MOVING BEYOND ISOLATION – A RECONCEPTUALIZATION OF UNION RIGHTS FOR INCARERATED WORKERS

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INTRODUCTION

The collective organization of incarcerated workers is a critical issue, particularly in the context of labor law and workers' rights, but also as a field of action for social movements. It is also of international significance as incarcerated workers struggle for collective rights and better working conditions in many countries.[1] In Germany, incarcerated workers face significant legal challenges in organizing and exercising their rights to bargain collectively and engage in collective action such as strikes.[2] Yet there is a lack of a labor law perspective on this phenomenon, which has been viewed almost exclusively as one of penal law. My research aims to investigate these challenges with a particular emphasis on the right to collective organization and the right to strike.

Through a review of German case law denying labor rights to incarcerated workers, I identified a main strand of argument. Courts reject individual labor rights on the basis that incarcerated workers do not enter into free contractual employment relationships and because the purpose of prison work is not income generation but resocialization. Thus, the existence of an economic and contractual relation is seen as essential for the application of labor rights.

With the help of Noah Zatz's analysis of the "separate spheres reasoning,"[3] it is possible to uncover the fiction of separate economic and social spheres that underlie this argument. By equating the "employment relationship" and "economic relationship," two distinct and mutually exclusive social spheres are constructed: the economic sphere and the non-economic/prison sphere.[4] Zatz identifies three mechanisms of how law contributes to this construction: the codification of relational markers, the normativization of relational markers, and the normativization of distinct spheres.[5]

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[1] *See* Rachel Knaebel, *Prison workers in Germany are organizing*, Equal Times (March 2, 2015), https://www.equaltimes.org/prison-workers-in-germany-are; Hunter Southall, *From Behind Bars, Incarcerated Workers Are Unionizing, Striking*, onlabor (Dec. 28, 2022), https://onlabor.org/from-behind-bars-incarcerated-workers-are-unionizing-striking/.

[2] *See* Joe Watson, *German Prisoners Form Union, Seek Minimum Wage and Pension*, Prison Legal News (Aug. 2, 2016), https://www.prisonlegalnews.org/news/2016/aug/2/german-prisoners-form-union-seek-minimum-wage-and-pension/#:~:text=A%20group%20of%20prisoners%20in,successful%20reentry%20after%20their%20release.

[3] Noah D. Zatz, *Prison labor and the paradox of paid nonmarket work*, 8 Econ. Socio. of Work 369, 373 (2009).

[4] *Id.*

[5] Noah D. Zatz, *Working at the boundaries of markets: prison labor and the economic dimension of employment relationships*, 61 VANDERBILT L. REV. 857, 943 (2008).

This paper will translate these mechanisms into the context of prison union organizing. In the first step, I will show that the legal reasoning for denying the freedom of association and the right to strike for incarcerated workers is also predicated on the separate sphere logic. Accordingly, the arguments developed by Zatz against such a fragmentation of reality can be transferred to the collective level. This transfer from an abstract legal concept to the specific legal situation in Germany is at the core of this paper.

Using a substantive approach, I will show that the legal argument against union rights for incarcerated workers confines the role of unions in the economic sphere. Consequently, unions are perceived as mainly economic actors today and therefore denied to incarcerated and other 'non-economic' workers. However, this perception is not derived from an observation of reality but rather a construction heavily influenced by labor law itself. Hence, it can be shown that the exclusion of incarcerated workers from the scope of freedom of association is due to a formalistic understanding of the significance of labor unions. In the same way that individual labor relations cannot be clearly categorized as either within the economic sphere or within the prison sphere, the same is true for the collective organization of incarcerated workers. Unions are not exclusively economic actors, separate and distinguishable from other social actors, and therefore, should not be exclusive to individuals whose labor relations are categorized as economic. While this is not grounds to establish a positive right of incarcerated workers to associate and to strike, the merit of these findings is to dispel the dominant legal arguments against these freedoms.

These findings are not only crucial for the labor rights of incarcerated workers in Germany but also raise more far-reaching questions. Ultimately, they can pave the way to a deeper understanding of how labor law shapes the role that unions have in a society by granting access to union rights and the right to strike to some workers while denying it to others.

I. THE "RIGHT TO FORM ASSOCIATIONS TO SAFEGUARD AND IMPROVE WORKING AND ECONOMIC CONDITIONS"[6] AS AN EXPRESSION OF THE LIMITATION OF UNIONS TO THE ECONOMIC SPHERE

Zatz analyzes how labor law, among other things, contributes to its own restriction of economic relationships using relational markers, excluding all other relationships assigned to a different social sphere from its scope.[7] This mechanism can be transferred to the collective level, explaining how law categorizes unions based on which relational markers this categorization

[6] Grundgesetz [GG] [Basic Law] art. 9 § 3, https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html#p0051.

[7] Zatz, *supra* note 5, at 943.

takes place. The wording of Art. 9 III GG, which includes the terms "safeguard and improve working and economic conditions" in its definition, plays a crucial role.[8] The interpretation of this wording in the jurisprudence of the German Federal Constitutional Court (BVerfG) illustrates how the law, as interpreted by the jurisprudence, contributes to and maintains this delineation and reshapes unions' practices to appear more distinctly economic.

A. Transfer of Zatz's Analysis to the Scope of Freedom of Association

First, it is necessary to establish a connection between Zatz's considerations in individual labor law and the question of unions under examination here. This connection exists on two different levels.

On the one hand, the constitutional scope of protection under Art. 9 III GG is not limited to employees.[9] However, they still constitute the majority of members in most unions, so much so that unions are often referred to as "associations of employees or employers," making it appear as if other workers are excluded from the fundamental protection.[10] Those recognized as employees can join a union to represent their own work-related interests; this is not disputed for this group, unlike, for example, parasubordinate work[11] or incarcerated workers. Therefore, the question of who is legally recognized as an employee plays a significant role in the scope of the freedom of association.

Furthermore, there is a second connection of greater interest for this chapter. According to the wording of Art. 9 III GG, the qualifying feature distinguishing unions from general associations under Art. 9 I GG is that their purpose must be "to safeguard and improve *working and economic conditions*."[12]

In this paper, this requirement will be examined with the analytical tools that Zatz has developed regarding the employment relationship. At the center is the initial finding that, according to the prevailing view, there must be a

[8] Grundgesetz [GG] [Basic Law] art. 9 § 3, https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html#p0051.

[9] Grundgesetz [GG] [Basic Law] art. 9 § 1, https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html#p0051.

[10] *See generally Germany's Employers' Associations*, deutschland.de, https://www.deutschland.de/en/topic/business/globalization-world-trade/employers-associations.

[11] "Economically dependent work which represents a form of work falling within a grey zone between dependent work and self-employment." *See* Adalberto Perulli, Eur. Parliament, Study on economically dependent work/parasubordinate (quasi-subordinate) work 8 (2002).

[12] Grundgesetz [GG] [Basic Law] art. 9 § 3, https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html#p0051.

functional connection between working and economic conditions to such an extent that it encompasses "the totality of conditions under which dependent work is performed."[13] This is often understood as a distinction from associations dealing with purely economic conditions, such as lobby organizations or cartels.

The reverse question often remains unanswered: is it essential for the scope of freedom of association that the association deals with the working conditions *of economic work specifically*? And if so, what requirements are placed on this concept of economy? It is interesting to note that a tendency to equate economic work and employment can also be observed in the following passage, which is considered so self-evident that it receives no argumentative support:

> Unions in the constitutional sense are accordingly associations of working life that are called and able to resolve and overcome intra-societal, i.e., private law conflicts of interest between employees and employers in a collective, liberal, and socially just autonomy.[14]

Thus, Zatz's substantive criticism of this simplifying equation[15] can be transferred to the collective level. In the following, we will therefore take a closer look at the importance that case law attaches to economic relationships and the understanding of "the economic" on which it relies in determining the relational markers. This analysis will be based on the analytical tools developed by Zatz for the individual employment relationship[16]: determine the relational markers and provide a substantive evaluation of these findings.

B. Illustration of the Delimitation to the Economic Sphere in Case Law and Legal Scholarship

The question of the significance of working and economic conditions for the scope of protection of Art. 9 III GG is most clearly expressed in a passage from a judgment of the LAG Stuttgart from the 1950s:

> Are there any associations on the part of employees at all for the preservation and promotion of working and economic conditions that are not trade unions? The most important characteristic of the term 'trade union' is collective bargaining capacity; on this, the entire literature agrees. But then the question arises: Is collective bargaining capacity not one of the

[13] Linsenmaier in: ErfK, 24th edition 2024, GG Art. 9 para. 23 (Ger.).

[14] Dürig/Herzog/Scholz in: Grundgesetz-Kommentar, 102nd edition 2024, GG Art. 9 para. 194 (Ger.).

[15] Zatz, *supra* note 3, at 386.

[16] Zatz, *supra* note 5, at 943.

> essential features of an 'associations to safeguard and improve working and economic conditions'? Can an organization that primarily wants to preserve and promote the working and economic conditions of its members achieve this main purpose other than by concluding collective agreements? [17]

The LAG Stuttgart did not address these questions subsequently because they were not relevant to the case to be decided. However, the questions already indicate a specific understanding of what the LAG considers the task and significance of an association protected by Art. 9 III GG: the conclusion of collective agreements. This conclusion presupposes two premises: first, that Art. 9 III GG only promotes the preservation and promotion of the conditions of economic work; second, that there is an economic and contractual work equation. This is because collective agreements are thought to be conceptually inseparable from the existence of an individual employment contract, their legitimation being the employees' deficiency in individual bargaining power.[18] Connected with Zatz's analysis, the following hypotheses result:

1. The presence of collective bargaining capacity or the intention to conclude collective agreements serves as a relational marker regarding the existence of an association protected by Art. 9 III GG.
2. The criterion of collective bargaining capacity hides a formalistic concept of the economy, which equates contractual to economic work.

These can be demonstrated by identifying two distinct relational markers for what is the relational package of "unions" in Art. 9 III GG according to the jurisprudence of the Federal Constitutional Court and by showing their relationality.

1. First Relational Marker: Working Conditions as Conditions of Contractual Employment

A marker that is easily recognizable based on the jurisprudence of the Federal Constitutional Court is the implicit equation of working conditions (in the sense of the wording of Art. 9 III 1 GG) and conditions of contractual work. This marker is also a good example that relational markers, unlike (legal) requirements, do not necessarily have to be present for a phenomenon

[17] Landesarbeitsgerichte (LAG) [Higher Labor Courts] June 5, 1953, Neue Juristische Wochenschrift [NJW] 1407, 1408 (1953) (Ger.).

[18] Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], 1 BvR 779/85, June 26, 1991, BVerfGE 84, 212, 229, https://www.servat.unibe.ch/dfr/bv084212.html.

to be qualified according to the "relational package": "The difficult part is that an element may regularly be present in a relationship and even contribute toward its recognition as a conventional package, without being essential to it."[19]

On the one hand, the Federal Constitutional Court repeatedly refers to the concept of the employee in its decisions. On the other hand, groundbreaking decisions such as on the freedom of association of domestic workers or on the right to strike for civil servants[20] also make it clear that the presence of an employment contract determining the working conditions is not a mandatory requirement for the scope of protection of Art. 9 III GG. In one of the first important decisions on freedom of association, the Federal Constitutional Court states as follows:

> The fundamental right to freedom of association concerns not only the association as such but the association for a specific overall purpose**, namely, for the active representation of employer (employee) interests**.
>
> From the totality of associations, only those were recognized as capable of collective bargaining whose statutory task was the representation of the interests of their members **precisely in their capacity as employers (employees)** {…}. In reality, however, these characteristics are nothing more than necessary prerequisites for the existence of genuine labor law associations.[21]

Here, the Federal Constitutional Court makes it clear that, in its opinion, the purpose of freedom of association is to represent the interests of employees (in their capacity as such). But even more interesting is that it sees this as a requirement "for the existence of genuine labor law associations" (meaning unions in the sense of Art. 9 III GG).[22] This is made even more explicit a few decades later with the following unequivocal statement: "The freedom of association (Art. 9 III GG) applies to employees and employers."[23]

This constriction is particularly evident in current legal commentary literature dealing with the interpretation of Art. 9 III GG:

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[19] Zatz, *supra* note 5, at 928.

[20] BVerfG, 2 BvR 1738/12, June 12, 2018, NVwZ 2018, 1121 https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2018/06/rs20180612_2bvr173812.html.

[21] BVerfG, 1 BvR 629/52, Nov. 18, 1954, NJW 1954, 1881, 1882 https://openjur.de/u/348773.html.

[22] *Id.*

[23] BVerfG, 1 BvR 779/85, June 26, 1991, NZA 1991, 809 https://openjur.de/u/177422.html.

> "Working conditions" traditionally refer to the conclusion, content, and termination of an employment relationship.[24]
>
> Economic conditions are the economically and socio-politically significant general conditions *for employers and employees*.[25]
>
> On the trade union side, *all employees* are entitled to the fundamental right; on the employer side, *all legal entities that hold employer positions* are entitled to the fundamental right.[26]

Even if the reference to employees is not explicitly adopted, it serves as an important reference – as a default – which can be seen in the following excerpts from legal commentaries:

> These are professionals who want to preserve and promote their working and economic conditions together. These are *primarily employees and their social opponents, the employers,* as well as apprentices, but also civil servants, judges, and soldiers, home workers, retirees, and the unemployed.[27]
>
> The reference to dependent work means that *only associations of employees (or comparable persons) and employers* are covered by this provision.[28]

In this context, it is important to clarify that there is no imperative legal argument for this restriction in the constitutional text and that a less limiting interpretation of "working and economic conditions" would be equally valid.

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[24] Boecken/Duwell/Diller/Hanau in: Nomos Kommentar - Gesamtes Arbeitsrecht, 2nd edition 2023, GG Art. 9 para. 23 (Ger.).

[25] Cornils in: Beck'scher Online Kommentar Grundgesetz, 56th edition 2023, GG Art. 9 para. 46 (Ger.).

[26] Dürig/Herzog/Scholz in: Grundgesetz-Kommentar, 102nd edition 2024, GG Art. 9 para. 194 (Ger.).

[27] Linsenmaier in: ErfK, 24th edition 2024, GG Art. 9 para. 27 (Ger.).

[28] Däubler in: Nomos Kommentar - Tarifvertragsgesetz, 5th edition 2022, para. 105 (Ger.).

2. Second Relational Marker: Collective Bargaining Capacity[29] and Conclusion of Collective Agreements

In addition, another relational marker can easily be identified in the jurisprudence of the Federal Constitutional Court: the conclusion of collective agreements as the main practice of unions. This goes so far that the Federal Constitutional Court in an early leading decision on Art. 9 III GG, equates the capability of collective bargaining with the existence of fundamental rights protection under Art. 9 III GG. It stated that the conditions for the collective bargaining capacity are identical to the conditions for the existence of a union protected under the freedom of association (and not the other way around):

> From the totality of associations, only those were recognized as capable of collective bargaining {…}. In reality, however, these characteristics are nothing more than necessary prerequisites for the existence of genuine labor law associations.[30]

This equation becomes particularly clear in the following passage:

> So, if case law and legal doctrine have set special requirements for the recognition of the collective bargaining capacity with regard to associations whose members can be covered by collective wage setting, they have thus correctly delimited the concept of the association - also in the sense of Art. 9 (3) GG.[31]

Here, the Federal Constitutional Court appropriates the conditions for the collective bargaining capacity in such a way that it extends their meaning to the extent that they are already a requirement for the preceding question of fundamental rights protection under Art. 9 III GG.

Several decades later, the Federal Constitutional Court's wording on the relationship between collective bargaining capacity and freedom of association sounds more open, as becomes clear in the following passage. However, it should be noted that the case law to date and the judgment cited relate exclusively to the question of which other activities of a union with

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[29] This is a specific legal term in German labor law (*Tariffähigkeit*) with specific requirements and legal consequences. It is required for a union to have Collective Bargaining Capacity in order to conclude legally binding collective agreements. *See Tariffähigkeit*, dbb beamtenbund und tarifunion, https://www.dbb.de/lexikon/themenartikel/t/tariffaehigkeit.html#:~:text=Tariff%C3%A4higkeit%20beschreibt%20die%20Eigenschaft%2C%20rechtswirksam,Arbeitgeber%20verbindlich%20regeln%20zu%20d%C3%BCrfen.

[30] BVerfG, 1 BvR 629/52, Nov. 18, 1954, NJW 1954, 1881, 1882, https://openjur.de/u/348773.html.

[31] *Id*.

collective bargaining capacity and collective bargaining agreements are additionally covered by the scope of protection of Art. 9 III GG.

These decisions are concerned with determining whether individual activities serve to safeguard and promote working and economic conditions and not whether the association as such pursues this purpose. Although the Federal Constitutional Court affirms protected freedom of association for unions incapable of collective bargaining today, moving away from the restrictive jurisprudence of the 1950s, it is also evident in recent jurisprudence that the conclusion of collective agreements is still considered an important marker for the activities of unions. This is explicitly stated in the following passage from a Federal Constitutional Court judgment from 2001:

> The protection extends to all union-specific behaviors and includes in particular collective bargaining capability, which is at the center of the possibilities granted to unions for pursuing their purposes. Negotiating collective agreements is an essential purpose of unions.[32]

II. RECONCEPTUALIZING UNIONS AS A RELATIONAL PACKAGE

According to Zatz, a relational package is a "contingent collection of particular practices, actors, meanings, and institutional contexts" that is used to define a legal concept.[33] In other words, it is a contingent set of specific practices, actors, meanings, and institutional contexts. He identifies the individual practices, actors, meanings, and institutional contexts that comprise a relational package as "relational markers." The special feature of these relational packages is that there is no definitive and complete list of requirements that must be met for a certain phenomenon to be legally recognized as such. Instead, its existence or scope of application is evaluated based on different mutually influencing (relational) factors and thus resolved legally as opposed to the court merely recognizing and identifying a phenomenon that is present in real life.

A. Relationality of the Concept of Unions

The analysis of the Federal Constitutional Court's jurisprudence on Art. 9 III GG shows that the concept of unions is a relational package in this sense. While "association" and "safeguard and improve working and economic

[32] BVerfG, 1 BvL 32/97, April 3, 2001, NZA 2001, 777, 778.
[33] Zatz, *supra*, note 5, at 925.

conditions" initially appear to be clear legal prerequisites, the relationality is concealed behind the term “working and economic conditions.”

For an association to claim the extended protection of Art. 9 III GG, its purpose must be safeguarding and improving working and economic conditions. However, the German Constitution does not specify the meaning of “working and economic conditions.”[34] Consequently, it is the constitutional jurisdiction’s task to determine this meaning and to differentiate it from other possible fields of activity. Thus, the Federal Constitutional Court has taken on the task that Zatz assigned to employment law concerning the legal concept of work: “Employment law actively contributes distinctive elements to the package, shapes their interaction, and reinforces their coherence as a package.”[35]

The Federal Constitutional Court has not established a conclusive list of legal prerequisites. Still, it conducts an examination of various criteria to assess whether the interests pursued by the association qualify as working and economic conditions. The following section will demonstrate how the term "working and economic conditions" constitutes a relational package by the Federal Constitutional Court.

B. Relational Markers

Subsequently, the question arises regarding which markers the Federal Constitutional Court uses to determine whether the pursued interests qualify as working and economic conditions. An analysis of the Constitutional Court’s case law has revealed that the collective bargaining capacity of unions and the connection of their area of responsibility to contractual employment play a particularly important role. This illustrates the markers’ relationality on the individual and collective level. By referring to the regulation of the pursued interests through collective agreements, the criterion of contractual relationships is elevated to the collective level as the collective agreement is and can be, qualified as the collective equivalent to the individual employment contract.[36] This also transfers the formalistic limitation of the economic concept[37] contained in the contractual and economic work equation to the collective level.

Regarding working conditions, a strong connection to the concept of employment exists. Although, according to the Federal Constitutional Court, statutory and common law cannot determine or even influence a binding

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[34] This is the wording of the constitutional provision. *See* Grundgesetz, *supra* note 12.

[35] Zatz, *supra*, note 5, at 925.

[36] Both are based on a voluntary contractual relationship, regulate wages and other conditions of employment and are binding only to the parties.

[37] Zatz, *supra*, note 3.

interpretation of the Constitution, it nonetheless assumes that within the scope of Art. 9 III GG, working conditions refer to the conditions of contractual employment. This reflects a naturalization of employment as a social category as opposed to one that is already legally constructed because the wording of the Constitution could support other, more extensive definitions of "work."

This indicates that the relational package, constituting "working and economic conditions" according to the jurisprudence of the Federal Constitutional Court, operates within "separate spheres reasoning"[38] or "separate world rationale"[39] identified by Zatz regarding the individual employment relationship. In this perspective, unions are seen as representatives of employees in the economic sphere. They are distinguished from other (social) political associations whose interests are classified as political or social, even if they are concerned with working conditions, as long as they are not economic in a formalistic sense.

The wording of Art. 9 III GG, explicitly containing the term "economic conditions," favors this interpretation but does not necessarily presuppose it.[40] As shown by Zatz, the concept of economic action or the economy, as accessed by a substantive analysis, could easily encompass the conditions of work and the interests of people performing work beyond a contractual relationship.[41]

Moreover, the two markers also demonstrate the relationality of markers described by Zatz.[42] It is not coincidental that both markers establish a connection to the contractual sphere. The collective bargaining agreement is traditionally seen as a collective mechanism compensating for the individual negotiating weakness of employees. This negotiating weakness is, in turn, justified by the deficient market mechanisms of the labor market. Thus, the existence of an individual employment contract legitimizes the conclusion of collective bargaining agreements. Conversely, this means that the requirement of a collective bargaining agreement presupposes (at least according to the classical understanding) the presence of contractual work. In this way, the two markers reinforce each other.

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[38] *Id.* at 374.

[39] NOAH D. ZATZ, THE CARCERAL LABOR CONTINUUM: BEYOND THE PRISON LABOR/FREE LABOR DIVIDE, LABOR AND PUNISHMENT 145 (Erin Hatton ed., 2021).

[40] This is the wording of the constitutional provision. *See* Grundgesetz, *supra* note 12.

[41] Zatz, *supra*, note 3.

[42] Zatz, *supra*, note 5, at 928-29.

C. Mechanisms of Construction by Law

Zatz's analysis also encompasses the mechanisms by which law contributes to the construction of relational packages.

A *codification of markers*[43] occurs when the law codifies specific markers. Usually this involves "mandating practices that themselves serve as relational markers".[44] For unions, this happens specifically through the German Collective Agreements Act (TVG)[45], which regulates collective bargaining in Germany: concerning the subject of collective agreements, the law starts from employment relationships (§ 1 I TVG), explicitly extending the scope only to parasubordinate workers.[46] As shown, working in an employment relationship is a marker for the existence of working and economic conditions under Art. 9 III GG. The same applies to the regulation of these conditions through a collective agreement. If both conditions are linked by the TVG ("Only the conditions of employment relationships are the subject of collective agreements."), this means that collective agreements not related to employment conditions are not included in the TVG and, therefore, are less likely to be classified as a collective agreement in the sense of Art. 9 III GG. This, as a relational marker, influences whether the conditions of work regulated in these agreements are recognized as working and economic conditions.

The *normativization of markers*[47] is the process of markers mutually influencing each other in a way that reinforces their role as indicators for the whole package. If specific markers are present for an association, this can contribute to its members perceiving themselves more as union members and accordingly demanding the enactment of other markers or even collectively enforcing them. The markers influence each other, creating a domino effect.

This can also be observed in the union concept and its delimitation. The restriction to contractual employment relationships and the conclusion of collective agreements both function as relational markers. Thus, associations that do not represent employees or do not strive to conclude collective agreements are not only not legally recognized as unions but are also not regarded as such by society. Conversely, legally and socially recognized unions of employees consider concluding collective agreements for their members as their primary responsibility (and not, for example, enforcing economic policy demands against the legislature or establishing other forms of co-determination that do not yet exist). When we think of unions, we think

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[43] Zatz, *supra*, note 5, at 943-944.

[44] *Id.*

[45] Tarifvertragsgesetz [TVG] [Collective Agreements Act], May 20, 2020, Bundesgesetzblatt 1 [BStBl] at 1055 (Ger.), https://www.gesetze-im-internet.de/englisch_tvg/englisch_tvg.html.

[46] *Id.* at §12a.

[47] Zatz, *supra*, note 5, at 947.

of associations of employees; when we think of associations of employees, we think of collective agreements. In this way, the normativization of the markers takes place.

Finally, through these two mechanisms, the working and economic conditions category is *institutionalized*[48]. This is not about the term itself, as it results from the constitutional wording and therefore immutably serves as the delimitation of the constitutional protection. Rather, it concerns the meaning attributed to the term, in other words, the relational package that defines what the law understands by "working and economic conditions." This package constructs the union as an association that advocates for the interests of employees and primarily uses the means of collective bargaining and the conclusion of collective agreements. This is illustrated by the qualification of the freedom of association as a "fundamental right of employees and employers" and the subdivision of associations into "unions and employer associations." The legal debates about exceptions to this rule, such as those favoring civil servants or parasubordinate workers, only prove that this construction exists and is predominant, requiring an argumentative justification for exceptions. By limiting the constitutional protection to the working conditions of employees in contractual relationships, the demarcation of the different spheres is maintained, and overlaps are prevented.

D. Summary of Findings

The case law on the scope of union protection contains requirements that reshape associations to make them look more distinctly ‘economic’ to be protected under Art. 9 III GG. This case law, in turn, influences whether unions consider such topics within their institutional purview, thus affecting what unions do in a way that creates separation from other types of associations. Conversely, for other associations, some activities are considered markers for unions, which they cannot do or cannot do with legal protection. This further discourages them from trying to do so and thus makes them resemble unions less.

III. THE CONDITIONAL LEGITIMACY OF UNIONS

Accordingly, the Federal Constitutional Court’s interpretation reduces the historical and conceivable societal, economic, and social functions of unions, a limitation of their significance that does not necessarily follow from

[48] *Id.* at 949-950.

the wording of Article 9 III GG. Diane Reddy provides an analysis of the consequences of this restriction of unions to their economic function.

She employs the term *conditional legitimacy*,[49] to describe the outcome of the process accompanying the legalization and legal recognition of unions. On the one hand, unions gained the protection of the law and thus increased room to maneuver. On the other hand, legal recognition came with a condition: while the field of unions was previously determined primarily by their practical effectiveness and power, now the law limits the societal conflicts in which unions can act and those in which they cannot.[50] Reddy demonstrates that this limitation mainly occurred in a formalistic sense, in the economic sphere: that the purpose and justification of unions lie in the conclusion of collective agreements, serving as the collective counterpart to individual employment contracts regulating the conditions of dependent, contractual work.

Reddy distinguishes between two categories of actors: political and economic actors, with unions being classified as economic actors.[51] According to her analysis, the two spheres receive different attributes, as shown in the following table, influencing societal perceptions and expectations regarding the respective actors.[52]

Economic sphere	**Sociopolitical sphere**
Unions	Civil-rights-movements, parties
Only acceptable as a means to an end (end = regulate commerce to promote industrial peace) = ***conditional legitimacy***	Sociopolitical issues (end in itself, rights-oriented)
Technocratic decision-making	Normative argumentation
Matters of private/individual concern	Matters of public concern
Economic / rational	Normative / moral
Strike as an apolitical, economic weapon, an economic right, directed inwards (towards the employer)	Strike as a form of political protest, a civil right, directed outwards (towards the public)

[49] Diana S. Reddy, *After the law of apolitical economy: Reclaiming the normative stakes of labor unions*, 132(5) YALE L. J. 1391, 1455 (2023).

[50] *Id.* at 1460.

[51] *Id.* at 1396.

[52] *Id.* at 1455; Diana S. Reddy, *'There Is No Such Thing as an Illegal Strike': Reconceptualizing the Strike in Law and Political Economy*, 130 YALE L. J. 421, 421 (2020).

As a result, unions' jurisdiction is limited to areas of economic problems, while their recognition as primarily political actors is denied.[53] This has consequences for applying freedom of association to incarcerated workers, as their work, as demonstrated above, is not considered economic. Therefore, the regulation of their working conditions is not within the jurisdiction of unions. Reddy attributes the cause of this to the ***normative insufficiencies of labor law***.[54]

IV. BACK TO PRISON AND BEYOND

In the final section of this paper, the insights presented above will be applied to the question of the legal status of incarcerated workers' unions. Applying Zatz's methodology of relational packages and markers to the collective level and thus to the concept of "union," the mechanisms of demarcating the economic sphere can be identified. This involves equating economic and contractual work. In defining unions, especially through the interpretation of "working and economic conditions," the Federal Constitutional Court adopts a formalistic perspective, basing its definition on the conditions of contractual work.[55] Consequently, incarcerated workers are excluded from the fundamental protections because their working conditions are not contractually regulated. Thus, they are not understood as economic and, consequently, not as "working and economic conditions" within the scope of Article 9 III GG.

This demarcation is noy[56] inherent to reality but constructed by the law. The relational markers are codified and normativized by the law, reinforcing and perpetuating the hegemonic discourse of what is to be understood as working and economic conditions under Article 9 III GG, legally and socially. This explains why the courts dismiss the question of union protection for incarcerated workers so easily and without further substantiation.

Reddy's analysis of the two spheres concerning unions further illustrates this exclusion. By constructing unions as purely economic actors, they are not perceived by law and society as associations representing incarcerated workers' interests regarding their working conditions.

The exclusion of incarcerated workers' unions from the scope of freedom of association is justified because the work performed by incarcerated workers is not contractually regulated and, therefore, belongs to a

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[53] Reddy, *supra*, note 49, at 1396.
[54] *Id.* at 1400.
[55] Grundgesetz, *supra* note 12.
[56] Grundgesetz, *supra* note 12.

fundamentally different legal sphere. This chapter has demonstrated that this argumentation is based on a double fallacy. On the one hand, it relies on a formalistic equation of economic and contractual work, grounding the exclusion of incarcerated workers from the economic sphere in the presumed social specificity of this type of work. This equation is unconvincing; the work performed by the incarcerated can be equally assigned to the economic sphere, and social specificities can be identified in work understood as economic. On the other hand, the role of unions is limited to a supposedly clearly demarcated economic sphere, which is also understood in a formalistic way and thus closely linked to the conclusion of individual and collective contractual agreements. This understanding is neither mandatory nor does it do justice to the material and historical significance of unions.

CONCLUSION

In conclusion, it is important to emphasize that, regardless of the legal debate surrounding their protection, unions historically almost always had to fight for societal and legal recognition.

Unregulated collective organization and strikes often preceded their legal protection, which could very well be the case for incarcerated workers' unions.

> The lesson of history is that, with or without legal support, incarcerated workers, like workers on the outside, have persisted in organizing and acting through unions as a means of improving the conditions under which they labor and live.[57]

However, labor law plays a pivotal role in constructing and maintaining the barrier that separates the sphere of economic work from the sphere of prison work. German Constitutional Law then places labor unions firmly in the economic sphere, seemingly out of reach for incarcerated workers. Recognizing the artificiality of this divide challenges that exclusion and allows us to see labor unions as more than just economic actors.

[57] Eric M. Fink, *Union Organizing & Collective Bargaining for Incarcerated Workers*, 52 No. 3 IDA. L. REV. 953, 973 (2016).