Research Proposal

The Rule of Law and State of National and/or International Emergency Caused By Strikes of Essential Employees

Submitted to: **The Minerva Center for the Study of the Rule of Law under Extreme Conditions**
Venue: **Extreme Conditions Caused by Socioeconomic Crises**
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Research Description

1. The Terrain

Strikes that cause or threaten to cause national emergency, and strikes by essential employees or those in essential services have always posed a challenge to the rule of law. This challenge stems from the tension between two rights that are expected to be secured by the state and through the legal system: (a) the right of workers, embedded in the power-based collective labor relations model, to bargain collectively and to exert pressure by directly inflicting pain and cost on the employer and quite often on the public and the government through strike or a threat of strike;[1] (b) the right of the public at large for security, safety, health and an uninterrupted flow of essential services. Furthermore, it has been argued that in extreme cases, strikes in essential services bestow unlimited power on unions, which may constitute a threat to democracy and interfere with the democratic process. It appears as though recent worldwide phenomena such as globalization,[2] privatization and the advance in technology have only exacerbated the sensitivity and intolerance of the public toward such strikes, on the one hand, and the challenges and difficulties in coping with extreme conditions caused by certain strikes or threats of strikes through the rule of law, on the other.

The three relevant international conventions – the International Labor Organization (ILO) Convention No. 87 of 1948, the ILO Convention No. 98 of 1949 and the United Nations International Covenant on Economic, Social and Cultural Rights of 1966, that are considered the sources of the right to organize and bargain collectively in

[1] Tania Novitz, *International and European Protection of the Right to Strike* (2003).
[2] Eric Neumayer and Indra De Soysa, *Globalization and the Right to Free Association and Collective Bargaining: An Empirical Analysis* (2005).

public international law[3] recognize the inherent normative dilemma associated with the right to bargain collectively, and the corollary right to strike[4] when it comes to essential service employees. It allows the states that are parties to the convention wide, albeit bounded, discretion to determine particular restrictions on the right of employees in essential services to organize, bargain collectively and strike. Section 9 of the ILO Convention No. 87 and section 5 (1) of the ILO Convention No. 98 authorize each state to use national law or regulation in order to determine the extent to which the rights bestowed under these conventions shall apply to the armed forces and the police. The United Nations International Covenant on Economic, Social and Cultural Rights offers two routes of action. Sections 8 (1) (a) and 8 (1) (c) authorize the state to enact restrictions by statute provided that they are necessary to defend the interests of national security or public order or for the protection of the rights and freedoms of others. Second, section 8 (2) enables restricting the rights of members of the armed forces or of the police or of the state administration to form unions, bargain collectively and strike.

In all legal systems that secure the right to form unions, organize and bargain collectively there is an ongoing search for an appropriate and well balanced public policy and for new and innovative ways to cope with the challenge of strikes in essential services. Frequently all three branches of government – the legislature, the executive and the courts – are involved in regulating and imposing restrictions on the right to strike of essential employees and in situations where strikes threaten or actually create national emergency.

In some instances the intervention is ex-ante or pre-dispute and carried out by legislation. The common example is when essential employees (e.g., policemen and firefighters in many states in the U.S.) are given the right to form unions, organize and bargain collectively but denied the right to strike.[5] In its more extreme version, the law identifies a particular service as essential (e.g., policeman, secret service

[3] Ruth Ben Israel, *International Labor Standards-The Case of the Freedom to Strike* (1988); Lance Compa, *Do International Freedom of Association Standards Apply to Public Sector labor Relations in the United States* (2012).

[4] Jane Hodges Aeberhard and Alberto Ordero De Dios, *ILO Principles of the Committee on freedom of Association Concerning Strikes* (1987).

[5] Thomas A. Kochan, David B. Lipsky, Mary Newhart and Alan Benson "The Long-Haul Effects of Interest Arbitration: The Case of New York State's Taylor Law 63 *Ind. & Lab. Rel. Rev*. 2010 565

employees and prison guards in Israel) and specifically prohibits its workforce to organize.[6]

In other instances the intervention is ad-hoc, i.e., during the dispute, and is usually carried out by the executive branch (e.g., National Emergency Procedure[7] and Presidential Seizure in the U.S.,[8] use of soldiers as strike replacements in the United States or the U.K.[9] and Back to Work Emergency Orders in Israel),[10] and/or the courts (e.g., injunctions against a particular strike based on proportionality in Germany and Israel).[11] Nonetheless, there have been well known instances, such as in Canada, where intervention in strikes that were deemed to create national emergencies took the form of ad-hoc legislation.[12]

The different models that are used for coping with strikes in essential services or with strikes that threaten to cause or create national emergencies tend to have a strong preference for voluntary, autonomous and consent-based regulation over mandatory, exogenous and decree-based regulation. Nonetheless, in practice, the latter, i.e., the rule of law and state imposed regulation, dominates the field. Generally speaking, the models themselves tend to have the following four basic components: (1) the definition of essential services or extreme conditions, including who is defining, how, and by which criteria; (2) the restrictions that are imposed on the right or liberty to unionize, to bargain collectively and to strike; (3) the benefits or privileges bestowed upon the essential service employees or under extreme conditions in lieu of the right to unionize, to bargain collectively and/or to strike; and (4) the menu of dispute resolution processes that is provided in order to assist negotiations, to act as strike substitutes and to assure finality. Not only are these four components not mutual exclusive, but they are highly interdependent and multifaceted.

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[6] Section 93 (b) of the Police Ordinance [New version] 1971; Section 129 (a) of the Prisons Ordinance [New version] 1971; Section 20 of the General Secret Service Law 2002.

[7] Jared Gross, Yet Another Reappraisal of the Taft Hartley Act Emergency Injunctions (2005).

[8] Maeva Marcus, *Truman and the Steel Seizure Case: The Limits of Presidential Power* (1977)

[9] "Strike Chaos at the Airports " *The Economist* 28.11.2011 http://www.economist.com/blogs/gulliver/2011/11/british-airports

10 Mordehai Mironi, "Back–to–Work Emergency Orders: Governments Intervention in Labor Disputes In Essential Services" 15 *Hebrew U. L. Rev.* (1986) 350

[11] Guy Davidov "The Proportionality Principle in Labor Law" 31 *Tel Aviv U. L. Rev.* (2008) 5.

[12] Gene Swimmer and Tim Bartkiw, "The Future Of Public Sector Collective bargaining in Canada"24 *J. of Lab. Res*. (2003) 579, 582; Harry Arthurs, "Public Interest Disputes in Canada: A Legislative Perspective" 17 *Buff. L. Rev*. 39 (1967); Donald D. Carter, Geoffry England, Brian Etherington and Gilles Trudeau, "Canada" in 5 *International Encyclopedia for Labor Law and Industrial relations*, Roger Blanpain ed., 296 (2001)

2. Israel as a Case in Point

Israeli society grappled with the challenge of strikes in essential services 41 years before statehood and has continued to actively struggle with it until now. Back in 1907,[13] Mr. Zeev Jabotinsky urged perceiving every strike as a strike against the public good and as a setback to the efforts to build the new nation. Hence, all strikes should be prohibited, and labor disputes should be resolved by compulsory arbitration. His plea sparked a heated political debate between the "right" who supported the idea and the "left" who vehemently opposed it. This old debate has colored all public discourse concerning strikes in essential services and compulsory arbitration ever since.

Over the years Israeli society has experienced a very rich, wide and varied spectrum of measures and initiatives concerning strikes in essential services.

Among the most important milestones are the Ottoman Law of Strikes 1909,[14] the London Agreement of 1934 concerning compulsory arbitration signed by David Ben Gurion and Zeev Jabotinsky,[15]compulsory arbitration under British Mandate during the years 1942-1948, the employment of army personnel as strike replacements in the air traffic controllers strike of 1960, the growing use of Back to Work Emergency Orders that reached its peak during 1975-1983,[16] the over forty abortive attempts by the government and parliament members to pass a no-strike compulsory arbitration bill for essential employees and the ensuing bitter and highly emotional debates between right and leftwing parties,[17] the public sector strike legislation of 1972 and 1976, the establishment of the Institute of Voluntary Arbitration in the Public Service in 1977,[18] the legislation denying policeman, secret service employees and prison guards the right to organize,[19] the ten year no-strike and arbitration agreement signed in 2000 following the nationwide doctors strike[20] and mediation, the growing

[13] Zeev Jabotinsky, *On the Way to Becoming a State* (1953).
[14] Israel Bar Shira, *Labor Law and Workers in the Law of Palestine* (1929).
[15] Joseph Goldstein and Jacob Shavit, *No Compromise* (1979).
16Mordehai Mironi, "Back–to–Work Emergency Orders: Governments Intervention in Labor Disputes In Essential Services" 15 *Hebrew U. L. Rev.* (1986) 350
Yearbook on Lab. L. (1991) 127
[17]Mordehai Mironi "Compulsory Arbitration – Eighty Years of Debate (part 2)" 2
[18]Mordehai Mironi, *The Arbitration of Labor Disputes – A Critical Study of the Institute of Voluntary Arbitration in the Public Service* (1988).

[19]Section 93 (b) of the Police Ordinance [New version] 1971; Section 129 (a) of the Prisons Ordinance [New version] 1971; Section 20 of the General Secret Service Law 2002.
[20]Mordehai (Moti) Mironi, "Experimenting with ADR as a Means for Peaceful Resolution of Interest Labor Disputes in Public Health Care – A Case Study" 71 L. and Contemp. Problems (2011) 201

contribution of the National Labor Court to the regulation of strike activities in essential services through the proportionality test,[21] the involvement of the High Court of Justice in the state's barristers and the medical interns strikes following public petitions submitted against the Prime Minister, and the recent government's initiatives to enact a compulsory arbitration law that will deny employees in the Foreign Ministry, healthcare, electric power supply, seaports, airports, and train services the right to strike and subject their disputes to institutional quasi-judicial arbitration.

2. Goals and Objectives

The current public debate over the government initiative and the continuing dissatisfaction and concern about the lack of systemic thinking and coherent policy for coping with strikes in essential services are the impetus for the suggested research project. It aims at getting deeper insight into and international perspective of the broad subject of strikes in essential services, analyzing the various aspects of legal regulation and assessing their efficacy.

The more specific objectives are as follows:

1. To highlight and analyze the normative and labor relations dilemmas that come into play when applying the rule of law in extreme conditions caused by strike or threat of strike in essential services.
2. To examine the different approaches to the definition of extreme conditions caused by a strike which justify the suspension of basic rights, i.e. the right to collective bargaining and to strike, and the employment of emergency powers and measures.
3. To build a conceptual map for designing and analyzing models of regulating strikes in essential services and strikes that threaten or actually lead to emergency situations.
4. To develop a set of criteria that might be used in order to assess the performance of the rule of law measures under extreme conditions caused by strikes in essential services.
5. To describe and analyze the history of legal regulation of strikes in essential services in Israel.
6. To provide an analytical account of International Law's treatment of state intervention in the right to strike of essential service employees.

[21] Mordehai Mironi " Public Sector Strikes and the Courts: Old Problems and New Challenges" 14 *L. and Government* (2012) 271

7. To canvass, examine and conceptualize the different models that are employed around the world for coping with extreme conditions caused by strikes in essential services in the public and private sectors of the economy and to assess their efficacy, workability and success.
8. To build a rich worldwide database concerning the four components that are likely to be involved in regulating the right to strike of essential service employees through the rule of law i.e., (1) the unit (population of employees, type of service or situation); (2) the arsenal of restrictions imposed on the right to bargain collectively or to strike; (3) the benefits or privileges bestowed upon the essential service employees in lieu of the right to bargain collectively and to strike; and (4) the menu of dispute resolution processes that are provided by the law of different jurisdictions in order to enhance and facilitate negotiation, to act as strike substitutes and to assures finality.
9. To suggest a new model for legal regulation of those strikes that are perceived to threaten to cause or actually cause national emergency.

3. Methodology

The suggested research crosses disciplinary lines and employs two methodologies. Disciplinarily, it combines labor law, industrial and labor relations and ADR. Methodologically, it applies thematic and theoretical with "law in action" research.

The major part of the project will employ theoretical and legal history research methodology.

The chapters dealing with international law will canvass all of the decisions of the ILO Committee on the Freedom of Association and the Court of Justice of the European Union concerning the denial of the right to organize and the restrictions imposed by law of the right to strike of employees in essential services or are engaged in a national emergency strike.

The comparative law part will not be limited to the study of the written rules and to reading and analyzing published materials. These sources are of limited value if one wants to gain insights and deep understanding of the different models that are used around the world in context and to assess their actual efficacy, success advantages and shortcomings. Consequently, a series of in-depth semi-structured interviews with people who have had experience with strikes in essential services and national emergencies caused by strikes will be conducted. The idea is to

concentrate efforts on a selected group of countries and practically speaking to write a rich case study for each country. At this initial stage, in addition to Israel, the group is made up of the following countries: Canada, U.S., Germany, U.K., France, Italy, Brazil and Japan. The list of interviewees includes: (1) labor law and industrial and labor relations scholars; (2) politicians and public officials; (3) judges; (4) management and union leaders; and (5) third party neutrals such as mediators and arbitrators.