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When Gorillas Strike: Constitutional Protection of Non-Market-Institutions in Labor Law

Wenn Gorillas streiken: Verfassungsrechtlicher Schutz von Nicht-Mehrwert-Institutionen im Arbeitsrecht

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Abstract: The "wildcat strike" against the poor working conditions of the bike couriers of the delivery service Gorilla at the beginning of 2021 ended in numerous dismissals by the employer. The trade unions did not support the strike, so that participation in the work stoppage was deemed unlawful by the courts. Under German law, strikes are only permitted as a means of exerting pressure in collective bargaining. However, it must be asked whether, with the changes in forms of employment and the associated limits to trade union representation of interests, it is still justified to regard the right to strike exclusively as an appendage of collective bargaining autonomy. Not only the pressure of international law, but also Gunther Teubner's concept of non-market institutions as necessarily resistant collective actors against economic profit pressures call for the further development of legal protection of collectivities. Alternative labor struggles for the often precarious conditions of increasing mobile, digitalized and transnational gainful employment would then have to be recognized under certain conditions.

Zusammenfassung: Der „wilde Streik" gegen die schlechten Arbeitsbedingungen der Fahrradkuriere des Lieferservices Gorilla Anfang 2021 endete in zahlreichen Kündigungen durch den Arbeitgeber. Die Gewerkschaften trugen den Streik nicht mit, so dass die Teilnahme an der Arbeitsniederlegung von den Gerichten als unzulässig gewertet wurde. Denn Streik ist nach deutschem Recht nur erlaubt als Druckmittel in Tarifverhandlungen. Jedoch drängt sich die Frage auf, ob es mit der Veränderung der Beschäftigungsformen und den damit einhergehenden Grenzen gewerkschaftlicher Interessenvertretung noch gerechtfertigt ist, das Streikrecht ausschließlich als Anhängsel der Tarifautonomie zu begreifen. Nicht nur der Druck

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des internationalen Rechts, sondern auch Gunther Teubners Konzept der Nicht-Mehrwert-Institutionen als notwendig widerständige Kollektivakteure gegen wirtschaftliche Profitzwänge fordern die Weiterentwicklung des rechtlichen Kollektivitätsschutzes ein. Alternative Arbeitskämpfe für die oft prekären Bedingungen der zunehmenden mobilen, digitalisierten und grenzüberschreitenden Erwerbsarbeit müssten dann unter bestimmten Voraussetzungen anerkannt werden.

Keywords: wildcat strike, alternative labor struggles, trade unions, freedom of association, precarious working conditions, collectivization

On the road in wind and weather

At the beginning of 2021, winter has Berlin firmly in its grip. Freezing temperatures and snow transform the city into a winter wonderland. Great for the kids, bad for everyone who has to get on the road. And dangerous for those whose job it is to quickly deliver groceries by bike from "department stores" to private customers who have previously ordered them via app from their sofa. But despite icy paths and slippery roads, the Gorillas business continues and the riders are sent out on the road under the usual conditions. No extra clothing, no special bike gear, no reduction in pack size, no extra allowance, no understanding of longer ride times. One boss reportedly responded to the riders' complaints by saying, "If you don't want to ride, walk". When the workers' concerns did not get through to management, they took their fate into their own hands. Some organized themselves in the so-called "gorillas workers collective" and called for a walkout in three warehouses on February 8 and 9 – without union support. The dispute escalated in June when Gorillas dismissed a strike-participating employee without justification. His colleagues again spontaneously stopped work in solidarity, mobilized on social media and protested (cf. Martin 2021).

Strike movements similar to the gorilla protests in the delivery services can be observed worldwide, such as the Alianza Unidos World Action, which organized several international strike days in Latin America against poor working conditions for riders. At the same time, they are supporting the Mobile Workers Alliance in California against restrictive legislative plans there. In Slovenia, there was resistance under the slogan "ReWolt" because politicians, together with the delivery services, decided to label the riders with numbers. In Hong Kong, riders went on strike because the app shows and pays for the route as the crow flies rather than the distance. In Russia, the independent courier union is worried about its rights following the introduction of a new platform law. And recently in the UK, riders from many

delivery services went on a self-organized strike initiated via social media, which spread rapidly in a chain reaction.

Could these dynamics of self-organization and networking not be appropriate responses to the ruthless value-added production of the platform economy, as clearly expressed, for example, in the profit-oriented actions of the food delivery service Gorillas, which are driven by a restless start-up logic? Alternatively, how could the riders of Gorillas have put forward their urgent employee interests against the profit logic of the company? The internal articulation of interests came to nothing. In the same way, the establishment of works councils failed. According to German law, this would be formally possible in companies with five actively entitled employees. But the company had deliberately isolated the riders at the end of 2021 and had thwarted the organization of works councils by restructuring the start-up into independent, solely responsible corporate units (known as warehouses) in the form of a franchise model (cf. Spiegel 2021). And Gorillas has also taken legal action against the workers council election.[1] So it seems downright cynical when the Gorillas company states that it is still possible to make workers' interests heard through "direct talks, internal feedback channels and other formats available in their warehouse" (Spiegel 2021).

And the trade unions? True, there are sympathetic and supportive gestures, whether from the grassroots union Freie Arbeiterinnen- und Arbeiterunion (FAU) Berlin, ver.di or even IG Metall. But they are not participating in the protest actions and have not joined the strike. Without unionization, the riders' fighting actions are so-called wildcat strikes, which are not covered by the protection of collective labor law. The work stoppages are qualified by national labor law as violations of labor duties.[2] Participation in such strikes can therefore be considered grounds for extraordinary dismissal – and the Gorillas company has already issued more than 300 dismissals for participation in the protests.

In the Gorillas case, however, it is not only a matter of existential questions for the workers concerned, but also of fundamental questions about the protection of the right to strike. Which strike actions are protected by law and which are not? What

1 Regional labor court (LAG) Berlin-Brandenburg, resolution of November 23, 2021 – Az. 13 TaBVGa 1534/21.

2 The "hM" (prevailing opinion) has developed in this direction since the case law on the newspaper strike of 1952 and in particular on the basis of the legal opinion of the later Labor Court President Nipperdey. On the judgments and history: Ramm 1964: 353 ff.; Wesel 1981: 14 ff., 20 ff. More on this below under "No legal protection".

is the appropriate way to collectivize in labor dispute? The Gorilla Struggle and the global strike movements of the Riders are struggles over the shape of the labor constitution. In order to understand it and to answer the *questio iuris* in context, it is not enough to look at the legal dogmatic technicalities; a theory-based understanding of the legal protection of collectivities is needed in order to develop appropriate solutions in the dogmatic forms.

A point of reference for this is offered by the concept of the protection of non-market institutions proposed by Gunther Teubner (2020a: 15ff.; 2020b: 389f.), whose focus on resistant non-surplus-driven collective actors opens up the view of how the precarious and often digital labor market can become collectivized. This perspective goes beyond the traditional labor law debates (an overview in Däubler, 2018: § 12) because it convincingly deplausibilizes the primary focus on unions as institutions of labor dispute.

Following Gunther Teubner's theses on non-market institutions,[3] I would like to try to classify the new labor disputes arenas, as they appear not only in the case of Gorillas and in Germany, but in the entire field of employment platforms worldwide (for a legal classification, see Gärtner 2020: 136ff.), from the point of view of social theory and then to define them in legal terms. It is appropriate to formulate the conditions of collective freedom of movement and thus also to define the limits of its permissibility in order to avoid dysfunctional excesses. The opportunities for developing collective resistance using the example of the narrow framework of the German right to strike is also interesting for the international debate on the riders' right to strike, because it shows alternative ways against economic value-added constraints.

No legal protection for so-called wildcat strikes

Until now it has been the case that the so-called wildcat strikes led by the riders under the call of the Gorillas Workers Collective[4] are regularly not recognized in German law as a lawful labor law action of struggle. As a result, the dismissals issued by the company for refusing to work are considered lawful.[5] This is not so

3 See more at chapter "Other resistant institutions against value added constraints".

4 An association of employees with a high media presence (e.g., on Twitter under @gorillasworkers).

5 Berlin Labor Court, judgment of April 6, 2022–20 Ca 10257/21, 20 Ca 10258/21 and 20 Ca 10259/21.

much due to the way in which the labor disputes were conducted, but to the lack of participation, which is the decisive factor in collective labor law. Labor disputes are only considered legitimate if they are the responsibility of a trade union.

Strike as an appendage of collective bargaining autonomy

This focus on the trade unions is the result and price of a gradual liberalization in which the trade unions are increasingly granted autonomy for collective bargaining and industrial action. Unlike many legal systems, German collective labor law has taken a special path and chosen to focus on the regulatory function of collective law – which was enshrined in § 4 a I TVG with the Collective Bargaining Unity Act (Tarifeinheitsgesetz). Trade unions become regulatory factors with an integration function. Even in times of crisis, they are supposed to secure the loyalty of employees in order to stabilize the economic system (cf. Klein 1979: 79ff; Däubler 2018: § 12 marginal no. 17). For this purpose and under these conditions, they are granted collective autonomy – for example, of the methods of labor disputes or of the content of collective bargaining demands.[6] The consequence of this orientation toward the order-building function of the unions is the functional and liberal classification of their options for action, i.e., the right to collective bargaining and the right to strike.

Freedom of association protects a safe space from state intervention in which trade unions can meaningfully organize working life.[7] The focus of trade union work is collective bargaining policy, which is intended to create a balance of power between the "social partners", i.e. employers, and the collective of employees by concluding collective agreements.[8] To this end, the clashes of interests must be brought to an appropriate balance not only vertically but also horizontally between different employee interests. The goal is to achieve peace through "overall compromises" and an order free of contradictions.[9] In order for the results of collective bargaining to provide a "balance of mutual interests" and a "guarantee of correctness", bargaining parity must be ensured by providing means of struggle. Against this background, industrial action has been regarded as an institution of collective bargaining auton-

6 See, for example, the flash mob decision of the Federal Labor Court (BAG) of September 22, 2009 – 1 AZR 972/08, BAGE 132, 140; also the Federal Constitutional Court (BVerfG), decision of March 26, 2014–1 BvR 3185/09, no. 1–42); confirmed by BVerfG, decision of July 9, 2020–1 BvR 719/19 –, no. 1–30; on collective bargaining autonomy: BAG, decision of April 24, 2007 – 1 AZR 252/06, BAGE 122, 134.

7 BVerfG, decision of October 20, 1981–1 BvR 404/78, BVerfGE 58, 233.

8 BVerfG, resolution of June 26, 1991–1 BvR 779/85, BVerfGE 84, 212.

9 This is expressly the reasoning of the government draft, BT-Drs. 18/4062, 8ff.

omy since the 1980 line of case law.[10] The right to strike is given functional protection precisely because it is regarded as a necessary condition for effective collective bargaining. It is a tool for concluding balanced collective agreements. Without this instrument of pressure, the employees would only have the option of "collective begging" vis-à-vis the employers.[11] The principle of countervailing power is thus a logical consequence of the principle of parity: it is intended to ensure negotiation symmetry and compensate for power imbalances. This is where labor dispute gets its legitimacy – but as a derived and subordinated freedom under strict limits of proportionality (this functionalization impressively summed up in Wiethölter 2014: 238).

The permissibility and conditions are derived from this equality of the means of struggle. This has considerable legal consequences for determining the legality of labor disputes and results in a twofold illegalization. They are only permissible if 1. they are supported by a supra-company and hierarchically organized union. Those affected by unequal economic redistribution, unfair working conditions, etc., must hope for the unions. Work stoppages or protests without union affiliation, i.e., wildcat strikes, are then unlawful, as already outlined. And 2. trade union labor action must be aimed at concluding a collective agreement. This means that concrete collective bargaining demands must be made, and the other side must be able to influence their realization. This is where the boundaries are drawn between political and demonstrative strikes, the former exclusively and the latter at least also directed against circumstances outside the sphere of the employer, such as environmental conditions or, in the case of Gorillas, against the restrictive migration law, which provides only for a temporary work permit.

Labor dispute without resistance

The core of freedom of association, thus restricted is the guarantee of an institutionalized procedure in which the collective bargaining parties set binding, externally uncontrollable, "correct" collective standards and thus order working life (cf. Kocher 2020: 198ff.). It is narrowed to orderly negotiation between the social partners. The various interests are "channeled", "objectified", in order to safeguard the "integration process" against disruptions. The process is characterized by the principle of reasonableness. The procedure is tied back to the economic principle.

10 See the fundamental decision BAG (GS), decision of June 10, 1980–1 AZR 822/79, AP No. 64, BAGE 33, 140. A reconstruction of this line of case law in Wiethölter 2014: 227 ff., 237 f.

11 BAG, decision of September 12, 1984–1 AZR 342/83, BAGE 46, 322.

An economic balance is to be achieved through collective agreements. The collective autonomy of the unions is shaped by private-sector dynamics, and industrial action is considered part of the exercise of private autonomy (instead of many cf. Wiethölter 2014: 227ff.; Kocher 2020: 196f.).

This cements a peculiar asymmetry: the unions are empowered in the public interest to regulate work – the empowerment comes from a public function. The manner, however, is determined by the private, economic principle of balancing market interests. With which the collective autonomy is primarily privately founded and must be hemmed in this direction. The conflictual collectivization processes preceding the negotiation process as the "power wrestling of social struggle groups" are no longer part of the protected sphere (Ridder 1960: 211, 215; on imbalances in these negotiation processes also Kempen 1977: 473ff., 479f.). Ridder (1960) already criticized the lack of formation of democratic will-forming processes, participatory structures and collective possibilities of dispute about the forms of work. The depoliticization and de-democratization of labor struggles means that the strike no longer has a substantive function. It is now only a means of "breaking negotiating deadlocks and securing a willingness to compromise"[12]. What is lost when the strike is understood only as a formal means of pressure is what Abendroth ([1953] 1972: 203ff., 206ff.) already demanded vehemently but unsuccessfully with his pleas for political and demonstrative strikes ("it must be the place in which the inner attitude of the workers is to be emphatically brought to light"): the proximity to the realities of life and work – in other words, nothing less than the content.

In this formal way, the strike only has an effect because it is supposed to build up pressure for negotiations. Everything that is conveyed in it, the diversity of interests, the displeasure, the fears and worries become a minor matter and irrelevant under the goal of finding overall solutions that are capable of compromise. The blindness of collective labor law is the price of collective bargaining autonomy, which depends on generally acceptable, low-damage and peaceful solutions. Strikes are necessary to enforce collective bargaining freedom. With the economic policy decision to institutionalize it (cf. Däubler 2018: marginal no. 17), the strike decisively loses its ability to move and, as a dramatic consequence, its resistance. Its opposing, radical and rough characteristics are smoothed out, even though they were inherent in it before.

12 Thus expressly: BAG, decisions of November 20, 2012–1 AZR 179/11, BAGE 143, 354, and 1 AZR 611/11, BAGE 144, 1; cf. also the precise analysis on the orientation towards conciliation and overcoming in Wiethölter 2014: 227 ff., 238.

This development of the unions was paved by an "artifice", as Wesel (1981: 22f.) calls it. While the Reichsgericht in the Weimar Republic still held that customary effects of wage and class struggle could not be unlawful, this view changed in the 1952 strike by newspaper publishers. Legal opinions were specifically commissioned to overcome this prevailing opinion. And Nipperdey, in his weighty expert opinion, did not simply argue that the political strike was unconstitutional (as Forsthoff argued in his expert opinion), but created the concept of social adequacy, thus marking the strike as fundamentally unlawful. The strike was undesirable because of its damaging effect on social peace, precisely because it could not be contained and controlled. This also explains the formulations of "attack," "strike," etc. against the employers, who, according to the assessment of the time, had to be provided with equal weapons to establish "fighting parity". In his later function as President of the Federal Labor Court, Nipperdey (1957) consolidated the view that the strike constituted an intervention under § 823 I BGB in the right to the established and practiced trade, which could only be justified by proving social adequacy, i.e., the social appropriateness of the labor dispute action.[13] The general interest had to be protected and was therefore the limit of what could still be justified. Thus, the rights of the trade unions and the possibilities of lawful strike action have been widely curtailed to the focus of "concluding collective bargaining agreements" (critically Abendroth [1953] 1967). They are permitted and authorized as long as they fulfill their regulatory function. The strike is permissible only within this function – its ability to fight against social conditions was lost.

Other resistant institutions against value added constraints

But isn't this mutual struggle and resistance what the institutionalization of non-market institutions is all about? The erosion of their resistive power could be a consequence of the fact that the trade unions in their present form as non-market institutions are clearly limited. In that case, contemporary answers to this erosion would be needed, because the constitutional question of the permanent social production of surplus value is the motor of systemic self-control, which, however, cannot limit its expansive dynamics on its own, but requires containment by counter-institutions (cf. Teubner 2020: 15ff.).

13 Cf. BAG GS, resolution of January 28, 1955 – GS 1/54 – AP Nr. 1, BAGE 1, 291; more recently: BAG, decision of March 18, 2009 – 4 AZR 64/08, BAGE 130, 43. Critical already: Ramm 1964.

Trade unions as viable non-market institutions?

Gunther Teubner (2020: 17) still sees in the trade unions a model for the non-market institutions he envisages, which can force companies to produce and distribute monetary surpluses ("surplus values"). Labor constitutional law had legally empowered them to fight for wages and working conditions and to externally shape surplus value production and distribution. In this role, they acted as mediators between economic profit orientation and democratic social values. This is especially necessary in the field of labor (as a fictional commodity in the Polanyian sense), because profit orientation is dysfunctional for this field of action. Therefore, a counter-movement in the form of massive social resistance is needed so that profit-orientation and also parasitic value-added orientation can be put in their place. Trade unions have been set up in this sense in order to re-embed the economy in society and to tie it back to democratic values for the protection of labor.

However, it is more than questionable whether the unions, with their own organizational interests and their orientation toward stabilizing an economic order, are in a position to continue fulfilling this role. On the contrary, there are many indications that it is difficult for them to detach themselves from a market logic, on the one hand, but also from their own institutional logic, on the other. A "democratic aggregation of needs into collective decision-making processes" (Teubner 2020: 18) is likely to be difficult to achieve even in the area of trade union membership, because the principle of majority and representation depends on generalization of interests, and minorities cannot be seen. However, it is even less likely to be possible to bundle the multiplicity of employee interests within the union, which has increased with digitization and globalization. The limits of the ability to organize interests have been reached. The unions are less and less able to represent all needs or even to balance them (instead of many: Ebbinghaus et al. 2009: 341). In this respect, the reciprocity mechanism fails, or rather the trade union counterweight as a correction of the profit logic threatens to be lost, if the trade unions obviously reinforce this logic. To stay in the picture: The counter-pressure that can be generated in this way is no longer sufficient to limit market dynamics.

This is particularly evident in the platform economy, which is difficult to organize and regulate because it operates according to its own global market mechanisms. Employment relationships are structured as seemingly flexible self-employment relationships, but flexibility is siphoned off unilaterally by imposing risks on the workers and minimizing their profit opportunities in favor of the platforms (cf. Kocher & Hensel 2016). Because of the independent form of employment, trade unions can no longer achieve anything with their collective bargaining policy

(Hensel 2019: 243ff.). The void becomes particularly clear in the case of the riders of Gorillas, although even formal employment relationships can be found here for the most part. The particular precarious and low-paid employment structure brings together many reasons that make long-term organization in the traditional trade unions difficult. For example, the fluctuation of employees due to the limited duration of employment contracts and the use of temporary workers prevents stability and continuity in the workforce, which is important for the organization. The part-time nature of the employment and the young age of the employees increases their tolerance for poor working conditions and decreases their willingness to work. At the same time, dependency and the fear of losing one's job increases for the majority of the migrant workforce, who find it difficult to find alternative employment. Financial, language and time barriers often stand in the way of union membership. Residency restrictions also play a role here. Many riders have only a limited work permit and have to renew it every six months at the immigration office. Unclear distribution of responsibilities and non-transparent decision-making processes at the platforms keep the possibility of job loss ever present. And last but not least, the isolation and singularity of employment – the riders only see each other sporadically in the warehouses – are a reason why they are difficult to address, motivate and collectivize (cf. Keller 2017: 27ff.; Wynn 2015, 111).

Need for a change of perspective: relevance of other forms of resistance

If we look at the preconditions of non-market institutions, the reason for the failure of traditional collective actors also becomes clear in the abstract: the trade unions are no longer placed at the point where "the failure of market mechanisms becomes painfully palpable" (Teubner 2021: 143)[14] on the changing labor market. This is because they have not reacted to the marketization of employment relationships and the increasing hybridization of the normal employment relationship. Their focus is still on representing the interests of the male, German-born, full-time worker. They are unable to reflect new forms of employment such as platform work in their interest policy. At best, as the initiatives on crowdworking show, they succeed in addressing them as trade union policy sideshows (cf. Hensel 2019: 243). The main business remains unaffected. The platform-mediated service sector, such as the cleaning industry (book a tiger, etc.) or the delivery services discussed

14 Thus in the german version. In the english version it says more cautiously: "precisely at the very points where false commodities had revealed the failures of the economic profit principle" (Teubner 2020: 15).

here (in addition to Gorillas, Foodora and others) are already less interesting. And the reactions of, for example, ver.di, which as a classic service trade union should actually be crying out about the working conditions of the riders, speak volumes. It does not feel responsible and in the last consequence shuns a liability risk to solidarize with the riders. It remains with distant and powerless declarations that the working conditions are unacceptable. In short, they are not positioned to feel the destructive effect of the profit orientation of the platforms. Their immobility and institutional rigidity prevent them from taking a stand and relegate the unions to informal actions in the platform economy, which are rather directed at individuals and are described in the debate with the term "Organizing" (cf. Brinkmann et al. 2008). They may be able to initiate collective creative power – it is conceivable, for example, that they provide spaces and communication channels for this in the case of the FairCrowdwork platform – but they cannot develop this from within themselves. And all in all, it seems questionable whether the plurality of interests that is becoming visible in the new employment relationships can be centrally captured and decided. Unfortunately, it is much more likely that it cannot be mapped and will be dissolved in general terms (on this danger, Hensel & Höllmann 2021: 244ff.).

But if it is a prerequisite for non-market institutions to develop resistance against towards value-added institutions, the crucial question is what are appropriate sensitive instruments that can capture the new labor market dangers. In this sense, a modification of the countermovement is necessary, which itself can only be thought dynamically and changeably. It is not the adherence to existing, proven institutions that can follow from the idea of the countermovement. It is not a matter of protecting institutions, but of protecting processes. Central is the always open requirement of how exactly the value-added constraints can be counteracted in the concrete case. The omnipresent but always general question of who is shaping the new world of work is concretized into more precise sub-questions: where are the dangers perceptible and how can resistance to them be developed. In this way, a highly demanding normative program is drafted that challenges nothing less than a change of perspective in collective labor law.

For it does not seem appropriate to deny protection to the Gorilla protests directed against working conditions, because they do not correspond to the previous form of resistance, which, however, drew its form from classical hierarchical labor conflicts. With their change, the processes of collectivization are consequently transformed, because effective resistance is given different preconditions. Precisely because of the basic economic policy decision of profit orientation, corrections are needed where previous reciprocal compensation mechanisms have failed. Thus, the stop

rules must be reactivated if it is to succeed in "giving the profit principle a different direction" (Teubner 2021: 142).

This conclusion is also compelling when one considers the collectivization situation of the Gorillas riders. The wildcat strikes in their protest form were the only means available to the riders to defend themselves against the poor working conditions. Even individual legal protection against the wave of layoffs is a major hurdle for many due to lack of resources and knowledge. It is often easier to look for another job – especially since the working conditions can hardly get any worse. But it is precisely this defenselessness that the platform economy builds on and structurally exploits. It does not have to fear any resistance. Especially not from politics. After 10 years of high relevance in terms of employment law, slowly there is political movement with the proposal of the European Commission for a directive on improving working conditions in platform work (COM (2021) 76COM2 final) or the key paper of the BMAS for fair platform work (BMAS 2020). What can be enforced and how the platforms can wriggle out of it remains to be seen. It is already clear that the platform lobby is strong by effectively threatening to leave. In addition, the dangers of circumventing legal standardization attempts are great.

Collectivization problems are particularly related to poor working conditions. This is not the first time in the history of labor disputes that this has come to light (for an overview, see Däubler 2018: § 12 marginal no. 17). For example, the wildcat Ford strike of 1973 already points to its social necessity (cf. Huwer 2013). For the work stoppages of the predominantly Turkish workers in the Cologne Werk of the car manufacturer Ford took place – similar to the case of the Gorillas-Riders – not wantonly and arbitrarily. "In view of certain grievances, they saw no other way out" (Däubler 2018: § 12 marginal no. 18) and could not hope for trade union support and hearing because access was made difficult for them due to their precarious and migrant status. The reciprocal relationship of labor contract relations was disturbed by the failure of the unions and, on the contrary, as is also evident in the case of the Gorilla riders, the labor risk was placed unilaterally on their shoulders. In this situation of violation of labor rights and contractual obligations by the employer, it seems necessary and appropriate for those affected to be able to defend themselves against overbearing employers through a collective and angry work stoppage.

Polanyi (1995 [1944]) has explicitly worked out this difficult connection between the conditions of fictional labor and those of the countermovement (on this, most recently for the field of care work Décieux et al. 2019: 389ff.). The fictional commodity of labor, which is increasingly developing into a fiction of the commodity value of labor power and human capital (Pongratz 2004: 17ff.), threatens to be pulled

unchecked into the market maelstrom if collective structures fail. The hybridization of work, alienation, the entrepreneurial self, flexibilization, or the blurring of the boundary between work and leisure are keywords of the debate that describes the enslavement of the social capital of employees by the economy and the exploitation of social relations. This is where a special tension arises. And it is precisely for this reason that strong protection under collective law is urgently needed. And this burden must not simply be placed on the riders and other platform employees, for example by making them responsible for simply joining a trade union, or by making the self-employed crowdworkers expose themselves to the risk of competition penalties if they try to jointly define working standards despite the ban on cartels (cf. Bayreuther 2018). It should not be left to chance whether unions discover platform work as a useful field of action for them and begin to organize "along the conflict"[15], for instance because they hope to gain members through it. Organizing riders, for example, is not lucrative because it is difficult to motivate them to become members, for the reasons explained above. No corresponding efforts or initiatives to gain members could be observed, for example at ver.di. It is therefore not to be expected that the low representation rate and the low level of organization will change.

This gap generated the need and the pressure to "fight back" outside the known collective forms. The loss of resistance in the realm of the fictional commodity of the search for work challenged alternative counter-movements that demanded the social protection of employment relations in a special way. This is quite consistent with Polanyi's logic of the counter-movement, which is conceived as a reaction to something and thus dynamic. Since the concept of movement and counter-movement according to Polanyi remains in balance and the liberal marketization dominates, the strategy of the counter-movement has to be changed and adapted to the new conditions. It must be compatible with the changed working conditions, such as time and resources, but also with the changed attitude towards work and also with the new flexibility or instability. Thus, the search movements are not finished in the economic system either. Collective labor law itself must remain capable of change.

15 This is what happened in the case of the "Kita-strike" in Germany, for example, see Dribbusch 2011: 231.

A view of the rider protests against Gorillas

If one reads the rider protests against this background, they can be interpreted as new self-protection mechanisms against encroaching profit orientation. Confronted with the obstacles to access to the unions and their reluctance, and at the same time under pressure to act in the concrete situation in the winter of 2021, in which the riders were sent out onto the streets without protection or conditions despite the adverse weather conditions (see the opening scene), they had to become active quickly. Waiting for the legislators or the unions was not an option at the time. It was necessary to parry the surprising encroachment of Gorillas and prevent labor standards from moving even further downward. It was also and especially about sending a signal to all riders that they do not have to put up with the treatment by Gorillas. So, it was an extreme situation, from the riders' perspective a moment of acute danger, which created an urgent need for action. Therefore, the protests can and must be read as an expression of a real dissatisfaction, even more: as an expression of crossing the limits of what is reasonable.

Protests as an expression of existential discontent

To express this, the riders resorted to means available and easily accessible to them. They stopped working and took to the streets to protest with placards and slogans. This was done very spontaneously. The ad hoc "Gorillas Worker Collective," an association of affected riders, began directly in February 2021 via the short message service Twitter to denounce the working conditions and called for joint action against them. Like a kind of chain reaction, the call spread to other riders. The "Gorillas Worker Collective" coordinated the protests and blockades of the individual warehouses and motivated the riders to join in. Currently, about 15,000 affected people, activists, politically interested people, etc. follow the collective via Twitter. Although an organized digital network has failed so far, it is possible to address and bring together affected people and activists distributed in different warehouses via social media.

Comparisons to digital activism have already been drawn (Kocher 2021). Such elements can also be found in isolated cases, such as when the #BoycottGorillas campaign was launched with the aim of influencing the evaluation of the Gorillas app. However, the actions are more characterized by the interweaving of analog and digital forms of communication. The mood and aggression built up by the media (one only has to follow the Twitter account) was discharged in analog, physical forms of protest on the ground, which at times also had a creative side. The form

of the protests carried elements from the social movement. A decisive factor here was that the affected, mostly young and migrant workers were not yet socialized in terms of trade unions and that different, for example, Latin American or South (Eastern) European labor struggle cultures met unencumbered by ideas about "legality" and "collective bargaining capacity" (Kocher 2021).

Gorilla riders came together to be heard and to stand up for themselves. For many, a union seemed too cumbersome and slow. Moreover, they did not want to relinquish their responsibilities and voices, but to determine the dynamics of the conflicts themselves. The Gorillas Worker Collective was a grassroots, minimalist organization that met these needs. It formed a forum with a wide reach, in which discussion, exchange of experiences and voting could take place. Not interests, but experienced problems and shared experiences of injustice formed the basis for the common actions. This led to a de-individualization of the concrete problems in the riders' everyday life. The riders came to an understanding about their experiences of injury and thus developed a common line about the limits of what is acceptable.

The anger of the individuals was thus activated and channeled, but not tamed. On the contrary, it was amplified by the echo in the community of protesters. A collective energy was discharged during the protests on the streets. The shared feeling of being able to make a difference and to unleash a force together against the company formed an important resource for the unions. This may also explain the escalation of protests in response to individual layoffs over the wildcat strike. Inspired by the experience of the collective self-efficacy of the protests, further actions followed. These were directed against the fact that the company wanted to deprive the riders of their right to resist and attacked the "lived solidarity".

This explains the conflictual, sometimes radical nature and high dynamics of the protests. The defense of common concerns was very emotional and loud. The media took notice because the staging of "small against big" was easy to scandalize. The involvement of the public promised maximum visibility. By playing with escalation, the media-effective staging of mass dismissals, meaningful symbolism and also the use of blockades, barriers made of bicycles and people in front of the warehouses and the company headquarters, an impressive demonstration of strength succeeded with the message that they will not be intimidated.[16]

16 This was already the approach taken by Deliveroo and Foodora bike couriers in their 2017/2018 strikes.

The accusation often made from the outside that there were no concrete demands in terms of content is misguided. For that was not the central issue, but rather to mark the limits of the marketization of supply activities by demonstrating strength and resistance. Therefore, it was also crucial to involve the public and to set a strong narrative of resistance – it was not by chance that the very concept of the "wildcat strike" was taken up as a fighting formula. The goal was not the reorganization of work according to the previous claim to order of trade union work, but the building and demonstration of resistance. In this respect, the illegality of the wildcat strikes could not affect the success of the actions. Much more decisive were the moral superiority and the public denunciation of the Gorilla company. From this, the protests drew a certain legitimacy and justification in the public eye.

In this respect, the protests were also strategically cleverly designed, because they were not directed against the purchasing behavior of consumers who use Gorillas, but against Gorillas as employers. The public was also not affected by the protests, but only entertained. And on the other hand, the protests conveyed a seriousness and urgency through their intensity but also precisely because of the risk taken by the protesters of losing their jobs and income through tips. Leisurely demo walks on Saturday morning would not have had this effect. The success was based precisely on the linkage with everyday employment, i.e., because it was targeted and took place at the site of the assaults and was thus suitable for building up pressure on the Gorillas company. In addition, the protests were not allowed to be too defensive, because they had to disrupt precisely the profit orientation. The term "wildcat strike" thus fit into this strategy.

Thus, it cannot be said that the protests were arbitrary or random. The wildcat strikes correspond exactly to the lifeworlds and possibilities of the riders. Without union support, which was hardly likely, the protests required some radicalization. To dismiss them as illegal and flawed strikes would be to turn a blind eye to the resistance expressed in them. They are qualitatively different from union-led strikes because they make use of a special combination of analog actual resistance and digital communication and develop a special affect communication about it (on this affect-drivenness esp. of digital media, Lünenborg et al. 2018; Stäheli 2021, 2012: 99ff.). This is why they are characterized by a certain swarm-like uncontrolledness. The peculiarity lies in the fact that a peculiar collective force unfolds precisely from the precariousness of the riders' employment, which cannot be grasped as a unified will, but only as a common resistance. The isolated riders, each with a different context, could not fall back on a prior sense of connectedness or an institutional structure. But there were other collective moments. Law and politics would have to develop a sensitivity for this.

Collective affect communication

Legal regulation is primarily about recognizing the peculiar power of resistance. The importance of the development of such social forms of resistance is already a supporting pillar of Polanyi's model of the countermovement (Polanyi [1944] 1995: 182). The interaction he describes between movement and counter-movement is not a rational, negotiating relationship between two contradictory organizing principles, but a struggle between the ever-expanding market and society. "Social forces" oppose the imminent dangers of economic liberalization and use the methods and resources at their disposal to do so (Polanyi [1944] 1995: 185). For Polanyi, then, various methods are conceivable, from protective laws to protective associations, to means of intervention, borne primarily by the "shifting support of those [...] who were first affected by the pernicious effects of the market" (ibid). Thus, the countermovement is not necessarily institutionalized, but, for Polanyi, a dynamic and contested development.

This requires experimentation with different forms of resistance (Teubner 2021: 145). It is crucial that these forms are suitable to limit the economic principle and to change its direction. In this way,scandalizations and protests also have the potential to express the "resistance of the maltreated bodies and souls" effectively, because here the suffering can express itself. Such "messages" are always only mediated and momentarily conceivable, but there is the "chance for social conflicts about the core area of human rights to develop" if the also aggressive, physical protests were socially translated into political struggles (Teubner 2006: 335). These are the concretization of the justice formula in the world of work, in that they do not formulate just working conditions, but name the unjust conditions and violations and demand their elimination.[17] Protests and other forms of resistance are central options for action in shaping the social, which step out of the bourgeois form and open up spaces for a "non-individual communicative power of pre-conceptual affection" (Teubner 2018: 371). They attain their normative intrinsic value precisely because they persist in their momentariness and consciously refrain from translating the resistance into what can be said. Thus, the protests are not subject to a certain formal logic. Nor is it a matter of pushing through political programs. Rather, the focus is on expressing anger about what is not visible, sayable or thinkable in the previous debate (which is not only pre-structured by the economic order, but also by labor law).

17 On the proximity of justice to unrest, indignation, scandalization and protest: Teubner 2006: 335; 2008: 9ff.

> „Jedenfalls in ihrer Anfangsphase sind Protestbewegungen dadurch ausgezeichnet, dass sie weitgehend ohne begriffliche Bestimmungen, ohne ausformulierte Theorie und ohne explizite politische Aktionsprogramme, spontan Affekte der Betroffenheit, des Unbeha-gens, der Anklage, des Engagements, des Zugehörigseins artikulieren und dies explizit nicht als bloß individuelle Gefühlswallungen, sondern eigensinnige Affekte eines Kol-lektivakteurs [...] entfalten kann“ (Teubner 2018: 371).

What is decisive, then, is not the interpretation and demand of individuals or the aggregation in political alternatives, but the elevation of the multiplicity of voices precisely in the place or with reference to the violations expressed by the preconceptual affects. This collective dimension, similar to Menke's counter-rights, is based on a “moment rather than reason” (Menke 2015: 378f.). Consequently, it is a matter of making this figure of collective actors legally tangible. For the preconceptual affects showed themselves above all here. The organized, but movement-intensive protest increases the “political clout” because affects are more likely to be heard here via the communicative power of social movement. Therein lies the democratically relevant function of such collective movements, which is worth protecting. These form a space for collective expressions of will, in the sense that experiences of injustice can be named as such, discomfort can be formulated, and defiance against political solutions and institutional assignment can be shown. Here it becomes possible to identify a clear “against” that is responsible for the experienced violations. The group context is based to a considerable extent on the common naming of a responsible adversary.

This function, however, requires going one step further and formulating another condition for such collective spaces: in order for such uninhibited, resistant collective affect spaces to develop, they must be designed to be free of power and domination. For this reason, Nancy Fraser (2011, 2017) argues for a complementary reading of Polanyi and for the introduction of a third emancipative force, one that steps alongside the social force. She criticizes Polanyi's dichotomy of good society vs. evil economy. Social mechanisms of resistance are themselves embedded in structures of power and domination and are not good per se. Those that are less suitable for emancipatory purposes because they are characterized by hierarchies and exclusion – such as the trade unions – must be hemmed in accordingly. And in return, social struggles against relations of domination would have to be permitted, which make it possible to overcome the existing order in the sense of emancipation.

It corresponds to their demand not to restrict the conception of non-market institutions narrowly to institutions, but to extend it by a capacity for movement, as it is inherent in the theory of collective affects. Thus, it is possible to work through closure effects without being relegated to existing order.

Constitutional protection for collective resistance structures

The question is, of course, how the law can deal with such collective emotions. In any case, it is wrong to dismiss them as ill-considered, arbitrary resistance and not to take them seriously. The fact that collective labor law is based only on institutional protection is not the result, but part of the legal description of the problem.

As a consequence, the question is how the described communication of affect can be supported by counter-rights (cf. Teubner 2018: 372). The extension of constitutional protection to such resistance structures is inherent in the logic of non-market institutions. If conventional structures fail, new ones must be promoted and stabilized. However, it is not a question of institutionalizing them by seeking a unified will, but of ensuring their resistance and ability to deal with conflict. In view of the history of the women's movement, which is attempting to free itself from its own essentialist narrowness by subjectifying itself as "we women" (for an overview of this critique, see Schmincke 2018), an attempt should be made to set the difference of the participants as the basis and to establish the identity of the movement through the shared experience of injustice.

Collective Dimension of Article 9 III GG

Under these premises, Article 9 III of the Basic Law must be read as an open fundamental right that, like freedom of assembly and freedom of expression (cf. Eickenjäger & Fischer-Lescano 2020: 264ff.), can withstand conflicts (cf. Hensel 2022: 207ff.). Debates in collective labor law about political (cf. Abendroth 1951, 1972), demonstrative (cf. Mückenberger 1980) and wildcat strikes already point in this direction. They all attempt to reformulate the function of the right to strike and to return it to its social origins, away from the institution. The most radical of these demands is to place even non-union strikes, which the mainstream calls "wildcat" strikes, under the constitutional protection of the right to strike (cf. Wesel 1981: 14ff.). The underlying balancing of interests is essentially about protecting the resistance of the strike while suppressing the dominant weighting of both a general interest in a stable and peaceful economic order and an economic interest in limiting the harmfulness of the strike (see above). In this way, the illegalization of the "non-association strike" (cf. Däubler 2018: § 12 marginal no. 17), which is already implicit in its designation as "wildcat", is deplausibilized (see also Berg 2020: 401ff.; Zachert 2001).

The very wording of Article 9 III GG opposes formal requirements for the organization of coalitions. It does not refer solely to trade unions, but, like Article 9 II GG, speaks of "associations". The possibilities for action opened up in this framework by the Federal Constitutional Court thus also apply in principle to such associations which are less institutionalized than trade unions, but which also exhibit a certain organizational independence beyond individual interests and are directed towards the common purpose of "safeguarding and promoting working and economic conditions". It is precisely in line with the parity of struggle at the heart of the argumentation on the right to strike that the quality of the association must not be subject to too high requirements. This already follows from the fact that the criterion on the employer side is already fulfilled by the nature of an enterprise, while the association on the side of the employees is much more preconditioned and depends on numerous factors. It is not the association status – i.e., the formal question of addressees and, as a consequence, the civil-law functional requirement of "collective bargaining reference" – but the achievement of a common employment-law objective that is at the core of the protection under Article 9 III GG.

If the scope of protection of freedom of association is reconstructed on the basis of its intrinsic normative orientation, it is precisely the communicative element that is central "to the specific nature of its position under fundamental law" and gives it an independent constitutional value compared to other forms of association. In Article 9 III GG, a collective dimension is already inherent in a special way, which refers more to a process than to an individual or an institution: According to the wording, the right is guaranteed for "everyone and for all types of occupation" to "form associations for the protection and promotion of working and economic conditions". The wording "to safeguard and promote working conditions" already indicates that an autonomous order must precede the institutional level, i.e., that the desired order is a social one and that any formalization through standardization must help it to find expression. The core of the norm is an autonomous order. Accordingly, the protective purpose of the norm can be determined neither in terms of individual law nor institutionally, but is directed toward the autonomous, collective organization of work.

Procedural protection of fundamental rights: communication and connectivity

Helmut Ridder (1960: 42ff., esp. 44; cf. Hensel 2022) already worked out in detail that the protection of the constitution does not refer to the existence of the collective, but to the institutionalized procedural creative process. This results from the

social function of fundamental rights, according to which they protect the freedom of socio-political processes (fundamentally Luhmann 1999: 98f.; building on this: Ridder 1975: 85; Ladeur 1999: 281ff.; Augsberg 2013: 530; Hensel & Teubner 2014: 152ff.). The shaping of working and economic conditions does not take place in the "private sphere" through individual action, but is – as Ino Augsberg (2013: 530) has already stated for religious freedom – "designed from the outset to be exercised collectively". In a very similar manner, Niklas Luhmann (1999: 98f.) also speaks of freedom of association as freedom of communication, which protects "politically independent expectation-forming processes". Collectives and individuals do not have opposing interests in freedom of association that could be mapped into individual vs. collective freedom of association. Both are established as subjects of fundamental rights only in the communication process protected by Article 9 III GG, "in accordance with given communication possibilities, in particular linguistic and non-linguistic symbols" (Luhmann 1999: 98f.; cf. also Däubler 2018: § 12 marginal no. 36–38). Article 9 III GG does not protect the collective "coalition", but the sphere of communication of the coalition, its political moment. "Coalition-making" to shape working conditions points beyond the individual as well as beyond the organization of the trade union and describes an in-personal, trans-subjective process of forming a community. Neither individual co-determination nor membership are constitutive for it. Protected is more than the sum of union members – more than the organization (but so Kittner 1984: Art. 9 marginal no. 63). With the dissolution of the sole focus on collective bargaining, the demands on the organization change, and it can no longer be thought of as exclusively hierarchical and stable. The formation of a common and unified will, as required by the traditional dogmatic approach to Article 9 III GG, is then still a possible characteristic, but no longer constitutive.

The protection of the freedom of association is detached from a concrete will-forming and statement content. The decisive factor for triggering protection is not the proportion and plausibility of concrete demands. Rather, what is protected are the processes of collective will formation and expression and, with them, the particular forms of affect communication. This means that instead of deliberative and rational processes of understanding, the main focus is on the special productivity of the energy of affect. Its creative potential lies precisely in the fact that it can unfold resistance where assaults and injuries become unbearable. In such spaces of resistance, the irrational, the unspeakable, the incommunicable have special power, because they develop a special closeness to needs, design needs, actual experiences of injustice, and so on.

The creative potential of such processes should not be underestimated. By no means can it be said that they do not have any meaningful effects. However, these effects

are of a different kind than the required strike effects at the level of collective bargaining policy, which must be directed at binding design in order to increase the necessary pressure on the bargaining parties.[18] But such collective forms of protest are carried by a just named common purpose: the change of direction in gainful employment, concretely the improvement of working conditions. It is a matter of putting up stop signs against the economic production of surplus value through targeted disruptions. They can develop a normative power of "against". Herein lies their transformative power, as it characterizes the so-called political solidarity, and their specific collective emergence. Their constitutional value lies in their aiming at changes of direction. Unlike assemblies, such forms of protest aim concretely at changes of direction in gainful employment and therefore require specific venues and forms. This is also the point of demarcation from mere singular individual appearances and forms of protest. For in such collective processes a certain pattern of order can be recognized. The specific collectivity of the coalition is characterized by a context-specific connectivity (cf. Ingold 2014). The participants engage in the dynamics of affect and interact with the collective (cf. Eickenjäger & Fischer-Lescano 2020: 266). Carried by an intention, a motive, a dissatisfaction with existing conditions, they move in synchrony with the collective, surrender to the rhythm. It is therefore wrong to base such dynamics on the individual right of self-determination of Article 1 Basic Law and individual freedom of action of Article 2 Basic Law.

With this reconstruction of the scope of protection of freedom of association, the stability and permanence of coalitions recede into the background and the development of social forces, especially in the run-up to previous collective bargaining policies, becomes central (cf. Hensel 2022: 211ff.). The right to strike is thus more than a functional appendage of the coalition; it is a decisive factor in determining the collective nature of the process. It is therefore only logical that spontaneous unions formed for a specific reason, so-called ad-hoc-coalitions, are also covered by the scope of protection. National constitutional law doctrine seems to recognize such other coalitions, even if only cautiously. When interpreted by the courts and the legislature, it is said to be permissible for collectively bargained unions to be granted special rights similar to those of the "Betriebsverfassungsgesetz". However, it follows from the protection of Article 9 III GG that other coalitions, such as ad-hoc-coalitions, must retain certain powers, such as the right to enter

18 Cf. on the fear of the otherwise threatening softening of the right to industrial action: BVerfG, decision of June 19, 2020–1 BvR 842/17 –, marginal no. 1–35; so even the requirement for strikes without associations: labor court (ArbG) Gelsenkirchen, decision of March 13, 1998–3 Ca 3173/97.

workplaces or the right to strike.[19] Otherwise, they would be left with no effective means of exerting pressure and the protection of Article 9 III GG would come to nothing (cf. Däubler 2018: § 12 marginal no. 22; Berg 2020: marginal no. 202; Klein 1979: 87ff.; Zachert 2001: 401, 404). The recognition of the relevance of other forms of collectivization becomes even clearer when one looks at the line of case law of the Federal Constitutional Court (BVerfG) and the Federal Labor Court (BAG), for example, on the legality of warning strikes, the opening up to third-party companies by allowing support strikes or the flash mob form as a permissible form of strike. In each case, the underlying logic is that a change and an adaptation of the means of labor action must be possible and necessary "in order to remain equal to the opponent".

Pressure of change in international law

International law is even clearer in its opposition to a trade union monopoly on strikes. In 2021, the Inter-American Court of Justice stated in a legal opinion that the right to strike is a fundamental human right of workers that they can exercise independently of any organization. The general principle of international law also applies to non-union strikes.[20] And there is further pressure for change. In November 2023, the International Labor Organization (ILO) submitted the question of interpretation to the International Court of Justice as to whether the interpretation of Convention No. 87, which has been consistently practiced by the ILO's Committee of Experts, is still valid.[21] Although the wording does not explicitly mention the right to strike, the Committee of Experts interprets Convention No. 87 in such a way that a right to strike for workers and their organizations must follow from the freedom of association and the protection of the right to organize. Such a fundamental right to organize and protest against economic and social policy does not permit any restriction of the scope of protection, such as the reference to collective bargaining in German law.

This is also in line with Art. 6 No. 4 European Social Charter (ESC) and the interpretation by international case law, according to which, in order to ensure the effective

19 Cf. BAG, resolution of September 19, 2006–1 ABR 53/05 – NZA 2007, 518, 522; Däubler, Arbeitskampfrecht, 2018, 4th ed., § 12 marginal no. 20.

20 Inter-American Court of Justice, opinion of May 5, 2021, marginal no. 95f.; translated in AuR 2022, 82ff.

21 See the ILO homepage: https://www.ilo.org/global/topics/freedom-of-association-and-the-right-to-collective-bargaining/advisory-opinion-C87-icj/lang--en/index.htm [Accessed 8 March 2024].

exercise of the right to collective bargaining, "the right of workers and employers to take collective action, including the right to strike in the event of a conflict of interests, subject to any obligations arising from collective agreements in force" is to be recognized, does not allow for a restriction of the right to strike to targets that can be regulated by collective agreements. A work stoppage without an association is also covered by the "collective action" mentioned, because the standard is a right not only of trade unions, but of all employees (Mitscherlich 1977: 120ff.; Klein 1979: 88; Ramm 1971: 72ff.). A restriction is only possible within the framework of Art. 31 ESC. Its binding nature for German labor law has now been established several times by the BAG, which has also announced that the collective bargaining nature of German labor law "requires a renewed review".[22] In doing so, the court has not only taken up the interpretation of the right to strike of the majority of the signatory states, but also explicit recommendations and reprimands – most recently in 2018 – of the Committee of Ministers of the Council of Europe, which goes back to a report of the independent governmental committee of the ESCs, according to which the restriction of protection to such strikes that are called by trade unions and aimed at the conclusion of a collective agreement must be abandoned.[23] Although the German government stated during the ratification of the revised European Social Charter of 1996 in 2020 that it interpreted Article 6 IV of the ESC differently and did not see any contradiction with the reference to collective bargaining, this interpretation can hardly be upheld against the background of the normative pressure to adapt through international law (cf. Lörcher & Ebert 2022; an overview of the debate: Heil 2020). This is because these rules also affect German law via Art. 59 GG (ESC) and Art. 25 GG (general principles of law). Further development of the right to strike by the courts is to be expected.

22 BAG, decision of September 12, 1984–1 AZR 342/83, BAGE 46, 322; BAG, decision of December 10, 2002–1 AZR 96/02 – NZA 2003, 734, 740; repeated in BAG, decision of April 24, 2007–1 AZR 252/06, AP No. 2, BAGE 122, 134; in part, this decision is also read in this way: BAG, decision of June 19, 2007–1 AZR 396/06, AP No. 173, BAGE 123, 134. Clearly also ArbG Gelsenkirchen, decision of March 13, 1998–3 Ca 3173/97.

23 No. 82 of the Report of the Governmental Committee of the ESC (XIII-4) to the Committee of Ministers of the Council of Europe, ArbuR 1998, 154 ff. and 2018: https://www.coe.int/en/web/european-social-charter/germany [Accessed 8 March 2024].

A flexible and dynamic right to labor dispute as a right of resistance

Thus, the right to labor dispute can only be conceived in a flexible and dynamic way. Three aspects outlined below are particularly relevant in this context: the ability to adapt internally, the preservation of the ability to engage in conflict externally and, finally, the relationship to institutional trade unions.

Autonomy subject to conditions

On the one hand, this right to industrial action must be able to react to structural and employment-related changes in companies (cf. Mückenberger 1980: 258ff.). In particular, it must develop alternatives where trade unions reach their limits of action and decision-making.

The dwindling importance of unions in the new employment relationships deplausibilizes their special position, which the Federal Labor Court assumes for classic, Fordist value creation relationships.[24] Here, they have neither knowledge sovereignty over employee concerns, nor a central role for employees, nor any significance in the area of the platform economy. And they find it difficult not only to secure the loyalty of employees but also to intervene in distribution issues. Other collective actors such as the disgruntled employee collective have more assertiveness. Especially for the period in which, due to the development of new types of employment structures, neither existing organizations have adjusted, nor new ones have been formed – both of which are a lengthy process – it must be possible for workers to strike for concrete reasons. Waiting for institutions and institutionalizability is not reasonable. Therefore, it makes sense to allow association-free wildcat strikes and "work stoppages wherever there are neither unions capable of acting nor a works council and where the disputed issue has also not found a binding legal regulation" (Däubler 2018: § 12 marginal no. 27 with further references).

The formation of a corresponding logic of resistance can only be thought in a self-learning and self-organizing way. This is the reason for the autonomy of the collectivization processes – the collective bargaining function is then only one manifestation of this exercise of freedom (see above). Only in direct contact with employment practices in the companies can appropriate forms of resistance be

24 Thus BAG, decision of December 20, 1963–1 AZR 428/62, AP No. 32, BAGE 15, 174.

developed and tried out. Specific rules of communication, networking strategies, decision-making processes, etc. are needed in which the effect, direction and forms of protest are negotiated and initiated. In this respect, there is autonomy in the choice of the means of struggle, as long as the purpose "the preservation and promotion of working and economic conditions" is observed. Effective resistance must fundamentally be able to determine its own means in order to oppose systemic order. Formal external prescriptions of permissible means of struggle would force resistance to conform to the system and thus undermine it (exclusively for "not too complex" minimum requirements: Lörcher & Ebert 2022: 56). Above all, alternative, experimental, novel forms of struggle have potential, which may well come close to art and assembly. In particular, Dadaist disruptions, boycotts, blockades, factory occupations, disruptions and even escalations are quite permissible, if not even trademarks of such new forms of strike, if they can express resistance in an appropriate way.[25] In the same manner, they can link up with media and political collectivization processes.

The law is confronted with the difficult task of increasing tolerance and sensitivity towards and protecting resistive affective communication, while at the same time defining its limits. An open concept of strike, which recognizes the autonomy of collectivization processes and in particular the societal disposition over strike means and goals, must at the same time curb their danger of excess and violence. Rudolf Wiethölter (2003: 21; taking this up for the right of assembly: Eickenjäger & Fischer-Lescano 2020: 266ff.) already strongly pleaded for such an autonomy under conditions that can endure – but not dissolve – this tension. It is difficult to find standards for this in such processes, which are precisely designed for disruption and collective violation of rules, and thus public order cannot form an effective boundary, because it is precisely this that is up for grabs. Such "meta-rules" would have to secure a framework for the free ability to move and at the same time make it bearable for others. In this context, the conflict-political orientation functions both as a boundary and as a protection of collectivization.

Securing the capacity for conflict

Securing the ability to deal with conflict is one of the most sensitive issues. This is because – contrary to political fears – it will only be necessary to limit the scope of

25 On egg-throwing as a permissible form of protest under certain conditions: Wiethölter 1972: 4, 6, reprinted in part in: Hensel 2019: 468, 471.

conflict in a few cases, because excesses are unlikely. For one thing, the economic risk for the individual participants is very high, since they do not receive strike pay and must forego income such as tips. Without organizational support, they are also exposed to the consequences of the strike alone, which in turn represents a barrier to participation. Second, it is difficult to initiate such collectivization processes and keep them going for a certain duration. Such networking, communication and motivation problems are hallmarks of collectivization in the platform economy (see above). They endanger the capacity for conflict.

This is evident in the protests of the Gorillas riders: they seem to have fizzled out. The strikes are currently at a standstill, although not much has changed in terms of employment conditions. The only effort is to introduce an app that calculates the maximum weight of the riders' backpacks. The company demonstrated its strength with the layoffs and nipped resistance in the bud. It no longer succeeded in further networking and organizing further resistance. This is symbolized by the appearances of the head of the company, who, holding his bicycle tattoo up to the camera, declares that he is a "rider by heart" and thus appeals to a "we" and a common corporate goal.

Resistance energy is a fragile resource that dries up if not nurtured. There is a danger that employers will sit out or tone down the "negative mood" with staying power. In terms of their specific effectiveness, the spontaneity and emotionality of the forms of protest seem to be not only the greatest driving force, but also their greatest weakness, because they can also die down all too quickly. What becomes problematic is the lack of permanent structures, so that conflicts cannot be conducted with perseverance and resources.

For this reason, the main legal concern must be to protect this special capacity for conflict as a special and different effect (see above). Crucially, the transformative power of the protests must be secured. To this end, the "collective effects" (Ladeur 2006: 647f.) must be able to unfold. On the one hand, incentives need to be created for the communication of the effects. Spaces, media, communication structures could be made available and further expanded, especially in the digital space. Coordination structures can be supported, forms offered. They must be given more power so that they can exert creative pressure. On the other hand, however, all forms of appropriation must be prevented. This would mean, above all, legalizing them in the way described above and removing the threat of dismissal from the employer's side, as well as safeguarding them in terms of employment law, similar to the existing law on labor disputes: participation in collective action must not have any negative consequences for the employment relationship. In addition,

financial protection for the strikers is certainly appropriate under constitutional law. The question remains where the funds would have to come from – from the state? Alternatively, the question arises as to how the protests relate to institutional structures.

New tasks for the trade unions

The biggest misunderstanding, which is also nurtured by the trade unions, is that the described collective processes compete with trade union work on collective bargaining. It is assumed that they are counterproductive for changes in the world of work because they lag behind the demands of the workers' movements, which not only denounce grievances but also change them. Strengthening them, in this reading, would mean weakening the power of the unions and the effect of collective bargaining.

But we have to think differently: if trade unions want to continue to fulfill their function in the new employment worlds, they have to find ways and means to be able to capture employment dynamics from which they are structurally and spatially distant. One important way to increase their own learning capacity is not to dismiss the collective protests described above, but to take them seriously as collective learning processes and sites of internal structure-building processes. To do so, trade unions would have to open up to these protests and develop sensitivity and attention for the experiences of injury and dissatisfaction expressed in them. The protest collectives are suited to bring out such a reflective capacity in the unions and to demand that the promise of the "new mobility" of the unions be kept.[26] Here lies a genuine opportunity for the democratization of the unions away from questions of power distribution and (unequal) participation struggles. With the version of freedom of association as a basic right of communication (see above), the unions even have a constitutional duty to do so. Helmut Ridder (1960: 43ff.) vehemently pleaded for an "inner pluralistic loosening" of the trade unions. If such a decentralization succeeds by procedurally opening up the process of expressing the will upstream of collective bargaining policy, then the design mandate of Article 9 III GG can be fulfilled not only formally but also materially. Here, there is a chance that resistance will be transformed into concrete processes of design. The trade unions have the means, the know-how and the proximity to the political discourse

26 In the context of the question of the permissibility of warning strikes: BAG, decision of September 12, 1984–1 AZR 342/83, BAGE 46, 322.

to translate dissatisfaction into demands that can be incorporated and translate these, in turn, into employment rights. This is where the likelihood is highest that the connection to political discourse and decision-making will succeed.

The relationship between collective, resistant forms of protest and trade unions must therefore be thought of as complementary and not only leaves the autonomy of trade unions untouched, but will strengthen them for the future. The exact balancing, of course, must be experimental. The essential premise is to prevent institutionalization as a mitigation of the protests. It is precisely through alliances that they must continue to develop resilience and not be weakened in their spontaneity and affect communication. That this is possible in principle is shown by the trade union action initiatives in the area of the platform economy (cf. Hensel 2019: 243ff.). To do so, it would have to free itself from a strict membership and representation principle, on the one hand, and expand resources for mobilization from below, on the other. In this context, Ridder's demand for a trade union solidarity contribution for non-organized workers also becomes exciting again (Ridder 1961). Such a contribution, to be paid into the general coffers from which it is then distributed on a parity basis, is no longer linked to membership and should not simply benefit a member association. According to Ridder, the aim of the solidarity contribution is to include workers independently in the collective design process, to grant them influence and a say. In return, the trade unions would also have to expand their policies and extend their fields of action to non-members. Legally, this process would have to be accompanied urgently, among other things by excluding liability risks for the unions in the case of formal and substantive support and also taking over the strike.[27] The fact that the trade unions can open up accordingly is demonstrated by individual pilot projects and, above all, by the demand for a political right to strike, which is made throughout, at least on paper.

A brief conclusion

For Teubner's (re)-construction of exemplary non-market institutions, this means that it would be fatal to reduce them to the ideal of certain institution in the narrow sense. With the dynamics driven by globalization and digitalization and the diversity of employment interests, it is indicated to capture them as a collective process – not ending in institutionalization – in order not to end up with a restrictive institutional protection. The reciprocity between the market and socially embedded work

27 Still on the trade union as an illegal "helper", BAG, judgment of December 20, 1963 –1 AZR 429/62.

is a process that must be constantly rebalanced and cannot be established or stabilized through order. Collective bargaining is an illusion that has reached its peak with the efforts to achieve collective bargaining unity. Trade unions cannot take on the task of establishing an order that is no longer conceivable in a state-centered way and thus become a substitute legislator. Instead, they must adapt themselves to the fragmented society and consistently meet the needs of employees. Teubner himself quite rightly speaks of the experimental character of the resistance movement, which must develop precisely where the failure of the market is painfully palpable. Here, sensitive processes must be allowed and secured. The Rider strike against Gorillas demonstrates that the element of counter-power must be made strong in relation to the idea of order.

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