SPANISH LAW ON STRIKES IN ESSENTIAL SERVICES

SPAIN

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1. INTRODUCTION.

1.1. Legal foundations.

Article 28.2 of the Spanish Constitution of 1978 (CE) recognises "workers' right to strike for the defence of their interests". It is enacted, moreover, as a fundamental right, which means that both exercise and legal implementation of the right to strike enjoy the most important guarantees in our Law. However, Article 28.2 CE itself contains a clawback clause, stating that "the Act that regulates this right will establish the guarantees which ensure the maintenance of essential services for the community".
One year before, Article 1 of *Real Decreto Ley* 17/1977, of 4 March (DLRT) had already regulated the right to strike. Besides, Article 10 refers to strikes in essential services, by allowing the competent Authority (see below) to adopt the necessary steps to keep such services in working order. This Article remains in force, but some of its rules were given a new interpretation or simply considered unconstitutional by the important Decision of Constitutional Court STC 11/1981 of 8 April.

After the 1978 Constitution other enactments address this right, as a basic collective right of employees [Article 4.1e) Act 1/1995, of 24 March, of the Workers' Statute (ET)], or the most important form of trade unions' industrial action [Article 2.2.d) Act 11/1985, of 2 August (LOLS)]. However, none of them regulate strikes in essential services. As a result this matter is within the remit of the competent Authority, even when limited by the principles set by the Constitutional Court, when interpreting Article 10 DLRT in the light of the Constitution.

1.2. Subjective scope of right to strike. Some exclusions in relation to workers in the public sector.

Concerning the subjective scope of this fundamental right, it is worth highlighting that Article 28.2 talks about "workers" without excluding any categories. Therefore, courts have concluded that this term must be broadly interpreted, including public employees in general.

However, specific categories of civil servants are excluded from the right to strike, on the basis that they have no trade union rights. Among others, these are the members of Bodies and Forces of National Safety, namely the National and Autonomous Polices and the Civil Guard (Article 6.8 Act 2/1986, of 13 March), the members of Armed Forces (Article 181 Act 85/1978, of 28 December), as well as judges, magistrates and prosecutors. While the exclusion of members of the Armed Forces is generally accepted, there is debate about the constitutional foundation of the other exclusions.

In particular the position of judges, magistrates and prosecutors is questioned. In fact, Article 1.4 LOLS and Article 127 CE exclude judges, magistrates and prosecutors only from the freedom to join or establish trade unions. Although the right to strike is an essential part of trade union rights, it has been recognised independently by the Constitution and therefore can also be exercised by those who are not members of any trade union[1]. It might be argued that judges, magistrates and prosecutors do provide essential services, but so do the rest of civil servants who work at the Administration of Justice, and yet the latter have the right to strike. In addition, it could be argued that it would be always possible to establish minimum services.

2. CONCEPT OF "ESSENTIAL SERVICES".

Neither the Constitution nor the statute law defines "essential services". However, the Constitutional Court has defined them as those aimed to fulfil constitutional rights, freedoms or goods, such as rights to life, health

[1] See GARC¸A BLASCO, J., *El derecho de huelga en Espa□a: Calificaci□n y efectos jur□dicos*, Bosch, Barcelona, 1983, pp. 49 and 50; MONEREO P´REZ, J.L., "L□mites subjetivos del derecho de huelga algunas reflexiones cr□ticas", *Relaciones Laborales*, II/1993, pp. 99 and 100; OJEDA AVIL´S, A., "El derecho de huelga de jueces, magistrados y fiscales", *Actualidad Laboral*, n□m. 6/8, 1993, p. 87 onwards.

and safety, freedom of movement, etc[2]. Consequently, the concept of essential service is connected to the nature of the interests satisfied by the service rather than the activity carried out by it[3].

It must be taken into account that not all public services are deemed to be essential services[4]. A public service may not be essential in order to satisfy constitutional rights, freedoms or goods, for example, tourist information. Conversely, a private service, that is to say, a service performed by a private company, can play an essential role in satisfying a community's needs, as occurs in relation to private hospitals or transport services.

In any case, the Constitutional Court has concluded that it is not necessary to perform minimum services in every strike involving essential services, but only when the above-mentioned constitutional rights and freedoms could be endangered because of the duration, and territorial or personnel scope of a specific strike. Therefore, the necessity to establish minimum services as well as the scope of them is determined by the circumstances of each strike.

3. ESTABLISHMENT OF "MINIMUM SERVICES".

3.1. <u>Determination by the government Authority.</u>

A) The scope of minimum services.

"Minimum services" involve a limitation of the right to strike, since the employees appointed to perform them cannot join the strike, and the effective fulfilment of the services reduces the strike's effect. This limitation is justified in the equal value of the constitutional rights and freedoms endangered by the strike.

Nonetheless, as the Constitutional Court has pointed out, the right to strike is rated as a fundamental right by the Spanish Constitution, which means that the scope of the minimum services must be interpreted restrictively[5], to avoid services which exclude or make ineffective the exercise of this right[6].

Indeed, the purpose of minimum services is not to guarantee the normal working of a company or a public service, but only the continuity of the part of the activity which is indispensable in order to satisfy the rights and freedoms[7]. Hence, the sacrifice imposed on the strikers and service users must be proportional[8].

Thus, the scope given to minimum services by the competent Authority must be proportional to the circumstances of the strike. Among these circumstances the Authority will take into account are the time when it takes place and its duration, the territorial and personnel scope affected by the strike, as well as the possible existence of alternative services which could satisfy partly or totally the community needs[9].

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[2] SSTC 11/1981, of 8 April (FJ. 18), 51/1986, of 24 April, 27/1989, of 3 February, 43/1990, of 15 March, and 123/1990, of 2 July. The competence in this matter is conferred to the Administrative Courts or administrative Chambers of Regional High Courts and Supreme Court, and finally to the Constitutional Court.

[3] GALIANA MORENO, J.M., "Consideraciones sobre una futura regulaci□n de las huelgas en los servicios esenciales", in *Homenaje al Profesor Juan Garc□a Abell□n*, Universidad de Murcia, 1994, p. 103.

[4] STC 53/1986 of 5 May. See MONTOYA MELGAR, A., *Derecho del Trabajo*, 20 Ed., Tecnos, Madrid, 1999, p. 727.

[5] This is also the point of view of ILO Committee of Freedom of Association, as has been highlighted by BEN-ISRAEL, R., in *International Labour Standards: The case of freedom to strike*, Kluwer, 1988, p. 109, note 102.

[6] SSTC 11/1981 (FJ.18) and 27/1989, of 3 February.

[7] SSTC 53/1986, of 5 May and 51/1986, of 24 April; Supreme Court Administrative Chamber Decisions (SSTS/CA) of 17 April 1996 (Arz. 3720) and 19 January 1988 (Arz.285). Cf. MAT¸A PRIM, J., SALA FRANCO, T., VALD˙S DAL-RE, F., VIDA SORIA, J., *Huelga, cierre patronal y conflictos colectivos*, Civitas, Madrid, 1982, p. 140; RAM¸REZ MART¸NEZ, J.M., "Huelga y cierre patronal en la Constituci□n Espa□ola", in *Estudios de Derecho del Trabajo, en memoria del Profesor Gaspar Bay□n Chac□n*, Ed. Tecnos, Madrid, 1980, p. 445.

[8] SSTC 43/1990 and 148/1993. Cf. GALIANA MORENO, J.M., *op. cit.*, p. 103.

[9] STS/CA of 25 February 1994, *cit.*

As a result, the decision establishing minimum services cannot be provided in the abstract, given that it has to refer to the circumstances of each strike. Similarly, a decision of minimum services established for a certain strike cannot be further applied to other strikes, even though it might well be taken as a point of reference for future decisions.

B) Competent Authority.

Article 10 DLRT confers on the government Authority the power to establish the minimum services to be performed. The competent government Authority will depend on the territorial scope of the strike. Thus, when the scope is national, the establishment of the minimum services is a matter for the Council of Ministers or, by delegation, the Minister of the sector of activity affected by the strike. Where the strike affects the territory of only one *Comunidad Autɳnoma*, it is the regional Government, while when the strike takes place within a *Provincia*, it is the *Delegado Provincial.* Finally, if the territorial scope of the strike does not exceed a city, the local Authority will be deemed competent to establish the minimum services.

It is worth noting that the Constitutional Court found constitutional the assignment of this power only to a government Authority, partly because the government Authority is the political Authority as a result of election, and therefore it is supposed to be impartial in respect to the interests of employers and strikers[10]. Unlike the government Authority, the administrative Authority is in charge of the management of public services, and consequently, might have a particular interest in the determination of minimum services when the strike affects the public services. However, in some cases the split between both government and administrative Authorities is not clear, as when the strike involves City Council workers (either employees or civil servants), where the employer would be the Mayor[11].

In addition, the Constitutional Court stated that the exercise of this power is always submitted to the tribunals' control, as regards compliance with the right to strike[12].

C) The Decree of minimum services.

The minimum services must be established by means of the corresponding statutory instrument (Decree, Order, *Bando*, etc), depending on the competent Authority.

The decision must detail the facts which justify the necessity of minimum services and their scope, as well as the number of workers to be appointed in each category or position, to perform these services[13]. This justification constitutes an essential requirement for the government Authority's decision to be valid. The imposition of minimum services without such justification in detail will make unconstitutional, and therefore

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[10] SSTC 11/1981, FJ.18 and 27/1989, of 3 February. Nevertheless, it must be recognised that the government Authority tends to abuse of its power when establishing minimum services in relation to strikes involving public services. Proof of this is the number of Decrees and Orders declared void and null. This circumstance has been repeatedly criticised by Trade Unions and the doctrine (GALIANA MORENO, J.M., *op. cit.,* pp. 104-107; MONTOYA MELGAR, A., *Derecho del Trabajo*, *op. cit.,* p. 728).

[11] See BAYLOS GRAU, A., *Derecho de huelga y servicios esenciales*, Tecnos, Madrid, 1987, pp. 181 and 182; cf. also GONZ¸LEZ ORTEGA, S., "Diseɒo normativo e intervenciɳn de la Administraciɳn en las relaciones colectivas de trabajo", DUR¸N L:PEZ, F., (ed.), *La intervenciɳn administrativa y jurisdiccional en las relaciones colectivas de trabajo*, VI Jornadas Universitarias Andaluzas del Derecho del Trabajo y Relaciones Laborales, Sevilla, 1989, p. 43.

[12] STC 11/1981, Judgement par. e).

[13] SSTC 8/1992, of 16 January and 17/1989, of 3 February. Cf. also SSTS/CA of 17 and 24 June 1994 (*Actualidad Laboral*, 1994, ref. 1739 and 1841 respectively), 12 June 1991 (Arz. 4953), 16 July and 27 September 1990 (Arz. 6130 and 6967). For a summary of the requirements to be fulfilled by the government Authority when establishing minimum services, see Supreme Court Social Chamber Decision (STS/SOC) of 12 March 1997 (Arz. 2892).

null and void, the Decree or Order of minimum services, given that in this case tribunals cannot control the proportionality of the services imposed, nor the fairness of the workers' right to strike[14].

D) Other special rules applicable in establishing minimum services.

In order to allow the competent Authority to fix the minimum services, the agreements to go on strike must be notified in writing not only to the employer but also to the Authority[15]. The notice must refer to the strike's purposes, the form, start date and duration of the strike, and the composition of the strike committee. As for the time to establish the minimum services, this should be determined normally during the cooling-off period between the notification of the agreement to go on strike and the start of the strike (Article 3.3 DLRT). It must be borne in mind that the ordinary 5-day notice period is extended to 10 days for strikes in public services (Article 4 DLRT). Once the Authority has decided the minimum services to be performed, its decision has to be notified to the workers' representatives before it is applied[16].

Other guarantees, such as the agreement or negotiation with the strike committee or with the person or other body who called the strike, would be desirable, but do not involve a constitutional requirement of the decision establishing minimum services[17]. However, when the prior Decree of minimum services states that the subsequent Order implementing it for each strike has to be made after consulting or negotiating with any of the above-mentioned bodies, then consultation or negotiation becomes a requirement of the legality (but not of the constitutionality) of this Order[18].

3.2. <u>Designation of workers in charge of the minimum services' performance</u>.

A) The power to designate.

It is obvious that the Decree of minimum services cannot specify the workers who will be responsible for them. Therefore, the government Authority has to delegate the designation of workers. The DLRT is silent in relation to the power to designate the workers.

As a general rule, this power to designate has been delegated by the government Authority to the employer[19]. It has been argued that the employer might not be impartial in the designation of workers[20]. If there has been a challenge to such a delegation, the Constitutional Court as well as the Supreme Court have stated that it is possible for the Authority to delegate this task to either the employer or to both employer and strike committee by agreement[21]. What the Authority cannot do is delegate the very establishment of minimum services to the employer[22], or simply give its approval to the employer's proposal of minimum services[23].

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[14] STC 27/1989, of 3 February; SSTS/CA of 25 February 1994, FD.3÷ (Arz. 1303), 14 September 1992 (Arz. 6896) and 27 March 1991 (Arz.4208).

[15] The workers' representatives or trade unions that call the strike must also give enough publicity to make it known by users of the service concerned (Article 4 DLRT).

[16] STC 51/1986, of 24 April.

[17] STC 51/1986, of 24 April (FD.3); SSTS/CA of 15 September 1995 (Arz. 6654), 2 and 16 July 1990 (Arz. 5956 and 6130), and 13 February, 21 March, 17 May and 27 September of 1989 (Arz. 1056, 2110, 3784 and 6372). See GALIANA MORENO, J.M., *op. cit.,* p. 105.

[18] SSTS/CA of 14 March (Arz.2074), and 17 June of 1994 (*Actualidad Laboral*, 1994, ref. 1739).

[19] ALBIOL MONTESINOS, I., SALA FRANCO, T., "El mantenimiento de los servicios m□nimos y de los servicios esenciales de la comunidad como l□mite del derecho de huelga", *Actualidad Laboral*, 1987, pp. 1307 and ss.

[20] BAYLOS GRAU, A., *op. cit.,* pp. 184 and 185.

[21] SSTC 8/1992 of 16 January, and 53/1986 of 5 May. The latter stated that the decision of who has to designate the workers in charge of minimum services' fulfilment is for the government Authority (FJ.5). STS/CA of 20 March (Arz. 2028) and 14 September 1992 (Arz. 6896).

[22] STS/CA of 8 July 1983 (Arz. 3918), 25 February 1994 (Arz. 1303) and 15 September 1995 (Arz. 6654).

However, the competent tribunals seem to prefer a delegation to the employer and strike committee by agreement. In fact, when it occurs the Supreme Court has stated that it is not necessary to justify in the correspondent Decree the scope of minimum services[24]. Another judgement has gone further by requiring the co-operation of employer and strike committee[25], as provided by Article 6.7 DLRT in relation to security and maintenance services during the strike[26].

B) Criteria for designating workers to minimum services.

As regards the principles to be followed in appointing the workers who have to perform the minimum services, again there is no explicit statutory rule. The importance of this issue is obvious, since designation of those workers is usually delegated to the employer(see above). Because of that, it is essential to establish some criteria to guide the designation procedure in order to avoid eventual employers' abuses aimed to minimise the exercise of the right to strike. In this sense, these criteria might be considered as limits to the employer's management power, in controlling and organising the employees' work during the strike.

One of the most important questions at this point is whether the employer should be allowed to appoint for minimum services those who have decided to join the strike, or conversely, whether s/he ought to appoint only non-strikers for this purpose. The response of Spanish tribunals is not unanimous.

On the one hand, the Supreme Court (Administrative Chamber) has stated that the employer cannot oblige only non-strikers to carry out minimum services when the functions concerned by minimum services are usually performed by the strikers as well[27].

The Supreme Court does not follow the doctrine of the extinct Central Employment Tribunal[28], which had pointed out the necessity to respect as long as it was possible the workers' decision to go on strike[29]. According to this tribunal's doctrine, designation to minimum services cannot only affect those who have stated their intention to join the strike. Conversely, when non-strikers are available, the employer must designate them preferentially to minimum services, so that where there are enough non-strikers to perform such services, it is not allowed to designate strikers. Otherwise, when the number of non-strikers is not

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[23] STC 27/1989, of 3 February and STS/CA of 21 February 1994 (Arz. 2188).

[24] STS/CA of 21 March 1994 (Arz. 2188).

[25] According to STS/CA of 24 of June 1988 (Arz. 4727), in order to comply with this requirement it would be enough to hold a hearing or consultation with such committee. Cf. also STS/CA of 15 September 1995 (Arz. 2372).

[26] It must be clarified that security and maintenance services are those aimed at ensuring the public safety and the maintenance of goods (e.g. raw materials and machinery) and to permit the continuation of the activity at the end of the strike.

[27] Decision of 14 May 1986 (Arz. 2372). This judgement has been criticised by some authors on the basis that under Workers' Statute (Article 39) the employer is allowed to introduce substantial changes in workers' functions for organisational reasons, which would be the case when the workers who usually are in charge of these functions join the strike (SANTANA G:MEZ, A., *El r•gimen jur□dico de los trabajadores no-huelguistas*, Civitas, Consejer□a de Trabajo Junta de Andaluc□a, Madrid, 1993, p. 205). It has been highlighted that the only limit in appointing non-strikers to minimum services would be the qualifications or aptitudes to perform the services (Cf. GOERLICH PESET, J.M., "Ejercicio del derecho de huelga y poder directivo empresarial", in *Homenaje al Profesor Juan Garc□a Abell□n*, Universidad de Murcia, 1994, pp. 163 and 164).

[28] Since 1989/1990, the Social Chamber of Regional High Courts has assumed the functions of Employment Central Tribunal. However, the decisions of this tribunal still enjoy great trust and are borne in mind by doctrine and courts.

[29] Decisions of 9 July 1985 (Arz. 5089) and 9 July 1986 (*Actualidad Laboral* 1985, ref. 1054).

enough to cope with the services, the employer could order the strikers to comply with them, but only the number that is strictly necessary[30].

Subsequently, the important Constitutional Court Decision STC 123/1990, of 2 July has partly upheld the Central Employment Tribunal's above-mentioned doctrine. The Decision (FJ.3) has stated that this doctrine cannot be taken as a general rule, but only in some circumstances, when the duration of the strike and its personnel scope make it possible for the employer to identify which workers are not willing to join or have not joined the strike. It might occur in relation to long strikes that are focused on a certain category of workers or are only partially followed. In such strikes, the employer must appoint the recognised non-strikers to minimum services[31].

Finally, the possibility of successfully challenging the designation to minimum services concerning workers' representatives and members of the strike committee or of trade unions is remote. It could be argued that such designation would frustrate the strike by hindering the leaders taking part in the action[32]. It might well be alleged that the designation to minimum services by reason of the union membership would also involve a limitation of their freedom to join and support trade unions[33]. However, the above-mentioned STC 123/1990, of 2 July, seems to be reluctant to declare the designation unconstitutional when the employer can justify such designation on reasonable grounds[34].

4. FAILURE TO COMPLY WITH MINIMUM SERVICES BY THE APPOINTED WORKERS.

4.1. Measures in order to guarantee the fulfilment.

A) Replacement of strikers.

The Article 6.5 DLRT forbids substitution of strikers by other workers who do not belong to the staff of the company before the employer is notified of the strike. Case law has interpreted this rule in a extensive sense in order to ban the employer taking any decision which could minimise the effects of strike[35].

In exceptional circumstances it is explicitly permissible to replace strikers. This happens in relation to those who fail to comply with security and maintenance services. Although Article 6.5 DLRT does not provide for the replacement of employees who take part in an unlawful strike, or of those who fail to comply with minimum services, Spanish courts[36] and doctrine[37] have stated unanimously that workers may be replaced in these circumstances.

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[30] Similarly, see GOERLICH PESET, J.M., "Ejercicio del derecho de huelga y poder directivo empresarial", *op.* cit., p. 161; ALBIOL MONTESINOS, I., "Efectos, responsabilidad y tutela del derecho de huelga", in *Ley de Huelga*, ISE, Madrid, 1993, p. 166; BAYLOS GRAU, A*., op. cit.,* p. 185.

[31] GOERLICH PESET, J.M., "Ejercicio del derecho de huelga y poder directivo empresarial", *op. cit.,* p.162.

[32] RODR¸GUEZ-PI ERO, M., "Dualidad de jurisdicciones y cumplimiento de los servicios esenciales en caso de huelga", *Relaciones Laborales*, num.8, 1990, p. 3

[33] RODR¸GUEZ-PI ERO, M., *op. cit.*, p. 2.

[34] The STC 123/1992 (FJ: 2) deems reasonable reasons, that the designated trade unionists were those who usually carried out the functions considered to be minimum services by the Authority, as well as the fact that when the employer nominated them, he did not know about their decision to join the strike.

[35] According to the Supreme Court and the Constitutional Court the prohibition on replacement applies to workers' recruitment directly or indirectly, as occurs when contracting out or through a Temporary Employment Business (Article 8.a) Act 14/1994, of 1 June). In addition, replacement of strikers is forbidden even with employees of the undertaking itself, who work in another workplace at the time of the strike notice (Article 96.10 ET). Furthermore, the STC 123/1992 of 28 September has stated that the employer cannot take advantage of his *ius variandi* with respect to non-strikers who worked in the same place at that time, if they have a superior position or qualification which allow them to carry out the striker's work, without further preparation, or with simple instruction.

[36] See STC 120/1983, of 15 December.

B) Mobilisation.
In extreme circumstances, the government Authority can introduce more drastic measures in order to guarantee the performance of minimum services and, as a consequence, the fulfilment of community needs which are endangered by the strike. To this end, Article 10 par. 2 DLRT allows the Authority to take "appropriate measures of intervention".

According to Articles 55.1 and 116 CE, implemented by Article 12.1 Act 4/1981, of 1 June, during a state of emergency it is possible to order intervention in the running of companies or public services. The Government can then decide the mobilisation of their staff, even by means of the strikers' replacement by police contingents or troops[38]. Such measures constitute Government emergency powers which are provided for extreme circumstances, where the strike completely paralyses the community's essential services because minimum services are not provided (Article 4.c) Act 4/1981). These measures ensure merely the provision of minimum services[39].

C) Compulsory arbitration.
Article 10 par. 1 DLRT provides, moreover, that the strike could end by a compulsory arbitration, when its long duration and serious effects on the national economy make this advisable. The Constitutional Court in the above quoted STC 11/1981 has pointed out that this arbitration could only be constitutional when the arbiter chosen is impartial[40].

4.2. <u>Effects of the failure to comply with minimum services</u>.

A) Disciplinary sanctions.
a) Dismissal of employee.

Regardless of the rating (lawful or unlawful) of the strike, failure to comply with minimum services constitutes a serious breach which justifies the employee's disciplinary dismissal by the employer, according to Articles 16.2 DLRT and 54.2.b) ET.

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[37] Among others, GOERLICH PESET, J.M., *Los efectos de la huelga, op. cit.,* pp. 96 and 98; MART¸N VALVERDE, A., "El derecho de huelga en la Constituci□n de 1978", *Revista de Pol□tica Social*, num. 121, 1979, p. 251; SALA FRANCO, T., "El esquirolaje externo", *Actualidad Laboral,* 1984, p. 165; SANTANA G:MEZ, A., pp. 187-189, VALDEOLIVAS GARC¸A, Y.*, Antisindicalidad y relaciones de trabajo (un estudio de la conducta antisindical en la empresa*), Civitas, Madrid, 1994, p. 383.

[38] Measures regulated by Act 50/1969, of 26 August, which is still in force according to Act 17/1999 of 18 May.

The compatibility of militarization with Spanish Constitution has been particularly discussed by the doctrine. Among others, see MONTOYA MELGAR, A., & others, "¿Es constitucional la militarizaci□n de los trabajadores en huelga o el empleo de efectivos militares para sustituir a los huelguistas?, *Revista de Trabajo*, num. 73, 1984, pp. 113-118 and 168-170; BAYLOS GRAU, A., p. 219 onwards; GONZ¸LEZ ORTEGA, S., "Dise□o normativo e intervenci□n de la Administraci□n en las relaciones colectivas de trabajo", DUR¸N L:PEZ, F., (ed.), *La intervenci□n administrativa y jurisdiccional en las relaciones colectivas de trabajo*, VI Jornadas Universitarias Andaluzas del Derecho del Trabajo y Relaciones Laborales, Sevilla, 1989, pp. 42 y 43; TORRENTE GARI, S., *El ejercicio del derecho de huelga y los servicios esenciales*, Centro de Estudios de Derecho, Econom□a y Ciencias Sociales (CEDECS), Barcelona, 1996, p. 312 and following.

[39] Mobilisation of employees has been accepted by ILO Committee on Freedom of Association only in circumstances of utmost gravity [see Report 39 (case 172), Report 36 (case 192) and Report 41 (case 199), quoted by MONTOYA MELGAR, A. *Derecho del Trabajo*, *op. cit.,* p. 729; see also BEN-ISRAEL, R., *op. cit.*, pp. 116 and 127].

Cf. also SALA FRANCO, T., "El esquirolaje externo", *op. cit.,* p. 165; and in general, CRUZ VILLAL:N, P., *Estados excepcionales y suspensi□n de garant□as*, Tecnos, Madrid, 1984.

[40] Judgement par. 2. d).

However, there is debate about whether the worker is allowed to disobey if the establishment of minimum services by government Authority did not follow the requirements set by the Constitutional Court, or if there was abuse or discrimination in applying the Decree by the employer. Neither doctrine nor the courts are unanimous on this point. There is a belief that allowing the worker to judge the proportionality or fairness of minimum services would give him/her carte blanche, and as a result would endanger the effective fulfilment of community needs.

On the other hand, it must be taken into account that if the worker has to comply with minimum services, even when they are abusive or discriminatory, a subsequent court decision declaring minimum services unconstitutional cannot restore the employee's right to join the strike[41].

For these reasons the Constitutional Court, in its widely discussed Decision 123/1990, of 2 July has followed an intermediate way. Firstly, it has stated that the employee does not have a right to judge an employer's decisions in applying a Decree of minimum services, since the Decree enjoys a presumption of fairness. However, the Constitutional Court recognises that the presumption of fairness is broken when an administrative court declares the Decree null and void.

Consequently, when the employee has brought a claim against his/her disciplinary dismissal for failure to comply with minimum services, the Employment Tribunal should take into consideration the administrative court's decision, which declares null and void the government Decree of minimum services. In judging the employee's conduct, the Employment Tribunal is, therefore, obliged to analyse to what extent the irregular Decree of minimum services would have limited the employee's right to strike, and if his disobedience has endangered the community's essential needs. After this balance the Employment Tribunal can decide whether the conduct was fair or not, and if not, whether its effects were serious enough or not to justify the disciplinary dismissal.

STC 123/1990 does not deal with other problems though, such as whether the Employment Tribunal itself would be allowed to judge the fairness of minimum services, when the administrative tribunals or courts have not yet come to a decision about them, or even when the minimum services have not been challenged before those tribunals[42].

The same sanction of disciplinary dismissal can be applied in relation to those who incite the employees in charge of minimum services to leave them, or those who take part in violent picketing in order to prevent the employees appointed to minimum services from performing them[43].

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[41] Some judicial decisions and authors have stated that the employee cannot be dismissed, when the Decree is declared null and void because of its abusive nature [e.g. High Court of Cataluña (Social Chamber) Decision of 5 febrero 1996 (*Aranzadi Social* 402) and Central Employment Tribunal Decisions of 5 May 1980 (Arz. 2546) and 18 June 1980 (Arz. 3628); see GOERLICH PESET, J.M., *Los efectos de la huelga, op. cit.,* p. 58] or because of the absolute failure to comply with the Decree formal requirements [STC 66/1983, de 21 julio; Employment Central Tribunal Decisions of 1 September 1982 (Arz. 4640); cf. also ALBIOL MONTESINOS, I., SALA FRANCO, T., "Servicios de mantenimiento y esenciales como límite del derecho de huelga", *op. cit,* p. 1241; RIVERO LAMAS, J., "Infracciones y sanciones laborales y regulación del derecho de huelga: criterios jurisprudenciales y proyectos de reforma", *Actualidad Laboral*, núm. 1, 1993, p. 22].

[42] Those problems constitute a consequence of the split of Spanish courts and tribunals' jurisdiction in relation to strikes in essential services. As has been seen before, the administrative tribunals and administrative chambers of court retain the jurisdiction on claims against Decrees establishing minimum services [Article 3.1.c) Procedural Labour Act 1995], whereas the employment tribunals and social chambers of courts have jurisdiction on an employer's decisions on replacement, dismissal and other disciplinary sanctions in relation to strikers employed by him [see SSTS/SOC of 12 March 1997 (Arz. 2892) and 11 July 1994 (*Actualidad Laboral*, 1994, ref. 1666); High Court (Social Chamber) of Aragón of 18 July 1997 (*Aranzadi Social* 2909), 20 January (*Aranzadi Social* 97) and 12 May 1993 (*Actualidad Laboral* 1993, ref. 1240); Employment Central Tribunal of 11 February 1985 (Arz. 1424)].

[43] STS/SOC of 27 October 1982 (Arz. 6261).

b) Sanctions in case of civil servants.
Article 31.1.l) Act 30/1984, of 2 August, considers a serious misconduct of civil servants to be the failure to comply with minimum services. In this case, the claim against sanctions imposed by administrative Authority is considered by administrative tribunals and courts [Article. 3.1.a) Procedural Labour Act].

B) Penal offences.
Civil servants' failure to comply with minimum services might be deemed a penal offence under Article 409 Criminal Code (Act 10/1995 of 23 November).

Besides, it has to be borne in mind that violent picketing (e.g. when used in order to prevent performance of minimum services) can constitute a penal offence under Article 315.3 Criminal Code.

C) Civil Liability.
In addition to disciplinary sanctions, the striker could also be liable for damages, if the employer can prove that the loss was suffered because of the failure to comply with minimum services correctly established. Given that there is no explicit rule of Labour Law providing this liability for damages, Employment Tribunals or Courts should apply subsidiary Civil Law on contractual liability, embodied by Articles 1102 and following of the Civil Code.

It may be the case that the striker's disobedience was due to a direct order or instruction from his/her trade union. Then the trade union will be liable for damages as well, according to Article 5.2 LOLS and Articles 1902 and following of the Civil Code on extracontractual liability (tortious). When the orders came from workers' representatives, they might also be sued according to Articles 1102 and ss. Civil Code on contractual liability.

In relation to the service's users, they would be entitled to claim for damages suffered as a result of the refusal to perform minimum services. In such case the private[44] or public[45] employer can be contractually liable.

Having stated the theoretical possibility to claim damages, in practice Spanish Employment Tribunals are reluctant to declare the employer's right to compensation for loss caused by the strike. The reason for that perhaps is because of the lack of explicit Labour Law, involving the necessity to apply Civil Law, which does not take into account the special circumstances surrounding the strike. Alternatively this may be because tribunals consider the disciplinary dismissal itself to be sufficient sanction, or the specific labour sanction[46]. Whatever the reason, it is unusual for Spanish employers to bring civil liability claims as a result of a strike.

Finally, when the worker's actions constitute a penal offence, tribunals can also declare civil liability for damages produced by means of violent picketing or individual actions against those who were appointed to minimum services (Articles 109.1 and 116.2 Criminal Code).

5. PERSPECTIVES ON THE LEGISLATIVE CONTEXT.
As has been seen, strikes in essential services are only partly covered by statute law, and even then they are regulated by a pre-constitutional enactment. Therefore the vast majority of issues concerning the essential services require regulation. Only the Constitutional Court's decisions have addressed this gap by deducing some rules when interpreting the Spanish Constitution.

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[44] Supreme Court (Civil Chamber) Decision of 16 July 1996 (Arz. 5672).

[45] With respect to strikes in public services, users could sue the public employer according to Articles 106.2 CE and 139 and ss. Act 30/1992, of 26 November. See Supreme Court (Civil Chamber) Decision of 2 February 1996 (Arz. 949).

[46] This seems to be the Supreme Court's belief in Decisions of 30 June and 6 July 1990 (Arz. 5551 and 6072 respectively).

Although Article 28.2 CE relates to "the Act that regulates this right", it has not been implemented by means of an Act. In 1992 a Bill was submitted by Government in order to regulate, among other matters in relation to strikes, those linked with essential services. This would have dealt with issues such as the definition of essential services, the sectors of activity which might be deemed as essential *prima facie*, special rules for the settlement of minimum services by agreement between employers' and workers' representatives in each sector, as well as the measures and liabilities in case of failure to comply with the minimum services. This Bill was the result of an agreement between the most representative Spanish Trade Unions CCOO and UGT, and the current socialist Government. It would have involved a guarantee of commitment and effective implementation by means of collective bargain. Unfortunately, this Bill was frustrated because of the dissolution of the Parliament in order to call a General Election.

Nowadays it seems to be impossible to have a legal implementation of this Article 28.2, given the absolute majority of the *Congreso* (parliamentary Chamber) required by the Constitution to pass an organic Act on fundamental rights or freedoms.

Summary

Article 28.2 of the Spanish Constitution of 1978 (CE) recognises "workers' right to strike for the defence of their interests", as well as the possibility to "establish the guarantees which ensure the maintenance of essential services for the community". This Article has not been implemented, therefore it remains in force the pre-constitutional *Real Decreto Ley* 17/1977, of 4 March (DLRT), the Article 10 of which refers to strikes in essential services, by allowing the competent Authority to adopt the necessary steps to keep such services in working order.

The Constitutional Court has defined the concept of "essential services" (STC 11/1981, of 8 April). In order to guarantee the fulfilment of community's essential services, Article 10 DLRT confers on the government Authority the power to establish "minimum services". According to the Constitutional Court, these services must be established in relation to each strike. In addition, minimum services will be interpreted in a strict sense, since they involve a limit to right to strike.

The competent government Authority, depending on the territorial scope of the strike, will establish minimum services by means of a statutory instrument (Decree, Order, etc.). The decision must detail the facts which justify the necessity of minimum services and their scope, as well as the number of workers to be appointed in each category or position, to perform these services. Once the Authority has decided the minimum services to be performed, its decision has to be notified to the workers' representatives before it is applied.

As a general rule, the power to designate the workers who will perform minimum services has been delegated by the government Authority to the employer. Spanish Tribunals are not unanimous in relation to the principles to be followed in nominating the workers. However, it seems that the employer should designate suitable non-strikers preferentially to carry out minimum services, when the strike's circumstances make it possible for the employer to identify which workers are not willing to join or have not joined the strike (STC 123/1990, of 2 July).

Strikers who fail to comply with minimum services may be replaced in order to guarantee the performance of minimum services. In extreme circumstances, the government Authority can introduce measures of intervention, such as mobilisation of their staff and replacement by police contingents or troops, or can decide that the strike will end by a compulsory arbitration (Article 10 DLRT).

Failure to comply with minimum services constitutes a serious breach, which justifies the employee's disciplinary dismissal by the employer, according to Articles 16.2 DLRT and 54.2.b) ET. The employee does not have a right to judge an employer's decisions in applying a Decree of minimum services, since the Decree enjoys a presumption of fairness. However, but the Employment Tribunal should take into consideration the administrative court's decision, which declares null and void the government Decree of minimum services (STC 123/1990, of 2 July).

The same sanction of disciplinary dismissal can be applied in relation to those who incite the employees in charge of minimum services to leave them, or those who take part in violent picketing in order to prevent the employees appointed to minimum services from performing them. Besides, violent picketing can constitute a penal offence under Article 315.3 Criminal Code.

In relation to civil servants, Article 31.1 Act 30/1984, of 2 August, considers a serious misconduct the failure to comply with minimum services. This misconduct might also be deemed a penal offence under Article 409 Criminal Code (Act 10/1995 of 23 November).

Finally, the striker and trade union could be liable for damages, according with Civil Law and Article 5.2 Act 11/1985, of 2 August, respectively. The service's users would be entitled to claim for damages suffered as a result of the refusal to perform minimum services, against the private or public employer responsible of the service