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Right to Strike in a Changing Regulatory Environment

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Right to Strike in a Changing Regulatory Environment[3]

1. Introduction

The regulatory environment of Hungarian industrial relations is under reconstruction. The coming into force of the new Labour Code, the modification of the Strike Act as well as the new Constitution are the key pillars of the legislative change which may and in fact do shape the power relations of the social partners. With this Paper our aim is to analyse how the right to strike functions in the new environment.

The Hungarian law gives workers a *positive right* to organise and participate in strike. The right to strike is attached to the workers themselves (not only to trade unions). In other words: as a main rule, every worker has the right to strike. Recent statistics however show that workers do not exercise this right of theirs in practice. Hungary has never been in the same league with France, Spain or Greece (just to mention three of the most strike prone countries) in fact statistics described moderated strike activity (see the charts).[4] However, figures from the last two years show drastic decline. While there can be many reasons behind the *near-absence of strike actions* in a certain country, we argue that the change in the Hungarian landscape has been mainly caused by the new regulatory environment and the limitations this environment has created within the system of industrial relations.

2. The legal framework

Before we start to analyse the current national system we need to provide a *definition* of strike. As early as this stage we encounter with the first problem. The Hungarian law does not provide for a precise, exact definition of strike. In legal literature and scholarship strike is defined as follows: "Strike is a temporary work stoppage of group of workers aiming at the advancement of their own (or other group of workers') economic and social interests."[5] It would be essential to draw up a coherent and clear legal concept of the right to strike in Hungary.

There are various legal sources under which the right to strike can be guaranteed and regulated under national law and practice, such as constitutional provisions, international

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[4] Undoubtedly a clear cut comparison is difficult. The strike activity of a given country can be measures by several factors such as number and duration of strikes, workers involved, days not worked etc.

[5] Kajtár, Edit: Hungarian Strike Law In The Light Of International And European Regulations, Doctoral Thesis, PTE Állam- és Jogtudományi Karának Doktori Iskolája, Pécs 2011. p. 18.

law by which the country is bound, statutory law and regulations, judge-made law, collective agreements and self-regulation by trade unions. The proportion and distribution of these sources is an indicator on how strike is perceived in a given country's system of industrial relations. A reference to strike in the Constitution indicates high status.[6] The *'old' Constitution* of Hungary (Act XX of 1949 The Constitution of the Republic of Hungary) contained the following relevant article:

Article 70/C.:

(1) Everyone has the right to establish or join organizations together with others with the objective of protecting his economic or social interests.

(2) The right to strike may be exercised within the framework of the law regulating such right.

(3) A majority of two-thirds of the votes of the Members of Parliament present is required to pass the law on the right to strike.

Let us highlight the core of this article: "The right to strike may be exercised within the framework of the law regulating such right". We can see that the old Constitution followed a traditional approach: the text is laconic, reference is made to other law sources which set the limits of the right to strike (see for instance the wording of the French or Italian constitutions). On the contrary, the *new Hungarian Constitution* (*Basic Act of Hungary)* breaks up with this tradition. The *Basic Act of Hungary* was adopted in April 2011. Its Article XVII., Paragraph 2. contains the right to collective bargaining and the right to strike. The new Constitution was passed at the Easter of 2011. Concerning labour law provisions, it did not bring about elementary changes; however, some rights are worded on a shorter and less detailed way. At the same time, the right to collective bargaining is a new element in the Constitution (Article XVII., Paragraph 2.). The new Constitution formulates the right to collective bargaining and the right to strike in a special way, so that it may be interpreted in a way that employers and employers organizations − similarly to workers and workers' representatives − also have the right to 'work stoppage' in order to defend their interests (Article XVII., Paragraph 2.).[7] The wording of this Article is more than unfortunate. Some labour law scholars give voice to their serious concern, arguing that Article XVII., Paragraph 2 might be interpreted in a way that it legitimises lock outs.[8] In our opinion such interpretation would go against the legal environment of industrial relations as well as the practice. 'Work stoppage' of the employer is an oxymoron, the wording of the article in question is more likely to be an unintentional error, a by-product of the hasty legislation. Without doubt, the unclear text infringes the principle of legal certainty.

Moving downwards in the hierarchy, the most important legal source is the Strike Act. The amendment of the old Labour Code in 1989, as part of the democratic transition, has institutionalised the freedom of industrial action. The same year brought about the enactment of the Strike Act (Act VII. of 1989 on Strike).[9] The Strike Act is a very laconic,

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[6] The importance of the Constitution is further emphasised by the Strike Act. According to Sec. 3, Subsection 1 the strike is illegal if − among other reasons − the aim of the strike contravenes the Basic Act of Hungary.

[7] "Employees and employers, or their respective organizations, have, in accordance the law, the right to negotiate and conclude collective agreements and, in cases of conflicts of interest, to take collective action to defend their interests, including strike action."

[8] See the detailed analysis of Rácz Zoltán. Rácz, Zoltán: A sztrájkjog megítélése az Alaptörvény tükrében. *Publicationes Universitatis Miskolciensis, Sectio Juridica et Politica*, Tomus XXX/2. 2012, pp. 569-575.

[9] *Cf.* Fine, Cory R: Strike law and ADR in Hungary: a model for labor movements in Central and Eastern Europe?(Alternative Dispute Resolution), Labor Studies Journal, June 22, 1999.

vague and − to some extent − out-dated Act, consisting only of seven brief articles. In December 2010, following the individual MP (Member of the Parliament) motion, amendments to the law on the right to strike were adopted by the Hungarian Parliament, in just one week.[10] This amendment narrowed down the scope of the right to strike to a great extent. All in all, the Basic Act lays down the right of any worker to strike. Act No. VII of 1989 provides for the conditions for exercising this basic right.

The framework provided by the afore-mentioned acts is filled up with *judge-made law*. It must be stated that the examination of the legality or the illegality of a strike may be requested by those who have a legal interest in the establishment of legality or illegality. The petition has to be filed at the Labour Court competent in the district according to the seat (address) of the petitioner. If several Courts of Labour are affected in the establishment of the legality or the illegality of a strike, it is the Budapest Labour Court which is competent to judge the petition. The Labour Court brings its decision within five days, in a non-trial procedure, if the need arises, after hearing the parties. An appeal lies against the decision of the Court (Sec. 5 of the Act on Strike). The short time is an advantage and a disadvantage at the same time. On the one hand the prescription of a 5 days period is beneficial as a longer period may cool down the willingness of the strikers and cause uncertainties. On the other hand 5 days is painfully short when it comes to deciding the amount of minimum service. For instance in case of a strike in public transportation sector the judge is forced to decide on the bus schedule - which is clearly a task beyond his expertise. The other big challenge is that the judge is bound by the petition.

As to *collective agreements and self-regulation by trade union,* these are possible, but not significant legal sources of strike law in Hungary. The state rather than trade unions and employers take the lead in the regulation of industrial conflict resolution. An earlier survey on collective agreements display the following statistical data: in the private sector 21 % of the collective agreements concluded by one employer contain regulations related to the exercise of the right to strike. In most numbers collective agreements in the water and energy supply sector contain such regulation. The exercise of the right to strike is dealt with in 31 % of the collective agreements concluded by more employers. Sectors with high percentages include processing industry and industry (77-77%), energy and water supply (76%), health care and social care (75%). In contrast we can find no strike related part of the collective agreements in agriculture, fishing industry or mining. Typical fields of self-regulation: prior notification, detailed regulation for conciliation, strike petrol. Regrettably the minimum service is rarely regulated in advance (a change is foreseeable in light of the modification of the Strike Act in relation to provision of minimum service). Only about 1/5 of the collective agreements regulate this issue. A tendency is detectable: there is a growing need to establish a system of in-workplace dispute resolution.[11] Though collective agreements often merely reiterate the provisions of the Strike Act there are refreshing exceptions. The strike regulation of the Nuclear Plants of Paks (Paksi Atomerőmű Zrt.) serves as a positive example. This document forms part of the collective agreement and

[10] Background: Workers at the Budapest Transport Company (BKV) had been on strike for weeks in January 2010. It was argued by employers' associations that employees had misused the existing strike law during this action and they demanded a more detailed definition of the 'minimum services'. During the BKV strike, metros and suburban railways did run, but buses and trams did not. As a result, legal proceedings were launched by BKV management against the striking employees, but failed because there were no clear regulations, agreements or contracts for the courts to rule on. See later in details (minimum services).

[11] Fodor T., Gábor – Nacsa, Beáta – Neumann, László: *Egy és több munkáltatóra kiterjedő hatályú kollektív szerződések összehasonlító elemzése. Országos összegző tanulmány*. Budapest, Kende Ügyvédi Iroda, 2008.

provides a thorough criteria catalogue of the procedural steps to be followed, rights and duties occurring in the event of strike.

3. Procedural requirements

As a main rule, *before calling a strike*, seven days must be allowed for *conciliation (waiting period)*. According to Section 2 of the Act on Strike, a strike may be initiated in case:
a) the conciliation procedure (this is the so-called "cooling off period"/ obligatory pre-strike negotiations) concerning the debated question has not led to a result in seven days, or
b) the conciliation procedure has not materialized for a reason not attributable to the initiator of the strike.
In other words: before calling a strike, seven days must be allowed for prior conciliation. If the employer refuses to negotiate during this period, a strike call is to be considered lawful. A strike may be adjudicated as unlawful if it has not been preceded by conciliation procedure for the minimum prescribed period of seven days.

In the case of a strike affecting several employers, the employers, if requested, are obliged to appoint their representative. If the employer affected in the strike's demand cannot be defined, the Government shall appoint its representative participating in the coordinating procedure within five days. In a recent case related to strike threats of the Hungarian Teachers Trade Union the government appointed the Human Resources Minister (Zoltán Balog) as its representative. One of the biggest issues in this case was the determination of minimum service. In the opinion of the Teachers Trade Union in the education sector no "minimum service" requirement was applicable. Obviously the Ministry of Human Resources (the ministry responsible for, amongst others, development of school education from nursery to university) saw the question otherwise. The problem arose when the Labour Court refused the petition of the minister of Human Resources claiming that under the Civil Procedure Act he had no entitlement to file in a petition.

Even in the period of the conciliation ('cooling off period') there may be held one strike action, the duration of which, however, may not exceed two hours ('warning strike'). It is a distinguished flaw of the Act on Strike that there is no set clear deadline for the prior declaration (*advance notice*) of strikes.

The law does not specify a certain quorum or requires the strike decisions to be taken by *secret ballot*. There is one important exception: based on the agreement concluded in 1994 between the Government and civil servants' trade unions strikes must be approved by a majority of the civil servants concerned. It should be noted that though its use is not compulsory outside the civil service, in practice informal ballots are often organised by trade unions to survey the 'willingness' of the employees.

During the time of the strike, the opposing parties continue further conciliation for the settlement of the debated question and are obliged to ensure the protection of persons and of property (Sec. 4, Subsec. 1 of the Act on Strike).

4. Who can call and launch a strike?

The question − who has the right to strike − may be answered in many ways. One possible answer is only a trade union or a coalition of unions. In other countries only a trade union that represents a majority of the workers involved in a dispute (for example a union that has been certified as the exclusive bargaining agent in respect to a specified bargaining unit, such as a plant, an enterprise, an industry, etc.) has the right to strike. In other countries the right to strike "belongs to" a non-union body (for example staff delegates, a workers'

committee), a federation or a confederation of workers. A state may also provide workers in general with the right to strike.

Under Hungarian law the Strike Law does not detail who is entitled to call a strike. The right to strike is a legal due of the workers − under the conditions provided for by the Act on Strike − for the assurance of their economic and social interests (Sec. 1, Subsec. 1 of the Act on Strike). Hungarian law gives workers a positive right to organise and participate in strike.[12] In consequence, the right to strike in Hungary is attached to the *workers themselves in general* (not only to trade unions). In other words: Every worker has the right to strike. This is not attached to trade union membership. There is one exception: solidarity strikes must be organised by the trade unions. Persons who belong to another trade union than the union which is the party to the strike are entitled to participate in a strike and so are those who do not belong to any trade union. The entitlement of employees to participate in a strike does not depend on the ability to benefit potentially from the outcome of the strike. The only condition is that the strike has to aim at the protection or furtherance of workers' economic and social interests (Sec. 1, Subsec. 1 of the Act on Strike).

Self-employed workers do not have an explicitly regulated right to strike (legally speaking, they are not considered to be 'workers' in a strict, above-mentioned sense). In a peculiar case strike took form of a massive breach of contract. Most likely bogus employment was in the background. [13] In the civil service, a strike can only be called by a trade union that is party to the agreement concluded between the Government and the trade unions concerned in 1994.

Works councils are not permitted to call a strike, and if works councillors participate in a strike, their mandate is suspended during the action.

According to Sec. 1, Subsec. 2 of the Act on Strike, participation in a strike is *voluntary*, no one can be forced to participate in it or to refrain from it. It is not allowed to intervene with coercive measures aimed at bringing an end to the work stoppage in a legal strike of the workers. In the course of exercising the right to strike, employers and employees shall co-operate with one another. The abuse of the right to strike is forbidden (Sec. 1, Subsec. 3 of the Act on Strike).

A decision of the Supreme Court (BH 2002.160.) endorsed the right of the employer to call on non-striking workers to perform *overtime* in order to reduce the damages caused by the strike. Thus, this managerial measure does not qualify as an unlawful coercive measure.

5. Type of conflicts that would eventually lead to a legal strike

There are many ways to limit the ambit of conflicts that would eventually lead to a legal strike. One obvious of these ways is relative or absolute peace obligation (the latter is prohibiting strikes on any cause, during the 'life' of a collective agreement, when the parties have agreed upon a no-strike clause). The law may prohibit strikes arising out of rights disputes or strikes aiming at bringing about or enforcing of a collective agreement (for instance, the legal validity of such agreement). Strikes arising out of disputes relating to issues that are not fit to be regulated by collective bargaining (management prerogatives) or arising out of inter-union disputes oftentimes fall outside the ambit of lawful strikes. Purely political strikes (i.e. strikes that are called to make pressure on the government) are

[12] Individual work stoppage can never be categorized as strike. LB. Mfv.I.10.998/1995.
[13] Berki, Erzsébet: A sztrájkok hazai gyakorlata. Mit mutatnak a számok? *PMJK*, 2008/2, pp. 117–128, 122.

declared unlawful under international regulations. Last but not least there are severe restrictions on strikes that announce certain concerns to the public.

In relation to the *peace duty* several questions arise: Is it a mandatory duty or can it be set aside by the parties concerned? Who can claim rights which arise from it? Who is bound to such duty? What does the "peace duty" imply? When does it begin and when does it end? What exactly is required to fulfil the "peace duty"? *The strikes to modify an agreement that is already in effect* are considered unlawful. According to Sec. 3, Subsection 1. of the Act on Strike the strike is unlawful if − among other reasons − it is held to have the agreement fixed in the collective agreement changed in the period when the collective agreement is in force. This is a specific so-called ex lege, mandatory "peace obligation".

Strikes motivated by legal conflicts (rights disputes) are unlawful as well. According to Sec. 3, Subsection 1. of the Act on Strike the strike is unlawful if − among other reasons − it is held against a measure or negligence of the employer, the decision on the change of which belongs to the competence of the court. In other words, a strike may be adjudicated as unlawful if it constitutes a legal, and not an interest dispute, which consequently should be decided by the courts.

Political strikes also do not enjoy protection. In Hungary the right to strike is only assured for the protection of workers' economic and social interests (Sec. 1., Subsec. 1. of the Act on Strike). Thus, political motivations for strikes are not adequate, however, not explicitly excluded by the Act. The Hungarian practice regarding political strikes is close to the ILO's view, though it should be underlined that decisions that would unify the practice are missing. The Strike Act itself fails to specify who can be the target of a strike thus leaves space to political strikes in the broad sense of the word (i.e. strikes that are of political nature but also have socio-economic side). A decision of the Labour Court of the Capital opened a new phase in the history of political strikes as it declared: it was not possible to strike demanding pension reform.

6. Lawful and unlawful modalities of industrial action

Industrial action may take several forms the evaluation of which oftentimes proves to be difficult. It is a legal due of the trade unions to initiate a sympathy / solidarity strike. Solidarity strike is the only form of strike in Hungary, which can only be organized by trade unions (not generally by the workers, with or without trade unions). In other words: the law in principle does not restrict the right to strike to trade unions, with the exception of solidarity strike. In practice, however, unorganised employees usually do not organise strikes. In the case of a sympathy strike, prior coordination may be dispensed with (Sec. 1., Subsec. 4. of the Act on Strike).

In the period of the coordination (prior 'cooling off period') there may be held one strike action, the duration of which, however, may not exceed two hours ('*warning strike'*).

Peculiar forms of strike such as surprise strike (used to be the trademark of the Railway Workers' Free Trade Union), moving strike (in various space and/or time), overtime ban (doctors refusing to work overtime), mosaic strike (one nurse per hospital department stop working, while the others cover for his shift) do appear on the landscape. In this regard the legal consequences applied in a partial strike organised by the Union of Mail Deliverers (Kézbesítők Szakszervezete) on the 22-23th of December 2009 are worthy of our attention. In this case the strikers did not stop working, they solely denied to perform the new tasks the employees were assigned to do (such as selling scratch cards and insurance). In practice the reason for the strike was that the employer broadened the scope of activities without prior modification of their contracts. The Budapest Labour Court

deemed the partial strike unlawful. 120 postmen received written warning and the contract of 29 employees (the leaders of the partial strike) got terminated without notice (49MPKFV.631.227/2010/2). The end result of this strike however was positive: the employment relationship of those fired was re-established and the Hungarian Postal Service provided financial compensation.

Other special forms of work stoppages (e.g.: go slows, sit-ins, work-to-rule, rotating strikes, occupation of the enterprise's premises, blockades, picketing) are not regulated − thus, also not per se excluded − by Hungarian law. These forms of industrial action were traditionally not widely used in practice. However the scenery has changed after the modification of the Strike Act. We have to emphasise that the restrictions on the right to strike intensify the use of other tools and at the same time it will make the evaluation of the legal nature and consequences of these tools inevitable. To mention two examples: in December 2011 a group of Hungarian journalists went on hunger strike to protest against alleged manipulation and termination of employment relationship in the state media. A recent example from the Christmas of 2012: bus drivers of Tükebusz worked to rule. As the Labour Court ruled the industrial action to be unlawful, the employment relationships of the organising trade union leaders were terminated.

7. Industries or sectors in which the right to strike is denied or restricted

In certain sectors and industries strikes are denied or restricted. The prohibition or restriction may apply to the civil service, sectors concerning public utilities in general, enterprises or industries that are of crucial importance for the country's economy or the defence or the essential services *(Sec. 3, Subsec. 2 of the Act on Strike).* There is no legal possibility for strike in organs of the judiciary, at the Hungarian Armed Forces, armed bodies, and law enforcement agencies, and at the civil national security services. According to the Hungarian Constitutional Court the prohibition of strikes in judicial institutions is constitutional, as a strike by their members potentially endangers – and in serious cases hinders – third parties' exercising of their basic rights. The overall prohibition of strikes is justified because these organizations can only efficiently carry out their functions with a full workforce (88/B/1999. AB hat.).

There is no legal possibility for strike, if it would directly and seriously endanger human life, health, corporal integrity or the environment, or would impede the prevention of the effects of natural disasters (Sec. 3, Subsec. 2 of the Act on Strike).

At organs of state / public administration the right to strike is limited: in this sphere, the right to strike may be exercised according to the special regulations fixed in the agreement between the Government and the trade unions concerned. As for the latter (public services), the agreement regulating the right to strike in the public sector has been concluded in 1994. The agreement restricts the right to strike of the civil servants in many respects. For example, only those trade unions may call a strike who participated in the conclusion of the given agreement. Furthermore, the trade union may call a strike only if it is supported by a certain portion of the civil servants according to a ballot. The solidarity strike is also restricted. According to some Hungarian labour lawyers, this agreement on the right to strike in the civil service is unconstitutional. Indeed, the Constitution ordered that the right to strike must be regulated by an Act, but this agreement is on a much lower level of normative force.

8. Strikes affecting services essential to the community

In the case of employers who perform activities of fundamental public concern − thus especially in the field of public transport on public roads and telecommunication, as well as at the organs providing the supply of electricity, water, gas and other energy − it is possible to exercise the right to strike only in a way that will not impede the performance of the services at a minimum level of sufficiency. (Sec. 4, Subsec. 2 of the Act on Strike). As we see there is no clear definition and specific levels of essential service are not specified either.

The extent and the conditions of such a strike may be subject to *legal regulation* (by an Act). Currently two such acts exist. In Act XLI of 2012 on public transport, effective of July 1st 2012, the government determined the mandatory minimum services at 66% of regular services for local and suburban mass transport and 50% for countrywide and regional public transport. Regarding minimum postal services Act CLIX of 2012 contains regulations. In absence of such a relevant Act, the extent and the conditions of such a strike must be agreed upon during the pre-strike negotiations.

One *major change* brought by the modified act is that striking against an employer carrying out an activity serving the basic interest of citizens is unlawful, unless the parties agree on the minimum service level and its conditions in advance, or, if there is no such agreement, the level should be defined by the court (new Sec. 4, Subsec. 2 of the Act on Strike). The Labour Court brings its decision within five days, not in a trial procedure, if the need arises, after hearing the parties. This regulation serves as an incentive for the employers to hinder the conclusion of such agreement. According to most of the trade unions in Hungary, this new rule is an obvious infringement of the right to strike. In our opinion this is the main reason why the number of strikes significantly decreased after the modified Strike Act came into force.[14]

On many occasions the judges of the Budapest Labour Court emphasised that without a precise and detailed petition they cannot judge the merits of a case.[15] The petition has to contain all the facts and evidences. It is necessary to attach the strike call and to establish when, where (i.e. in which sector) and for what reason was the strike called. As the court is only entitled to establish the level of minimum service if the parties fail to come to an agreement it is also necessary to point out when, where, how did the parties negotiate and with what result. Without these documents (memo, report**)** the court can and will not judge on the merits of the case. The petition has to be very exact in term of the level of minimum service as well. It is not sufficient to ask the court to set the level of minimum service, the parties have to accurately specify the level of the service to be provided during strike (i.e. exact percentage, conditions). At first sight, it seems that the parties to the conflict are in the best position to determine the amount of minimum service to be provided (in form of a petition). But are they really the best candidates? At the heat of the conflict their sight might be clouded, positions tend to become rigid and the offers irrational. We believe the

[14] At a press conference held by union leaders in July 2011, László Kiss, President of the Hungarian Engine Drivers' Union said that nine strike initiatives had been launched in the first half of 2011 after the amended legislation was introduced. All were referred to the Labour Court for a ruling on the nature of 'minimum services' and none were able to proceed. HU1202051I, EIRonline http://www.eurofound.europa.eu/eiro/2012/02/articles/hu1202051i.htm (Last Visited: 11.12.2012.)

[15] Asbóth, Balázs: A még elégséges szolgáltatás mértékének meghatározására irányuló nem peres eljárás. Jogi Fórum Publikációk, Nov. 2011.

amount of minimum service should be determined in advance (with the intensive participation of the social partners, experts and stakeholders).

9. Other limits to a lawful strike

In addition to the afore-mentioned limits under Hungarian law, workers willing to strike are confronted with other obstacles as well. The general rules of (labour) law such as proportionality, "ultima ratio" principle, abuse of rights, fairness, reasonableness etc. have to be applied, though their use in practice is ambiguous. Strikes are subject to limitations on the basis of the need of protecting the common good. It is an intriguing question if the aims of a strike and/or the underlying demands are to be taken into account when determining the lawfulness of a strike. According to Sec. 3, Subsec. 1 of the modified Act on Strike the strike is unlawful, amongst others, if it violates the duty to cooperate or abuses the right to strike. It is a general requisite that the strike cannot use violence.

The *ultima ratio principle* is connected to gradualism. In the past a certain "schedule" used to be followed. Most of the strikes were preceded by warning strikes, or in case of strikes concerning more firms, by demonstrations, collection of signatures and warning strikes. As for the recent statistics: gradualism faded away. Strike threats and warning strikes are rarely followed by strikes. The Hungarian strike law and practice (unlike the German one) does not refer explicitly to the "*principle of proportionality*". However it can be derived from the general principle of "proper exercise of law".

During the time of the strike the opposing parties continue further conciliation for the settlement of the debated question and are obliged to ensure the protection of persons and of property (Sec. 4, Subsec. 1 of the Act on Strike). In the course of exercising the right to strike, employers and employees shall co-operate with one another. All in all, employers and employees do have to co-operate in exercising their right to strike.

10. Consequences of lawful strikes

Lawful strikes have different legal consequences with regard to the individual contracts of employment of persons participating in the strike and with regards to others (persons employed in an undertaking that may be inside or outside the scope of the strike). Perhaps the most interesting aspect is the impact lawful strikes have on the pay claims of workers in case their employers have to interrupt the business temporarily due to the strike.[16]

In line with the suspension theory the employment relationships of the strikers are not terminated, however there are negative consequences - especially in terms of *wages*. The initiation of a strike and/or the participation in a lawful strike do not qualify as violation of the duties originating from employment, they may not serve as a basis for discriminatory measures against the worker. The rights resulting from employment are a legal due of the worker participating in a lawful strike, however, no remuneration or other benefits after the work performed are due to the worker for the working hours lost because of strike - failing agreement to the contrary. It is the legal rules on social security that regulate the social security rights and obligations resulting from employment, with the provision that the period of the lawful strike is to be counted as years of service (Sec. 6 of the Act on Strike).

[16] It is highly debated how Section 146 of the Labour Code should be applied in such cases: In the event of the employer's inability to provide employment as contracted during the scheduled working time (downtime), the employee shall be entitled to his base wage, unless it is due to unavoidable external reasons.

According to Sec. 1, Subsec. 2 of the Act on Strike, participation in a strike is voluntary, no one can be forced to participate in it or to refrain from it. Participation or non-participation in a strike may not serve as a basis for discriminatory measures against the worker.

11. Support for strikers

In the long run the right to strike may only function well if strikers receive support from trade unions (e.g. strike funds and pay allocations to workers on strike) on the one hand and are not cut off from payments provided by the state or social security funds (e.g. unemployment benefits) on the other.

Strike funds are not regulated by Hungarian strike law, but in practice they are widely used by trade unions (strike funds are basically financed from the trade union membership fees, so they are typically heavily limited financial sources in practice, hindering the factual potential of trade unions to organize effective, long-lasting strikes).

It is the legal rules on *social security* that regulate the social security rights and obligations resulting from employment, with the provision that the period of the lawful strike is to be counted as years of service (Sec. 6 of the Act on Strike). In the social security system there is no specialized benefit for the workers while on strike, however, in principle, general social security rights prevail during lawful strikes, since the rights resulting from employment (such as social security rights) are a legal due of the worker participating in a lawful strike (Sec. 6 of the Act on Strike).

12. Unlawful strikes, liability

As the consequences of an unlawful strike are sever it is of utmost importance that the question of legality is decided by the most appropriate forum. From the practice of other states several possible models are visible. The legality of a strike can be determined by the government, an independent authority (the judiciary in general, a specialized Labour Court or an ad-hoc industrial relations body, etc.). In Hungary the *Labour Court* decides on the legality of a strike.

As to the effects of declaration of illegality/unlawfulness of a strike on the individual contract of employment: calling on and participating in an *unlawful strike* is a breach of the employment contract for which the employer may apply due sanctions (e.g. disciplinary measures, liability for damages, termination of the employment relationship). In principle, the organisers, especially the trade union(s) may be liable for damages caused by the unlawful strike (on the basis of general civil law rules).

The lack of clear and detailed regulation in relation to liability is one of the greatest flaws of the Hungarian system. If we apply the general rules of the new Labour Code the consequences can be rather severe: According to Section 179 employees shall be subject to liability for damages caused by any breach of their obligations from the employment relationship stemming from their failure to act as it might normally be expected in the given circumstances. The amount of compensation may not exceed four months' absentee pay. Compensation for damage caused intentionally or through grave negligence shall cover the full extent (!) of losses. (In contrast the general rules of the old Labour Code specified that in the event of causing damage by negligence the amount of the employee's liability shall not exceed fifty per cent of the employee's average wages for one month and the collective agreement or the employment contract had the possibility to raise this amount to one and a half months' or six months' salary.) .

In theory the trade union can be held liable under civil law rules but in practice it is not typically the case. Strike patrol could be a possible solution to keep strikes lawful, however the current act does not contain rules in this regard.

The liability of the employer for damages caused by employees is regulated by Sec. 348 Subsec. 1 of the Civil Code. If an employee causes damage to a third person in connection with his employment, unless otherwise provided by law, the employer shall bear liability towards the injured person. Later the employer may claim the sum back in line with labour law provisions. The employer is liable even if the damage is caused by unlawful activity of the employee, for example unlawful strike.

As to the penal effects of declaration of illegality/unlawfulness of a strike on the leaders, the current practice pose the burden of liability for damages caused by strike to a great extent on the employer but it hardly pays attention to consumer protection. The Strike Act imposes no obligation on the (public) service providers to inform service users in the event of a strike.[17]

13. ADR

The Labour Code) applies an *inflexible categorisation* in terms of law/interest, individual/collective disputes. This rigidity is unknown or little known in other countries. The Labour Code provides for mediation and other forms of ADR in the event of an interest dispute but not in the case of a rights dispute. According to the *New Labour Code*[18] the parties (the employer and the trade unions or workers' councils) may set up ad hoc or − by way of collective agreements or workplace agreements − permanent conciliation committees (organized in line with the technique of 'parity'). As a consequence, the New Labour Code will certainly put more emphasis on the idea that collective labour disputes shall primarily be solved by the parties themselves.[19] Besides ad hoc or permanent 'conciliation committees', the New Labour Code will also maintain the possibility of conciliation, mediation and arbitration, and will also make a differentiation between mandatory and voluntary arbitration (but the latter has − and in our opinion will have − little significance in Hungary).

In 1996, based on the decision of the national tripartite body, the Érdekegyeztető Tanács (Interest Reconciliation Council, ÉT) the Munkaügyi Közvetítői és Döntőbírói Szolgálat (Labour Mediation and Arbitration Service, MKDSZ) was set up in order to facilitate peaceful resolution of industrial disputes between employers' and employees' representatives by providing third party arbitration and mediation. The MKDSZ, however, has been barred to provide third party participation in individual legal disputes and in collective disputes over statutory rights, namely in legal disputes. According to its Rules of Procedure the mission of the organisation is to assist effective and quick settlement of interest disputes in the workplace, to promote social peace at sectoral and workplace levels, and to improve the culture of industrial relations. It should be noted that parties involved in a dispute are not obliged to choose a mediator or arbitrator from the register of MKDSZ. In

[17] *Cf.* OBH 2533/2008. (All strike related relevant infomation is public information).
[18] Sections 291-293.
[19] Cf. Kun, Attila: Research Study on the Enforcement of Fundamental Workers' Rights, MiliEU Ltd. - European Parliament, Brussels, 2012. (Country Report, Hungary pp. 141-168.), European Parliament, Directorate General For Internal Policies Policy Department A: Economic And Scientific Policy, European Union, 2012.

practice, however, if the parties ask for a neutral party's service, they mostly choose among the mediator and arbitrators of the MKDSZ.[20]

Notwithstanding, until now, the number of cases referred to the MKDSZ has been *fairly low*. Also, in practice, regrettably parties mostly take advantage of MKDSZ when "direct connections almost completely vanish, communication ceases, and trust reaches the lowest possible level."[21] The first and most important *reason* could be labelled as "culture of mistrust". Employers are not interested in making a dispute public and disagreement between different unions can also make it difficult to resolve conflicts. The enterprises fear from loosing prestige and the Hungarian culture of negotiation and communication as well as the asymmetric power relations between the trade unions and the employer are also to be blamed. The parties often have prejudices about the ADR expert and in practice it also happens that they ask for mediation or arbitration without a genuine will to settle the dispute (see the case between the Free Trade Union of Railway Workers and Hungarian Railway Company). Obviously mediation does not work if the true will to settle the dispute is missing, or if one of the parties enters mediation under false pretences (for instance to gain time or money). On the other hand when it is accepted, the mediation offered by MKDSZ is successful. In 93% of the cases the parties reach an agreement. The presence of the mediator eases the tension, gets the dialogue between the parties started, keeps the negotiation within borders and encourages the parties to suspend the use of coercive tools. Mediation usually lasts for three–four weeks in average. Given the small number of requests for mediation and arbitration in collective disputes, in recent years the MKDSZ has shifted its activity towards pre-emptive mediation counselling and organising awareness-raising events in the area of managing labour conflicts.[22]

About half of all collective agreements negotiated in the country contain regulations on internal conflict settlement and 28 per cent establish some sort of conflict-management committee. Also, the majority of multi-employer collective agreements include some mechanism to solve collective disputes at the workplace level.[23]

14. Legal protection of conflicting interests

Legal protection of conflicting interests is undoubtedly one of the biggest issues of strike law. How are (potentially) conflicting interests of other parties legally protected? Is there a legal protection of property? Is there a legal protection of the freedom of profession; in particular can non strikers demand that their right to work be respected and protected? - these questions needs to be answered.

According to Sec. 1, Subsec. 2 of the Act on Strike, participation in a strike is *voluntary*, no one can be forced to participate in it or to refrain from it. It is not allowed to intervene with coercive measures aimed at bringing an end to the work stoppage in a legal strike of the workers. In the course of exercising the right to strike, employers and employees shall co-operate with one another. The abuse of the right to strike is forbidden (Sec. 1, Subsec. 3 of the Act on Strike).

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[20] http://www.tpk.org.hu/engine.aspx?page=tpk_mkdsz_a_szervezetrol (Last Visited : 10.12. 2012.)

[21] Gulyás, Kálmán: Közvetítés a munka világában. In: Eörsi, Mátyás – Ábrahám, Zita (szerk): *Pereskedni rossz!* Minerva, Budapest, 2005, pp. 104–117.

[22] Čulo Margaletić, Anica –Kajtár, Edit: Mediation in Family and Labour Law Conflicts. In: Drinóczi, Tímea et alia (eds): *Contemporary legal challenges: EU – Hungary – Croatia*, Pécs-Osijek, [Univ. J. J. Strossmayer Faculty of Law] [Univ. of Pécs Faculty of Law], 2012, pp. 551–572.

[23] *Cf.* Fodor T., Gábor – Nacsa, Beáta – Neumann, László, 2008.

Strikebreaking is not regulated in more details in the Act on Strike. However, the Labour Code contains one important measure: It is forbidden to hire out employees by TWAs (temporary work agencies) at any place of business of the user enterprise where there is a strike in progress from the time when pre-strike negotiations are initiated until the strike is called-off.[24] The temporary work agency breaking this rule faces a fine up to 60.000 HUF (Government Decree 218/1999. (XII. 28.) Sec. 96. Subsec. 1 point d, Sec.96/A Subsec.1 point c).

The collision of the right to strike with other fundamental rights (such as, for instance the right to life, education or property) is one of the fundamental issues that need to be regulated.[25] The clash of the right to strike and the right to property was a crucial point in a strike of 2008 The Free Trade Union of Railway Workers (Vasúti Dolgozók Szabad Szakszervezete, VDSZSZ) launched a nationwide strike and demanded among others a bonus of HUF 250,000 to be paid to all railway workers following the privatization of MÁV Cargo – the freight transport arm of the Hungarian Railway Company. The Court ruled that demand for a bonus after the privatisation was lawful. In another case the Budapest Labour Court pointed out that the right to strike *cannot go as far as to infringe other constitutional rights* such as for instance the right to property, since the employees have no right to decide on the use of the employer's income (49.Mpkfv. 631.227/2010/2).

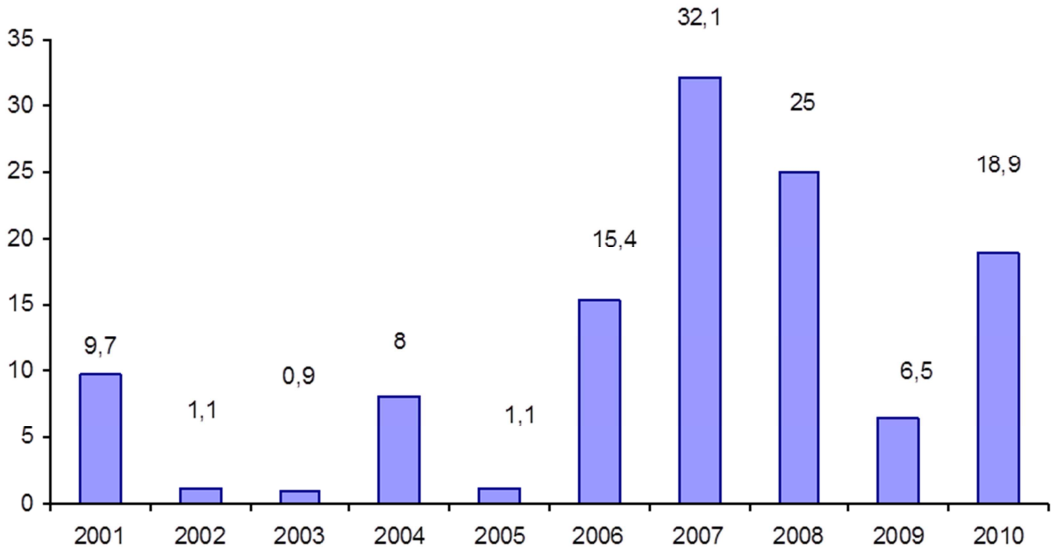
15. Strikes in practice, economic relevance of industrial actions

In Hungary, major strikes typically take place in *the public sector (mostly public utility* sector– that is, in health and social care, railways, local public transport and airports. Virtually no industrial actions are reported in private manufacturing and service companies. The major reasons for strikes are as follows: pay disputes and conflicts related to collective bargaining, staff reduction, outsourcing and privatisation. However, the largest strikes are usually related to governmental reforms (e.g.: strikes against the planed reform programmes in the health insurance system and planned measures to close public schools, rural hospitals and underutilised railway services in former years). *General strikes* are not frequent in Hungary's industrial relations practice.

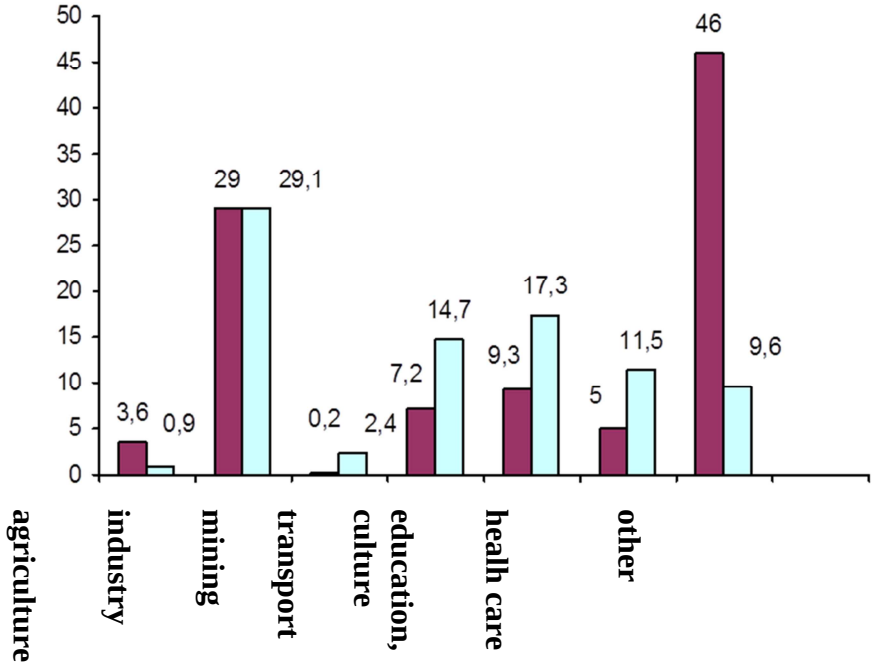
The economic relevance of strikes can be seen in the mirror of numbers related to the number of strikes, average duration of strikes, number of working days lost due to strikes and the estimated damage brought about by strikes (with regard to the "opponent", but with regards also to third parties like customers, suppliers, private consumers).[26] Here we have to underline a shocking difference between the statistics before and after the modification of the Strike Act.

[24] In the wording of the new Labour Code: The assignment of workers is not allowed with a view to replacing workers on strike (Section 216).
[25] *Cf.* Sztrájkjogi projekt, AJOB-Füzetek, 2010/4, Országgyűlesi Biztos Hivatala.
[26] The statistical data is provided by Erzsébet Berki. ("Sztrájkok az ezredforduló után" speech delivered at a conference organised by the Institute for Legal Studies of the Hungarian Academy of Sciences on the present and future of Hungarian strike law. Budapest, 22th of April 2011).

The number of working days lost through industrial action / year / 1,000 employees:



Sectors involved (1989-2010, all forms of industrial actions)



purple: rate of workers
blue: rate of actions

Forms of industrial action (2000-2010)

year	*warning strike*	*strike*	*solidarity strike*	*demonstration*	*collection of signatures*	*petition*	*other within the firm*	*other*	*total*	*%*
2000	3	4	3	12	3	2	2	4	33	4.7
2001	3	3	1	10	9	2	2	3	33	4.7
2002	3	5	0	11	3	2	0	3	27	3.9
2003	6	0	0	16	4	0	6	10	42	6.0
2004	4	7	0	10	3	1	5	3	33	4.7
2005	7	7	0	9	0	2	0	3	28	4.0
2006	9	3	0	12	1	2	4	5	36	5.2
2007	7	9	0	28	4	0	1	11	60	8.6
2008	2	6	3	19	1	0	2	5	38	5.5
2009	3	9	0	20	5	0	4	11	52	7.5
2010	2	7	1	15	2	1	1	3	32	4.6
total	**138**	**111**	**11**	**233**	**65**	**21**	**46**	**70**	**695**	**100**
%	19.9	16.0	1.6	33.5	9.4	3.0	6.6	10.1	100.0	
avg.	**6**	**5**	**1**	**11**	**3**	**1**	**2**	**3**	**31**	

In contrast, *after the modification of the Strike Act* the numbers are extremely low. It is worth taking a careful look at the following figures: In 2010 (after the modification of the Strike Act): only one warning strike took place. The strike was declared unlawful.[27] In 2011 statistical figures show one warning strike (the pilots of the Hungarian Airlines (Malév))[28] and one strike (bus drivers of International bus company OrangeWays). The later action was declared unlawful due to the non-compliance with the minimum service requirements.[29] Finally, last year (2012) only one warning strike took place.[30] The Steeler Union Association of steel company Dunaferr held a pay strike. Their warning strike was not followed by main strike. It is noteworthy that although the strike threats of the Hungarian Teachers Trade Union (see earlier) were on the agenda for months no industrial action took place.

16. Final remarks

With the modification of the Strike Act severe limitation were built into the system of industrial action. Strikes have traditionally served as an ultima ratio tool to channel pressure. It seems that the new regulatory environment keeps the pressure relief valves blocked. Unless this tendency is reversed and/or accompanied by more effective social dialogue the tension between the parties (and consequently within society) will inevitably build up. As for now the landscape of industrial actions has changed. While the number of strikes has

[27] 16th of December 2010, Gödöllő.
[28] 23rd of March 2011.
[29] 13st of December 2011.
[30] 2nd of April 2012.

drastically declined, other forms of industrial action (hunger strike, work-to-rule) are likely to gain importance in the future.

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