

Spain

Antonio Baylos Grau (Professor Universidad de Castilla, La Mancha)

Nunzia Castelli (Universidad de Castilla, La Mancha)

1. Introduction
2. Strike action, collective dispute and lockout: constitutional position and conceptual clarifications
3. The legal regulation of the right to strike: Spain's unusual regulative situation
4. Ownership and exercise of the right to strike
5. Limits on the right to strike
 - 5.1 Formal and procedural requirements: notice, constitution of the strike committee and advertising
 - 5.2 Control over the objectives of the strike: external limits and illegal strikes
 - 5.3 Control of strike procedures: internal limits and unfair strikes
 - 5.4 Balancing strike action with other constitutional right and interests: strike action in essential public services
6. Residual nature of other techniques: compulsory arbitration ending the strike
7. The effects of strike action on industrial relations, on employment contracts, on corporate powers, and on social benefits

1. Introduction

In the Spanish legal system, the right to strike is enshrined as one of the most important fundamental rights, expression of the admission of workers as an organised social group, of their power to safeguard their interests and, more generally, of the political and social pluralism on which Spanish legal system as a whole is based. The principle in question is expressed in article 28.2 of the Spanish Constitution of 1978 (hereinafter, the SC), that recognises that workers have the right to strike to protect their interests, and leaves it to the law regulating the same to establish the guarantees for maintaining essential public services. The systematic placement of article 28.2 in Section 1, Chapter II of Title 1 of the Spanish Constitution, titled «On fundamental rights and public freedoms», determines that application of a special constitutional protection of the right. This is substantiated in the necessity of (organic) law developing the same (articles 53.1 and 81.1 of the Spanish Constitution) and on the predisposition of special procedural means and judicial protection proceedings before the common courts based on the principles of preference and summary judgement (regulated in articles 175 and foll. of the Labour Proceedings Law, hereinafter, the LPL), with further possibility of appealing for protection to the CC (article 53.2 SC). According to the reconstruction given by the CC itself,¹ recognition of strike

action as a constitutional right of the highest order is closely linked to, and explained by, the threefold position of the constitutional lawmaker on:

1. The establishment of Spain as a social and democratic State governed by the rule of law (article 1.1. SC) «which, among other things, means the legalisation of the means to defend the interests of socially dependent groups and segments of the population, including granting constitutional recognition to an instrument of pressure that secular experience has shown to be necessary to enforce the interests of workers in social and/or economic disputes».

1 CCJ 11/1981.

2. The clause granting trade unions a social and political institutional role, charged with contributing to «the defence and promotion of the economic and social interests which they represent» (article 7 SC).

3. The clause on the effectiveness of the freedom and equality of individuals and social groups, which compels the public authorities to «promote conditions ensuring that freedom and equality of individuals and of the groups to which they belong are real and effective», removing «the obstacles preventing or hindering their full enjoyment, and [facilitating] the participation of all citizens in political, economic, cultural and social life» (article 9.2 SC). Strike action, then, is conceived as a «counterweight» that allows those in a situation of salary dependency to take up a position of strength to favour their interests. The aim is to «re-establish the balance between two, economically unequal parties» (CCJ 11/1981).

From this point of view, taken as a fundamental way of restoring the balance of strength and power in industrial relations and, therefore, as an instrument for fulfilling the constitutional promise of material equality for all citizens, the right to strike in the Spanish Constitution of 1978 is an essential instrument for the citizen-worker, as an individual and an organised social group, to participate democratically in the construction of the social, political, economic and cultural order. The broad constitutional formulation of the right granted «to workers in defence of their interests» (article 28.2 SC) corresponds therefore, and is consistent with, the democratic model of industrial relations ushered in by the SC; a model that assigns to the conflict of interest an active role in the institutional system as an essential element for the dynamic, democratic participation of all citizens.

2. Strike action, collective dispute and lockout: constitutional position and conceptual clarifications

Under the Spanish system, the expression «collective action» has no precise meaning. The most similar concept would be «labour dispute», which could be understood as a broad concept, inclusive of all forms of «collective action». However, its technical use is different. Its historical origin can be found during

Franco's regime when the expression was used as opposed to the term «strike». The collective dispute referred to conflicting positions taken in connection with «rights» or «interests» arising at a given level of labour relations, however it could not be externalized by stopping work or disrupting the normal production process. The «collective dispute» was solved through the conciliatory action of public authorities: the Labour Courts through the labour procedure and the ruling ending the conflict, or the administrative authorities by means of a binding award or decision. So the expression «collective action» appears as a concept contrary to the classical forms of collective action, namely going on strike, prohibited and punishable under Franco.

This semantic separation has pervaded the democratic system of industrial relations based on the Spanish Constitution of 1978 too. It distinguishes between the right to strike (article 28.2 SC) and the right of employers and workers to take collective action (article 37.2 SC). That is why the workers' powers of collective self-protection find their true expression in the recognition of the right to strike, as well as the collective action provisions, located in the constitutional text immediately after those referred to collective bargaining, are construed as an allusion to the autonomous or voluntary mechanisms of solving disputes, mechanisms created by collective agreements. Other forms of dispute not comparable to the right to strike or other fundamental rights are also included, such as the right to assemble and demonstration. It therefore refers to a certain type of collective action by the workers on the use of company products, or avoidance of trade relations with the company, on which there is no public or collective regulation. Thus, the right to strike is recognized as a fundamental right that becomes independent of the concept of collective action.

A debated issue is whether lock-out should be recognized as collective action. The key question is whether the Spanish legal system, as the German one, allows for an «equal means» principle or a parallelism between the collective action arising among the workers and that originating among the corporate sector. The answer is no. The Constitutional Court states that differences between the right to strike and lock-out are so great that the legal treatment has to be different, as evidenced by the different placing within the constitutional text. The Constitutional Court argues that that parallel treatment is unfeasible due to a number of reasons, but mainly due to the different grounds of each concept: «strike is a counterweight designed to allow salary-dependent workers to establish a new more favourable balance of power. Strikes tend to restore the balance between parties of unequal economic strength. On the other hand, lock-out implies giving a greater amount of power to a party who already had power before». From this point of view, based on the different functionality of each mean, lock-out may only be allowed very restrictively: lock-out is possible when exercised by the employer as a policing power, as a reaction to situations that endanger people or things; that is, solely to preserve the integrity of persons, goods and facilities, and only for as long as is necessary to remove such causes and ensure the resumption of activity. Such specific and limited purpose recognized to lock-out

prevents it from being regarded as a measure of «collective action».

3. The legal regulation of the right to strike: Spain's unusual regulative situation

The emphasis laid by the democratic Constitution of 1978 on the right to strike as the typical expression of the structural social conflict contrasts, nonetheless, with the unusual regulative situation of the same. Indeed, the strike action having been formerly prohibited and criminalized under Franco, only found its legal recognition after the dictator's death, in full political transition, by virtue of Royal Decree Law of Labour Relations of 4 March 1977 (DLRT), enacted when freedom of association had still not been recognized. This law distrusted and, at times, was clearly hostile toward the forms of collective selfprotection that were not functionalized towards labour costs regulation. The contrast with the new constitutional model of right to strike, prompted to lodge an appeal on the ground of unconstitutionality before the CC to repeal the DLRT as being contrary to the provisions of the Constitution. The appeal concluded with the aforementioned judgment 11/1981 of 8 of April in which, partially upholding the appeal, the CC passed up to nine judgements of unconstitutionality directly against the DLRT. For the rest, the political transition regulation was declared in accordance to the SC, albeit with the important provision that its rules must be interpreted according to the constitutional guidelines indicated in the judgement.

However, the absence of a law developing the right recognized in article 28.2 SC implies that the current legal regulation governing the right to strike is still contained in pre-constitutional law (DLRT), albeit interpreted conform to the new constitutional values and rights. This has raised numerous interpretive problems that have been brought before the Courts, reaching the Constitutional Court by virtue of «amparo» action (procedure for the protection of fundamental right). The judicialization of the right hinders the designing of general rules, while conflicting rulings may issue at the same time, a problem only solved by resorting to the necessarily extensive *casalaw* of the Constitutional Court and, more recently, of the Supreme Court. This makes very difficult to study the Spanish regulation of the right to strike.

4. Ownership and exercise of the right to strike

As we saw above, article 28.2 SC attributes the right to strike «to the workers» for the purpose of defending their interests. In order to clarify the concept of «workers», and so establish ownership of the right, constitutional law is considered, *a priori*, to have referred to workers in the legal-material sense. Accordingly, the following workers are legally entitled: civil servants, statutory and administrative staff, and, of course, those subjects with an employment contract. However, as we shall see later, in important sectors of the public administration and public services, the right to strike is restricted by imposing essential public services. This restriction, however, is determined by the sphere in which strike action is to be taken, the so-called essential community services, and not by the

legal status of the owners with regard to their employment relationship.

A specific problem has arisen in connection with foreign workers. Organic Law 8/2000 of 22 December set a subjective restriction in this point. Parallel to the restrictions imposed on the exercise of trade union freedom, article 11 states that immigrant workers were holders of the right to strike, but such right could only be lawfully exercised provided they had obtained a work permit. The clear opposition of this article to International Treaties and to the notion of worker of article 28.2 of the Constitution as well as the very functionality of strike action as a right has been considered a sufficient element in order to legitimate the questioning of the constitutionality of the norm. The issue was settled by CCJ 259/2007, of 19 December 2007, which partially upheld the appeal, declaring the unconstitutionality and invalidity of that portion of the Organic Law that declared the legal right to strike by foreign nationals living in Spain to be dependent on their being in possession of a permit to work in Spain.

Another problem stands up with respect to the entitlement and exercise of the right to strike on behalf of self-employed workers and a special type of freelancers known as «economically dependent self-employed workers» as defined in Act 20/2007, on The Self-employed Workers' Statute (SWS). Jurisprudence understands that they are entitled to strike insofar as they belong to a trade union, who may call a strike by virtue of its freedom of action. It is more doubtful that professional associations of self-employed workers may assimilate these typically trade unionist powers and tactics, however it has been argued that the professional associations' – not unions – authority to call a strike is implicitly recognized in the provisions of article 19. 2 SWS that recognizes their right to «exercise collective defence and protection of the interests of selfemployed professionals».

Despite this broad interpretation of the subjective realm of the right to strike, there are categories of public officials who are prohibited from exercising the right to strike, in the same way as they are denied the right of freedom of association:

- Members of the armed forces and bodies subject to military discipline, such as the Guardia Civil (Civil Guards).
- Judges, Magistrates and Public Prosecutors while they are active, although in this case there is no provision explicitly prohibiting the exercise of the right to strike, yet the prohibition is deduced from their exclusion from freedom of association stipulated by OLTUF of 1985.
- Members of the Security Forces, both state-level police officers and regional and municipal police, notwithstanding their right to freely associate.

On the other hand, the strike action is defined according to the well-known formula – with Italian and French precedents – as a right «individually owned and collectively exercised». This formula's immediate consequence is to prevent the collective powers of calling strikes to become monopolized by trade unions. Having rejected an «organic» concept of ownership of the right to strike, which would make it directly depend on freedom of association, the Spanish system devised this right independently, allowing organizations representing workers, such as

councils or staff representatives, or all of them assembled, to validly call a strike. This conclusion also applies to the civil service for Staff Committees, as confirmed by article 15 of the Public Servants' Basic Statute of 2007 that recognizes the right to strike as «an individual right exercised collectively». However, it should not be forgotten that the collective party with powers to call a strike is typically the trade union, and that article 2.2.d) OLTUF recognizes this right to any union, regardless of its implementation or representation inside or outside the company, so that in practice, the «unionization» of the right to strike is very relevant.

5. Limits on the right to strike

Based on the premise that «no right, not even constitutional rights, are unlimited », the CC explained that the limits imposed on the right to strike by ordinary legislation are considered to respect said right and be constitutional to the extent that they are justified by the need to protect other constitutional rights and other constitutionally protected assets, and do not exceed the limits of the basic substance of the right to strike.

The limits of the right to strike can be classified as follows:

1. Procedural and formal limits. For the collective exercise to be «recognized» as valid by the legal labour system, it must comply with a number of requirements regarding the strike call, prior notice and formation of a strike committee. This is what is known as a «strike call procedure» regulated in DLRT. These limits are considered constitutional to the extent that they are not based on arbitrary criteria, are aimed at protecting other constitutionally protected assets and interests, and include restrictions «which are not so rigid and difficult to fulfill that in practice they make exercise of the right impossible» (CCJ 11/1981).

2. Limits to the definition and legitimate aims of strike action and strike procedures. For this purpose «external» limits, affecting the claims behind the strike are differentiated from «internal» limits, or the procedures applied to the strike itself. The CC lays particular emphasis on streamlining these aspects of the DLRT to bring it in line with the Spanish Constitution.

3. Limits derived from the protection of other constitutionally protected fundamental rights or assets.

5.1 Formal and procedural requirements: notice, constitution of the strike committee and advertising

CCJ 11/1981 declared that certain constraints set by DLRT to consider as valid a decision to go on strike did not conform to the Constitution. Thus, at present, work councils may call a strike when voted by the majority of its members without requiring a higher percentage of majorities, something that suggests an aim to obstruct the exercise of this right. Regarding the trade union, deciding to call a strike falls under the union's own authority, so the only possible

conditions can be those self-imposed by the union in its statutes. The strike declaration agreement must be reported to the employer or employers concerned and to the labour authorities. It must be in writing and given with a prior notice of five days, or ten days for essential services. The notice must contain the objectives of the strike, the efforts made to resolve differences, the date of commencement of the strike and the composition of the strike committee, the body representing the strikers as statutorily required (article 3.3 DLRT).

When calling a strike, article 3.3 DLRT requires the appointment of a «strike committee» whose function is to «participate in all union, administrative or judicial actions undertaken to resolve the conflict» (article 5 DLRT). The committee is a body representing the striking workers who undertakes «from the time of notice and during the strike» to negotiate with the employer in order to reach an agreement ending the strike with «the same effects as the terms of a collective agreement» (article 8.2 DLRT).

It is, therefore «the body which defends and negotiates with a view to reaching a solution to the conflict» (CCJ 11/1981). This atypical representative body of workers' interests throughout the strike also undertakes to ensure the so-called maintenance services for the safety of persons and things, regulated in article 6.7 DLRT, although the appointment of employees to cover these services is agreed between the employer and the strike committee itself. These maintenance services should not be confused with the minimum services prescribed by the governing authority in the strikes affecting essential services to the community. Safety and maintenance services are considered to be «services required to ensure the safety of person and things, maintenance of premises, machinery, installations, raw materials and any other measures needed to enable the enterprise to eventually return to business» (article 6.7 DLRT). The employer may not in either case impose or define such services (CCJ 80/2005 of 4 April).

Based on article 6.6 DLRT, whereby «the striking workers may peacefully disseminate information on the strike and carry out fundraising without coercion», CCJ 120/1983 of 15 December has clearly stated that the power of information, publicity and extension of the strike are an essential part of the right to strike. But these actions must be peaceful and non-violent. Coercive or intimidating picketing behaviour are not protected.

5.2 Control over the objectives of the strike: external limits and illegal strikes

Article 11 DLRT defines the objectives that the strike may pursue. This is done in a negative manner by providing a list of strikes declared illegal or unlawful according to their objectives. In this area, the filtering or editing effected by constitutional case-law has been intense because the constitutional striking model differs drastically from this restrictive view of the functionality of this right. Indeed, the strike is a mechanism included in collective bargaining, but does not exhaust its many purposes in this area, nor in the wider scope of what is technically known as a labour dispute. It is a means of industrial action and

therefore shares its overall goals, in defense of workers' economic and social interests, both before the employers and public authorities; it is thereby understood that this is a right involving citizen participation taking part in the process of gradual levelling of material inequality foreseen in article 9.2 CE. Based on these coordinates, the list of illegal strikes in article 11 DLRT focuses on political strikes, sympathy strikes (secondary) or strikes against convention; this area has been used to explain the new constitutionally guaranteed content of the right to strike; the constitutional doctrine is summarized below.

Article 11 a) DLRT stipulates that a strike is illegal when «started or upheld for political reasons or for any other purpose beyond the workers' professional interests». The «non-involvement» factor of the workers in a claim that is «not their own» has enabled the CC to consider the constitutionality of strikes directed against decisions of public authorities when affecting the workers' interests, such as, for example measures applied to the employment market regulation, or restructuring the social security or health system. There are many examples of actions by the political power and the public Administration that affect the interests of workers, whether active, inactive, or retired from the labour market, and in general all measures that restrict social citizenship situations. A very similar approach has led the constitutional doctrine to legalize sympathy or support strikes.

Regarding strikes against a collective agreement, article 11 c) DLRT declares illegal any strike «intended to alter the terms reached in a collective agreement while it remains in force» which implied an implicit peace-keeping duty upon entering into the agreement and coinciding with its legal term. The CC, however, interpreted this prohibition in a narrow sense when saying that although the provision does not allow strikes intended to alter what has been collectively agreed during its legal term, nothing prevents the strike while the agreement is in effect when its purpose is not strictly that of altering the agreement, such as requesting its interpretation or making claims that do not involve amendment of the convention. Besides these two cases of strikes claiming the interpretation of the agreement or those concerning matters and issues unrelated to the terms of the agreement, there are two other cases in which the objective of the strike is directly related to the terms of the collective agreement, yet it cannot be construed as grounds for illegality. Such strikes are the result of an infringement on behalf of the employer or business association of all or any of the collectively agreed terms; in the second case, the strikes respond to the finding that there has been an absolute and major change in the circumstances on which the agreement was based, whereby the *rebus sic stantibus* clause applies. Thus, the implicit peace-keeping duty lasting throughout the legal term of the collective agreement has been severely restricted in view of the multipurpose nature of the right to strike, not confined – by virtue of constitutional recognition – to the limits set for collective bargaining.

5.3 Control of strike procedures: internal limits and unfair strikes

Pursuant to article 7.2 DLRT, certain types of strike action are unfair. These include rotating strikes, strikes in strategic sectors and «work-to-rule» or Italian strikes. The provision does not mention intermittent strikes, so this method is not deemed abusive and is thus considered lawful. CCJ 11/1981 understood that in principle the abuse of rights doctrine had been correctly associated to the strike issue, because the right to strike «requires proportionality and mutual sacrifices, so when these requirements are not observed, the strikes may be considered abusive». The argument is very controversial, however abuse of rights is deemed to be present in strikes that «achieve the inevitable participation of non-striking workers, so that the concurrence of just a few extends the strike to all», or when the strike causes a multiplier effect to the unrest generated, «thus triggering the destruction of the company organization and its productive capacity only to be possibly overcome long after the strike has ended»; lastly, when the number of striking workers is formally and apparently reduced, thus reducing the number of people not entitled to wages, and real strikers pretend not to be on strike; «this feigning is contrary to the mutual duty of loyalty and honesty that remains notwithstanding the strike».

It is therefore about forms of expression linked to how the right is exercised and not to the content of the strike. The issue was raised in the Spanish doctrine with the Viking and Laval case, brought before the Court of Justice of the European Union. There has been a very critical reaction to this doctrinal approach that opposes strike action and economic freedoms.

In any case, this statutory statement on «unlawful or abusive acts» of the above strike types is not absolute, yet it creates a presumption that such forms of exercise are contrary to the principle of proportionality and of mutual sacrifices; however, this may be proved unfounded in each case, while the burden of proof is on the workers. The constitutional doctrine states that to determine that a strike is predatory, «damages to the company is not enough, it is necessary that damages should be serious and intentionally sought by the strikers beyond what is reasonably required by the activity itself and the requirements inherent to the pressure necessarily involved in the strike» (CCJ 72/1982, of December 2, and CCJ 41/1984 of 21 March).

As to the intermittent strike, CCJ 72/1982 of 2 December, it was included in this same doctrine when claiming the following: «when the strike exercised is not expressly included» among the strikes declared illegal or abusive «it must be presumed valid, while not excluding the possibility of it becoming abusive under certain circumstances», so in these cases the burden of evidence of its abusive nature is on the employer.

There is a form of strike, regulated in article 7. 1 DLRT that differs from the general predatory strike regime, whereby the workers occupy the workplace (sitdown strike). The CC has declared that the sit-down strike statutorily conceived as illegal referred to the «illegal entry into premises or an illegal refusal to leave in response to a lawful order to leave», when the occupation threatens the indemnity of persons and safety of property; however, in no way can it be considered

illegal to «simply stay in the workplace» or the peaceful occupation of premises, while it is not possible to invoke article 7.1 DLRT «to prevent the workers' right of assembly required to implement the right to strike and to settle the conflict». The occupation is thus considered illegal when there is «obvious danger of breaching other rights or of creating disturbances», in which case «the prohibition of remaining in the premises may be ordered as a control measure», which refers to the lockout option as interpreted in CCJ 11/1981.

This same technique of the unlawful strike presumption applies to those strikes called without meeting the formal requirements laid down in DLRT, strikes with an irregular exercise procedure referred to in article 11 d) DLRT.

5.4 Balancing strike action with other constitutional right and interests: strike action in essential public services

The legal system applied to the right to strike in essential public services is based on article 28. 2 SC, which states that «[t]he law governing the exercise of this right shall establish the safeguards necessary to ensure the maintenance of essential public services». This precept means that a certain limit is imposed on the right when it is exercised in a particular sphere, i.e. essential public services. In this case, the constitutional right to strike «gives way» when the services affected by the strike are received by the entire community. If this were not so, «it would result in a more detrimental situation than that which would affect the strikers if their claims were not met or their aims not satisfied». In other words, «the strike cannot impose the sacrifice of the interests of those for whom the essential services are destined» because «the right of the community to benefit from these vital services has priority over the right to strike» (CCJ 11/1981). Hence CCJ 11/1981 states that «paragraph 2 of article 10 DLRT, which gives the government authority the power to enact the necessary measures to maintain essential community services, is not unconstitutional, as the exercise of this power is subject to the jurisdiction of the courts and of the «amparo» action before this Court». Indeed, in the opinion of the CC the establishment of such measures cannot be left to the «discretion of the strikers» as a «sole rule», «as it is hard for those involved to be both judge and judged» (CCJ 11/1981). And so the CC, in accepting a technique to guarantee the maintenance of essential services, validated a political option inherited from the Spanish political transition, whereby the governing authorities (and the executive power insofar as government political authorities) are conferred powers to decide which sectors must be regarded as essential services and the imposition of a minimum service in the event of strike action.

In summary, therefore, one might describe the current strike system regarding essential services as a regulation focused on government bodies – being «politically responsible, either directly or indirectly, before the general public (CCJ 296/2006) –, therefore having a strong public component.

The authorities, by virtue of the powers conferred to them by article 10.2 DLRT, manage the conflict as regards essential services, and may impose restrictive

terms on the exercise of the right to strike for workers and civil servants and their representative organizations. The development of regulatory instruments on the right to strike within the framework of collective autonomy is something ignored by Spanish law, focusing exclusively on the intervention of the public authority without any participation from unions in the auto regulation of the right of strike in this sector.

It is true however that this government power is subject to supervision by the courts, and that this jurisprudential review and assessment of the constitutional correctness of the public authority's acts should be emphasized, as it means the recognition of the creative and shaping role of the courts in the design of the prescriptive framework and the limits to which governmental interventions are secured, so that the jurisprudence, particularly that of the CC by means of the «amparo» action, shall be the one to define the discipline of strikes affecting essential services. However, when assessing this issue as a whole, and without there being a law developing article 28.2 SC directly inspired by constitutional values, the most striking finding is the active intervention by public authorities in the restriction of the right to strike, without allowing or encouraging union participation in self-regulation of the conflict, against which a subsequent judicial review is irrelevant to preserve the right to strike unfairly sacrificed in favour of other rights at stake.

Aware of this, the CC itself calls on lawmakers – whose failure to implement appropriate legislation on article 28.2 SC it criticises – to establish «appropriate procedures», and «means of bringing the corresponding decisions to impose essential services under direct legal control» (CCJ 123/1990). This is because court decisions to set aside government decisions to impose essential services, after the strike, do not repair the damages that said decisions could have caused. In fact, the government's ignorance or failure to comply with the limits imposed on the exercise of its powers simply results in the invalidation of the order to impose essential services and, as applicable, the consequences of said order – mainly, penalties arising from declaring the strike illegal. This, however, is not grounds for granting compensation as a means of re-establishing the integrity of the right unfairly violated.

Summarized below are the most notable features of the regulation of such strikes, both in regard to defining the concept of essential service, and the minimum activity to be maintained during the strike, i.e. the minimum service.

5.4.1 The essential public service notion

The constitutional interpretation of what is meant by essential services in the context of a strike, especially in CCJ 26/1981 of 17 July, led to a broader notion than «urgent or indispensable services», and referred to activities that sought the satisfaction of fundamental rights, civil liberties and constitutionally protected property, to be defined in each individual case. A broad, bottom-line or results-based definition of essential services was therefore adopted. According to this, essential services are those aimed at satisfying the fundamental rights,

public liberties and constitutionally protected assets of people, this being the interpretation that «best satisfies the principles inspired by the Constitution» (CCJ 26/1981).

Thus, a truly *general clause* of the essentiality of the service as the limit to the right to strike was created, which prevented the *a priori* definition of the activities involved (CCJ 51/1986 y 53/1986 of 24 of April and 5 of May, respectively). The CC provided a flexible application of the notion of essential service to be adapted depending on certain parameters to the specific circumstances of the case at hand. In these services deemed essential the governmental authority could order the maintenance of a minimum activity, the so-called minimum service. The extent and intensity of this minimum service must be directly related to the conflict it is regulating, which sets the exercise of the fundamental right to strike against other fundamental rights protected in the Constitution, so the minimum service must solve this conflict of rights through a proper combination of them, or by a balanced limitation of the fundamental rights at stake. This constitutional doctrine deals with two elements of undoubted importance when imposing a minimum service: the decisive influence of the intended result of the activity in determining the essentiality of the service and, simultaneously, the degree of impact of the strike on fundamental rights and civil liberties affected, which requires the analysis of the circumstances surrounding the strike as defining elements of the above criteria.

The general clause technique to determine the essentiality of the service has been applied in practice, allowing a number of sectors to be defined as essential to progressively build up in order to limit the right to strike within the sector. The Constitutional Court's most recent doctrine has reacted against this expansive trend when noting that «*a priori*, no productive activity can be regarded in itself as an essential service», and to consider a service essential «from an angle other than that of the right to strike» (such as has happened with public broadcasting) cannot replace the classification which, according to constitutional parameters, defines an activity or service as essential «for the purpose of strike action». CCJ 193/2006, of 19 June states that «The classification of the service is not enough to justify the restrictive measures and, where appropriate, such measures must adjust to the circumstances which should not only be serious, but extremely serious».

5.4.2 Formal and material guarantees surrounding the act of imposing a minimum service

As mentioned, once a service has been defined as essential, it is the public authority that must impose a minimum service to maintain activity during the strike. The constitutional case-law has developed a series of requirements to be met by the government act in order to respect the proper exercise of the right to strike. Such requirements may be of a material or formal nature. Indeed, as noted above, the classification of a service as essential does not usually foreshadow what may be the scope of the minimum service, and this depends

on the specific assessment of the circumstances surrounding the strike called. In the words of the Supreme Court (SCJ 3 February 1998), the configuration of a service as essential «implies only a rational basis for the possible establishment of minimum services, but this necessary condition is not enough, far from it, since one cannot disregard the specific circumstances of the strike. The inevitable conclusion is that the minimum services should be based on the specific circumstances of the strike». Accordingly, the following issues must be considered: the duration of the strike called; the amount of staff involved in the strike (personal scope); the geographical area affected; the possibility of substituting the essential service affected with other unaffected services; the incisiveness of the strike on the fundamental rights concerned, taking into account «when the rights are exercised» (CCJ 183/2006 and 193/2006, both June 19). Two basic principles may be used as interpretative criteria in the final assessment (CCJ 26/1981, of July 17): the principle of proportionality of the sacrifices and the principle of «least possible restriction» of the right to strike (*favor libertatis*); the latter principle complements the first principle in cases where the fundamental rights in conflict are balanced. This basically means that the government, in establishing essential services, must choose, whenever possible, measures guaranteeing the rights and assets involved – essential public services – that least restrict individual liberty, i.e., the right to strike.

These are, in short, the material guarantees for the imposition of a minimum service, to be applied by the governing authority and based on specific grounds for such act in keeping with the constitutional provisions. The importance of the specific circumstances of the strike and rights becoming affected by it is the core of these criteria.

As to the formal guarantees requisite in the imposition of a minimum service, these are summarized in the following notions: that the act is properly motivated and justified, on the one hand, and it is issued by an authority with Government responsibility and that it be an impartial public request.

Although it is obvious, the imposition of a minimum service act is a political responsibility «which should be applied by political channels and that should produce the necessary political effects» (26/1981, CCJ 17 of July). Therefore the competence for its application should belong to State bodies exercising Government powers directly or by delegation. This capacity pertains to the national Government (article 97 CE), and the delegates of the Government in the autonomous communities (CCJ 27/1989, of 3 of February) but also to the Councils of Government of the autonomous communities (CCJ 33/1981, of 5 November), even where there may be conflict in allocating powers in this area, which CCJ 233/1997, of 18 December seems to solve using as a criterion the competence – State or autonomic – on the public service concerned. The delegation of this competence is possible, but never to be effected by «cascading» through the administrative hierarchy or «sub-delegation». What is radically excluded is that the power to impose minimum services be exercised by «bodies of management and administration of the service where the strike develops» (CCJ)

53/1986, 5 may, CCJ 296/2006 of 11 October), since its decision cannot respond to the preservation of business interests, nor can the company perform that task (CCJ 233/1997, of 18 December, CCJ 193/2006, of June 19).

5.4.3 Jurisdictional control and excess authority in the establishment of minimum services

The judicial guarantee to the exercise of the right to strike in essential services is applied, by virtue of its own constitutional suggestion, whenever faced with a particular course of strike action, and always after the issuing of a Government act imposing a minimum of activity, which is what the magistrate controls. But this mechanism does not wholly prevent the governmental authority, in the event of new strike calls, from taking renewed action imposing minimum services that may be incorrect, thus violating the fundamental right, while the new control and subsequent declaration of invalidity will not prevent the particular strike from being quashed. This kind of vicious circle which allows repeated authoritarian practices that exceed their authority in determining minimum services has been sought to be addressed from a double angle: through precautionary measures and through compensation.

6. Residual nature of other techniques: compulsory arbitration ending the strike

Although designed as a general measure, not limited to strike action in public services, article 10.1 DLRT establishes that the government, on a proposal by the Ministry of Labour, «in consideration of the duration or consequences of the strike, the positions of the parties and the serious damage it could cause to national economy», may agree on mandatory arbitration. This is a strictly political measure not only recommended by the central government but also by the autonomous communities that have taken over competence for «implementing labour laws». It has been used in disputes of a certain duration and scope affecting, mainly, the transport and cleaning sector, and has therefore been used as an additional resource to complement the «generalised» resource of imposing essential services. The government's decision to make it compulsory to subject settlement of disputes arising from strike action by essential services to arbitration must be taken on the grounds specified by article 10.1 DLRT, indicate the specific terms subject to arbitration, and guarantee the impartiality of the arbitrators assigned to the case. These are the conditions under which the measure is valid. The government's decision to impose compulsory arbitration can be legally challenged if it lacks one or all of these requirements. The arbitrator's decision can likewise be challenged on the grounds established by the Labour Proceedings Law for challenging arbitral decisions. Both employers and workers must accept the decision when it is published, and the labour authorities can impose penalties for non-compliance. The strike must be called off. If it continues, it is considered an illegal strike.

7. The effects of strike action on industrial relations, on employment contracts, on corporate powers, and on social benefits

Exercise of the right to strike can be classified as legal or illegal, i.e. strike action not statutorily foreseen. The unlawfulness of a strike may only be decided by a judge, not by administrative authorities or of course by the employer's private authority. One must distinguish between those «normal» effects caused by exercising the right to strike and the effects of the «unlawful» or «illegal» strike. In particular, the restriction of the employer's powers during the strike is considered a consequence of the strike action and has entailed some amount of litigation. The effects of a lawful strike on individual employment relationships are summarized in three points: the strike may not lead to any kind of penalty by the employer as a reprisal, whereby any such punitive actions, including dismissal, are deemed null and void due to the violation of a fundamental right; exercising the right to strike suspends the employment contract and therefore the reciprocal obligations (work and salary); the strike puts the worker in a special situation regarding the social security system, whereby workers are unable to receive social benefits, especially unemployment benefits, while the strike lasts.

Besides these classical effects of the strike on individual employment relations, it is important to address the effects of the exercise of that right on the faculties and powers of the employer. Typically these limits refer to restrictions on the hiring of workers and, more broadly, to limitations on the employer's powers of direction and control, and result from the interplay between a transitional situation of irregular production and respect for the effectiveness of the strike action as a means of pressure not to be inhibited by corporate action. The first restriction common to many legal systems is the prohibition to replace striking workers by hiring other workers. The second issue stems from a jurisprudential doctrine later systematized by CCJ 123/1992 of 28 September, stating that during the strike situation the employer's management powers are paralyzed – or «anesthetized» as stated by the Court in a figurative sense – because it is an exceptional situation in the production process, so «the preeminence of the right to strike» has the effect of reducing the employer's rights, such as management powers, «which in normal situations may and should display their full potential». This means that the employer cannot resort to the functional mobility of workers to replace striking workers by the company's own non-striking staff, or even to the geographic mobility for the same reason, or, in short, any disposition of staff that results in a restriction or impediment to the effectiveness of the right to strike.

Regarding the effects of illegal strikes on individual employment relationships, it should be noted that regardless of this classification, workers participating in the same will be in the same situation as that analyzed in respect of wage deductions and suspension of the obligation to contribute. What distinguishes unlawful strikes at an individual level is that the employee is no longer protected against the employer, thus finding him or herself in a situation of

possible breach of contract, which may result in disciplinary measures applied by the employer, including dismissal of an employee who has participated in an illegal strike. The DLRT includes its own grounds for dismissal in article 33 of the same text, to which the still current article 16 of the same refers. This specific definition should be considered repealed from as far back as 1980. However, this does not prevent the actions of the irregular striker being placed within the generic formula of article 54.1 WS, requiring the verification of a serious and culpable breach on behalf of the worker. That means that not all strikers can be punished with dismissal, yet only those who, through their participation, have committed a serious and culpable violation of contractual good faith, something still known as «active participation» (according to a statutory formula that goes back to Franco) in an illegal strike.