Strike as a Fundamental Right of the Workers and its Risks of Conflicting with other Fundamental Rights of the Citizens

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A. Introduction

No national laws on strike action are alike. Notably, the law on strike action is part of a much broader picture. As strikes are mostly related to collective bargaining, distinct perspectives that may exist in national systems in this regard inevitably influence assessments of strikes. If the room for bargaining is deemed an area in which the state does not interfere, the decision to use strike action may essentially be left to the autonomous decision-making of trade unions. If, on the other hand, the state tightly regulates collective bargaining, then it seems plausible for regulations on strikes to be subject to similar rules. A possible link between collective bargaining and strikes may also have other implications. If the right to conclude collective agreements is, for instance, limited to the most representative unions only, then the case might be that only members from those unions actually enjoy the right to strike. More generally, legal systems differ considerably with respect to who may represent workers´ interests. In many countries, trade unions exercise monopoly power in the representation of workers. In other countries, dual systems are in place. Works councils, for instance, may be the representative bodies at the level of the individual establishment, while trade unions may represent workers´ interests at the company and, in particular, at the branch level. Though collective agreements can be concluded at all these levels, it may very well be that works councils are prevented from staging a strike when the employer is reluctant to conclude an agreement. Instead of calling a strike, the works council may have to take recourse to arbitration as is indeed the case, for instance, in Germany.

Second, entirely different attitudes exist towards strikes. In some countries, strikes are considered “a right to self-defence” which is not necessarily directed at the employer; in other countries, the area of admissible industrial action may be necessarily congruent with the relationship between employers and employees. In yet other countries, strikes are seen as acts of “self-empowerment” which have very little to do with a legal order granting certain powers or rights. Finally, in some countries, the right to strike is viewed as being firmly rooted in human dignity, granted to each individual worker and not waivable by him or her, and in others, the perspective may be more “technical” with a considerable power to dispose of the right to strike.

Third, as strikes are a means of balancing power between the employer and the workers, socio-economic conditions which influence this relationship may have to be considered when determining the rules on strikes. To give only two examples: Today, many companies are highly dependent on each other. Some of them may even form clusters. A move to reduce in-process inventory and associated carrying costs has made just in time production prevalent among, for instance, car manufacturers. Accordingly, a strike at a supplier will quickly start affecting the customers, a fact that lends additional power to unions and can therefore not be easily disregarded when determining the rules on strikes. Similarly, if employers can move factories beyond borders, which is indeed possible in times of a globalized economy, the question what workers should be able to throw into the balance needs to be addressed.

The following comparative overview tries to shed light on the various legal systems and the solutions they provide to the most important issues relating to strikes. It must be noted, however, that descriptions of the legal situation can only do so much. As every comparatist knows, a considerable gap exists between the “law in the books” and reality. This may, in particular, be true with regard to strikes, because striking is part of a “fight” which raises the question of power, a question that cannot be answered by simply referring to legal rules. In some countries, strike action often takes place outside the scope of the legal framework. Not only are many strikes unofficial, strikers all too often do not care much about the law. Accordingly, to get a clear understanding of what strike action means “on the ground”, one would have to broaden the perspective and take industrial relations as whole into account. In this context, many questions would have to be raised, for instance, about the number and structure of the relevant “players”, about trade union democracy, discipline

among trade union members, accountability and the feeling of responsibility on the part of unions as well as employers, dependence or independence of trade unions, the scope of inter-union rivalry, etc. Many questions have yet to be answered and the answers may often be disputable. The following section discusses the legal situation of strike law.

B. Comparative overview

I. Legal Definitions

In many jurisdictions it is far from clear what precisely constitutes a "labour dispute" or a "strike", for that matter. The issue often proves to be highly controversial among academics as well. Should it, for instance, be a requirement for the strike action to be directed at the employer? And what line must be drawn between striking, on the one hand, and exercising the right of refusal to work or perform, on the other, which is based exclusively on the individual contract of employment. The importance of discussing the definitions "labour dispute" and "strike" should not, however, be overestimated; how to define the respective terms is one issue, but whether a "labour dispute" or "strike" are to be considered lawful or not is an entirely different question. By no means should the answer to the latter question be prejudiced by the answer to the former one.

While the legislators in many countries have defined the term "strike", there are many others in which the respective terms have not been specified and where it is left to the courts to define them. In **Uruguay**, the term "strike" is neither defined in statutory nor in case law. Though some may consider this to be an inadequacy, others claim that there is an inherent danger in attempts to define the term "strike" because such a demarcation may, ultimately, limit the right to strike. Consequently, some call for trade unions themselves to further substantiate (in practice) the concept of "strike".

1. Existence of Statutory Definitions

In **Ireland**, the word "strike" is defined in different Acts for different legal purposes. Though statutory definitions slightly differ, they all comprise two fundamental elements: first, a *stoppage of work* and second, *concerted action*. The two elements are also defined in terms of their ends, based on the *objective of inducing employers to accept or reject terms or conditions of employment*. Similar definitions exist in many other jurisdictions.

In some countries, statutory definitions of the term "strike" are more elaborate. For instance, in the **Czech Republic**, the definition of the term "strike"[1] does not only refer to a "work stoppage", but explicitly mentions the possibility of a "partial work stoppage". In **Turkey**[2], the purpose of a strike, according to the statutory definition of the term, is the direct aim of strike action, whereas its ultimate purpose is not mentioned at all. According to Turkish law, a strike is "any concerted cessation by employees of their work with the purpose of halting the activities of an establishment or of paralyzing activities to a considerable extent, or any abandonment by employees of their work". In **Ecuador**, the statutory definition[3] refers to a "work stoppage by workers collectively" without considering the purpose of the action.

In some countries, the legal definition seems to be more rigid. For instance, in the **United States**[4], employees enjoy the right to engage in "concerted activities for the *purpose of collective bargaining or other mutual aid or protection*" (and shall also have the right to refrain from any or all such activities). As opposed to many other countries, strikes essentially only serve the purpose of being instrumental to collective bargaining. **Colombian** legislation expressly provides[5] that the suspension of work must not only be temporary, but also "peaceful".

[1] As stipulated in the Act on Collective Bargaining.
[2] According to the definition of the term in Article 25 of the Act on Collective Agreements, Strikes and Lock-outs.
[3] Article 467 of the Labour Code.
[4] According to the National Labor Relations Act.
[5] Article 429 of the Labour Code.

2. Lack of Legal Definitions

In many other jurisdictions (for instance, **Austria**, **Finland**, **Germany**, **Hungary**, **Israel, Spain**) the legislator has refrained from providing a definition for the term "strike". In these countries, the court has to step in and devise a definition. In **Israel**, the courts developed a relatively broad concept. According to the National Labour Court, a strike is a coordinated oppressive action, taken by a group of employees within the scope of an occupational struggle of employees against an employer, aiming to induce the employer to meet their demands with regard to work conditions or other work-related issues. According to the courts in **Finland**, the strike must be linked to the employment relationships. In **Japan**, the term "strike" is generally defined as a complete simultaneous stoppage of work by a group of workers. According to this definition, the underlying purpose of the action plays no role at all. The approach in the **Netherlands** is specific in that the term "strike" has neither been defined by legislation nor by the courts. Instead, the Dutch Supreme Court refers to the European Social Charter, which, however, does not include a definition of collective action or strikes, either.

II. The Legal Basis of a Right to Strike

1. International Instruments

Guarantees of the right to strike are part of a number of international instruments. Only some of them will be mentioned here. Article 6(4) of the European Social Charter (ESC) of the European Council, which was adopted in 1961 and revised in 1996, guarantees "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." Most members of the European Council consider themselves bound by the ESC, but some countries made reservations with regard to the right to strike action: In both **Germany** and the **Netherlands**, civil servants are barred from striking by national law. **Austria**, **Poland** and **Turkey** excluded Article 6(4) from ratification, while

Portugal formally declared that the obligations entered into under Article 6(4) shall in no way invalidate the prohibition of lockouts as enshrined in the Portuguese Constitution.

Article 27(1) of the Inter-American Charter of Social Guarantees, which was adopted in 1948, provides that "workers will have the right to strike. The law shall regulate the conditions and exercise of that right." The North American Agreement on Labor Cooperation between the Government of the United States, the Government of Canada and the Government of the United Mexican States, which was signed in 1993, in its Annex 1 enshrines "Labor Principles", including: **"**The protection of the right of workers to strike in order to defend their collective interests".

2. Constitutional Guarantees

The legal position of trade unions and workers is particularly strong if the right to strike action is provided for both in a statute and if it is guaranteed at the constitutional level. This is the case in **Poland**, for example. The Polish Constitution acknowledges the right to strike in its second chapter on "The Freedoms, Rights and Obligations of Persons and Citizens" – "Political Freedoms and Rights". Accordingly, the right to strike is understood as a basic human right (or freedom). The consequences are twofold: First, the right to strike is difficult to restrict. According to Article 31(3) of the Constitution, "any limitation upon the exercise of constitutional freedoms and rights may be imposed only by statute, and only when necessary in a democratic state for the protection of its security or public order, or to protect the natural environment, health or public morals, or the freedoms and rights of other persons. Such limitations shall not violate the essence of freedoms and rights". Second, according to the so-called *in dubio pro libertate*-rule of construction, any doubts that may arise when interpreting the provisions on strike must be interpreted in favour, not against, the constitutionally protected right to strike. In **Colombia**, the Constitutional Court has repeatedly stressed that only the legislator can limit the right to strike and only if certain requirements are met. In particular, when setting limitations on the right to strike in the area of "essential public services", the criteria applied by the legislator must be "objective and reasonable". Accordingly, the court holds that "essential public services" refers to services whose suspension could affect fundamental rights such as life or physical integrity. Merely

invoking “public interest or economic importance” does not suffice to justify restrictions on the right to strike.

a) Guarantees of a Right to Strike

In most countries, the right to strike is founded in constitutional law. Many countries explicitly guarantee the right to strike. A case in point is **Hungary** where both the right to collective bargaining and the right to strike are expressly mentioned in the new Constitution (which was adopted in April 2011). The same applies, for instance, to **Argentina**.

In some countries, the guarantee of a constitutional right to strike is only implicit. Article 28 of the Constitution of **Japan**, for instance, provides for “the right of workers (…) to act collectively”. This is understood to guarantee so-called “dispute acts” of workers, the right to strike action being the most important of such acts. In **Chile**, the Constitution is ambivalent with regard to the right to strike, based on a purely literal interpretation of the respective provision. If the Constitution is to explicitly contain a ban on strikes in various sectors, an *argumentum e contrario* is required to conclude that the right to strike may be exercised outside these sectors. The law in **Germany** provides an example for an even more “circumlocutory” constitutional guarantee of the right to strike. Under Article 9 of the Constitution, “the right to form associations to safeguard and improve working and economic conditions shall be guaranteed to every individual and to every occupation or profession”. This is interpreted by the courts as meaning that individuals may establish associations and become members but that the associations as such enjoy certain constitutional rights as well. Though the right to bargain collectively is not expressly mentioned in Article 9, it is generally understood as forming an essential element of freedom of association. And though the right to collective action is also not mentioned in Article 9, it is understood as being included in the freedom of association, insofar as such a right is necessary to ensure an effective right to collective bargaining. A similar approach can be found in other jurisdictions. For instance, in **Finland**, the right to strike is not guaranteed “as such”, but is considered part and parcel of freedom of association.

In other countries, the courts are more cautious. For instance, in **Ireland**, the guarantee of freedom of association contained in Article 40(6) of the Constitution cannot

with certainty be regarded as providing constitutional protection for workers on strike. The legal situation in the **United States** is similar: Although the First Amendment to the U.S. Constitution provides that "Congress shall make no law (...) abridging (...) the right of the people peaceably to assemble, and to petition the Government for a redress of grievances", this provision has not been interpreted to guarantee the right for private or public sector employees to engage in concerted work stoppages. In **Austria**, where the freedom of association is enshrined in Article 12 of the Constitution, the legal guarantee in terms of strike action does not go beyond establishing an obligation on the part of the state to not interfere in industrial conflicts.

Some countries have witnessed long struggles to embed the right to strike in the Constitution. The situation in the **Netherlands** may be illustrative. In a judgement that was delivered in 1960, the Supreme Court in the Netherlands confirmed that striking in principle constituted a contractual default on the part of the worker and that trade unions were liable under tort law. This decision was heavily criticised and resulted in a governmental proposal to codify the legal right to strike. Several political parties even proposed inclusion of the right to strike in the catalogue of fundamental rights. No agreement on the explicit wording of the right to strike was reached, however. As a result, the proposals never became law. Instead, the Supreme Court finally declared that a right to strike derived from the European Social Charter.

b) Bearers of the Right to Strike

Theoretically speaking, constitutional guarantees come in different shapes: It is conceivable that a Constitution only protects strike as an institution. This implies non-recognition of a person's or an association's individual right. In case an individual right were indeed guaranteed, such a right could be designed quite differently. First, the right to strike could be an exclusive right of every individual person. Empowerment of an association, a trade union, for instance, would then have to be derived from such an individual guarantee. Second, the constitutional guarantee of the right to strike could assume the form of a "double fundamental right". This would mean that every trade union would have an individual right to call a strike in addition to every worker's individual right to refuse work. As

a strike undoubtedly comprises individual (contractual) as well as collective elements, it is tempting, in any event, to regard the legal protection of individual workers and the protection of trade unions as being inter-related. Such a relationship may entail that the individual right of workers is based on the protection of trade unions or it may entail that the individual rights of workers are, in one way or other, conditional upon group action.

In **Germany** there is an ongoing debate among legal scholars about who exactly is the bearer of the right to strike. As Article 9 of the Constitution represents an individual basic right, there can be little doubt that the assumption of a mere institutional guarantee is out of the question. Whether the right of a trade union derives from the right of individual workers to strike or whether, on the contrary, the right of workers to strike is derived from the trade union's right is a question which is still being disputed. Most academics view Article 9 as providing a "double fundamental right". This is a view that is shared by many academics in **Argentina**, for instance, where extensive theoretical studies have been carried out on the issue of who exactly is the bearer of the right to strike. A strong sense that the two elements of the right to strike are inter-related also exists in **Chile**. It is acknowledged in Chile that a strike starts because individual workers chose between accepting their employer's final offer or starting a strike instead. At the same time, it is also acknowledged, however, that the right to strike can only be exercised collectively, since approval by at least half of the workers involved is required for it to be qualified as legal.

The statutory language in some countries—though not to be overestimated—may provide an indication as to how the legislator has conceptualised the right to strike. In **Mexiko**, Article 123 of the Constitution states that the law recognises "a right for workers and employers to strikes and lockouts". In **Turkey**, Article 54 of the Constitution states that "employees have the right to strike in the event of a labour dispute". This implies that the right to strike is vested in each individual worker. However, in ordinary legislation which substantiates the Constitution[6], explicit reference in the definition of the term "strike" is made to a concerted cessation of work by employees "in accordance with a decision taken to that effect by an organization". In **Lithuania**, the focus is on the individual worker, with the Constitution providing for the right of workers to strike in order to protect their economic and social interests. In **Slovenia**, Article 77 of the Constitution expressly states that

[6] Article 25 of the Act on Collective Agreements, Strikes and Lock-outs.

"workers have the right to strike". This provision is interpreted as establishing workers´ ownership of the right to strike, though this right can only be exercised collectively.

In **Argentina**, Section 14bis of the Constitution states that "Trade unions are hereby guaranteed: the right to enter into collective labor bargains; to resort to conciliation and arbitration; the right to strike". Thus, a literal interpretation implies that the right to strike is essentially a collective right. According to Article 59(2) of the Constitution of the Republic of **Poland**, "trade unions shall have the right to organize workers' strikes or other forms of protest subject to limitations specified by statute". In **Uruguay**, though Article 57 of the Constitution specifies that a strike is a trade union right, it is considered an individual right which is exercised collectively. Finally, in **Sweden**, the right to take collective action is guaranteed in Chapter 2 Section 14 of the Constitution. There, the right is conferred on trade unions, employers and employers' associations. In **Ecuador**, Article 14 of the Constitution stipulates that both workers and their representatives have the right to strike.

However, irrespective of the theoretical aspects of ownership of the right to strike, there may be a gap between the legal concept and practice. For instance, according to the law in **Russia**, the decision to stage a strike must be taken by the workers themselves. The role of trade unions in this regard is limited to announcing the strike only. However, strikes are usually organised by trade unions.

c) Content of the Right to Strike

Legal guarantees in the area of strike law can take two forms: One is the guarantee of a (positive) *right* to strike. The other is the guarantee of the (mere) **freedom** to strike. In **Austria**, it is widely acknowledged that the constitutional guarantee of freedom of association as laid down in Article 12 of the Constitution contains a guarantee of the freedom to strike, but does not guarantee the right to strike. A similar approach is taken in **Japan**. Generally, common law does not provide for the right to strike. Instead, there is "freedom to strike", whereby strikers do not become liable under the common law torts. In **Australia**, the legal system provides for an empowerment of workers to strike, which is based on exceptions and immunities. The freedom to strike exists In **Ireland** as well, which is

guaranteed by statutory immunities that protect workers and trade unions from certain criminal and civil liabilities associated with strikes.

A right to strike which is guaranteed by the Constitution, albeit only "indirectly" (by means of providing for freedom of association), can be found in **Germany**. Providing for the right to strike means that there is no breach of contract on the part of a worker who participates in a lawful strike. The striker, in other words, enjoys a right to temporarily suspend his or her contract of employment. A right to strike also exists in **Israel**, where the right to strike is primarily understood as a fundamental right and is essentially derived from the protection of human dignity.

In some countries, guaranteeing the freedom to strike was a starting point for the legal protection of workers who strike, and only later developed into a guarantee of the right to strike. In **Germany**, for instance, it was only in 1955 that the Federal Labour Court "invented" a right of workers to suspend their contracts of employment during a lawful strike and thereby transformed the freedom to strike into a right to strike. In **Argentina**, a remarkable evolution of the right to strike took place as well. First, striking constituted a crime, then a tort, later an individual right and finally, it became a collective right.

d) Limitations of the Right to Strike

A positive right to strike does not mean that it is guaranteed without restriction. The freedoms and rights of other persons must be respected. Apart from that, inherent limitations may exist as well. This is the case in **Germany**, for instance. The right to strike is acknowledged because such a right is required for collective bargaining to take place. Bargaining without the right to strike would be no more than "collective begging", to put it in the words of the Federal Labour Court. That the right to strike is based on the right to bargain collectively has an important consequence, namely, that the right to strike is guaranteed *only insofar* as the strike is related to that very purpose. The need to ensure collective bargaining both justifies and limits the right to strike. In other words: A strike is lawful in **Germany** if and only if its underlying objective is the reaching of a collective bargaining agreement. This implies that the regulation demanded must be viable and fall within the competence of the "social partners" (as it affects "working and economic

conditions"). Similarly, in the **Czech Republic,** a strike may only be called in a dispute over entering into a collective agreement. In **Chile**, too, the right to strike is strictly related to collective bargaining. This right can only be exercised if negotiations between the parties fail. Outside the framework of collective bargaining, striking is regarded a violation of labour law, and possibly even a crime. In practice, however, a considerable number of strikes take place outside these boundaries. Though the constitutional background differs entirely from Germany, the law in the **United States** also requires a strike to be related to collective bargaining. Workers may only strike over so-called "mandatory subjects of bargaining" which are "wages, hours, and other terms and conditions of employment." Though it is true that parties may lawfully bargain over other issues – so-called "permissive" bargaining subjects – neither is legally obliged to do so. In addition, neither party may insist upon – or strike over – such permissive topics. A labour union may certainly not demand bargaining over – or strike over – an unlawful topic.

No relation to collective bargaining exists, on the other hand, in **Slovenia**. It suffices if the strike serves the workers' economic or social interests. Consequently, the right to strike is neither limited to the conclusion of a collective agreement, nor is it required for the strike to be aimed at inducing the employer to concur to a collective agreement.

3. Provisions in Ordinary Law

In some countries, a more or less comprehensive legislation on the right to strike exists. In **Slovenia**, the respective Act[7] contains a number of relatively detailed provisions. In **Chile**, statutory law also deals in depth with many of the issues that arise in this area. There are even claims that the right to strike is "over-regulated", resulting in a situation where the exercise of the right to strike may be impeded rather than facilitated. In **Hungary**, on the other hand, the Act that deals with strikes is brief (it only consists of seven provisions) and is fairly ambiguous, seeming, as some commentators claim, rather "outdated". In other countries there are no explicit Acts on strikes. In **Japan**, for instance, all issues related to strike law are essentially regulated in the Trade Union Act. It stipulates that trade unions which engage in what is called "proper dispute acts" are exempt from criminal and civil

[7] Act on Strikes of 1993.

liability. In addition, provision is made to prohibit disadvantageous treatment, such as retaliatory discharge or disciplinary action.

In some countries, no specific Act on strikes exists, nor are comprehensive provisions included in other Acts. In the **Netherlands**, for instance, no more than a feeble indirect recognition of the right to strike can be found in statutory law. In **Germany**, practically the only provision which explicitly mentions strike action is part of the Social Code and deals with the consequences of such actions for workers who claim unemployment benefits. In essence, statutes are silent on the issue of strikes, which is generally considered attributable to the fact that the law on strikes and lock-outs is a "hot potato" and that the legislator therefore prefers to overlook it. In **Italy**, Article 40 of the Constitution, which enshrines the right to strike, requires the legislator to further substantiate that right. However, no strike law has to date been promulgated.

4. Judge-made Law

In **Israel**, neither the Constitution nor ordinary statutory law explicitly recognise the right to strike. Instead, the right to strike is based, first, on the case law of the courts, which declared long ago that the right to strike is "a right not written in a book", and, second, on human dignity and freedom from which the right is derived. In Germany, too, the law on strikes has essentially been developed by judges and is predominantly derived from the constitutional protection of the right to strike. The task of developing the "rules of the game" has been left to the courts. In **Colombia**, the Constitutional Court also played a key role in developing strike law and, in particular, in acknowledging the right to strike. In a groundbreaking judgement, the Constitutional Court not only linked the right to strike to "fundamental rights as freedom of association and unionization of workers", but also to "constitutional principles such as solidarity, dignity, participation and completion of a just order". It is worth noting that the court not only qualified the right to strike as being a fundamental constitutional right in its judgement, but also acknowledged that it represented one of the essential principles of the rule of law in Colombia.

5. Collective Agreements

Only in a few countries have the "social partners" autonomously regulated the issue of strike action to a considerable extent. **Sweden** might represent such an exception. The constitutional right to strike can be restricted both by statute and by collective agreement in Sweden. The legislator's initial presumption since the 1930s has been that it is primarily up to the social partners themselves to assume responsibility for ensuring that the right to take collective action is not abused. Statutory intervention in the process is only regarded as a means of last resort. As a result, collective agreements, in particular the peace obligations contained in them, play a key role. Apart from that, so-called Basic Agreements between the social partners in certain sectors contain procedural as well as material rules on collective action.

In most countries, however, collective agreements hardly bear any significance in the area of strikes, especially when leaving aside the issue of peace obligations that may be part of collective agreements. In fact, there might only be one area where collective agreements play a key role. Many collective agreements provide for the implementation of emergency and/or maintenance measures during strikes. In some countries, such as **Slovenia** and **Italy**[8], legislation actually specifies that the "social partners" must agree on the provision of minimum services. In addition, Slovenian law provides for the payment of wages during the period of strike to be agreed upon by the social partners.

In **Germany,** collective agreements often aim at regulating certain consequences of a strike by (partly) compensating workers for some losses sustained during the strike. Such provisions are sometimes problematic, because they may move the boundaries of illegal strikes.

Since collective agreements seem to play a limited role in most countries, the discussion to what extent constitutional and statutory rules on the right to strike could be disposed of by the parties to collective bargaining is a rather academic one. The same applies to the question whether and to what possible extent one party may extract concessions from the other parties regarding regulations of strikes in collective agreements.

[8] Act 146/1990 in the case of Italy.

6. Self-regulation

Certain aspects of strike actions are subject to autonomous regulation, in particular in the by-laws of unions. Unions may, for instance, make provision for steps to be taken internally to decide upon a strike. The powers and duties of strike pickets may also be established in by-laws or in specific guidelines. Finally, unions may provide for strike funds and determine the requirements for gaining support in case of strike. In **Slovenia**, collective agreements generally provide that the trade union which calls a strike is obliged to organise the action in accordance with its so-called *strike rules*. The existence of such rules in a legal system in which the right to strike is deemed a constitutional right of individual workers (as opposed to trade unions) is disputable. Some legal experts are of the opinion that strike rules cannot apply to workers who did not participate in their adoption and who may not even be union members. Apart from that, it is debatable whether disobeying such rules can make a difference when assessing the lawfulness of a strike.

In **Germany**, the guidelines on industrial action of the umbrella organisation of trade unions oblige unions to ensure the establishment of minimum services in case of emergency.

III. The Right to Call a Strike

As has been outlined above, in many countries individual workers are seen as bearers of the right to strike, although this right may only be exercised collectively. This view is taken, for instance, in **Italy**, the consequence being that even a loose or spontaneous association of workers can declare a strike. In **Uruguay**, too, the right to strike may be invoked and exercised by a group of workers, organised or not, unionised or not. As is the case in **Italy**, the right to strike is considered an individual right that may be collectively exercised. Finally, in **Hungary**, not only trade unions, but every individual worker has the right to strike. Accordingly, trade union membership is not relevant. There is one exception, however: Solidarity strikes must be organised by a trade union.

In other countries, “wild cat-strikes” are prohibited, and qualifying as a trade union does not suffice to call a strike. **Germany** is a case in point. Trade unions are empowered to call a strike if, but only if, they enjoy the so-called “capacity to bargain collectively”. This

capacity requires, among other things, an ability to enforce their objectives (so-called social power). Trade unions must be in a position to exert sufficient pressure to induce the counterpart to conclude a collective bargaining agreement. Because the right to bargain collectively is constitutionally applicable to only those groups which can make sensible contributions to the spheres not explicitly regulated by the state, trade unions must be in a position to exert sufficient pressure in order for their counterpart to embark on negotiations for a collective agreement. That the right to strike is conditional on the "capacity to bargain collectively" seems plausible given the fact that German law guarantees the right to strike only insofar as that right is understood as being necessary for ensuring proper collective bargaining. As a result, "wild cat-strikes" are prohibited in Germany. However, trade unions may legitimise such strikes with retroactive effect by taking over the strike. Courts will generally hold that trade unions may take over a "wild cat-strike" for two reasons. First, unions would have been put in a position of mere observers if the "wild cat-strike" were not capable of being legitimised. Second, unions must be able to determine the point in time at which a strike was initiated. It is within this context that the courts also acknowledge trade unions' aim to surprise employers with sudden strike action (by taking over a strike which was initially initiated by a group of workers). In **Japan**, the basic legal set-up is similar. The right to strike as guaranteed by the Constitution is understood to ensure equality between the employer and the workers in collective bargaining and as a means to overcome deadlocked negotiations. Consequently, to qualify as lawful a strike must be organised by a so-called "constitutional union" which requires, *inter alia*, independence from the employer. The existence of "social power" is not required. In **Turkey**, a lawful strike can also only be staged by a trade union which is party to collective negotiations. Under Turkish law, trade unions must be active in an industry. In addition, a union must represent a minimum of 10 per cent of the employees working in a given sector, as well as more than half of the employees in the establishment(s) in which it intends to conclude a collective agreement[9].

In other countries, the legal situation differs completely. In **Ireland**, for instance, non-unionised bodies as well as the workers themselves may call or launch strikes, though some of the immunities provided by statutory law are only applicable to members and officials of trade unions. In **Finland**, too, strikes can be organised by a group of workers or by a trade union. However, workers who strike in response to a trade union's call for strike enjoy better

[9] Article 12(1) of Act No. 2822.

protection from dismissal[10]. Even if the strike is illegal, the worker is protected if the strike was called by a union. In the **United States**, work stoppages may be initiated by employees who act alone or by their representative labour union. A concerted action of employees may be found to be legally protected[11], even though no actual bargaining relationship with the employer exists. In most cases, however, work stoppages take place at facilities at which the employees are represented by parties to the collective bargaining negotiations.

In some countries the right by an association of workers or by a trade union to call a strike depends on the factors of the individual case. Which union enjoys the right to strike is equally dependent on the factors of the individual case. The legal situation in **Israel** is illustrative for this: In a unionised workplace with a collective agreement, the right to call a strike is enjoyed by the representative union which signed the collective agreement. In a unionised workplace where there is neither a collective agreement, nor a union which represents the majority of the workers involved in a dispute with the employer, the right to call a strike is enjoyed by the union which *could* have been representative had the employer agreed to sign a collective agreement. In a workplace where there is neither a collective agreement nor a union, the right to call a strike is enjoyed by any group of employees elected by the employees at the workplace.

In **Chile**, a trade union representing the workers in a given company can call a strike. If there is more than one union in a company, all trade unions may collectively call a strike if they are involved in a regulated collective bargaining process. Unions that represent the workers of more than one company as well as federations of unions may call a strike if the majority of union members in a given company, who are entitled to bargain collectively, agree to confer the right of representation to them. Unions are not privileged, however. Instead, they represent only one possible "negotiating group". Any group of workers may join forces for the purpose of collective bargaining. Hence, if such a group negotiates in a structured manner and if it meets the conditions required by law, it may call a strike. It has been noted that this set-up holds the danger of atomisation and an overall decrease of bargaining power and that it makes unionisation difficult. In **Slovenia**, strikes may be called by a company trade union and, if no such union exists, by the workers themselves. Additionally, unions at branch level and even federations of unions (in case of a general

[10] According to Chapter 7 Section 2(2) of the Employment Contracts Act.
[11] Under the National Labor Relations Act.

strike in the country) enjoy the right to strike. In other countries, trade union federations are prevented from calling a strike. That is the case, for instance, in **Colombia**. The Constitutional Court expressly held that the decision to call a strike must be linked to the workers at the given company, because it is only at that level that the economic and legal effects of a strike and its impact on the employment contracts can be assessed.

IV. The Right to Participate in a Strike

In **Italy**, the right to strike is understood as belonging to the individual worker. Therefore, every worker, irrespective of any union membership, can participate in a strike. In **Colombia**, the right to strike is understood as belonging to workers who share a common interest. Because trade union membership by these workers is not required, every worker can participate in a strike. In **Ireland,** though strikes initiated by trade unions entail some privileges, any "worker" may participate in a strike and as a consequence is entitled to statutory immunities. In **Finland**, individuals who belong to another union or to no union at all enjoy the same right to participate in a strike as members of the union which called the strike, as long as they fall within the scope of the "combat area" as specified in the notice given. This even applies to workers who are unlikely to benefit from the outcome of the strike. All workers are entitled to the same protection. In the **United States**, the main group authorised to strike under the National Labor Relations Act consists of members of the relevant bargaining unit[12]. In most cases, all bargaining unit members leave their jobs. Occasionally, however, some unit members choose to remain at work. If they return to work as actual members of the striking union, the union may impose fines on them for failing to support their co-workers. In **Chile**, workers can participate in a strike if they are part of the formal collective bargaining process, irrespective of whether they may eventually benefit from the (outcome of the) conflict or not. In **Germany**, too, non-union members may participate in a strike. One of the reasons is that without participation of "outsiders", many strikes would stand little chance of being successful. Another reason is that although non-union members are not legally bound to collective agreements under German law and, as a consequence, are not subject to the normative effects of these agreements, they still profit

[12] Section 7.

from the conclusion of collective agreements in the majority of cases, because collective agreements are mostly referred to in individual contracts of employment, which makes their provisions implied terms of these contracts.

In **Turkey**, the law is silent on the participation of outsiders and members of other trade unions. In practice, union membership seems to not play a role. Interestingly, the law expressly states that if a collective agreement is eventually concluded, the agreement shall not apply to non-striking employees, unless provision to the contrary has been made in the collective agreement[13].

In other countries, non-union members and members of other unions are not entitled to participate in a strike. For instance, in **Japan** such persons are neither entitled to participate in a strike nor do they enjoy any legal protection.

V. Lawful Strikes According to Their Purpose

In some countries, strikes are understood as being based on a broad concept with (almost) no inherent limitations. This is the case, in particular, in **Uruguay** where there is also a strong tradition of little state intervention in industrial conflicts. Even the courts are reluctant to interfere and, in principle, are only competent in case of individual, and not collective disputes. Due to such an extensive understanding of the concept of strike, the objective of a given strike (social, economic, political) does not matter, nor does, in principle, the form of strike (strike in sympathy, rotating strike) or other action. In **Austria**, which has a unitary trade union movement, the concept of "strike" is also broad, with little inherent limitation to the right to strike. In other countries, strikes that have specific purposes fall outside the scope of legal protection.

1. Strikes with a View of Concluding Collective Agreements

In most countries, strikes may be considered lawful if they aim to induce the other party into concluding a collective agreement. In some countries like **Germany** or **Turkey**, the

[13] Art. 38(2) of Act No. 2822.

very purpose of granting the right to strike is to provide a means for exerting pressure on employers and, by doing so, to induce the employer's willingness to conclude a collective agreement. In both countries, the question may arise whether a strike becomes illegal if a set of demands exists of which only part are admissible.

2. Strikes Arising from Rights Disputes

In some countries, e.g., **Russia**, no distinction exists between disputes over rights and disputes over interests. This is also the case in **Ecuador**, where, in principle, all strike action is based on "collective wisdom", irrespective of the subject.

Many other countries differentiate: When strikes are used in disputes over rights, the strike is illegal. When strikes are used in disputes on interests, the strike is lawful. For instance, in **Hungary**, statutory law[14] explicitly prohibits strikes if they are called in response to measures taken by the employer or to acts committed by the employer, whose lawfulness is to be decided by the courts. In **Turkey**, the right to strike is explicitly related to "negotiations for the conclusion of a collective agreement" under the Constitution. Accordingly, strikes are admissible only in cases of a dispute over interests. In **Australia**, the only legitimate industrial action is that which is taken by parties negotiating a new enterprise agreement. Strikes over rights disputes would typically be unlawful. In **Germany**, strikes are unlawful because court proceedings take priority. In **Colombia**, even if the rights dispute relates to a collective agreement whose lawfulness is in question, there is no right to strike and the matter must be taken to the courts.

In some countries, explicit provision is made in case a strike is used as a means of intervention in an *individual dispute* over rights. For instance, in **Ireland** the law provides[15] that where the trade dispute relates to an individual worker and if procedures for the resolution of individual grievances have been agreed, the statutory immunities will only apply where those procedures have been resorted to and exhausted. In **Japan**, the legal situation is different. Because not only disputes over interests but also over rights may represent mandatory bargaining issues, the latter are also understood as possible topics of

[14] Section 3(1) of the Act on Strikes.
[15] Section 9(2) of the 1990 Act.

collective bargaining and, thus, of strike. A strike aiming at preventing an employer from dismissing a specific union member, for instance, is lawful in Japan. In the **Netherlands**, on the other hand, an action that protests the dismissal of an individual employee is not considered a conflict of interest, but a conflict of rights. That said, it must be noted that in case law, the concept of 'conflict of interest' is usually applied broadly. As soon as the action has a collective goal, it is considered a conflict of interest.

It may be interesting to note in this context that while strikes are used mainly as a means in many countries to push through demands for pay increases, there are several countries where the non-payment of salaries, breaches of other obligations or violations of workers´ rights constitute the main reasons for strikes.

3. Strikes Aiming at the Enforcement of Collective Agreements

Strikes that aim at enforcing a collective agreement qualify as illegal strikes in many countries. This is the case, for instance, in **Finland**, where such strikes are regarded as violations of the peace obligation. The same applies in **Turkey**, because the right to strike is guaranteed only insofar as it is a means to reaching a collective agreement. In the **United States**, work stoppages are rarely used to enforce the provisions of existing bargaining agreements, because such controversies are generally subject to resolution through grievance-arbitration procedures. In fact, if workers strike over issues subject to arbitral resolution, they will be found to have breached their grievance-arbitration obligation and be enjoined.

In **Japan**, **Russia** or **Colombia**, strikes that aim to enforce a collective agreement are legal. The same is applicable in **Israel**, where strikes are permitted even if the means of settling differences of opinion are set down in the agreement. According to the Supreme Court, if the employer does not honour workers' rights, no demand can be made on the employees to uphold their own commitments. In **Sweden**, collective action to enforce a collective agreement is prohibited in principle, with the exception of collective action to recover unpaid wages.

4. Strikes with an Aim of Restricting Management Prerogatives

Can strikes be used to push through demands on the part of the workers, which would interfere with the managerial prerogative or would limit entrepreneurial decision-making?

In the **United States**, labour organisations may not strike over issues included in management rights clauses. In **Australia**, protected industrial action may only be taken in relation to what is termed "permitted matters"" under the legislation. Matters falling within the area of "management prerogatives" are not 'permitted matters'. In **Sweden**, according to the law[16], management prerogatives ("matters regarding the conclusion and termination of contracts of employment, the management and distribution of work and the operation of the activity in general") can be regulated in collective agreements. However, if management prerogatives are not explicitly regulated in the collective agreement, they are considered to be implicitly regulated in the form of a "silent clause".

In many countries, no rigid and distinct rules on strikes exist which aim at areas covered by "management prerogatives". In **Israel**, so-called "mixed subjects" illustrate this problem. The number of personnel slots, for example, is such a 'mixed subject'. On the one hand, it covers entrepreneurial decision-making. On the other hand, it has implications for labour conditions in an establishment as well as for labour relations. According to the courts, decisions on mixed subjects are to be taken exclusively by the employer. Nonetheless, since decisions of this kind have significant implications, the employer must conduct negotiations with the workers' representatives on these implications. If no such discussions take place, the workers can declare a strike. In **Germany**, the right to strike is acknowledged only insofar as a strike is used in the context of collective bargaining. Consequently, the collective agreement the workers aim to push through may not violate law. As free entrepreneurship (as well as property) is guaranteed by the Constitution, it may well be that a strike will be found to be illegal on the ground that it violates that constitutional guarantee. Specifically, a strike that aims at preventing the employer from closing down a factory may be illegal while a strike that aims at mitigating the consequences of such a decision for the workers will, in most cases, be legal. In **Japan**, calls to remove the manager of a company are deemed lawful

[16] Section 32 of the Co-Determination Act.

if their underlying meaning is recognised as a demand for the improvement of working conditions. Accordingly, a strike that supports such demands may be entirely legal. In **Colombia**, the employer enjoys a (limited) so-called *ius variandi* in the sense that he/she is allowed to unilaterally alter working conditions with reference to manner, place, quantity or time. Workers must comply with any decision of the employer, as far as the employer did not exercise his/her right arbitrarily. No right to strike thus exists in this case.

In **Russia**, interference with management prerogatives does not mean that the strike is illegal, as long as the underlying demand does not violate legal provisions and is within the employer´s control. In **Slovenia**, the right to strike (which is vested in individual workers) has an extraordinarily wide scope. Even there, however, legal literature points out that strikes which are aimed at issues that are subject to management prerogatives are illegal.

5. Inter-union Disputes

In **Australia**, the law explicitly states that industrial action must not "relate to a significant extent to a demarcation dispute"[17]. In **Ireland**, strikes arising from inter-union disputes would not fall within the scope of statutory immunities, because the definition of "trade dispute" is restricted to disputes between employers and workers, and, accordingly, does not apply to disputes between workers. The same is true for **Colombia**, where it is acknowledged that strikes may not be aimed at settling disputes between unions. In **Turkey**, strikes over such issues are not permissible because they cannot be dealt with by collective bargaining. In the **United States**, strikes occasionally arise over disputes between labour unions over the right to perform specific work which both entities believe should be assigned to members of their own bargaining unit. If employees of a unit strike once an employer assigns given work to the members of another unit, such a jurisdictional dispute constitutes a violation of the National Labour Relations Act[18].

[17] Section 409(5) of the Fair Work Act 2009.
[18] Section 8(b)(4)(D).

6. "Political" Strikes

"Political" strikes seem to represent a "grey area" in some countries in the sense that a gap exists between law and practice. In **Ecuador**, for instance, such strikes are prohibited. In practice, however, they have taken place several times.

In **Ireland**, purely "political" strikes would not fall within the scope of statutory immunities. In **Argentina**, they are illegal as well. In **Colombia**, the Constitutional Court has held that political strikes are potentially undemocratic and that there is no place for such strikes in the legal order of the state because they do not aim at defending the economic and professional interests of workers, but rather interests with an entirely different nature. For a long time in **Turkey**, political strikes were explicitly prohibited by the Constitution[19]. The respective provision was abolished in 2010. However, under the Constitution strikes must be related to collective bargaining, and it is generally accepted that the ban on political strikes continues to hold. Accordingly, statutory law[20] prohibits political strikes and imposes penal sanctions. Similarly, in **Germany** and **Japan**, strikes relating to issues that cannot be settled by the parties to collective bargaining are unlawful. As a result, "political" strikes are unlawful in both countries. In the **United States**, political strikes are similarly not protected, since they do not involve mandatory bargaining subjects. In addition, such work stoppages would almost certainly be found to violate contractual no-strike provisions.

In the **Netherlands**, the position regarding the lawfulness of "political" strikes is particularly interesting because the right to strike derives directly from the European Social Charter. The Dutch Supreme Court considered within the scope of the Charter the case of strikes to pressure the government pertaining to labour-related issues, which are usually subject to negotiation between unions and employers, even though the employer may not be able to influence the decision of the government. According to a recent ruling of the Court of Appeal, the adjournment of the pension age by the legislator impacts on the bargaining position of the unions, and therefore strikes in this context fall within the scope of the Charter. In **Spain**, "political" strikes are in principle prohibited. However, the Constitutional Court considers strikes to be "political" only if there is no connection with

[19] Article 54(7).
[20] Act No. 2822.

workers´ interests. Hence, general strikes against government decisions or legislative proposals on social issues are lawful because they do not intend to alter the constitutional order or coerce the free will of the institutions of the state. In **Israel**, the courts are of the opinion that a "political" strike (as opposed to a so-called "economic" strike) is not a strike in accordance with labour law, since the employees seek to erode the power of the Sovereign and attempt to interfere in the legitimate legislative processes of the legislature, not by means of democratic persuasion, but by unyielding interference to coerce the legislature to change its position. However, a political strike may have a standing in labour law in the sense that the subject of the strike directly affects the terms of their employment. In that case, a strike is lawful, albeit subject to specific limitations. Such a strike is only lawful if it takes the form of a protest strike that lasts a certain number of hours. In **Hungary**, the right to strike only applies to the protection of workers' economic and social interests. That leaves some room, however, for political strikes that, for instance, aim at inducing the legislator to modify existing laws which affect workers´ interests.

In **Finland**, "political" strikes are in principle permitted (and do not violate the peace obligation which is part and parcel of every collective agreement).

7. Strikes with an Aim of Raising Public Awareness

Both in **Germany** and **Japan**, strikes that aim at addressing certain concerns of the public are regarded to be unlawful. The same is true for **Russia** and **Turkey**. In the **United States**, work stoppages which seek to influence public opinion would almost certainly be found to violate contractual no-strike provisions. In **Colombia**, such strikes are admissible if, and only if, interests are at stake which are directly affected at the corresponding level of activity, occupation, trade or profession.

VI. Procedural Requirements

Article 14 of the Constitution of Argentina reads as follows: "It is guaranteed to the unions to conclude collective agreements of work; recourse to conciliation and arbitration,

the right to strike". The wording of this provision indicates a certain order of steps that must be followed before the right to strike can be exercised. As a matter of fact, some procedural requirements exist in many countries.

1. Exhaustion of all Means of Negotiation

Strikes are, almost by definition, a means employed when negotiations fail. This indicates a certain subsidiarity of strikes with regard to collective bargaining. Against this background, to qualify as "protected industrial action" that gives rise to immunity from other legal action, the parties in **Australia** must be involved in negotiations for a new collective agreement and must be "genuinely trying to reach agreement"[21].

National jurisdictions require trade unions to enter into and to continue negotiations with the other parties in varying degrees. Such requirements are relatively weak in **Japan**. Strikes without any previous bargaining are deemed to be inappropriate. However, once negotiations have started it is up to the union to decide at which stage it will resort to strikes, even while negotiations are still in progress. That is, strikes do not need to be a means of last resort. In **Germany**, on the other hand, the principle of *ultima ratio* applies. The practical results are not very different, however, because it is not required for bargaining to be formally declared a failure. Instead, it suffices for a union to simply initiate strike action. According to the courts, the decision to start a strike includes the assessment that all possibilities of negotiation without accompanying industrial action have failed. Such an assessment cannot be second-guessed by a court. In the **Netherlands**, "fair play rules" exist which implies that the protagonists will have to exhaust all means to reach an agreement with the opposing party before they call a strike. Strikes should hence be the *ultima ratio*. However, similarly to Germany, judges must adhere to a duty of self-restraint when considering whether a strike was premature, though the corresponding restrictions are not always respected in practice.

In some countries, much more than exhausting all means of negotiation is required. In particular, mediation may be understood as a natural extension of negotiations. In some countries, mediation represents part of a wider set of provisions which regulate collective

[21] Section 413(3) of the Fair Work Act 2009.

bargaining in much detail. For instance, in **Chile**, the process of negotiating a collective agreement (at enterprise level) is the subject of detailed statutory regulation. Only if a union has taken all steps prescribed by law does the door to eventually calling a strike open. The same is applicable in **Colombia**. There, the process of collective bargaining as prescribed by law starts with the appointment of a council by the workers, which is mandated with entering into negotiations with the employer. The employer is obliged to initiate discussions no later than five days after the demands of the workers have been presented. The law provides for a negotiation period of 20 days, which may be extended by up to another 20 days. If negotiations fail, workers must hold a general meeting and the Ministry of Labour notified at least five days in advance to ensure that a representative of the ministry or a labour inspector can attend the meeting and is in a position to ensure that all legal requirements are duly respected.

In **Turkey**, a 60-day negotiation period is foreseen by law. If either of the parties fails to appear at the place, date and time set for negotiations or fails to attend the meetings after the commencement of negotiations, the competent authority shall immediately initiate a mediation process[22]. If no agreement has been reached 60 days after the commencement of negotiations, the competent authority must apply to the competent labour court to request the appointment of a mediator. The term of duty of the mediator is 15 days, but can be extended for a maximum of six working days. If, despite the mediation process, the parties fail to arrive at an agreement, the mediator must write up a report on the dispute within three working days and transmit it to the competent authority. The competent authority, in turn, must transmit a copy of the report to each of the parties within six working days[23]. The decision to call a strike may not be taken until six working days after the date of notification by the competent authority of the mediator's report to the parties.

In the **United States,** parties to an existing collective bargaining agreement cannot resort to a strike (or lock-out) until they have endeavoured in good faith to achieve a new agreement without a work stoppage[24]. Sixty days prior to the termination date of the existing contract, the party wishing to negotiate a new agreement must provide the other party with notice indicating that they wish to modify the terms of employment. They must then provide the Federal Mediation and Conciliation Service and the relevant state

[22] Art. 22(1) of Act No. 2822.
[23] Art. 23(4) of Act No. 2822.
[24] Section 8(d) of the National Labor Relations Act.

mediation service with such notice to enable the agencies to offer the parties mediation assistance. Neither side may resort to a strike (or lock-out) for 60 days after such notice has been provided to the opposing party (or the termination date of the contract, whichever comes later). In the majority of cases, new agreements are reached through this process without resorts to strikes (or lock-outs).

In many other countries, it is also provided that a strike must be preceded by serious negotiations and mediation and hence represents a means of last resort. For instance, in **Poland**, a strike may not be called without previously exhausting all possibilities for settlement of the dispute in accordance with the statutory rules which, among others, specify the requirements of negotiations. In case bargaining fails, mediation must be pursued before the trade union can call a strike. In **Lithuania**, the requirement of previous conciliation or mediation is even part of the definition of the term "strike" as laid down in the Labour Code. In **Uruguay**, provision is also made for implementing means for a peaceful resolution of a labour dispute before calling a strike. No clear legal consequences have been attached to a possible failure, however, which essentially means that the rule lacks practical importance.

In **Russia**, there is an obligation to resolve industrial disputes, if at all possible, by peaceful means. This, in principle, includes exhaustion of all means of negotiation as well as mandatory conciliation. Only if a strike is called by a trade union or a trade unions' confederation (instead of by the workers themselves) can it be initiated without previous implementation of peaceful procedures.

2. Balloting

a) Requirement of Holding a Ballot

In **Germany**, most trade unions have established so-called guidelines which provide for a ballot of the members to be held before calling strike. A typical provision would be that a strike can only be initiated if 75 per cent of all members who are called to vote give their consent. Some legal experts claim that holding such a ballot is required by the *ultima-ratio*-principle. As a result, failure to hold a ballot would immediately render a strike unlawful.

However, according to prevailing opinion, whether a (proper) ballot was held or not does not influence the lawfulness of a strike. Provisions in the by-laws of trade unions that establish the requirement for a previous ballot are understood to not have external effect, unless these rules make it perfectly clear that the requirement of holding a ballot limits the legal power of the union leadership to call a strike. In **Argentina**, the principle of union democracy requires that the declaration of a strike is the result of a decision taken by the majority of workers concerned. In practice, decisions are taken at meetings conducted by two or more workers. Voting takes place by show of hands and no more than a simple majority is needed.

In many countries the requirement of holding a ballot is directly based on statutory law. This is the case, for instance, in **Ireland** where the ability of trade unions to organise, sanction or support a strike is constrained by a provision in the Industrial Relations Act[25], which requires that trade union rules must contain a provision that the union shall not organise, participate in, sanction or support a strike or other industrial action without a secret ballot. It should be noted, however, that the rights conferred by the Act are conferred on the members of the union concerned and on no other person. Consequently, an employer may not seek to contain a strike merely because no ballot took place. In **Japan**, the legal situation is to some extent similar. The Trade Union Act provides that the rules of a trade union should include a direct secret ballot of the members or their delegates to approve the start of a strike. As is the case in Ireland, the approval of the strike by the workers' rank and file is not a requirement for the lawfulness of a strike. Instead, providing for a secret ballot in case of strikes is necessary to enjoy the specific remedies available to trade unions in case of unfair labour practices. In practice, most trade union rules require a direct secret vote before starting a strike. Whether a strike in violation of such union procedures is lawful has been discussed. Most courts have, however, held that the failure to hold such a ballot is an internal affair of the given trade union and does not impact on the lawfulness of a strike.

In some countries where holding a ballot is required by law, failure to meet these legal requirements has consequences that go far beyond the relationship between the union and its members. In **Chile**, a ballot is required by law, and the law even explicitly determines the date for holding such a ballot. For instance, if the parties bargain over a new collective agreement, a ballot must be held within the last five days of the existing collective

[25] Section 14(2).

agreement, if there is such agreement. In addition, statutory law stipulates certain requirements a trade union has to comply with when holding a ballot. Specifically, personal and secret voting must be ensured; a ballot must be held in the presence of a notary and the ballot papers must have the terms “employer´s final offer” and “strike” printed on them. The consequences of non-compliance with these requirements are severe. For instance, if no balloting took place within the predetermined period specified by law, the workers are deemed to have accepted the employer's final offer. In other cases of violations of the law, a so-called “forced collective agreement” may apply, which essentially means that the terms of the new collective agreement will become the terms of the old agreement, without respecting the provisions of the original agreement which related to an indexation of wages and other benefits.

b) Modalities

Where national laws include the requirement for a ballot, they vary widely when it comes to establishing the modalities of such ballots. In **Poland**, how a union holds a strike ballot is essentially considered an internal matter. The law only requires that the ballot does not preclude employees from expressing their free will. As the lawfulness of a strike is conditional on a free declaration of intent by employees, the court can find that this rule was violated and that this, consequently, constitutes a reason for qualifying a strike as unlawful.

In **Ireland**, the law specifies a number of relatively detailed conditions a union must meet when holding such a ballot. Statutory law[26], for instance, explicitly requires that the entitlement to vote must be accorded equally to all members who may potentially be called upon to engage in the strike. The union must take reasonable steps to ensure that every member entitled to vote in the ballot can vote without interference from the union or any of its members, officials or employees and, insofar as is reasonably possible, that such members shall be given a fair opportunity to vote. The trade union shall take reasonable steps to disclose to those members who were entitled to vote in the ballot the number of ballot papers issued, the number of votes cast, the number of votes in favour of the proposal, the number of votes against the proposal, and the number of spoilt votes as soon

[26] Section 14.

as (practically) possible following the holding of the secret ballot. In **Australia**, there is a comprehensive set of rules[27] regulating protected action ballots. These provisions are in themselves quite legalistic, requiring applicants to establish relevant criteria and, amongst other matters, specifying the questions to be included on the ballot. These ballot provisions are important because the next step in the process (notice of industrial action) cannot be taken without the initial granting of an order that a secret ballot can be held and the holding of the ballot which authorises the industrial action. The ballots must be conducted by the Commonwealth Electoral Commission or another party as specified by an independent industrial tribunal[28], and in accordance with the timetable for the ballot and any other instructions provided for[29].

In **Turkey**, not only the trade union´s rank and file, but *all employees* in an establishment which will be affected by a strike have to approve the strike, independent of them being union members or not. Legislation is in place according to which a strike ballot must be held as soon as one-fourth of all employees who work in the establishment request such a vote to be conducted. This request must be submitted to the highest local civil authority. According to the law, the strike ballot must be conducted within six working days following the written request, outside working hours[30].

In **Ecuador**, a strike can be declared by the so-called "works council" which is the representative body of all workers, including those not affiliated with a union. If no such works council exists, workers must establish a Special Committee to deal with the conflict. In both cases, any resolution must be adopted by half plus one of all workers concerned. The state has attempted to interfere in the process by means of regulations and ministerial orders to lay down additional requirements. These provisions have, however, had little effect on balloting in practice[31].

c) Required Majority

[27] Division 8 of Chapter 3, Part 3-3, of the Fair Work Act 2009.
[28] Fair Work Australia.
[29] Section 449(2) of the Fair Work Act 2009.
[30] Art. 35(2) of Act No. 2822
[31] Art. 498 of the Labour Code.

National systems vary as regards both the number of votes required to call a strike and the consequences once this required threshold is or is not reached. In **Ireland**, even if the majority of those voting in the ballot favour a strike, the result is not binding for the leaders of the trade union. On the other hand, however, the leaders of a trade union may in principle not organise a strike if the majority of its members voted against strike action in a secret ballot. In **Turkey**, if the absolute majority of employees votes against the strike, it may not be called[32]. In **Australia**, the proposed industrial action must be authorised by a protected action ballot in which 50 per cent of employees included in the ballot cast their vote and over 50 per cent of the valid votes approve the action. In **Poland**, a strike in a given establishment can be called by a union only after approval by the majority of voting employees, under condition that at least 50 per cent of employees employed in the establishment participated in voting. In the **Czech Republic**, a strike must be approved by 2/3 of the employees who are affected by the collective agreement and voted on the strike, provided that at least 1/2 of such employees executed their right to vote. In **Russia**, the quorum is 2/3 in case the decision is taken by representatives to call a strike and 50 per cent in case such a decision is taken directly by the workers. The latter threshold used to be 2/3 for a long time, but was reduced to 50 per cent in 2006 after criticism by the ILO. In **Chile**, the majority of workers in a given enterprise must approve of the strike. If, following the ballot, the majority does not stop working, the strike is deemed to take place without employee approval.

In **Colombia**, the required majority depends on the individual case. If no union exists in a given enterprise, a strike can only be called if a majority of workers votes in favour of a strike. The same applies if a union exists which does not represent the majority of workers. In case a majority union exists, the vote of the majority of trade union members is required to call a strike. If a majority and a minority union coexist in an enterprise, all members of these unions may vote, with the total majority of all workers in the company representing the decisive quorum.

3. Obligation to Notify Other Party

[32] Art. 35(3) of Act No. 2822.

In **Germany**, the Federal Labour Court has made it clear that a strike requires the given trade union to have taken the decision to call a strike. The other party to the conflict must be informed about that decision. Though the union does not need to provide specific details, it must be clear for the other party to be able to determine whether or not the strike is lawful on the basis of the information provided. Some scholars claim that there should be an additional obligation to inform the other party about an imminent strike in advance, but the courts do not recognise such an obligation to give advance notice. One of the reasons the courts do not support it might be that such an obligation has the potential of rendering a strike ineffective. In other countries like **Colombia**, no obligation for giving advance notice of a strike exists, either. In some countries, like **Hungary**, the lack of such an obligation is considered a flaw of the law by some legal experts.

In many countries, obligations exist under which notice of a strike (or notice of individual measures of a strike) must be given to the other party in advance. In **Australia**, written notice of the proposed action must be submitted to the employer at least three days in advance. In **Poland**, notice of a strike must be given at least five days in advance[33]. The same period of notice applies in **Slovenia** with regard to strikes in the private sector. In the public sector, the respective period is seven days. In **Spain**, notice must be given five days in advance in the private sector and ten days prior in the public sector. In **Mexiko**, the respective periods are 6 and ten days. In **Russia**, a notice period of 10 calendar days must be observed. In **Finland**, a party planning to strike must inform the opposite party as well as the National Conciliation Office 14 days before the work stoppage begins[34]. In **Italy**, prior notice of strikes is required only with regard to essential public services. The period of notice is ten days. No notice needs to be given, however, if a strike aims at defending the constitutional order or if its purpose is to protest against measures that seriously affect the physical integrity and safety of workers.

In the **Czech Republic**[35], a trade union must give the employer notice of a strike at least three working days prior to the start of the strike. The notice requires information about the start of the action, the reasons and objectives of the strike, the number of employees participating and a list of workplaces which will not operate during the strike. In **Mexiko**, the employer must be informed in writing about the purpose of the strike and its

[33] Pursuant to section 6(3) of the Act on the Resolution of Collective Disputes.
[34] According to section 7 of the Mediation in Labour Disputes Act.
[35] Pursuant to section 17(4) of the Act on Collective Bargaining.

date and time. In **Turkey**, additional requirements exist. There[36], the decision to call a strike must be submitted to a public notary for communication to the other party within six working days of the date of the decision to take strike action, and one copy of the decision must be submitted to the competent authority. The decision to strike must be immediately announced in the establishment. In addition, it is expressly provided that the respective strike must be held within 60 days following its communication to the other party.

4. "Cooling off-periods"

As far as national systems require the parties to a possible conflict to undergo a mediation or conciliation process prior to calling a strike, "cooling off-periods" exist (with these periods being congruent with the time that is foreseen for mediation or conciliation). The same applies if the parties are obliged to give advance notice, as far as the law provides for periods of notice.

In some countries, there are additional attempts to "cool off" an imminent conflict. For instance, in **Hungary** there is a "cooling off period" of seven days. Strikes may only be initiated in case either obligatory pre-strike negotiations did not lead to a result within that period or negotiations did not take place for reasons not attributable to the initiators of the strike[37]. In **Poland**, there is a statutory "cooling off period" of 14 days starting from the day the worker representatives are authorised to declare that a collective dispute exists[38]. In **Chile**, following approval of a decision to call a strike in a secret ballot, a strike can only be called on the third day following the date of approval. There may even be further delays (of at least five days), as the law explicitly foresees that either party may request the labour inspectorate to step in and attempt to facilitate an agreement. In the public sector in **Italy**, there is a "cooling off-period" of ten days for the purpose of conciliation. A "cooling off period" related to mandatory mediation or conciliation also exists, for instance, in **Russia** and **Turkey**.

[36] According to Article 28 of the Act No. 2822.
[37] According to section 2 of the Act on Strikes.
[38] Pursuant to section 7(2) of the Act on the Resolution of Collective Disputes

VII. Peace Obligations

With regard to so-called peace obligations, a line must be drawn from the onset between what may be referred to as a relative and an absolute peace obligation. In the case of the former, strikes are prohibited unless they do not aim at amending an existing collective agreement (which may be difficult to decide if it is unclear whether and to what extent a given issue is exhaustively dealt with in a collective agreement). In the case of the latter, any strike is prohibited irrespective of its cause and underlying demands

1. Absolute and Relative Peace Obligations

In the **United States**, nearly all bargaining agreements contain no-strike clauses prohibiting all work stoppages during the duration of such contracts, including issues not specifically covered by the applicable contract. Violations of no-strike clauses constitute non-protected conduct and may subject supporting labour organisations to claims for breach of contract. Even where such contracts do not include express no-strike clauses, the U.S. Supreme Court has held that implied no-strike obligations exist with respect to contractual disputes subject to final resolution through exclusive grievance-arbitration procedures. If workers strike over issues that are subject to final resolution through contractual grievance-arbitration procedures, they violate the implied no-strike obligation emanating from those procedures. In **Australia**, the law clearly states that industrial action cannot be taken while an agreement remains in force (during the nominal duration of an agreement). The only opportunity to engage in strike action (or “protected industrial action”) arises during the negotiation phase prior to entering into an agreement with the employer. In **Sweden**, the peace obligation prohibits collective action relating to a concluded collective agreement. Thus, it is in principle lawful to take collective action relating to issues that have not yet been regulated in a collective agreement. According to settled case law, however, collective agreements also regulate issues that are considered to fall within the scope of the employer´s prerogative or are considered to fall within the general framework of the collective agreement. Accordingly, so-called “silent clauses” are considered to be part of the

collective agreement. This, taken together with the fact that collective agreements cover a wide range of employment conditions and are, for the most part, relatively detailed means that there are, in practice, very limited possibilities for claiming that issues are not regulated by the collective agreement. The most relevant exception is the possibility of taking sympathy action, since sympathy action is lawful as long as the primary action is lawful. In **Turkey**, statutory law expressly states that no more than one agreement can exist within an establishment at a given time. As a result, throughout the duration of a collective agreement, strikes are prohibited for any cause, regardless of the existence of a no-strike clause. In many countries (for instance, **Japan**, **Germany**), an absolute peace obligation can be agreed upon by the parties concerned, but does not result from law.

In most countries, "relative peace obligations" play an important role. In **Uruguay**, statutory law[39] explicitly stipulates a relative peace obligation which is effective as long as the collective agreement is in force. The same applies in **Spain**[40]. In **Colombia**, a peace obligation applies as long as the employer does not substantially fail to fulfil the duties arising from the collective agreement[41]. In **Japan** and **Germany**, "relative peace obligations" are understood to be inherent in all collective agreements, even if there is no explicit provision in the agreement. With regard to Germany, the Federal Labour Court has held that a mutual peace obligation must not be explicitly agreed upon, but resides in the collective agreement, which essentially constitutes an "order of peace". Similarly, the Labour Court in **Israel** has ruled that every collective agreement by implication includes a limited/relative commitment to industrial peace. In **Argentina**, too, relative peace obligations are regarded as inherent in any collective agreement. However, they are mostly disregarded by the parties concerned or are in any event not applied in practice.

In **Russia**, collective agreements concluded at plant level may contain relative peace obligations which are effective as long as the employer meets his/her obligations[42]. With regard to multi-employer collective agreements, strikes that violate the peace obligation are not included in the limited list of illegal strikes contained in the Labour Code[43]. Even so, such

[39] Article 21 of Act 18.566 on the Promotion of Collective Bargaining.
[40] RDL 7/77, Article 11.
[41] See Article 450 of the Labour Code.
[42] Article 41(2) of the Labour Code.
[43] Article 413.

a strike might be considered to be in breach of the Code[44]. There is no case law on this issue, however.

No (relative or absolute) peace obligation exists in **Slovenia.** Even if a no-strike clause were agreed upon by the parties to a collective agreement, such a clause could not prevent workers from striking. Similarly, in **Italy**, according to the majority opinion, no implied peace obligation exists. As a result, there is no restriction to strikes relating to matters already covered by a collective agreement. A peace obligation cannot be valid unless it is expressly agreed. And if it is expressly agreed by the signatories of the collective agreement, a peace obligation only commits the union, not its members. As is the case in Slovenia, the right to strike is a right that belongs to individual employees, although it must be exercised collectively. This right can neither be waived by workers themselves, nor by workers´ representatives.

In most countries, no absolute peace obligation seems to exist. This may also be attributable to the fact that the right to strike as such may not be waived. Accordingly, even if an absolute peace obligation were agreed upon by the parties, it might admissible only in case of a limited duration.

2. Mandatory Nature of the Peace Obligation

In many countries, the peace obligation is deemed mandatory. This is the case, for instance, in **Finland**, where such obligation cannot be disregarded by the parties, but can only be expanded (with binding effects between the parties of the collective agreement). In other countries, like **Uruguay**, the statutory peace obligation can be disposed of by the parties to the collective agreement. In **Japan**, it is hotly debated whether the "relative peace obligation", which is inherent in all collective agreements, can be disposed of by the parties. Some scholars argue that such opting-out would be contrary to an important function of collective agreements, namely the establishment of stable and reliable terms of employment. In the **United States**, contractual no-strike obligations are binding on the parties to such agreements, but can theoretically be waived by the parties involved.

[44] Article 413(3).

3. Content of the Peace Obligation

In many countries, a peace obligation does not only entail that the parties bound to it must abstain from calling or otherwise supporting industrial action (passive side), but also implies that the parties must see to it that their members abstain from such action (active side). Such "double-edged" peace obligation can be found, for instance, in **Finland**, **Japan** and **Germany**.

4. Start and End of the Peace Obligation

It seems that the peace obligation is in force in all countries as long as the collective agreement is in force. This usually means that industrial action is illegal during the validity period of the collective agreement if it is directed against the collective agreement as a whole or against part of it. In **Germany**, as in many other countries, collective agreements continue to have some effect after their termination. During that period, there is no "statutory" peace obligation, though the parties may agree on a continuing peace obligation in order to gain time for negotiations that are not threatened by a strike.

5. Legal Effects of the Peace Obligation

Major differences exist with regard to the legal effects of a peace obligation. In **Japan**, the peace obligation only binds the parties to a collective agreement because it lacks normative effect. In **Turkey**, too, only the signatories of a collective agreement are bound. In **Finland**, the peace obligation binds the trade union and employers´ association as parties to the collective agreement, as well as affiliate associations and individual employers. It does not bind individual employees. In **Germany**, individual employees are not bound, either. However, under the doctrine of so-called "contracts for the benefit of third parties", rights may arise from a peace obligation not only for the signatories of the agreement, which in the German context are normally trade unions and employers´ associations, but also for

individual employers (and employees) if they are members of the associations that concluded the agreement; no rights arise under a peace obligation for third parties (for instance, suppliers of the employer). In **Spain**, employees and trade unions are bound by a peace obligation while rights arising from such obligation can also be invoked by individual employers.

6. Consequences of Violations of the Peace Obligation

With regard to the consequences of violations of the peace obligation, major differences exist between the countries. In **Germany** and **Japan**, a "relative peace obligation" is understood to be inherent in all collective agreements. The consequence of breaching such an obligation are very different, however. In **Germany**, a strike that violates the peace obligation is illegal. In **Japan**, on the other hand, it is far from clear whether such a violation impacts on the lawfulness of the strike as such or must be regarded as a mere breach of contract.

VIII. Other Limitations to Strikes

In many countries, the rules on strikes are relatively detailed and specified in statutes. Often, strikes are seen as only one element in a process that starts with demands tabled by worker representatives and may result with the conclusion of a collective agreement. In these countries, there is little room and little need for principles like proportionality or ultima-ratio, which require further substantiation before they can be applied. This would be considered circumstantial in light of so many explicit provisions. In other countries, no or very few statutory provisions on strikes exist. Accordingly, the regulation of industrial conflict has essentially been left to the courts. In these countries, legal principles play an important role, as they provide guidelines or even reasons, criteria or justifications for certain legal conclusions regarding, for instance, the lawfulness of a strike. **Chile** and **Germany** are good examples of this divide.

In **Chile**, determining the lawfulness of a strike is based on compliance with the steps and requirements established by the Labour Code. If workers started negotiations with the employer within the legal framework stipulated in the statute, they can eventually have recourse to the right to strike, if they followed every step provided for in legislation. Compliance with these rules is the only criterion applied by the courts. Criteria like proportionality, last resort, reasonableness, abuse of law, equity or other factors do not play a role. Accordingly, determining the lawfulness of a strike is almost like a mathematical equation: Verifying that parties complied with the procedure regulated by statutes during the negotiation process for a collective agreement, that workers were properly balloted, that the necessary quorum for approval was met, and that all procedural steps were implemented within the period prescribed by law. The sum of all these factors represents a "legal strike". The provisions that specify these steps may be expressions of "proportionality" or "reasonableness", but only statutory provisions and not the underlying principles are considered.

A completely different approach is taken in **Germany**. There, Parliament has not passed any legislation in the field of industrial action. Accordingly, the courts have had to step in using the constitutional guarantee of the right to strike as the starting point of their legal considerations. In such a legal set-up, it is not surprising that the rules on strikes are the result of the application of legal principles, even though they represent, by definition, a high level of abstraction. In Germany, elaboration of constitutional guarantees by applying legal principles has a long tradition. Since extensive areas of collective labour law are not regulated in statutes, judge-made law as such is not only regarded as inevitable, but is also widely accepted, though individual judgements, especially in the area of strikes and lock-outs, are particularly controversial in most cases and often trigger calls for the legislator to take responsibility. In other countries the, role of judges differs entirely. This may also explain why there are, for instance, no limitations based on abuse of rights, fairness, reasonableness or other similar concepts in the **United States** or **Australia.**

1. Legal Principles and Tests

a) Proportionality or Ultima Ratio

According to what has been determined so far, proportionality is seen in many countries as an issue which has been exhausted by the legislator. For instance, in **Lithuania**, the Labour Code stipulates a system of negotiation, conciliation and other instruments which must first be applied in a collective labour dispute, while a strike can only be declared when all peaceful means of dispute resolution have been exhausted. In that sense, it can be said that strikes must comply with the ultima ratio-principle, a principle that has, however, been elaborated by the legislator. Accordingly, the significance of the application of the principle in the area of strike law is an issue debated by academics rather than by the courts. That said, it must be noted that these principles are important when assessing whether statutory restrictions of the right to strike are in conformity with constitutional provisions. According to settled case law of the Constitutional Court in **Colombia**, for instance, the limitations of the right to strike imposed by the legislature must meet the criteria of proportionality and reasonableness, amongst others.

In other countries, there is some room for applying the principles of proportionality and ultima-ratio. This is the case in **Turkey**, where the courts apply these principles although they are not mentioned in the law. In the **Netherlands**, the courts are prepared, to a certain extent, to apply the principle of proportionality, the fact notwithstanding that it is almost inevitable (and the very purpose of industrial action) that the employer will suffer damages as a consequence of a strike. Damages caused to third parties or the general public may make the actions disproportionate. In some cases, the courts may prohibit parts of an action (for instance, a public transport strike during rush hour). Parties claiming that damage caused to third parties is disproportionate are not always required to prove their claim; often, it suffices to simply assert that the strike is disruptive to society. In **Finland**, the principle of proportionality and the criterion of “good practice” have been used by the courts when evaluating the lawfulness of industrial action in a situation where one or both parties were not part of the legal system of collective bargaining. When the parties take industrial action within that system, its legality is determined by the collective agreement,

especially its peace obligation, and by statutory law[45]. In **Israel**, the ultima ratio-principle is also applied. Calling a strike must be the last means in the labour dispute and may certainly not be the first. In addition, the good faith principle is applicable: Starting a strike prematurely may indicate an absence of good faith. The parties must respect the peace obligation and must exhaust all means to settle the dispute as stipulated in the agreement. Finally, strikes must be proportional. This means that a sense of proportion must exist between the scope of the strike and the objective that is to be achieved through it. Proportionality is measured geographically, quantitatively and substantively.

In **Germany**, extensive use is made of the principle of proportionality or ultima-ratio. Several years ago, the Federal Labour Court even went so far as to hold that proportionality represents the key criterion when evaluating the lawfulness of industrial action. According to the court, such action is illegal if it is evidently neither necessary nor appropriate when taking the aim of the industrial action into account. By assessing the lawfulness of a strike according to these standards, the courts are prepared to grant trade unions wide discretionary power and exercise a considerable measure of self-restraint.

b) Fairness

In **Japan**, with regard to the lawfulness of the means employed in a collective dispute, the principle of fair play applies, which results from the so-called faithfulness principle in union-management relations. Since employer-union relations are premised to continue after a collective bargaining agreement is reached, a "fair fight" is required in the parties' exercise of economic pressure. From this perspective, industrial action would be inappropriate if resuming operations becomes impossible. The example of Japan is noteworthy, because it clearly indicates that there is a (continuing) legal relationship between the "social partners" which exceeds a singular collective agreement.

[45] The Collective Agreements Act.

c) Abuse of Rights and Public Mores

In some countries like **Germany** and **Turkey**, the abuse of rights (principle of good faith) is regarded as a universal concept. Accordingly, it also applies to strikes. The significance of this concept is rather limited, however, because it can only be applied in cases of "reckless" behaviour or to a strike that aims to economically destroy the other party. In **Austria**, public mores constitute the outer limits of the right to strike.

d) Need of Protecting Public Welfare

In **Hungary**, strikes are prohibited if they directly and seriously endanger human life, health, corporal integrity or the environment, or if they impede the prevention of the effects of natural disasters. In **Australia**, an industrial tribunal may suspend or terminate protected industrial action when, for instance, the personal safety or health of others is jeopardised[46]. In **Turkey**, the right to strike may not be exercised in such a manner as to cause harm to society or to destroy national wealth[47]. Any strike called in non-compliance with this rule shall be suspended by the competent court upon the request of either party or the Minister of Labour and Social Security. In **Russia**, the government has the right to suspend a strike for a period of no more than 10 calendar days "in situations of special importance for the vital interests of the Russian Federation or its territories"[48]. In addition, there is an obligation to perform minimum services during the course of a strike. According to the law, the list of services to be performed during a strike shall be defined by the parties of the collective labour dispute together with the competent local government authority within five days of the announcement of the strike action[49].

[46] Section 424 of the Fair Work Act 2009.
[47] Article 54(2) of the Constitution, Article 47(1) of Act No. 2822.
[48] Article 413(8) of the Labour Code.
[49] Article 412(4) of the Labour Code.

e) Excessive Demands

In **Japan**, the objective of a strike is taken into account when determining its lawfulness. A strike must aim at promoting collective bargaining. Actions which only aim at harming employers or third persons are deemed unlawful. In **Spain**, strikes are understood to be abusive and illegal if they aim at destroying the employer's business. In this context, the principle of proportionality is applied, with the sacrifices suffered by the striking workers being considered as well. The two examples define the outer limits to be applied with regard to workers´ demands. This is also the case in **Germany**, where the courts are equally hesitant to engage in what is called "censorship" of collective agreements. In the **United States**, the Labor Board is not empowered either to determine whether union bargaining demands are excessive or whether employers' offers are parsimonious. As a result, strikes do not lose protection because the union bargaining position is unreasonable, nor do those job actions receive a greater degree of protection if the employer's proposals are unduly minimal. Even when a labour organisation decides to strike to drive a company out of business, the Supreme Court has held that the union was exempt from antitrust liability.

2. Rights of Others

a) Rights of the Employer

Determination of the lawfulness of a strike may require a comprehensive balancing of the right to strike against other rights.

aa) Entrepreneurial Freedom

In some cases, the assessment of strikes may be influenced by the outcome of balancing the right to strike against the rights of the employer as, for instance, the

employer's right "to organize and manage the enterprise from an economic and technical point of view" as specified in Article 7 of the MERCOSUR Social and Labour Declaration.

With regard to the European level, the right to strike is enshrined in Article 28 of the Charter of Fundamental Rights of the European Union according to which "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." The ECJ some time ago held, however, that collective actions constitute restrictions to the freedom of establishment [Article 49 of the Treaty on the Functioning of the European Union]. Those restrictions may, in principle, be justified by an "overriding reason of public interest, such as the protection of workers, provided that it is established that the restriction is suitable for ensuring the attainment of the legitimate objective pursued and does not go beyond what is necessary to achieve that objective" (Viking case). In another judgement, the ECJ pointed out that "since the freedom to provide services [Article 56 of the Treaty on the Functioning of the European Union] is one of the fundamental principles of the Community, a restriction on that freedom is warranted only if it pursues a legitimate objective compatible with the Treaty and is justified by overriding reasons of public interest; if that is the case, it must be suitable for securing the attainment of the objective which it pursues and not go beyond what is necessary in order to attain it" (Laval case).

With regard to the Member States of the EU, it seems that the fact that important interests or even fundamental rights of the employer such as entrepreneurial freedom or the right to property may be infringed, has no particular significance as such in most cases brought before the courts. For instance, in the **Netherlands**, the relevant criterion is only whether rules of fair play were respected and whether the strike is proportional in view of the damages caused to the general public or, in extreme cases, to the employer. Accordingly, there is no example of Dutch jurisprudence on collective action in which the parties to the conflict or the court took recourse to the above-mentioned rulings of the ECJ. In **Germany**, the Federal Labour Court has stressed that the principle of proportionality lends itself as the key criterion on which to judge the lawfulness of a strike for the very reason that the exercise of the right to strike regularly interferes with constitutionally protected legal positions of the immediate opponent as well as of third parties. This may sound similar to

what was stated by the European Court of Justice. However, the German system is a rights-based system. One consequence is that the legality of the right to strike forms the starting point of the legal analysis and any limitations to the fundamental right to strike must be narrowly construed. In some Member States of the European Union it remains to be seen, however, what impact these rulings have, in particular, when national courts have to 'strike' a balance between the right to strike and the freedom of economic activity.

In **Russia**, the weighing of freedom of association and entrepreneurial freedom was behind rulings of the Constitutional Court regarding the constitutionality of statutory provisions on the lawfulness of dismissing workers who are members of trade union bodies. This balancing is difficult as is evident in the fact that the Constitutional Court arrived at different results in its rulings. In **Israel**, an employer can, in principle, claim that a strike is abusive in that it undermines his/her freedom to provide services. The legality of the strike will be assessed according to the criterion of proportionality. In **Uruguay**, the right to strike is a (universal, inclusive, inalienable and unavailable) fundamental right, which takes precedence over individual rights of property (which are exclusive, assignable and waivable). In **Colombia**, too, the right of the employer must give way to the right of workers to strike (provided it meets the requirements and formalities required by the law).

bb) Property

In **Lithuania**, according to Article 23 of the Constitution, property shall be inviolable and the rights of ownership shall be protected by law. Furthermore, the Labour Code determines that the strike committee together with the employer is obliged to ensure the safety of property and people[50]. If there is a breach of such conditions and damage is done to the employer's property, trade unions and individual workers can be found liable for damages or even be prosecuted under penal law. In **Hungary**, with regard to the legal protection of property, the Act on Strikes stipulates that throughout the duration of the strike, the opposing parties must continue further conciliation for the settlement of the debated issues, and are obliged to ensure the protection of persons and of property[51]. Thus,

[50] Article 80(1).
[51] Section 4(1) of the Act on Strikes.

the organisers of a strike must cooperate with the management insofar as this is necessary to protect the employer's property and to ensure the uninterrupted and safe operation of certain processes. In a recent ruling, the Budapest Labour Court found that the right to strike may not 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.

In **Uruguay**, it has been suggested that a restriction to strikes arises if a strike causes such harm to the other party that this party's constitutionally protected rights are violated. This may be the case if there is "damage to productivity" in the sense that the employer is obstructed from continuing business operations (as opposed to a mere loss of profit or competitiveness in the market).

b) Rights of Non-Strikers

In **Poland**, participation in a strike is voluntary[52]. Hence, the prevailing opinion is that anyone who does not want to strike can demand his/her right to be protected. This legal position of non-strikers does not impact on the lawfulness of a strike, however. Instead, there may be a claim against the employer to provide an opportunity to work and, in case he/she fails to meet this obligation, a claim to pay wages. Similarly, in **Turkey**, as long as the right to strike is not abused, non-strikers cannot demand their right to work to be respected and protected.

IX. Public Sector and "Essential Services"

1. Public Sector

a) Public Sector in General

In some countries, nearly all workers in the public sector enjoy the right to strike. **Ireland** may offer an illustrative example. There, the possibility of workers to strike is not

[52] Article 18 CLDRA.

restricted by law, except in the case of members of the Police and the Defence Forces. In **Australia**, the public service is subject to the same laws as the private sector in respect of enterprise agreements and industrial action. In **Uruguay**, all persons essentially working in the public sector enjoy the right to strike, except members of the armed forces and persons who exert public power. In **Slovenia**, all persons in the public service (including judges), in principle, enjoy the right to strike, irrespective of the type and nature of the activity involved. However, treating all workers in the sector as a uniform category has been criticised by some scholars as not fully taking into account the constitutional concept of the right to strike (and its possible limitations).

In other countries, the legal situation differs entirely in that nearly all workers in the public sector are prevented from striking. In the **United States**, federal employees may not strike. Most states have also expressly prohibited all strike action. Such strike bans have been sustained when challenged on constitutional grounds. In the relatively few states which permit strikes by public employees, this right is only available to non-essential personnel. Police officers, fire fighters, and emergency medical personnel may not conduct work stoppages. In **Chile**, Article 19 of the Constitution expressly prohibits the exercise of the right to strike for all workers of the state and of the municipalities without distinction. Consistent with this, these workers do not have the right to bargain collectively, much less to exercise the right to strike to achieve their legitimate claims. Promoting strikes or participating in strikes justifies dismissal. In addition, it is a crime and as such punishable by law. In practice, however, the respective trade unions regularly negotiate and exercise the right to strike.

In some countries, (the majority of) workers in the public sector enjoy the right to strike, but the legislator has introduced some restrictions. In **Israel**, for instance, strikes in the public sector are unprotected in three situations: A strike at a time when the parties are subject to a collective agreement in which labour wage rates are being set, except if the strike does not pertain to salaries and social benefits and provided that it has been approved by the trade union's central governing institution; a strike at a time when a collective agreement does not apply to the parties and is not declared by the authorised workers' organisation, which did not approve it; a strike not announced 15 days in advance. The underlying ideas behind this regulation may be the following: First, there is a budgetary need to ensure that wage rates are stable. Second, strikes can only be permissible if a trade union

assumes responsibility. Third, an early warning is required to put the state in a position to ensure that there is no sudden breakdown of services in the public sector.

b) Civil Service

In many countries, essentially two categories of workers exist in the public sector: Employees and civil servants. While the former may, in principle, enjoy the right to strike, the latter may be prevented from engaging in industrial action. In **Japan**, though the Constitution guarantees the right to strike for all workers, all civil servants, whether on-site or clerical, are prohibited by law from engaging in strikes. In **Ecuador**, there is also a sharp boundary between public workers (who enjoy the right to strike) and public servants (who do not). Whether that differentiation is in conformity with the Constitution is hotly debated.

Similarly, in **Germany**, "civil servants" are denied the right to strike while workers in the public sector enjoy the right to strike. Whether such denial of the right to strike stands up to legal scrutiny is increasingly debated, not least because of rulings by the European Court of Human Rights according to which the right to strike is a human right recognised and protected in international law and, as such, can only be limited in strictly defined circumstances which must be provided for by law, have a legitimate aim and be necessary in a democratic society. In one ruling which concerned a prohibition of public sector trade unions from taking industrial action, the Court acknowledged that the right to strike was not absolute and could be subject to certain conditions and restrictions, but held that a ban applied to all public servants was too expansive of a restriction. In any event, it should be noted that civil servants under German constitutional law may not be ordered to perform the work of strikers.

In some countries, though most civil servants enjoy the right to take industrial action, this right is significantly limited. For instance, in **Finland**, a so-called permanent peace obligation applies in the civil service based on the relevant statute and irrespective of any collective agreement. According to the law, when there is no collective agreement on matters concerning the terms of employment of civil servants, only strikes and lock-outs are permissible forms of industrial action. Wild-cat strikes are prohibited. Sympathetic action or political action is also not permitted. When a collective agreement is in force, the individual civil servant is also bound by the peace obligation. Civil servants are obliged to do protective work which is work that must be performed during industrial action to protect the life or health of the citizenry or to protect property that is in jeopardy due to the industrial action. In **Sweden**, employees who exercise public power may essentially only strike and not engage

in other forms of industrial action. Partial strikes are not permissible, nor are political strikes. Sympathy actions are restricted to actions for the benefit of employees in the public sector. Finally, participating in collective action requires previous approval by a trade union.

In **Hungary**, there is, *inter alia*, no legal possibility for strikes by bodies of the judiciary. According to the Constitutional Court, the prohibition of strikes in judicial institutions is constitutional, as a strike by their members potentially endangers the exercise of basic rights by third parties. With regard to public administration, the right to strike may only be exercised in accordance with the special regulations specified in an agreement between the government and the trade unions. This agreement restricts in many respects the right of civil servants to strike. For example, only those trade unions which participated in the conclusion of the given agreement may call a strike. Furthermore, a union may only call a strike if it is supported by a certain percentage of civil servants. The right to initiate a solidarity strike is also restricted. Whether these limitations, which are based on a mere agreement instead of on an Act of Parliament conform to the Constitution, is widely debated.

2. "Essential Services"

In some countries, the concept of "essential services" exists while in others no such concept applies. One way or other, strikes that affect companies that perform "important" functions are the subject of regulations which—more or less—limit the right to strike or exercising such a right.

a) Qualification as "Essential Service"

The key question with regard to "essential services" is what constitutes such a service. In this regard, it should be noted that legal experts in some countries claim that the concept of "essential services" is too broad. For instance, in **Ecuador**, the statutory list of "essential services" is so extensive that the right to strike does not exist in public service (given the fact that civil servants are denied the right to strike altogether). In **Chile**, an

extensive list of companies exists to which a strike ban applies. In addition, statutory law grants employers far-reaching rights to claim that their enterprises perform "essential services" in the sense that workers must ensure emergency services. In **Turkey**, there is no overall definition or concept of "essential services". Strike bans exist, however, in many sectors ranging from water supply to banking and from educational and training institutions to cemeteries. In **Uruguay**, the competent minister is empowered to determine whether a given service qualifies as "essential". Accordingly, in case of an industrial conflict, a public authority may declare a strike illegal. It may also take the necessary steps to maintain the services. The broad discretionary power of the minister in qualifying a service as an "essential service" has been criticised by many legal commentators.

In **Russia**, strikes which may jeopardise the defence of the country, state security or the life and health of people[53] are prohibited. This prohibition extends to life-sustaining activities like supply of energy, heating, water supply, gas supply, aviation and railroads, communications and hospitals. In addition, strikes by civil aviation personnel responsible for servicing and directing aviation transport are prohibited[54]. Under specific legislation, strikes are also prohibited for employees of rail transport, whose work is connected with trains' operations, manoeuvring operations, passengers, senders and recipients of cargo shipment services, according to a list based on Federal Law. This list is so extensive that virtually all rail transport employees are prevented from striking. The regulation was challenged in the Constitutional Court, but the Court held that the right to strike was not excessively restricted for rail transport workers. Accordingly, the law has been left unchanged.

In **Colombia**, Article 56 of the Constitution guarantees the right to strike "except for essential public services defined by the legislature". "Essential services" in this sense are, in particular, public service, central banking services, administration of justice, health service, social security administration, the oil industry (as long as these activities are intended to supply oil throughout the country) and transport. Telecommunications companies also provide "essential services", the reason being, according to the Constitutional Court, that these companies guarantee freedom of expression and impart ideas and opinions, as well as transmit and receive information. In its ruling, the Court expressly acknowledged that these

[53] According to Article 413(1b) of the Labour Code.
[54] Article 52 of the Air Code of Russia.

services may also be necessary to ensure the exercise and protection of other fundamental rights.

b) Limitations of the Right to Strike

In some countries, it seems that legislators trust in the ability of the "social partners" to arrive at solutions that suit the needs of a specific "essential services". For instance, in **Ireland**, those engaged in "essential services" (in particular, health services, energy supplies, including gas and electricity, water and sewage services, fire, ambulance and rescue services, and certain elements of public transport, this list being indicative rather than comprehensive) are subject to a (voluntary) Code of Practice on Dispute Procedures. Where the parties have not concluded an agreement introducing procedures and safeguards which ensure the continuity of essential supplies and services, the Labour Relations Commission is empowered to consult with the top level labour organisations with a view to securing their assistance and co-operation with whatever measures may be necessary to resolve the dispute or alleviate the situation[55].

In **Hungary**, in the case of employers who perform activities of fundamental public concern (in particular, public transport, telecommunications, supply of electricity, water, gas, etc.), the right to strike must be exercised in a way that does not impede the performance of the services at a minimum level. The extent and conditions of a strike may be subject to legal regulation. In absence of such law, the extent and conditions of a strike must be agreed upon during pre-strike negotiations. Calling a strike against an employer who carries out an activity that serves the basic interest of citizens is unlawful, unless the parties agree on a minimum service level and its conditions in advance. If there is no such agreement, the level will be defined by the court in specific proposals submitted by the parties. The courts, however, are hesitant to get involved too extensively. In the **Netherlands**, though the concept of "essential services" is not specified, judges may oblige strikers to exercise restraint as may be the case, for instance, with regard to action taken by public transport or health care workers.

Finally, in **Spain**, in addition to essential services, the law requires establishing so-called maintenance services (services necessary for the safety of persons and goods,

[55] See clause 34 of the Code of Practice.

maintenance of premises, machinery, facilities, materials and what else may be needed for the subsequent resumption of the company's tasks) in any private business, irrespective of its activity[56]. It should be noted, however, that such services are exceptional with the underlying concept being narrowly interpreted by the Constitutional Court.

In some countries, relatively far-reaching limitations exist if a strike affects an "essential service". In others, restrictions are fairly minor, reflecting a view which is, for instance, taken in **Italy**, that the real issue with regard to "essential services" is to carefully balance the right to strike with the fundamental rights of others who may be affected by a strike, and that the former may only be limited if required by the latter.

In some countries, the state may interfere in strikes under certain circumstances. In the **United States**, private sector employees are authorised to strike even when employed in critical industries. As a result, individuals who work for public utilities that are privately owned may engage in work stoppages. Even persons who work for private health care institutions may strike, but they are required to provide their employers with at least ten days´ notice of any contemplated work stoppage. Under the Labor Management Relations Act, if the President determines that a threatened or actual strike affecting an entire industry or part thereof would "imperil the national health or safety", he may instruct the Attorney General to seek an 80-day injunction against such action to allow an emergency board to conduct a fact finding hearing and report on the final positions of the parties. During the last 20 days of that court order, the Labor Board must conduct a secret ballot vote among the workers on the employer's final bargaining proposal. If the voters reject that offer, the injunction must expire and the employees may engage in a work stoppage. In **Australia**, too, the law allows for industrial action to be suspended or terminated. In those cases, an independent industrial tribunal must be satisfied that the protected industrial action is threatening or would threaten "to endanger the life, the personal safety or health, or the welfare, of the population or of part of it" or "to cause significant damage to the Australian economy or an important part of it".[57]

[56] Section 6.7 RDLRT.
[57] Section 424 of the Fair Work Act 2009.

X. Specific Emanations of Strikes and Other Forms of Industrial Action

As has been mentioned before, the concept of "strike" is so broad in certain countries that the notion embraces nearly all conceivable modalities of industrial action. Such is the case, for instance, in **Uruguay**. In **Austria**, industrial action is essentially permitted as far as no specific legal provisions (of, for instance, penal law) are violated.

In some countries, on the other hand, the right to take industrial action is essentially limited to calling a strike in the strict sense of the word. In **Chile**, strikes are regarded as forming part of collective bargaining which is regulated in some detail in the Labour Code. If the parties fail to reach an agreement, workers must determine whether to accept the employer's final offer or to declare the strike. As a "strike" is legally defined as a "collective abstention from work", it is widely concluded that sympathy (or solidarity) strikes, warning strikes, work-to-rule, rotating strikes, occupation of premises, blockades and picketing are not permitted. In **Turkey**, a legal strike must aim at the conclusion of a collective agreement. In addition, it must meet strict procedural requirements as laid down in statutory law. Modalities of industrial action such as solidarity strikes, sympathy strikes, secondary strikes, warning strikes, go slows, sit-ins, work-to-rule, rotating strikes, occupation of the enterprise's premises, blockades, picketing and similar actions are not permitted under Turkish law.

In many countries, it is highly doubtful whether and to what extent other forms of industrial action other than strikes are permissible. In **Slovenia**, for instance, no explicit legal provisions on, e.g. solidarity/sympathy/secondary strikes, warning strikes, sit-ins, work-to-rules, rotating strikes, picketing, occupying or blockades exist. Though most of these forms of action are known in practice, some scholars claim that one or the other is not legal because it does not meet the requirements of a strike as laid down in statutory law[58]. Moreover, almost no case law exists in this regard.

[58] The Act on Strikes.

1. Specific Emanations of Strikes

a) Solidarity-, Sympathy- or Secondary-Strikes

Specific problems arise in case a strike represents a "solidarity strike", "sympathy strike" or "secondary strike". The problem starts with the definition of such strikes. Does it, for instance, constitute a "solidarity" strike if workers initiate a strike in support of another strike that is addressed at an employer who is legally independent, but economically related to the employer who is the subject of the main strike? Or: Does it make a difference whether the "supporting strike" is organised by the union which is responsible for the main strike or a different union?

In some countries, there is a notion of "sympathy action" which is quite extensive due to the fact that various bargaining units often exist at one single employer. In the **United States**, non-unit employees of the same employer may honour the picket lines of the striking workers to demonstrate their sympathy, unless such sympathy action is prohibited by their own bargaining agreement. As regards "secondary strikes", the situation is the following: If striking employees ask the employees of secondary employers who may be producing goods for the employer targeted by the strike or who purchase goods from that employer to stop work as well, such conduct would constitute an unfair labour practice. In addition, it would subject the violating labour organisation to liability for any damages caused to the primary or secondary companies[59].

In **Japan**, sympathy strikes and secondary strikes are unlawful because they cannot be resolved in collective bargaining. In **Russia**, they are unlawful as well because the underlying demands are not addressed to the actual employer. In **Chile**, they are illegal for many reasons. One reason is that collective bargaining takes place at the level of the enterprise and "sympathy strikes" extend beyond that level. Another reason is that "sympathy strikes" lie outside the scope of the collective bargaining procedure as regulated by law. In addition, they are not meant to support demands against the employer. In **Australia**, "secondary strikes" (or boycotts) are unlawful because they do not involve a

[59] Under section 303 of the Labor Management Relations Act.

bargaining representative "genuinely trying to reach an agreement" with the employer of a specific group of employees, as required by law.

In the **Czech Republic**, a solidarity strike is only permitted on condition that the employer of the employees engaged in the solidarity strike may influence the course and result of collective bargaining to which the main strike is related[60]. In **Germany**, the situation was similar for a long time. Recently, there has been a change in course. Since then, the courts approve "sympathy strikes" as long as they are "proportional". In assessing whether that is the case, many factors must be taken into account. One factor to be considered is whether employers who are affected by primary and secondary action belong to the same group of companies. Another factor is whether one single trade union is party to both the "main strike" and the strike that supports it.

In **Colombia**, the Constitutional Court has found that the right to call a sympathy strike is rooted in the constitutional guarantee of the right to strike. In **Italy**, the Constitutional Court has held that the right to strike includes the right to initiate sympathy strikes, provided that strikers are bound together by common interests. Similarly, in **Spain**, "sympathy strikes" are permissible as long as there is a bond of solidarity between the supporting workers and the workers being supported. In **Ecuador**, the law[61] explicitly allows "sympathy strikes". The same applies in **Mexico**[62]. In **Ireland**, such strikes are expressly recognised in the statutory definition of "strike". Under the relevant provisions[63] the term "strike" is defined as encompassing "the cessation of work by a body of persons employed acting in combination (…) done as a means of compelling their employer (…), *or to aid other employees in compelling their employer* (…), to accept or not to accept terms or condition of or affecting employment".

An interesting question is whether and under what conditions a sympathy strike qualifies as violating the peace obligation contained in a collective agreement which the strikers are bound to. In **Germany**, sympathy strikes are usually not considered to violate the peace obligation. In **Finnish** case law, on the other hand, a sympathy strike is regarded as breaching one´s own collective agreement if it supports an action that is against the peace obligation of the collective agreement which the supported workers are bound to.

[60] Sections 16(3) and 20 e) of the CBA
[61] Article 505 of the Labour Code.
[62] Article 442 of the Federal Labor Law.
[63] Section 6 of the Redundancy Payments Act 1967 and section 1 of the Minimum Notice and Terms of Employment Act 1973.

In **Hungary**, "sympathy" strikes are in principle legal though subject to specific rules. For instance, while in general strikes must not be initiated by a trade union, sympathy strikes can only be organised by a union.

In some countries, the legal position on "sympathy strikes" is unclear. Opinions of academics are often divided. Case law is often non-existent or, in any event, not very rich. A case in point is **Slovenia**, where the issue is controversial but where most scholars deem that "sympathy strikes" may be included in the statutory definition of "strike".

b) Warning Strikes

Warning strikes which accompany negotiations over a new collective agreement are unlawful if negotiations take place at a time when a collective agreement is still in force and a peace obligation still exists. Problems arise, however, if the peace obligation has elapsed. In such cases the question must be answered whether a trade union is prevented from calling a strike by the mere fact that the parties are still negotiating with an aim of reaching agreement.

In **Germany**, case law on warning strikes has been modified several times. Over time, however, the position of the courts has become concrete: Warning strikes that are initiated during the duration of a collective agreement are illegal, as they are in breach of the relative peace obligation. A warning strike which is initiated by a trade union thereafter is not privileged over other forms of strikes. That means that, as is the case with other strikes, the so-called "ultima ratio-principle" is to be applied to warning strikes. Since initiating a warning strike as such amounts to a statement that negotiations have broken down which, in principle, cannot be verified by the courts, there are almost no limitations to warning strikes. In **the Netherlands**, on the other hand, warning strikes are regarded as violating both the ultima ratio-principle and the rules of "fair play" which requires the potential strikers to warn the opposite party of their intention to call a strike in as timely a manner as possible, so that the counterpart may take precautionary measures to limit damages.

In some countries, the ability of trade unions to call a warning strike is significantly limited. In **Hungary**, for instance, during the period of the so-called coordination (or "cooling off") period only one single strike may be initiated, the duration of which may not exceed

two hours. In **Poland**, a warning strike may only be conducted once and for no longer than two hours, provided that the course of mediation justifies the assessment that there will be no settlement of the dispute. In **Lithuania**, the Labour Code[64] states that a warning strike may not last longer than two hours. In **Russia**, finally, the Labour Code[65] provides that a warning strike may be called after five calendar days from the beginning of the conciliation process. Such a strike may not exceed one hour and may only be staged once throughout the course of the dispute. In addition, the employer must be informed about the warning strike no later than three days in advance.

In other countries, no specific rules for warning strikes exist. For instance, in the **United States**, work stoppages in support of bargaining over new agreements are perfectly lawful under the National Labour Relations Act. In some countries, warning strikes do not occur. In **Sweden**, in particular, such strikes are unknown.

c) Rotating Strikes

It is tempting for unions to devise forms of strike that entail the greatest possible disadvantage for employers, but at the same time minimise time and effort on the part of the workers. One instrument that is often used in this context are co-ordinated strikes of relatively short duration. Such strikes may be particularly effective if different workers within one establishment successively strike or if different establishments or companies are successively made the subject of strike action.

In **Italy**, the courts under the so-called doctrine of "equivalence of sacrifices" used to hold that strikes are illegal since they unfairly cause additional and excessive damage to the employer. Some time ago, however, the Supreme Court modified its position. Since then, "rotating strikes" are regarded as legal as long as they only harm the output of the company ("damage to production") without "damaging productivity" in the sense that the employer cannot resume operations once the strike ends. In **Uruguay**, there are no legal limits to rotating or intermittent strikes. And though it is true that a legal obligation exists to give

[64] Article 77(4).
[65] Article 410(6).

notice of a strike at least seven days in advance[66], in practice the ability of trade unions to stage so-called "surprise strikes" is hardly restricted.

In **Russia**, the ability of trade unions to initiate successful "rotating strikes" is limited. In principle, it is up to the union to decide how many workers will take part in the strike and what the "strike pattern" should look like. According to the Labour Code[67], the employer must be informed about "the date and time of the commencement of a strike, its expected duration and the expected number of participants". As a result, a trade union may initiate a rotating strike, but may not catch the employer off guard.

In **Spain**, rotating strikes are explicitly deemed to be illegal under statutory law[68] the rationale being that trade unions should not be allowed to lend a multiplier effect to the decision of a few to stop working. The legal presumption may be rebutted by proving that any damages caused were not excessive and that the rights of other workers and third parties were not compromised.

In **Germany**, rotating-strikes are lawful in principle. However, the employer is under no obligation to maintain business operations during a strike. Instead, he/she may (partly) close down the plant. Even if the strike is called off by the union, the workers lose their right to pay if it cannot be reasonably expected from the employer to reverse his/her decision to close down business operations.

2. Other Forms of Industrial Action

In **Spain**, any form of collective action other than strikes is in principle deemed to be illegal under statutory law[69]. The corresponding presumption is rebuttable, however. In the **United States**, the Labor Board has determined that activities like slow down or work-to-rule are not protected, albeit not unlawful, based on the theory that employees have a duty of loyalty to their employers. Employees may strike or they may work, but they may not receive full wages and deliberately fail to perform work at their normal levels.

[66] Act 13.720 of 16.12.1968.
[67] Article 410(9).
[68] Article 7(2) RDLRT.
[69] Article 7(2) RDLRT.

In **Hungary**, special forms of work stoppages like go slows and work-to-rule are not regulated and, thus, deemed not to be prohibited. In **Uruguay**, such actions are regarded as atypical strikes which form part of a broad range of actions which are perfectly lawful, with essentially only sabotage by workers being prohibited. In **Russia**, "go-slows" are included in the definition of a "strike" because the definition explicitly refers to a "refusal of work *in whole or in part*". Work-to-rule does not amount to a labour dispute, as long as the underlying demands are not officially stated. As a consequence, work-to-rule is not illegal. In the **Netherlands**, go slows, sit-ins and work-to-rule actions are, in principle, considered lawful. The Supreme Court, however, has emphasised that these actions may disturb the "balance of power" between the unions and the employers. As a consequence, the court may be prepared to justify restrictions to this type of action more easily, though it has been observed by other courts that this type of action may often cause less damage to the employer, third parties or the general public.

In **Colombia**, such practices are dealt with in individual labour law which provides that go slows and work-to-rule represent just causes for dismissal[70]. In **Italy**, too, go slows are not considered to be protected by the right to strike, but fall within the ambit of contract law and constitute a breach of contract. This is also true for so-called "non-cooperation" where employers do not (strictly) comply with the instructions of their employer.

a) Sit-ins and Occupation of Premises

In the **United States**, sit-down strikes are unlawful, based on the fact that such activities violate trespasses laws. As a result, individuals who engage in such conduct may be immediately terminated and may even be prosecuted for criminal trespass. In **Colombia**, the occupation by the company as a means of exerting pressure on the employer is not permitted and considered to be a violent act against the property of the employer.

In **Spain**, the occupation of premises is admissible provided that the workers do not endanger the rights of others or disturb production. In **Japan**, an exclusive workplace occupation infringes the employer's property rights and is thus unlawful. Sit-downs or occupation of the workplace are deemed to be appropriate, however, if the workers merely

[70] Article 62 of the Labour Code.

"stay" on the employer's premises and do not obstruct business operations. Although such sit-down strikes infringe the employer's property, the predominant opinion among courts and academics seems to take into consideration the fact that in the context of Japanese enterprise unionism, union offices are usually located on the employer's premises and that holding union meetings or engaging in other union activities on those premises is a common practice during peacetime. However, a so-called "union's production management", which implies that a union has initiated production activities independently, infringes employer's property rights and is therefore unlawful.

Even in **Uruguay**, where in principle all forms of industrial action are permissible, the competent court has held that an occupation without previous dialogue is disproportionate. Accordingly, the court ordered the evacuation of the workplace in order to protect the property of the employer and the interests of non-striking workers. This ruling marked a radical change because until then, the state had only intervened in industrial conflicts as a mediator. In later judgements the courts, however, upheld the right of workers to occupy the employer's premises (even for up to 72 hours), if the occupation was peaceful, and the occupants took the necessary measures to avoid damage to the facilities and other property of the company, and if the occupation was preceded by collective bargaining.

b) Picketing

In some countries, the issue of picketing is regulated in some detail. For instance, in **Ireland**, legal regulations provide that it is "lawful for one or more persons, acting on their own behalf or on behalf of a trade union in contemplation or furtherance of a trade dispute, to attend at (…) a place where their employer works or carries on business, if they so attend merely for the purpose of peacefully obtaining or communicating information or of peacefully persuading any person to work or abstain from working"[71]. So-called "secondary picketing" (when an employer is not party to the trade dispute) is lawful, if it is reasonable to assume "that that employer has directly assisted their employer who is a party to the trade dispute for the purpose of frustrating the strike (…), provided that such attendance is merely for the purpose of peacefully obtaining or communicating information or of peacefully

[71] Section 11(1) of the 1990 Act.

persuading any person to work or abstain from working"[72]. In the **United States**, employees engaged in labour disputes may lawfully picket their employer, with such action constituting classic concerted activity for mutual aid and protection[73]. They may also ask persons who work for the employer whom the strike action is directed at and individuals who work for secondary firms which make deliveries to that employer to honour the picket lines. They may not, however, use threats of serious and immediate violence or engage in any violent behaviour, since the National Labor Relations Act[74] deems it an unfair labour practice when a labour organisation restrains or coerces employees in the exercise of their protected rights.

In **Russia**, both individual employees and trade unions enjoy the right to picket. The meaning of "picketing" is relatively restricted, however. Under the statutory definition[75], "picketing (…) is a form of public expression of the opinions, performed without (…) using audio transmitting technical equipment by means of allocation near the object of picketing of one or more citizens using placards, banners and other items of visual agitation". In **Japan**, according to the Supreme Court, picketing is lawful, as long as it remains within the confines of peaceful verbal persuasion. In the **Netherlands**, too, picketing "as such" is lawful because it falls within the scope of fundamental rights such as freedom of speech and freedom of assembly.

In **Slovenia**, on the other hand, according to the prevailing view, any act preventing those who did not decide to take part in a strike from working is illegal, picketing included.

c) Boycotts

In **Japan**, a "product boycott" is generally deemed to be lawful. Only if it is accompanied by violence, threats or defamatory (i.e., false) statements is it considered unlawful. In the **United States**, on the other hand, courts have found it unlawful for employees to request consumer boycotts of firm products while they continue to produce those items, based on the theory that it is unacceptable for them to continue to earn their wages while simultaneously harming their employer economically. The Labor Board also

[72] Section 11(2) of the Act.
[73] Within the meaning of Section 7 of the NLRA.
[74] Section 8(b)(1)(A).
[75] Contained in Article 2 of the Act on Assemblies.

found that product disparagement constitutes unprotected behaviour, due to the duty of loyalty of employees towards their employer, even when they are striking. It is, however, interesting to note the degree of the duty of loyalty towards the employer in the U.S., given the fact that employers do not owe their employees any reciprocal loyalty under the so-called "employment-at-will" principle.

d) Others

In **Israel**, so-called protest shifts may be lawful. There is a need, however, to check the balance of the right to freedom of expression and the right of the employer to his/her property. This balancing is effected in accordance with the proportionality test, giving large weight to the workers´ right to free expression. In **Slovenia**, the strike committee or the striking workers frequently take a unilateral decision to "freeze" the strike for a certain period of time during which the employer is given the opportunity to fulfil the workers' demands. According to the Supreme Court, such unilateral interruption of a strike is unlawful, the reason being that it places too heavy a burden on the employer with regard to the organisation of the working process.

In **Germany**, the Federal Labour Court delivered a ruling on so-called "flash mobs" some time ago, in which participants in a coordinated action put numerous low value goods in their shopping trolleys and left them behind, and consequently considerably disrupted business in a retail store. The court ruled that the constitutional guarantee of the right to strike has not irreversibly specified all weapons that can be employed in industrial conflicts. Rather, the parties have the right to adapt them to changing circumstances in order to be at eye-level with the opponent. The court expressly acknowledged that flash mob actions significantly differed from traditional industrial action as they represented an "active" disruption of business operations and were not detrimental for participants (which is the case with a strike since it usually entails wage losses). Even so, the court was of the opinion that flash mob actions, if merely "accompanying" a strike, were not necessarily disproportionate and, as a consequence, no rule existed according to which they are illegal.

XI. Legal Consequences of Lawful Strikes

1. The Position of Strikers

As regards the position of workers who participate in a lawful strike, the key question is whether national law provides for a *right* to strike or for a *freedom* to strike. A right to strike, as opposed to the mere right to strike, means that the worker does not breach his/her obligation to work when participating in a lawful strike.

In the **United States**, individuals who engage in lawful strikes are protected from employer discipline[76]. If an employer discriminates against such strikers, he/she is engaging in an unfair labour practice according to the National Labour Relations Act[77]. Persons who strike are not entitled to any pay for the period they are out of work. In **Israel**, Article 19 of the Collective Agreements Law states that participation in a strike is not a violation of a personal commitment.

The law in **Turkey** clearly states that employment contracts are suspended during a strike. Strikers are protected from dismissal while they have no right to payment of wages or other benefits. Also, this period shall not be taken into account in the calculation of the employee's severance pay[78]. Deductions from wages such as taxes, social insurance premiums or union dues cannot be made for the duration of the strike. In **Poland**, the law also explicitly states[79] that participation in a strike which is lawfully conducted leads to an automatic suspension of the individual contract of employment. The same applies in **Lithuania**. In **Chile**, the Labour Code[80] explicitly provides for the employment contracts of strikers to be suspended. There is no right to pay. On the other hand, holiday rights continue to accrue. In **Argentina**, too, a strike is understood as suspending only the most important obligations (obligation to provide work, remuneration), but by no means all rights and duties of the parties involved. According to the Supreme Court, strikers enjoy the right to remuneration if the strike was called because the employer failed to meet his/her obligations. In the **Netherlands**, workers who participate in a lawful strike lose their right to

[76] Section 7.
[77] Section 8(a)(1).
[78] Art. 42(5) of Act No. 2822.
[79] In the Act on Collective Labour Dispute Resolution.
[80] Article 377(1).

wages and have no right to social security benefits, either[81]; on the other hand, they cannot be dismissed nor face other disciplinary measures. In **Uruguay**, strikers lose their claim to pay because the contract is suspended during the strike. They cannot claim unemployment benefits, either, because unemployment has not been forced upon them. In practice, strikes often end with an agreement between the parties, which may make provision for partly compensating strikers for the wages lost. In **Colombia**, strike action also represents a suspension of the employment contract. During the strike, the employer is not obliged to make contributions to occupational accident insurance. As there is no provision of services by the workers, there is also no risk, much less an obligation for the employer to pay contributions. The employer is not obliged to pay wages to strikers. According to a recent ruling of the Constitutional Court, however, there is an obligation to pay wages and benefits to workers with employment contracts suspended due to strike when the strike is attributable to the employer who disregarded rights arising from changes in legislation or legally enforceable collective agreements.

In **Ecuador**, workers who participate in a lawful strike are entitled to their wages during the strike[82] and are protected from dismissal for one year from the date of their return to work[83]. Before that time, they can only be dismissed with permission from a labour inspector.

2. The Position of Non-Strikers

a) Pay Claims

In many cases, strikes may give rise to a situation where part of the workforce at a given establishment is on strike while others want to continue performing their work. In such situations, the question arises whether and under what circumstances the employer must pay wages to the latter even if, due to the strike, he/she cannot (reasonably) provide a place to work.

[81] Article 7:627 of the Civil Code and Section 19(1) of the Unemployment Act.
[82] Article 504(1) CT.
[83] Article 503 CT.

In some countries, the problems that arise in this context have not been fully resolved. For instance, in **Russia**, the legal situation is uncertain, the reason being that it is not entirely clear whether there is a so-called "standstill by the fault of the employer" in such cases (who could end the strike by meeting strikers' demands) or a "standstill for reasons beyond the control of the parties". In the first case, the employee could claim an amount of 2/3 of his/her average wage for the period of the standstill, including additional benefits. In the second case, the employee would have the right to 2/3 of his/her basic salary only[84].

In other countries, the legal situation is clearer. In **Poland**, the burden of providing a place to work is placed on the employer. In the event of a strike, a non-striker continues to be entitled to remuneration because, legally speaking, he/she is unable to perform work due to "reasons concerning the employer"[85]. Similarly, in **Lithuania**, employees who do not take part in a strike, but are unable to perform their work because of the strike, shall be entitled to their wages during the strike period because a lay-off is no fault of their own. Alternatively, they may be transferred (by consent) to another job[86]. In the **Czech Republic**, too, non-strikers can claim full wages. Employees who can only perform lower paid work during the strike period have the right to receive additional payments from the employer, so that in total they receive their full wage[87]. In **Uruguay**, non-strikers can claim their full wages as well. In **Finland**, employees whose work is interrupted due to an industrial action which has nothing to do with their terms of employment have the right to continued remuneration for up to seven days[88]. Thereafter, they can claim unemployment benefits.

In **Italy**, non-strikers lose their right to pay if their further employment is impossible as a result of the strike. In **Spain**, the employer may suspend the contracts of non-strikers if business operations cannot continue due to the strike. In **Germany**, non-strikers may claim wages (with the according risk being imposed on the employer) if the employer cannot reasonably be expected to fully or at least partly continue to run his/her business operations and if he/she does not close down the entire business in response to the strike. Because multi-employer bargaining prevails in Germany, the question often arises how to deal with pay claims addressed to employers who are indirectly affected by a strike (for instance, car

[84] Article 157(1) and (2).
[85] Article 81(1) of the Labour Code.
[86] Article 82(3) of the Labour Code.
[87] Section 22(4) of the CBA.
[88] Chapter 2 Section 13(2) of the Employment Contracts Act.

manufacturers in case of a strike directed against suppliers). In such a case, the courts hold the view that the burden of further pay cannot be imposed on third parties without restriction. Instead, the causes and consequences of those indirect effects of labour disputes must be considered with regard to the underlying "battle strategy" of the unions. The crucial factor, in other words, is whether pay claims against secondary employers in these cases affect the "balance of power" between the parties to the conflict.

Similarly, in the **Netherlands**, the right to pay of non-participants who wanted to continue working was the subject of a complicated ruling by the Supreme Court. According to its judgement, regular strikes that are organised by unions place the employees at risk collectively. The balance of power between unions and employers is disturbed in case employers have to not only bear the costs of the strike, but to also pay the wages of non-participants who cannot work because of the strike. Therefore, non-participants have no right to pay. At the other end of the spectrum is the "wild strike" in which only a few workers participate. In that case, non-participants have a right to pay. For each type of action within these two extremes, the judge must consider whether or not the risk of the action applies to the employees collectively or to the employer.

In many cases, the question may arise whether and under what circumstances an employer who is affected by a strike can lock-out employees or otherwise shut down business operations in order to avoid continued pay claims. In **Turkey**, the employer is free to engage any employees who are not participating in the strike in work or not[89]. Yet due to the employer's duty of equal treatment, the employer must either engage all of the non-striking employees in work or none of them. If an employer decides to shut down the entire establishment in an attempt to derive concessions in collective bargaining rather than by objective factors pertaining to the operations of the undertaking, then such a shutdown may be considered an unlawful lock-out. As a consequence, the employer must pay the full wage the employees are entitled to under their employment contract and must in addition compensate any damage the latter has sustained, without any obligation on the employee's part to perform the corresponding work.

In **Israel**, in case some workers strike and others do not, the employer may take steps to lock-out employees. This closure can only be applied against employees who are not involved in the dispute and only in circumstances when deemed necessary. More

[89] Article 38(2) of Act No. 2822.

specifically, closure is an option if, but only if, it is practically impossible to continue employing every worker because of the strike. In **Australia**, individuals in the establishment who are not involved in the industrial action but who cannot work because of it as there is no work for them to perform may be 'stood down' by the employer, that is, may be required to not work and are not paid for the period during which they are stood down[90]. If either an enterprise agreement or a contract of employment provides for the standing down of employees, the agreement or contract governs the terms of the stand down[91].

In **Colombia**, suspension of employment contracts in case of strike also extends to workers who do not participate. According to the law[92], in case a majority of workers insists on striking, the authorities must ensure that the right to strike can be exercised. Accordingly, they can neither authorise nor support the entry to work of a minority of workers, even if they express their desire to work. This does not apply to employees engaged in essential services, however.

b) Employment in Other Functions

In **Sweden**, an employee who is not a member of the trade union that called the strike may refuse to perform work which is covered by the strike

According to the law in **Turkey**, employees who do not participate in a strike may only be employed in their own functions and may not substitute for employees who are taking part in the strike[93]. **In Hungary,** the Supreme Court held that the employer is entitled to order non-striking employees to perform work which otherwise falls outside the scope of their activities. According to another decision of the Supreme Court, the employer enjoys the right to call on non-striking workers to perform overtime in order to reduce the damages caused by the strike.

[90] Section 524(1) and (3).
[91] Section 524(2).
[92] Article 448 of the Labor Code.
[93] Article 43(2) of Act No. 2822.

3. The Position of the Employer

a) Right to Replace Strikers

In many countries, replacing striking workers is prohibited or, in any event, restricted. Under the law in the **Czech Republic**, an employer cannot hire other employees to replace the strikers[94]. In **Slovenia**, employers may not recruit other workers to replace those on strike, either. Nor may employment agencies temporarily provide employees to replace the workers on strike. The same is applicable in **Argentina**. In **Lithuania**[95] and **Turkey**[96], the employer is not permitted to recruit new employees to replace the striking employees, except in cases when it is necessary to fulfil minimum conditions (services) to meet immediate (vital) public needs. The use of temporary agency workers is also prohibited.

In **Poland**, those who are on strike can be replaced by strike-breakers with whom the employer may conclude either contracts for a definite period or for the completion of a specified task[97]. On the other hand, workers participating in a legal strike action cannot be replaced by temporary agency workers[98]. In **Russia**, striking workers can be replaced and temporary agency workers may also be used. In **Ireland**, there is no legal impediment to employers hiring workers to replace those who are on strike. The same is true in **Israel**. In **Finland**, employers do in practice sometimes use temporary agency workers during the course of a strike. Trade unions have criticised this practice as violating international law and the right to strike, while employers view this practice as part of their property right and free entrepreneurship, which are both protected by the Constitution. In any case, the employer is not allowed to permanently replace the striking workers. Similarly, in **Italy**, it is a much debated issue whether and to what extent the employer may replace strikers. While under the so-called doctrine of "internal dissent in a strike" the employer may in principle replace workers, there may be restrictions if replacements are made with the purpose of making the strike ineffective (so-called "external dissent in a strike"). The use of temporary agency

[94] Section 25 of the CBA
[95] Article 83(2) of the Labour Code.
[96] Article 43(1) of Act No. 2822.
[97] Article 21 CLDRA.
[98] Article 8(2) of the Act on Employing Temporary Agency Workers.

workers is, in any event, explicitly prohibited[99]. In **Uruguay** and **Colombia**, replacements are not permissible in the private sector if no essential service is affected by the strike[100]. In **Chile**, the replacement of striking workers is only admissible in exceptional circumstances[101]. The courts' interpretation of this has, however, lead to a situation where replacements are standard practice. The use of temporary agency workers is prohibited, however.

In the **United States**, employers whose employees are striking may hire temporary or even permanent replacements. They may also hire replacement workers from temporary employment agencies. Strikers who are temporarily replaced can return to work as soon as their union decides to end the work stoppage. Strikers who are permanently replaced must be placed on preferential recall lists and must be rehired when their former positions become vacant. In **Israel**, there is no prohibition on the use of temporary employment agency workers to replace workers who are on strike. The same applies in **Ireland**. In the last Social Partnership Agreement, the government agreed to introduce legislation prohibiting the replacement of strikers by agency workers, but no such legislation has yet been enacted.

In **Hungary**, a decision of the Supreme Court endorsed the right of the employer to call on non-striking workers to perform overtime to reduce the damages caused by the strike. Thus, this managerial measure does not qualify as an illegal coercive measure. In **Germany**, the Federal Labour Court has indicated that it considered the granting of "premiums" for strike-breakers as admissible in principle. Under German law, the employer may not order co-workers to perform the work of strikers. In addition, the law expressly foresees[102] that a temporary agency worker can refuse to work in a user undertaking that is directly affected by a strike. The hirer-out has to inform the temporary worker about that right. If the temporary agency worker refuses to work for the undertaking, the temporary work agency has to continue to pay his or her wages. In **Sweden**, though it is not unlawful for employers to seek to hire other available workers to perform the strikers´ duties (or for such replacement workers to accept the employment in question), there have been no such cases over the past few decades.

[99] Article 20 of Legislative Decree No. 276 of 10.09.2003.
[100] Article 449 of the Labour Code.
[101] According to Article 381 of the Labour Code.
[102] Section 11(5) of the Act on Temporary Agency Work.

b) Right to Lock-Out Workers

In the **Czech Republic**, an employer can apply a defensive lock-out[103] during which he/she has to pay all laid-off employees 1/2 of their regular wage[104]. In **Finland**, too, a defensive lock-out is permissible. In **Poland**, the right to lock-out is neither recognised nor prohibited. However, the prevailing view is that an employer does not have a right to lock-out workers who are not on strike. In **Slovenia**, employers cannot *lay off* workers who are not on strike, either. In **Ireland**, an employer may lay off workers who are not on strike, but such workers may be entitled to claim redundancy payments depending on the duration of the lay-off. In **Israel**, if there is "employment-at-will" as is normally the case, there might be no restriction to lock-out workers, but it could then be considered an act which was not done in good faith.

In the **United States**, if striking employees make it difficult for firms to continue to operate, they may lay off their non-striking workers until they are able to resume normal operations. Such laid off individuals may apply for unemployment compensation, but they have no legal right to demand their employer to continue employing them during the strike. Employers may use pre-emptive defensive lock-outs to avoid such difficulties. In addition, they are permitted to use offensive lock-outs, simply to exert pressure on workers and their representative unions at the bargaining table.

In **Italy**, employers have no right to lock-out workers. Only if strikers employ illegitimate means, which results in the need to protect the safety of persons or the integrity of facilities and to avoid any damage to the productivity of the enterprise, does the employer have the right to close the plant and to release non-strikers (so-called "retaliatory lockout").

[103] Section 27 of the CBA.
[104] Section 30(1) of the CBA.

XII. Role of the Courts in Determining Lawfulness and Legal Consequences of Unlawful Strikes

1. Role of the Courts in Determining Lawfulness

In **Argentina**, the labour administration is entitled to qualify a strike as either legal or illegal. However, this power relates only to the collective dispute as such and does not justify a determination of individual disputes arising in connection herewith. However, the courts must consider the decision of the labour administration when deciding on individual disputes. The decision of the public authority can be appealed. In most countries, strikes can only be declared illegal by a judge. In **Ecuador**, the Court of Conciliation and Arbitration is the competent body in this regard.

In many countries, summary proceedings play an important role. For instance, in the **Netherlands**, the courts organise a court session and render a judgement within a few days. Most of the time, the ruling is accepted by both parties. The unions immediately end their strike action when a ban is imposed and the cases are only rarely brought before an appeal court. Hence, the normal legal procedure is quick, relatively cheap and authoritative. In some countries (**Slovenia**), the courts seem reluctant to issue injunctions. In **Poland**, no classic “no-strike injunction” or interim interlocutory injunction is available. However, employers can make use of some form of surrogate institution.

2. Legal Consequences of Unlawful Strikes

The legal consequences of unlawful strikes are important in two respects: First, they are significant in terms of possible compensation. Second, they have an impact on the risks that are associated with a strike and, eventually, the willingness to engage in industrial action. In some countries, it seems that the consequences of illegal strikes are not entirely clear. The lack of clear and detailed regulation in relation to liability is regarded by some legal experts as one of the greatest flaws of the legal system in **Hungary**.

a) Individual Workers

aa) Claim for Damages

In many countries, employees are protected from liability for damages when participating in an illegal strike, at least to some extent. In **Russia**, workers cannot be liable for damages caused to the employer by the illegal strike. In **Poland**, an employee can be sued for damages only if he/she "intentionally caused damage". In **Hungary**, the general rules of the Labour Code specify that in the event of damage due to negligence, the amount of the employee's liability shall not exceed 50 per cent of his or her average wage for one month. In **Israel**, when an illegal strike takes place in the private sector, the striking workers are exposed only to claims of damages pertaining to acts that are not integral to the strike, such as locking a plant manager in his office, trespassing, causing a nuisance, illegal delaying of property, etc. In **Turkey**, workers cannot be held liable for damages if they respond to a strike call of a trade union.

In the **United States**, when individual employees engage in a strike which violates the no-strike clause in a bargaining agreement or which constitutes an unfair labour practice under the NLRA, their employer may discipline them. They cannot be held liable for unfair labour practices, however, since only labour organisations can be held responsible for such behaviour. If their actions contravene the provisions of their collective contract, they could conceivably be sued for breach of contract damages, but such actions are rare. In **Australia**, if unlawful industrial action takes place, damages may be claimed from the union and/or employees engaged in the industrial action. In **Colombia**, on the other hand, the law expressly states that the employer may sue individual workers for damages[105].

bb) Protection against Dismissal

In **Italy**, participants in illegal strikes enjoy far-reaching protection against dismissal. In the **Netherlands**, participants in unlawful strikes that were organised by unions are

[105] Article 450 of the Labor Code.

protected as long as they immediately terminate their actions once the judge has determined the strike's unlawfulness. In **Israel**, when the court declares a strike to be illegal, it generally warrants issuing an injunction instructing the workers to return to their jobs, and the workers are ordered to obey the injunction. They are not fired following an illegal strike. In the public sector, dismissals of strikers are an option. In **Ireland**, when an employee is dismissed for taking part in a strike, the conduct of both the employer and the employee, amongst others, must be taken into account when determining whether the dismissal is unfair. The dismissal of an employee for taking part in a strike is deemed to be unfair if one or more employees of the same employer were not dismissed for taking part in the strike, or if one or more employees who were dismissed for taking part in the strike were subsequently permitted to resume their employment[106]. In **Finland**, the position of the individual employee depends on whether the industrial action was lawful or called by a trade union or whether it was organised by a group of workers only without the involvement of a trade union. In the first case, employees participating in the strike enjoy protection against dismissal. In the latter case, the matter is more complex. In theory, there is a possibility for the employer to dismiss the workers who organised or participated in illegal action, but the employer has to treat the workers equally and cannot discriminate against any individual worker. In **Colombia**, the law expressly provides that employers may terminate employment contracts without payment of compensation, if the worker was involved in an abusive or illegal strike[107]. The same applies in **Ecuador** and **Mexico**. A strike will only be found illegal, however, if strikers engaged in violent action or damaged property.

In the **Czech Republic**, strikers cannot, in any event, be summarily dismissed, but if they do not return to work voluntarily after the strike is declared illegal, their absence is treated as unexcused[108] and such absence may justify dismissal (depending especially on the length of such absence and whether the employee knew or at least could and should have known that the strike was declared unlawful). In **Poland**, employers can only take recourse to summary dismissal if they made workers aware of violating legal provisions. This rule applies only to rank-and-file members of a trade union, however. In **Turkey**, workers who participated in an illegal strike can be summarily dismissed. In **Lithuania**, summary dismissal generally requires an advance warning.

[106] Section 5(2) of the Unfair Dismissals Act 1977.
[107] Article 450 of the Labor Code.
[108] Section 22(3) of the CBA.

b) Trade Unions

aa) Injunctive Relief

In many countries, injunctive relief is available in case of illegal strikes. The example of the **United States** is illustrative. Work stoppages may be unlawful either because they contravene no-strike provisions in bargaining agreements or because they violate provisions of the National Labor Relations Act. If an employer contends that a labour organisation has breached the no-strike clause by supporting an improper stoppage, he/she normally files a grievance and takes the matter to arbitration. The arbitrator hears the case and orders the workers and the union to cease their concerted activities, if a breach of contract is found. Certain work stoppages constitute unfair labour practices under the National Labor Relations Act. When such issues are raised, the adversely affected employer must file an unfair labour practice charge with the Labor Board. If any violations were involved, the Board is obliged to petition a District Court for an injunction ending the unlawful stoppage.

On the other hand, no injunctive relief is available for employers in **Italy** outside the area of essential public services. This may reflect concerns that are shared by many scholars inside and outside Italy, that injunctive relief could render the right to strike obsolete, because a strike cannot arbitrarily be called and delayed. Even if workers could claim damages in case the interim injunction were to be found unjustified in later legal proceedings, that would be of little help because of a lack of quantifiable damage on the part of the union or the workers.

bb) Claim for Damages

In **Israel**, unions in the private sector are exempt from a claim of being the catalyst of a contract violation in the case of a strike, be it legal or illegal[109]. Liability may arise, however, with regard to acts that are not integral to the strike. In **Ecuador**, no claim for damages exists. In practice, damages have not been granted, in any event.

[109] Article 62b of Ordinance Damages.

In the **United States**, any primary or secondary employer harmed by violations of the National Labor Relations Act[110] may seek actual damages in proceedings in District Court. In **Russia**, the workers' representative body which announced the strike can be liable for damages caused to the employer by the illegal strike, if it did not end the strike after a court found the strike to be illegal[111]. In **Turkey**, the law expressly provides that any damages sustained by the employer as a result of the initiation or conduct of an unlawful strike must be compensated by the labour union which called it or, if it took place other than by the decision of a labour union, by the employees who have taken part in it[112]. In **Poland**, too, trade unions are liable for all damages resulting from an illegal strike. In the **Czech Republic**, the trade union responsible for the strike is liable for damages[113]. In **Germany**, a trade union can be liable for damages because of a violation of the peace obligation. There may also be a claim under tort law (which protects not only property but also, to some extent, the right to run a business). Since the lawfulness of a strike may be difficult to determine, there is no liability if, at the time of calling the strike, there were substantial reasons for the union leadership to believe that the strike would be found lawful. A strike that is called by a trade union is presumed to be legal.

In **Lithuania**, the Labour Code[114] provides that in case of an unlawful strike, the losses incurred by the employer must be compensated by the trade union with its own funds and from its assets, if it declared the strike. If the funds of the trade union are insufficient, the employer may, by his/her own decision use the funds set aside under the collective agreement for bonuses to employees, additional benefits and reimbursements other than those provided for by law.

c) Ordering of Fines

In the **United States**, although the Labor Board may ultimately order the responsible labour organisation to refrain from illegal actions in the future, it does not have the

[110] Section 8(b)(4).
[111] Article 417(2) of the Labour Code.
[112] Article 45(2) of Act No. 2822.
[113] Section 23(4) of the CBA.
[114] Article 85(1).

authority to impose any fines on such entities. In **Lithuania**, too, fining a trade union is not possible. The same applies to **Slovenia** and **Poland**.

In the **Netherlands**, an employer or a third party who initiates a court case to declare the strike unlawful often also demands a penalty to be paid in case the strike is continued. In **Finland**, the trade union has to pay a compensatory fine. At present, the maximum fine from actions violating the peace obligation is EUR 29.500.

d) Organising an Unlawful Strike as an Offence or Crime

In some countries, trade union leaders commit a criminal offence when organising an illegal strike (**Chile**). For instance, in **Turkey**, union leaders may be prosecuted under the Penal Code and face a term of imprisonment of not less than one month and not more than three months, as well as a major fine. In **Lithuania** and the **Czech Republic**, on the other hand, union leaders cannot be prosecuted under penal laws. The same is true in **Slovenia**, if no crime was committed during the strike which falls under the responsibility of union leaders.

e) Others

In **Australia**, proceedings can be undertaken to de-register a union, which means that it loses its status as a legal person. Such action has been rare and is usually considered to be a double-edged sword as it punishes the union but also casts it outside the system and makes it more difficult to sue the union in its name for wrongdoings, etc. In **Italy**, though only in the area of essential public services, union dues or any other payroll deductions may be temporarily suspended. Apart from that, unions may be excluded from negotiations in which they normally would participate[115].

[115] Act No. 146/1990.

XIII. Dispute Resolution

In **Argentina**, statutory law used to provide for binding arbitration. These provisions were repealed some time ago. At present, only voluntary arbitration exists. The state is in no position to order a dispute to be submitted to arbitration. Historically, **Australia** had a system of conciliation and arbitration, which meant that intractable industrial disputes were traditionally subject to the process of "compulsory arbitration". The tribunal's compulsory arbitration powers have effectively been removed. This means that where "arbitration" exists, it arises under a dispute resolution provision in an enterprise agreement that is binding upon the parties. In **Slovenia**, too, arbitration can only be instituted through negotiations between the parties of a dispute. In no event may arbitration be forced by the state. The same applies to **Turkey, Lithuania, Czech Republic**, **Poland** or **Ecuador**, where arbitration cannot be imposed by the state, either. In **Uruguay**, mandatory arbitration would be considered a violation of freedom of association and, in particular, of trade union autonomy. The same holds, for instance, in **Germany** where mandatory arbitration is considered inconsistent with both the freedom of association and the obligation of the state to remain neutral.

In **Poland**, it is explicitly foreseen that a trade union may attempt to settle the dispute by submitting it to a Social Arbitration Committee (SAC) instead of organising a strike. Similarly, in **Ireland**, there is no system of arbitration in trade disputes. Such disputes, however, can be referred, if both sides agree, to the Labour Relations Commission for conciliation and/or mediation. In **Italy**, mechanisms of arbitration are, for instance, provided for in an inter-confederal agreement which applies to the industrial sector. In **Spain**, various inter-confederal agreements exist which provide for alternative dispute resolution. In **Hungary**, the Labour Code provides for voluntary mediation and other forms of alternative dispute resolution in case of an interest dispute (but not in case of a rights dispute). According to the new Labour Code, the parties to the dispute (the employer and the trade unions or work councils) may establish permanent conciliation committees. In **Israel**, there is a multi-faceted legal framework for dispute resolution. Included within this framework is mediation which gains momentum and becomes the most powerful tool in the industrial dispute resolution process.

While in some countries, like **Lithuania**, conciliation is a mandatory stage of collective dispute resolution, mandatory arbitration only plays a very limited role in the national systems. This role is confined to rather extraordinary circumstances as is illustrated by the case of **Colombia**. There, mandatory arbitration only applies in three cases: If a strike lasts for more than 60 calendar days without the parties being able to resolve the conflict that gave rise to it. In that case the competent minister may order arbitration, which will require the workers to resume work within a maximum period of three days. Mandatory arbitration applies if a strike, by reason of its nature or magnitude, seriously affects the interests of the national economy. In that case, the President may, at any time and with the prior approval of the Labour Chamber of the Supreme Court, order the cessation of the strike and the cause of the dispute to be subjected to arbitration. Finally, mandatory arbitration applies if a labour dispute affects essential public services as defined by the legislature.

XIV. Support of Strikers

1. Support by Trade Unions

In **Slovenia**, as workers have the right to wage compensation for the duration of the legal strike, if so agreed in a collective agreement, the strike funds reserved by trade unions are practically not necessary. In **Mexico**, the law foresees the establishment of funds by means of collective bargaining, which may cover pay losses that arise from a strike, if so agreed between the trade union and the employer or on an order of the Board of Conciliation and Arbitration[116]. These funds may also cover damages in case of illegal strikes.

In **Lithuania**, there is no financial support for participants in a strike by trade unions. In **Uruguay**, striking workers do not receive material support from their union during a strike as workers themselves consider the wage loss during a strike to be a personal sacrifice made in order to achieve a goal that is more important than lost wages. In the **Czech Republic**, it is in any event not usual for trade unions to reserve special funds from which they can support striking employees.

[116] Article 278 of the Federal Labour Act.

In **Austria**, **Finland** and **Sweden**, trade unions regularly compensate for lost wages. In **Turkey**, **Argentina** and **Hungary**, some unions have strike funds. The same applies to **Germany** where union members regularly are eligible for support after three months of membership. The exact amount depends on the duration of payment of membership dues. In **Ecuador**, strike funds have been established by a few, relatively strong unions. The available funds are minor, however. In **Colombia**, the law explicitly foresees that a trade union may spend its budget in whole or in part on providing financial support to workers during a strike, with no further restrictions applying in this case[117]. In **Australia**, trade unions usually support industrial action out of strike funds, if the strike continues for a longer period of time. One-day work stoppages are typically funded by the striking employees themselves. In the **Netherlands**, union members receive compensation for lost wages. Often, the employees involved in a strike are offered the possibility to become immediate members of the union. Compensation may amount to approx. EUR 50 to 60 per day. In **Ireland**, some trade unions provide in their rules that members shall be entitled to "strike pay" while involved in strike sanctioned by the committee of management. Typically, this is EUR 125 per week and is reviewable after 10 weeks.

In the **United States**, non-involved labour organisations may provide monetary support to enable striking unions to extend benefits to individuals who are out of work. These may be unconditional grants or temporary loans.

2. Support by the State

In **Chile**, strikers are not entitled to social security benefits while on strike. During the strike, the employer is exempt from paying social security contributions. Hence, if the employer does not voluntarily pay social security contributions during that period, there could be gaps in the future. In **Colombia**, strikers cannot claim unemployment benefits, either. The same is true in **Ecuador**, where strikers may be able to get unsecured loans from the so-called Social Security Institute to support their families, however. In the **United States**, employees engaged in work stoppages are disqualified from unemployment benefits in all fifty states. In almost all of these states, striking individuals are ineligible for benefits

[117] Article 394 of the Labor Code.

for the entire period they are out of work. In the **Czech Republic**, employees who participate in a lawful strike are not entitled to any payments or any state or social security fund payments[118]. The same applies, for instance, in **Austria**, **Finland**, **Turkey** and **Israel**. In the **Netherlands**, there is neither a right to unemployment benefits[119] nor to social assistance[120]. This is to prevent the government from influencing the industrial conflict. In **Ireland**, the law provides that a person who has lost his or her employment by reason of "a stoppage of work" due to a trade dispute at his or her place of employment is disqualified from receiving certain social welfare payments[121]. An application can, however, be made to the Social Welfare Tribunal which is empowered to consider, *inter alia*, whether the person was deprived of employment "through some act or omission on the part of the employer concerned which amounted to unfair or unjust treatment"[122]. In **Germany**, the state is explicitly prevented from interfering in industrial conflicts by providing unemployment benefits.

XV. Parity of Parties

If it is true that it is the very purpose of labour law to protect the workers against the employer because he/she is the weaker party, then the right to strike as such may be viewed as a result of an attempt to secure a certain "parity of parties". The Constitutional Court in **Spain**, for instance, ruled that the strike is something of a counterweight which aims to enable individuals who are dependent on their wage to establish a new relationship with their employer by way of force which is more favourable to them. In that sense, a strike restores the balance between parties who enjoy unequal economic strength.

In many countries, a legal principle of the "parity of parties" that goes beyond what is described above would blatantly contradict the basic idea of collective bargaining. For instance, in the **United States**, there is no policy in labour relations law which endeavours to place bargaining parties on an equal footing. It is often said that under the basic rule of collective bargaining, to the lion goes the lion's share. In many countries, no explicit principle

[118] Section 22(1) and (2) of the CBA.
[119] Section 19(1) Unemployment Act.
[120] Section 13(1) sub c Work and Welfare Act.
[121] Sections 68 and 147 of the Social Welfare (Consolidation) Act 2005.
[122] Sections 331-333 of the 2005 Act.

of the "parity of parties" exists. However, in **Sweden**, there is a long tradition by the state to treat the parties to a strike as being on an equal footing. In some countries, the parity of parties may result from a specific legal set-up. For instance, in the **Netherlands**, the fact that there is no right to unemployment benefits in case of strike is precisely understood as aiming at ensuring that the parties are on an equal footing.

In a few countries, the "parity of parties" does indeed exist in the form of a legal principle. In **Argentina** or **Turkey**, this principle is addressed when asking whether and to what extent the employer should be able to respond to a strike with a lock-out. In **Colombia**, the parity principle may explain why strike-breaking by a minority of workers in the enterprise is not permissible. In **Russia**, there is a principle of social partnership as "equality of the parties", which does not have consequences on strike law, however[123]. In **Lithuania**, the law states that the social partnership shall be based on the equality of the parties[124]. This implies that each party can initiate negotiations and conclude a collective agreement. Furthermore, parties are equal in the process of negotiation and conclusion of an agreement. In **Ecuador**, the "principle of parity" is enshrined in the Constitution with little, if any impact, however.

In **Finland**, the principle of parity is recognised. The law holds that the same rights concerning industrial action are guaranteed to both parties of the labour market. The emphasis is on the equality between the social partners. In **Germany**, where strike law is essentially judge-made law, the Federal Labour Court claimed that the "parity of the parties" (or "balance of power") represents the "supreme principle" of the law on strike. Consequently, it held at the time that short warning strikes were admissible because they did not jeopardise the parity between employers and trade unions. Recently, the court has modified its position by stating that no clear criteria could be derived from the principle of parity. As a result, that principle has ceased to be a benchmark when assessing the lawfulness of certain industrial action. Instead of applying the parity principle the court is now of the opinion that the principle of proportionality should be the key yardstick when determining the legality of industrial action.

[123] Article 24 of the Labour Code.
[124] Article 40 of the Labour Code.

XVI. Neutrality of the State

In many countries, there is no principle enshrined in the legal system assuring the neutrality of the State. In some countries, such a principle, though not expressly specified in legislation, carries some weight. For instance, in **Turkey**, it is argued that the entitlement of the Council of Ministers to suspend a strike for reasons of general health or national security is incompatible with the principle of neutrality, as the assessment of the degree to which a strike endangers general health or national security is likely to be highly subjective in many disputes.

In some countries, "neutrality of the State" exists insofar as the social partners´ "autonomy to bargain collectively" is recognised. For instance, in **Uruguay**, the system of labour relations is characterised by little state intervention; the social partners are expressly called upon[125] to establish, through collective autonomy, mechanisms of preventing and resolving conflicts. It should also be noted that in a wider sense, neutrality of the State means that any final legal determination concerning a strike is made by industrial tribunals or the courts, and not by the executive government. In this regard, there are concerns whether, as is the case in **Ecuador**, the lawfulness of a strike is subject to administrative proceedings considering that those persons who are supposed to deliver the judgement are appointed by the government.

In **Finland**, neutrality (impartiality) is an underlying principle. Accordingly, the state must essentially remain neutral in any conflicts of interest between the social partners. In **Germany**, the constitutional guarantee of the right to strike is understood to go hand in hand with state neutrality. Hence, the state is prevented from intervening in industrial conflicts, by, for instance, supporting one of the parties to the conflict with state funds. According to the courts, there may, however, be an obligation on the part of the state to ensure "parity-promoting neutrality". This means that the state may have to pursue an equal balance and to ensure that each party can act effectively when designing the legal framework for industrial conflict because a policy of mere non-intervention would be to the detriment of the weaker party (the workers). Moreover, state neutrality comes into play with reference to possible unemployment benefits, because the granting of such benefits in

[125] Act Nr. 18.566 of 11.09.2009 on Fundamental Principles and Rights within the Collective Bargaining System.

the case of strike may lead to a severe disruption of the power equilibrium between the parties.

C. Conclusion

The constitutions of many States have explicitly recognised the right to strike. In others, it is not explicit but implied. In several States it is not possible to speak of a right but only of a freedom to strike.

However, the issue is not whether the right to strike exists, but whether there are limits on the modality of engaging in industrial conflict. Some time ago the following was observed: “The problems most frequently arising in connection with the right to strike are: the imposition of compulsory arbitration by decision of the authorities or at the initiative of one of the parties; the imposition of penal sanctions for organizing or participating in unlawful strikes; the requirement of an excessively large majority of votes to be able to call a strike; the ban on strikes by public servants who do not exercise authority in the name of the State; the power forcibly to requisition striking workers and, in many countries, the ban on strikes in certain non-essential services” (Gernigon/Odero/Guido, ILO Principles Concerning the Right to Strike, 2000). These problems still persist.