to strike under the Conventions 87. The CAS conclusions are adopted by the International Labor Conference each year.

Second, in concrete cases of violations of Conventions 87 and 98, the trade union or employers' organization concerned may file a complaint with the permanent Committee on Freedom of Association (CFA). As with all ILO organs, this is a tripartite committee. The CFA has nine members, three in each section and their substitutes. An independent chairperson chairs the meetings, which are held three times a year in Geneva. In response to complaints against a member state, the CFA makes recommendations to the member state to rectify the violation. The recommendations are published and, after each ILO Governing Body meeting, are scrutinized and approved on a case-by-case basis. In each session, the CFA typically discusses about forty cases of reported violations. The current caseload is approximately 170 cases. CFA jurisprudence is bundled in regularly updated ILO publication, the Digest of Decisions of the CFA (last published in 2006). CFA complaints are almost always serious, for example, homicide, manslaughter, kidnapping, assault, harassment of union members or officials. The committee also handles involuntary dismissals of union leaders or members, refusals of registration of a union, and prohibitions of a strike by the police or armed forces. Complaints are filed by trade unions, but may also come from employers organizations, such as in Venezuela. Additionally, the CFA reviews law or practices that conflicts with the freedom to unionize and collective bargaining rights. It is clear from its jurisprudence that the CFA has examined numerous strikes that were prevented by force or law and that it has in response formulated a series of principles governing the right to strike. Complaints to the CFA may also be filed against countries that have not ratified Conventions 87 and 98, such as the United States and China, because the ILO considers the right to unionize and various associated rights to be essential, binding each member state by membership alone.

The ILO therefore channels its judgments on the right to strike through the CoE and the CFA. The Committee of Experts evaluates the implementation of ratified treaties, including Conventions 87 and 98. The Committee on Freedom of Association judges concrete cases of violation regardless of ratification. In principle, the right to strike is recognized, subject to exemption regulations that specify when a strike is prohibited or must be discontinued. The debate in the supervisory bodies generally focuses on the exceptions: Do federal employees have the right to strike? Are essential services allowed to strike? What exactly are essential services—health care, banking, IT, utilities? Under which circumstances should a minimum level of services be delivered in spite of the strike?

Although the ILO regulations and jurisprudence apply worldwide, Europe has been especially active in this field. The Council of Europe established the European Social Charter (ESC) in 1961 and revised it in 1996, recognizing the right to strike in Article 6, paragraph 4. The Supreme Court of the Netherlands took this provision as a guiding principle (direct effect) to formulate a

Dutch right to strike in the absence of a national legislation on the subject.[iii] Once again, an exception to the general rule that striking is permitted is also possible. Article G of the ESC states that restrictions on the right to strike must be prescribed by law and are necessary in a democratic society to protect both the rights and freedoms of others and public order, national security, public health, and morals. The European Committee on Social Rights must be consulted to interpret Article G because it monitors compliance with the ESC. This committee consists of independent experts from the member states of the Council of Europe. Like the CoE of the ILO, the ESC's Committee for Social Rights also publishes conclusions annually with regard to lack of or incorrect application of the ESC in the member states. These conclusions are not formally binding but they are respected. The ESC committee is seen by the Supreme Court of the Netherlands as an authoritative body.

The European Union also has legislation and jurisprudence relevant to the right to strike. Its Charter of Fundamental Rights, which became legally binding in the EU in 2009 with the signing of the Lisbon Treaty, includes a provision on the right to strike, Article 28. Its text refers to the ESC, which greatly simplifies jurisdiction and implementation. Both the ESC and the EU Charter provide ample leeway to national legislatures and judges. The same is true of the European Court of Human Rights, which has expressed its opinion on the right to strike under Article 11, freedom of association (see, for example, *Demir and Baykara v. Turkey*, 12 November 2008). Measures and limitations are thus firmly in place to delineate the jurisdiction of national bodies and to define the playing field.

In the last decade, soft law has also gained ground in relation to the right to strike. I refer here to the developments in the context of corporate social responsibility. The United Nations dispatched Harvard Professor John Ruggie to see whether guidelines could be drawn up for business and human rights. The mission was successful, resulting in the UN Guidelines for Business and Human Rights. These guidelines refer, among many other things, to the fundamental principles of the ILO, including the freedom to unionize and of negotiation—which in turn include, in ILO terms, the right to strike.

The OECD's Guidelines for Multinational Enterprises were revised in 2009 and also refer to the ILO principles on the right to strike. Many companies have committed themselves to endorse the guidelines formulated by the UN and the OECD.

As we have seen in the ILO, therein lies the rub. What exactly does all of this mean?

Tension on the ILO line

The International Organisation of Employers (IOE) rocked the boat at the ILO conference in June 2012. As mentioned, the Committee on the Application of Standards examines the CoE report every year during the annual ILO conference. In 2012, the expert report contained passages on the right to strike, which led the IOE to question the mandate and authority of the experts. That was remarkable, because the CoE had not presented a new interpretation of the right to strike in its report or adopted an otherwise new slant. Its relevance has increased, however, because the ILO's views on freedom of association and the related right to strike are now "codified" in soft law guidelines that have been endorsed by many of the world's larger companies. ILO membership is available only to states, and international law developed at the ILO addresses the member states. Commercial businesses cannot become members. When treaties are violated, the state is called on to rectify the violation with or without ILO assistance.

Because companies are often subjected to social pressure to endorse the guidelines, public international ILO law comes into force in the civil commercial setting. That explains, at least partly, why the IOE has launched an attack on the ILO right to strike in the summer of 2012. Normally, the CAS processes a list of about thirty countries whose experts have observed in their reports violations of ratified treaties. These are the serious cases. The IOE was unwilling to cooperate in compiling and processing the list as long as the unions were unwilling to participate in a review of the CoE mandate. Because, understandably, this was not what the unions wanted, the clash was unreserved and so no list was drawn up or dealt with. This train of events was a first in the history of the ILO and therefore all the more shocking for many. Many delegates make long and costly trips to attend the conference, with the prime aims of seeing treaty violations identified as such and of calling on ILO intervention. Examples include safety at work (garment factories in Bangladesh, mine explosions in China), child labor (India, Bangladesh and Zimbabwe), forced labor, and infringement of freedom of association (Belarus). These are hardly insignificant grievances.

The ILO Right to Strike

What is the current mandate of the CoE, and what is its stance on the right to strike? In its report to the annual ILO conference of 2013, the CoE reiterated that on the basis of Articles 19, 22, and 35 of the ILO constitution, and adopted by the ILO Governing Body, its task is to indicate whether ILO member states are fulfilling their obligations of membership, and whether their laws and practices are in line with the ratified conventions. In carrying out its task, the CoE is committed to the principles of independence, impartiality, and objectivity. Its composition shows that these principles are respected.

The CAS acts on CoE observations as it sees fit. In the past, the CAS has shown a tendency to adopt the experts' observations and to urge countries somehow failing to meet their obligations to do so. The CoE reaffirms in its 2013 report that its observations are not legally binding. Its views are intended as guidelines and provide member states with a framework within which they can comply with their ILO obligations.

The CoE has developed the following principles with regard to the right to strike over the years. The right to strike is a fundamental right that derives from the right to freedom of association. It must be exercised peaceably. The law applies to employees in both the private and the public (federal) sectors. It does not include the police and the army, federal employees who exercise authority in the name of the state, or employees working in essential services in the strict sense of the word. The discontinuation of these services may not endanger lives, safety, or health of the whole or part of the population. Nor does the right to strike apply in situations of acute national crisis. The right also does not apply to purely political strikes. A minimum level of services may be compulsory in the event of a strike when personal safety, accident prevention, and the protection of equipment and instruments are at issue. Procedural requirements also apply, such as timely announcement of the strike, the obligation to collaborate with reconciliation efforts, and access to voluntary arbitration. Practical examples have defined these principles even further: when services are essential and when they are not, when personal safety and belongings are endangered and when they are not, and so on. Many examples appear in the reports of the CoE and the CFA Digest.

The right to strike as developed by the CoE and the CFA has resonated in numerous national trials conducted during strikes in many countries in the world. The CoE and CFA views are

generally regarded as authoritative by officiating national courts (compare the Dutch Supreme Court and the ESC Committee of experts). The IOE considers that the views of the CoE overstep the ILO's authority. The right to strike does not appear in Conventions 87 and 98, and the interpretation that this right automatically follows from the right to freedom of association and bargaining, is unacceptable for the employers. The IOE has expressed this view for a number of years, but ultimately the majority opinion prevailed in the ILO that the interpretation of Convention 87 includes the right to strike. As jurisprudence has developed over the past forty years, the IOE never put a resolution to the vote in search of ultimate limits. It adopted a very different stance in 2012 and the heated debate continues in 2013.

During this year's International Labor Conference (ILC), the CAS drew up a list of countries to be examined for violations of ratified conventions and was able to reach conclusions concerning the violations . These conclusions were, as usual adopted by the ILC. The CAS noted that it did not address the right to strike because "the employers do not agree that there is [such] a right ... recognized in Convention 87." A solution to this problem must be found in the coming year; otherwise the supervisory machinery of the ILO will continue to suffer. Words from the past may be helpful. In 1953, the director general (DG) of the ILO was questioned about the interpretation of Conventions 87 and 98. It would be inappropriate, he responded, to express an opinion on the interpretation of those conventions, given the special procedure laid down by the Governing Body for dealing with complaints of alleged infringements of freedom of association.[iv] Reference to the CoE and ESC, which though not legally binding are considered authoritative, is also worthwhile.

Tension on the EU Line

In recent years, the right to strike has also been a bone of contention between employers' and workers' organizations in the EU. The conflict escalated to such an extent that the European Commission felt that it could only be settled by regulation. The tension was caused by four rulings issued by the European Court of Justice: Viking, Laval, Rüffert, and Luxembourg. These cases highlighted the clash between the fundamental right of collective action, including the right to strike and other fundamental principles of the EU, freedom of establishment, and free movement of services.

In the case of Viking (ECJ C-438/05), for example, a Finnish ship owner wanted to make use of the freedom of establishment. A ship that sailed back and forth between Helsinki and Tallinn would be reflagged, and thus the workers would ultimately fall under the much less costly Estonian collective bargaining agreements. A labor union protested against the reflagging with an action whose legitimacy was unclear in the light of freedom of establishment. In the Laval case (ECJ C-341/05), Latvian workers were posted to Sweden but earned Latvian wages, which were lower than Sweden's. Another case of labor union action and the question of the legality of the action can be found in the context of the free movement of services. In its rulings, the Court of Justice recognized for the first time in the history of the EU that the right to collective action, including the right to strike, is a fundamental right and an integral part of the general principles of EU law, which the Court of Justice ensures. The Court of Justice also referred to ILO Convention 87, which, it says, recognizes the right to collective action.

The Court of Justice, however, has also held that the EU treaty provisions on the free movement of goods, services, persons, and capital must be balanced against social policy objectives. Moreover, the court accepted that the right to take collective action is a legitimate interest that,

in principle, can justify restrictions of fundamental freedoms, as guaranteed by the treaty. The court adheres to the well-known subsidiarity and proportionality principles. The freedom of services and of establishment may only be restricted when the restriction serves a legitimate aim that is compatible with the treaty, and when the restriction is justified for overriding reasons of public interest. Furthermore, the restriction must be appropriate to the objective pursued and may not exceed what is necessary. The national judge assesses the case in practice. In this view, the right to strike does not come before the freedom of establishment and freedom of services, but must somehow be considered in relation to them.

The unions in Europe, united in the European Trade Union Confederation (ETUC), find this concept difficult to accept. In their view, the EU court is now prescribing that industrial action be assessed by the national or EU courts to detect any potential infringements of the freedoms of services and establishment. This is seen as an unjustified curtailment of the right to strike.

This concern was shared by the ILO Committee of Experts, which expressed serious misgivings about the practical limitations of the right to strike. After all, it maintained, these restrictions go beyond what is permitted in ILO jurisprudence. The European Commission tried to mitigate the tension by establishing a regulation. The renewal of the Posting of Workers Directive, established in 1996,[v] also plays an important role in the discussion in that it still fails to sufficiently protect the position of posted workers within the EU.

The draft regulation as presented to the European Parliament confirmed that the fundamental right of collective action does not prevail over the freedoms, or vice versa (Article 2).[vi] It acknowledged that situations may arise in which the right to strike and other freedoms may clash, and that reconciliation must take place in accordance with the principle of proportionality and in conformance with the established practice of the courts and EU legislation. That is, the measure addresses equality and provides for possible conflicts. It emphasized that this situation only applies in cross-border matters. In a national context, it has now been clearly established that the EU sees the right to strike as fundamental, which determination again was intended as a balm for the trade union soul. The draft regulation has been fiercely rejected. It has been awarded a "yellow card" by the national parliaments of many countries; the Dutch parliament is no exception. It was not considered to be a matter for the EU, but for national states. European labor union federations had lobbied hard to overturn the regulation, and did so successfully. The regulation was withdrawn under pressure from the national parliaments. Meanwhile, the Court of Justice's controversial jurisprudence is still valid, though it will undoubtedly be challenged in a subsequent case.

Market Thinking and Value-Driven Thinking

All in all, for those interested in the root causes of the differences of opinion and the legal battles, the matter soon boils down to quite divergent views on society. In the EU, the social market philosophy is embraced as it attempts to unite conservative, social democratic, and Christian democratic principles. The values underlying the rights that unions have established in the course of a long and hard history—livelihoods, worker protection, and solidarity—cannot always be reconciled with those of the free economic market—supply and demand, and the individual responsibility of the citizen. The controversy surrounding the international right to strike is a painful illustration of the difference between an image of humanity and a vision of society. We are, though, talking and trying to settle matters, not fighting.

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[i] An earlier version of this essay was published (in Dutch) in the Dutch Lawyers Journal (NJB) on 21 June 2013.
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[iii] Judgment Supreme Court of the Netherlands May 30, 1986, NJ 1986, 688 (Dutch National Railway Strike).
[iv] ILO Governing Body 1953 p. 110.
[v] EU Directive nr. 96/71/EG PB EG 1997 L 18/1.
[vi] Proposal for a Regulation of the European Council on exercising the right to conduct collective action in the context of the freedom of establishment and the freedom to provide services [Dutch], COM/2012/0130 final-2012/0064 (APP).