HUNGARIAN LABOUR LAW
E - J O U R N A L

The right to strike in the civil service: Enforceable entitlement or a theoretical possibility?

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Abstract

This paper examines the enforceability of the right to strike in the public sector, with a particular focus on the jurisprudence of the European Court of Human Rights. The right to strike, though a cornerstone of collective labour rights, faces considerable legal and practical hurdles for civil servants due to their unique position as agents of the State. The paper analyses two contrasting cases: the Court's judgment in *Humpert and Others v. Germany*, which upheld a strike prohibition for German civil servants, and an ongoing case involving Hungarian teachers' unions challenging strike restrictions. The paper highlights the Court's rationale in Humpert, finding Germany's strike ban compatible with the freedom of assembly and association due to robust legal mechanisms safeguarding civil servants' professional interests. Conversely, the Hungarian case underscores the absence of such alternatives and the imposition of stringent strike limitations without meaningful dialogue. By comparing these cases within their respective legal and constitutional frameworks, the paper argues that the Hungarian restrictions, unlike those in Germany, may be deemed to impair the essence of the right to strike by neutralizing its pressure element. This suggests the Court might rule differently, potentially favouring the Hungarian teachers.

Keywords: Right to strike, European Court of Human Rights, civil servants, freedom of assembly, trade union rights

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1. Introduction

In this paper, I aim to examine the enforceability of collective labour rights – more specifically the right to strike – in the public sector with emphasis on the European Court of Human Rights' interpretation. Labour rights are essential for the protection of workers' interests and the promotion of social dialogue, yet public sector workers often face legal and practical obstacles in exercising these rights, as they are subject to specific duties and limitations derived from their status as agents of the State.[1] Therefore, one might be sceptical about the possibility of effectively enforcing – especially collective – labour rights in the public sector and wonder how the European Court of Human Rights (hereinafter: the Court) has addressed this issue in its case law.

On December 14, the Court delivered a judgement of major importance for civil servants in Germany. In the case of *Humpert and Others v. Germany*,[2] it ruled that a prohibition on strikes by civil servants does not violate their freedom of assembly and association when there are institutional safeguards that allow for effective defence of professional interests. The Court was called upon to examine possible violations of Articles 11 (freedom of assembly and association) and 14 (prohibition of discrimination) of the European Convention on Human Rights (hereinafter: the Convention).

According to the applicants (German teachers with civil servant status), the disciplinary measures taken against them for participating in a strike during working hours, along with the general prohibition on strikes for civil servants, do not have a legal justification and are disproportionate and discriminatory. The Grand Chamber of the Court held that the measures against the teachers had been proportional to the legitimate aims pursued by the German state, in particular to ensure effective public administration and to protect other rights, such as the right to education.

According to the judgement, the statutory right of civil service trade unions to participate in the formulation of regulations and the constitutional right of civil servants to 'adequate maintenance' are sufficient for the protection of their interests. The judgement was welcomed by the CESI[3] and its German member organisations, according to which "the civil service ban on strikes is closely linked to the constitutional foundations of the German civil services" and that "a right to strike would trigger a chain reaction with regard to the structure of the civil service relationship as a whole".[4]

There is another – seemingly – similar procedure still pending at the Strasbourg Court, in which the application was submitted by two Hungarian teachers' unions, claiming that the Government Decree No. 36/2022. (II. 11.) (hereinafter: the Government Decree) violated Article 11 (namely the

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1 Hrecska-Kovács, Renáta: A sztrájkjog közszférában történő gyakorlásának korlátai és lehetőségei. In: Szilágyi, J. E. – Hrecska-Kovács, R. (szerk.): *A sztrájkjog összehasonlító jogi elemzése egyes európai államokban*. Budapest, Mádl Ferenc Összehasonlító Jogi Intézet, 2021. 103–121.

2 The case of *Humpert and Others v. Germany,* Applications No. 59433/18, 59477/18, 59481/18 and 59494/18, Judgement of 14 December 2023.

3 The European Confederation of Independent Trade Unions.

4 *New ECHR case law on the right to strike in public services*, CESI.org, 18. december 2023. https://www.cesi.org/posts/new-echr-case-law-on-the-right-to-strike-in-public-services/ (downloaded: 07.06.2024)

right to strike) and also Article 6 of the Convention. In the following chapters I would like to examine the case of *Humpert and Others v. Germany* and the Hungarian case and highlight its differences, and based on the circumstances why a decision, declaring the violaton of Article 11 could be expected in the latter.

2. The case of *Humpert and Others v. Germany* before the Court

In this cahapter I would like to outline the most relevant facts and circumstances of this case, and examine the Court's judgement and why it did not find the German regulation to be violating Article 11 of the Convention.

2.1. Briefly about the facts of the case

The applicants, Karin Humpert, Kerstin Wienrank, Eberhard Grabs and Monika Dahl, are German nationals, living in Germany. At the relevant time, they were teachers employed by different Bundesländer as civil servants. In 2009 and 2010 they did not turn up to work for between one hour and three days, demanding an improvement in learning and working conditions. They were subsequently subjected to disciplinary sanctions for having been on strike. The applicants challenged the decisions against them in different administrative courts and the Federal Constitutional Court (hereinafter: FCC), to no avail.[5]

The Federal Constitutional Court held in particular that the Basic Law banned civil servants from going on strike, which it considered compatible with the European Convention of Human Rights and the Strasbourg Court's case-law. Otherwise, the relationship between the European Court of Human Rights and the Federal Constitutional Court is quite complex and sometimes even conflicted. In Germany, the Convention ranks as statutory federal law and therefore below constitutional rank, however the FCC decided early that the Convention and the Court's judgements must be taken into account when interpreting the constitutional rights. Having regard to this, the Constitutional Court took the utmost care not to give the impression that it was upfront disagreeing with the Court's jurisprudence.[6]

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5 Ignatius Yordan Nugraha: Defusing a Brewing Conflict with the Constitution: Humpert and Others v Germany, Procedural Rationality, and the Right of Civil Servants to Strike. *Starsbourg Observers Blog,* February 6, 2024. 1. https://tinyurl.com/bd3du8jr (downloaded: 30.07.2024.)

6 Justine Batura: *The Strike Ban For German Civil Servants Between Karlsruhe And Strasbourg. verfassungsblog.de,* 20.12.2023. 3. https://verfassungsblog.de/a-european-dialogue-on-strike-action/ (dowloaded: 07.08.2024.)

The applicants, relying on Articles 11 (freedom of assembly and association) and 14 (prohibition of discrimination) of the European Convention on Human Rights, complained that the ban on teachers with civil-servant status from striking was not prescribed by law, was disproportionate and, in comparison with teachers employed on a contractual basis, discriminatory. They also complained, under Article 6 § 1 (right to a fair trial), that the Federal Constitutional Court failed to consider the relevant international treaties.[7]

2.2. The principal conclusions of the Court's judgement

Having regard to all circumstances, the Court reiterated that the impugned restriction on the right to strike of civil servants, including teachers with that status, such as the applicants in the present case, was severe in nature. However, while the right to strike is an important element of trade-union freedom, strike action is not the only means by which trade unions and their members can protect the relevant occupational interests and Contracting States are in principle free to decide what measures they wish to take in order to ensure compliance with Article 11 as long as they thereby ensure that trade-union freedom does not become devoid of substance as a result of any restrictions imposed. In this connection, the Court emphasised that, in the respondent State, a variety of different institutional safeguards have been put in place to enable civil servants and their unions to defend occupational interests. As explained above, civil servants' trade unions are granted a statutory right to participate in the drafting of statutory provisions for civil servants, who are also granted an individual constitutional right to be provided with "adequate maintenance", which they can enforce in court. The Court considered that these measures, in their totality, enable civil servants' trade unions and civil servants themselves to effectively defend the relevant occupational interests. The high unionisation rate among German civil servants illustrates the effectiveness in practice of trade-union rights as they are secured to civil servants. In this connection it is noteworthy that the Association of Civil Servants and Union for Collective Bargaining, the largest civil servants' union, representing about 50 per cent of all civil servants, submitted to the Court that civil servants already had all that could be gained by strike action owing to the constitutional rights which came with their status and advocated against granting civil servants a right to strike. Moreover, unlike the situation in the case of *Enerji Yapı-Yol Sen*, where a circular, which was issued five days before a national day of strike action and which prohibited civil servants from participating in that strike, was drafted in general terms, without any balance having been struck in relation to what was necessary in order to attain the aims enumerated

[7] *Announcement of a Grand Chamber case concerning the right to strike of teachers with civil servant status*. Press Release. Registrar of the Court, ECHR 343 (2023), 07.12.2023.

in Article 11 § 2, the impugned prohibition on strikes by civil servants is a general measure reflecting the balancing and weighing-up of different, potentially competing, constitutional interests. [8]

Reiterating that the more convincing the justifications for a general measure, the lesser the importance that will be attached by the Court to its impact in the particular case, the Court considered that the impact of the prohibition on strikes in the present case does not outweigh the aforementioned solid and convincing justifications for the restrictions entailed by the general measure as presented by the respondent Government and reflected in the extensive assessment of the Federal Constitutional Court. In particular, having regard to the totality of the measures enabling civil servants' trade unions and civil servants themselves to effectively defend the relevant occupational interests, the prohibition on strikes does not render civil servants' trade-union freedom devoid of substance. Therefore that prohibition does not affect an essential element of civil servants' trade-union freedom as guaranteed by Article 11 of the Convention. Moreover, the disciplinary measures against the applicants were not severe, they pursued, in particular, the important aim of ensuring the protection of rights enshrined in the Convention through effective public administration (in the specific case, the right of others to education), and the domestic courts adduced relevant and sufficient reasons to justify those measures, weighing up the competing interests in a thorough balancing exercise that sought to apply this Court's case-law throughout the domestic proceedings. The material employment conditions of teachers with civil servant status in Germany further militate in favour of the proportionality of the impugned measures in the present case, as does the possibility of working as State school teachers under contractual State employee status with a right to strikes.[9]

At the end, the Court thus concluded that the measures taken against the applicants did not exceed the margin of appreciation afforded to the respondent State in the circumstances of the present case and were shown to be proportionate to the important legitimate aims pursued. Accordingly, there has been no violation of Article 11 of the Convention.[10]

3. The Hungarian teachers' case

Firstly, I would like to highlight that as of 1 June 2022, parallel to declaring a state of danger with a reference to the war in Ukraine, the Government terminated the state of danger declared due to the pandemic. As a result, all emergency decrees issued under the state of danger declared due to the pandemic lost their force – unless they were specifically kept in force –, including Government Decree 36/2022. (II. 11.). However, at this point, the governing majority chose to cement the restrictions on

8 *Humpert and Others v. Germany* at [144]–[145].

9 Ibid. [146].

10 Ibid. [147].

the teachers' right to strike on a statutory level: it reintroduced the restrictions originally included in the government decree in Articles 14–15 of Act V of 2022 on the Regulatory Issues related to the Termination of the State of Danger (hereinafter: the Act) Thus, even though Government Decree 36/2022. (II. 11.) is longer in force, the restrictions threatening the right to strike with respect to educational institutions have remained.[11]

The Democratic Union of Educators (*Pedagógusok Demokratikus Szakszervezete*, *PDSZ*) and the Union of Educators (*Pedagógusok Szakszervezete*, PSZ) submitted a constitutional complaint against the Government Decree in February 2022, claiming that it violated the right to strike, and that since no link could be established between most of its provisions and the enforcement of epidemiological rules, the Government exceeded its mandate under the state of danger. However, in June 2022, the Constitutional Court declared the constitutional complaint of the teachers' unions inadmissible. Subsequently, both unions submitted an application to the European Court of Human Rights, as already mentioned.[12]

After this, the respective provisions – incorporating basically the same regulation – of the Act V of 2022 were challenged before the Constitutional Court in July 2022 by opposition Members of Parliament, who argued in their posterior norm control request that the provisions in question violated, among others, the right to strike, freedom of expression and the right to a fair administrative procedure, and were in contradiction with international treaties.[13] The Hungarian Constitutional Court had already made its decision[14] – unlike the Court – which I will analyze in the following.

3.1. The arguments of the petition

The application submitted to the Constitutional Court initially addressed the concept of strike and the right to strike. It referred to Article 1(1) of Act VII of 1989 on Strikes (hereinafter referred to as the Strike Act), which stipulates that workers have the right to strike in order to *safeguard their economic and social interests*, subject to the conditions set forth in the Act. In the applicants' view, a strike is conceptually nothing more than a collective strike by workers who are employed or have a legal relationship equivalent to an employment relationship, in order to exert pressure on the employer to assert their social and/or economic interests. The definition of the strike could be determined as: a

11 *Curtailing the rights of teachers in Hungary*. Hungarian Helsinki Committee, Executive summary, 23. March 2023. 5. [hereinafter: Ex. Summary] https://helsinki.hu/en/wp-content/uploads/sites/2/2023/03/HHC_Hungary_teachers_23032023.pdf (downloaded: 10.06.2024.).

12 Ibid.

13 bid.

14 *Decision No 1/2023. (I. 4.)* of the Constitutional Court (hereinafter: AB Decision or the Decision).

strike is a collective action, which means a significant slowdown or total stoppage of work, whether or not the workers show up at the workplace.[15]

The petition cites the paragraph in the grounds of AB 88/B/1999 dealing with international conventions, which states that although the latter do not expressly provide for the right to strike, the ILO case law and reports deal with this issue and that the former also refer to the possibility of restricting the right to strike. The petition describes that, although the Convention does not explicitly mention the right to strike, two recent decisions of the European Court of Human Rights have already recognised the right to strike as an integral part of trade union freedom and therefore the freedom of association. These are the case of: *Enerji Yapi-Yol Sen v. Turkey* and; *Demir and Baykara v. Turkey*.[16] According to the Court's reasoning the right to strike is not an absolute right, but that its essential content cannot be restricted. The applicants stated that in accordance with the case law of the Court and the Constitutional Court, it is possible to restrict the right to strike in the public sector. However, this should not result in a general withdrawal of the right to strike for public sector workers.[17]

According to the petition, the case law of the Court and the Constitutional Court requires the application of the necessity and proportionality test to the restriction of the right to strike. The Article 11 (2) of the Convention refers to this, according to which the exercise of the rights set out in paragraph (1) may be subject only to such restrictions as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of public health or morals or for the protection of the rights and freedoms of others. According to the most recent practice of the Constitutional Court [Decision 3065/2022 (25.II.) AB], the necessity and proportionality test must be applied in the examination of the constitutionality of a restriction of the right to strike in accordance with Article I (3) of the Fundamental Law. The petition then refers to decisions of the Constitutional Court – and lists the general and possible elements of the necessity and proportionality test as it has developed in practice.[18]

The applicants acknowledge that the contested provisions do not explicitly prohibit the exercise of strike action. They submit, however, that they impose conditions which make the actual exercise of the right to strike impossible, in particular by depriving it of its element of pressure, and that they empty it of its content. It is argued that the very definition in law of a service which is still sufficient is in itself a restriction on the right to strike. Then, referring to the elements of the legal definition of sufficient service, and listing them (the obligation to work 50% or sometimes 100% of the time, the provision of supervision and its duration from morning to late afternoon, the number of hours, and the obligation on the employer to work), they argue that these circumstances make it impossible to hold a strike and deprive it of its element of pressure. In their view, a strike without pressure is not a

15 *AB Decision at* [3].

16 App. No. 68959/01, Judgement of 21 April 2009. and; App. No 34503/97, Judgement of 12 November 2008.

17 *AB Decision at* [4].

18 Ibid. [5].

strike, since according to the ILO and the Hungarian Constitutional Court practice, the characteristic feature and conceptual characteristic of a strike is that it can exert pressure on the employer. They highlight Section 15 of the Act, which, due to its uncertain legal consequences – the possibility of immediate termination – makes those exercising the right to strike uncertain and may have a chilling effect on them, and thus also constitutes a restriction. They consider Section 15 of the Act to be a sanctioning provision, which, however, does not comply with Article B(1) of the Fundamental Law. It is a constitutional requirement that rules of a punitive nature must be clearly defined and foreseeable. According to the petition, a less restrictive way of legitimately limiting the right to strike (e.g. agreement of the parties, judicial discretion) would have been available. The restriction deprived the teachers of the right to strike.[19]

The petition posits that the restriction is an end in itself, as it "does not serve the enforcement of another fundamental right to be protected, but is the reason and express purpose of the legislation to deprive teachers." It does not consider the smooth operation of public education to be a legitimate justification for the restrictions in question, as it was paraphrased in the explanatory memorandum of the Act. With regard to the right of children to education and proper physical and mental development, the petitioners argue that this cannot be guaranteed because of the restrictions on freedom of education and the underpaid teachers. Furthermore, the petitioners emphasised that if the right of the child to education and to the proper physical and psychological development of the child can be considered a legitimate basis for restricting the right to strike in this specific case, the proportionality of the restriction is not constitutional, since, as previously outlined, it deprives the strike of its coercive, demand-asserting effect, which is therefore no longer in fact a strike. If the level of service that is still sufficient is too high, then the pressure – which is an essential element of a strike – cannot be exerted. The petition further asserts that the restriction of the right to strike under the contested provisions also constitutes an infringement of the freedom of assembly and of association. As a result, the petition argues that the rights of workers under the Fundamental Law are infringed [Article XVII (2)].[20]

3.2. The judgement of the Hungarian Constitutional Court

In its decision, the Constitutional Court ruled that the provisions of the Act on the regulatory issues related to the end of the state of danger, which determine the exact content of the services that are still sufficient in the event of a strike in public education institutions, are not in conflict with the Fundamental Law. According to the Act on strikes, at an employer that carries out an activity fundamentally affecting the public a strike may only take place in such a way that it does not prevent the provision of still

19 Ibid. [6]–[7].

20 Ibid.t [8]–[9].

sufficient services. The level and conditions of the service that is still sufficient may be set by an Act, and in the absence of statutory regulation, the level and conditions shall be agreed in the pre-strike consultation. Sections 14 to 15 of the Act V of 2022 on regulatory issues related to the end of the state of danger determine the exact content of the services that are still sufficient in the event of a strike in public education institutions. According to the petitioning Members of Parliament, these provisions restrict the essential content of the right to strike in such a way that its function of exerting pressure is lost. They also stated that the concerned legislation imposes unnecessary and disproportionate arbitrary restrictions on teachers' right to strike, which is enshrined in the Fundamental Law, and it also violates international treaties.[21]

The Constitutional Court found that, according to the Act on National Public Education, public education institutions primarily serve to ensure children's fundamental right to education and to proper physical and mental development. The fundamental rights of children can be achieved through the active conduct of the state. In the contested Act, the law-maker, in differentiating between the minimum service levels that are still sufficient, took into account the rights of children with different needs (e.g. children about to graduate from school, pupils, kindergarten children, children with special educational needs, etc.). The Constitutional Court found that the restriction of the right to strike in the public education institutions was made for legitimate purposes, to the extent necessary and in a balanced manner, i.e. proportionately, taking into account the fundamental rights and constitutional values to be protected in contrast with it. The functioning of public education institutions, and thus the rights of children, are legitimate objectives for restricting the right to strike. Therefore, the provisions of the Act regulating the provision of services that are still sufficient are in line with the provisions of the Fundamental Law, and the Constitutional Court rejected the petition for a posterior norm control of the conformity of the Act with the Fundamental Law.[22]

3.3. Dissenting opinions of two judges of the Constitutional Court

In contrary to the opinion of the Constitutional Court's judges' majority, two judges expressed their arguments against the final decision. Judge *Balázs Schanda* concluded the following.

The Fundamental Law recognises the right to strike, although it is not an absolute right. The right to strike can be limited by law and, in certain cases, even excluded, as set out in the majority decision. Furthermore, the decision acknowledges that the wording of Article XVII (2) of the Fundamental Law, which states that the right to strike is "subject to the provisions of the law", does not grant the legislator the authority to impose arbitrary restrictions. Instead, it requires a balancing of interests,

21 Ex. Summary op. cit. 5., see also *AB decision* at [20]–[50].

22 Ibid.

whereby the benefits of workers expressing their economic and social needs by stopping work must be weighed against the interests served by restricting the right to strike. He wrote that

> "I am unable to concur with the methodology employed in the decision and the resulting conclusion. It is indubitable that the rights of children and young people to education and to be supervised are of paramount importance. However, it is equally vital that the representatives of a profession, which is of pivotal importance for the right to education, are able to express their interests within a legal framework."[23]

The Decision No. 8/2011. (II.11) of the Constitutional Court highlighted that the employment relationship is inherently asymmetrical and that the objective of the legislation is to ensure that the "dependent situation does not lead to vulnerability on the part of the employee". This protection is not achieved and the right to strike is thus nullified if the law does not guarantee the employees' ability to assert their interests against the employer. It can be argued that legislation which, in practice, renders it permanently impossible for a work stoppage to exert pressure on the employer, contravenes the essential content of Article XVII(2) of the Fundamental Law. The recently enacted legislation pertaining to the right of teachers to strike is enshrined in a so-.called "omnibus act" that contains transitional rules for the conclusion of the emergency period. The legislator has enacted a temporary restriction in the legal system, which is intended to remain in place throughout the duration of the epidemic. It is not inherently problematic that the legislature has opted to define the scope of sufficient service through statutory regulations rather than through an agreement between the employee and the employer.[24]

Judge Schanda also addad that the regulation differentiates between nursery, primary and secondary schools, but unilaterally protects the 'competing interests', thereby ignoring the essential content of the strike: the exertion of pressure on the employer. A specific relationship exists between children's right to education and teachers' right to strike. It is also important to recognise that teachers do not exercise their right to strike solely to protect their own interests, which are often aligned with those of their pupils. In the short term, the right of children to education may be adversely affected by a walkout. However, improving teachers' working conditions may also promote the rights of pupils.[25]

Judge *Marcell Szabó* also expressed his dissenting opinion. The State is afforded a degree of flexibility in the legislative design of the right to strike. Consequently, any legislative restrictions on the exercise of the right to strike must be examined in accordance with Article I (3) of the Fundamental Law. Nevertheless, it appeared that the decision did not encompass all the pertinent elements that

23 *AB Decision* at [59]–[60].

24 Ibid. [61]–[62].

25 Ibid.t [63].

emerged from the Fundamental Law. In accordance with the Preamble of the Fundamental Law, the Fundamental Law is "a covenant between the Hungarians of the past, present and future." The consideration of the rights and interests of future generations is not only mandated by Article P (1) and Article 38 (1) of the Fundamental Law, but also by the constitutional principle that permeates the entire Fundamental Law through the preamble.[26]

The preamble of the Public Education Act explicitly refers to the prominent role of teachers and public education in general in determining our future. The aim of the public education system is, among other things, to ensure the "patriotic education and quality education of the rising generations". This combines the noble traditions of Hungarian education with the expectations of the present age and the opportunities of the future, as a "pledge of the nation's rise". It is therefore necessary to assess whether the legal provision which renders the right to strike completely meaningless in the case of an occupation of paramount importance for the education and training of future generations in cases where it is completely meaningless fulfils the requirements of necessity and proportionality. The aim of the right to strike is not only to improve the individual working conditions of teachers as workers but also to promote the education and training of future generations (and thus, ultimately, the right of children to education).[27]

4. Overall assessment and possible outcome of the Hungarian case

Taking into consideration all the above outlined facts and arguments of the Hungarian and the German case, I would like to outline the major factors, because of which I assume that the upcoming judgement of the European Court of Human Rights is more likely to be different from the one in the case of *Humpert and Others v. Germany.*

4.1. The nature of the employment relationship

The first aspect is the difference between the Hungarian and German legal and constitutional framework. Before anthying else, it is important to note that there is no blanket ban on strikes in the public service in Germany, as contractual State employees, which account for some 62 per cent of all staff working in the public service, do have a right to strike. State school teachers in the Länder in which the applicants worked or had worked, may, in principle, be employed with either civil servant status or contractual State employee status. The applicants were aware of this duality of employment

26 Ibid. [65]–[66].

27 Ibid. [67]–[68].

status for State school teachers. The strikes in which the applicants participated were in part held in support of teachers with contractual State employee status and the applicants' discrimination complaint before this Court is based on the fact that teachers with contractual State employee status had not been sanctioned for their participation in the same strike.[28]

It was a matter of dispute between the parties as to whether the applicants had the possibility of working as State school teachers with contractual State employee status. As regards the choice of employment status at the time of their recruitment, a choice which the applicants claimed they did not have, the Court took note of the Government's submission that the second and third applicants had from the outset limited their job applications to appointment as civil servants. The application form used by the third applicant at the time featured a box with the indication "the application is also valid for an application as a contractual State employee"; he did not tick that box. The first applicant had even worked as a teacher with contractual State employee status at an earlier point and then obtained civil servant status after she had explicitly asked for it. As to the possibility of a subsequent change from civil servant status to contractual State employee status, both parties agreed that, technically, the civil servant would have to ask for his or her dismissal and then be re-employed as a contractual State employee. Whereas the applicants argued that there was no guarantee that dismissed civil servants would subsequently be re-employed with contractual State employee status, the Government maintained that, in practice, such change in status, with subsequent appointment as a contractual State employee, would be negotiated before a civil servant asked for his or her dismissal; the applicants' submission that asking to be dismissed would put the civil servant at risk of unemployment was therefore incorrect. They asserted that such change in employment status was well-established practice and possible in all Länder, including in the applicants' cases. Thus the Court noted that the applicants did not demonstrate that they had engaged with their employers regarding a potential change of their employment status from civil servant to public employee.[29]

In contrary to this, the Hungarian teachers cannot choose the type of their employment, therefore the lack of such possibilty – what the German teachers do have as outlined above – in it self creates a significantly different situation.

4.2. Legal framework and legislation

Secondly, I would like to highlight the rather notable differences between the German and the Hungarian legal environment, more specifically the nature and the adoption of the concerned restrictive provisions.

28 Ibid. [139].

29 Ibid. [140]–[141].

Looking at the German prohibition on strikes by civil servants, it should be noted that it is a general measure rooted in the Basic Law, as interpreted by the Federal Constitutional Court, and reflects a long-standing democratic consensus in Germany as well as the outcome of the weighing-up and balancing of different, potentially competing, interests. Therefore the central question for the Court in assessing the proportionality of this measure was not whether less restrictive rules could have been adopted or, indeed, whether the State could prove that, without the impugned prohibition, the aim of providing continuous public education would not be achieved, but rather whether, in not making an exception for State school teachers with civil servant status, the constitutional legislature had acted within the margin of appreciation afforded to it. It is in this connection that the possibility for the applicants to be employed as State school teachers with contractual State employee status, with the right to strike, constitutes an element to be taken into account in the assessment of the proportionality of the prohibition on strikes imposed on the applicants as State school teachers with civil servant status. By providing for a duality of employment statuses for State school teachers, while rendering the status which comes with a prohibition on strikes considerably more attractive in practice (as the relevant figures show), the respondent State essentially reduced the potential impact of strikes in State schools.[30]

To sum up, the relevant German legislation and interpretation of the concerning provisions, with supporting case law of the Federal Constitutional Court and constitutional principles deriving from the Basic law have been exisiting for decades.

Whereas none of the previously mentioned factors could be considered watertight in case of the Hungarian teachers' case. The contested Hungarian provisions restricting the right to strike were introduced by the Government Decree, issued only a month before the scheduled day of strike action. In my opinion, considering the nature of a government decree – thus being drafted exclusively by the cabinet in a relatively short period – the enacted regulation lacked not just the social dialoge with the citizens, but a consultation with expert bodies and representative organisations, trade unions, and not to mention that a fundamental right had been restricted with just a decree and not an act of the parliament. Unfortunately these deficiences were not made up when the Act V of 2022 reintroduced the restrictions. Thus, unlike in the German case, there were no possibility for discussions to set up institutional safeguards in order to enable teachers and their unions to defend occupational interests, and to negotiate about other means of protecting their collective rights and interests.

30 Regarding the ECHR conformity of the German regulation and practice see: Gabrielle Buchholtz: *Streikrecht für Staatsdiener? – Spagat am Bundesverfassungsgericht. verfassungsblog.de,* 18.01.2018. https://verfassungsblog.de/streikrecht-fuer-staatsdiener-spagat-am-bundesverfassungsgericht/ (downloaded: 30.08.2024.)

5. Conclusion

The right to strike has been largely acknowledged as an indispensable element of collective bargaining, and as one of the most essential means by which workers can preserve their socio-economic rights. It is safeguarded by international and European human rights instruments, and is enshrined in a number of states' constitutions, including several parties to the European Convention on Human Rights. Within the legal framework of the Convention, in the seminal cases of *Demir and Baykara v. Turkey* and *Enerji v. Turkey* the European Court of Human Rights acknowledged the significance of both the right to collective bargaining and to strike as vital features of the freedom of trade unions association, covered by article 11 Convention.[31]

At this point let me cite what did the Court concluded in the case of *Demir and Baykara v. Turkey*: "[…] the Court considers that the restrictions imposed on the three groups mentioned in Article 11 are to be construed strictly and should therefore be confined to the 'exercise' of the rights in question. These restrictions must not impair the very essence of the right to organise."[32]

In my opinion, the European Court of Human Rights should come to a different conclusion in the Hungarian teachers' case than it did in the case of *Humpert and Others v. Germany*, as considering all factors, it could be concluded that the Hungarian restrictions have impaired the very essence of the right to strike, and nullified it by depriving it of its essential element, the ability to exert pressure on the employer.

[31] Stylogiannis Charalampos: The protection of the right to strike under the European Convention on Human Rights. *UCL Journal of Law and Jurisprudence,* Vol. 6, No. 1 (2017). Article 6., 142.

[32] *Demir and Baykara v. Turkey* at [97], see also: Keith Ewing – John Hendy: The Dramatic Implications of Demir and Baykara. *Industrial Law Journal,* Vol. 39, No. 1 (2010).