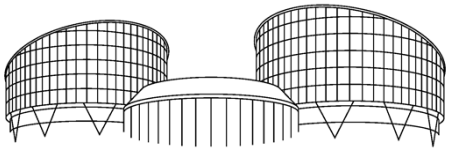

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

GRAND CHAMBER

CASE OF HUMPERT AND OTHERS v. GERMANY

(Applications nos. 59433/18, 59477/18, 59481/18 and 59494/18)

JUDGMENT

Art 11 • Freedom of association • Proportionate disciplinary sanctions on teachers with civil-servant status for participating during their working hours in strikes organised by their trade union, in breach of the constitutional ban on civil servants striking • Non-exhaustive list of essential elements of trade-union freedom built up through Court's case-law • Question of whether strike prohibition affected an essential element of trade-union freedom being context-specific and requiring an assessment of all case circumstances • Legitimate aims of ensuring the maintenance of a stable administration, the fulfilment of State functions and the proper functioning of the State and its institutions • Impugned disciplinary measures also served to ensure a functioning school system and thus safeguard the right of others to education protected by Art 2 P1 • General ban on strikes for all civil servants raised specific issues under the Convention • Negative assessments by monitoring bodies set up under the specialised international instruments and trend emerging from the practice of the Contracting States are relevant elements, but not decisive for Court's assessment • Strike action, albeit important part of trade-union activity, not the only means for trade unions and their members to protect relevant occupational interests • Variety of different domestic institutional safeguards, in their totality, enabled civil servants' trade unions and civil servants to effectively defend the relevant occupational interests • Prohibition on strikes a general measure reflecting the balancing and weighing-up of different, potentially competing, constitutional interests

STRASBOURG
14 December 2023

This judgment is final but it may be subject to editorial revision.

COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

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In the case of Humpert and Others v. Germany,

The European Court of Human Rights, sitting as a Grand Chamber composed of:

Síofra O'Leary, President,
Georges Ravarani,
Marko Bošnjak,
Gabriele Kucsko-Stadlmayer,
Pere Pastor Vilanova,
Arnfinn Bårdsen,
Faris Vehabović,
Egidijus Kūris,
Stéphanie Mourou-Vikström,
Alena Poláčková,
Georgios A. Serghides,
Tim Eicke,
Lətif Hüseynov,
Raffaele Sabato,
Anja Seibert-Fohr,
Diana Sârcu,
Mykola Gnatovskyy*, judges*,

and Johan Callewaert, *Deputy Grand Chamber Registrar*,

Having deliberated in private on 1 March and 11 October 2023,

Delivers the following judgment, which was adopted on the latter date:

PROCEDURE

1. The case originated in four applications (nos. 59433/18, 59477/18, 59481/18 and 59494/18) against the Federal Republic of Germany lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by four German nationals, Ms Karin Humpert, Ms Kerstin Wienrank, Mr Eberhard Grabs and Ms Monika Dahl ("the applicants"), on 10 December 2018.

2. The applicants were represented by Mr R. Buschmann, a lawyer practising in Kassel. The German Government ("the Government") were represented by two of their Agents, Ms S. Jacoby and Ms N. Wenzel, of the Federal Ministry of Justice.

3. The applicants, teachers with civil servant status (*Beamte*), complained, in particular, about the disciplinary measures against them for having participated, during their working hours, in strikes which had been organised by the trade union of which they were members. The measures were based on the prohibition of strikes by civil servants. The applicants considered the disciplinary measures, together with the fact that they were prohibited from participating in strikes owing to their status as civil servants, to be in breach

of, in particular, their right to freedom of association as provided for in Article 11 of the Convention.

4. The applications were allocated to the Fifth Section of the Court (Rule 52 § 1 of the Rules of Court). On 10 September 2019 notice of the applications was given to the Government.

5. The Vice-President of the Fifth Section granted leave to make written submissions as third parties (Article 36 § 2 of the Convention and Rule 44 § 3) to the Government of Denmark, the Association of Civil Servants and Union for Collective Bargaining (*dbb Beamtenbund und Tarifunion*), the German Trade Union Confederation (*Deutscher Gewerkschaftsbund*), the Trade Union for Education and Science (*Gewerkschaft Erziehung und Wissenschaft*) and the European Trade Union Confederation.

6. On 6 September 2022 a Chamber of the Third Section, to which the applications had since been allocated, decided to join the applications (Rule 42 § 1) and to relinquish jurisdiction in favour of the Grand Chamber (Article 30 of the Convention).

7. A hearing took place in public in the Human Rights Building, Strasbourg, on 1 March 2023.

There appeared before the Court:

(a) *for the Government*

Ms S. JACOBY,
Ms N. WENZEL, *Agents*,
Mr C. WALTER, *Counsel*,
Mr M. SONNTAG
Ms U. BENDER,
Mr T. SCHRÖDER,
Mr A. BUCHWALD,
Ms U. HÄFNER,
Ms M. ZAPFE,
Mr R. BELLIN,
Mr M. STOTZ,
Mr P. TAMME, *Advisers*;

(b) *for the applicants*

Mr R. BUSCHMANN, *Counsel*,
Mr K. JESSOLAT,
Ms U. ROTH, *Advisers*,
Ms K. WIENRANK,
Mr E. GRABS,
Ms M. DAHL, *Applicants*.

The Court heard addresses by Mr Walter and Mr Buschmann, as well as their replies to questions put by judges.

THE FACTS

I. THE DISCIPLINARY MEASURES AGAINST THE APPLICANTS

8. At the relevant time, the four applicants were State school teachers with civil servant status employed by different German *Länder*. They were members of the Trade Union for Education and Science. They all participated in strikes, which included a demonstration, organised by that union during their working hours in order to protest against worsening working conditions for teachers. They were subsequently reprimanded or fined in disciplinary proceedings for having breached their duties as civil servants by participating in the strikes during their working hours.

9. In the case of Ms Humpert (the first applicant), a primary school teacher, the Schleswig-Holstein Ministry for Education and Culture, relying on Article 33 of the Basic Law (see paragraph 39 below) and sections 34 and 47 of the Civil Servants' Status Act (*Beamtenstatusgesetz*, see paragraph 48 below), issued a disciplinary decision against her on 5 July 2011. It reprimanded her for having participated in a strike on 3 June 2010 to protest, in particular, against the deterioration of working conditions for teachers and the prolongation of working hours, and for not having taught one lesson as a result. In the subsequent proceedings it was found that the first applicant had in fact failed to teach two classes.

10. In the cases of Ms Wienrank (the second applicant), a vocational school teacher, and of Mr Grabs (the third applicant), a secondary school teacher, the Lower Saxony School Authority issued a disciplinary decision against them on 10 and 11 January 2011 respectively. Relying on Article 33 § 5 of the Basic Law and sections 34 and 47 of the Civil Servants' Status Act read in conjunction with section 67 § 1 of the Lower Saxony Civil Servants Act (see paragraph 48 below), it imposed an administrative fine of 100 euros (EUR) on each of the applicants for unauthorised absence from work. It noted that the applicants had participated in a strike on 25 February 2009 and thus had not given their lessons (some five each) on that day. The aims of the strike included the securing of a collective agreement, notably providing for higher remuneration, for private-law employees (*Angestellte im öffentlichen Dienst*, hereinafter "contractual State employees") in the public educational sector and the transposition of the results of that agreement into the legislation covering civil servants in that sector.

11. In the case of Ms Dahl (the fourth applicant), a secondary school teacher, the Cologne District Government issued a disciplinary decision against her on 10 May 2010. Relying on Article 33 § 5 of the Basic Law and section 83 § 1, first sentence, read in conjunction with section 79 § 1, first

sentence, of the North Rhine-Westphalia Civil Servants' Status Act (see paragraph 48 below), it imposed an administrative fine of EUR 1,500 for her unauthorised absence as a civil servant during 12 lessons owing to her participation in strikes on 28 January and 5 and 10 February 2009. The aim of the strikes was the same as that in the cases of the second and third applicants.

II. PROCEEDINGS IN THE ADMINISTRATIVE COURTS

12. The applicants' actions in the administrative courts to have the disciplinary decisions set aside were ultimately to no avail.

13. All the administrative courts found that the applicants had breached their professional duties by participating in strikes. The traditional principles of the career civil service (*hergebrachte Grundsätze des Berufsbeamtentums*) under Article 33 § 5 of the Basic Law restricted civil servants' freedom of association under Article 9 § 3 of the Basic Law (see paragraph 38 below) by laying down a prohibition on strike action.

14. At first instance, the Schleswig-Holstein, Stade and Osnabrück Administrative Courts – in judgments of 8 August 2012 (first applicant), 6 December 2012 (second applicant) and 19 August 2011 (third applicant) – upheld the respective disciplinary decisions against the first, second and third applicants. Having regard to the judgments of this Court in *Demir and Baykara v. Turkey* ([GC], no. 34503/97, ECHR 2008) and in *Enerji Yapı-Yol Sen v. Turkey* (no. 68959/01, 21 April 2009), they considered that, even assuming that the prohibition on strikes by civil servants did not comply with Article 11 of the Convention, that prohibition was part of the essence of the constitutional principles enshrined in Article 33 §§ 4 and 5 of the Basic Law, which could not be altered by an interpretation of the Basic Law in line with provisions of public international law such as Article 11 of the Convention. By contrast, the Düsseldorf Administrative Court, in a judgment of 15 December 2010 (fourth applicant), considered that the employing State entity had to avoid a breach of Article 11 of the Convention by discontinuing the disciplinary proceedings.

15. On appeal, the Lower Saxony Administrative Court of Appeal, in a judgment of 12 June 2012 in the third applicant's case, found that the prohibition on strikes by civil servants was part of the essence of the constitutional principles enshrined in Article 33 §§ 4 and 5 of the Basic Law which could not be altered by an interpretation of the Basic Law in line with provisions of public international law such as Article 11 of the Convention. No appeal on points of law lay against that judgment.

16. By order of 16 May 2013 the Lower Saxony Administrative Court of Appeal rejected the second applicant's request for leave to appeal against the Administrative Court's judgment in her case, finding that it had

comprehensively addressed the relevant questions in its judgment of 12 June 2012 in the third applicant's case.

17. In the fourth applicant's case, on an appeal by the competent authority, the North-Rhine Westphalia Court of Appeal, in a judgment of 7 March 2012, overturned the Administrative Court's judgment. In a judgment of 27 February 2014, the Federal Administrative Court, on the fourth applicant's appeal on points of law, found that the disciplinary decision against the fourth applicant, which had ceased to be valid as she had since left the civil service at her own request, had as such been lawful. The administrative fine imposed on her, in order for the amount to be appropriate, should have been fixed at EUR 300. Referring to the judgment of this Court in *Enerji Yapı-Yol Sen* (cited above, § 32), the Federal Administrative Court considered that, in view of her tasks in the public service, the fourth applicant had had a right to participate in strikes under Article 11 of the Convention. However, Article 33 § 5 of the Basic Law could not be interpreted in a Convention-compliant manner as the prohibition on strikes by civil servants concerned the essence of the status of civil servants. The legislature was therefore called upon to resolve this conflict between the Basic Law and the Convention, with the prohibition on strikes by civil servants under Article 33 § 5 of the Basic Law remaining valid in the meantime.

18. The Schleswig-Holstein Administrative Court of Appeal rejected the first applicant's appeal by a judgment of 29 September 2014. By an order of 26 February 2015 the Federal Administrative Court rejected the first applicant's request for leave to appeal on points of law by reference to its judgment of 27 February 2014 in the fourth applicant's case.

III. PROCEEDINGS IN THE FEDERAL CONSTITUTIONAL COURT

A. The applicants' constitutional complaints

19. On different dates the applicants, who were all legally represented, lodged separate constitutional complaints with the Federal Constitutional Court against the disciplinary decisions issued against them, as confirmed by the administrative courts. They submitted that the decisions, which resulted from a prohibition on strikes by teachers with civil servant status, had breached their right to form associations to safeguard and improve working and economic conditions under Article 9 § 3 of the Basic Law. They further argued that the administrative courts had failed to interpret national law in line with public international law as the prohibition on strikes by teachers with civil servant status, who did not hold duties involving the exercise of core elements of public authority, violated, in particular, Article 11 of the Convention.

B. The Federal Constitutional Court's judgment

20. On 12 June 2018 the Federal Constitutional Court dismissed the applicants' constitutional complaints (file nos. 2 BvR 1738/12 and others).

1. Compliance with Article 9 § 3 of the Basic Law

21. The Federal Constitutional Court found that the disciplinary decisions against the applicants, which were all issued on the understanding that there was a prohibition on strikes by civil servants, had not violated the applicants' right to form associations to safeguard and improve working and economic conditions under Article 9 § 3 of the Basic Law.

22. The court found that Article 9 § 3 of the Basic Law applied to every person and thus also to civil servants. It covered collective measures, including strikes, organised by trade unions in the context of the negotiation of collective agreements. Such measures fell within the scope of Article 9 § 3 even though civil servants themselves could not be covered by, and their trade unions could not conclude, collective agreements for them, as their rights (including their salary) and duties were regulated by law. The applicants' participation in strikes called by their trade union in connection with collective bargaining for contractual State employees was thus covered by Article 9 § 3 of the Basic Law. The disciplinary decisions issued against the applicants, as confirmed by the administrative courts, had therefore interfered with the right to form associations and to safeguard and improve working and economic conditions as they limited the possibility of participating in labour disputes.

23. However, that interference had been justified. The right to freedom of association was limited by other constitutional interests, in particular by the traditional principles of the career civil service under Article 33 § 5 of the Basic Law. The prohibition on strikes by all civil servants, owing to their status, which was well-established in its case-law (see also paragraph 40 below), was one of these traditional principles. It served the purpose of maintaining a stable administration, of ensuring the fulfilment of State functions and thereby the functioning of the State and its institutions.

24. The court reiterated that Article 33 § 5 of the Basic Law guaranteed the existence of the career civil service. As an institution, the career civil service was intended to ensure a stable administration that functioned as an equalising factor *vis-à-vis* the political forces shaping the State. The traditional principles of the career civil service covered the core structural principles developed over a long period of time, notably under the Weimar Constitution (of 1919). These core principles, which also comprised the civil servants' duty of loyalty, the principle of lifetime employment, the principle of "adequate maintenance" (*Alimentationsprinzip*, i.e. that civil servants must be paid appropriate remuneration, hereinafter the "principle of alimentation")

and the corresponding principle that the salary of civil servants must be determined by law, did not exist independently but were interrelated.

25. The court further reiterated that civil servants' duty of loyalty and the "principle of alimentation" were incompatible with the right to strike. The purpose of providing a legally and financially safe post was to ensure that civil servants complied with their duty of loyalty. Accordingly, the principle of lifetime employment served to guarantee the civil servants' independence notably from political bodies so that they could guarantee a stable administration in accordance with the rule of law. The "principle of alimentation" obliged the employer to provide civil servants and their families with "adequate maintenance" throughout their lifetime in keeping with the development of the general economic and financial circumstances and the general standard of living. The level of this maintenance had to correspond to the civil servant's grade, responsibilities, and to the relevance of the career civil service for the general public. The guarantee of an appropriate remuneration under Article 33 § 5 of the Basic Law established an individual right which each civil servant held *vis-à-vis* the State.

26. Given that the prohibition on strikes was part of the institutional guarantee enshrined in Article 33 § 5 of the Basic Law, the legislature was bound by it and could not amend it. A right to strike, even if it were for only some of the civil servants, would fundamentally question the entire set-up of Germany's system of the career civil service and would, at the very least, require fundamental changes to the "principle of alimentation", the duty of loyalty, the principle of lifetime employment, and the principle that material rights and duties, including remuneration, had to be regulated by the legislature. It would thus constitute an interference with the core of the structural principles guaranteed under Article 33 § 5 of the Basic Law. If civil servants' remuneration or parts of it could be negotiated by means of labour disputes, the current possibility of bringing an action for the provision of "adequate maintenance" in the courts, based on the "principle of alimentation" under Article 33 § 5 of the Basic Law, could no longer be justified. In the reciprocal system of interrelated rights and duties, expansions of one right or duty resulted in changes to the other rights and duties. Civil servant status did not permit "cherry-picking".

27. According to the court, it was furthermore not possible to limit the prohibition on strikes to those civil servants who were exercising public authority. Dividing civil servants into groups that did or did not have the right to strike based on their different functions would entail difficulties of distinction that were connected to the concept of public authority. It was very difficult to assess whether a given act involved the exercise of public authority and to determine whether a particular civil servant who performed different functions was to be accorded the right to strike. Extending the right to strike to civil servants not exercising public authority would further create a special category of civil servants, which would add a "third pillar" to the

differentiated two-track system of public service. This would raise questions as to their distinction from and their equal treatment with contractual State employees and the extent to which this category of personnel could still be regarded as having the legal status of civil servant.

28. The court further considered that granting a limited right to strike that was subject to requirements, for example an obligation to notify or obtain an approval for a planned strike, was not possible. Such a restricted right to strike would reduce the negative effects of the strike on the fundamental rights of third persons, e.g. parents and students, and would allow the administrative bodies to at least partly ensure that their duties were fulfilled. However, this would only be possible – this being an important objection because of the uncertainty – if a sufficient number of civil servants decided not to participate in the strike or could be excluded from participating in the strike by imposing a prohibition in individual cases. Moreover, in the case of longer-lasting labour disputes and the participation of persons holding senior positions in schools, the State's mission to provide education and to guarantee a functioning school system (see Article 7 § 1 of the Basic Law, at paragraph 37 below) could not be continuously ensured. The fact that there had been no severe disturbances in schools' operations in the past in those *Länder* in which the majority of teachers were contractual State employees did not call into question the potential negative impact of labour disputes in the educational sector.

29. The interference with the right of civil servants to freedom of association was not unreasonable. The right to strike constituted only one aspect of the right to freedom of association. The prohibition on strikes did not result in the complete irrelevance of freedom of association and did not render it entirely ineffective. Moreover, the legislature had sufficiently compensated for the prohibition on strikes by giving umbrella organisations (*Spitzenorganisationen*) of civil servants' trade unions a right to participate in the drafting of new legal provisions on the status of civil servants (see section 53 of the Civil Servants' Status Act, at paragraph 49 below). It was not possible to significantly strengthen this participatory right, as it would notably result in a conflict with the principle of democracy if trade unions, as representatives of specific interests, were accorded the right to co-determine working conditions and remuneration of civil servants to be set by the legislature. Another measure to compensate for the prohibition on strikes was the aforementioned possibility for civil servants to sue for "adequate maintenance" in the courts, in accordance with the "principle of alimentation".

2. Compliance with Article 11 of the Convention

30. In the Federal Constitutional Court's view, the prohibition on strikes by civil servants under German law was also compatible with Article 11 of the Convention and with this Court's case-law regarding the right to strike.

31. The prohibition on strikes by civil servants was prescribed by law, namely by Article 33 § 5 of the Basic Law as interpreted by the Federal Constitutional Court in its well-established case-law and by the statutory provisions on the duties of civil servants, including sanctions for unauthorised absence from work, which presupposed a prohibition on strikes. It aimed at ensuring a functioning public administration, in the applicants' case ensuring the fulfilment of the State's mission to provide education and to guarantee a functioning school system, and thus served the aim of preventing disorder.

32. Recapitulating this Court's case-law on trade-union freedom and noting that this Court had taken other international instruments and their interpretation by the competent bodies into account when interpreting Article 11 of the Convention, the Federal Constitutional Court observed that the right to strike had so far not been found to constitute an essential element of the right to form and join trade unions under Article 11 (with reference to *National Union of Rail, Maritime and Transport Workers v. the United Kingdom*, no. 31045/10, § 84, ECHR 2014). Rather, this Court had made the following differentiation with regard to the margin of appreciation concerning restrictions on the freedom of trade unions: if a legislative restriction struck at the core of trade-union activity, the national legislature had a lesser margin of appreciation and a greater justification was required for the resulting interference, in the general interest, with the exercise of trade-union freedom. Conversely, if it were not the core but a secondary or accessory aspect of trade-union freedom that was affected, the margin of appreciation was wider and the interference was more likely to be proportionate (with reference to ibid., § 87). The Court had held that secondary strike action did not affect the core of the right to freedom of association, but merely constituted a secondary or accessory aspect and therefore a wider margin of appreciation concerning restrictions was to be afforded to the national authorities (with reference to ibid., § 88).

33. Against this background, a prohibition on strikes imposed on civil servants, and specifically on teachers with that status, was justified under Article 11 § 2, first sentence, of the Convention. The Trade Union for Education and Science, which had organised the strike in which the applicants participated, represented both teachers with civil servant status and teachers with contractual State employee status. It negotiated collective agreements with the employers' associations of the *Länder* for teachers with contractual State employee status only. These collective agreements did not apply to civil servants, in respect of whom the legislature, which had exclusive competence for determining the working conditions, decided whether and to what extent the outcomes of the collective bargaining for contractual State employees could be transferred to them. In part, the applicants sought to bring about such a transfer of collective bargaining outcomes by means of their participation in the strike. This behaviour was – at least partially – intended to support strike action aimed at the conclusion of a collective agreement and showed a

certain similarity to a secondary strike and was thus not a core aspect of the guarantees of Article 11 of the Convention. The margin of appreciation granted to the State was therefore wide.

34. The prohibition on strikes was not a manifestation of civil servants' privileged status (permanent employment, specific health insurance benefits, pensions) and was justified not merely by reference to their function which was to maintain the administration and the protection of the rights of third parties. Rather, as explained above, civil servant status entailed interrelated rights and duties and the German civil career service, which was a particular national tradition, would be called into question if a right to strike were granted to civil servants. Moreover, the prohibition on strikes by the applicant teachers served to safeguard the right to education and thus served to protect the human right enshrined in Article 2 of Protocol No. 1 to the Convention. Furthermore, measures to compensate for the prohibition on strikes had been established under German law, notably the aforementioned participation of umbrella organisations of trade unions in the drafting of statutory provisions concerning the civil service, which enabled trade unions to make their voice heard, and the possibility for civil servants to have the constitutionality of their level of remuneration reviewed in the courts.

35. The Federal Constitutional Court further took the view that the applicants as teachers with civil servant status were "members of the administration of the State" for the purposes of Article 11 § 2, second sentence, of the Convention on whom restrictions could be imposed, a question which this Court had so far left open (with reference to, *inter alia*, *Vogt v. Germany*, 26 September 1995, § 68, Series A no. 323). The group of persons to be considered "members of the administration of the State" had to be construed strictly, with one possible aspect that could be assigned to this concept being the exercise of public authority on behalf of the State, and it would be excessive to consider all public service employees as "members of the administration of the State" (with reference to *Enerji Yapı-Yol Sen*, cited above, § 32). However, under the two-track German public service system, civil servants made up the smaller part of personnel in comparison to public service employees. The court conceded that teachers usually did not exercise sovereign authority on a regular basis and could therefore, in accordance with Article 33 § 4 of the Basic Law (see paragraph 39 below), also be employed by the State on a private-law basis, which was practised to a varying degree in the different *Länder*. The employment of teachers without civil servant status was not based on their function or the duties they performed, but generally on specific factual reasons. Some of the teachers so employed did not fulfil the personal requirements necessary to become civil servants; in other cases, the decision was based on practical administrative considerations, as it led to more flexible types of employment. That being said, the school system and the State's educational mandate were of great importance and the State had a special interest in the discharge of duties by

teachers at State schools. In view of the very important duties exercised by teachers, the decision to grant teachers civil servant status – which meant that they were in a relationship of service and loyalty – had to be reserved to the State.

36. As there was no conflict between the Constitution and the Convention for the reasons set out above, the Federal Constitutional Court found that questions as to the limits of the Constitution's openness to international law were not decisive for the adjudication of the case before it. In this connection, it reiterated its well-established case-law that the text of the Convention and the case-law of this Court served, at the level of constitutional law, as guidelines for the interpretation of the content and scope of fundamental rights and constitutional principles of the rule of law. When using the Convention as a guideline for interpretation, the Federal Constitutional Court also took into account judgments and decisions of this Court which did not concern the same issue. This was due to the function of direction and guidance (*Orientierungs- und Leitfunktion*) of the case-law of this Court for the interpretation of the Convention, which went beyond the judgment or decision in a specific case. Beyond the scope of Article 46 of the Convention, particular importance had to be attached to the specific circumstances of the case decided by this Court and its background to provide for contextualisation. It had to be taken into account that *inter partes* statements in a specific case by this Court were made against the background of the legal system of the respondent State concerned. The direction and guidance function was particularly strong with regard to parallel cases within the same legal order, that is to say, proceedings in the Contracting State in respect of which this Court had rendered its judgment. Beyond this impact on parallel cases, the direction and guidance function had to be taken into account by adopting the principal values formulated by this Court in terms of abstract, general guidelines. The possibilities of the above Convention-friendly interpretation of the Basic Law ended where this no longer appeared tenable according to the recognised methods of statutory and constitutional interpretation.

RELEVANT LEGAL FRAMEWORK AND PRACTICE

I. THE DOMESTIC LEGAL FRAMEWORK

A. Provisions of the Basic Law

37. Article 7 of the Basic Law, on the school system, in so far as relevant, provides:

> "(1) The entire school system shall be under the supervision of the State."

38. Article 9 of the Basic Law, on freedom of association, in so far as relevant, provides:

> "(3) The right to form associations to safeguard and improve working and economic conditions shall be guaranteed to every individual and to every profession. Agreements which restrict or seek to impair this right shall be null and void; measures directed to this end shall be unlawful. ..."

39. Article 33 of the Basic Law, on, *inter alia*, the career civil service, in so far as relevant, reads:

> "(4) The exercise of sovereign authority on a regular basis shall, as a rule, be entrusted to members of the public service who stand in a relationship of service and loyalty defined by public law.
>
> (*Die Ausübung hoheitsrechtlicher Befugnisse ist als ständige Aufgabe in der Regel Angehörigen des öffentlichen Dienstes zu übertragen, die in einem öffentlich-rechtlichen Dienst- und Treueverhältnis stehen*.)
>
> (5) The law governing the public service shall be laid down and developed with due regard to the traditional principles of the career civil service.
>
> (*Das Recht des öffentlichen Dienstes ist unter Berücksichtigung der hergebrachten Grundsätze des Berufsbeamtentums zu regeln und fortzuentwickeln*.)"

B. The case-law of the domestic courts

1. Case-law on the prohibition to strike

40. The Federal Constitutional Court found as early as 1958 that the traditional principles of the career civil service under Article 33 § 5 of the Basic Law contained a prohibition on strikes by civil servants seeking to defend their professional interests. Instead, civil servants had an individual right under that Article to be provided with "adequate maintenance", which was not agreed upon between the civil servants and the State but had to be fixed by law (see file nos. 1 BvR 1/52 and 1 BvR 46/52, judgment of 11 June 1958, § 48, compendium of decisions of the Federal Constitutional Court (BVerfGE), vol. 8, pp. 1 et seq.). The court has repeatedly confirmed that case-law ever since (see, for instance, file nos. 2 BvR 1039/75 and 2 BvR 1045/75, decision of 30 March 1977, BVerfGE, vol. 44, pp. 249 et seq., § 38; and file no. 2 BvF 3/02, decision of 19 September 2007, BVerfGE, vol. 119, pp. 247 et seq., §§ 55 and 66).

41. Similarly, the Federal Administrative Court has continuously held that strike action by civil servants is in breach of the traditional principles of the career civil service under Article 33 § 5 of the Basic Law (see, for example, Federal Administrative Court, file no. 1 DB 12.77, order of 19 September 1977, BVerwGE, vol. 53, pp. 330 et seq.; file no. 1 D 82.77, judgment of 16 November 1978, BVerwGE, pp. 158 et seq.; file no. 1 D 84.78, judgment of 22 November 1979, BVerwGE, vol. 64, pp. 293 et seq.; and

file no. 1 D 86/79, judgment of 3 December 1980, BVerwGE, vol. 73, pp. 97 et seq.; see also paragraph 17 above).

42. Following judgments rendered by this Court on the right of civil servants to strike in cases against Türkiye, two first-instance administrative courts questioned the legality of disciplinary measures imposed on teachers with civil servant status for having participated in strikes. The first was the judgment by the Düsseldorf Administrative Court of 15 December 2010 in relation to the fourth applicant in the present case (file no. 31 K 3904/10.O, see paragraph 14 above). This was subsequently overturned by the North-Rhine Westphalia Administrative Court of Appeal. In the final instance, the Federal Administrative Court held that it was for the legislature to resolve any conflict between Article 33 § 5 of the Basic Law and Article 11 of the Convention, with the prohibition on strikes under Article 33 § 5 of the Basic Law remaining valid in the meantime, and confirmed the lawfulness of the disciplinary decision against the fourth applicant (see paragraph 17 above). The second was the Kassel Administrative Court in a judgment of 27 July 2011(file no. 28 K 574/10.KS.D.).

2. Case-law on the relevant principles of the career civil service

43. According to the well-established case-law of the Federal Constitutional Court, the "principle of alimentation" is a traditional principle of the career civil service under Article 33 § 5 of the Basic Law (see, for example, file no. 2 BvR 556/04, judgment of 6 March 2007, BVerfGE, vol. 117, pp. 330 et seq., § 60; and file no. 2 BvL 4/10, judgment of 14 February 2012, BVerfGE, vol. 130, pp. 263 et seq., § 143). It requires the State to provide "adequate maintenance" to the civil servant and to his family throughout their lifetime (see, for example, the judgment in file no. 2 BvL 4/10, cited above, § 145). This principle is closely connected to the principle of lifetime employment (*Lebenszeitprinzip*) (see, for example, file no. 2 BvF 3/02, order of 19 September 2007, BVerfGE, vol. 119, pp. 247 et seq., § 72; and file no. 2 BvL 11/07, order of 28 May 2008, BVerfGE, vol. 121, pp. 205 et seq., § 35). It entails an adequate salary for the civil servant and also an adequate pension, including for his or her surviving family members (see, for example, file no. 2 BvL 3/62, order of 11 April 1967, BVerfGE, vol. 21, pp. 329 et seq.; and file no. 2 BvL 11/04, order of 20 March 2007, BVerfGE, vol. 117, pp. 372 et seq.).

44. To be adequate and thus to comply with the "principle of alimentation" under Article 33 § 5 of the Basic Law, the remuneration must be commensurate with the civil servant's grade, his or her responsibilities and the relevance of the career civil service for the general public, and it must be in keeping with the development of the general economic and financial circumstances and the general standard of living (see, for example, file no. 2 BvL 4/10, cited above, § 145; file nos. 2 BvL 17/09 and others, judgment of 5 May 2015, BVerfGE, vol. 139, pp. 64 et seq., § 93; and

file nos. 2 BvL 6/17 and others, order of 4 May 2020, BVerfGE, vol. 155, pp. 77 et seq., § 26). The legislature needs to adjust the remuneration continuously (see, for example, file nos. 2 BvL 17/09 and others, cited above, § 98; and file no. BvL 4/18, order of 4 May 2020, BVerfGE, vol. 155, pp. 1 et seq., § 29). The net income, which is decisive for the determination whether the remuneration is adequate (see, for example, no. 2 BvL 1/86, order of 22 March 1990, BVerfGE, vol. 81, pp. 363 et seq., § 48; and file nos. 2 BvL 6/17 and others, cited above, § 33), is composed of the basic remuneration as well as allowances and additional payments (see file nos. 2 BvL 19/09 and others, order of 17 November 2015, BVerfGE, vol. 140, pp. 240 et seq, § 72). The net income must ensure legal and financial security and independence for civil servants and enable them and their families to live a way of life which is appropriate to the office held and which goes beyond meeting basic needs (see, for example, file no. 2 BvL 3/15, order of 28 November 2018, BVerfGE, vol. 150, pp. 169 et seq., § 28).

45. According to this case-law, a rebuttable presumption that civil servants' remuneration falls short of these requirements will be created, where at least three of the following five indicators are met: (i) there is a significant difference between the development of civil servants' remuneration and the results reached in collective agreements for contractual State employees in the public sector; (ii) the development of remuneration significantly deviates from the development of the nominal wage index; (iii) the development of remuneration significantly deviates from the development of the consumer price index; (iv) there is a significant reduction of the gaps in gross remuneration between civil servants with different grades; (v) there is a significant difference in remuneration compared to the average remuneration of civil servants holding the same grade in other *Länder* or at the federal level (see file nos. 2 BvL 17/09 and others, cited above, at §§ 96 et seq.; file nos. 2 BvL 19/09 and others, cited above, §§ 76 et seq.; and file no. 2 BvL 4/18, cited above, §§ 29 et seq.). This presumption may be rebutted or corroborated in a global assessment, which has regard to other relevant elements, notably the reputation of the position held in the eyes of society and the training of and demands on the civil servant, in particular (i) the quality of the civil servants' work and the responsibility assumed, (ii) developments in the area of allowances and pensions, and (iii) a comparison with the average gross salaries of private-sector employees with comparable qualifications and responsibilities (see file nos. 2 BvL 17/09 and others, cited above, §§ 116 et seq.; file nos. 2 BvL 19/09 and others, §§ 99 et seq.; and file no. 2 BvL 4/18, cited above, §§ 86 et seq.). In cases concerning the remuneration of judges and prosecutors, the Federal Constitutional Court has further had regard to the development of the qualifications of those recruited as an indicator of whether the remuneration is such as to enable the State to recruit individuals with above-average qualifications (see

file no. 2 BvL 17/09 and others, cited above, § 117, and file no. 2 BvL 4/18, cited above, § 88).

46. The guarantee of "adequate maintenance" under Article 33 § 5 of the Basic Law establishes an individual constitutional right which each civil servant holds *vis-à-vis* the State (see, for example, file no. 2 BvL 4/10, cited above, § 143, and file nos. 2 BvL 6/17 and others, cited above, § 24). In order to enforce this right, each civil servant can bring an action in the administrative courts against his employing State entity and thus obtain judicial review of whether the remuneration complies with the "principle of alimentation" under Article 33 § 5 of the Basic Law. In several cases the Federal Constitutional Court held that civil servants' remuneration was in breach of Article 33 § 5 of the Basic Law and ordered the legislature to enact provisions which were in conformity with the "principle of alimentation" (see, for example, file no. 2 BvL 6/17, cited above, concerning senior judges with three or four children in the *Land* of North Rhine-Westphalia; file no. 2 BvL 4/18, cited above, concerning judges and prosecutors in the *Land* of Berlin; file nos. 2 BvL 19/09 and others, cited above, concerning a specific group in an executive grade in Saxony; file nos. 2 BvL 17/09 and others, cited above, concerning judges and prosecutors in the *Land* of Saxony-Anhalt; and file no. 2 BvL 4/10, cited above, concerning university professors in the *Land* of Hesse). It also found that a temporary reduction of basic remuneration as well as of additional payments for certain groups of civil servants in the *Land* of Baden-Württemberg breached Article 33 § 5 of the Basic Law (see file no. 2 BvL 2/17, order of 16 October 2018, BVerfGE, vol. 149, pp. 382 et seq.).

3. Case-law on the duty of care

47. Another traditional principle of the career civil service under Article 33 § 5 of the Basic Law recognised by the Federal Constitutional Court is the duty of care (*Fürsorgepflicht*) incumbent on the employing State entity (see, for example, file no. 2 BvR 1053/98, order of 7 November 2002, BVerfGE, vol. 106, pp. 225 et seq., § 27). It requires the employing State entity to ensure that the civil servant's "adequate maintenance" is not threatened in the event of particular financial burdens arising from illness, care, birth or death (ibid., § 29).

C. Statutory provisions relating to civil servants

1. Provisions relating to the prohibition on strikes

48. Under section 47 § 1, first sentence, of the Civil Servants' Status Act (*Beamtenstatusgesetz*), which applies to civil servants employed by the *Länder*, civil servants commit a disciplinary offence if they culpably breach their duties. Under that Act, such duties comprise the duty to be fully devoted

to the exercise of one's profession (section 34). While that Act does not expressly lay down a prohibition on strikes, the Civil Servants Acts of the *Länder* stipulate that civil servants must not be absent from work without permission (see, in relation to the *Länder* concerned by the present applications, section 67 of the Schleswig-Holstein Civil Servants Act, section 67 § 1 of the Lower Saxony Civil Servants Act and section 79 § 1 of the North Rhine-Westphalia Civil Servants Act, as in force at the relevant time). Section 83 § 1, first sentence, of the North Rhine-Westphalia Civil Servants Act contains the same rule as section 47 § 1, first sentence, of the Civil Servants' Status Act.

2. Provisions relating to the participation in the legislative procedure

49. Under section 53, first sentence, of the Civil Servants' Status Act, the umbrella organisations of the competent trade unions and professional organisations shall be involved in the preparation of legal provisions governing matters of civil service law by the highest *Länder* authorities. According to the explanatory report in respect of the draft Civil Servants' Status Act, this participation of umbrella organisations in the legislative procedure is intended to protect the rights and interests of civil servants in the determination of provisions concerning civil servant status and to compensate for the absence of the right to collective bargaining and the prohibition on strikes (see Publication of the Federal Parliament (*Bundestagsdrucksache*) no. 16/4027, p. 35). Similar provisions exist in the Civil Servants Acts of the *Länder* (see, in relation to the *Länder* concerned by the present applications, section 93 of the Schleswig-Holstein Civil Servants Act, section 96 of the Lower-Saxony Civil Servants Act and section 93 of the North-Rhine Westphalia Civil Servants Act). According to the *Länder* Civil Servants Acts, umbrella organisations must be informed of any draft regulation and allowed to comment within a reasonable time before the draft is submitted to Parliament. If the *Länder* governments do not follow proposals made by the umbrella organisations in the respective draft laws, they must provide reasons for failing to do so, which are transmitted to the *Länder* Parliaments, either of their own motion or at the request of the umbrella organisations. The said provisions of the *Länder* Civil Servants Acts also provide that meetings are to be held regularly between the competent ministry and the umbrella organisations to discuss general and fundamental questions of civil service law.

3. Rights of representation of civil servants

50. The representation of civil servants is to be ensured (section 117 of the Federal Civil Service Act (*Bundesbeamtengesetz*)). Applicable laws provide, as a rule, for staff councils in the public sector (section 12 of the Federal Staff Representation Act, as in force at the relevant time; and, in

relation to the Länder concerned by the present applications, section 1 of the Schleswig-Holstein Co-Determination Act, section 1 of the Lower-Saxony Staff Representation Act and section 1 of the North-Rhine Westphalia Staff Representation Act). At the relevant time, section 76 § 2 of the Federal Staff Representation Act provided that staff councils were to co-determine (*mitbestimmen*) certain matters exclusively relating to federal civil servants, in so far as these were not determined by law, including the ongoing training and appraisal of civil servants. To that end, there was the option for staff councils to enter into service agreements (*Dienstvereinbarungen*) with the relevant department or agency. Following amendments to the Federal Staff Representation Act which entered into force in 2021, the matters subject to co-determination, through staff councils, include staff, social and organisational matters and are equally applicable to both federal civil servants and contractual State employees; there is the option for staff councils to conclude service agreements in relation to some of these matters (sections 63 and 78-80 of the Federal Staff Representation Act). Similar provisions exist in the *Länder* (sections 51(1) and 57 of the Schleswig-Holstein Co-Determination Act, sections 64-72 and 78 of the Lower-Saxony Staff Representation Act and sections 70 and 72-74 of the North-Rhine Westphalia Staff Representation Act). In some *Länder* umbrella organisations of trade unions and the State agree on general regulations on matters that are subject to co-determination (see section 59 of the Schleswig-Holstein Co-Determination Act and section 81(1) of the Lower-Saxony Staff Representation Act).

II. INTERNATIONAL LAW AND PRACTICE

A. Vienna Convention on the Law of Treaties

51. Article 27 of the Vienna Convention on the Law of Treaties, adopted on 23 May 1969, 1155 UNTS 331, provides, in so far as relevant:

Internal law and observance of treaties

> "A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. ..."

B. The Permanent Court of International Justice

52. The Permanent Court of International Justice in its advisory opinion of 4 February 1932 on *Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory* (PCIJ, Series A/B, no. 44) held, in so far as relevant:

> "[62] It should however be observed that, while on the one hand, according to generally accepted principles, a State cannot rely, as against another State, on the

provisions of the latter's Constitution, but only on international law and international obligations duly accepted, on the other hand and conversely, a State cannot adduce as against another State its own Constitution with a view to evading obligations incumbent upon it under international law or treaties in force ..."

C. The right to strike and possible bans and restrictions

1. Universal instruments and practice

53. The right to strike is expressly provided for in Article 8 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), which reads:

"1. The States Parties to the present Covenant undertake to ensure:

...

(d) The right to strike, provided that it is exercised in conformity with the laws of the particular country.

2. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces or of the police or of the administration of the State.

..."

No general comment on the right to strike, its limitations or exceptions has to date been adopted by the United Nations (UN) Committee on Economic, Social and Cultural Rights (CESCR). Its practice is thus primarily reflected in its Concluding Observations on States' reports regarding their implementation of the ICESCR. In its Concluding Observations the CESCR has repeatedly criticised States' prohibition of strikes by public servants or contractual State employees who do not provide essential services. In its Concluding Observations of 12 October 2018 on the State report submitted by Germany regarding the implementation of the ICESCR (document E/C.12/DEU/CO/6), the CESCR stated as follows:

Right to strike of civil servants

"44. The Committee remains concerned about the prohibition by the State party of strikes by all public servants with civil servant status, including schoolteachers with this status. This goes beyond the restrictions allowed under article 8 (2) of the Covenant, since not all civil servants can reasonably be deemed to be providers of an essential service (art. 8).

45. The Committee reiterates its previous recommendation (E/C.12/DEU/CO/5, para. 20) that the State party take measures to revise the scope of the category of essential services with a view to ensuring that all those civil servants whose services cannot reasonably be deemed as essential are entitled to their right to strike in accordance with article 8 of the Covenant and with the International Labour Organization (ILO) Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87)."

54. Article 22 § 1 of the International Covenant on Civil and Political Rights (ICCPR) does not expressly provide for a right to strike but has been interpreted by the UN Human Rights Committee (HRC) as providing for such right. As with the CESCR, in the absence of a general comment, practice is primarily reflected in its Concluding Observations. In its Concluding Observations of 30 November 2021 on the State report submitted by Germany regarding the implementation of the ICCPR (CCPR/C/DEU/CO/7), the HRC stated as follows:

> "50. The Committee is concerned about the blanket ban on public sector workers striking within the State party, based upon the assessment that all such workers, including schoolteachers, are essential (art. 22).
>
> 51. The Committee reiterates the recommendation of the Committee on Economic, Social and Cultural Rights [in its Concluding Observations of 12 October 2018] that the State party should take measures to revise the scope of the category of essential services with a view to ensuring that all those civil servants whose services cannot reasonably be deemed as essential are entitled to their right to strike, also in accordance with article 22 of the International Covenant on Civil and Political Rights."

55. The International Labour Organisation (ILO) Convention No. 87 on Freedom of Association and Protection of the Right to Organise of 1948 ("ILO Convention No. 87"), which was ratified by Germany in 1957, does not expressly provide for a right to strike but has been interpreted by the ILO's two main supervisory bodies – the Committee of Experts on the Application of Conventions and Recommendations ("CEACR") and the Committee on Freedom of Association ("CFA") – as providing for such right, mainly derived from its Articles 3 and 10. The CEACR and the CFA both consider that States may restrict or prohibit the right to strike of those public servants who exercise authority in the name of the State[1]. The ILO bodies have not agreed on a general definition of "public servants exercising the authority in the name of the State". However, the CEACR considers that public sector teachers are not included in the category of public servants "exercising authority in the name of the State" and that they should therefore benefit from the right to strike without being liable to sanctions, even though, under certain circumstances, the maintaining of a minimum service may be envisaged in this sector[2]. Both the CEACR and the CFA consider that States may furthermore restrict or prohibit the right to strike of those who provide

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[1] See International Labour Conference, 101st Session, 2012, Report of the CEACR, Report III(1B): Giving globalization a human face (General Survey on the fundamental Conventions), Doc. No. ILC.101/III/1B ("CEACR General Survey 2012"), §§ 117 et seq., in particular §§ 127 and 129, https://www.ilo.org/ilc/ILCSessions/previous-sessions/101stSession/reports/reports-submitted/WCMS_174846/lang--en/index.htm (last consulted 26 September 2023); and Compilation of the decisions of the Committee on Freedom of Association (2018) ("CFA Compilation of decisions 2018"), §§ 828-830, https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:70002:0::NO::P70002_HIER_ELEMENT_ID,P70002_HIER_LEVEL:3945366,1 (last consulted 26 September 2023).

[2] CEACR General Survey 2012, § 130.

"essential services", with that term being understood in the strict sense as meaning only those services "the interruption of which would endanger the life, personal safety or health of the whole or part of the population"[3]. These bodies consider the "public education service" (CEACR) respectively the "education sector" (CFA) not to constitute an essential service in that sense[4].

56. In its most recent observations in relation to Germany's obligations under ILO Convention No. 87 in 2021 the CEACR adopted the following observation (published at the 110th ILC session (2022)):

> "The Committee recalls that it has been requesting for a number of years the adoption of measures to recognize the right of public servants who are not exercising authority in the name of the State to have recourse to strike action.
>
> ...
>
> The Committee takes due note of the ruling of the Federal Constitutional Court [of 12 June 2018][5] that for civil servants, irrespective of their duties, the strike ban amounts to an independent traditional principle of the career civil service system within the meaning of section 33(5) of the Basic Law, which justifies an overriding of freedom of association. Moreover, the Committee wishes to make clear that its task is not to judge the validity of the Court decision of 12 June 2018 (Case No. 2 BvR 1738/12), which is based upon issues of German national law and precedents. The Committee's task is to examine the outcome of this decision on the recognition and exercise of the workers' fundamental right to freedom of association. In this regard, the Committee observes with *regret* that the result of the Court's decision is not in keeping with the Convention, inasmuch as it amounts to a general ban on the right to strike of civil servants based on their status, irrespective of their duties and responsibilities, and in particular a ban on the right of civil servants who are not exercising authority in the name of the State (such as teachers, postal workers and railway employees) to have recourse to strike action. *In view of the above, the Committee encourages the Government to continue engaging in a comprehensive national dialogue with representative organizations in the public service with a view to finding possible ways of aligning the legislation more closely with the Convention. Further noting that proceedings against the strike ban for civil servants are currently ongoing before the European Court of Human Rights, the Committee requests the Government to provide information on the resulting decision and on any impact it may have at the national level.*"

In 2021 the CEACR further adopted the following Observations in relation to Germany's obligations under ILO Convention No. 98 on the Right to Organise and Collective Bargaining Convention of 1949, which was ratified by Germany in 1956 (published at the 110th ILC session (2022)):

> "The Committee recalls that it has been requesting, for a number of years, the adoption of measures to ensure that public servants who are not engaged in the administration of the State, enjoy the right to collective bargaining.
>
> ...

[3] CEACR General Survey 2012, § 131; CFA Compilation of decisions 2018, § 830.

[4] CEACR General Survey 2012, § 134; CFA Compilation of decisions 2018, §§ 842 and 844-846. See also the decision of the CFA in case no. 1528, concerning the right to strike of teachers in Germany.

[5] I.e. the judgment at issue in the present case.

The Committee takes due note of the 2018 ruling of the Federal Constitutional Court. The Committee observes that it results in a ban on the involvement of all civil servants in collective bargaining. The Committee *regrets* that public servants not engaged in the administration of the State are thus deprived of the right to bargain collectively granted to them by the Convention. The Committee recalls in this regard that it has been highlighting for many years that, pursuant to Articles 4 and 6 of the Convention, all public service workers, other than those engaged in the administration of the State, should enjoy collective bargaining rights. It also emphasizes that while the determination of wages is an important element of the scope of collective bargaining, other terms and conditions of work and employment also fall within its scope. *In view of the above, the Committee encourages the Government to continue engaging in a comprehensive national dialogue with representative organizations in the public service with a view to exploring innovative solutions and possible ways in which the current system could be developed so as to effectively recognize the right to collective bargaining of public servants who are not engaged in the administration of the State, including for instance, as previously indicated by the [Confederation of German Employers' Associations] BDA, by differentiating between areas of genuinely sovereign domains and areas where the unilateral regulatory power of the employer could be restricted to extend the participation of representative organizations in the public service. Further noting that proceedings are currently ongoing before the European Court of Human Rights in relation to the ban on the right to strike of civil servants and observing that it may also have repercussions on the right of civil servants to bargain collectively, the Committee requests the Government to provide information on the resulting decision and on any impact it may have at the national level.*"

2. Council of Europe

57. The European Social Charter of 1961, which entered into force for Germany on 26 February 1965 and was applicable at the relevant time, provided:

Part II

"The Contracting Parties undertake, as provided for in Part III, to consider themselves bound by the obligations laid down in the following articles and paragraphs."

Article 6 – The right to bargain collectively

"With a view to ensuring the effective exercise of the right to bargain collectively, the Contracting Parties ...

... recognise:

4. the right of workers and employers to collective action in cases of conflicts of interest, including the right to strike, subject to obligations that might arise out of collective agreements previously entered into."

Part III
Article 20 – Undertakings

"1. Each of the Contracting Parties undertakes:

...

b. to consider itself bound by at least five of the following articles of Part II of this Charter: Articles 1, 5, 6, 12, 13, 16 and 19;

...

2. The articles or paragraphs selected in accordance with sub paragraphs b and c of paragraph 1 of this article shall be notified to the Secretary General of the Council of Europe at the time when the instrument of ratification or approval of the Contracting Party concerned is deposited.

..."

Article 31 – Restrictions

"(1) The rights and principles set forth in Part I when effectively realised, and their effective exercise as provided for in Part II [which includes Article 6], shall not be subject to any restrictions or limitations not specified in those parts, except such as are prescribed by law and are necessary in a democratic society for the protection of the rights and freedoms of others or for the protection of public interest, national security, public health, or morals.

..."

The wording of Article 6 § 4 was retained without changes in the Revised European Social Charter of 1996, which Germany ratified on 29 March 2021.

58. The European Committee of Social Rights (ECSR) has accepted restrictions of the right to strike in sectors which are essential to the community, since strikes in these sectors could pose a threat to public interest, national security and/or public health, as well as of certain categories of public officials, i.e. those whose duties and functions, given their nature or level of responsibility, are directly related to national security, general interest etc.[6]

59. Prior to its signature of the European Social Charter of 1961 on 18 October 1961, the Federal Republic of Germany made a declaration dated 28 September 1961 in relation to the European Social Charter, in which it explained:

"... civil servants (*Beamte*) ... [u]nder the national legal system ... are debarred, on grounds of public policy and State security, from striking or taking other collective action in cases of conflicts of interest. Nor do they have the right to bargain collectively since the regulation of their rights and obligations in relation to their employers is a function of the freely elected legislative bodies. Hence, with reference to the provisions of items 2 and 4 of Article 6 of Part II of the Social Charter ... in the view of the Government of the Federal Republic of Germany those provisions do not relate to the above-mentioned categories of persons."

That declaration was not reiterated when Germany ratified the European Social Charter of 1961. The declaration contained in a letter from the Permanent Representative of the Federal Republic of Germany, dated

[6] See Digest of the Case Law of the European Committee of Social Rights, 2018, at p. 105, https://rm.coe.int/digest-2018-parts-i-ii-iii-iv-en/1680939f80 (last consulted 26 September 2023).

22 January 1965, handed to the Secretary General at the time of deposit of the instrument of ratification, on 27 January 1965, stated:

> "The Federal Republic of Germany considers itself bound by the following Articles and paragraphs:
>
> a. in accordance with Article 20, paragraph 1 (b):
>
> Articles 1, 5, 6, 12, 13, 16 and 19,
>
> ..."

The ECSR thereafter repeatedly rejected Germany's reference to the above declaration of 28 September 1961, most recently in its Conclusions VII of 1981 regarding the right to strike laid down in Article 6 § 4 of the European Social Charter of 1961:

> "...
>
> 3. denial of the right to strike by civil servants ('Beamte').
>
> The committee based itself on the same considerations as in previous conclusions. However, the new situation which was created by the recent ratification by the Kingdom of the Netherlands of the Charter with a reservation concerning Article 6, paragraph 4, which has been accepted by all the member states of the Council of Europe and which does not affect the minimum requirements of Article 20 of this instrument, led the committee to consider afresh whether the Federal Republic of Germany's declaration of 28 September 1961 (cf Conclusions IV, pp 48 et seq.) could be regarded as a reservation of the same nature. On consideration, the committee came to the conclusion that this was not possible.
>
> Since, however, it appeared that the Government of the Federal Republic of Germany had intended its declaration to have a similar effect to a reservation, and since *if it has* [sic] *been made in due form such a reservation would have been acceptable* [emphasis added], given that it would not have affected the minimum requirements of Article 20, the committee decided not to revert to the matter again."

60. The ECSR repeatedly found the prohibition of strikes by all civil servants in Germany not to be in conformity with Article 6 § 4 of the European Social Charter of 1961. The Conclusions XXI-3 of 24 January 2019 read:

> "The Committee previously found the situation in Germany not to be in conformity on the grounds that prohibiting civil servants from striking constituted an excessive restriction on the right to strike. There have been no changes to this situation. Therefore the Committee reiterates its previous conclusions.
>
> The Committee recalls that the right to strike is one of the essential means available to workers and their organisations for the promotion and protection of their economic and social interests. In the light of Article 31 of the Charter, 'the right to strike of certain categories of public servants may be restricted, in particular members of the police and armed forces, judges and senior civil servants. However, the denial of the right to strike to public servants as a whole cannot be regarded as compatible with the Charter' (cf. Conclusions I (1969)). The Committee also notes that in the case of civil servants who are not exercising public authority, only a restriction can be justified, not an absolute ban (Conclusions XVII-1 (2005) Germany). According to these principles, all

> public servants who do not exercise authority in the name of the State should have recourse to strike action in defence of their interests. ...
>
> Conclusion ...
>
> The Committee concludes that the situation in Germany is not in conformity with Article 6§4 of the 1961 Charter on the grounds that: ...
>
> - the denial of the right to strike to civil servants as a whole, regardless of whether they exercise public authority, constitutes an excessive restriction to the right to strike."

In its Conclusions XXI-3 of 20 January 2023 the ECSR reiterated its finding of non-conformity.

3. European Union

61. Article 28 of the Charter of Fundamental Rights of the European Union provides that "[w]orkers and employers, or their respective organisations, have, in accordance with Union law and national laws and practices, the right to negotiate and conclude collective agreements at the appropriate levels and, in cases of conflicts of interest, to take collective action to defend their interests, including strike action". The Court of Justice of the European Union has considered that the right to strike is not absolute but may be subject to restriction in accordance with the principle of proportionality, as striking may, for example, entail a restriction of fundamental freedoms in the internal market (see *International Transport Workers' Federation and Finnish Seamen's Union v. Viking Line ABP and OÜ Viking Line Eesti*, C-438/05, EU:C:2007:772, §§ 44-46, 11 December 2007). In *Roberto Aquino and Others v. European Parliament* (T-402/18, EU:T:2020:13, §§ 56-62, 29 January 2020), which concerned strike action by interpreters employed by the European Parliament and which thus did not involve such a restriction on a fundamental freedom, the General Court considered that the limitation on the right to strike had to be provided for by law and to refer to an objective of general interest, recognised as such by the European Union, and that it should not be excessive. The limitation at issue was found not to have been provided for by law.

4. Inter-American system

62. On 5 May 2021 the Inter-American Court of Human Rights issued an Advisory Opinion on the "right to freedom of association, right to collective bargaining and right to strike, and, and their relation to other rights, with a gender perspective" (OC-27/21). Drawing on international material, in particular that of the ILO, it stated that the right to strike could be considered as a general principle of international law (§ 97) and that the right to strike was an "essential component" of freedom of association (§ 118) and an "essential tool" for the freedom of association and the freedom to organise (§ 124). It considered that the exercise of the right to strike could be restricted or prohibited only in the case of public servants who served as arms of public

power and exercised authority on behalf of the state, and workers in essential services (§ 102). Workers who provided essential services should be defined according to the strict sense of the term, that is, providing services whose interruptions entailed a clear and imminent threat to the life, safety, health or freedom of the whole or part of the population (§ 103). In the subsequent judgment of 17 November 2021 in *Former Employees of the Judiciary v. Guatemala*, which concerned the dismissal of employees of the Guatemalan judiciary for allegedly participating in a strike that was declared unlawful, the court did not address the respondent Government's submission that the applicants belonged to a category of persons for whom the right to strike could be restricted or suspended.

D. The right to education

63. The right to education is enshrined in various international instruments, including, for example, Articles 28 and 29 of the Convention on the Rights of the Child and Article 13 of the ICESCR (see *Catan and Others v. the Republic of Moldova and Russia* [GC], nos. 43370/04 and 2 others, §§ 77-81, ECHR 2012 (extracts)).

64. At Council of Europe level, Recommendation CM/Rec(2012)13 of the Committee of Ministers to member States on ensuring quality education considered, *inter alia*, that "ensuring quality education is a public responsibility" and that "education is crucial to developing the democratic culture that democratic institutions and societies need to function" and recommended that "[p]ublic authorities should include quality education as a prominent element of their policies".

III. COMPARATIVE LAW MATERIAL

65. According to the information available to the Court, the vast majority of the thirty-five member States surveyed provide for different statuses of employment in the public sector, with a mixture of employment under public law, in particular the civil service, and employment under private law. The grounds for a particular employment status relate essentially to the type of employer, the nature of the duties and the recruitment procedure. In particular, civil servants under public law, unlike other public sector employees, perform duties of public authority in a public administration and are recruited on the basis of a competition.

66. All of the thirty-five member States surveyed impose bans or restrictions on the right to strike of certain categories of public sector workers. Five States impose a ban on the right to strike for civil servants generally, with such a ban being based on the State's conception of the civil service and on the duties performed by a civil servant in public authority positions, while being intended to avoid damaging or hampering the functioning of public

authorities. Other States impose bans and restrictions on specific, narrower categories of public sector workers on the grounds that they perform activities which are essential for the State or provide services that are of vital importance for society. Commonly, strikes are prohibited in the military, police, security services and often also in the justice system, prison service and diplomatic service. The rationale for a ban on strikes in these areas is that they are at the core of State authority and relate to tasks which are essential for the functioning of the State and for the protection of national security and public order/safety. In a number of States strikes are further banned or restricted in order to ensure the continuity of vital public services, such as the medical service, air traffic control, fire and rescue services. Minimum services can be required in areas such as public transport, waste management, power and heat supply, and telecommunications. The reasons for these prohibitions and restrictions relate to the need to secure the protection of life, health, personal security and public safety.

67. State school teachers have the status of civil servant in eight of the thirty-five member States surveyed, in seventeen States their employment is governed by a private-law regime and/or special legislation and in ten States more than one status exists. Teachers in the latter group of States are not able to choose their employment status as it is determined by the type of school in which they work and the legal regime applied to them. It appears from the material available to the Court that there is no prohibition on strikes by State school teachers in any of the member States surveyed, it being noted that State school teachers were previously granted civil servant status and were prohibited from striking in Denmark (see paragraph 94 below). The exercise of this right can, however, be made subject to certain conditions (e.g. union membership, duty to secure a minimum service, obligatory prior conciliation procedure). In States where different employment statuses for State school teachers exist, the right to strike applies in principle equally to teachers with civil servant status and those whose employment is governed by private law.

68. Alternative means of protecting employment-related rights in the case of a strike ban include conciliation and mediation procedures, collective bargaining and negotiation, representation through professional bodies (which the government may have to consult) and the possibility in some States of bringing court proceedings in respect of remuneration. Favourable conditions of service for civil servants are also seen in some of these States as a form of compensation.

THE LAW

I. THE ROLE OF THE COURT

69. The High Contracting Parties to the Convention have undertaken "to secure to everyone within their jurisdiction the rights and freedoms defined

in Section I of [the] Convention" (Article 1 of the Convention). It is the duty of the Court to ensure the observance of the engagements undertaken by the Contracting States (Article 19 of the Convention). In accordance with Article 32 of the Convention, the Court provides the final authoritative interpretation of the rights and freedoms defined in Section I of the Convention (see *Juszczyszyn v. Poland*, no. 35599/20, § 208, 6 October 2022, and *Opuz v. Turkey*, no. 33401/02, § 163, ECHR 2009).

70. The Court reiterates in this connection that its rulings serve not only to decide those cases brought before it but, more generally, to elucidate, safeguard and develop the rules instituted by the Convention, thereby contributing to the observance by the States of the engagements undertaken by them as Contracting Parties (see *Jeronovičs v. Latvia* [GC], no. 44898/10, § 109, ECHR 2016, and *Konstantin Markin v. Russia* [GC], no. 30078/06, § 89, ECHR 2012 (extracts), with further references).

71. As the Court has repeatedly stated (see, among other authorities, *Grzęda v. Poland* [GC], no. 43572/18, § 340, 15 March 2022), Contracting Parties should abide by the rule-of-law standards and respect their obligations under international law, including those voluntarily undertaken when they ratified the Convention. The principle that States must abide by their international obligations has long been entrenched in international law; in particular, "a State cannot adduce as against another State its own Constitution with a view to evading obligations incumbent upon it under international law or treaties in force" (see the Advisory Opinion of the Permanent Court of International Justice on *Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory*, quoted in paragraph 52 above). The Court further observes that, under the Vienna Convention on the Law of Treaties, a State cannot invoke its domestic law, including the Constitution, as justification for its failure to respect its international-law commitments (see Article 27 of the Vienna Convention on the Law of Treaties, quoted in paragraph 51 above).

72. It follows from the aforementioned principle of international law as well as, *inter alia*, from Articles 1, 19, 32 and 46 of the Convention, that the Contracting Parties must fulfil the obligations voluntarily undertaken by them when they ratified the Convention (see *Juszczyszyn*, cited above, §§ 208-209). As the Court does not engage in matters of domestic constitutional interpretation (see *Grzęda*, cited above, § 341), it is for the Contracting Parties to choose the manner in which they fulfil their obligations under the Convention (see, *mutatis mutandis*, *Verein gegen Tierfabriken Schweiz (VgT) v. Switzerland (no. 2)* [GC], no. 32772/02, § 88, ECHR 2009).

II. ALLEGED VIOLATION OF ARTICLE 11 OF THE CONVENTION

73. The applicants complained that the disciplinary measures against them for having participated in a strike during their working hours, as well as

the general prohibition on strikes by civil servants, on which those measures were based, had violated their right to freedom of assembly and association as provided for in Article 11 of the Convention, which reads as follows:

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

A. Admissibility

74. The Court observes that the former European Commission on Human Rights (hereinafter "the Commission") dealt with a case under Article 11 against Germany concerning a disciplinary penalty imposed on a teacher with civil servant status who had participated, as a member of the managing board of his union, in a decision advising the union's members, namely teachers, to participate in a strike even though under German law civil servants were not allowed to strike (see *S. v. Federal Republic of Germany*, no. 10365/83, Commission decision of 5 July 1984, Decisions and Reports 39, p. 237). Noting that German law did not grant the right to strike to civil servants in view of their special legal status and that the right to freedom of association could also be respected through means other than by granting a right to strike, the Commission concluded that the disciplinary action taken against the applicant could not in itself be regarded as a violation of his right to freedom of association and that his Article 11 complaint was manifestly ill-founded (ibid., at p. 241).

75. While the question raised in the present case is very similar to the one at issue in that case before the Commission, and the relevant domestic legal framework in the present case remains the same, the Court, having regard to the developments in the Court's case-law on Article 11 since the decision of the Commission, considers that the applicants' Article 11 complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

(a) The applicants

76. In the applicants' submission, the absolute prohibition on strikes affecting all civil servants owing to their status and the disciplinary measures imposed on them for their work stoppage, which had been carried out with the express aim of participating in public protest meetings called by their union in relation to a dispute about working hours and remuneration, had violated their rights to freedom of assembly and association, including their right to engage in trade union activity, under Article 11. The interference with these rights had not been prescribed by law, as neither Article 33 § 5 of the Basic Law nor statute law laid down a prohibition on strikes by civil servants in a precise and foreseeable manner and the case-law of the domestic courts was contradictory. In particular, the Federal Administrative Court had found the prohibition on strikes by civil servants to be in violation of Article 11 (in the fourth applicant's case). Moreover, the interference had been disproportionate.

77. The Court had recognised the right to collective bargaining as an essential element of freedom of association under Article 11 of the Convention (they referred to *Demir and Baykara v. Turkey* [GC], no. 34503/97, § 154, ECHR 2008), which was distinct from the right for a trade union to seek to persuade the employer to listen to what it had to say on behalf of its members (they referred to *National Union of Rail, Maritime and Transport Workers*, cited above, § 85; *Association of Academics v. Iceland* (dec.), no. 2451/16, § 31, 15 May 2018; and *Ognevenko v. Russia*, no. 44873/09, § 55, 20 November 2018). The right to organise industrial action was a constitutive feature of collective bargaining (they referred to, *inter alia*, *Association of Civil Servants and Union for Collective Bargaining and Others v. Germany*, nos. 815/18 and 4 others, § 58, 5 July 2022). The recognition of the right to collective bargaining as an essential element of freedom of association necessarily implied the recognition of the right to strike as an essential element of trade-union freedom. The necessary linkage of the right to collective bargaining and the right to strike was a legal principle recognised worldwide and constituted customary international law (they referred to the Advisory Opinion of the Inter-American Court of Human Rights, see paragraph 62 above). It was illustrated by the well-known principle "without the right to strike, collective bargaining would amount merely to collective begging", which was recognised by the Federal Labour Court and, more broadly, in international labour law. Conversely, denying the right to strike to all civil servants also meant denying them a right to collective bargaining, which was recognised as an essential element of freedom of association under Article 11. Without the effective possibility of participating

in trade-union industrial action, a right to membership in a trade union alone was unsubstantial. Trade union membership as such did not influence the working conditions of teachers, since the *Länder* did not enter into collective agreements with unions. Trade unions pursued their objectives through the collective action of their members.

78. It also followed from Article 11 § 2 of the Convention that the right to strike was an essential element for those civil servants who did not exercise public authority in the name of State. The distinction made in Article 11 § 2 allowing, in its second sentence, for certain restrictions only for those who were "members of the administration of the State" would be blurred if it were possible to introduce the same restriction for civil servants outside these specific areas and circumstances. Civil servant status alone was not sufficient to make a person a member of "the administration of the State" within the meaning of Article 11 § 2. That provision had to be interpreted narrowly and required the exercise of public authority (they referred to *Junta Rectora Del Ertzainen Nazional Elkartasuna (ER.N.E.) v. Spain*, no. 45892/09, §§ 30 and 33, 21 April 2015). Teachers did not exercise public authority in the name of the State – which was why they could be employed without civil servant status in Germany in the first place (they referred to Article 33 § 4 of the Basic Law). They were not "members of the administration of the State" for the purposes of Article 11 § 2 of the Convention.

79. The exercise of public authority in the name of the State was the decisive criterion in assessing whether a prohibition on strikes was compatible with Article 11 of the Convention. Civil servants could only be denied the right to collective bargaining and related industrial action if they exercised public authority; for those not exercising public authority, no restrictions could be made. The Court had previously found that a ban on strikes must not cover all categories of civil servants (they referred to *Enerji Yapı-Yol Sen v. Turkey*, no. 68959/01, § 32, 21 April 2009) and that civil servant teachers did not belong to the categories for whom the right to strike could be restricted (they referred to *Kaya and Seyhan v. Turkey*, no. 30946/04, 15 September 2009; *Urcan and Others v. Turkey*, nos. 23018/04 and 10 others, 17 July 2008; *Saime Özcan v. Turkey*, no. 22943/04, 15 September 2009; and *İsmail Sezer v. Turkey*, no. 36807/07, 24 March 2015). Eliminating the right to collective bargaining and the right to strike for all civil servants, regardless of whether they exercised public authority, and reducing these rights to a mere right to organisation and consultation would be incompatible with the Court's case-law and with international labour law. Several international bodies had expressed concern about the prohibition in Germany on strikes by civil servants not exercising public authority. Such civil servants had a right to strike in other States Parties to the Convention.

80. The Government's argument that teachers with civil servant status had no right to strike because they provided essential services was not convincing: if that argument held true, strikes by all teachers would have to be prohibited,

regardless of their status. There was no difference in the specific duties or tasks of teachers with civil servant status and those who were contractual State employees. However, the Federal Constitutional Court had upheld the ban at issue in the present case on the basis of the civil servant status of the applicant teachers, rather than on their functions. No sanctions had been imposed on teachers who were contractual State employees and who had participated in the same demonstration during working hours. This tolerance of the latter's strike action also proved that the nature of teachers' duties did not require civil servant status and that teachers did not provide "essential services" in the sense that prohibiting them from striking would be justified. Experience in all Council of Europe member States showed that school systems could cope with work stoppages of teachers. Everyday school life was characterised by the fact that lessons could be and were cancelled or postponed for various reasons, including illness, natural events such as storms, traffic obstructions, pandemics or strikes. It was undisputed that no damage had been caused to the applicants' schools by their participation in the strike; internal substitution arrangements had been made. More generally, teachers in German schools had always been considerate of the right to education and school lessons when it came to striking; what was at issue were short work-stoppages, which were sufficient to advance the bargaining process, and not long-term strikes. Details of a strike could be agreed between the strike leadership and the school management, as they had been in the present case. It was trade-union experience that the threat of damage was used as an argument against every strike. The ILO had developed a very differentiated approach in relation to essential services. By way of example, they referred to strikes of hospital staff, which took place in Germany and during which emergency aid was maintained. If pupils experienced how social conflicts were resolved through collective bargaining, they gained an insight into the resolution of conflicts in a democratic society.

81. Reiterating that the nature and extent of a restriction on a trade-union right was relevant for determining the breadth of the margin of appreciation (they referred to *National Union of Rail, Maritime and Transport Workers*, cited above, § 86), the applicants emphasised that the interference at issue was not a mere restriction but an absolute ban. Civil servants and their trade unions were deprived of any possibility of negotiating their own working conditions and of taking collective action. The prohibition on strikes could not be compensated for through other means such as participation or consultation. In any event, no alternative means that were comparable or equivalent to collective bargaining existed in Germany for civil servants and their trade unions. Notably the right of umbrella organisations to be consulted in the legislative process concerning the regulation of employment conditions of civil servants was not equivalent to collective bargaining, as it did not entail any right to co-determine working conditions. In the end, these conditions were determined unilaterally by the employer and there were many

examples where trade union concerns had simply been ignored, such as in respect of legislation concerning diverging remuneration in the different *Länder* and the 41-hour work week for civil servants. Court proceedings offered no alternative to industrial action in regulatory matters as to terms and conditions of employment like working hours and remuneration. The "principle of alimentation" did not protect against unilateral increases in the number of working hours and courts could not set salaries. Collective bargaining was the method for resolving disputes on terms and conditions of employment that was recognised by the Convention, tested and proven in all member States. National traditions could not justify excluding the right to collective bargaining or the right to strike, as traditions did not relieve States from complying with their Convention obligations. Moreover, neither earlier democratic constitutions in Germany nor civil service law had formulated a ban on civil servants' strikes.

82. In the applicants' submission, the presumed better employment conditions for civil servants were not capable of justifying the interference with their Article 11 rights. To hold otherwise would undermine or frustrate trade unions' ability to strive for the protection of their members' interests and would constitute a disincentive or restraint on the use by employees of union membership to protect their interests (they referred to *Wilson, National Union of Journalists and Others v. the United Kingdom*, nos. 30668/96 and 2 others, §§ 47-48, ECHR 2002-V). The applicants furthermore disputed that civil servants were in general in an advantageous situation compared to contractual State employees. The latter had the possibility of enforcing certain employment-related rights through collective bargaining and of obtaining conditions that were advantageous compared to those of civil servants, for example shorter working hours (which was already the case in Germany in sectors other than education). Civil servants did not enjoy advantages compared with teachers who were contractual State employees in terms of gross salary; differences in net salary could result from social security law (civil servants did not pay contributions to certain social security instruments, which contractual State employees did pay). These differences resulted from political decisions and could be altered.

83. Whether teachers were employed with civil servant status or as contractual State employees was the choice and unilateral decision of the *Länder*. There were considerable differences between the different *Länder*: some pursued a policy of employment as civil servants, while others rejected it. Nationwide some 20 to 25 per cent of teachers were contractual State employees. Various considerations informed the political decision-making as to whether teachers were recruited as civil servants or as contractual State employees, in particular fiscal and practical administrative considerations. Employing teachers as contractual State employees allowed for more flexible deployment and transfers as well as the possibility of staff reductions. It was in breach of Article 11 if teachers with civil servant status – who were

appointed based on the aforementioned considerations – were excluded from exercising their right to strike. Prospective teachers, including the applicants at the time of their recruitment, had no choice between one status or the other. Nor did domestic law provide for a right to change from civil servant status to contractual State employee status. Rather, civil servants would have to ask for their own dismissal, which would entail the loss of their job as well as of rights from the civil service relationship. There was no guarantee that dismissed civil servants would subsequently be re-employed with contractual State employee status. Even if a former civil servant were later employed with contractual State employee status, he or she would be subjected to disadvantages in salary, pension and health insurance as well as a lesser protection against dismissal compared with those who had worked as contractual State employees from the start. The applicants had therefore not applied for dismissal form civil servant status or sought to be employed with contractual State employee status; nor should they have to be asked to do so in order to be entitled to exercise their rights under Article 11. The applicants had not waived their Article 11 rights and in fact the rights under that provision could not be waived. The Government's submission that teachers would no longer be granted civil servant status in the future and that their working conditions would deteriorate if they were granted a right to strike was scaremongering.

84. With regard to the severity of the disciplinary measures imposed on them, the applicants submitted that they had been disproportionate. They had been reprimanded or even fined without prior warning, for short work-stoppages and participation in a trade-union demonstration. The sanctions were documented in their personnel files, which in practice led to a ban on promotion and blocked their professional development. In substance, they faced individual prohibitions on future participation in trade-union strikes, also to avoid harsher sanctions in case of repetition. This inability to heed trade-union calls for future work stoppages constituted a severe interference with the possibilities of action of trade unions and their members.

(b) The Government

85. In the Government's submission, the interference with the applicants' right to freedom of association by the obligation not to strike had been justified under Article 11 § 2, first sentence, of the Convention; they stated that they did not primarily rely on the second sentence of Article 11 § 2. They maintained that the interference was prescribed by law, notably by Article 33 § 5 of the Basic Law as interpreted by the Federal Constitutional Court since 1958. Any legal uncertainty that arose was owed to attempts by administrative courts to draw guidance from this Court's judgments in cases against Türkiye, notably *Enerji Yapı-Yol Sen* (cited above). This aspect also related to the essence of the present case, which turned on the question of what judgments and decisions by this Court in cases against one Contracting

State meant for the specific situation in another Contracting State and of where distinctions were required. Given that the organisation of the administration of the public sector varied widely between Contracting States, it was not possible to simply transpose judgments rendered in respect of one Contracting State to the situation in another Contracting State. The Government submitted that the impugned interference pursued the legitimate aim of protecting the rights and freedoms of others, notably the right to education, as part of the overall aim pursued by the career civil service to provide for good administration, in pursuit of the State's wider obligation of good governance. The obligation not to strike guaranteed the effective performance of the functions delegated to the civil service and thereby ensured the protection of the population, the provision of services of general interest and the protection of the rights enshrined in the Convention in manifold situations. The prohibition on strikes thus pursued all the legitimate aims mentioned in Article 11 § 2 of the Convention. The interference was also "necessary in a democratic society". For teachers who wanted to avoid the obligation not to strike, the status of contractual State employee was available. For teachers appointed as civil servants, their overall highly advantageous status – when compared with the corresponding conditions for contractual State employees – taken together with important participatory rights concerning the establishment of employment conditions, justified the obligation not to strike for civil servants under Article 11 § 2. The said factors distinguished the situation at issue from that in *Enerji Yapı-Yol Sen* (cited above), where all public sector employees, regardless of their status, were prohibited from striking and no alternative forms of collective bargaining or compensatory instruments were available. In the present case, there was no far-reaching interference with freedom of association that intruded into its inner core (they referred, by way of contrast, to *Demir and Baykara*, cited above). The applicants' claim amounted to unacceptable cherry-picking by combining the advantages of the status of civil servants with those of contractual State employees without accepting the corresponding duties.

86. Contracting States had a wide margin of appreciation in the organisation of the provision of public services, including the decision on where to rely on civil servants and where to provide services through contractual employees. The organisation of public administration related to a State's sovereignty and there was a lack of consensus within Council of Europe member States on the organisation of public service. A recent study commissioned by the European Commission had shown that virtually all European Union member States differentiated between two main types of status – one specially protected based on public appointment (civil servants) and one of public employment based on civil law (contractual State employees) –, with a strong divergence in the prevalence of one status over the other: the percentage of civil servants ranged from 93 per cent in one member State to zero per cent in another. The diversity in the organisation of

public services widened even further among Council of Europe member States. This diversity was also reflected in different approaches to the organisation of the education sector, with private schools playing an important role in providing primary and secondary education in some States, which could lead to extreme disparities of educational opportunity for certain groups in society.

87. The German system of a career civil service was a historically developed, deeply-rooted concept, which was integral to the democratic consensus underlying the Basic Law. The obligation not to strike for civil servants had been subject to continuous review by the constitutional legislature but had never been changed. It was a deliberate choice by the legislature, which reflected the balancing and weighing-up of different, potentially competing, interests and which had been thoroughly reviewed by the domestic courts. When determining the proportionality of a general balancing measure, the central question was not whether less restrictive rules should have been adopted or, indeed, whether the State could prove that, without the prohibition, the legitimate aim would not be achieved, but rather whether, in adopting the general measure as it did, the legislature had acted within the margin of appreciation afforded to it (they referred to *Animal Defenders International v. the United Kingdom* [GC], no. 48876/08, § 110, ECHR 2013 (extracts)). The rationale underlying the decision requiring civil servants not to strike, i.e. to provide good administration (see paragraph 85 above), was of the utmost importance. In cases relating to general social and economic policy questions, the role of the domestic legislature should be given "special weight" and generally be respected by the Court unless it was "manifestly without reasonable foundation" (they referred to *National Union of Rail, Maritime and Transport Workers*, cited above, § 99, and *Savickis and Others v. Latvia* [GC], no. 49270/11, § 184, 9 June 2022). If such a measure had already been reviewed by the domestic courts, the Court required strong reasons to substitute its view for that of the domestic courts (they referred to *M.A. v. Denmark* [GC], no. 6697/18, § 149, 9 July 2021). In the present case, the Federal Constitutional Court had extensively engaged with the Convention.

88. The classification of the applicant teachers as civil servants was not in itself subject to the Court's supervision, but was of relevance only in so far as it entailed an obligation not to strike (they referred to *Vilho Eskelinen and Others v. Finland* [GC], no. 63235/00, § 62, ECHR 2007-II). The obligation not to strike formed an integral part of the package of mutually interdependent and inseparable rights and duties constituting the German concept of career civil service. Civil servants notably had a right to lifetime employment and to "adequate maintenance", resulting in a better net pay due to significantly lower deductions, a better pension scheme and better conditions regarding health care. Every civil servant had the subjective right to initiate judicial proceedings for review of the adequacy of his or her remuneration and the

Federal Constitutional Court had decided on several occasions that the salaries of civil servants set by Parliament had been insufficient. As a corollary, the German concept of a career civil service provided for certain duties of civil servants, such as the duty of loyalty and the obligation not to strike. A right to strike for civil servants was incompatible with the other traditional principles of a career civil service. In particular, if civil servants were able to strike, the possibility of challenging the adequacy of their remuneration in the courts would have to be abolished. Moreover, a right to strike for civil servants was incompatible with their special bond of loyalty and trust (they referred to *Pellegrin v. France* [GC], no. 28541/95, § 65, ECHR 1999-VIII). Creating a right to strike for civil servants would have the effect of abolishing the status as it existed, given the inseparability of the rights and duties forming the package. As changing the entire system was not an option, the most likely consequence of a holding by the Court that the right to strike of teachers could not be restricted on the basis of their civil servant status would be that teachers could only be employed under a private-law regime in the future. This would constitute a far-reaching interference with States' autonomy regarding administrative organisation and the realisation of the right to education and would render public education in Germany less stable. It would also result in the loss of the aforementioned advantages enjoyed by teachers, seriously affect their position and might thus prove to be a Cadmean victory. The particularly favourable conditions in the education sector in Germany also had to be taken into account in this connection (they referred to *Federation of Offshore Workers' Trade Unions and Others v. Norway* (dec.), no. 38190/97, 27 June 2002): teachers in Germany earned significantly higher salaries than most of their colleagues in OECD countries (except Luxembourg) while teaching fewer hours than the OECD average[7].

89. The obligation not to strike for civil servants did not touch upon the "essential elements" of the freedom of association under Article 11 of the Convention currently accepted in the Court's case-law (they referred to *Demir and Baykara*, cited above, §§ 144 et seq.). To date, the Court had notably not extended this list of essential elements to include a right to strike (they referred to *National Union of Rail, Maritime and Transport Workers*, § 84; *Association of Academics*, § 24; *Ognevenko*, §§ 55 et seq.; *Association of Civil Servants and Union for Collective Bargaining and Others*, § 59, all cited above) and the right to strike did not fit into that category. The right of a trade union to seek to persuade the employer and to be heard with respect to what it had to say on behalf of its members and, in principle, to enter into collective bargaining, were merely rights of access or procedure; they were

[7] They referred to OECD, Education at a Glance 2022, at p. 441, https://read.oecd-ilibrary.org/education/education-at-a-glance-2022_3197152b-en#page443 (last consulted 26 September 2023), and OECD Indicators. Germany – Country note, 2022, at pp. 2 et seq., https://read.oecd-ilibrary.org/education/education-at-a-glance-2022_9e9d0c62-en#page1 (last consulted 26 September 2023).

not rights guaranteeing a specific outcome or a specific instrument, like the right to strike. There were no legitimate rights of others at stake that could justify limitations of the right to the right to form and join a trade union and the prohibition of closed-shop agreements. The right to strike, on the contrary, could be restricted to protect the rights of others (they referred to, *inter alia*, *Federation of Offshore Workers' Trade Unions and Others*, and *Association of Academics*, both cited above). The right to strike was subject to considerable limitations and conditions in all member States (they referred to *Ognevenko*, cited above, § 58), but these varied significantly. They referred to diverging approaches to the questions whether strikes had to be organised by trade unions, under what conditions solidarity strikes were lawful, whether a prior conciliation procedure was required, whether strikes had to be announced beforehand and, if so, by observing which period of notice. The lack of consensus on the scope and limitations to the right to strike was also reflected in the divergent practice of the different ILO organs. In consequence, the exact scope and limitations of the right to strike remained unclear, which militated against characterising the right to strike as an essential element, as such uncertainty in the core area of Article 11 of the Convention had to be avoided.

90. There was a high degree of divergence between the domestic systems in the field of trade union matters and in general a wide margin of appreciation was afforded to the Contracting States, which also applied in the present case. When assessing compliance with Article 11 of the Convention, the totality of measures taken by the State in order to secure trade-union freedom was to be taken into consideration (they referred to *Demir and Baykara*, cited above, § 144). The Court's approach was mostly concerned with the result produced by a certain system (such as the opportunity to participate in negotiations, the existence of favourable working conditions, including salaries, etc.), not with the methods that were implemented to achieve the outcome (for example strikes). Civil servants in Germany were able to exercise the essential elements of Article 11. They were able to become and remain members of a trade union. The unionisation rate among civil servants was considerably higher than the average unionisation rate in Germany, which stood at 16.5 per cent. Through trade union representatives, civil servants actively participated in establishing regulations concerning remuneration and working conditions, as umbrella organisations, by law, had rights of participation in the process of drafting laws on matters concerning the civil service; these rights went far beyond a mere right to be heard. By way of example, the Government referred to the regulation on parental leave in Schleswig-Holstein, where the demands by the trade union were initially not taken up, then later partly taken up by the government when the draft law was presented to Parliament, which then accepted the union's demands. They added that strike action would be directly addressed to Parliament, with the aim of forcing the democratic legislature to legislate in a particular way;

something that was not permissible. Moreover, unions were free to support proceedings for judicial review of the adequacy of remuneration initiated by individual civil servants and were invited by the Federal Constitutional Court to file *amicus curiae* briefs in relevant cases. Civil servants were thus able to seek to persuade an employer within a comprehensive legally prescribed framework (they referred to *Association of Academics*, cited above, § 31). The mere existence of the right to challenge laws on remuneration and working conditions had an influence on the prior process of negotiation between umbrella organisations and the Government. Collective bargaining thus took place, albeit without the option of strikes. There was no indication that strikes would be equally or more effective than the measures in place in Germany, it being borne in mind that the right to strike did not entail a "right to prevail" (they referred to *National Union of Rail, Maritime and Transport Workers*, § 85, and *Association of Academics*, § 24, both cited above). It was noteworthy that the largest civil servants' union, the Association of Civil Servants and Union for Collective Bargaining, which represented about 50 per cent of all civil servants and which was a third party in the present case (see paragraph 97 below), supported the concept of a career civil service and the existing mechanisms of participation for trade unions and their members.

91. The Court had acknowledged an apparent international consensus that restrictions could be imposed on the right to strike of workers providing essential services to the population (they referred to *Ognevenko*, cited above, § 72). While the ILO and the ECSR agreed on the relevance of the "essential service" category for restrictions on the right to strike, their approaches did not necessarily converge when it came to the scope of that category. There was moreover no consensus among Contracting States as to what constituted an "essential service", as illustrated by a comparative review of the relevant provisions and by the varying approaches taken during the COVID-19 pandemic. Contracting States thus enjoyed a margin to determine which services they considered essential. Teachers in Germany performed an essential service as they fulfilled the State's obligations under Article 2 of Protocol No. 1 to the Convention. The categorisation of teaching as an essential service was in line with the utmost importance of education recognised by international organs (they referred to, *inter alia*, *Leyla Şahin v. Turkey* [GC], no. 44774/98, § 137, ECHR 2005-XI, and the CESCR General Comment No. 13 on the right to education). Employing teachers as civil servants with the obligation not to strike ensured the continuous provision of high-quality public education, *inter alia*, by minimising the need to cancel lessons due to teacher strikes. *Länder* that had opted for the employment of teachers as contractual State employees in the past had since reconsidered this decision due to the negative consequences of strikes in the form of cancellations of classes resulting from an increased number of

strikes[8] – which in turn prevented the State from fulfilling its duty to provide education – and due to a lack of qualified applicants for teaching positions. The linear and individualised nature of the tasks that teachers fulfilled did not allow for less restrictive measures than an obligation not to strike, distinguishing the present case from that of *Ognevenko* (cited above, § 73). Teaching followed fixed schedules and minimum services would not be able to fulfil these schedules. The provision of continuous education also contributed to a stable social environment for families, for example by ensuring day care for children with working parents.

92. The obligation not to strike for civil servants did not result in a blanket-ban on strikes in the entire public sector, as contractual State employees, who accounted for roughly 62 per cent of the staff in the public sector, were allowed to strike. The civil servant status was limited to tasks that were closely connected to the main functions of government. Teachers employed under civil servant status, including the applicants, had knowingly and deliberately opted for that status instead of contractual State employee status. The second and third applicants had limited their job applications at the outset to appointment as civil servants. The application form used by the third applicant at the time featured a box with the indication "the application is also valid for an application as a contractual State employee"; he did not tick that box. The first applicant had even worked as a teacher with contractual State employee status at an earlier point in time and then obtained civil servant status after she had explicitly asked for it. Contractual State employee status was an alternative available to teachers in all *Länder*, with efforts being undertaken to prevent disadvantages regarding pension rights resulting from status changes. In 2020/21, between about 80 and 91.59 per cent of the teachers working in the *Länder* in which the applicants worked or had worked (Lower Saxony, North Rhine-Westphalia, Schleswig-Holstein) were civil servants and the remainder were contractual State employees. A later change from civil servant status to contractual State employee status was well-established practice and possible in all *Länder*, including in the applicants' cases. In Lower-Saxony and Schleswig-Holstein such change was at the beginning of the next school semester, in North-Rhine Westphalia it was also possible during the school year. Technically, the civil servant would have to ask for dismissal and then be immediately re-employed as a contractual State employee. In practice, such change in status, with subsequent appointment as a contractual State employee, was negotiated

[8] By way of example, they submitted that Berlin had a relatively high number of contractual State employees (69 per cent) in the teaching profession at State schools, while most teachers in Hamburg were employed as civil servants and only relatively few teachers were contractual State employees (8.7 per cent). Pupils in Berlin were affected by strikes more severely compared to Hamburg (10 strikes with more than 2,000 teachers participating between 2017 and 2022 in Berlin, as opposed to very few striking teachers in the last years in Hamburg, the last bigger strike dating back to the year 2000).

before a civil servant asked for his dismissal; the applicants' submission that asking to be dismissed would put the civil servant at risk of unemployment was therefore incorrect. The fact that very few teachers with civil servant status chose to change to contractual State employee status was due to the attractiveness of civil servant status. As the status in question was subject to an element of personal choice, the State's margin of appreciation was considerably wider (they referred to *Savickis and Others*, cited above, § 183). Moreover, the obligation not to strike was general in nature and related to work-stoppages only. It did not encroach on freedom of assembly, thus distinguishing the case from those of *Enerji Yapı-Yol Sen* (cited above, § 32), *Urcan and Others* (cited above, § 33) and *Kaya and Seyhan* (cited above, § 29). The applicants' participation in strikes outside hours of duty would not have caused any problems. The individual disciplinary measures imposed on the applicants had been moderate and had only addressed the breach of the obligation not to strike during teaching hours. The sanctions thus could not have the effect of deterring the applicants from participating in trade-union activities in general.

2. Submissions of the third-party interveners

(a) The Danish Government

93. The Government of Denmark submitted in essence that it lay within the wide margin of appreciation afforded to the Contracting States regarding the right to strike of public-sector workers to prohibit certain groups of employees, including teachers, from striking. Such a prohibition was justified under Article 11 § 2, second sentence, provided that it was not unnecessarily broad in scope and that the teachers' interests were otherwise sufficiently protected, for example by a sufficient right to collective bargaining or an otherwise improved protection of their rights.

94. They explained that in Denmark, those who enjoyed civil-servant status, having a right to engage in collective bargaining but being prohibited from striking, were today employed in important sectors of the administration of the State. They included chief government officials, judges, members of the police, prison officers and high-ranking officers in the military and civil defence forces, but no longer primary school teachers.

(b) European Trade Union Confederation, German Trade Union Confederation, Trade Union for Education and Science

95. The European Trade Union Confederation (ETUC), the German Trade Union Confederation (DGB) and the Trade Union for Education and Science (GEW) all submitted that an absolute prohibition on strikes for all civil servants, and in particular teachers who did not perform duties involving the exercise of public authority, due to their status alone, violated Article 11 of the Convention. The ETUC and the DGB argued that it further amounted

to a breach of fundamental provisions of international labour law contained notably in Article 22 of the ICCPR, Article 8 of the ICESCR, the law of the ILO and Article 6 § 4 of the European Social Charter, as interpreted by the competent monitoring bodies (see paragraphs 53-60 above). The ETUC added that the Inter-American Court of Human Rights had recently found that the right to strike constituted a "general principle of international law" (see paragraph 62 above) and argued that the right to strike should be recognised as an essential element of Article 11 of the Convention.

96. The third parties submitted that the prohibition on strikes by civil servants was not adequately compensated for by other measures, notably: the financial advantages enjoyed by civil servants; the right to judicial review of the adequacy of civil servants' remuneration; and the right of trade unions' umbrella organisations to be heard in the legislative procedure concerning civil servants' working conditions. The GEW emphasised the long duration of judicial proceedings concerning the adequacy of civil servants' remuneration and the insufficient enforceability of decisions taken in those proceedings due to the wide margin of appreciation of the legislature in their implementation. Moreover, other key working conditions, in particular working hours, could not be judicially reviewed. The DGB submitted that involving civil servants in strikes of contractual State employees would enhance the likelihood of more appropriate salaries being fixed in collective agreements regarding those employees. The GEW asserted that the main reason for a considerable loss of school lessons was a nationwide shortage of teachers. The GEW and the DBG argued that whether or not teachers were recruited as civil servants was based on fiscal and labour market policy considerations, rather than on ensuring the provision of education.

(c) Association of Civil Servants and Union for Collective Bargaining

97. The Association of Civil Servants and Union for Collective Bargaining submitted that the Court's case-law on civil servants' right to strike in respect of applications against Türkiye could not be transferred to applications against Germany as the position of civil servants in Türkiye and Germany was not comparable. Civil servants in Türkiye did not have a significantly better position as regards salary, health insurance and pension rights as compared to public sector employees without civil servant status. In Türkiye, the salaries of both civil servants and of contractual State employees were determined by collective agreements and both groups were prohibited from striking. Against this background, the judgments rendered by this Court in cases against Türkiye concerning the right to strike were understandable (they referred to *Enerji Yapı-Yol Sen* and *Kaya and Seyhan*, both cited above). In Germany, contractual State employees whose salaries were determined on the basis of collective agreements had a right to strike, due to the structural equality of the parties to collective agreements and the principle of equality of arms. The freedom to be party to collective agreements and the right to

strike converged. The situation of civil servants in Germany was, however, not determined by collective agreements but by legislation. In Germany, the terms governing civil servant status were almost without exception more favourable than the terms agreed for contractual State employees, including in respect of health care and pensions. Because of the constitutional protection of their status, civil servants already had everything contractual State employees could gain by strikes and did not have any material needs that a right to strike could address. For example, in Germany pay increases for contractual State employees were usually transferred to and mirrored in the relevant legislation for civil servants, who already had a better net salary to start with. Recognising a right to strike for civil servants in Germany would result in a deterioration of the civil servants' situation as the civil servants' advantageous conditions compared to contractual State employees would no longer be justifiable. The significantly more attractive status of civil servants (without the right to strike) compared with that of contractual State employees (with the right to strike) was illustrated by the fact that all of those *Länder* which in the past had stopped recruiting teachers as civil servants and employed them as contractual State employees had experienced a shortage of applicants and staff, since newly qualified teachers systemically chose to work in other *Länder* where they were granted civil servant status. As a result, the vast majority of these *Länder* had returned to granting civil servant status to teachers. Prospective teachers in Germany had the choice of being appointed with or without civil servant status and thus with or without the right to strike.

3. The Court's assessment

(a) General principles

(i) The Court's approach to trade-union freedom

98. Trade-union freedom is not an independent right but a specific aspect of freedom of association as recognised by Article 11 of the Convention (see *Manole and "Romanian Farmers Direct" v. Romania*, no. 46551/06, § 57, 16 June 2015). Article 11 of the Convention affords members of a trade union the right for their union to be heard with a view to protecting their interests, but does not guarantee them any particular treatment by the State. What the Convention requires is that under national law, trade unions should be enabled, in conditions not at variance with Article 11, to strive for the protection of their members' interests (see *Sindicatul "Păstorul cel Bun" v. Romania* [GC], no. 2330/09, § 134, ECHR 2013 (extracts)). Article 11 § 2 does not exclude any occupational group from the scope of that Article. At most the national authorities are entitled to impose restrictions on certain of their employees in accordance with Article 11 § 2 (ibid., § 145). The Convention makes no distinction between the functions of a Contracting State as holder of public power and its responsibilities as an employer. Article 11

is no exception to that rule. On the contrary, paragraph 2 *in fine* of this provision clearly indicates that the State is bound to respect the freedom of assembly and association of its employees, subject to the possible imposition of "lawful restrictions" in the case of members of its armed forces, police or administration. Article 11 is accordingly binding upon the "State as employer", whether the latter's relations with its employees are governed by public or private law (see *Tüm Haber Sen and Çınar v. Turkey*, no. 28602/95, § 29, ECHR 2006-II).

99. The guiding principles of the Court's approach to trade-union freedom were set out in *Demir and Baykara* (cited above):

> "144. ... [T]he evolution of case-law as to the substance of the right of association enshrined in Article 11 is marked by two guiding principles: firstly, the Court takes into consideration the totality of the measures taken by the State concerned in order to secure trade-union freedom, subject to its margin of appreciation; secondly, the Court does not accept restrictions that affect the essential elements of trade-union freedom, without which that freedom would become devoid of substance. These two principles are not contradictory but are correlated. This correlation implies that the Contracting State in question, while in principle being free to decide what measures it wishes to take in order to ensure compliance with Article 11, is under an obligation to take account of the elements regarded as essential by the Court's case-law."

100. In line with the aforementioned guiding principles of the Court's approach, the Court has built up, through its case-law, a non-exhaustive list of the essential elements of trade-union freedom, including the right to form and join a trade union, the prohibition of closed-shop agreements, the right for a trade union to seek to persuade the employer to hear what it has to say on behalf of its members and, having regard to developments in labour relations, the right to bargain collectively with the employer, which has, in principle, except in very specific cases, also become one of those essential elements (see *Norwegian Confederation of Trade Unions (LO) and Norwegian Transport Workers' Union (NTF) v. Norway*, no. 45487/17, § 95, 10 June 2021; *Sindicatul "Păstorul cel Bun"*, cited above, § 135; and *Demir and Baykara*, cited above, §§ 145 and 154).

101. The Court, in defining the meaning of terms and notions in the text of the Convention, can and must take into account elements of international law other than the Convention, the interpretation of such elements by competent organs, and the practice of European States reflecting their common values. Any consensus emerging from specialised international instruments and from the practice of Contracting States may constitute a relevant consideration for the Court when it interprets the provisions of the Convention in specific cases (see *Demir and Baykara*, cited above, § 85). At the same time, the Court's jurisdiction is limited to the Convention. It has no competence to assess a respondent State's compliance with the relevant standards of the ILO or the European Social Charter (see *National Union of Rail, Maritime and Transport Workers*, § 106, and *Norwegian Confederation*

of Trade Unions (LO) and Norwegian Transport Workers' Union (NTF), § 98, both cited above).

102. In ascertaining whether restrictions on union freedoms have complied with Article 11, the Court must carry out a proportionality assessment which takes into account all the circumstances of the case – and the totality of the measures taken by the State to secure trade-union freedom –, even where the restrictions affected an essential element of such freedom (see *Demir and Baykara*, cited above, §§ 154 et seq., in respect of the right to collective bargaining; *Tüm Haber Sen and Çınar*, cited above, in respect of the right to form and join a trade union; and *Sørensen and Rasmussen v. Denmark*, [GC], nos. 52562/99 and 52620/99, §§ 64-65 and 76, ECHR 2006-I, in relation to closed-shop agreements; see also *Norwegian Confederation of Trade Unions (LO) and Norwegian Transport Workers' Union (NTF)*, cited above, § 94).

(ii) The right to strike

103. The Court has so far left open the question whether a prohibition on strikes affects an essential element of trade-union freedom under Article 11 of the Convention (see *National Union of Rail, Maritime and Transport Workers*, § 84, and *Association of Academics*, § 24, both cited above).

104. The right to strike allows a trade union to make its voice heard and constitutes an important instrument for the trade union to protect the occupational interests of its members and in turn for the members of a trade union to defend their interests (see *Hrvatski liječnički sindikat v. Croatia*, no. 36701/09, § 59, 27 November 2014; *Federation of Offshore Workers' Trade Unions*, cited above; and *Ognevenko*, cited above § 70, for cases emphasising the importance of the right to strike as an instrument for trade unions, and see *Enerji Yapı-Yol Sen*, § 24, and *Junta Rectora Del Ertzainen Nazional Elkartasuna (ER.N.E.)*, § 32, both cited above, where the emphasis was placed on the importance of the right to strike for the members of the trade union; see also, more generally, *Ognevenko*, cited above, § 55, emphasising the dual nature of trade union action as a right of the trade union and of the individual union members). Strike action is clearly protected by Article 11 in so far as it is called by trade unions (see *National Union of Rail, Maritime and Transport Workers*, § 84, and *Association of Academics*, § 24, both cited above; and *Barış and Others v. Turkey* (dec.), no. 66828/16 and 31 others, § 45, 14 December 2021).

105. The prohibition of a strike must therefore be regarded as a restriction on the trade union's power to protect the interests of its members and thus amounts to a restriction on the trade union's freedom of association (see *UNISON v. the United Kingdom* (dec.), no. 53574/99, ECHR 2002-I, and *Hrvatski liječnički sindikat*, cited above, § 49). It also constitutes a restriction on the freedom of association of trade union members (see *Veniamin Tymoshenko and Others v. Ukraine*, no. 48408/12, § 77, 2 October 2014).

106. However, the right to strike does not imply a right to prevail (see *National Union of Rail, Maritime and Transport Workers*, § 85, and *Association of Academics*, § 24, both cited above).

107. The Court has also stated that the right to strike is not absolute. It may be subject to certain conditions and restrictions (see *Wilson, National Union of Journalists and Others*, § 45; *Enerji Yapı-Yol Sen*, § 32, and *Junta Rectora Del Ertzainen Nazional Elkartasuna (ER.N.E.)*, § 33, all cited above). Notably, a prohibition on strikes imposed on civil servants exercising public authority in the name of the State may be compatible with trade-union freedom (see *Enerji Yapı-Yol Sen*, § 32, and *Junta Rectora Del Ertzainen Nazional Elkartasuna (ER.N.E.)*, § 33, both cited above). Similarly, restrictions may be imposed on the right to strike of workers providing essential services to the population (see *Ognevenko*, § 72, and *Association of Academics*, both cited above), while a complete ban on the right to strike in respect of certain categories of such workers requires solid evidence from the State to justify the necessity of those restrictions (*Ognevenko*, cited above, § 73).

108. In this connection, the Court reiterates that, while the ability to strike represents one of the most important means by which trade unions can fulfil their function of protecting the occupational interests of their members, they also have other means of achieving this (see *Federation of Offshore Workers' Trade Unions and Others*, cited above). When determining whether restrictions on the right to strike comply with Article 11 of the Convention regard must be had to the totality of the measures taken by the State concerned in order to secure trade-union freedom (see paragraphs 99 and 102 above). To comply with Article 11, the impact of a restriction on a union's ability to take strike action must not place its members at any real or immediate risk of detriment or of being left defenceless against future attempts to downgrade pay or conditions (see, *mutatis mutandis*, *UNISON,* cited above).

109. It follows that the question whether a prohibition on strikes affects an essential element of trade-union freedom because it renders that freedom devoid of substance in the circumstances – a question which the Court has so far left open (see *National Union of Rail, Maritime and Transport Workers*, § 84, and *Association of Academics*, § 24, both cited above) – is context-specific and cannot therefore be answered in the abstract or by looking at the prohibition on strikes in isolation. Rather, an assessment of all the circumstances of the case is required, considering the totality of the measures taken by the respondent State to secure trade-union freedom, any alternative means – or rights – granted to trade unions to make their voice heard and to protect their members' occupational interests, and the rights granted to union members to defend their interests. Other aspects specific to the structure of labour relations in the system concerned also need to be taken into account in this assessment, such as whether the working conditions in that system are determined through collective bargaining, as collective

bargaining and the right to strike are closely linked. The sector concerned and/or the functions performed by the workers concerned may also be of relevance for that assessment (see paragraphs 53-60, 62 and 66 above).

110. Thus, the question whether a prohibition on strikes affects an essential element of trade-union freedom because it renders the latter devoid of substance in a given context, can only be answered in the context of this assessment, taking into account all the circumstances of the case. However, even where a prohibition on strikes may not affect an essential element of trade-union freedom in a given context, it will, nonetheless, affect a core trade-union activity if it concerns "primary" or direct industrial action (see *National Union of Rail, Maritime and Transport Workers*, cited above, §§ 87-88).

111. The margin of appreciation allowed to the State will be reduced where measures affect an essential element of trade-union freedom (see *Sørensen and Rasmussen*, cited above, § 58) as well as where restrictions strike at the core of trade-union activity, which include severe restrictions on "primary" or direct industrial action by public-sector employees (see *National Union of Rail, Maritime and Transport Workers*, cited above, §§ 87-88) who are neither exercising public authority in the name of the State nor providing essential services to the population. Where restrictions strike at the core of trade-union activity, and may affect an essential element of trade-union freedom, an assessment of the proportionality of the restriction requires an assessment which takes into account all the circumstances of the case (see paragraphs 102 and 110 above). Such analysis also allows it to be determined whether a restriction such as a prohibition on strikes affects an essential element of trade-union freedom in a given case.

112. By contrast, the margin of appreciation afforded to the State will be wide if a substantial restriction on the right to strike concerns civil servants exercising public authority in the name of the State (see *Junta Rectora Del Ertzainen Nazional Elkartasuna (ER.N.E.)*, §§ 37-41, in respect of a prohibition on strikes by members of the police) or secondary action, as in that latter scenario it is not the core but a secondary or accessory aspect of trade-union activity which is affected (see *National Union of Rail, Maritime and Transport Workers*, cited above, §§ 87-88).

(b) Application of those principles to the present case

(i) Whether there has been an interference

113. The Court observes that the disciplinary measures at issue were imposed on the applicants because they had gone on strike, that is, they had stopped teaching for a few hours, together with others, in order to demand better working conditions, and had participated during that time in demonstrations organised for that purpose by the trade union of which they were members and which also represented the interests of teachers employed

as contractual State employees. The impugned measures, in that they were taken in respect of a demonstration, concerned the applicants' right to freedom of assembly. However, the applicants would not have been disciplined for participating in such a demonstration outside their working hours. The point of the measures was to impose a sanction for the applicants' participation in a work stoppage organised by their trade union, in contravention of the prohibition on strikes by civil servants owing to their status. The measures thereby interfered with the applicants' freedom of association, of which trade-union freedom is a specific aspect (compare, among other authorities, *Demir and Baykara*, cited above, § 109; *Manole and "Romanian Farmers Direct"*, cited above, § 57; and *Ognevenko*, cited above, § 54) and the Court will examine the case from that angle alone (compare also, *mutatis mutandis*, *İsmail Sezer*, cited above, § 41).

(ii) Whether the interference was justified

114. The Government argued that the impugned measures were justified under the first sentence of Article 11 § 2 as they served in particular to protect the rights and freedoms of others. The Government stated that they were not primarily relying on the second sentence of Article 11 § 2 (see paragraph 85 above). In these circumstances, the Court does not consider it necessary to determine whether the applicants as teachers with civil servant status could be said to be "members of the administration of the State" for the purposes of Article 11 § 2 *in fine*, a question which the Court left open in *Vogt* (see *Vogt v. Germany*, 26 September 1995, § 68, Series A no. 323). The Court reiterates, however, that the concept of "the administration of the State" should be interpreted narrowly, in the light of the post held by the official concerned (see *Vogt*, cited above, § 67; *Grande Oriente d'Italia di Palazzo Giustiniani v. Italy*, no. 35972/97, § 31, ECHR 2001-VIII; and *Demir and Baykara*, cited above, §§ 97 and 107).

115. To be justified under the first sentence of Article 11 § 2, the interference complained of must be shown to be "prescribed by law", to pursue one or more legitimate aims, and to be "necessary in a democratic society" in order to achieve such aims. To be considered necessary in a democratic society, it must be shown that the interference corresponded to a "pressing social need", that the reasons given by the national authorities to justify it were relevant and sufficient and that the interference was proportionate to the legitimate aim pursued. Regard must be had to the fair balance to be struck between the competing interests of the individual and of the community as a whole (see *Association of Academics*, cited above, § 25).

(α) "Prescribed by law"

116. The applicants argued that the disciplinary measures against them were not "prescribed by law". The Court notes that the disciplinary measures

were based on Article 33 § 5 of the Basic Law, read in conjunction with provisions of the Civil Servants' Status Act and the Civil Servants Act of the respective employing *Land* laying down general duties of civil servants and the prohibition on being absent from work without permission (see paragraphs 9-11, 39 and 48 above). While neither the Basic Law nor statute law lays down an explicit prohibition on strikes by civil servants, such as the applicants, Article 33 § 5 of the Basic Law has for decades consistently been interpreted by the Federal Constitutional Court as enshrining such a prohibition for all civil servants (see paragraphs 23, 31 and 40 above). The Federal Administrative Court has also consistently found that strike action by civil servants is in breach of the traditional principles of the career civil service under Article 33 § 5 of the Basic Law (see paragraph 41 above).

117. It is true that, following the relevant judgments of this Court, one first-instance administrative court questioned the legality of the prohibition on strikes for teachers with civil servant status, while another questioned, in the proceedings concerning the fourth applicant in the present case, the legality of disciplinary measures against teachers with civil servant status for having participated in strikes (see paragraphs 14, 42 and 85 above). However, this does not alter the fact that the applicants in the present case could have foreseen, to a degree that was reasonable in the circumstances, that their participation in strikes as teachers with civil servant status would lead to disciplinary measures. In this connection, the Court also takes note of the position taken by the Federal Administrative Court in the proceedings concerning the fourth applicant, in which that court found that Article 33 § 5 of the Basic Law could not be interpreted in a Convention-compliant manner and that this conflict between the Basic Law and the Convention would have to be resolved by the legislature, with the prohibition on strikes by civil servants under Article 33 § 5 of the Basic Law remaining valid in the meantime (see paragraph 17 above). The impugned interference was thus "prescribed by law" for the purposes of Article 11 § 2 of the Convention.

(β) Legitimate aim

118. The Court accepts the Government's submission that the prohibition on strikes by civil servants generally pursued the overall aim of providing good administration, in conformity with the State's wider obligation to provide good governance, by guaranteeing the effective performance of functions delegated to the civil service and thereby ensuring the protection of the population, the provision of services of general interest and the protection of the rights enshrined in the Convention through effective public administration in manifold situations (see paragraph 85 above). As the Federal Constitutional Court stated in its judgment of 12 June 2018, the prohibition on strikes by civil servants was considered in Germany to be essential for maintaining a stable administration, ensuring the fulfilment of State functions and, linked to that, the proper functioning of the State and its

institutions. It added that the career civil service, as an institution, was intended to ensure a stable administration system that functioned as an equalising factor *vis-à-vis* the political forces shaping the State (see paragraphs 23-24 above). In the light of the foregoing, the Court considers that the prohibition on strikes by civil servants pursues at least one of the legitimate aims listed in the first sentence of Article 11 § 2 of the Convention. In the present case, the disciplinary measures imposed on the applicant teachers for having gone on strike, and thus not having taught between two and twelve lessons at their respective schools also served to ensure a functioning school system and therefore to safeguard the right of others to education protected by Article 7 § 1 of the Basic Law and Article 2 of Protocol No. 1 to the Convention.

(γ) "Necessary in a democratic society"

119. It remains to be determined whether the interference with the applicants' right to freedom of association was "necessary in a democratic society".

120. It is not the Court's task to review the relevant domestic law in the abstract, but to determine whether the manner in which it actually affected the applicants infringed their rights under Article 11 of the Convention (see *National Union of Rail, Maritime and Transport Workers*, cited above, § 98). However, when examining the issues raised in the case before it, more specifically the disciplinary measures taken against the applicants in the present case, the Court must not lose sight of the general context, that is to say, here, the general prohibition on strikes by all civil servants in Germany owing to their status (see, *mutatis mutandis, Taxquet v. Belgium* [GC], no. 926/05, § 83 *in fine*, ECHR 2010). As a matter of principle, the more convincing the justifications for the general measure, the lesser the importance that will be attached by the Court to its impact in the particular case (see *Animal Defenders International*, § 109, and *Ognevenko*, § 69, both cited above).

121. To determine whether the disciplinary measures against the applicants for having participated in strikes, in contravention of the prohibition on strikes by civil servants in Germany, were "necessary in a democratic society", regard must be had to the entire factual and legal context in which the impugned measures were taken (see paragraphs 102 and 109 above).

122. The Court must therefore ascertain whether the effect that the ban on strikes by civil servants had on the applicants in the present case was proportionate and whether or not the ban rendered their trade-union freedom devoid of substance. As already indicated (see paragraphs 109 and 111 above), the answer to this question is context-specific in a number of ways and requires an assessment which takes into account all the circumstances of the case. For that purpose, the Court will have regard to the following aspects

of the case: (i) the nature and extent of the restriction on the right to strike; (ii) the measures taken to enable civil servants' trade unions and civil servants themselves to protect occupational interests; (iii) the objective(s) pursued by the prohibition on strikes by civil servants; (iv) further rights encompassed by civil servant status; (v) the possibility of working as a State school teacher under contractual State employee status with a right to strike; and (vi) the severity of the impugned disciplinary measures.

i. The nature and extent of the restriction on the right to strike

123. The Court observes that the prohibition on strikes by civil servants, including teachers with that status, is based on their status and is absolute. The restriction on the right to strike by German civil servants, including the applicants, can thus be characterised as severe (see paragraph 111 above).

124. The applicants relied heavily on a statement made by the Court in *Enerji Yapı-Yol Sen* (cited above, § 32) to the effect that a prohibition on strikes could not extend to civil servants in general (see paragraph 79 above). The Court would agree that a general ban on strikes for all civil servants raises specific issues under the Convention. In this connection, the Court also reiterates that the assessment as to whether a prohibition on strikes renders trade-union freedom devoid of substance depends on a number of elements (see paragraph 109 above).

125. The applicants also relied on international labour law (see paragraph 79 above). The Court acknowledges that the practice of the competent monitoring bodies set up under the specialised international instruments, as well as that of other international bodies, shows a strong trend towards considering that civil servants should not *per se* be prohibited from strike action (see paragraphs 53-60 and 62 above), this trend also being reflected in the practice of the Contracting States (see paragraph 66 above). In as much as there is common ground among them as to the principle that bans or restrictions on the right to strike may be imposed on certain categories of civil servants or public sector workers, notably those exercising public authority in the name of the State and/or providing essential services, there is also a tendency to consider that the notion of essential services, despite some divergence as to its precise definition, is to be understood in the strict sense and as not including public education (see paragraphs 53-55, 58, 62, 66 and 67 above). The Court notes that the approach taken by the respondent State, namely to prohibit strikes by all civil servants, including teachers with that status, such as the applicants, is thus not in line with the trend emerging from specialised international instruments, as interpreted by the competent monitoring bodies, or from the practice of Contracting States.

126. The competent monitoring bodies set up under the specialised international instruments – notably the CEACR and the ECSR as supervisory bodies for the ILO standards and the European Social Charter, the latter containing a more specific and exacting norm regarding industrial action, but

also the CESCR and the HRC – have repeatedly criticised the status-based prohibition of strikes by civil servants in Germany, including, in particular, with respect to teachers with that status (see paragraphs 53, 54, 56 and 60 above). Without calling into question the analysis carried out by those bodies in their assessment of the respondent State's compliance with the international instruments which they were set up to monitor, the Court would reiterate that its task is to determine whether the relevant domestic law in its application to the applicants was proportionate as required by Article 11 § 2 of the Convention (see paragraph 122 above), its jurisdiction being limited to the Convention (see *National Union of Rail, Maritime and Transport Workers*, cited above, §§ 98 and 106; and see paragraph 101 above).

127. Moreover, while any trend emerging from the practice of the Contracting States and the negative assessments made by the aforementioned monitoring bodies of the respondent State's compliance with international instruments constitute relevant elements, they are not in and of themselves decisive for the Court's assessment as to whether the impugned prohibition on strikes and the disciplinary measures imposed on the applicants remained within the margin of appreciation afforded to the respondent State under the Convention (see also *National Union of Rail, Maritime and Transport Workers*, cited above, §§ 91 and 98).

ii. The measures taken to enable civil servants' trade unions and civil servants themselves to defend occupational interests

128. The Court recalls that the right to strike constitutes an important instrument for a trade union to protect the occupational interests of its members and in turn for the members of a trade union to defend their interests (see paragraph 104 above). While strike action is an important part of trade-union activity, the Court reiterates that it is not the only means for trade unions and their members to protect the relevant occupational interests. Contracting States are in principle free to decide what measures they wish to take in order to ensure compliance with Article 11 as long as they thereby ensure that trade-union freedom does not become devoid of substance as a result of any restrictions imposed (see paragraph 99 above). The Court thus needs to examine whether other rights granted to German civil servants' unions and to civil servants themselves enable them to protect the relevant occupational interests effectively (see paragraph 109 above).

(α) The right of civil servants to form and join trade unions

129. At the outset, the Court notes that civil servants in Germany have the right to form and join trade unions to defend their occupational interests and that the applicants availed themselves of the relevant right. The applicants are members of the Trade Union for Education and Science (see paragraph 8 above, as well as paragraphs 95-96 above for that union's submission as a third-party intervener). The largest civil servants' union, the Association of

Civil Servants and Union for Collective Bargaining, alone represents about 50 per cent of all civil servants, according to the undisputed submission by the Government (see paragraph 90 above and see also paragraph 97 above for that union's submission as a third-party intervener). It is noteworthy that the unionisation rate among civil servants in Germany is very high and that it is considerably higher than the average general unionisation rate in Germany which stands at 16.5 per cent (see paragraph 90 above).

(β) Participatory rights granted to trade unions to protect the occupational interests of civil servants

130. In Germany, working conditions of civil servants, including remuneration, are regulated by statute law in the light of the traditional principles of the career civil service, not by collective agreements between trade unions and the employing State authority. The umbrella organisations of civil servants' trade unions have a statutory right to participate when legal provisions for the civil service are drawn up (see paragraphs 29, 34 and 49 above). This participation of umbrella organisations in the preparation of new legislation is intended to protect the rights and interests of civil servants in the drafting of provisions concerning civil servants and to compensate for the absence of a right to collective bargaining and the prohibition on strikes (see paragraph 49 above). The *Länder* Civil Servants Acts, which applied to the applicants, provide that umbrella organisations have to be informed of any draft legislation and allowed to comment within a reasonable time before the draft is submitted to Parliament (see paragraph 49 above). If the *Länder* governments do not follow proposals made by the umbrella organisations in the respective draft laws, they must provide reasons for failing to do so and transmit them to the *Länder* Parliaments, either of their own motion or at the request of the umbrella organisations (see paragraph 49 above).

131. This participatory right enables civil servants' trade unions to seek to persuade the employer to hear what they have to say on behalf of their members. As regards the effectiveness of this right in practice, the Court takes note of the example invoked by the Government where the competent *Land* Parliament ultimately accepted the trade-union demands in relation to parental leave, after the government had not fully done so (see paragraph 90 above). None of the other Contracting Parties surveyed provides for comparable rights of trade-union participation in the process of fixing working conditions as a means of compensating for a prohibition on strikes by the workers concerned (see paragraph 68 above). The Court is aware that this right of trade unions to participate in the drafting of statutory provisions for the civil service does not, as the applicants stressed, include a right to co-determine the future legislative provisions; but the right to collective bargaining has not been interpreted as a right to a collective agreement either, nor does the right to strike imply a right to prevail (compare, for instance, *National Union of Rail, Maritime and Transport Workers*, cited above, § 85).

132. Beyond the statutory right of trade unions to participate when legal provisions for the civil service are drawn up, the relevant provisions of the *Länder* Civil Servants Acts also provide that meetings are to be held regularly between the competent ministry and the umbrella organisations to discuss general and fundamental questions of civil service law (see paragraph 49 above). Such meetings constitute another possibility for trade unions to seek to persuade the employer to hear what they have to say on behalf of their members.

(γ) Individual right of each civil servant to be provided with "adequate maintenance"

133. Moreover, as explained in detail by the Federal Constitutional Court, the "principle of alimentation", a traditional principle of the German career civil service, guarantees civil servants an individual and enforceable constitutional right to be provided with "adequate maintenance", which must be commensurate with, *inter alia*, the civil servant's grade and responsibilities and be in keeping with the development of the prevailing economic and financial circumstances and the general standard of living (see paragraphs 43 and 44 above). The legislature is required to continuously adjust the remuneration of civil servants in order to comply with this principle and the Federal Constitutional Court has set out detailed and specific standards for the assessment of the adequacy of civil servants' remuneration. These include a duty to have regard to the results reached in collective agreements for contractual State employees in the public sector, as well as to the development of the nominal wage index and of the consumer price index (see paragraph 45 above). According to the Association of Civil Servants and Union for Collective Bargaining, the increase in remuneration of contractual State employees is thus usually transferred to and mirrored in the legislative provisions on civil servants' remuneration in order to comply with the constitutional duty to provide civil servants with "adequate maintenance" (see paragraph 97 above). Other elements taken into account in the assessment of the adequacy of civil servants' remuneration include their training and responsibilities and the average gross salaries of private-sector employees with comparable qualifications and responsibilities (see paragraph 45 above). Finally, it is the civil servants' net income which is decisive for the determination of the adequacy of the remuneration and which must enable the civil servant and his or her family to enjoy a way of life which is appropriate to the office held and which goes beyond meeting basic needs (see paragraph 44 above).

134. While proceedings for the judicial review of the adequacy of civil servants' remuneration have to be initiated by civil servants themselves, their trade unions are free to support such proceedings and have been invited by the Federal Constitutional Court to file *amicus curiae* briefs in the relevant cases (see the uncontested submission by the Government, at paragraph 90

above). Noting that the Federal Constitutional Court has found in several cases that civil servants' remuneration was in breach of Article 33 § 5 of the Basic Law and ordered the competent legislature to enact provisions which were in conformity with the "principle of alimentation" (see paragraph 46 above), the Court considers that civil servants are granted an effective means by which to enforce through the courts their individual constitutional right to be provided with "adequate maintenance", that is to say, an effective alternative means of defending their interests in relation to an essential working condition, and that they can rely on support from their trade unions in this connection.

(δ) Rights of representation and of co-determination

135. Lastly, domestic law requires that the representation of civil servants be ensured. Civil servants are entitled to be represented through staff councils (see paragraph 50 above). These councils are entitled, through the right to co-determination, to participate in staff, social and organisational matters relating *inter alia* to civil servants and may enter into service agreements with the relevant department (ibid.). While these rights are not union-related, they nonetheless need to be taken into account when assessing the prohibition on strikes by civil servants, as they enable civil servants to participate in the process of regulating some of their working conditions. Moreover, in certain *Länder*, umbrella trade-union organisations and the State agree on general regulations on matters that are subject to co-determination (ibid.).

iii. The objectives pursued by the prohibition on strikes

136. The Court reiterates that it accepts the Government's submission that the prohibition on strikes by civil servants as combined with several complementary, legally enforceable fundamental rights (see paragraphs 43-46 above) pursues the overall aim of providing for good administration. This reciprocal system of interrelated rights and duties (see paragraphs 24, 26 and 34 above) guarantees the effective performance of functions delegated to the civil service and thereby ensures the protection of the population, the provision of services of general interest and the protection of the rights enshrined in the Convention through effective public administration in manifold situations (see paragraph 118 above). In this connection, the Court observes, more generally, that restrictions on the right to strike may serve to protect the rights of others, which are not limited to those on the employer's side in an industrial dispute, and may serve to fulfil a Contracting State's positive obligations under its constitutional law, the Convention and other human rights treaties (see *National Union of Rail, Maritime and Transport Workers*, § 82, and *Association of Academics*, § 30, both cited above).

137. In the applicants' case, the contested restriction pursued the aforementioned objective to provide for good administration. The disciplinary decisions sought to ensure the continuous provision of education at State schools and to safeguard the right of others to education, as guaranteed by Article 7 § 1 of the Basic Law (see paragraph 37 above), Article 2 of Protocol No. 1 to the Convention and other international instruments (see paragraph 63 above). The Court would underline that the right to education, which is indispensable to the furtherance of human rights, plays a fundamental role in a democratic society (see *Leyla Şahin*, cited above, § 137, and *Timishev v. Russia*, nos. 55762/00 and 55974/00, § 64, ECHR 2005-XII). Primary and secondary education is of fundamental importance for each child's personal development and future success (see *Catan and Others v. the Republic of Moldova and Russia* [GC], nos. 43370/04 and 2 others, § 144, ECHR 2012 (extracts)). While the Convention does not dictate how education is to be provided and still less does it prescribe any specific status for teachers, the Court emphasises the huge importance, from a public-policy perspective, of an efficient educational system capable of providing teaching and educating children, in a credible manner, about freedom, democracy, human rights and the rule of law (see *Godenau v. Germany*, no. 80450/17, § 54, 29 November 2022). It cannot but agree with the Committee of Ministers that education is crucial to developing the democratic culture that democratic institutions and societies need in order to function and that public authorities should include quality education as a prominent element of their policies (see paragraph 64 above).

iv. Further rights encompassed by civil servant status

138. Beyond the rights granted to civil servants and their trade unions to defend occupational interests, domestic law grants civil servants a number of rights based on their status, including a right to lifetime employment and a right to be provided with "adequate maintenance" for life, including after retirement from active service and in the event of illness (see paragraphs 43 and 47 above). According to the Association of Civil Servants and Union for Collective Bargaining, in Germany civil servant status results in higher net pay than that of comparable contractual State employees in the public sector as well as better conditions regarding health care and a better pension scheme (see paragraph 97 above, and the submissions by the parties in paragraphs 82, 83 and 88). In Germany, civil servant status is thus more advantageous than contractual State employee status in several ways, both legally and in terms of resulting material conditions (compare and contrast *Demir and Baykara*, cited above, § 168, where the Court considered the Turkish Government's general reference to the privileged position of civil servants in relation to other workers as not constituting sufficient evidence to justify the exclusion of municipal civil servants from the right to collective bargaining; see also the third-party submission by the Association of Civil Servants and Union for

Collective Bargaining, at paragraph 97 above, that in Türkiye civil servants did not have a significantly better position as regards salary, health insurance and pension rights than contractual State employees). In this connection, the Court also observes that the employment conditions of State-school teachers in Germany, in terms of salary and teaching hours, compare favourably to those in most other Contracting Parties (see the uncontested submission by the Government referring to OECD material, at paragraph 88 above; see also *Federation of Offshore Workers' Trade Unions and Others*, cited above, where the Court took the level of the salaries in the relevant sector into account when assessing the proportionality of a measure prohibiting the continuation of strike action and imposing compulsory arbitration).

v. The possibility of working as a State school teacher under contractual State employee status with a right to strike

139. The Court further observes that there is no blanket ban on strikes in the public service in Germany, as contractual State employees, which account for some 62 per cent of all staff working in the public service (see the uncontested submission by the Government, at paragraph 92 above), do have a right to strike. State school teachers in the *Länder* in which the applicants worked or had worked, may, in principle, be employed with either civil servant status or contractual State employee status (see paragraphs 83, 92 and 97 above). The applicants were aware of this duality of employment status for State school teachers. The strikes in which the applicants participated were in part held in support of teachers with contractual State employee status (see paragraphs 9-11 and 33 above) and the applicants' discrimination complaint before this Court is based on the fact that teachers with contractual State employee status had not been sanctioned for their participation in the same strike (see paragraph 148 below).

140. It is a matter of dispute between the parties as to whether the applicants had the possibility of working as State school teachers with contractual State employee status (see paragraphs 83 and 92 above). As regards the choice of employment status at the time of their recruitment, a choice which the applicants claimed they did not have, the Court takes note of the Government's submission that the second and third applicants had from the outset limited their job applications to appointment as civil servants. The application form used by the third applicant at the time featured a box with the indication "the application is also valid for an application as a contractual State employee"; he did not tick that box. The first applicant had even worked as a teacher with contractual State employee status at an earlier point and then obtained civil servant status after she had explicitly asked for it (see paragraph 92 above). As to the possibility of a subsequent change from civil servant status to contractual State employee status, both parties agreed that, technically, the civil servant would have to ask for his or her dismissal and then be re-employed as a contractual State employee. Whereas the applicants

argued that there was no guarantee that dismissed civil servants would subsequently be re-employed with contractual State employee status (see paragraph 83 above), the Government maintained that, in practice, such change in status, with subsequent appointment as a contractual State employee, would be negotiated before a civil servant asked for his or her dismissal; the applicants' submission that asking to be dismissed would put the civil servant at risk of unemployment was therefore incorrect. They asserted that such change in employment status was well-established practice and possible in all *Länder*, including in the applicants' cases. They explained that the fact that very few teachers with civil servant status chose to change to contractual State employee status was due to the attractiveness of civil servant status (see paragraph 92 above), which in essence corresponds to the applicants' submission that a change from civil servant status to contractual State employee status would entail certain disadvantages. The Court notes that the applicants did not demonstrate that they had engaged with their employers regarding a potential change of their employment status from civil servant to public employee (see paragraph 83 above).

141. The applicants relied on the existence of the possibility of working as a State school teacher with contractual State employee status and a right to strike as an argument in support of their submission that there was no obstacle to allowing teachers with civil servant status to strike. It is true that teachers with contractual State employee status and a right to strike accounted for a certain percentage of State school teachers in the *Länder* in which the applicants worked – between 8.5 and 20 per cent in 2020/21 according to the figures submitted by the Government (see paragraph 92 above) and between 20 and 25 per cent nationwide according to the applicants (see paragraph 83 above) – and that consequently disruptions in the provision of education due to striking teachers could, and did, happen. This raises the question whether a requirement to ensure minimum service in State schools, or a restricted right of teachers with civil servant status to strike subject to certain requirements, could have been envisaged as a less restrictive measure than a general prohibition on strikes by civil servants (see paragraph 55 above). The applicants submitted that it was undisputed that no damage had been caused by their participation in the strikes as internal substitution arrangements had been made and that, in general, those teachers who had a right to strike had been considerate of the right to education. Moreover, they asserted that short work-stoppages were sufficient to advance the collective bargaining process (see paragraph 80 above).

142. As the impugned prohibition on strikes by civil servants is a general measure rooted in the Basic Law, as interpreted by the Federal Constitutional Court, and reflects a long-standing democratic consensus in Germany as well as the outcome of the weighing-up and balancing of different, potentially competing, interests, the central question for the Court in assessing the proportionality of this measure is not whether less restrictive rules could have

been adopted or, indeed, whether the State could prove that, without the impugned prohibition, the aim of providing continuous public education would not be achieved, but rather whether, in not making an exception for State school teachers with civil servant status, the constitutional legislature had acted within the margin of appreciation afforded to it (see *Animal Defenders International*, cited above, § 110). It is in this connection that the possibility for the applicants to be employed as State school teachers with contractual State employee status, with the right to strike, constitutes an element to be taken into account in the assessment of the proportionality of the prohibition on strikes imposed on the applicants as State school teachers with civil servant status (see also *mutatis mutandis Travaš v. Croatia*, no. 75581/13, 4 October 2016, where a teacher had knowingly and voluntarily opted for a certain special arrangement to become a teacher of religious education, which entailed certain privileges but also a requirement of special allegiance towards the teachings and doctrine of the church and consequently certain restrictions on his private life, and, more generally, *Savickis and Others*, cited above, § 183, as to the margin of appreciation being considerably wider if the status in question was subject to an element of personal choice). By providing for a duality of employment statuses for State school teachers, while rendering the status which comes with a prohibition on strikes considerably more attractive in practice (as the relevant figures show), the respondent State essentially reduced the potential impact of strikes in State schools.

vi. The severity of the impugned disciplinary measures

143. Although the main issue in the current case inevitably will be the effect of the ban on strikes, it being a constitutive element in the overall organisation of the civil service in Germany, rather than the severity of the sanctions for breaking the ban, the Court cannot but note that the first applicant was reprimanded (see paragraph 9 above), while the second and third applicants were given an administrative fine of EUR 100 each (see paragraph 10 above). The fourth applicant was initially given an administrative fine of EUR 1,500 (see paragraph 11 above), with that sum being reduced on appeal to EUR 300. The disciplinary decision against the fourth applicant was ultimately not enforced, however, as it had ceased to be valid because she had since left the civil service on her request (see paragraph 17 above). The disciplinary measures against the applicants were thus not severe (compare and contrast *Urcan and Others*, cited above, §§ 34-35, and *Saime Özcan*, cited above, §§ 22-23, where criminal sanctions had been imposed on teachers for having participated in strikes organised by their trade unions).

(iii) Overall assessment

144. Having regard to the foregoing, the Court reiterates that the impugned restriction on the right to strike of civil servants, including teachers with that status, such as the applicants in the present case, was severe in nature (see paragraphs 123-127 above). However, while the right to strike is an important element of trade-union freedom, strike action is not the only means by which trade unions and their members can protect the relevant occupational interests and Contracting States are in principle free to decide what measures they wish to take in order to ensure compliance with Article 11 as long as they thereby ensure that trade-union freedom does not become devoid of substance as a result of any restrictions imposed (see paragraph 128 above). In this connection, the Court emphasises that, in the respondent State, a variety of different institutional safeguards have been put in place to enable civil servants and their unions to defend occupational interests (see paragraphs 128-135 above). As explained above, civil servants' trade unions are granted a statutory right to participate in the drafting of statutory provisions for civil servants, who are also granted an individual constitutional right to be provided with "adequate maintenance", which they can enforce in court. The Court considers that these measures, in their totality, enable civil servants' trade unions and civil servants themselves to effectively defend the relevant occupational interests. The high unionisation rate among German civil servants illustrates the effectiveness in practice of trade-union rights as they are secured to civil servants. In this connection it is noteworthy that the Association of Civil Servants and Union for Collective Bargaining, the largest civil servants' union, representing about 50 per cent of all civil servants, submitted to the Court that civil servants already had all that could be gained by strike action owing to the constitutional rights which came with their status and advocated against granting civil servants a right to strike (see paragraphs 97 and 129 above).

145. Moreover, unlike the situation in the case of *Enerji Yapı-Yol Sen* (cited above, § 32), where a circular, which was issued five days before a national day of strike action and which prohibited civil servants from participating in that strike, was drafted in general terms, without any balance having been struck in relation to what was necessary in order to attain the aims enumerated in Article 11 § 2, the impugned prohibition on strikes by civil servants is a general measure reflecting the balancing and weighing-up of different, potentially competing, constitutional interests.

146. Reiterating that the more convincing the justifications for a general measure, the lesser the importance that will be attached by the Court to its impact in the particular case (see *Animal Defenders International*, cited above, § 109), the Court considers that the impact of the prohibition on strikes in the present case does not outweigh the aforementioned solid and convincing justifications for the restrictions entailed by the general measure as presented by the respondent Government and reflected in the extensive

assessment of the Federal Constitutional Court. In particular, having regard to the totality of the measures enabling civil servants' trade unions and civil servants themselves to effectively defend the relevant occupational interests, the prohibition on strikes does not render civil servants' trade-union freedom devoid of substance. Therefore that prohibition does not affect an essential element of civil servants' trade-union freedom as guaranteed by Article 11 of the Convention (see paragraphs 99 and 109-111 above). Moreover, the disciplinary measures against the applicants were not severe (see paragraph 143 above), they pursued, in particular, the important aim of ensuring the protection of rights enshrined in the Convention through effective public administration (in the specific case, the right of others to education), and the domestic courts adduced relevant and sufficient reasons to justify those measures, weighing up the competing interests in a thorough balancing exercise that sought to apply this Court's case-law throughout the domestic proceedings. The material employment conditions of teachers with civil servant status in Germany (see paragraph 138 above) further militate in favour of the proportionality of the impugned measures in the present case, as does the possibility of working as State school teachers under contractual State employee status with a right to strike (see paragraphs 139-142 above).

147. The Court thus concludes that the measures taken against the applicants did not exceed the margin of appreciation afforded to the respondent State in the circumstances of the present case and were shown to be proportionate to the important legitimate aims pursued. Accordingly, there has been no violation of Article 11 of the Convention.

III. ALLEGED VIOLATION OF ARTICLE 14 READ IN CONJUNCTION WITH ARTICLE 11 OF THE CONVENTION

148. The applicants complained that as teachers with civil servant status, against whom disciplinary measures had been taken following their participation in strikes, they had suffered discrimination in the enjoyment of their Convention rights compared to teachers employed under the private-law regime, who had not been disciplined for such participation. They relied on Article 14 read in conjunction with Article 11 of the Convention.

149. The Government objected that the applications were inadmissible in this respect as the applicants had failed to exhaust domestic remedies, as required by Article 35 § 1 of the Convention. The applicants had complained neither expressly nor in substance about a breach of Article 14 of the Convention or a breach of the corresponding constitutional right to equal treatment (Article 3 of the Basic Law) before the Federal Constitutional Court.

150. The applicants asserted that they had exhausted domestic remedies. They had raised in substance a complaint about a difference in treatment of teachers with civil servant status without a right to strike and teachers

employed under the private-law regime with a right to strike throughout the proceedings before the domestic courts, including the Federal Constitutional Court. It had not been necessary to expressly refer to the legal provisions concerned (Article 14 of the Convention and Article 3 of the Basic Law). To support their claim, the applicants referred to the following statements in the constitutional complaint by the third applicant, Mr Grabs:

> "[Page 8] It is not understandable why the same loyalty bond does not stand in the way of a strike by workers and employees, but a ban on strikes should be imposed on civil servants."

> "[Page 132] ... The European Convention on Human Rights only allows the right to strike to be structured differently according to different tasks/functions. If national law already assigns the same task (teaching) to both civil servants and teachers employed under private-law regimes, a differentiation cannot be justified against this background. The differentiation practised in Germany in the public sector between employees covered by collective bargaining with the right to strike and civil servants in public law employment relationships without the right to strike therefore does not correspond to the differentiation permitted under Article 11 § 2 of the Convention."

151. The Court reiterates that the purpose of the exhaustion rule is to afford a Contracting State the opportunity of addressing, and thereby preventing or putting right, the particular Convention violation alleged against it. It is true that under the Court's case-law it is not always necessary for the Convention to be expressly invoked in domestic proceedings, provided that the complaint is raised "at least in substance". This means that the applicant must raise legal arguments to the same or like effect on the basis of domestic law, in order to give the national courts the opportunity to redress the alleged breach. However, as the Court's case-law bears out, to genuinely afford a Contracting State the opportunity of preventing or redressing the alleged violation requires taking into account not only the facts but also the applicant's legal arguments for the purposes of determining whether the complaint submitted to the Court has indeed been raised beforehand, in substance, before the domestic authorities. That is because "it would be contrary to the subsidiary character of the Convention machinery if an applicant, ignoring a possible Convention argument, could rely on some other ground before the national authorities for challenging an impugned measure, but then lodge an application before the Court on the basis of the Convention argument" (see *Hanan v. Germany* [GC], no. 4871/16, § 148, 16 February 2021).

152. The Court notes that all four applicants were legally represented before the Federal Constitutional Court and they all lodged separate constitutional complaints. They presented very comprehensive and detailed arguments, and relied extensively on the case-law of this Court, the practice of the ECSR and on international labour law as interpreted by the competent monitoring bodies, in support of their claim that they had to be granted a right to strike as teachers with civil servant status who did not hold functions involving the exercise of core elements of public authority; they alleged that

the administrative courts had failed to interpret national law in line with these European and international standards and had thereby violated Article 9 § 3 of the Basic Law and Article 11 of the Convention (see paragraph 19 above). The Court observes that three of the four applicants did not even claim before this Court that they had made any submissions relating to an alleged discrimination compared to employees under a private-law regime, despite an explicit request by the Court to refer to the relevant parts of their constitutional complaints. Instead, the applicants referred to the aforementioned statements contained in the constitutional complaint of the third applicant alone. The Court observes that that constitutional complaint, which was prepared by two lawyers, runs to a total of 149 pages and the legal arguments in respect of the alleged Article 11 violation are raised in a very thorough and detailed manner. The first of the two aforementioned statements is made in the part summarising the third applicant's submissions before the administrative court (on page 8 of the constitutional complaint). The second statement is made in the part of the constitutional complaint which thoroughly discusses this Court's case-law on Article 11 and the transferability of that case-law to civil servants in Germany (on page 132 of the constitutional complaint); the statement itself explicitly refers to Article 11 § 2 of the Convention.

153. The Court considers that the inclusion, in passing, of the two aforementioned statements in the third applicant's submissions – which are characterised by very comprehensive and detailed submissions in respect of an alleged violation of Article 11 of the Convention – cannot be considered as a sufficiently substantiated discrimination complaint which would legitimately lead to the expectation that the Federal Constitutional Court would entertain such complaint. There was no comprehensive argument as to why the applicant, in his view, had a right to strike based on the fact that he would otherwise be discriminated against compared with contractual State employees. The third applicant's entire constitutional complaint was framed as alleging a violation of Article 9 § 3 of the Basic Law and Article 11 of the Convention – to which the Federal Constitutional Court responded in great detail. It would run counter to the purpose of the exhaustion rule if the two aforementioned statements in passing were to be deemed sufficient – not least given that the submission was extremely thorough with respect to Article 11 – for the purposes of exhausting domestic remedies in respect of an Article 14 complaint. As could be expected from the way the third applicant's constitutional complaint was framed, the Federal Constitutional Court exclusively and extensively addressed the alleged violation of Article 11 of the Convention, but did not address Article 14 of the Convention or Article 3 of the Basic Law. It would therefore not be in line with the purpose of the exhaustion rule if a case that was argued as an Article 11 case by the applicants at the domestic level and which was thoroughly examined with respect to that Article by the Federal Constitutional Court were now to be

examined, for the first time under Article 14 in conjunction with Article 11, by this Court. In this connection, the Court reiterates that the assessment of domestic courts is particularly important in relation to discrimination complaints, as complex issues of comparators and justifications arise (see *Vučković and Others v. Serbia* (preliminary objection) [GC], nos. 17153/11 and 29 others, 25 March 2014, and *Advisory opinion on the difference in treatment between landowners' associations "having a recognised existence on the date of the creation of an approved municipal hunters' association" and landowners' associations set up after that date* [GC], request no. P16-2021-002, French *Conseil d'État*, § 66, 13 July 2022).

154. The Government's objection must therefore be allowed and this part of the application is declared inadmissible for non-exhaustion of domestic remedies, pursuant to Article 35 §§ 1 and 4 of the Convention.

IV. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

155. The applicants furthermore complained under Article 6 § 1 of the Convention that the Federal Constitutional Court had failed to address their essential argument that their right as civil servants to strike was recognised in international labour law.

156. The Government maintained that there had been no violation of Article 6 § 1 of the Convention. The Federal Constitutional Court had dealt extensively with the applicants' arguments relating to the constitutional rights of civil servants and, specifically, with the arguments relating to the effects of the Convention and of the relevant judgments delivered by the Court. In doing so, it also took into account the effects of international labour law on the Court's case-law. The effects of Germany's international obligations regarding a possible right to strike, including the obligations under international labour law, had thus been dealt with comprehensively.

157. The Court reiterates that while Article 6 § 1 does oblige the courts to give reasons for their decisions, it cannot be understood as requiring a detailed answer to every argument (see *Perez v. France* [GC], no. 47287/99, § 81, ECHR 2004-I). The Federal Constitutional Court extensively discussed this Court's case-law regarding trade-union freedom and, when doing so, explained that this Court took into account other international instruments when interpreting Article 11 of the Convention (see paragraph 32 above). The Court thus considers that the Federal Constitutional Court sufficiently dealt with the question of Germany's international obligations regarding a possible right to strike, including obligations under international labour law, and gave specific and explicit reasons for rejecting the applicants' claim that they had a right to strike (see *Petrović and Others v. Montenegro*, no. 18116/15, §§ 41 and 43, 17 July 2018).

158. It follows that this complaint is manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention and must be declared inadmissible under Article 35 § 4.

FOR THESE REASONS, THE COURT

1. *Declares*, unanimously, the complaint concerning Article 11 of the Convention admissible and the remainder of the applications inadmissible;

2. *Holds*, by sixteen votes to one, that there has been no violation of Article 11 of the Convention.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 14 December 2023, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Johan Callewaert Deputy to the Registrar	Síofra O'Leary President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

(a) concurring opinion of Judge Ravarani;
(b) dissenting opinion of Judge Serghides.

S.O.L.
J.C.

CONCURRING OPINION OF JUDGE RAVARANI

I voted with my colleagues in finding no violation of Article 11 of the Convention in respect of the sanction imposed on the applicants for participating in a strike in spite of the blanket ban on strikes applying to their civil servant status.

A personal choice. As a matter of fact, Germany seems to be the only member State of the Council of Europe to impose a blanket ban on civil servants in the educational sector (see paragraph 67 of the judgment). There is another distinctive feature of the German system, namely a duality of career paths in the educational system and the possibility of choosing between them, even with the right to change from one to the other: either to be a civil servant without the right to strike, or to have public employee status with such right. The judgment explains in depth that education in the public sector is not only provided by civil servants, but also by contractual State employees, who have the right to strike (see paragraphs 139 et seq.). Importantly, although this was disputed by the applicants, there is an initial choice as to which career path is embraced and, moreover, teachers employed under civil servant status can change to that of contractual State employee. Of course, one could ask why the advantages of civil servant status have to be offset by a total ban on strikes, but still, and despite the question whether such choice is really free, the absence of the right to strike can be considered the result of an option entailing a waiver of such right in the event that a civil service career is chosen. This aspect prompted me to vote for the finding of no violation of Article 11 of the Convention.

Some questions. I do feel, however, compelled to add some explanations for my vote as I have serious doubts as to most of the other reasons adduced by the German authorities for imposing such a blanket ban on strikes by civil servants in the educational sector. My doubts cover the legitimate aim as well as the proportionality of the measure imposed. It should be borne in mind, in this context, that whatever the extent of the member State's margin of appreciation, what is at stake in the present case is not a mere restriction on the right to strike, but a blanket ban on such right imposed on a certain category of people. It is not based on the specificities of their activity, but on their status as civil servants.

The right of others to education. Whereas there is no problem with regarding good administration as a legitimate aim of the ban on strikes and as a valid objective pursued by the measure in the proportionality assessment, one may wonder whether the protection of the rights of others (see paragraphs 118 and 136 et seq. of the judgment) can justify such a total ban. To admit such an aim as legitimate goes very far, as in many circumstances a strike will indeed affect the rights of others, e.g. in the field of access to medical care. Is not the very purpose of a strike to create some disruption and to – at least indirectly – affect the situation of others, for example in the field

of transport, waste collection, etc.? Will acknowledging the rights of others as a legitimate aim for imposing a ban on strikes, moreover considered to be a proportionate measure, not open the floodgates for allowing the prohibition of strikes in any field of activity? Human activities are very much interrelated, and each activity has an impact on the rights and comfort of others. Many aspects of human life are protected by the rights under Article 8 of the Convention. Would each and every negative impact of a strike on such rights have to be examined as an encroachment on the rights of others?

Is education an "essential service"? In its judgment, the Federal Constitutional Court (FCC) considered education to be part of the core activities of the administration of the State, an area where Article 11 § 2 of the Convention allows restrictions on the right to strike. It should be borne in mind, in this context, that the right to education, whose importance nobody can seriously challenge, is generally not considered an essential service – in the sense of exercising public authority in the name of the State and/or providing essential services – under the specialised international instruments (see paragraphs 55, 58 and 125 of the judgment). It is true that, as highlighted in paragraph 126 of the judgment, the Court's task was limited to the interpretation of the Convention and to a determination as to whether the relevant domestic law in its application to the applicants was proportionate for the purposes of Article 11 § 2 of the Convention. However, according to the Court's consistent case-law, the Convention cannot be interpreted in a vacuum and should as far as possible be interpreted in harmony with other rules of international law of which it forms part (see, for example, *Demir and Baykara v. Turkey* [GC], no. 34503/97, §§ 76 et seq., 12 November 2008; see also *Al-Adsani v. the United Kingdom* [GC], no. 35763/97, § 55, 21 November 2001, and *Hassan v. the United Kingdom,* [GC], no. 29750/09, § 77, 16 September 2014). Here, the discrepancy with the position adopted by virtually all the specialised international bodies is striking. Moreover, the Court's own case-law calls for a restrictive approach to the notion of members of the administration[1]. Incidentally, if education is to be considered an essential service which does not allow any disruption, why do teachers under contractual employment status have the right to strike?

A further argument developed by the FCC in its judgment, namely that to divide civil servants into two groups, having or not having the right to strike based on their different functions, would entail difficulties of distinction that were connected to the concept of public authority, also fails to convince, as other States, where some civil servants have the right to strike and others do not, manage to draw such a distinction.

The "package" argument. According to the German authorities, the ban on strikes by civil servants is part of an "integral system which is

[1] See Filip Dorssemont, "The Right to Take Collective Action under Article 11 ECHR", in Filip Dorssemont, Klaus Lörcher and Isabelle Schönmann (eds), *The European Convention on Human Rights and the Employment Relation*, Hart (Oxford and Portland) 2013, at p. 351.

characterised by different parameters" and the prohibition on strikes is thus counterbalanced by various factors. The German authorities consider that allowing strikes in addition to all the other advantages provided by civil servant status would amount to cherry-picking.

Without going into the details of this "package", some points may be highlighted. While the principles of "alimentation" and of lifetime employment surely constitute weighty arguments, the simple question in this context is why the duty of loyalty, the foreseeable career, the full dedication and duty of neutrality should prevent civil servants from striking. Would it be loyal to strike in the private sector but not in the public sector? So a doctor working under employee status who has to save lives may strike while a civil servant in the educational sector may not? Why would it be disloyal for civil servants and not for other people employed in the public sector? Is it really impossible to abide by all the relevant obligations and nevertheless have the right to strike? To put it simply: is it disloyal in itself to strike? There can of course be disloyal behaviour in the organisation of strikes, especially if they are aimed at disrupting the provision of essential services. However, such action can legitimately be prohibited or restricted and efficiently combatted via judicial means.

It is true that German civil servants have means other than strikes by which to defend their interests *vis-à-vis* their employer, namely the right to form and join trade unions, which have a statutory right to participate in the legislative process when legal provisions for the civil service are drawn up and to bring court proceedings against the State if they consider that their remuneration is no longer adequate. However, and once again, would the right to strike fundamentally call these rights into question? Some adaptation might be necessary, but that should not be a reason for imposing a blanket ban on the right to strike for civil servants[2]. Moreover, the scope of the right to sue is not entirely clear. Does it go beyond the right to claim better remuneration and include, for instance, demands for better working conditions?

Conclusion. While the choice offered in Germany to teachers in the State educational sector, between civil servant status and that of contractual State employee, may serve to establish the legitimacy and proportionality of an absolute ban on strikes in the case of the former, while the latter are permitted to strike, the other reasons put forward to justify such a ban may at least be questioned.

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[2] The right to strike of civil servants does not necessarily imply the right to collective bargaining, see the concurring opinion of Judge Spielmann, joined by Judges Bratza, Casadevall and Villiger in *Demir and Baykara*, cited above.

DISSENTING OPINION OF JUDGE SERGHIDES

Introduction

1. All four applicants in the present case were, at the relevant time, State-school teachers with civil servant status under German law. They complained before the Court that the disciplinary measures against them for having participated in a strike, as well as the general prohibition on strikes by civil servants, on which those measures were based, had violated their right to freedom of assembly and association, as provided for in Article 11 of the Convention, which reads as follows:

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

In particular, the four applicants participated in strikes, which included a demonstration, organised by the Trade Union for Education and Science, of which they were members, during their working hours, in order to protest against worsening working conditions for teachers (see paragraph 8 of the judgment).

2. In accordance with the decision of 12 June 2018 of the Second Senate of the Federal Constitutional Court (FCC), all civil servants in Germany, including the applicants, are prohibited from participating in trade union or industrial action. In other words, there is a total ban on strike action concerning all civil servants, purely on account of their status.

3. The Court in its judgment rightly observes that the prohibition on strikes by civil servants, including teachers with that status, is based on their status and is absolute, adding that the restriction on the right to strike by German civil servants, including the applicants, can thus be characterised as severe in nature (see paragraphs 123 and 144 of the judgment).

4. While I voted in favour of point 1 of the operative provisions of the present judgment, declaring the complaint concerning Article 11 of the Convention admissible, and the remainder of the complaints inadmissible, I voted against point 2 of the operative provisions of the judgment, that there has been no violation of Article 11 of the Convention. I have a methodological, conceptual and substantive difficulty in subscribing to the judgment and in particular regarding its approach, leading as it does to the conclusion that there has been no violation of Article 11.

I. The correlation between the rights to collective bargaining and to strike and the right to freedom of association

5. The right to strike is a collective human right. As Ruth Ben-Israel explains[3]:

> "If the right to strike is to be considered on the plane of international human rights as the right of workers to refuse in a concerted fashion to perform their work in order to advance collective bargaining, it follows that it also be classified on this plane as a collective right. The reason for this is that the elements which comprise the right are in consonance with the definition of collective rights, at least in terms of the implementation of the work stoppage. This is so because we do not refer to a right which is open to the person individually, but to something which – although performed by the individual – must be performed in accordance with a decision of the group and in concert with the others who comprise the group."

6. The Court has recognised the right to collective bargaining as an essential element of the right to freedom of association under Article 11 § 1 (see paragraph 100 of the present judgment, and *Demir and Baykara* [GC], no. 34503/97, § 154, ECHR 2008). Furthermore, as the present judgment acknowledges, "the right to strike allows a trade union to make its voice heard and constitutes an important instrument for the trade union to protect the occupational interests of its members and in turn for the members of a trade union to defend their interests" (see paragraph 104 of the judgment).

7. However, the judgment considers that the question whether a prohibition on strikes affects an essential element of trade-union freedom, because it renders that freedom devoid of substance in the circumstances – a question which the Court has so far left open – is a context-specific question that cannot therefore be answered in the abstract or by looking at the prohibition on strikes in isolation, but rather, requires an assessment of all the circumstances of the case, in consideration of the totality of the measures taken by the respondent State to secure trade-union freedom and a number of other aspects including individual rights (see paragraphs 109-110 of the judgment). Such an approach reminds one of the overall fairness approach (and the associated counterbalancing of rights) employed by the Court regarding the right to a fair trial under Article 6 of the Convention.

8. I respectfully hold a differing viewpoint on this matter. I consider that the right to strike is an indispensable component or element or aspect of the right to freedom of association and specifically trade-union freedom under Article 11 of the Convention in all circumstances[4]. The character and nature of the right to strike, as an element of freedom of association, cannot depend

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[3] See Ruth Ben-Israel, "Is the Right to Strike a Collective Human Right?", in *Israel Yearbook on Human Rights*, Volume II, 1981, 195, at pp. 214-215.

[4] See on this subject, Filip Dorssemont, "The Right to Take Collective Action under Article 11 ECHR", in Filip Dorssemont, Klaus Lörcher and Isabelle Schömann (eds), *The European Convention on Human Rights and the Employment Relation* (Hart Publishing, Oxford, 2013), 333, at pp. 334-336.

on specific circumstances and vary from case to case; that right is part of the "DNA" – and norm of effectiveness – of freedom of association and should always be treated as such. It would be paradoxical for the right to collective bargaining to be recognised by the case-law (see *Demir and Baykara*, cited above, § 154) as an essential element of freedom of association, while the right to strike, which is intrinsically and inseparably associated with the right to collective bargaining, is not also considered an essential element of freedom of association in all circumstances, but rather depends on the circumstances of each case. As the applicants rightly argued in this connection (see paragraph 77 of the judgment):

> "The necessary linkage of the right to collective bargaining and the right to strike was a legal principle recognised worldwide and constituted customary international law ... It was illustrated by the well-known principle 'without the right to strike, collective bargaining would amount merely to collective begging'. Conversely, denying the right to strike to all civil servants also meant denying them a right to collective bargaining, which was recognised as an essential element of freedom of association under Article 11. Without the effective possibility of participating in trade-union industrial action, a right to membership in a trade union alone was unsubstantial."

Undoubtedly, therefore, there is a functional link between the right to bargain collectively and the right to strike[5].

9. The right to strike is a core value of a democratic society. Former UN Special Rapporteur for Freedom of Association and Assembly, Maina Kiai, in a UN Press Release (9 March 2017)[6], insightfully acknowledged and underlined that the right to strike is an intrinsic corollary of the fundamental right of freedom of association and that there is a link between the right to strike and democracy:

> "The right to strike is also an intrinsic corollary of the fundamental right of freedom of association. It is crucial for millions of women and men around the world to assert collectively their rights in the workplace, including the right to just and favourable conditions of work, and to work in dignity and without fear of intimidation and persecution. Moreover, protest action in relation to government social and economic policy, and against negative corporate practices, forms part of the basic civil liberties whose respect is essential for the meaningful exercise of trade union rights. This right enables them to engage with companies and governments on a more equal footing, and Member States have a positive obligation to protect this right, and a negative obligation not to interfere with its exercise.
>
> Moreover, protecting the right to strike is not simply about States fulfilling their legal obligations. It is also about them creating democratic and equitable societies that are sustainable in the long run. The concentration of power in one sector – whether in the hands of government or business – inevitably leads to the erosion of democracy, and an

[5] See on this subject, also Filip Dorssemont, "The Right to Take Collective Action under Article 11 ECHR", cited above, 333, at p. 339.

[6] See Former UN Special Rapporteur for Freedom of Association and Assembly, Maina Kiai, UN Press Release (9 March 2017), entitled: "UN rights expert: Fundamental right to strike must be preserved" (available at: www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights).

> increase in inequalities and marginalization with all their attendant consequences. The right to strike is a check on this concentration of power.
>
> I deplore the various attempts made to erode the right to strike at national and multilateral levels. In this regard, I welcome the positive role played by the ILO's Government Group in upholding workers' right to strike by recognizing that 'without protecting a right to strike, freedom of association, in particular the right to organize activities for the purpose of promoting and protecting workers' interests, cannot be fully realized.'
>
> I urge all stakeholders to ensure that the right to strike be fully preserved and respected across the globe and in all arenas."

The link between strike action and democracy has further been elaborated by Jeffry Vogt, Janice Bellace, Lance Compa, K D Ewing, Lord Hendy QC, Klaus Lörcher and Tonia Novitz[7].

10. The judgment fails to see that striking is aimed at negotiations and collective bargaining, and that it is the right of collective bargaining which is also curtailed by the impugned measures[8].

11. It is pertinent to note that the word "including" in Article 11 § 1 of the Convention shows that the brief enumeration of the sub-rights mentioned there is not an exhaustive one, therefore leaving room for the right to strike to be included therein. The interpretation made by the Court of freedom of association, as regards whether the right to strike is an element of that freedom, is very restrictive and runs counter to the principle of effectiveness, which requires that the rights should be interpreted and applied broadly, while any limitation to them should be interpreted narrowly and restrictively.

12. Article 8 of the International Covenant on Economic, Social and Cultural Rights of 1967, an international text seventeen years more recent than the Convention, adopts *in verbatim* in its paragraph 2, the second sentence of Article 11 § 2 of the Convention and it expressly provides in its paragraph 1(d) that States Parties to the Covenant undertake to ensure the right to strike (see also paragraph 53 of the present judgment). In addition, Article 22 § 1 of the International Covenant on Civil and Political Rights of 1966, though it does not expressly provide for a right to strike, has been interpreted by the UN Human Rights Committee as providing for such right (see also paragraph 54 of the present judgment). As the present judgment observes in paragraph 62, the Inter-American Court of Human Rights, drawing on international material, has stated that the right to strike could be considered a general principle of international law, being an "essential component" of freedom of association and freedom to organise. It has

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[7] See Jeffrey Vogt, Janice Bellace, Lance Compa, K D Ewing, Lord Hendy QC, Klaus Lörcher and Tonia Novitz, *The Right to Strike in International Law* (Hart, Oxford, 2021), preface, xi-xiii.

[8] See also paragraph 4 of the joint dissenting opinion of Judges Serghides and Zünd in *Association of Civil Servants and Union for Collective Bargaining and Others v. Germany*, nos. 815/18 and others, 5 October 2022.

considered, however, that the exercise of the right to strike could be restricted or prohibited, but only in the case of civil servants who serve as arms of public power and exercise authority on behalf of the State, together with workers in essential services (ibid). Vogt, Bellace, Compa, Ewing, Lord Hendy, Lörcher and Novitz strongly support with convincing arguments that the right to strike is recognised as customary international law[9].

I thus submit that the same approach as that of the Inter-American Court of Human Rights should be followed by the European Court of Human Rights. If the right to strike is a general principle of international law – which in my submission it is – it should be considered as such and be respected by all international and domestic courts. After all, the Convention is part of international law and should be interpreted in harmony with the general principles of international law, that being a function or aspect of the principle of effectiveness.

13. Furthermore, the United Nations Committee on Economic, Social and Cultural Rights in its observations in relation to Germany's obligations under International Labour Organisation Conventions No. 87 and 98 (ratified by Germany), on "the Freedom of Association and Protection of the Right to Organise" and "the Right to Organise and Collective Bargaining Convention", respectively, recalls, *inter alia,* that all public service workers, other than those engaged in the administration of the State, should enjoy collective bargaining rights and, in particular, to have recourse to strike action (see paragraph 56 of the judgment).

14. Importantly, the European Trade Union Confederation, the German Trade Union Confederation and the Trade Union for Education and Science, all submitted, as third-party interveners in the proceedings before the Court, that an absolute prohibition on strikes by all civil servants, and in particular teachers who do not perform duties involving the exercise of public authority, due to their status alone, violates Article 11 of the Convention (see paragraph 95 of the judgment), thus, in effect, considering that the right to strike is an essential element of the right to freedom of association.

II. The critical passages from the judgment against which my dissent lies

15. The critical or crucial passages from the judgment against which my dissent lies, are those of paragraphs 114-115, which read as follows:

> "114. The Government argued that the impugned measures were justified under the first sentence of Article 11 § 2 as they served in particular to protect the rights and freedoms of others. The Government stated that they were not primarily relying on the second sentence of Article 11 § 2 (see paragraph 85 above). In these circumstances, the Court does not consider it necessary to determine whether the applicants as teachers

[9] See Vogt, Bellace, Compa, Ewing, Lord Hendy, Lörcher and Novitz, *The Right to Strike in International Law*, cited above, Chapter 11, at pp. 168-175.

with civil servant status could be said to be 'members of the administration of the State' for the purposes of Article 11 § 2 *in fine*, a question which the Court left open in *Vogt* (see *Vogt v. Germany*, 26 September 1995, § 68, Series A no. 323). The Court reiterates, however, that the concept of 'the administration of the State' should be interpreted narrowly, in the light of the post held by the official concerned (see *Vogt*, cited above, § 67; *Grande Oriente d'Italia di Palazzo Giustiniani v. Italy*, no. 35972/97, § 31, ECHR 2001-VIII; and *Demir and Baykara*, cited above, §§ 97 and 107).

115. To be justified under the first sentence of Article 11 § 2, the interference complained of must be shown to be 'prescribed by law', to pursue one or more legitimate aims, and to be 'necessary in a democratic society' in order to achieve such aims. To be considered necessary in a democratic society, it must be shown that the interference corresponded to a 'pressing social need', that the reasons given by the national authorities to justify it were relevant and sufficient and that the interference was proportionate to the legitimate aim pursued. Regard must be had to the fair balance to be struck between the competing interests of the individual and of the community as a whole (see *Association of Academics*, cited above, § 25)."

III. No absolute prohibition can be treated as a restriction falling within the ambit of the first sentence of Article 11 § 2

16. While the judgment acknowledges that the ban on strike action for civil servants, including teachers with civil servant status, as the applicants were at the relevant time in the present case, is an absolute, total and general prohibition on the right to freedom of assembly and association, based only on the status of persons as civil servants, it nevertheless fails to consider that such ban, by its nature, cannot have any exceptions and is not susceptible or subject to any proportionality or balancing test, irrespective of the facts and circumstances of the case. An absolute or blanket ban is an unconditional ban, and, by its nature, is the epitome of inflexibility, indeed inflexibility in the extreme, leaving no room for any exception or weighing-up of interests. A blanket ban is a comprehensive and complete prohibition, encompassing all aspects or elements relating to the subject matter, without exception. Consequently, the judgment fails to see that such an absolute ban automatically breaches Article 11 § 1 of the Convention, without any further examination being required under Article 11 § 2. An absolute prohibition, restriction or ban amounts to a complete negation of the right concerned. Instead the judgment considers the ban on strike action for civil servants as a restriction falling within the first sentence of Article 11 § 2 of the Convention and examines it under the requirements of that provision (see paragraphs 113-147).

17. Accordingly, such treatment of an absolute and total prohibition is conceptually erroneous, leading to an entirely flawed interpretation and application of Article 11, running counter to the principle of effectively protecting the right concerned, the principle of effectiveness, which militates against any inflexibility and formalism. For example, it makes no sense to examine whether an absolute ban is necessary in a democratic society, using

the proportionality test, as the judgment does in paragraphs 119-147, when such a ban, by its very nature, is not capable of passing that test. More simply, a complete negation of a right, which is the effect of the absolute ban in the present case, cannot, by its nature, be proportionate. In my humble view, since no proportionality test can be associated with an absolute ban, not only is it irrelevant, but also it does not make sense for the judgment in the first place to deal with the right of civil servants to be provided by the State with adequate maintenance ("the principle of alimentation", see paragraphs 43-46 of the judgment) and the other rights conferred upon civil servants (referred to in paragraphs 133-138 of the judgment), and, subsequently, to consider these rights, which give rise to status-related benefits and advantages, as capable of counterbalancing the absolute ban. In any event, an absolute ban on strikes directly and automatically violates the right to freedom of assembly and association, leaving no room for any further examination and evaluation.

I contend that the principle of effectiveness, through its defensive operation, functions as the immune system of the right under Article 11 § 1. It prevents an absolute prohibition from finding a place or establishing a presence in the first sentence of Article 11 § 2, rather treating such a ban as a pathogen or parasite.

18. The Court cannot and should not try to alter the nature of an absolute prohibition, a total negation in breach of Article 11, by treating it as a limitation or restriction falling under the first sentence of Article 11 § 2. Such an approach, apart from being conceptually wrong, is also a non-pragmatic one.

19. Another finding in the judgment which is truly problematic for me is that, in its paragraph 144, after reiterating "that the impugned restriction on the right to strike of civil servants, including teachers with that status, such as the applicants in the present case, was severe in nature", the Court holds:

> "However, while the right to strike is an important element of trade-union freedom, strike action is not the only means by which trade unions and their members can protect the relevant occupational interests and the Contracting States are in principle free to decide what measures they wish to take in order to ensure compliance with Article 11 as long as thereby ensure that trade-union freedom does not become devoid of substance as a result of any restrictions imposed (see paragraph 128 above)."

I really find it extremely difficult to accept that the choice of means by which to exercise a human right or a fundamental freedom should not depend on the will of the holder of the right or the freedom in question, but on the will ("freedom") of the Contracting State. The human rights and fundamental freedoms safeguarded in the Convention are meant to be enjoyed by individuals and not by the States. For the same reason, and in view of everything I have explained in this opinion, I am unable to subscribe to the conclusion of the judgment (paragraph 147):

> "The Court thus concludes that the measures taken against the applicants did not exceed the margin of appreciation afforded to the respondent State in the circumstances

of the present case and were shown to be proportionate to the important legitimate aim pursued. Accordingly, there has been no violation of Article 11 of the Convention."

Contrary to what is stated in paragraph 147 of the judgment, as has been explained above, an absolute ban on strikes cannot be examined under the ambit of the first sentence of Article 11 § 2; therefore, the respondent State is not afforded any margin of appreciation to take such a decision under this provision.

20. Even if I were to follow the view of the Court that the character of the right to strike, as an essential element of trade-union freedom, is context-specific, again, I would disagree with its approach of examining the absolute ban within the first sentence of Article 11 § 2, because such an approach cannot enable an absolute ban on strikes to be examined, as if it were a limitation or restriction falling under that first sentence; it is the absolute ban which is not susceptible to any proportionality test under the first sentence of Article 11 § 2, and not the character of the right to strike as an essential element of the right to freedom of association.

IV. What led the Court to decide the present case by relying only on the first sentence of Article 11 § 2?

21. To analyse paragraph 114 of the judgment, quoted above, what the Court says there is that it "does not consider it necessary to determine whether the applicants as teachers with civil servant status could be said to be 'members of the administration of the State' for the purposes of Article 11 § 2 *in fine*", because "the Government [had] argued that the impugned measures were justified under the first sentence of Article 11 § 2 as they served in particular to protect the rights and freedoms of others", and because "the Government [had] stated that they were not primarily relying on the second sentence of Article 11 § 2". The Court in the next sentence of the judgment reiterated, however, "that the concept of 'the administration of the State' should be interpreted narrowly, in the light of the post held by the official concerned".

22. With all due respect, the above are unconvincing arguments to explain why the Court decided the present case by relying merely on the first sentence of Article 11 § 2. The Government did not argue that they were not relying at all on the second sentence of Article 11 § 2. What they argued is that they were not *primarily* relying on that second sentence, implying that they were also relying on it to some extent. Importantly, the German Federal Constitutional Court clearly based its decision of 12 June 2018 on both the first and second sentences of Article 11 § 2. This is clear from paragraph 176 of the said decision:

"Regardless of the question whether the ban on strike action for civil servants constitutes an interference with Art. 11(1) ECHR, it is in any case justified under

Art. 11(2) first sentence (aa) and Art. 11(2) second sentence ECHR (bb) based on the particularities of the German system of the career civil service."

23. The Court decided to examine the issue under the first sentence of Article 11 § 2, accepting the Government's stance that the impugned measures were justified under that first sentence, as they pursued legitimate aims and served in particular to protect the rights and freedoms of others and to provide good administration (see paragraphs 114, 118 and 136 of the judgment).

24. The Court avoided examining the issue also under the second sentence of Article 11 § 2, while showing, at the same time, its difficulty to accept that the measure might fall under that second sentence, if it had been required to so determine. This difficulty is reflected in the following words of the Court: "The Court reiterates, however, that the concept of 'the administration of the State' [in Article 11 § 2 *in fine*] should be interpreted narrowly, in the light of the post held by the official concerned" (see paragraph 114 of the judgment).

25. With all due respect, since the Court examined the issue under the first sentence of Article 11 § 2, such an approach was absolutely wrong, and there is no need to elaborate again on what has been said above under part III of this opinion, namely that no absolute prohibition can be treated as a restriction falling within the ambit of the first sentence of Article 11 § 2.

V. Whether an absolute prohibition, as the ban on strike action by civil servants, may fall within the ambit of Article 11 § 2 *in fine*

26. I have argued elsewhere that "[u]ntil now we have known that the Convention makes provision for some absolute rights, but not for absolute restrictions. An absolute restriction leads to the death of a right or to no right at all"[10]. However, in the whole of the Convention and the Protocols thereto, one absolute restriction can be found, which appears to be the only one, namely that provided for by the second sentence of Article 11 § 2.

27. In my submission, an absolute prohibition may fall within the second sentence of Article 11 § 2 under two conditions: (a) if it is "lawful"; and (b) if it concerns the "imposition of lawful restrictions on the exercise of these rights by members of the armed forces, or of the police or of the administration of the State".

28. Such a prohibition, if lawful, can be an absolute one within the margin of appreciation of the relevant member State, because unlike the first sentence of Article 11 § 2, according to the second sentence the restrictions do not have to be "necessary in a democratic society" (a phrase which is missing from the second sentence of Article 11 § 2), and, therefore, do not entail a requirement

[10] See paragraph 71 of my partly dissenting opinion in *Regner v. the Czech Republic* [GC], no. 35289/11, 19 September 2017.

of proportionality. The word "lawful" in Article 11 § 2 *in fine* means that "a restriction need only have a basis in national law and ... [does] not also entail a requirement of proportionality"[11]. If the necessity requirement were also to apply regarding the second sentence of Article 11 § 2, then that sentence would be obsolete, as it would not add or differentiate anything to or from the first sentence. However, it has also been argued that "the mere fact that they belong to the categories concerned [i.e., citizens belonging to either of the three categories in Article 11 § 2 *in fine*] does not imply that a restriction will need to be considered per se as justified"[12]. Contrary to this view, it is clear to me that the Contracting Parties to the Convention are not precluded from imposing on members of the three categories mentioned in the second sentence of Article 11 § 2, lawful restrictions on the exercise of their rights under Article 11 § 1, even if this entails an absolute prohibition. It is another matter, of course, whether a democratic and social State should deem it appropriate, 73 years after the enactment of the Convention, to exercise its discretion in imposing a restriction on the members of the three categories concerned in the form of a blanket ban.

29. Thus the second sentence of Article 11 § 2 is *lex specialis* in relation to its first sentence: it is an exception to its first sentence, thus an exception to an exception to the right to freedom of assembly and association, as it is not subject to the principle of proportionality.

VI. Are the first and second sentences of Article 11 § 2 mutually exclusive?

30. From my standpoint, the first and second sentences of Article 11 § 2 are mutually exclusive. An absolute prohibition, which falls within the ambit of Article 11 § 2 *in fine*, cannot also fall within the ambit of Article 11 § 2, first sentence, for two reasons: firstly, Article 11 § 2 *in fine*, as said earlier, is *lex specialis* in relation to the first sentence of Article 11 § 2, and, therefore, they cannot coexist regarding the same issue; and, secondly, because an absolute prohibition cannot, by its nature, at the same time be a restriction falling within the first sentence of Article 11 § 2, which does not allow for such blanket bans.

31. It is a logical fallacy, breaching the fundamental Aristotelian principle of non-contradiction[13], to make the contrary argument – one that the

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[11] See William A. Schabas, *The European Convention on Human Rights – A Commentary* (Oxford University Press, 2015), at p. 523, referring to *Council of Civil Service Unions and Others v. the United Kingdom*, no. 11603/85, Commission decision of 20 January 1987, DR 50, p. 228.

[12] See Filip Dorssemont, "The Right to Take Collective Action under Article 11 ECHR", cited above, 333, at p. 351.

[13] For this principle, see Aristotle, *inter alia, Metaphysics,* Book IV, particularly in section 3 (1005b25-1006a3).

Government, the Court and the German Federal Constitutional Court seem to accept – that the issue may come under both the first and second sentences of Article 11 § 2 (irrespective of the question whether it falls primarily under the first sentence of Article 11 § 2 and secondarily under the second sentence).

VII. Whether the measures at issue can be justified under Article 11 § 2 *in fine*

32. The impugned measures could be justified under the second sentence of Article 11 § 2, only if they (a) were lawful, and (b) affected members of one of the three groups mentioned in this provision, namely, the armed forces, the police or the administration of the State.

33. It is not necessary to examine the first requirement (lawfulness), because the second requirement (membership of one of the three groups), as will be explained, does not apply in the present case.

34. The applicants in the present case, being State-school teachers with civil servant status, do not belong to the armed forces or the police and the question arises whether they are members of the administration of the State. The Court, in paragraph 114 of the present judgment, as quoted above, reiterates that the concept of "the administration of the State" should be interpreted narrowly and restrictively, in the light of the post held by the official concerned, and refers to its previous relevant case-law[14].

35. This is absolutely in line with the principle of effectiveness, which, as said earlier, requires a broad interpretation of the right in question, and a narrow and restrictive interpretation of its limitations or restrictions. In this connection, the Court in *Demir and Baykara* (cited above) held that "limitations to rights must be construed restrictively, in a manner which gives practical and effective protection to human rights" (ibid., § 146). On this point, Professor Schabas pertinently argues[15]:

> "...the notion of 'administration of the State' is to be interpreted narrowly and the position of the victim of an infringement of article 11(1) scrutinized carefully in order to determine whether it falls under the exception of the final sentence of article 11(2). For example, teachers are public employees but they are not considered to be part of the 'administration of the State'."

36. Undoubtedly, an interpretation of the "members of the administration of the State", as covering all civil servants in a country indiscriminately, would be not merely a non-narrow interpretation, but in fact a very broad one. Furthermore, such interpretation would run counter to both the literal and

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[14] See *Demir and Baykara v. Turkey* [GC], no. 34503/97, cited above, §§ 97, 107 and 146, ECHR 2008; *Vogt v. Germany* [GC], no. 17851/91, § 67, 26 September 1995; *Grande Oriente d'Italia di Palazzo Giustiniani v. Italy*, no. 35972/97, § 31, ECHR 2001-VIII.

[15] See William A. Schabas, cited above (note 9), at p. 523.

teleological interpretations of the final sentence of Article 11 § 2 and of Article 11 in its entirety, because if the Convention drafters had intended that the final sentence of Article 11 § 2 should cover all civil servants, they would not imply this under the concept of "administration of the State", but instead would state this clearly. Besides, if this sentence were to apply to all employees of the State there would be no need to refer specifically to three specific categories. Thus it is clear from the second sentence of Article 11 § 2 that there should be no absolute ban under Article 11 in cases of civil servants other than in the three categories mentioned therein, namely members of the armed forces, the police and the administration of the State, and therefore to interpret and apply this sentence as imposing an absolute ban on all civil servants would be a *contra legem* interpretation and application of the Convention, breaching the principle of effectiveness and Article 11. Furthermore it would be absurd to extend the scope of the second sentence of Article 11 § 2 to all civil servants, while its text expressly limits its application only to the three categories.

37. In this connection, the argument made by the applicants is well summarised in paragraph 79 of the judgment and is very convincing:

> "The exercise of public authority in the name of the State was the decisive criterion in assessing whether a prohibition on strikes was compatible with Article 11 of the Convention. Civil servants could only be denied the right to collective bargaining and related industrial action if they exercised public authority; for those not exercising public authority, no restrictions could be made. The Court had previously found that a ban on strikes must not cover all categories of civil servants (they referred to *Enerji Yapı-Yol Sen v. Turkey*, no. 68959/01, § 32, 21 April 2009) and that civil servant teachers did not belong to the categories for whom the right to strike could be restricted (they referred to *Kaya and Seyhan v. Turkey*, no. 30946/04, 15 September 2009; *Urcan and Others v. Turkey*, nos. 23018/04 and 10 others, 17 July 2008; *Saime Özcan v. Turkey*, no. 22943/04, 15 September 2009; and *İsmail Sezer v. Turkey*, no. 36807/07, 24 March 2015). Eliminating the right to collective bargaining and the right to strike for all civil servants, regardless of whether they exercised public authority, and reducing these rights to a mere right to organisation and consultation would be incompatible with the Court's case-law and with international labour law. Several international bodies had expressed concern about the prohibition in Germany on strikes by civil servants not exercising public authority. Such civil servants had a right to strike in other States Parties to the Convention."

38. On the basis of what has been argued above, an interpretation of Article 11 § 2 *in fine*, covering under the concept "the administration of the State" all civil servants would not only be a very broad interpretation leading to unreasonable and absurd results, but it would also run counter to the principle of effectiveness, including its aspect of *effet utile*, as well as to the Latin maxims of construction, namely, *noscitur a sociis* and *ejusdem generis*.

39. Since the second sentence of Article 11 § 2 is an exception to an exception, namely, to the first sentence of Article 11 § 2, the aspect or function of the principle of effectiveness, requiring that limitations or restrictions to rights should be interpreted narrowly and restrictively, should

apply with even more severity and extreme caution in the case of the limitation provided for in the second sentence of Article 11 § 2 than in the case of the limitation provided for in the first sentence.

40. Sara Jötten and Felix Machts remarked in the conclusion to their pertinent article[16] that:

> "It needs to be seen whether the particularities of the German civil service system, to which the FCC oftens refers, are deemed sufficient by the ECtHR to explain why the ban on strike action for civil servants not 'engaged in the administration of the State as such' is a violation of a human right in Turkey [apparently, referring to the Grand Chamber judgment of *Demir and Baykara v. Turkey,* cited above] while, at the same time, the ban on strike action is not supposed to violate the identical human right of those teachers who have the status of civil servants in Germany. Hope remains that the answer may be given one day in Strasbourg, and regardless of the outcome, it will provide a way to stabilise or change the German civil service once and for all."

In my humble view, the different treatment and conclusion of the present case in relation to *Demir and Baykara* (cited above) cannot be justified at all. What matters is not so much any particularities of the German civil service system, but more importantly the consistent interpretation and application of Article 11 to both of these cases. Stated otherwise, there should be no double standards or measures. With all due respect, in view of the arguments expressed in the present opinion, the judgment of the Court in the present case does not provide the best way to "stabilise" the German civil service once and for all.

VIII. The Court should not have dealt with the issue under the first sentence of Article 11 § 2, without first deciding that it did not fall under Article 11 § 2 *in fine*

41. Irrespective of the valid arguments presented above, namely that the issue falls under neither the first sentence nor the second sentence of Article 11 § 2, and irrespective of the Court's implicit suggestion that the issue might not fall under the second sentence because restrictions must be interpreted narrowly, the Court ought to have started by examining the case from the angle of the second sentence of Article 11 § 2, which it did not do. That would have meant taking into account the fact that different considerations apply for each sentence of Article 11 § 2 and the fact that the second sentence is more specific in nature than the first, and also, as said earlier, the fact that the second sentence is an exception to an exception.

42. As argued above, it is contradictory for the judgment, while admitting that the ban was an absolute one in character, to nevertheless treat it as a non-absolute one, by examining it under the first sentence of Article 11 § 2.

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[16] See Sara Jötten and Felix Machts, "Ban on Strike Action for Civil Servants is Constitutional: The Judgment of the Federal Constitutional Court of 12 June 2018", in *German Yearbook of International Law,* Volume 61 – 2018, 466 at p. 473.

Apart from this, it is also paradoxical and nonsensical that, instead of examining the absolute ban under the second sentence of Article 11 § 2, where an absolute ban may have a place if it were to fall within one of the three categories of civil servants, the judgment proceeds to examine it under the first sentence of Article 11 § 2, where an absolute ban has no place.

43. If an absolute ban cannot be justified within the second sentence of Article 11 § 2 in relation to civil servants other than members of the three categories expressly mentioned in that sentence, it is absolutely clear that it cannot be justified within the first sentence of Article 11 § 2, which does not allow for absolute bans.

44. Regrettably, the Court has left open once again[17] an important issue, namely, whether teachers with civil servant status are considered to be part of "the administration of the State".

IX. Failure to respect principle of external coherence with international law and practice

45. Before concluding, I wish to emphasise that Article 11 of the Convention should be read according to the principle of external coherence or harmony – an aspect of the principle of effectiveness – which means that the Convention must be interpreted in line with international law, of which it is a part[18]. The judgment, under Section entitled "II. International Law and Practice" (see paragraphs 51-64), refers to a significant number of international texts and materials. However, not only do they fail to support the approach taken by the Court in the present case, but, on the contrary, the Court's approach is not in line with them. In particular, as the applicants and the third-party interveners referred to in paragraph 14 of the present opinion also submitted, the Court's approach is not in line with Article 22 of the International Covenant on Civil and Political Rights (ICCPR – see paragraph 54 of the judgment), Article 8 of the International Covenant on Economic, Social and Cultural Rights (ICESCR – see paragraph 53 of the judgment), the law of the International Labour Organisation (ILO – see paragraphs 55 and 56 of the judgment), Article 6 § 4 of the European Social Charter (see paragraphs 57-60 of the judgment), and Article 28 of the Charter of Fundamental Rights of the European Union (see paragraph 61 of the

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[17] The question was left open previously in *Vogt*, cited above, § 68. See also paragraph 114 of the present judgment, quoted above.

[18] See Article 31 § 3 (c) of the Vienna Convention on the Law of Treaties (1969); see *Golder v. the United Kingdom*, 21 February 1975, §§ 29, 30 and 35, Series A no. 18, and *Loizidou v. Turkey* (merits), 18 December 1996, § 43, *Reports of Judgments and Decisions* 1996-VI; on the principle of external coherence in general, as a dimension of the principle of effectiveness, see Daniel Rietiker, "The principle of 'effectiveness' in the recent jurisprudence of the European Court of Human Rights: its different dimensions and its consistency with public international law – no need for the concept of treaty *sui generis*", *Nordic Journal of International Law*, 79 (2010), p. 245, at pp. 271-275.

judgment), as interpreted by the competent monitoring bodies, or with the case-law of the Inter-American Court of Human Rights, which recently found that the right to strike constituted a "general principle of international law" (see paragraph 62 of the judgment) and argued that the right to strike should be recognised as an essential element of freedom of association.

46. Regrettably, while the Court refers to international law and practice, in the "Law" part of its judgment, it nevertheless fails to discuss and take them into account later on when it deals with the merits of the case and ultimately adopts an approach which is inconsistent with them.

Conclusion

47. In addition to my submission that the right to strike is an essential element of the right to freedom of association, it can be concluded that the impugned measures against the applicants could not be justified under either of the two sentences of Article 11 § 2 and that they, therefore, violated Article 11 § 1 of the Convention.

48. In particular, the impugned measures cannot not be justified under the first sentence of Article 11 § 2, because they were based on an absolute prohibition which does not have a place under this sentence, and they could not be justified under the second sentence of Article 11 § 2, because they do not concern members of any of the three groups specified therein.

49. Since the absolute ban in question fell neither under the first nor under the second sentence of Article 11 § 2, it directly confronted the right in question that is safeguarded under Article 11 § 1, which applies to "everyone" and therefore also to civil servants (see also Article 14 of the Convention on the prohibition of discrimination). Stated otherwise, the absolute ban in question, not falling under either of the two sentences of Article 11 § 2 and being inflexible in nature, *per se* and automatically rendered ineffective the right to freedom of peaceful assembly and association and, therefore, violated Article 11 § 1 of the Convention.

50. In my humble opinion, the methodological approach used by the Court regarding Article 11, as well as the interpretation and application followed by it regarding the same Article, were erroneous and wrong.

51. With all due respect, I regret to argue that the four applicants have not obtained the protection under the Convention they deserved, and along with them, at least for the time being, all civil servants in Germany or elsewhere in Europe who are not members of the administration of the State, who wish to exercise their freedom of association and in particular their right to strike in the present or future. As said above, the ban imposed on the applicants' right to freedom of assembly and association was not only an absolute and total one, but also a general one. Here the following observation is warranted. The combination of the character of the ban as both an absolute and general one extending to all civil servants, thus all members of one sector of

employees in society, namely, the public as opposed to the private sector, produces the problematic consequences of an absolute ban for a large number of persons in society with the effect that their rights under Article 11 may be violated. Consequently, the more general the application of an absolute ban, the larger the number of potential victims of an Article 11 violation.

52. The right safeguarded by Article 11, apart from being a civil right, is also a social one, with a predominant moral element, which requires careful and special consideration by the Court when interpreting and applying it.

53. With due modesty, I believe that the present judgment is not in line with the fundamental Convention principles of effectiveness and respect for human dignity, and is somehow a setback to the application of the doctrine that the Convention is a living instrument to be adapted to the present-day conditions of society and to the development of international law. Contrary to what the majority argue, the approach of the judgment is also not supported by the principle of subsidiarity, which affords a margin of appreciation to member States in line with the primary aim of the Convention, namely, the effective protection of human rights.

54. Protocol No. 15 to the Convention, by inserting the principle of subsidiarity in the Preamble to the Convention, enhances this principle, not by rendering the margin of appreciation of member States broader than before, but, on the contrary, by underlining in the Preamble the true meaning of the principle of subsidiarity, namely that the primary responsibility of the member States under the supervisory jurisdiction of the Court is to ensure the effective protection of human rights, thus ensuring that the principle of effectiveness is applied not only by the Court in the exercise of its supervisory power, but also by the member States. In this connection, the Court in *Grzęda v. Poland*[19] noted that the principle of subsidiarity imposed a shared or collective responsibility between the States Parties and the Court, and that national authorities and courts must interpret and apply domestic law in a manner that gives full effect to the Convention. In the present case, the domestic authorities not only overstepped their margin of appreciation, but engaged in an entirely erroneous methodological interpretation and application of Article 11, marginalising the relevant international law.

55. By way of conclusion, I would find that there has been a violation of the applicants' right to freedom of peaceful assembly and association, as provided for in Article 11 § 1 of the Convention. However, I see no need to address the issue of just satisfaction.

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[19] See *Grzęda v. Poland* [GC], no. 43572/18, § 324, 15 March 2022.

APPENDIX

List of cases:

No.	Application no.	Case name	Lodged on	Applicant Year of Birth	Represented by
1.	59433/18	Humpert v. Germany	10/12/2018	**Karin HUMPERT** 1961	Hans Rudolf BUSCHMANN
2.	59477/18	Wienrank v. Germany	10/12/2018	**Kerstin WIENRANK** 1960	Hans Rudolf BUSCHMANN
3.	59481/18	Grabs v. Germany	10/12/2018	**Eberhard GRABS** 1951	Hans Rudolf BUSCHMANN
4.	59494/18	Dahl v. Germany	10/12/2018	**Monika DAHL** 1965	Hans Rudolf BUSCHMANN