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Gloss to the Decision of the European Court of Human Rights of May 15, 2018, Case Number 2451/16, Association of Academics v. Iceland, Hudoc.int Gloss of Approval

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Abstract: In the judgment of the ECtHR in the case of Association of Academics v. Iceland, the Court commented on two important issues concerning the broadly understood procedure for resolving collective disputes. Firstly, the Court pointed out that "found that the taking of industrial action should be accorded the status of an essential element of the Article 11 guarantee but it is clear that strike action is protected by Article 11 as it is considered to be a part of trade union activity". Secondly, it considered that the institution of mandatory arbitration could be a substitute for the right to strike, which was prohibited due to the need to protect the health of Icelandic citizens. In the context of the issues outlined in this way, the aim of the gloss is to verify the two theses mentioned above. First, the thesis was analyzed according to which the right to strike is not an essential element of freedom of association. For this reason, the jurisprudence of the Tribunal has been discussed against the background of ILO standards, taking into account the doctrine's views on the status of the right to strike in the system of human rights protection and its relationship with other irenic methods of dispute resolution. Secondly, the thesis of the ECtHR was verified, according to which the mandatory arbitration established by the Icelandic legislator in the circumstances presented in the facts of the case does not constitute a violation

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of the right to strike. As part of the second thesis, the concept of mandatory arbitration and its status in the jurisprudence of the Court, as well as ILO bodies and labor law doctrine were analyzed. Finally, the relationship between the right to strike and social arbitration was examined.

First Thesis:

"So far the Court has not found that the taking of industrial action should be accorded the status of an essential element of the Article 11 guarantee but it is clear that strike action is protected by Article 11 as it is considered to be a part of trade union activity"

Second Thesis:

"Before the domestic courts, it was not disputed between the parties that the restrictions on the member unions' strike actions and the imposition of compulsory arbitration constituted an interference with their right to freedom of association, nor was it disputed that the interference was prescribed by law. As to the aim of the interference, the Supreme Court concluded that the restrictions pursued the legitimate aim of being in the interest of public safety and for the protection of the rights of others. The Court sees no reason to disagree"

In December 2014, a collective dispute was initiated between individual trade unions, which are members of the Association of Academics trade unions, and the Icelandic state acting as the employer. The dispute concerned the content of a new collective bargaining agreement to replace the previous one, which was to expire on February 28, 2015. However, due to the fact that no agreement could be reached during the negotiations, most of the affiliated trade unions in the Association of Academics decided to start strike action. Despite the start of negotiations and mediation, the first strikes were launched already in April 2015. Some of the trade unions decided to go on strikes indefinitely, while others launched strikes lasting four hours. The last of the affiliated trade unions decided to initiate an indefinite strike only on June 2, 2015. At the end of May 2015, a trade union representing the nursing profession, not affiliated to the Association

of Academics, joined the strikes. Until the date of the ban on strikes, unions exercised the right to strike from 11 to 67 days.

On June 13, 2015, the Parliament of Iceland passed Act No. 31/2015, which prohibited strikes and other collective actions for all members of the Association of Academics, regardless of whether they were on strike at the date of entry into force. The Act also provided that if no agreement was reached between the trade unions and the employers by 1 July 2015, the Supreme Court of Iceland would be obliged to appoint an Arbitration Tribunal whose decision on the resolution of the dispute would be binding on the parties on the basis of a collective agreement. Due to the lack of an agreement, the Court of Arbitration established by the Supreme Court of Iceland decided to extend the existing collective labor agreement with some amendments until August 31, 2017.

Proceedings before the District Court commenced in June 2015. The applicant trade union association requested the Court to declare Act No. 31/2015 incompatible with the Constitution of Iceland and Article 11 sec. 1 of the European Convention on Human Rights[1], both in terms of the prohibition of a strike and the settlement of a dispute by the Arbitration Court. The court of first instance rejected the Association of Academics' complaint, stating that although the right to strike is protected by the ECHR, it is subject to certain restrictions. The statutory ban on strikes, in the opinion of the Court, was established to protect the public interest, which was demonstrated in the justification to the act, according to which ongoing strikes threatened the functioning of state health care institutions, and strike demands could not be implemented without undermining the economic stability of the state. According to the Court of First Instance, some of the strikes lasted 67 days until their ban came into force, and there was no prospect of their end after that time. And the establishment of mandatory arbitration in lieu of a strike did not, in the Court's view, constitute a violation of the right to strike and freedom of association,

[1] Council of Europe, European Convention on Human Rights and Fundamental Freedoms, Rome, 4 November 1950 as amended by Protocols Nos. 11 and 14 supplemented by Protocols Nos. 1, 4, 6, 7, 12, 13 and 16, ETS no. 5: ETS no. 009, 4: ETS no. 046, 6: ETS no. 114, 7: ETS no. 117, 12: ETS no. 177.

and moreover was in line with the precedent established by the Supreme Court of Iceland.

In August, the case went to the Supreme Court of Iceland. There, the position of the District Court was mostly upheld. The Supreme Court additionally indicated that the main argument for prohibiting the right to strike was the impact of strikes on lowering the level of health protection below an acceptable level, which in turn led to a violation of the public interest and the constitutional rights of Icelandic citizens. The necessity to establish a ban on strikes resulted from the fact that on the date of entry into force of the Act prohibiting strikes and establishing mandatory arbitration, indefinite strikes were still in progress. Thus, they posed a threat to the public interest and there was no prospect of an agreement. As emphasized by the Supreme Court of Iceland, trade unions had unfettered freedom to organize their activities for some time by organizing strikes. Following the latest ruling, the trade union association decided on 21 December 2015 to lodge a complaint with the European Court of Human Rights.

In the application, the trade union association sought the Court's recognition that, by enacting Act no. 31/2015, prohibiting strike action and imposing mandatory arbitration on trade unions, the Government had made illusory the applicant's right to protection of trade union interests and had disproportionately and unjustifiably restricted the rights and freedoms under Section 11 of the Convention. Alternatively, the application alleged that the Government of Iceland had restricted the rights and freedoms under Article 11 of the Convention of those member unions which were not engaged in collective action at the time. Furthermore, the applicant submitted that the Supreme Court, in upholding the law at issue, had failed to examine the case in accordance with the Court's case-law.

At the beginning of its argumentation, the European Court of Human Rights indicated the scope of protection of freedom of association specified in Art. 11 sec. 1 ECHR. According to the Tribunal, its essence boils down to, on the one hand, the establishment of sufficient measures in a given legal order, thanks to which it is possible to ensure this freedom, and, on the other hand, the special protection of "essential element" of freedom of association, without which this freedom could not be exercised. When enumerating these elements as an example, the Court

pointed out that the right to strike has not yet been recognized as one of them. However, "it is clear that strike action is protected by Article 11 as it is considered to be a part of trade union activity". However, the fact that the applicant's right to strike did not bring the desired effect does not mean that its implementation was illusory. In the second part of the judgment, the Tribunal decided, following the Supreme Court of Iceland, that if, during the ongoing strike, there is no prospect of the implementation of the strike demands and, additionally, the strike is a threat to the values protected in a democratic society, it is necessary, within the meaning of Art. 11 sec. 2 of the ECHR to prohibit it and oblige the parties to submit to arbitration. According to the Tribunal, such action by the legislator does not constitute a violation of the content of the freedom of association expressed in Art. 11 sec. 1 ECHR. As indicated by the Tribunal, the content of the right to strike does not include the right to convince the employer, just as the right to collective bargaining does not include the right to conclude a collective agreement. In accordance with this thesis, the Tribunal considered the complaint to be manifestly unfounded and rejected it.

In the context of the thesis of the commented decision, two main problems should be pointed out on which the Tribunal focused and which will be the subject of the commentary. First, the Court addressed the status of the right to strike under Art. 11 sec. 1 of the Convention, denying this right the status of an essential element of freedom of association. The second issue dealt with by the Court was the decision that the establishment of mandatory arbitration in place of a prohibited strike, in certain circumstances, did not constitute a violation of that right or freedom of association.

According to Art. 11 sec. 1 of the ECHR, everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and join trade unions for the protection of his or her interests. This provision, similarly to Art. 3 of ILO Convention No. 87[2], does not explicitly mention the right to strike as an object of protection. This right, similarly to the ILO system, was interpreted from the freedom of association through a creative interpretation of the Tribunal, which has been dealing with the issue of the right to strike for at least 50 years.

[2] International Labour Organization (ILO), Freedom of Association and Protection of the Right to Organise Convention, San Francisco, 9 July 1948, C87.

Its jurisprudence was not and still is not sufficiently clear, especially in terms of determining the nature and status of this right in terms of freedom of association. Not granting the right to strike directly, however, is not a rule in the content of international conventions concerning the protection of human rights. This law was literally recognized by, among others, in art. 8 sec. 1 of the International Covenant on Economic, Social and Cultural Rights [3], article 6 sec. 4 of the European Social Charter [4], whether in art. 28 of the Charter of Fundamental Rights [5].

It followed from the first judgments of the Court concerning the right to strike that the Convention, in accordance with its literal wording in Art. 11 sec. 1, only guarantees the right to protection of employees' interests, which means that it grants individual employees the right to have their trade union heard by the employer[6]. Within such a general wording of this right, the national legislator could freely determine what measures are sufficient to implement it. In particular, the competing right to mandatory collective bargaining and the right to strike were cited as the most important examples in the jurisprudence of the Court. In the judgment of 6 February 1976 in the case of Schmidt and Dahlström v. Sweden [7], The Court pointed out that one of the most important means of protecting employees' interests may be the right to strike, but it is not the only one. However, due to the fact that this right is not explicitly mentioned in Art. 11 sec. 1 of the ECHR, it may be subject to further restrictions under national law. Similarly in Wilson, National Union of Journalists and Others v. Great Britain [8] The Court has defined the right to strike as the most important means of protecting employees' interests, which may constitute an alternative form of implementing Art. 11 ECHR, also in the absence of the right

3 UN General Assembly, International Covenant on Economic, Social and Cultural Rights, New York, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3.

4 Council of Europe, European Social Charter, Turin, 18 October 1961 ETS No 35.

5 EU (2000) Charter of Fundamental Rights of the European Union, 2000/C 364/01, 7 December 2000.

6 ECtHR Judgement of 27 October 1975, Case National Union of Belgian Police, application no. 4464/70, hudoc.int.

7 ECtHR Judgement of 6 February 1976, Case Schmidt i Dahlström v. Sweden, application no. 5589/72, hudoc.int.

8 ECtHR Judgement of 2 July 2002, Case Wilson, National Union of Journalists and Others v. United Kingdom, application no. 30668/96, hudoc.int.

to obligatory negotiations. Then, in a different case of 10.01.2002, UNISON v. Great Britain[9], which directly concerned the prohibition of the right to strike, the Court confirmed its status as an alternative to other measures, however, given the importance of strikes, it also considered that their prohibition could constitute a violation of Art. 11 sec. 1 of the ECHR, and therefore should be assessed under Art. 11 sec. 2 of the Convention.

Important for the determination of the status of the right to strike in Art. 11 sec. 1 of the Convention were two judgments[10]. The first concerned the case of November 12, 2008, Demir and Baykara v. Turkey [11], which directly related to the right to collective bargaining. However, this ruling was crucial to the right to strike for at least two reasons. Firstly, by synthesizing the existing jurisprudence, the Tribunal stated that the essential elements of the freedom of association include: the right to establish and join trade unions, the prohibition of concluding agreements between an employer and a trade union concerning the employment of trade unionists only, and the right of a trade union to attempt to convince the employer to hear what the union has to say on behalf of its members. In the context of the last-mentioned right, the Court considered for the first time that the right to collective bargaining should be singled out *expressis verbis* as the fourth essential element of freedom of association. Secondly, the Tribunal, using a dynamic interpretation of Art. 11 sec. 1 of the ECHR, made it possible to use it to strengthen the right to strike in its subsequent jurisprudence. The consequence of the judgment in the case of Demir and Baykara v. Turkey was the judgment of November 6, 2009 in the case of Enerji Yapi-Yol Sen v. Turkey [12], which already concerned directly the right to strike. The significance of this judgment lies in the fact that for the first time the Tribunal did not define the strike merely as one

9 ECtHR Judgement of 10 January 2002, Case UNISON v. United Kingdom, application no. 53374/99, hudoc.int.

10 Piotr Grzebyk, *Od rządów siły do rządów prawa. Polski model prawa do strajku na tle standardów unijnego i międzynarodowego prawa pracy* (Warsaw: Wydawnictwo naukowe SCHOLAR, 2019), 100 et seq.

11 ECtHR Judgement of 12 November 2008, Case Demir and Baykara v. Turkey, application no. 34503/97, hudoc.int.

12 ECtHR Judgement of 6 November 2009, Case Enerji Yapi-Yol Sen v. Turkey, application no. 68959/01, hudoc.int.

of the measures implementing the right to protect workers' interests. Instead, referring to ILO and ESC standards, it considered them to be an integral part of freedom of association under Art. 11 sec. 1 ECHR. Thus, any interference with the right to strike should meet the conditions set out in Art. 11 sec. 2 ECHR[13].

However, the Demir and Baykara v. Turkey ruling did not resolve the question of whether a strike, like negotiations, is an essential element of freedom of association. Including a given right in this category of elements guarantees the broadest protection, because without them it is impossible to implement the provisions of Art. 11 ECHR. On the other hand, as regards the remaining elements, it is up to the national legislator to choose between them such measures that, in general terms, can implement the freedom of association[14].

This doubt has not been resolved by the subsequent jurisprudence of the Court. In the case of Hrvatski liječnički sindikat v. Croatia [15], The Court found that limiting the right to strike for a period of more than 3 years constituted a violation of Art. 11 ECHR. Thus, the Court confirmed that the right to strike, as the most powerful means of protecting employees' interests, is justified by the content of the freedom of association, and its disproportionate limitation constitutes in itself a violation of Art. 11 sec. 1 ECHR. Particularly noteworthy in the context of the aforementioned judgment is the dissenting opinion of Judge Pinto de Albuquerque, who, referring to the judgment of Demir and Baykara, in which the Tribunal mentioned, among the essential elements of the freedom of association, i.a. "the right for a trade union to seek to persuade the employer to hear what it has to say on behalf of its members", pointed out that this wording meant the right to strike. In addition, he argued, since the right to take collective action is the core of the freedom of association, the right to strike is a central element of this core, and therefore should have the status

13 Paweł Nowik, "European Collective Labor Law," in *Międzynarodowe Publiczne Prawo Pracy*, ed. Krzysztof Baran (Warsaw: Wolters Kluwer, 2020), 1025.

14 Marek Nowicki, "Commentary on the Convention for the Protection of Human Rights and Fundamental Freedoms," in *Wokół Konwencji Europejskiej. Komentarz do Europejskiej Konwencji Praw Człowieka*, ed. Marek Nowicki (Warsaw: Wolters Kluwer, 2021), 1015–1016.

15 ECtHR Judgement of 27 November 2014, Case Hrvatski liječnički sindikat v. Croatia, application no. 36701/09, hudoc.int.

of an essential element of the freedom of association referred to in Art. 11 sec. 1 ECHR.

The Court took a completely different tone in the National Union of Rail, Maritime and Transport Workers v. Great Britain case [16]. In this ruling, it was recognized that the secondary strike action is not fundamental to the content of the freedom of association, but only ancillary. This means that this type of strike can be prohibited, which does not violate Art. 11 ECHR. Also in this judgment, the dissenting opinion of the Polish judge K. Wojtyczek deserves attention, who criticized the use of dynamic interpretation, accusing it of excessive extension of the competences of the ECtHR. The Polish judge also pointed out that the right to strike is not indisputable under international human rights law. In addition, he emphasized that raising the standards of protection of the right to strike may be associated with excessive narrowing of the implementation of the rights and interests of other people.

In the commented decision, as for example on May 3, 2016, in the case of Unite the union v. Great Britain [17], The Tribunal, listing the examples of essential elements of the freedom of association consistently, not only omitted the right to strike, but also confirmed that the Tribunal had not granted it this status so far. When listing the essential elements of freedom of association, he once again used the general phrase "the right for a trade union to seek to persuade the employer to hear what it has to say on behalf of its members". The content of the commented decision seems to confirm the thesis about the ambiguous position of the right to strike among the elements of freedom of association. On the one hand, this right has not yet been recognized as an essential element of freedom of association, on the other hand, it has been stated that a strike is protected by Art. 11, since it is considered part of trade union activities. On the other hand, as it results from previous judgments, its total prohibition or suspension for a significant period constitutes a disproportionate and unacceptable violation of Article 3 11 of the Convention.

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16 ECtHR Judgement of 8 April 2014, Case National Union of Rail, Maritime and Transport Workers v.United Kingdom, application no. 31045/10, hudoc.int.

17 ECtHR Judgement of 3 May 2016, Case Unite the union v. United Kingdom, application no. 65397/13, hudoc.int.

While it is not clear what powers lie behind the enigmatic "right to compel the employer to hear what the union has to say on behalf of its members," it must be recognized, contrary to the dissenting opinion of Judge Pinto de Albuquerque, that it is not obvious that there is mainly the right to strike. The content of the said right to induce the employer therefore remains opaque. This is especially due to the fact that since 2008 it does not include the right to collective bargaining, which for a longer period was mentioned next to the strike as an important means of protecting employee interests and which in the EKS system is considered a source of the right to strike[18].

The jurisprudence of the Tribunal also does not allow to determine the position of the strike in the procedure of resolving collective disputes. This is an obvious conclusion. The Court must take into account the diversity of legal traditions and cultures of national legislators that are Parties to the Convention. However, the separation of the right to collective bargaining as an essential element of freedom of association and the thesis according to which a total ban on strikes or its long-term limitation would constitute a violation of Art. 11 sec. 1 of the ECHR, allow us to conclude that both of these rights should be present within the framework of a given national legislation, although this right to strike can and should be subject to greater restrictions, however, applying to Art. 11 sec. 2 ECHR. It seems, therefore, that the Court sufficiently protects the right to strike, which is of a special nature related to its negative impact on the interests, rights and freedoms of others, as well as on the public interest. In axiological and ethical terms, the struggle of social partners, manifested by a strike, can only be undertaken when the postulates of social justice cannot be restored by peaceful means. Although it is not possible to organize collective labor relations in such a way as to exclude the use of strikes, actions should be taken to limit them to the necessary minimum[19]. Negotiations, mediation and arbitration are non-irreactive methods of resolving collective disputes, the aim of which is to prevent, limit or mitigate the effects of

18 Nowik, "European Collective Labor Law," 1028–1029.

19 Karol Wojtyła, *Katolicka etyka społeczna* (Lublin: Wydawnictwo św. Stanisława BM Krakau, 2018), 130–134.

strikes[20]. For this reason, they, or at least the right to bargain in particular, deserve a special, higher scope of protection expressed by granting it the status of an essential element of the freedom of association.

Comparing the human rights protection systems of the ECHR and the ILO, the right to strike has a stronger status under the latter. This is primarily due to the statements of the ILO Committee on Freedom of Association, according to which this right is an integral and basic means of employees and their organizations to defend their interests[21]. Moreover, the ILO organs indicated that the right to strike is fundamental and fundamental, however, due to its negative consequences, it cannot be an end in itself and must be subject to certain restrictions, and in specific situations it may be prohibited. The ILO Committee on Freedom of Association includes such situations, as does the Court in this decision, as a threat to health protection[22].

In the commented decision, the ECtHR approved the position of the Icelandic legislator and the Icelandic courts, according to which in the event of a deadlock during the strike, and at the same time a threat to the health of Icelandic residents posed by a prolonged strike, it is permissible to prohibit it and submit the matter to mandatory social arbitration. This thesis raises some doubts regarding, first of all, the very concept of mandatory arbitration and the permissibility of substituting a strike with it, or the assessment of the conditions that should be met for such a substitution to take place.

The concept of mandatory arbitration causes controversy not only in the doctrine of law[23], but also among human rights protection authorities. Traditional arbitration is one of the non-irenic dispute resolution methods. Its most important constitutive features, in the traditional approach, include the private nature of the arbitration body and

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20 Walery Masewicz, *Strajk. Studium prawno-socjologiczne* (Warsaw: Instytut wydawniczy związków zawodowych, 1986), 98–100.

21 Grzebyk, *Od rządów siły do rządów prawa*, 55–57.

22 International Labour Organization, *Freedom of Association: digest of decisions and principles of Freedom of Association Committee of the Governing Body of the ILO* (Geneva: International Labour Office, 2013), 581–582.

23 Aleksandra Orzeł-Jakubowska, *Sądownictwo polubowne w świetle standardów konstytucyjnych* (Warsaw: Wolters Kluwer, 2021), 27 et seq.

consensuality consisting, among others, of by granting the arbitrator, pursuant to declarations of will of the parties themselves, in principle, authoritative powers to resolve the dispute. The parties to arbitration should have a certain degree of autonomy not only in determining who the arbitrator will be, but also how and on what terms the arbitrator will resolve the dispute. Within the concept of arbitration outlined in this way, the institution of "obligatory arbitration" does not fit. From this perspective, as noted by A. Orzeł-Jakubowska, the expression itself is an oxymoron[24]. However, in this form, this phenomenon is known not only in national law, but also in the jurisprudence of the ECtHR and in the ILO labor rights protection system.

Due to the diversity of traditions and legal cultures of national legislators, mandatory arbitration may take various forms[25]. First of all, the obligatory feature may result from two sources. Firstly, from the content of the provisions of the adhesion agreement, which are particularly popular in the United States. Secondly, the law. In the latter approach, mandatory arbitration is carried out by arbitrators appointed or proposed by the state or related to the common judiciary. The use of the term "arbitration" in this context is justified only by the fact that the procedure itself is informal and may draw some elements from the institution of voluntary arbitration[26], for example granting a certain degree of autonomy to the parties to a dispute, e.g. for the selection of members of the arbitration panel. The doctrine even indicates that this form of arbitration, in the ECHR system, is just another name for court proceedings[27].

Although mandatory arbitration is highly controversial[28], especially due to the possible limitation of the right to a court and a fair trial, or

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24 Orzeł-Jakubowska, *Sądownictwo polubowne w świetle standardów konstytucyjnych,* 29–55.

25 Walery Masewicz, *Strajk. Studium prawno-socjologiczne* (Warsaw: Instytut wydawniczy związków zawodowych, 1986), 116–121.

26 Jean Sternlight, "Creeping Mandatory Arbitration," *Stanford Law Review* 57, no. 5 (April 2005): 1647.

27 Martina Závodná, "The European Convention on Human Rights and Arbitration" (Bachelor's thesis, Masaryk University, 2014), 32.

28 Jean Sternlight, "Creeping Mandatory Arbitration," *Stanford Law Review* 57, no. 5 (April 2005): 1632–1638.

allegations according to which this form of arbitration is unfair[29], however, from the perspective of the ECtHR, it is not inconsistent with Art. 6 sec. 1 ECHR. Due to the fact that the parties have little freedom, whether in determining the subject matter of the case or choosing the legal system on the basis of which the dispute should be settled, or in determining procedural issues[30], the Tribunal emphasized that, similarly to proceedings before a common court, the mandatory arbitration procedure must meet the standards provided for in Art. 6 sec. 1 ECHR. In particular, the jurisprudence of the ECtHR emphasizes the need to guarantee the independence of arbitrators from the pressures of the executive and the parties themselves, as well as, as a rule[31], the transparency of the proceedings[32].

The most important doubt that exists in the doctrine in the context of the institution of obligatory arbitration is whether it can implement the postulates of justice. This doubt, however, arises on the basis of mandatory arbitration, the source of which are the provisions of the adhesion agreement, under which the stronger party to the legal relationship, using arbitration, deprives the weaker party of the protection of common courts. In the case of mandatory arbitration, the source of which is the Act, these doubts are not so strong. Firstly, the described form of arbitration, similarly to a court trial, can effectively serve to achieve a fair solution in the material sense. Secondly, in the context of procedural fairness, it is possible to establish such standards of mandatory arbitration that it arouses a sense of fair treatment, e.g. by giving the parties the opportunity to hear the parties, present their arguments, or at least guarantee them a balance in the selection of members of the arbitration body[33]. This fact is confirmed by the jurisprudence of the ECtHR itself, according to which

29 Sternlight, "Creeping Mandatory Arbitration," 1670 et seq.

30 ECtHR Judgement of 12 December 1983, Case Lars Bramelid I Anne Marie Malmstrom v. Sweden, application no. 8589/79, hudoc.int.

31 ECtHR Judgement of 7 March 1984, Case Sir William Lithgow and Others v. United Kingdom, application no. 9006/80, hudoc.int.

32 ECtHR Judgement of 21 October 1998, Case Norman Scarth v. United Kingdom, application no. 33745/96, hudoc.int.

33 Yuval Feldman, *The law of good people* (Cambridge: Cambridge University Press, 2008), 75–77.

Art. 6 sec. 1 ECHR[34]. Making the procedure less formal may have a positive impact on reaching a satisfactory solution for both parties to the dispute. The literature also emphasizes the function of justice in social and individual terms. Also in this respect, the institution of obligatory arbitration may, contrary to the court process, implement both of these aspects. In individual terms, the need to guarantee the parties a quick, cheap and easily accessible procedure is indicated[35]. These demands, in contrast to court proceedings, can be implemented by informalizing the arbitration procedure. The social aspect of justice, in turn, is achieved primarily through the implementation of the principle of legal certainty, as well as prevention and education of citizens. Therefore, it is crucial to guarantee a certain degree of openness of the proceedings in the framework of the mandatory arbitration procedure, including the need to publish its decisions[36]. The institution of mandatory arbitration has a certain potential that can positively influence the procedure of collective disputes. However, it is important to be aware of its limitations under collective labor law. This form of arbitration undermines the autonomy of social partners and freedom of association. Its use must therefore be limited to exceptional situations, as was the case in the present case.

The uniqueness of the commented decision, in the context of the already well-established view as to the possibility of applying mandatory arbitration, is that it has been recognized as an acceptable substitute for the right to strike, should it be prohibited. The Court's decision in this respect is in line with the statements of the ILO Committee on Freedom of Association. In the light of these views, mandatory arbitration may replace negotiations and other consensual-irenic methods of dispute resolution, and therefore strikes even more so. However, this substitution can only be made exceptionally, i.e. only when at least two conditions are met[37]. The first one mentioned by the ILO Committee on Freedom of As-

34 Jean Sternlight, "Creeping Mandatory Arbitration," *Stanford Law Review* 57, no. 5 (April 2005): 1671.

35 Sternlight, "Creeping Mandatory Arbitration," 1668.

36 Sternlight, "Creeping Mandatory Arbitration," 1672.

37 International Labour Organization, *Freedom of Association: digest of decisions and principles of Freedom of Association Committee of the Governing Body of the ILO* (Geneva: International Labour Office, 2013), 1003–1005.

sociation is the existence of a deadlock, i.e. a situation in which it is not possible to resolve the dispute by strike. The second premise, which must occur cumulatively, is a threat to the values protected in a democratic state, such as protection of citizens' health. The ILO Committee on Freedom of Association also commented directly on the relationship between the right to strike and mandatory arbitration, but these statements concerned arbitration as a substitute for the right to strike in a situation where it was ex ante limited or prohibited for a specific group of workers[38]. The Tribunal, on the other hand, ruled on the replacement of mandatory arbitration with an already ongoing strike, which was banned ex post. In the context of the ILO system, it should be emphasized that mandatory arbitration is only an exception to the rule, i.e. consensual-irenic methods of resolving collective disputes, including voluntary arbitration, which is referred to, inter alia, in point 6 of the ILO Recommendation No. 92 on voluntary conciliation and arbitration.

Also in the context of academic considerations on the relationship between the right to strike and mandatory social arbitration, there are discrepancies regarding the extent to which mandatory arbitration could replace a strike. On the one hand, it is indicated that it should be a substitute for the right to strike, only if its organization was not or ceased to be ethically justified. The lack of ethical justification for strikes concerns, in particular, some employees employed in services considered essential, e.g. employed in health care[39]. On the other hand, arbitration is considered a competitor to the right to strike. In this context, it is indicated that due to the development of irenic methods of resolving collective disputes, the strike, which causes a number of negative consequences, should be completely replaced, among others, by state arbitration[40][41]. Proponents of this view therefore contest the very legal admissibility of a strike

38 International Labour Organization, *Freedom of Association: digest of decisions and principles of Freedom of Association Committee of the Governing Body of the ILO* (Geneva: International Labour Office, 2013), 564–569.

39 Antoni Szymański and Ludwik Górski, *Kodeks społeczny: zarys katolickiej syntezy społecznej* (Lublin: Towarzystwo Wiedzy Chrześcijańskiej, 1934), 86.

40 Czesław Strzeszewski, *Praca ludzka* (Lublin: Towarzystwo Naukowe KUL, 1978), 247.

41 Arthur Fridolin Utz, "Is a right to strike a human right?," *Washington University Law Review* 65, no. 4 (1987): 755.

as a means of resolving disputes. Importantly, both of these institutions of collective labor law show some similarities in terms of their functions and possible place in the structure of the collective dispute resolution model. Obligatory arbitration, like a strike, may be a source of pressure on the parties to a collective dispute to resolve the dispute as quickly and consensually as possible, either by negotiation or mediation. Due to the fact that mandatory arbitration constitutes the legislator's interference in the autonomy of social partners, which is contrary to the content of freedom of association and the principle of subsidiarity, this form of arbitration should always be perceived – similarly to the strike – as the *ultima ratio*[42].

According to the thesis of the ECtHR, mandatory arbitration established instead of the right to strike, due to the impossibility of settling the dispute by means of it and the increasing threat to the protection of citizens' health, does not constitute a violation of Art. 11 sec. 1 ECHR. This thesis is consistent with the previous statements of the ILO Committee on Freedom of Association and part of the doctrine. It should be emphasized that the impasse reached in the ongoing dispute is not a sufficient reason for the establishment of mandatory arbitration in place of a strike. The Court, like the ILO's Committee on Freedom of Association, expressed the view that it was necessary for the strike to additionally threaten the values particularly protected in a democratic society. In addition, disregarding the dispute as to whether the obligatory feature excludes the described institution from the semantic scope of arbitration as such, it should be stated that the measure called "compulsory arbitration" may meet the demands of justice and, under certain conditions, positively influence the resolution of the dispute. However, due to the fact that the strike is a recognized means of resolving collective disputes in international human rights law, which, as the Court has emphasized, is "the most powerful means of protecting workers' interests" and is justified by the content of freedom of association, and therefore fits in with the idea of trade union autonomy and the principle of proportionality, should not be replaced by arbitration, but only substituted by it, should the organization of a strike turn out to be illegal. These arguments mean that the position of the Tribunal regarding the admissibility

[42] Karol Wojtyła, *Katolicka etyka społeczna* (Lublin: Wydawnictwo św. Stanisława BM Krakau, 2018), 143–144.

of exceptional substitution of a strike with mandatory arbitration deserves approval and is consistent with the views of the ILO.

In the commented decision, both theses of the Tribunal deserve approval and both are also in line with the views of the ILO, which, due to its narrow specialization in the protection of workers' rights, has unquestionable authority. The right to strike is a right protected under both the ECHR and the ILO Convention. The only difference between them comes down to the status of the right to strike, which according to the ILO Committee on Freedom of Association is a fundamental right. In the wording of the commented decision, the Tribunal once again decided not to use similar terms. However, this does not change the fact that due to the need to apply restrictions to the right to strike, especially due to its invasive nature, the level of protection provided by the Convention seems to be sufficient. It is also worth noting that the Tribunal appreciated collective bargaining, the function of which is, inter alia, to minimizing the risk of going on strike. The Court also remains in line with the views of the ILO regarding the exceptional admissibility of mandatory arbitration in lieu of a strike under strict conditions. Mandatory arbitration is not part of the content of freedom of association, but is a form of state intervention. For these reasons, its use can only be justified in a situation of a significant threat to the values essential in a democratic society, when the parties have used all means falling within the limits of freedom of association.

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