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The Right to Strike as a Human Right

Abstract

This paper presents the findings of research into the concept of the sector of essential services. The key objective is to gain an understanding of the nature of this sector. Essential services are fundamental to the functioning of everyday life for all. The lack of their provision will have irreversible consequences. The presented considerations argue that research on legal qualification should be based not only on the analysis of regulations but also on philosophical principles. It is essential to give due consideration to the moral implications of this issue. This approach is not exhaustive or universal. However, it aims to enhance the incomplete presentation of approaches and solutions to the problem.

KEYWORDS: strike; essential services sector; human rights; ILO

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1 Introduction

The question of whether the right to strike can be considered a human right is a recurring topic of debate in the field of labour law. The findings of this research are of significant value, both from a research standpoint and a practical one. It is not possible to implement and protect a right effectively unless it is correctly categorised. Furthermore, it introduces ambiguity regarding the scope of courts' jurisdiction, particularly in the context of international matters. It is also unclear whether the European Union or the International Labour Organization will intervene or offer an interpretation.

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The analysis of literature on international labour law proves that there is still no clear answer to the question announced in the title of this work. Therefore, during the course of research the question must be answered: since the right to strike has been treated as a worker's right so far, how to examine its nature? Do we find in human rights a foundation for recognising that the right to strike belongs to them?

The essence of this analysis is to answer the key question: is the right to strike a human right?

At the beginning of this article the specificity of conducting a strike in the sector of essential services, taking into account the general characteristics as well as ethical dilemmas related to this phenomenon, will be discussed. The sector of essential services, along with the relevant definitions and regulations, will be presented. Subsequently, a definition of essential services will be proposed. Subsequently, the current state of the scientific, philosophical and legal debate on the issue of the right to strike in the context of human rights, as well as the principal positions and arguments, will be presented. In light of the above, the research questions will be addressed in the final stage. The issue of a strike in the sector of essential services will be discussed, with particular consideration of the consequences of qualifying the right to strike as a human right, as opposed to leaving it within the sphere of labour rights.

2 What is the specificity of conducting a strike in the sector of essential services?

The concept of the so-called essential services or basic services is expressed in Article 3 of Convention No. 87 of the International Labour Organization. The indicated legal norm establishes the right of workers' organisations to organise their administration and activities and to formulate their programmes without interference by the public authorities[1]. With the recognition of the Committee on Freedom of Association, some member states do however limit rights flowing from Article 3 to groups of workers

1 International Labour Organization, Convention No. 87 concerning Freedom of Association and Protection of the Right to Organise, 9 July 1948 as amended.

employed in sectors that are considered essential services. The Committee on Freedom of Association has drawn attention to the abuses that might arise out of an excessively wide definition in the law of the term „essential services" and suggested that the prohibition of strikes should be limited to services that are genuinely essential[2].

It should also be emphasised that a total ban on strikes would be contrary to international ideals. The European Committee of Social Rights argues that it is up to the state itself to classify a given sector as essential since a justification, why a given group cannot exercise the right to strike, must be found. Automation is prohibited here[3].

The concept of „essential services" enables the categorisation of services in a manner that precludes the obstruction of the right to strike by workers in general. What is important is that the strike action in the analysed sphere must take place provided that the safety of recipients, of a given essential service, is ensured.

2.1. General characteristics of the specificity of conducting a strike in the sector of essential services

The specificity of conducting a strike in the sector of essential services focuses on the collision of a strike action which consists in refraining from work, i.e., providing a given service.

The pivotal point is that a service is designated as an essential service, meaning one that is necessary. Failure to provide a given service can result in significant risks to the health and lives of individuals within a given country. It is therefore problematic to accept the exercise of the right to strike by workers in a given sector. The nature of a service leads to the restriction of a strike action, so that it takes place without any threats. A rotational strike, which does not result in such gross consequences for the employer as a regular strike, is a common solution in this case. Thus, it may be called slightly weaker than a classic strike.

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2 Timo Knabe, Carlos R Carrion-Crespo, *The Scope of Essential Services: Laws, Regulations and Practices* (International Labour Organization, 2019), 1-63. www.ilo.org/wcmsp5/groups/public/---ed_dialogue/---sector/documents/publication/wcms_737647.pdf. [accessed: 22.08.2022].

3 Ibidem.

The determination of the minimum scope of service provision constitutes an element of a strike in the sector of essential services. It is, however, untenable to deny workers in a given sector the right to strike on the basis that such an action would be excessive.

2.2. Ethical dilemmas – general catalogue and characteristics of the issue

In considering whether the right to strike may be referred to as a human right, it is important to acknowledge the ethical challenges that arise in relation to it. The literature on human rights emphasises their vertical impact, which determines the individual-authority relationship and not the individual-individual relationship. It is often stated that human rights present ideas.

Consequently, there are no national mechanisms dedicated to regulating and enforcing human rights. Rather, human rights influence the application of law in various contexts, including administrative, civil, and criminal law. In human rights there is also no hierarchy of these rights. Each of these rights is of equal value and should be applied and enforced according to the same standard. This gives rise to a fundamental issue that is closely linked to the strike action in the sector of essential services. For instance, if doctors or nurses wish to strike in order to protect their rights, the manner in which they do so must be such that the lives of patients are not endangered.

It is important to bear in mind that the doctors who have been recalled may be motivated to strike not only due to the low remuneration, but also because of the complete lack of basic working conditions, which has led to the emergence of a phenomenon that could be described as „slavery". In this case, the problem becomes more complex and the dilemma more challenging to consider. What are the rights of doctors? What about the social level of their families? Is the patient's life more important than ensuring basic living conditions for oneself? It may be argued that a doctor, without the ability to exercise their right to remuneration or rest and overtired, themselves can be a threat to patients. There are no clear and correct answers in such a situation.

2.3. Legal dilemmas – general catalogues, characteristics of the problem

The aforementioned discussion gives rise to two principal legal dilemmas. Firstly, no definitive approach to regulating strikes in the sector of essential services in ILO member states has been established. Firstly, it is not straightforward to determine which services are considered necessary, and furthermore, it is equally challenging to establish a framework for striking that does not result in the disruption of essential services.

Moti Mordehai Mironi presents the concept of three models of strike regulation in the sector of essential services. The model of bilateral autonomous regulation, in which restrictions on strikes in the sector of essential services are derived from agreements reached between the relevant parties or social partners[4]. The model of unilateral autonomous regulation, in which the trade union itself imposes restrictions on strikes in the sector of essential services with the objective of minimising damage[5]. The researcher presents the model of hybrid/mixed regulation as the third one. The initial stage is that of autonomous regulation. However, should the level of essential services provided during a strike be deemed inadequate, external intervention will ensue[6].

The question of whether the right to strike should be classified as a labour right or a human right is the second most significant legal issue. This question was first posed in 2012 and remains unresolved to this day. The classification of the right to strike within the appropriate legal category will facilitate the creation of suitable legislative provisions.

4 Moti Mordehai Mironi, „Introduction: Theory, Conceptualization and Methodology", [in:] *Regulating Strikes in Essential Services: A Comparative 'Law in Action' Perspective*, Vol. LII, ed. Moti Mordehai Mironi, Monika Schlachter (Alphen_aan_den_Rijn: Kluwer Law International, 2019), 13.

5 Ibidem, 13.

6 Ibidem, 13.

3 What is the sector of essential services?

The International Labour Organization (ILO) has indicated that the precise definition of essential services depends to a significant extent on the specific circumstances prevailing in a given country[7]. Furthermore, the concept is not fixed and can be subject to change. For instance, a non-essential service may be deemed essential if the strike exceeds a certain duration or scope, posing a threat to the lives and health of individuals[8]. The ILO acquis demonstrates that essential services encompass the hospital sector, electricity services, water supply services, policy and armed forces, fire services, public or private prisons, the provision of food to pupils and school cleaning, and air traffic control[9].

3.1. Various proposals for definitions and regulations

The current approach taken by countries is to propose their own definitions of essential services, as well as legal regulations pertaining to this area. The Italian regulation is an example worthy of detailed examination, given its generally acknowledged exemplary status.

In Italy, a strike in the sector of essential services is primary regulated by Law 146/1990 of 2 June 1990[10]. The construction of essential services is carried out in accordance with the principle of balancing constitutional rights. The right to strike is enshrined in Article 40 of the Italian Constitution. Law 146/1990 enumerates the constitutional rights that must be weighed against the right to strike. The fundamental rights enshrined in Article 1, Paragraph 1.1, Section 1 of the Act encompass the right to life, the right to health, the right to freedom and personal security, the right to travel, the right to social assistance and security, the right to education and the right to communication.

The Act then goes on to set out a list of essential services, which are subject to specific rules. The services in question are those aimed at ensuring the exercise of constitutionally protected rights, namely the right to life, health, freedom and security of persons, freedom of movement, social

7 Ibidem, 13.
8 Cf. Knabe, Carrion-Crespo, *The Scope of Essential Servic*, (n-2)10.
9 Ibidem 10.
10 LEGGE 12 Giugno 1990, no. 146.

assistance and security, education and freedom of communication. This encompasses services provided regardless of the legal nature of the work relationship, even if carried out through public procurement or health.

The services also include public hygiene, civil protection, collection and disposal of municipal waste and special, toxic and harmful waste. Waste management; customs, limited to control over animals and perishable goods; the supply of energy, energy products, natural resources and primary goods, as well as the management and maintenance of the related systems, limited to what concerns their safety; the administration of justice, with particular reference to measures restricting personal freedom and those precautionary and urgent as well as criminal proceedings with defendants in detention status; environmental protection services and cultural heritage supervision. The provision of urban and suburban public transport by road, rail, air, airport and maritime is limited to connections with the islands. The disbursement of related amounts is also made through the service banking. The public education sector encompasses nursery schools, kindergartens and elementary schools, as well as the performance of final exams and university education, with particular reference to examinations that conclude education cycles.[11].

In the Italian system, the right to strike is regarded as a fundamental constitutional right that cannot be in conflict with other fundamental rights.

A crucial aspect of strike regulation in the sector of essential services is the action to prevent a strike, known as the cooling-off procedure. Article 2, Paragraph 2 of Law 146/1990 obliges the parties to collective agreements (i.e. the workers' unions and employers) to regulate cooling-off procedures as well as arbitration bodies, which are to lead to dispute resolution. In the event of a collective dispute, it is imperative that workers only undertake the actions that are strictly necessary to ensure the continued provision of services without jeopardising the rights of users.

In the event of a strike in the sector of essential services, trade unions are required to notify the relevant authorities in accordance with Article 2, Paragraph 2 of Law 146/1990. The notification must be provided at least ten days before the strike action. The notification must include the following elements: reasons for the strike, length of the strike and methods of operation.

11 Cf. Knabe, Carrion-Crespo, *The Scope of Essential Servic*, (n-2), 23, and LEGGE 12 Giugno 1990, no. 146 Article 1.

In the event of an interruption or restriction to an essential service as listed in the Act, the authorities are obliged to issue an order to protect fundamental rights. In accordance with Article 8, Paragraph 1, the authorised bodies to issue such an administrative order in the case of national-scale conflicts are the Prime Minister (Presidente del Consiglio dei Ministri) and ministers. In the case of local-scale conflicts, the Prefect (agent of the central government at the district level) is the authorised body. The order should be directed towards workers, the self-employed, small business owners, trade unions and employers[12].

The analysis of the solutions adopted by states in the research area, based on the report presented by the ILO[13], has led to the conclusion that the models can be divided into three categories. The complete model is supported by constitutional norms. The aforementioned Italian model may be classified as belonging to this category,

The second model represents an intermediate stage of development, incorporating the essential features of the full model but not fully encompassing all of its elements. The solutions employed in Germany serve as a case in point. In this model, legal norms do not explicitly express the right to strike. However, according to the jurisprudence of German courts, the right to strike can be derived from the freedom of association expressed in Article 9, Paragraph 3, Point 1 of the German Constitution[14]. In accordance with the prevailing jurisprudence, the right to strike is regarded as an integral component of this freedom[15]. In the event that a trade union calls for a strike, it is deemed to be legal and thus protected. In this system, the right to strike is subject to restrictions on the basis of the so-called "practical compliance" when a strike affects other constitutional guarantees[16]. This principle states that conflicting fundamental rights must be balanced so that they are limited but not completely restricted in favour of the other. No legal norms have been established to resolve the issue of strikes in Germany. Consequently, the quasi-legislative role is assumed

12 See: Adriana Tapo, „Italy", [in:] *Regulating Strikes in Essential Services: A Comparative 'Law in Action' Perspective*, Vol. LII, 279-318.

13 Cf. Knabe, Carrion-Crespo, *The Scope of Essential Servic*, (n-2) 11.

14 Monika Schlachter, Christina Hießl, „Germany", [in:] *Regulating Strikes in Essential Services: A Comparative 'Law in Action' Perspective*, Vol. LII, 182.

15 Ibidem, 182.

16 Ibidem, 183.

by the courts, whose rulings lead to the proportional implementation of constitutional rights in the event of a conflict[17].

With regard to the category of essential services under German law, it is important to note that there is no clear definition and no list of services that could be considered as such[18]. A strike in this sector is in principle no different from an ordinary strike. However, in this case the principle of proportionality is strongly emphasised due to the importance of the service. It is believed that such a strike may be illegal also due to the unacceptable infringement on third parties[19]. In this case third parties may claim a strike ban on the grounds of the disproportionate impact on their legal situation[20].

As illustrated in the presented model, a strike in the sector of essential services is not distinguished from other types of strikes and is treated as an ordinary strike. Furthermore, there is no definition of essential services. Nevertheless, there is a legal recourse that allows for the determination of the legitimacy of the strike. However, due to the nature of the services and the infringement of interests, it is easy to achieve a total ban on strikes in this sector.

The third category is characterised by the absence of a model, that is to say, a total absence of regulation. Poland can be included in this model. The right to strike is enshrined in Article 59 of the Constitution of the Republic of Poland[21].

The subject of a collective dispute may pertain to matters pertaining to the working conditions, remuneration, or social benefits of employees, as well as the rights and freedoms of trade union workers or other groups that have the freedom to associate in trade unions[22].

In accordance with the Act of 23 May 1991 oon solving collective labour disputes, any such dispute must be conducted in accordance with the prescribed procedure, which includes mandatory elements such as negotiations, mediation and, where necessary, arbitration. However, a strike is the final element in this process. Article 19 of the Act on solving collective labour disputes states that:

17 Ibidem, 185.

18 Ibidem, 194.

19 Ibidem, 197.

20 See more: Artur F. Utz, „Is the Right to Strike a Human Right" *Washington University Law Review*, No. 4 (1987): 741.

21 Journal of Laws from 1997 no. 78 item 483, as subsequently amended and restated.

22 Journal of Laws from 1991 no. 55 item 236, Article 1 Paragraph 1.

> Any work stoppage because of the strike that affects positions, equipment and installations where the interruption of work constitutes a hazard to human lives or health or to security of the State, shall be prohibited[23].

In the indicated article there are no guidelines as to which positions lead to the indicated threat. There is also no other legal act that would mention these areas. Nevertheless, Article 26 of the Act outlines criminal and civil liability for organising an illegal strike. There is a complete lack of transparency regarding strikes in essential services, which undoubtedly contributes to the phenomenon of a chilling effect.

3.2. The author's proposal of a definition

In accordance with the ILO, the prohibition on strikes should be confined to services that are not indispensable in the strict sense of the term. This restriction should also apply if a strike lasts longer than a certain period of time or goes beyond a certain scope, thus threatening the life, personal safety or health of the entire population or its part[24].

When determining essential services, it is first necessary to establish the minimum level of service that must be provided. Minimum services are defined as those services that must be provided during a strike in order to ensure the continued functioning of society and to guarantee the realisation and protection of fundamental constitutional rights within a given country[25]. It should be noted that minimum services apply not only to the strike in the sector of essential services but to others as well. These are the services that, in the absence of which, do not immediately result in a threat to the life, personal safety or health of the entire population or a significant proportion thereof (the educational sector, garbage collection, culture) but if these services are not provided for several days, these services become essential.

23 Journal of Laws from 1991 no. 55 item 236, Article 19 Paragraph 1.

24 Cf. Knabe, Carrion-Crespo, *The Scope of Essential Servic*, (n-2) 10.

25 See: Francisca Ferrando Garcia, *Spanish Law on Strikes in Essential Services*. www.dirittodellavoro.it/public/current/miscellanea/atti/israele/0039-s~1.pdf. [accessed: 22.08.2022].

> It has to be borne in mind that 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. Hence, the sacrifice imposed on the strikers and service users must be proportional[26].

It is necessary to create a definition based on these two concepts which in the event of a strike will become complementary. Only when functioning together will they protect both the parties to the dispute and the individuals utilising the services.

Nevertheless, the question of the designation of essential services remained to be resolved at the state level in accordance with the preferences of the respective authorities. In some countries, such as Bulgaria, France, Hungary, Italy, Latvia and Romania[27] the legislation repeats the list of essential services, which includes the protection of life and health, the supply of water, electricity, gas and heat, transport, security, telecommunications and so forth.

It is evident that the selection of services deemed essential by individual states is dependent on a number of factors, such as geographical location or main pillars of the economy. There is no order in these regulations. There is no scheme that would be common to states.

A solution that would reconcile all of the aforementioned dilemmas would be to construct a definition that takes into account three components. The first of these is essential services, which are those that, if they are lacking, directly lead to a threat to the life, personal safety or health of the entire population or its Part; basic services – namely, those which are of the utmost importance for the provision of services to society, but also of significant economic importance for the state. Minimum services which must be provided in the event of a strike, in both of the above cases.

Such a solution would facilitate a consensus between the ILO requirements and the interests of each state. The determination of essential services from a top-down perspective will facilitate the safeguarding of the most critical spheres of life, which could potentially be jeopardised in the event of a strike. This is consistent with the ILO definition.

Basic services are designed to protect not only against direct but also indirect threats which depend on the situation of a given country. For instance,

26 Cf. Knabe, Carrion-Crespo, *The Scope of Essential Servic*, (n-2) 39.
27 Ibidem, (n-2) 9-38.

the work of museums is an essential service in Italy[28]. It is due to the fact that this country has developed tourism which brings a lot of profit. A strike in this sector will bring losses to the state budget which will also affect every citizen later. In this case, each state should assess which service or which services are essential from the point of view of the economy.

The normative description of the concept of minimum services should be implemented based on the Italian model, which provides a useful example of how to determine how the service will be provided in a limited way but without causing difficulties for users, that is to say, people residing in the state during a strike. The proposed solution aims to achieve a balance between the higher good, workers' rights and the state's own interests. The state's interests often result in decisions by the authorities that prevent compliance with ILO requirements.

4 The current shape of the scientific debate on the issue of the right to strike in the context of human rights, main positions and arguments (research discussion map)

The question of whether the right to strike is a human right has been considered by many researchers from a variety of perspectives. One approach is to begin with the philosophical research on the essence of human rights, their existence, and foundation. This can then be used as a basis to pose the question of whether human rights can be the foundation for labour law. Such a consideration is presented by Joe Attkinson in the publication entitled *Human Rights as Foundations for Labour Law*[29]. The author presents a systematic classification of philosophical approaches, dividing them into political and naturalistic. Concurrently, he provides a succinct overview of the key tenets and assumptions inherent to each philosophical approach.

28 See: Cf. Tapo, „Italy", (n-13) 279-318.

29 Joe Atkinson, „Human Rights as Foundations for Labour Law", [w:] *Philosophical Foundations of Labour Law*, ed. Hugh Collins (Oxford: Oxford University Press 2018), 122-138. http://dx.doi.org/10.1093/oso/9780198825272.003.0007. [accessed 22.08.2022].

The political theories espoused by this school of thought posit that the concept of human rights is a post-war phenomenon[30]. According to the supporters of this theory, the violation of human rights is a justification for the intervention of a sovereign state. Furthermore, political theories posit that human rights are designed to fulfil specific political functions that are necessary at a given time. John Rawls was an advocate of this perspective. This philosopher treated human rights as those that limit the reasons justifying war and its conduct[31]. In his considerations, Rawls does not see labour standards as related to human rights.

Another prominent figure in the field of political theory is Joseph Raz, who developed his own theory based on the assumptions put forth by Rawls while simultaneously modifying them. A modified theory, known as „triggers for intervention", posits that human rights constitute a subset of moral rights. The violation of these rights, it is argued, justifies external intervention in a sovereign state[32].

Naturalistic theories, on the other hand, contend that human rights are the contemporary equivalents of natural rights. They define these rights as moral rights that are inherent to humanity. According to these theories, human rights did not emerge solely after World War II; rather, they have a much longer history[33]. James Griffin, according to whom human rights constitute the protection of "personality" is a representative of this theory. Personality, in this context, refers to the capacity to choose and pursue a personal vision of a good life[34]. This concept is based on the possibility of choosing a life path free from external control.

Naturalistic theories are developed by John Tasioulas[35]. In his opinion, human rights are to be understood as universal moral rights that are due simply because of humanity, regardless of the motivation of a person.

30 See more: John Rawls, *The Law of Peoples* (Boston: Harvard University Press 2010).

31 Ibidem.

32 See more: Joseph Raz, „Human Rights Without Foundations" *Oxford Legal Studies Research Paper*, No. 14 (2007). https://ssrn.com/abstract=999874 or http://dx.doi.org/10.2139/ssrn.999874.

33 Cf. Attkinson, „Human Rights as Foundations for Labour Law", (n-30) 122.

34 See more: James Griffin, *On human rights* (Oxford: Oxford University Press 2008).

35 See: John Tasioulas, „On the Foundations of Human Rights", [in:] *Philosophical Foundations of Human Rights*, ed. Rowan Cruft (Oxford: Oxford University Press, 2015), 45-70. http://dx.doi.org/10.1093/acprof:oso/9780199688623.003.0002. [accessed: 3.05.2023].

He argues that human rights are justified by the reference to „fundamental interests, for example, the interests of health, physical security, autonomy, understanding, friendship, achievement, fun, etc.". Any right can be justified by the reference to a range of fundamental interests, as they are open-ended and can underpin human rights. Furthermore, human rights do not have to be universally applicable; they can be justified in specific historical contexts. In accordance with this concept, a human right exists

> when (1) the object of the alleged right serves the fundamental interests of all persons in a given historical context, (2) these interests are *pro tanto* important enough in order to justify the obligations of others to respect or protect it and (3) these obligations constitute enforceable claims, given human nature and the historical context[36].

The philosopher emphasises the dynamics of human rights, the content of which will change because the assessment of feasibility and burdensomeness depends on technological progress and the availability of resources.

As Atkinson himself emphasises, he describes political theories as often incomplete and requiring further substantial moral reasoning. Naturalistic theories provide a more effective framework for integrating labour law norms. The theories of Griffin and Tasioulas provide the basis for some of the basic elements of this law. They are built on morality. However, according to Atkinson, building a law on this foundation can be complicated.

In the literature that analyses labour rights as human rights, there are actually three different approaches which are not always clearly distinguished. This discussion is presented by Virginia Montevlou, who outlines three approaches in research[37].

The first approach is the positivist approach, which states that a group of rights constitutes human rights as long as they are recognised as such by human rights treaties or other documents explicitly recognising labour rights as human rights[38]. Montevlau points out that there is no such clarity in case of a strike. The right to strike has been explicitly recognised in

36 Ibidem, 50.

37 Virginia Mantouvalou, „Are Labour Rights Human Rights?" *European Labour Law Journal*, No. 2 (2012): 151. http://dx.doi.org/10.1177/201395251200300204. [accessed: 22.08.2022].

38 Ibidem, 151-152.

the text of conventions and treaties (European Social Charter)[39], while in other cases it has been achieved through the work of supervisory or judicial bodies (as in the ILO and ECHR).

A positivist may also turn to the International Labour Organization (ILO), the UN expert agency in the field of labour rights. „The ILO predates all the human rights treaties and organisations (having been founded in 1919), which shows that labour issues became a matter of international concern before human rights"[40].

Montevlau believes that the Treaties concerning human rights are compromised. They may include provisions that the framers readily agreed to and omit others simply because they were not agreed upon in political debates at a given moment in history[41]. It is clear that such measures are still evident in current legislation, which demonstrates that this phenomenon is well-known and still prevalent.

The second approach is called instrumental[42]. It consists in analysing the strategy in the light of social facts. The nature of labour rights as human rights is confirmed if state and international institutions, such as courts or civil society organisations: trade unions and nongovernmental organisations, successfully promote them as such. It should be noted that the judgments in this regard are problematic and contradictory[43].

The third approach is called normative[44]. This approach examines what a human right is and assesses, given this definition, whether certain labour rights are human rights. Hugh Collins is the representative of this theory[45]. He examined possible justifications for labour law in human rights theory. He defined human rights as rights that all human beings are entitled to by virtue of their humanity. The are „universal and imperative and have a special moral weight that usually outweighs other considerations". Collins agreed that labour rights lack some of the key features of human rights found in this definition and therefore should

39 See: The European Social Charter, Turin, 18 November 1961, Article 6.

40 Cf. Mantouvalou, „Are Labour Rights Human Rights?", (n-38) 154.

41 Ibidem, 155.

42 Ibidem, 159.

43 See more: ECtHR of 2 July 2002 Wilson, National Union of Journalists and Others v The UK. App no. 30668/96; ECtHR of 12 *November 2008 Demir and Baykara v Turkey,* App no. 34503/97; and others.

44 Ibidem.

45 Hugh Collins, „Theories of Rights as Justifications for Labour Law" *The Idea of Labour Law*, ed. Guy Davidov (Oxford: Oxford University Press 2011), 13. http://dx.doi.org/10.1093/acprof:oso/9780199693610.003.0010. [accessed: 22.08.2022].

not be included in this category. He provided four arguments in support of this position[46]. The first argument against labour rights as human rights is that they do not represent the same urgent and compelling moral claims („the non-necessity thesis"). The second argument is that labour rights are not universally applicable like other human rights („the non-universality thesis"). According to the third argument, labour laws do not contain sufficiently stringent standards („the lack of stringency thesis"). The final argument is that labour rights evolve over time, while universal human rights embody timeless and basic needs („the lack of time thesis"). According to this view, since labour rights are not human rights, we should not look for justification for labour law in human rights theory which is most likely in the tradition of natural law.

Montavlau herself analyses Collins's arguments, undermining all of the assumptions[47]. She argues that human rights prohibit moral harm and that that certain labour rights meet the criteria for this type of protection. She provides contemporary slavery as an example.

In relation to the universality of human rights, the author acknowledges that the existence of a human right is not contingent on status and that it remains a human right, as illustrated by the philosophy of Tasioulas. In terms of the unrestricted nature of labour rights, she maintains that human rights are normative standards. Even if a given society is unable to respect them at the moment, it must strive to achieve the goal of respecting these rights. She also highlights the issue of social rights, which are classified as human rights. In response to the argument that human rights are timeless, she acknowledges that workers' rights are often timeless claims but their expression changes depending on external factors.

46 Collins explores this argument in the essay.
47 Monavlau explores this argument in the essay.

5 An attempt to answer the main research question – the author's arguments

The presented analysis aims to answer the question whether the right to strike can be treated as a human right, taking into account the restrictions on strikes in the sector of essential services.

When analysing philosophical approaches, one should bear in mind the dilemmas associated with a strike in this area which is very different from an ordinary strike.

Therefore, it is necessary to refer to the concept of Tasioulas[48]. First of all, he assumes that a human right exists when (1) the object of the alleged right serves the fundamental interests of all persons in a given historical context, (2) these interests are *pro tanto* important enough in order to justify the obligations of others to respect or protect it and (3) these obligations constitute enforceable claims, given human nature and the historical context.

This argument is raised in the literature by Montevlau as well. On the one hand, by recognising the right to strike as a human right, it will undoubtedly protect the interests of workers. The status of being a worker is a matter of choice, and therefore all those who are, have been or will be workers will benefit from this right. From another perspective, it is important to consider how this concept will benefit those who provide an essential service. The assumption refers to everyone. Even though the worker himself/herself will be able to exercise this right, the impact on the recipient of the service may lead to a threat to life and health. There is no doubt about the importance of the protected interests. However, the issue is based on the rights of recipients as well as the threat posed by the cessation of the provision of essential services. As for the respect and protection that Tasioulas talks about, it will apply as long as the strike does not threaten. However, the question, of how to determine the moment of the emerging threat, arises. The ILO makes it clear that a seemingly redundant service can become essential if a strike lasts too long. For example, a strike of garbage collectors does not pose any threats at the beginning but if it lasts too long it will cause diseases, bad smell and a plague of vermin and rodents.

48 Cf. Tasioulas, „On the Foundations of Human Rights", (n-36) 50.

Referring to this philosophical concept, I do not find do not provide a rationale for the right to strike in the context of essential services. The ethical dilemma precludes this possibility entirely.

When analysing the approaches of the doctrine of labour law, firstly, the positivist approach, the following should be pointed out. The fact is that the right to strike is not enshrined in the Universal Declaration of Human Rights. Instead, it is only referenced in the European Social Charter of 1961[49].

The positivist approach therefore rejects the right to strike as a human right. In contrast, the instrumental approach did not promote or recognise the right to strike as a human right until 2012. Despite the ECtHR adjudicating, there is currently no consistency or uniformity in its adjudication, which is leading to chaos[50]. Morover, this is becoming increasingly problematic.

It is important to consider Collins's arguments regarding the „who/why" features of human rights when analysing the normative approach. Does the right to strike represent urgent and compelling moral claims? The answer is a definite yes. The purpose of the strike is to protect workers' interests, while the strike itself is the only instrument of action „in the hands" of workers.

Will recognising the right to strike as a human right make its universally applicable? Full universality is not possible in the case of restrictions in the sector of essential services. Even though the right itself may exist, it will be significantly limited for workers working in the sector of essential services. Some professions are completely deprived of the right to strike – it is most often noticeable in the services.

Studying the issue from the perspective of the lack of stringency, it is impossible to agree with Collins on the right to strike. The definition proposed above is to be based on the specific integrity of states within a given scope. Therefore, the differentiation of basic services in various countries

49 Universal Declaration of Human Rights (adopted on 10 December 1948) UN General Assembly Resolution no. 217 A(III) UDHR) Articles 23-4; International Covenant on Economic, Social and Cultural Rights (adopted on 16 December 1966 entered into force on 3 January 1976.) Article 7; Charter of Fundamental Rights of the European Union (26 October 2012) 2012/ C326/02 rond. 4; European Social Charter (revised) adopted on 3 May 1996 entered into force on 1 July 1999) ECJ 163 Articles 1–9.

50 See: Jorge Andrés Leyton Garcia, „El derecho a la huelga como un derecho humano fundamental: reconocimiento y limitaciones en el derecho internacional" *Revista Chilena de Derecho*, No. 3 (2020): 781, and Piotr Grzebyk, „The Right to Strike as a fundamental Right", [in:] *EU Collective Labour Law* (Cheltenham: Edward Elgar Publishing 2021), 88-101. http://dx.doi.org/10.4337/9781788116398.00011. [accessed: 22.08.2022].

according to their respective needs will inevitably result in inequalities. Additionally, it is not possible to implement top-down strike standards or a prohibition for specific groups. There is a definite lack of rigour, which is necessary in these mechanisms. In this instance, there is no need for a strict normative standard, as the diversity is the result of factors that are not dependent on human or legal factors, such as geographical location or the main pillars of the economy.

The last argument is that labour rights are subject to change over time, whereas universal human rights are fundamental and enduring. In light of this, it is clear that the right to strike is subject to evolution, particularly within the context of essential services. The development of technology and the evolving needs of humanity will determine which services will be necessary.

Studying this issue, it is visible when the concept of human rights originated. However, work is the primal form and has always accompanied humans. Every element of human life was determined by work, first in order to survive and then in order to earn money. It was thanks to work that humans learned about the social hierarchy related to wealth. It was thanks to work that many social concepts were formed. It was work which was many times a determinant of some human rights. Thus, the question arises whether we should look for the foundation of labour rights in human rights? It may be that at some point in the future, human rights will be found to have their foundation in labour law.

According to Utz[51] the strike as we know it today has significantly changed from the strike in its original form. The strike of today offers workers considerably greater protection for their rights, as well as expanded rights. In consequence, workers are better equipped to enforce these rights.

Thus, we must learn to notice this evaluation process when deciding on the legal classification. A strike is no longer solely a fight against slavery or violence. Currently strikes are often used as a tool to negotiate better working conditions or salary increases. However, these demands are frequently exaggerated and do not align with the fundamental requirements for a fair wage. Contemporary strikes are often strategic and planned, lacking the element of instinctive rebellion. This makes them distinct from the primal human rights issues that have traditionally underpinned such actions.

51 See more: cf. Utz, „Is the Right to Strike a Human Right", (n-21) 732-757.

6 To what extent is there a need for further research – gaps in the existing literature

A significant number of authors have inquired about the specifics of a strike as depicted in their works. However, this question is posed in relation to the strike *in genre*. From the perspective of the sector of essential services, this remains an area that is still open for investigation. The concept of essential services, as well as the issues surrounding it, is not frequently discussed in the literature. Unfortunately, this has resulted in significant challenges in practice. There is a lack of guidance for workers, who are often unsure of their rights and how to exercise them.

In light of the findings, it would be reasonable to conduct further in-depth research in this area.

7 Conclusions

This article examines the issue of the right to strike as a human right, with particular consideration for the sector of essential services. It would be possible to precisely define the subject within the framework of the International Labour Organization, which would help to clarify any remaining doubts.

Unfortunately, the guidelines provided by the ILO are not respected which leads to many practical problems.

First of all, the definition of essential services, with the exception of a few universal sectors treated as a model, is still unclear. It is not in the interest of the states to comply with the guidelines, as they do not align with their own objectives. It is therefore essential to establish a definition that will not only take into account the model sectors but will also allow for the specification of additional sectors in accordance with the needs of the state.

The concept of „basic services" is defined in Convention No. 87 of the International Labour Organization. The Convention establishes the right of workers' organisations to organise their administration and activities and to formulate their programmes without interference by the public authorities, with certain restrictions for groups of workers in essential services, as determined by the Committee on Freedom of Association. A complete

ban on strikes is contrary to international standards. The state is required to demonstrate why a specific group is unable to exercise its right to strike. Any industrial action in the context of basic services must be conducted in a manner that ensures the safety of service users. The particular nature of strikes in basic services is to restrict their occurrence in order to minimise disruption and ensure the safety of all parties. A strike in basic services gives rise to a number of ethical and legal issues, including the right to strike and the right to life. Furthermore, there is a lack of uniform regulation on strikes in basic services in ILO member states.

he regulation of strikes in essential services differs between countries. In Italy, a comprehensive model exists, with the right to strike based on constitutional norms. The Italian Act lists the constitutional rights that must be balanced with the right to strike and includes a list of basic services subject to special rules. In Italy, the right to strike is regarded as a fundamental constitutional right. The cooling-off procedure was also introduced with the objective of preventing strikes. In the event of a strike in the sector of basic services, trade unions are required to notify the relevant authorities, who are obliged to protect fundamental rights by issuing an administrative order. The models of strike regulation in basic services may be divided into three categories. The second model is an intermediate model, exemplified by Germany. In this model, the right to strike results from the freedom of association but is limited on the basis of practical compatibility with other constitutional guarantees.

The question of whether the right to strike is a human right has been considered by many scholars from a variety of perspectives. Philosophers have adopted two distinct approaches to this issue: political and naturalistic theories. Political theories view human rights as a post-war construct designed to fulfil specific political functions. In contrast, naturalistic theories regard human rights as universal moral entitlements inherent to being human. These theories form the basis for certain aspects of labour law, but establishing the law on this foundation can be complex. Three distinct approaches to the analysis of labour rights as human rights have been identified in the literature on this topic: positivist, instrumental and normative. The positivist approach focuses on human rights treaties and documents, while the instrumental approach examines how state and international institutions promote labour rights as human rights. The normative approach determines the definition of a human right and evaluates the right to strike in accordance with this definition.

The question of whether the right to strike constitutes a human right remains a topic of discussion.

The question of whether the right to strike may be considered a human right is a complex one. From a philosophical standpoint, the right to strike must serve the fundamental interests of all individuals, be of sufficient importance to justify associated obligations, and be enforceable based on human nature and historical context. However, the right to strike in the sector of basic services gives rise to ethical considerations in relation to its impact on service users. The right to strike is recognised in the European Social Charter, but not in the Universal Declaration of Human Rights. The instrumentalist approach acknowledges it as a human right, but the ECtHR judgments are inconsistent and problematic. The normative approach supports the right to strike as a moral claim, but its universality is limited in the sector of basic services. The lack of rigour in this approach ultimately leads to inequality. The right to strike has evolved significantly over time, yet its foundation in human rights remains a topic of debate.

The analysis leads to the conclusion that the right to strike cannot be considered a human right. The primary argument is based on the limitations imposed on the sector of essential services. There is a risk of a conflict between two fundamental human rights, which could have significant implications.

It is important to gain a clearer understanding of this subject and to undertake further research in this area.

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