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Bridge(s) over Troubled Water

Strike is a peculiar, contradictory element of labour law. Collective refusal to work is present throughout history; it is the price paid for higher wages and better working conditions and – ultimately – for democracy; the famous sentence "bargaining without the right to strike amounts to collective begging"[1] speaks for itself. As a fundamental right, strike enjoys the protection of international, regional and national law sources. However, there are less positive sides of this phenomenon. Along with other forms of industrial action, strike is harmful not only for the employer but also for third parties (business partners, clients, consumers, everyday citizens). Its collision with other fundamental rights (such as for instance the right to life, education or property) raises serious concerns. It makes industrial relations instable and causes disruption in the course of the economy. Consequently, laws regulating the right to strike have to build a "bridge over troubled water", always have to bear in mind both viewpoints and to aim at a construction that is economically feasible and at the same time ensures protection of lawful strikes to the highest possible extent. In this paper the reader finds comments on four bridges as four different levels of strike regulation – namely international, European (i.e. Council of Europe), European Union and national – are examined. We refer to the legal sources and the case law of international and European courts as well as expert commissions. The EU's configuration of the right to strike is considered too. Afterwards some remarks are offered on Hungarian strike law.

1. The strike landscape

"...the first step towards understanding a system of labour law is to grasp its social history, above all the history of its labour movement."[2] The labour movement, to which Lord Wedderburn refers in this line, is strongly connected to strikes. This right went through enormous changes. For a long time, it was prohibited and prosecuted, later it became tolerated, finally it was acknowledged and protected. However, it would be a mistake to assume that the right to strike has arrived to a safe harbour. On the contrary, it seems that this essential tool of workers and of their organisations is in danger.

Two seemingly contradictory tendencies deserve mentioning. Firstly, according to statistics Europe is experiencing low strike rates. The substantial decline in working days lost due to industrial action indicates that workers and unions are under pressure. This phenomena is connected to the transition to a new (post-industrial, knowledge or service) economy. Secondly: although strike rates lowered, the attention of the media is intensified. Special attention is paid to so-called "high profile strikes". Some strikes are highly publicized, such as those in transport sector or those with transnational dimen-

1 Blanpain, Roger: *European labour law*. 12., rev. ed., The Hague, Kluwer Law International, 2010, 752.

2 Wedderburn, Kenneth William: Trade union liability in strikes in Britain and France. In: *Labour law and freedom. Further essays in labour law*. London, Lawrence & Wishart, 1995, 164–179. 165.

sion. The strike patterns have changed in terms of sectors (e.g. health, education and culture) and workers (increasing participation of women, new immigrants) involved in strikes. There has also been a rise in political use of industrial disputes. The cause of change in many cases is the presence of collective actions with transnational dimension (more precisely collective actions responding to the threat to current economic conditions posed by foreign workers). Reorganisation of work and other forms of restructuring increasingly lead to protest. This intensification of transnational strikes makes evaluation of strike regulations even more important.

2. The first bridge: international regulation of the right to strike

The right to strike is protected by more international documents. The UN's Covenant on Economic, Social and Cultural Rights states that "the States Parties to the present Covenant undertake to ensure: .... the right to strike, provided that it is exercised in conformity with the laws of the particular country" (Art. 8 para. 1 subpara. d.). The ILO, the specialised agency of the UN devotes particular attention to the subject. Numerous conventions contain reference to strike. Convention No. 105 on the Abolition of Forced Labour prohibits the use of forced or compulsory labour "as a punishment for having participated in strikes" (Art. 1, subpara. d). Strike is also mentioned incidentally in Convention No. 44 on Unemployment Provision (Art. 10) and in Convention No. 102 on Social Security (Minimum Standards) (Art. 69). Though it is not a convention, it is worth mentioning Recommendation No. 92 on Voluntary Conciliation and Arbitration Recommendation which amongst others states that no provision may be interpreted as limiting, in any way whatsoever, the right to strike (paragraphs 4, 6 and 7).[3] Above and beyond these references, surprisingly enough, there is no ILO convention dealing exclusively with the subject.

The right to strike was deducted from Convention No. 87 on Freedom of Association and Protection of the Right to Organise: "organize their administration and activities and to formulate their programmes" (Art. 3), and the aims of such organizations as "furthering and defending the interests of workers or of employers" (Art. 10). This convention and the associated supervisory procedure are amongst the most respected international standard-setting instruments. The findings of the Committee on the Freedom of Association as well as that of the Committee of Experts on the Application of Conventions and Recommendations are invaluable. During the last 6 decades a very rich case law has been gathered.

From the more than two thousand cases a map or syllabus can be drawn. The fields cover the content, conditions, limits and consequences of the right to strike. From the beginning it was declared that the right to strike constitutes an intrinsic corollary to the right to organize and a fundamental right of the workers and of their organizations. The right to strike can be confined in terms of its objective (restriction to economic and

[3] Gernigon, Bernard – Odero, Alberto – Guido, Horacio: Freedom of association. In: *Fundamental rights at work and international labour standards.* Geneva, ILO, 2003, 5–20, 12.

social issues[4], exclusion of purely political strikes[5] and use of the peace clause[6]), timing (prior notice requirement and cooling off periods[7]) and participants (ballot[8]). The right to strike of certain groups of employees (e.g. policemen) can be limited.[9] There are also conditions that justify restriction or prohibition such as an acute national emergency, public service, essential services.[10] The committees examine situations in which minimum services may be imposed. From the case law it is apparent that the employer may protect his interest by redirecting the non-striking workforce but not by hiring temporary agency workers.[11] The strikers can be aided by strike funds and supported by sympathy strikes. Numerous cases examine the issue of criminal and civil law sanctions[12] as well as the intervention of police.[13] An important lesson to be learned is that despite the suspension theory (i.e. the employment relationships of the strikers are not terminated), there are negative consequences – especially in terms of wages. [14] The use of alternative dispute resolution methods is considered as well.[15]

The ILO struggles to maintain a delicate balance between economic changes and protection of workers. It has, like every organisation, its weak and strong points. About its virtues: Through the conventions a set of internationally recognised norms, in other words a common ground was laid down in the field of workers' rights. ILO standards serve as reference points for other international documents such as ICCPR and ICESCR, the Charter of Fundamental Rights of the European Union, or the OECD guidelines.[16] The tripartite structure of the ILO is beneficial in many ways. The regula-

4 2006 Digest, para. 521. See amongst others: 302nd Report, Case No. 1809, para. 381; 328th Report, Case No. 2116, para. 368; 332nd Report, Case No. 2258, para. 522; 335th Report, Case No. 2305, para. 505.

5 2006 Digest, para. 528; 303rd Report, Case No. 1810/1830, para. 61; 329th Report, Case No. 2094, para. 135.

6 2006 Digest, para. 533, 330th Report, Case No. 2208, para. 601.

7 2006 Digest, para. 552; 325th Report, Case No. 2049, para. 520; 333rd Report, Case No. 2251, para. 996.

8 2006 Digest, para. 555–561. See amongst others: 316th Report, Case No. 1989, para. 190, 332nd Report, Case No. 2216, para. 912; 333rd Report, Case No. 2251, para. 987.

9 1996 Digest paras 597–603.

10 2006 Digest, para. 585. See amongst others: 300th Report, Case No. 1818 para.366 (hospital), 308th Report, Case No. 1921 para.573 (electricity); 326th Report Case No. 2135, para.267 (water supply), 314th Report, Case No. 1948/1955, para.72 (telephone), 307th Report, Case No. 1898, para. 323 (police and armed forces); 309th Report, Case No. 1865, para. 145 (fire-fighters); 336th Report, Case No. 2383, para. 767 (prisons); 324th Report, Case No. 2037, para. 102 (the provision of food to pupils of school age and the cleaning of school); Case No. 2127, para. 191 (air traffic control).

11 2006 Digest, para. 631. See amongst others: 302nd Report, Case No. 1849, para. 217; 327th Report, Case No. 2141, para. 322; 333rd Report, Case No. 2251, para. 998; 335th Report, Case No. 1865, para. 826.

12 2006 Digest, para.664. 302nd Report, Case No. 1849, para. 211; 307th Report, Case No. 1890, para. 372; 310th Report, Case No. 1932, para. 515; 311th Report, Case No. 1934, para. 127; 316th Report, Case No. 1934, para. 211.

13 2006 Digest, para. 635. See amongst others: 308th Report, Case No. 1921, para. 575; 320th Report, Case No. 2044, para. 452; 333rd Report, Case No. 2288, para. 831.

14 See amongst others: 304th Report, Case No. 1863, para. 363; 307th Report, Case No. 1899, para. 83; 318th Report, Case No. 1931, para. 366.

15 2006 Digest, para. 564–569. See amongst others: 310th Report, Case No. 1931, para. 506; 338th Report, Case No. 2329, para. 1275, 300th Report, Case No. 1839, para. 86; 310th Report, Case No. 1930, para. 348, 299th Report, Case No. 1768, para. 110.

16 Ewing, Keith D. (ed.): *The right to strike: From the Trade Disputes Act 1906 to a Trade Union Freedom Bill 2006*. Liverpool, Institute of Employment Rights, 2006, 248–249.

tions of the right to strike and – more broadly – the regulations regarding prevention and resolution of collective labour conflict may only be successful if they are based on a close cooperation of governments, social partners and civil society. Involvement of more viewpoints and expertise also provides more legitimacy.[17] The exceptionally detailed and active work of the commissions is a main asset. The work of the CFA is one of the ILO's success stories; acts are amended, imprisoned trade union officials are released, unlawfully fired employees are reinstated due to its activity.[18]

However, the picture is not all positive. The size of the organization and the differences between the states in terms of political, economic and ideological background raise problems. The ILO does not constitute a new legal system, it only lays down basic standards. It is questionable if it is possible to find a common denominator for the different European, Asian and Latin American needs and possibilities.[19] It is often asked if international human rights instruments should represent the ceiling or the bottom of requirements and if the answer is the bottom, would this not lead to social dumping.[20] Regarding the ILO – similarly to other specialised agencies – the presence of international politics as well as over-politicization is a critique.[21]

The weakness of monitoring is another often raised issue. Time and again, even states that ratified a given convention fail to submit their report, or the initial enthusiasm evaporates quickly. For example, the United Kingdom which was amongst the first states that ratified the conventions in question later habitually stood in the fire of criticism for not complying with the recommendations.[22] We should not forget, that ratification is voluntary and it is precisely the major states, namely China and the US did not sign conventions No. 89 and 97.[23] In the US, even these days, participants of lawful strikes may very well face dismissal.[24] Lack of classic, hard law sanctions is also one of the drawbacks. Publication of non-compliance and mobilization of shame are

17 Oates, Steven: International labour standards: The challenge of the 21st century. In: Blanplain, Roger (ed.): *The ILO and the social challenges of the 21st century: The Geneva lectures.* The Hague [etc.], Kluwer Law International, 2001, 93–103. 99.

18 Servais, Jean-Michel: *International labour law.* Kluwer Law International, 2009, 317–318.; Swepston, Lee: International labour law. In: Blanpain, Roger (ed.): *Comparative labour law and industrial relations in industrialised market economics.* 9. rev. ed. Deventer, Kluwer, 2009, 313.; Creighon, Breen: Freedom of association. In: Blanpain, Roger (ed.): *Comparative labour law and industrial relations in industrialised market economics.* 9. rev. ed. Deventer, Kluwer, 2007, 275–322. 320.

19 Engerman, Stanley L.: History and political economy of international labor standards. In: Basu, Kaushik et al. (eds): *International labor standards: history, theory, and policy options.* Malden, Blackwell, 2003, 9–83. 66.

20 Singh, Nirvikar: The impact of international labour standards: A survey of economic theory. In: Basu, Kaushik et al. (eds): *International labor standards: history, theory, and policy options.* Malden, Blackwell, 2003, 107–181. 141–144.

21 The empty chairs policy of the US 1977–1980 in protestation of the decisions condemning Israel illustrates well how a current international conflict may influence the operation of the ILO. Bruhács János: *Nemzetközi jog III.*, Budapest-Pécs, Dialóg Campus, 2001, 96, 98.

22 Novitz, Tonia: Freedom of association and „fairness at work". An assessment of the impact and relevance of ILO Convention No 87. *Industrial Law Journal* 1998/3. 169–191.

23 http://www.ilo.org/ilolex/english/newratframeE.htm.

24 See for instance the analysis of Compa, Lance: Worker's freedom of association in the United States under international human rights standards. *International Journal of Comparative Labour Law and Industrial Relations* 2006/3. 289–308. 289.

just about the only tools to hold member countries back. It is also problematic that the international standards oblige the states but have little power to account international companies.

Convention No. 87 was drafted in 1948. The last six decades has brought significant changes, trade unions have to operate in an environment that is radically different.[25] The hopeful start turned into marginalisation and pessimism by the turn of the 20th century.[26] More and more authors draw attention to the fact that changes (such as globalization, advancement of transnational companies, long term unemployment, increasing privatisation and deregulation) question the role of international labour standards.[27] The question arises: is the ILO capable of fulfilling its previous dominant role? The challenges mentioned afore force the organisation to revise its activity.

3. The second bridge: the right to strike and the Council of Europe

The European Convention on Human Rights states that: Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests. (Art. 11 para. 1). The 1961 European Social Charter as well as its revised version of 1996 contains the right to strike. The (Revised) European Social Charter states: "With a view to ensuring the effective exercise of the right to bargain collectively, the Contracting Parties undertake: ... the right of workers and employers to collective action in cases of conflicts of interest, including the right to strike, subject to obligations that might arise out of collective agreements previously entered into" (Art. 6 para. 4). Due to the cooperation with the ILO, similar but not identical patterns can be observed. Thanks to the European Committee of Social Rights we find a hand crafted criteria catalogue.[28]

The Council of Europe represents another form of integration, a non political one. Membership signals acceptance of European values.[29] The European human rights protection system does not only exist in the dreams of idealists. The institutions of Strasbourg operate similarly to national systems. A developed, mainly lawyers-operated system came to existence.[30] The last six decades naturally brought changes. The increased number of members made the organisation more heterogenic and slows down the operation. Naturally, as technology has advanced so did the legal system which made dynamic interpretation necessary.

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25 Szyszczak, Erika: *EC labour law.* Harlow, Longman/Pearson, 2000, 173–175.

26 See for instance Crawford, James: UN human rights treaty system: A system in crisis? In: Alston, Philip (ed.): *The future of UN human rights treaty monitoring.* Cambridge, Cambridge University Press, 2000, 1–12.

27 Ewing, K. D. 2006, 245–246.; Herencsár Lajos – Schottner Krisztina – Vasali Zoltán: *Bevezetés a nemzetközi intézmények és szervezetek világába.* Budapest, L'Harmattan, 2006, 65.

28 http://www.coe.int/t/dghl/monitoring/socialcharter/Conclusions/ConclusionsYear_en.asp

29 *Arató* Krisztina – Koller Boglárka: *Európa utazása. Integrációtörténet.* 2009, 68, 71.; Magyar Péter: *Az Európai Unió története.* Budapest, Útmutató, 2000, 6.

30 Janis, Mark W. – Kay, Richard S. – Bradley, Anthony W.: *European human rights law: Text and materials.* 3. ed. Oxford, Oxford Univ. Press, 2008, 24.

The Council of Europe is linked to both the ILO[31] and the European Union; there is cooperation on professional, technical and policy level. Reference is made to the case law of the ILO when Art. 11 is interpreted. In connection with the enlargement of the Union it appears that western states treat membership to the Council of Europe as a foyer to the EU. The often cited Social Charter serves as blueprint or handbook for the ECJ when it interprets the Treaty. The Secretariat of the Council of Europe cooperates with the European Commission: they sit in each others specialised committees and there exist forms of non official cooperation. At the same time the Council of Europe and the EU represent different norm and value systems.

The Council of Europe has two main instruments: the European Convention on Human Rights and the European Social Charter. Though the two mutually enrich each other, they have a separate case law and supervisory system. First of all we have to ask ourselves a question: to what extent ensure ECHR and European Court of Human Rights effective protection to the right to strike. There is no straightforward answer. Other mechanisms, especially those working under the aegis of the ILO or the European Social Charter are more effective and are built on more detailed norms. ECHR is a stronger law source then the Social Charter. On the other hand the ECHR does not include protection of the right to strike. Therefore the Court is in the position (to put it more strongly, it would be the Court's task) to derive the regulation of the right to associate and assembly from Art. 11. Such an interpretation would not be without precedent. The specialised commissions of the ILO derived the right to strike from Articles 3 and 10 of Convention 87.

The judgement in *Schmidt and Dahlström v. Sweden*[32] held a narrow interpretation of Art. 11. In this case, the applicants' unions called selective strikes not affecting the sectors in which the applicants worked, who thus did not participate in the action. Mr. Schmidt and Mr. Dahlström complain that on conclusion of the new agreement, they, as members of the "belligerent" unions, were denied certain retroactive benefits paid to members of other trade unions and to non-union employees who had not participated in the strikes. They claimed that such a denial violated Art. 11 of the European Convention. The Court decided differently. The reasoning stated that Art. 11 contained a clear statement allowing trade union activity, however, the right to strike was not inherent in the right to freedom of association. Art. 11 leaved each State a free choice of the means to be used to make collective action possible. The Court acknowledged that the right to strike represented one of the most important of these means, but also underlined that there were others. As a consequence the State was free to restrict the right to strike.

Compared to the reserved nature of earlier cases new decisions (*Demir and Baykara, Enerji Yapi-Yol Sen v. Turkey, Sat lm ş and Others v. Turkey, Danilenkov v Russia etc.)* signal encouraging changes. In *Demir and Baykara*[33] we can witness a change in the Courts mentality, the door finally started to open for the right to take collective action. In this case the applicants complained that the Turkish courts had denied them the right to form a trade union and to enter into collective agreements. The Court stated that the right for civil

31 The ILO was actively involved in the drafting of the European Social Charter.
32 Application no. 5589/72.
33 Application No 34503/9.

servants to be able, in principle, to bargain collectively, was recognised by international legal instruments, both universal and regional, and by a majority of Member States of the Council of Europe. In addition, Turkey had ratified ILO Convention No. 98, the principal instrument protecting, internationally, the right for workers to bargain collectively and enter into collective agreements – a right that was applicable to the applicants' trade union. The case is ground breaking because it confirms that there is an inherent right to collective bargaining protected by Art. 11 ECHR within the right to freedom of association. The Court ruled that only interference that is strictly necessary in a democratic society can be justified. The annulment of the collective agreement was not "necessary in a democratic society" and consequently there had been a violation of Art. 11.

In *Enerji Yapi-Yol Sen*, the main actor was an Ankara based union of civil servants. On 13 April 1996 the Turkish government published circular containing a general ban on strike actions for civil servants in the context of national action days organised by a Turkish trade union for the recognition of the right to collective bargaining in the public sector. In this case the Court acknowledged that the right to strike was not absolute and could be subject to certain conditions and restrictions. Disciplinary action taken against them on the strength of the circular was capable of discouraging trade-union members and others from exercising their legitimate right to take part in such one-day strikes or other actions aimed at defending their members' interests. The Turkish Government again had failed to justify the need for the impugned restriction in a democratic society. The circular did not answer a "pressing social need" and that there had been disproportionate interference with the applicant union's rights. While these cases are forward looking, we should not forget that the Court only gave its position on complete prohibition and not on the limitations to the right to strike. [34]

Clare Ovey and Robin C. A. White (the former is a Head of Division at the Registry of the European Court of Human Rights) remark critically that there are two routes the Court in Strasbourg may take. It either provides the member countries with space to act, in which case trade unions better turn elsewhere for protection or it pays more attention to the case law of bodies that have more detailed principles and for uniform practice it adopts these principles.[35] Which route will the Court take? From its case law the image of a more active body is unfolding, however, these changes are unlikely to be fast or drastic.

The second question: how effective is the European Social Charter and the mechanism built on it? The Charter provides a broad spectrum of economic and social rights and embodies the values represented by social Europe. It's a unique international document with complex and systematic regulations and an exclusive apparatus for monitoring compliance.[36] Despite all the efforts made its effect and acceptance however remains low.

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34 For detailed analysis see Dorssemont, Filip: The right to form and to join trade unions for the protection of his interests under Article 11 of the European Convention on Human Rights. An attempt "to digest" the case law (1975-2009) of the European Court of Human Rights. *European Labour Law Journal*, 2010/2, 185–235. 232.

35 Ovey, Clare – White, Robin: *The European conventions on human rights.* 4th ed. Oxford, Oxford University Press, 2006, 344.

36 Świątkowski, Andrzej Marian: *Charter of Social Rights of the Council of Europe.* Alphen aan den Rijn, Kluwer Law International, 2007, 41–42.

The number of references to the Charter in concrete cases serves as a good indicator to the effectiveness of the document regarding the level of protection of social rights. Analysis show that national courts mainly refer to it when they whish to support their argument and in cases that is based on national regulations. The fact that since the Treaty of Amsterdam of 1997 it forms part of union law and therefore is a source of workers' rights strengthens its significance. The most intense critiques concern the following areas: implementation, check up, sanctions, soft terms, "à la carte rights", and individual complaint mechanism.[37] In fact all of these areas are problematic regarding the regulations on the right to strike. Implementation largely depends on the willingness of the states. Revision in 1991 aimed at greater effectiveness', establishment of a more efficient check up mechanism that divides competitions of the different organs more clearly. The involvement of employees' and employers' organisation in the supervision is strengthened. However, this reform only partly delivered the desired changes. The sanction system is still built on the method of publication and naming and shaming.

4. The third bridge: the regulation of the right to strike in the European Union

The strike regulation of the EU differs in many respects from that of the ILO or the Council of Europe. While the primary role of the later two is protection of human (and workers') rights this cannot be said about the EU. The differences are stemming from not only the different level of governance (global or regional) but also from the various historical background and aims. Accordingly significant divergence can be detected in terms of how norms are formulated, how strong the protection offered by these norms is, the effectiveness of the monitoring system and last but not least regarding the order of priority between economic and social rights.

According to the Community Charter of the Fundamental Social Rights of 1989: "The right to resort to collective action in the event of a conflict of interests shall include the right to strike, subject to the obligations arising under national regulations and collective agreements". Art. 151 Treaty on the Functioning of the European Union states that "the Union and the Member States [...] shall have as their objectives the promotion of employment, improved living and working conditions, so as to make possible their harmonisation while the improvement is being maintained ..." Arguably the right to take industrial action is a tool to promote improved living and working conditions. Nonetheless, the Union has no competence to legislate over it. Art. 153 TFEU (with a view to achieving the objectives of Art. 151) lists the fields in which the Union shall support and complement the activities of the Member States. Paragraph 5 however contains an expressed exclusion provision. The provisions of this Article shall not apply to pay, the right of association, the right to strike or the right to impose lockouts. This is a surprising restriction knowing that the right to strike is recognised in EU Member States. The right or freedom to undertake industrial action forms part of the common constitutional traditions of the Member States (and it consequently forms

37 Birk, Rolf: *European Social Charter*. Alphen aan den Rijn, Kluwer Law International, 2007, 27–28. 36.

part of EU law). The protection is sometimes embedded in the constitution itself,[38] oftentimes in acts[39] and in some countries this right is developed in the case law.[40] The Member States' monopoly over the regulation of the right to strike is illusory. Though the regulation belongs to the competence of the Member States, in line with the primacy of EU law the States cannot follow or tolerate practice contrary to EU law.

In contrast, the Charter of Fundamental Rights of the European Union clearly includes the protection of the right to strike. It states: "Workers and employers, or their respective organisations, have, in accordance with Union law and national laws and practices, the right to negotiate and conclude collective agreements at the appropriate levels and, in cases of conflicts of interest, to take collective action to defend their interests, including strike action." (Art. 28). The right to strike as well as its main limits is expressed here. There is room for restriction, as the protection has to be granted in accordance with Community law and national laws and practices.

The ECJ transmits an ambiguous message. On the one hand we hear that the right to take collective action and also the right to strike is a fundamental right which forms an integral part of the general principles of Community law. However we also hear that these rights are not as fundamental as the four freedoms, the cornerstones of the Community. In reality collective actions are treated as inferior factors which seriously jeopardise the freedom to provide services or the freedom of establishment. Collective actions must be justified and pass the proportionality test. They must have a legitimate aim, respond to overriding reasons of public interest and be suitable for securing the attainment of the objective pursued and not go beyond what is necessary in order to attain them. The proportionality criterion was applied in a way that it undermined the very substance of the right to strike. As Norbert Reich puts it there is no reserved area left. Suddenly, with Laval[41] and Viking[42] the national labour law that so far enjoyed immunity, falls within the scope of Community's free movement regulations. With the application of horizontal direct effect freedoms can be invoked against trade unions too.[43]

The most perceptible characteristic of the regulation is the lack of competence. Taking into account the special nature of the European social policy, this is hardly surprising. Yet, we cannot ignore that the tendencies present in the 21th century make regulation necessary. Globalisation serves as a catalyst for collective actions with the

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38 The right to strike appears implicitly for instance in the Hungarian, Croatian, Polish, Bulgarian, French, Greek, Italian, Portuguese and Spanish constitutions. The German and the Finnish constitutions contain indirect provisions.

39 E.g. *Loi n 63-777 du 31 juillet 1963 relative à certaines modalités de la grève dans les services publics* (France), *Legge 12 giunio 1990 n. 146. Norme sull'eserzio del diritto di sciopero nei servizi pubblici essenziali e sulla salvaguardia dei diritti della persona constituziomente tutelati* (Italy), *Real Decreto-ley 17/1977, de 4 de marzo, sobre Relaciones de Trabajo Título I. El derecho de huelga* (Spain) *or 1989. évi VII. tv* (Hungary).

40 Ireland and Germany are fine examples. The courts also play a predominant role in shaping strike law in France, Denmark, Belgium, the Netherlands.

41 *Laval v. Svenska Byggnadsarbetareförbundet*, Laval, *Case C-341/05* [2007] ECR I-11767

42 *International Transport Workers' Federation and Finnish Seamen's Union v. VikingLine*, Viking, *Case C-438/05*, [2007] ECR I-10779

43 Reich, Norbert: Free movement v social rights in an enlarged union. The Laval and Viking cases before the European Court of Justice. *German Law Journal*, 2007/9, (Iss. 2.) http://www.germanlawjournal.com/article.php?id=891

involvement of more countries (cross border demonstration is only one example). Acknowledgement of the right to strike as fundamental right also means that no strike breakers from other Member States are allowed, nor is the relocation of production from one Member State to another. The national tool kit is obviously insufficient to handle these types of problems.

The (relative) balance of power between employers and workers is a prerequisite of the EU's economy. While at Member State level such balance exists (via collective actions, social dialogue and workers participations) at EU level the equilibrium is compromised, more precisely the balance is shifted towards employers.[44] This power imbalance is further strengthened by the current economic crisis and the unemployment that accompanies it.

The European Court of Justice serves multiple functions: it provides assessment, impulse and uniformity.[45] The Court is often labelled as activist. Indeed in many occasions it did apply broad interpretation to fill the gaps in the EU Treaty and coined new terms. Its activist approach however is not even in terms of time, policies or types of cases.'[46] The Court follows a liberal agenda, built on individual rights, but it does not give a blueprint on the limits of the Member States actions.[47] The European Court of Justice is certainly not designed as a Human Rights Court and the competences provided by the Treaty set the limits for its activist behaviour. It is not easy to draw the line between activism and trespassing. Had the ECJ attempt to regulate fundamental social rights without authorisation it would lead to legitimacy crisis.[48] While respecting the aforementioned inner limits one must not forget that restricting strike also means restricting collective bargaining.[49] This, in the long run undermines the European Social Model itself, a model which attempts to combine economic and social values, including but not limited to free collective bargaining and solidarity.[50]

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44 Bercusson, Brian: Implementation and monitoring of cross-border agreements. The potential role of cross-border collective industrial action. In: Papadakis, Konstantinos: *Cross-border social dialogue and agreements: An emerging global industrial relations framework?* Geneva, ILO, 2008, 131–158.

45 Basedow, Jürgen: The judge's role in European integration, the Court of Justice and its critics. *The European Court of Justice and the autonomy of the member states.* Workshop, Firenze, EUI. April 20–21 2009

46 Craig, Paul P. – De Búrca, Gráinne: *EU law: text, cases, and materials.* 4th ed, Oxford, Oxford University Press, 2008, 73–75.

47 Reich, Norbert: How proportionate is the proportionality principle in the internal market case law of the ECJ *The European Court of Justice and the autonomy of the member states.* Workshop, Firenze, EUI. April 20–21 2009

48 Weiss, Manfred: Cumulative objectives of fundamental rights' protection in the European Union. In: Betten, Lammy – Mac Devitt, Delma: *The protection of fundamental social rights in the European Union.* The Hague, London, Boston: Kluwer Law International 1996, 33–37.; Bronitt, Simon: *Principles of European Community law: commentary and materials.* Melbourne, Law Book Company, 1995, 172.

49 Schlachter, Monika: Posting of workers in the EU. *PMJK* 2010/1, 87–94. 93.

50 European Commission (publ.): *White paper, European social policy: a way forward for the Union.* Luxembourg, Office for Official Publications of the EC, 1994; European Council: *Presidency Conclusions.* Nice, European Council Meeting, 2000, Annex 1, European Social Agenda. See for instance Vaughan-Whitehead, Daniel: *EU enlargement versus social Europe? The uncertain future of the European social model.* Cheltenham, Edward Elgar, 2003; Szyszczak, E. 2000, 164–170; Gyulavári Tamás – Krémer Balázs: Európai szociális modell? *Esély,* 2004/3, 3–25. 4.; De Búrca, Gráinne: Towards European welfare? In: De Búrca, Gráinne (ed.): *EU law and the welfare state. In search of solidarity.* Oxford [etc.], Oxford University Press, 2005, 1–9.

5. The BALPA case

In this case to become more cost effective the British Airways decided to set up a subsidiary company in other EU States. The British Airline Pilot Association (hereinafter: BALPA) realised the possible negative implications of this decision on terms and conditions of employment. After failed negotiation it decided to go on strike. Irrespective of the overwhelming support of workers (the pre strike ballot showed 86% in favour of work stoppage) the strike could not take place, because the company requested an injunction, claiming that the action would be illegal under Viking and Laval. It argued that the right to strike was subject to restrictions under European law, where its effect may disproportionately impede an employer's freedom of establishment or freedom to provide services. What is more, the company threatened that should they go on strike, it would claim damages estimated at £100 million per day. The BALPA turned to the High Court, however three days later the case stopped for BALPA realised that the process would be likely to last at least 18 months during which time it could not risk taking strike action.

The case was referred to the ILO's Committee of Experts on the Application of Conventions and Recommendations. The Committee made it clear that its task is not to judge the correctness of the ECJ's decisions. It referred to its previous position on permissible restrictions on the right to strike and underlined that there is no need to assess the proportionality of interests bearing in mind a notion of freedom of establishment or freedom to provide services. In previous cases it has only suggested that, the notion of a negotiated minimum service in order to avoid damages which are irreversible or out of all proportion to third parties may be considered, and, if agreement is not possible, the issue should be referred to an independent body. The Committee expressed its serious concern in connection with the practical limitations on the effective exercise of the right to strike. The serious threat of an action for damages that could bankrupt the union, possible in the light of the Viking and Laval judgements, creates a situation where the rights under the Convention cannot be exercised, the injunction and the delays would probably render the action meaningless. Such cases are becoming more and more common, therefore the doctrine that emerged from the ECJ' judgements was likely to have a significant restrictive effect on the exercise of the right to strike in practice in a manner contrary to the Convention.[51]

The activity of the European Union raises serious concerns. In the *BALPA* case it was openly stated that the decisions of the European Court of Justice in Laval and Viking are incompatible with ILO standards. The clash between the ECJ's viewpoint (on the liability of trade unions for the consequences of an industrial dispute) and that of the European Court of Human Rights (trade union's rights) is obvious.[52] The message of the ILO and that of the Council of Europe is about a strike that is considered and

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51 Report of the Committee of Experts on the Application of Conventions and Recommendations (Appendix to the General Report Part II. Observations concerning particular countries United Kingdom).

52 Ewing, Keith D. – Hendy, John: The dramatic implications of Demir and Baykara. *Industrial Law Journal* 2010/1 2–51.

protected as human right, the ECJ's decisions on the other hand build a pedestal for the four freedoms. Which approach will triumph? On one side there is a remarkably detailed set of rules, a suitable machinery to identify infringements, but the proper sanctions are lacking or are rarely applied. On the other side there is seemingly no competence but there is a very effective sanction system. Paul Germanotta and Tonia Novitz point out that the EU is in a better position to secure an enforceable right to strike than the ILO or the Council of Europe. Clearly, if it were not for the historical reluctance to regulate industrial action, the EU would have the potential to reverse the gradual diminution of labour standards.[53] Indeed, the EU has the way but not the will. It is fearful, that at least when strikes with transnational elements are concerned, the rules of the EU will conquer over the international regulations.

6. The fourth bridge: some remarks on the Hungarian system

In Hungary the right to strike is a fundamental right protected by the Constitution and by a separate act. The content of this right is closer to the ILO's vision than to the European Social Charter's. Industrial actions directed to collective bargaining are not the only ones protected, but all actions with the objective to protect the social and economic interests of workers.

Act VII of 1989 on Strike was written at turbulent times, when the change of regime was on its way therefore contains lots of fuzzy regulation. In the last three years the strike issue has been in the limelight. Conferences were organised, Hungary's Ombudsman launched a comprehensive review of the Strike Act in the autumn of 2008 to map the problematic areas. These issues concerns areas such as the restrictions concerning public servants, the provision of essential services (the problematic nature of these fields was pointed out by the European Committee of Social Rights as well) information of the public or liability for damages etc. Though attention is paid to the issue, strikes with cross border elements are not considered as burning problem. Regarding transnational strikes we shall examine two cases, one hypothetical and one that de facto took place.

Starting with the hypothetical case, one might ask: how would Hungarian judges decide in a situation similar to Viking or Laval? This question is rather complex. Actions comparable to those involved in the aforementioned cases would most likely to be unlawful. Strike against the employer who has partially remodelled its activity abroad to force him to conclude the same agreement in that given foreign country as the agreement in force between the trade union and the employer would be considered unlawful. Similarly, trade union action to force the posted workers' employer to quasi join the collective agreement to extend the application of the conditions of the collective agreement to posted workers would be unlawful. The employer shall ask the opinion of the trade union operating at the employer's workplace prior to passing a decision in

53 Germanotta, Paul –Novitz, Tonia: Globalisation and the Right to Strike: The Case for European-Level Protection of Secondary Action. *International Journal of Comparative Labour Law and Industrial Relations* 2002/18, 67–82.

respect of any plans for actions affecting a large group of employees (like proposals for the employer's reorganization, transformation) (Art. 21 para. 1 of the Labour Code). If the employer fails to fulfil this obligation or – in the opinion of the trade union – fulfils it improperly the trade union may take advantage of its right to veto. The contested actions shall not be executed or, if already in progress, shall be suspended until the negotiations between the employer and the trade union are concluded, or until the court's final decision (Art. 23 para. 5 of the Labour Code). If an employer has failed to provide information, the trade union can exercise its right to veto the reconstruction of the enterprise abroad.[54]

Another strike with transnational element was the protest at Budapest Airport in December 2008. Budapest Airport decided to hire new workers due to the proximity of Christmas. Some 40 strike-breakers have arrived at Ferihegy airport from Greece and the airport manager started to train them as check-in security controllers. The Union claimed violation of the strike law and turned to the Labour Inspectorate to prevent the use of foreign workers hired to cover for striking security staff. The strike went on and the Greek security controllers started to work. The European Trade Union Confederation expressed support for the airport employees. In my opinion the employer's action breached not only international law standards but was contrary to the Hungarian labour code too. The later states: "It is forbidden to employ a hired-out worker...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 (Art. 193/D Labour Code)". We can see that for the duration of a strike the employer is prohibited from replacing striking employees with temporary workers. However this "anti-strike-breaker" provision of the Labour Code only prohibits to use temporary workers. An employer wishing to maintain his activities may however utilize his own employees, or recruit new workers other then temporary workers. According to the ILO: The hiring of workers to break a strike in a sector which cannot be regarded as an essential sector in the strict sense of the term, constitutes a serious violation of freedom of association.[55] The term "essential services" is defined by the jurisprudence of the ILO. This definition is applied only in cases where the interruption of services would pose a danger to the population, in terms of people's life, safety or health (the hospital sector; electricity services; water supply services; the telephone service; air traffic control). In these cases the right to strike may be subject to major restrictions or even prohibitions. The definition is restrictive. Consequently other areas of transport operation are not "essential services".

How could Hungarian strike law and practice advance? In my opinion the first step would be to provide information on international and European rules. Regarding legal sources, the analysis of travaux préparatoires and the knowledge of "insider" profes-

54 Kiss György – Kajtár Edit: Freedom of services, establishment and industrial conflicts. Country Report: Hungary. In: Blanpain, Roger – Świątkowski, Andrzej M. (eds): *The Laval and Viking cases: freedom of services and establishment v. industrial conflict in the European Economic Area and Russia.* Alphen aan den Rijn, Wolters Kluwer, 2009, (Bulletin of comparative labour relations; 69) 83–101.

55 2006 Digest para. 632.

sionals[56] (i.e. lawyers working at the International Labour Organization, Council of Europe or European Court of Justice) provides a more complete understanding. We have to build on the knowledge of practicing experts as well as the work of theoreticians. Secondly, it is important to take advantage of the good practices of other countries. I am convinced that legal transplants[57] (new concepts, solutions and techniques) would invigorate the current Hungarian system. This of course cannot be done without paying proper attention to the fact that legal norms are strongly intertwined with the historical, political, ideological and economic environment of a given country. Thirdly, rules imposed on the parties (especially on the workers) are not feasible in the long run. Self-regulation in forms of collective agreement or a separate document is therefore to be encouraged.

The Hungarian Strike Act was amended a few months ago yet various areas are still unregulated (strike breaking, strike petrol, liability issues, prior notification of the public and the employers, consumer protection, data protection etc.). I believe that certain aspects of the national regulation (regulation on minimum service, peace clause and complete prohibition of strike in relation to certain employees) violate the rules set up by the ILO and the Council of Europe.

7. Concluding remarks

Strikes are present throughout organized labour history. If we look back, each period has its own emblematic strikes. Let us think about the UK miners' strike of 1984-85 the fall of which also signalled the end of strong trade unionism. This right is an essential consequence of the right to organize and at the same time an indispensable tool to promote and defend the economic and social interest of workers and of their organisations. It is of utmost importance that effective guarantees exist for the furtherance of the right to strike, while measures which unduly prevent recourse to strike are eliminated.

Only regulations that are transparent, predictable and consistent comply with the rule of law. In other words, a clear concept of the right to strike is a prerequisite. In reality however, the extent of protection granted to the right to strike is different on international, regional, European and national level. The relationship between Geneva, Strasbourg, Luxembourg and Budapest is not clear; therefore the legislator/trade unions/employees/employers face difficulties when attempting to predict the lawfulness of a given protest. Via its case law, Geneva and Strasbourg provide a rather detailed set of guidelines; although there are minor differences, the visions of the two institutions are similar. Luxembourg, on the other hand, transmits a different message. The right to strike, though acknowledged to be a fundamental right, is treated inferior to the four

56 De Witt, Bruno: European Union law: A unified academic discipline? *EUI working papers, Law*, 2008/34, 1-3.

57 Watson, Alan: Legal transplants: *An approach to comparative law.* 2. ed. Athens, Georgia, The University of Georgia Press, 1993; Kahn-Freund, Otto: On uses and misuses of comparative law. *The Modern Law Review* 1974/37, 1-27.

freedoms. From cases, such as BALPA, it is fearful that no matter how broadly the right to strike is interpreted by the Council of Europe or (even more broadly) by the ILO, the enforcement methods attached to international and regional norms might not provide sufficient protection.

To conclude, even if industrial peace is the ideal state, different interests between employees and employers will always lead to clashes. Conflicts as such form a natural part of industrial relations, be they national, international or European. It is the uncontrolled conflict that turns to be harmful, ruins solidarity in the society and jeopardises the rule of law. The question we have to ask ourselves is by no means how to curtail the right to strike but how to keep it within lawful boundaries. In the 21th century the preservation and sometimes reconstruction of those bridges is more important than ever.