



Justifications of the right to strike: from the rule of force to the rule of law*

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1. Introduction

The existence of the right (freedom) to strike appears so self-evident that no specific justifications are required. It has been argued that the attitude of the state to strikes is a measure of progress (democracy). Totalitarian states forbade striking, while socialist states – forced by the circumstances – tolerated it, but generated no relevant legal regulations. In liberal democracies, strikes were considered a natural occurrence, and were eventually elevated to the status of a right or freedom, sometimes even with constitutional safeguards. It is however of pivotal importance to note that an accurate justification of the right to strike has a tremendous impact on the scope of this right, and thus determines the interpretation of laws regarding strikes. Demonstrating potential inconsistencies in the justification of the right to strike may effectively weaken the legal safeguards and be used as an instrument of limiting this freedom in the application of relevant laws.

The topic of strike has been elaborated in Polish and international legal literature.¹ Experts have discussed the notion, assessed national and international regulations, suggested amendments, and developed theoretical concepts. Research focused on the topic of strikes has generated a plethora of views. What more can we expect today from labour law theory, and is it possible to offer an insight

* This paper was presented at the LLRN Conference in Amsterdam, 25-27 June 2015. I am deeply indebted to prof. Teun Jaspers with whom I had discussed the draft paper. Any errors which remain are my sole responsibility. Part of the manuscript was published in Polish: P. GRZEBYK: Uzasadnienie istnienia prawa do strajku – od rządów siły do rządów prawa. *PiZS*, 6., (2015) 2–12.

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¹ See, for instance, B. HEPPLÉ – R. le ROUX – S. SCIARRA (eds.): *Laws Against Strikes. The South African Experience in an International and Comparative Perspective*. Franco Angeli, 2015.; B. WAAS (ed.): *The Right To Strike: A Comparative View*. Kluwer Law International, 2014.; T. NOVITZ: *International and European Protection of the Right to Strike*. Oxford University Press, 2003.; R. BEN ISRAEL: *International Labour Standards: The Case of Freedom to Strike*. Kluwer Law–Taxation Publishers, 1987.; O. KAHN-FREUND: *The Right to Strike; Its Scope and Limitations*. Council of Europe 1974.; M. KURZYNAGA: *Warunki legalności strajku*. Wolters Kluwer, 2011.; W. MASEWICZ: *Strajk – stadium prawno-socjologiczne*. Instytut Wydawniczy Związków Zawodowych, 1986.

that has as yet gone unnoticed? All human activity is subject to a simple rule, aptly characterized by Władysław Tatarkiewicz: 'It is an intrinsic quality of human matters that none of them have a single inevitable solution. There are several views, from which now one, now another prevails, and which may disappear for a while, but will sooner or later resurface.'² Consequently, in searching for new concepts and building new constructs and syntheses – which is the purpose of science – care must be taken not to disregard past scientific achievements.³ However, new social and economic factors – including in particular globalization⁴ with all its attendant effects, economic integration of Europe⁵, changing of the balance of 'power' within the ILO⁶ – pose new questions with regard to issues discussed in the past.⁷ Old concepts, which used to provide a fairly accurate explanation of the world, are not always fully capable of taking into account the complexities of contemporary realities and the pace of change in social relations and in the economy.⁸

2. Reasons for Striking

It is unclear when and where the idea of a strike was conceived.⁹ For the purposes of this paper, it is not really relevant. However, the underlying question is very relevant indeed: namely, why do workers go on strike? The list of potential reasons is very long; only some of them have been thoroughly investigated and accurately labelled. Not all reasons for striking are recognized under the law. It is important for the present discussion to determine why workers strike, and what they wish to achieve by doing so. In further analyses, this will prove helpful in determining which forms of strike have become incorporated into the regulatory framework, and why.

2.1. Why do workers go on strike?

The strike was one of the first elements of unionization. Strikes were organized with a view to forcing the employer to recognize workers' unions as a body that legitimately represents the workers as a

² W. TATARKIEWICZ: Okresy filozofii europejskiej in Droga do filozofii i inne rozprawy filozoficzne. In: W. TATARKIEWICZ (ed.): *Państwowe Wydawnictwo Naukowe*. 1977. 108.

³ F. ZOLL: Prawo pracy w biegu wieków. *Rocznik Prawniczy Wileński*, 4, (1930) 250, 250–251.

⁴ See, for instance, H. ARTHURS: Who's afraid of globalization? Reflections on the future of labour law. J. D. R. CRAIG – S. M. LYNK (eds.): *Globalization and the Future of Labour Law*. Cambridge University Press, 2006. 58 ff.

⁵ F. DORSSEMONT: Collective Action against Austerity Measure. In: N. BRUUN – K. LÖRCHER – I. SCHÖMANN (eds.): *The Economic and Financial Crisis and Collective Labour Law in Europe*. Oxford, Hart, 2014. 153 ff.; R. BLAINPAIN – A. M. ŚWIĄTKOWSKI (eds.): *The Laval and Viking Cases. Freedom of Services and Establishment v. Industrial Conflict in the European Union*. Kluwer Law International, 2009.; A. JESCHKE: *Der europäische Streik*. Nomos, 2006.

⁶ L. SWEPSTON: Crisis in ILO Supervisory System: Dispute over the Right to Strike. *IJCLLIR*, 31., (2013) 199 ff.; K. D. EWING: Myth and Reality of the Right to Strike as 'Fundamental Labour Right'. *IJCLLIR*, 31, (2013) 145 ff.

⁷ M. WEISS: Re-inventing Labour Law? In: G. DAVIDOV – B. LANGILLE (eds.): *The Idea of Labour Law*. Oxford University Press, 2011. 45 ff.

⁸ M. ŁOJEWSKA: *Filozofia nauki*. Centralny Ośrodek Metodyczny Studiów Nauk Politycznych, 1986. 64.

⁹ E. BERNSTEIN: *Strajk jego istota i oddziaływanie*. Spółka Wydawnicza J. Rowiński i A. Sobieszczański, 1907. 4.

group. They were the epitome of the freedom to unionize, at the time still unacknowledged and not labelled as such. It was noted at the time that ‘on many occasions, a strike is the only instrument that safeguards the existence of workers’ organizations, which are often necessary for the worker to discuss the conditions of work and stand on a more equal footing with the entrepreneur.’¹⁰

As the movement towards workers’ organization made progress, strikes became not so much an instrument of recognition of the working masses as having agency, but primarily an instrument of improving the quality of workers’ life. This was essentially achieved by working to: 1) secure the interests of the workers and 2) safeguard the rights granted to them in legal regulations and collective agreements.

With regard to the former, strikes were the most effective method of securing the economic interests of workers. They were usually staged for the express purpose of ensuring better working conditions,¹¹ yet other interests were considered potential grounds to call a strike too. For a long time, workers had no other means of pursuing their collective interests. They were also quick to note that without a strike (or even a threat of a strike) the employer was unlikely to even listen to their grievances and demands. The mere threat of a strike was often sufficient to force the employer to calculate whether ignoring the workers’ demand made economic sense.¹²

With regard to the latter, it has been argued that the state – including the authorities in charge of individual labour disputes which were often slow to respond or prejudiced against the workers – offered no effective instruments of enforcement of rights that were enshrined in legislation. The passive approach of the state resulted in strikes that were designed to force the employers to act in line with the agreements or laws that were already in place and binding.¹³

Finally, strikes were also caused by the workers’ dissatisfaction with the state’s social policy. With their limited access to policy-making (or given the institutional restrictions), workers perceived the strikes overall, and general strikes especially,¹⁴ as an instrument of securing their interests that could be labelled ‘political,’ as opposed to employer-related and economic.¹⁵

This is the simplest answer to the question about the typical reasons for strikes. Workers went on strike firstly to establish their agency; secondly to secure their self-identified interests, primarily of economic nature; thirdly to secure their interests of political nature; and fourthly to enforce the rights they had won through their struggle.

To recapitulate: the objective of a strike is to secure and safeguard the interests of workers, understood in the broadest sense. These interests include economic and political interests, rights, freedoms, and

¹⁰ A. MIKŁASZEWSKI: *Strajki i kwestia społeczna*. Księgarnia Powszechna, 1906. 12

¹¹ F. PERL: *Placa robocza a strajki*. Towarzystwo Wydawnictw Ludowych, 1906. 3.; J-M. SERVAIS: ILO and the Right to Strike. *Canadian Lab. & Emp. L. J.*, 15., (2009-2010) 147.

¹² A. C. L. DAVIES: *Perspectives on Labour Law*. Cambridge University Press, 2009. 220.

¹³ B. WERTHEIM: Skutki cywilne strajku. *Nowy Kodeks Zobowiązań*, 23, (1934) 97, 99.

¹⁴ P. H. GOODSTEIN: *The theory of the general strike from the French Revolution to Poland*. Columbia University Press, 1984.

¹⁵ B. GERNIGON – A. ODERO – H. GUIDO: ILO Principles Concerning the Right to Strike. *ILR*, 137, (1998) 441, 445–446.

other interests that the workers believe should be secured. Of course, not every interest is just and fair, and thus a legitimate reason for striking. ‘Temerity and revenge-seeking’¹⁶ have certainly driven workers to strike; this does not mean that the law finds it acceptable striking motivation.

2.2. *Why do we accept strike?*

Over a very short period, as capitalism and industrialization swept through the world, strikes became an inherent element of social and political life. They continue to play an important part today. In the early 20th century it was noted: ‘most economists, industrialists and legislators find the strike to be a perfectly natural component of industrial life. Yet rarely do they wonder why is it actually that the strike, this special expression of industrial war, is considered so natural.’¹⁷ The question remains perfectly valid today.

In the next part of the paper, I am going to discuss the reasons why the strike is allowed and protected by the law. In other words, I will focus on the justification (*raison d’être*) of the strike and on the foundations of its legal protection.¹⁸

3. Strike from “power struggle” or “value discourse” perspective

Certain tendencies can be observed in collective labour law that encourage fundamental questions about the role of law in general. Historically, the development of collective labour law provides grounds for a twofold perspective. On the one hand, there is the power perspective: the law is perceived as an instrument of either dominance¹⁹ or emancipation.²⁰ On the other hand, the law may be viewed as more than a simple function of the power struggle, but rather as a mechanism that establishes, confirms, or fosters certain values shared by the general population²¹. In this view, the law balances the interests of particular groups in order to ensure individual freedoms and the common good (public and national order, etc.).²² The strike fits into either of these two perspectives, and likely many more.

¹⁶ BERNSTEIN op. cit. 15.

¹⁷ MIKŁASZEWSKI op. cit. 52.

¹⁸ T. Novitz refers to ‘reasons for legal protection’, see NOVITZ op. cit. 49 ff.

¹⁹ On statute as an expression of masses’ will, see S. ROZMARYN: *Polskie prawo państwowe*. Książka i Wiedza, 1951. 68.

²⁰ Similarly, however in the context of idea of ‘Rechtsstaat’ E. ŁĘTOWSKA: *Trudności w przyswajaniu w Polsce praktyki państwa prawa*. In: S. WRONKOWSKA (ed.): *Zasada demokratycznego państwa prawnego w Konstytucji RP*. Wydawnictwo Sejmowe, 2006. 198.

²¹ M. ŚWIĘCKI: *Prawo pracy*. Państwowe Wydawnictwo Naukowe, 1968. 28–29.

²² On the role of values in law see an excellent paper T. GIARO: *Wartości w języku prawnym i dyskursie prawniczym*. In: *Preambula Konstytucji Rzeczypospolitej Polskiej*. Biuro Trybunału Konstytucyjnego, 2009. 13 ff.

3.1. *The Rule of Force*

Let us begin with the first of the above-presented viewpoints. There is evident truth in the fact that the strike became a legal institution because of the power represented by organized labour. Trade unions have successfully fought to achieve this right and to define its scope. The strike is thus not a product of axiological, philosophical, and political thought, but rather of the brute strength or organized workers' movement. History provides ample support for this view. The constitutions of France (1946), Italy (1948), Portugal (1976), Spain (1978), South Africa (1994), and Poland (1997) all demonstrate that elevating the right to strike to constitutional status was an acknowledgment and reward for workers' organizations that fought against the systems that denied citizens fundamental rights, not only those related to unionization. Conversely, the German constitution of 1949 has no mention of the right to strike, which may be interpreted as a result of the weakness of the trade union movement in Germany at the time.²³ The right to strike gains legal protection when the trade unions are strong; their weakness causes the strike and its legal status to atrophy. This is one of the reasons why it has been argued that 'a worker will find a true guarantee of the freedom to strike only in the trade unions.'²⁴

Bob Hepple said famously that labour law is not an exercise in applied ethics.²⁵ By this logic, we may find that there is no particular need to justify the existence of the right to strike in order to win better working conditions and improved quality of life²⁶. The right to strike exists because an organized and determined social group exerted sufficient pressure on the state, the employers, and the public opinion to accept it. The strike was first decriminalized and then recognized by the law. Any further discussion of axiological foundations of the right to strike is essentially a pointless exercise in legal rhetoric, and its sole purpose is to lend legitimacy to the *status quo*. The strike is also a symptom of weakness of the state, which allows the use of force and coercion in collective negotiations and is unable to provide a better, more civilized solution to the tensions between labour and capital.

3.2. *Strike and values (axiology)*

I suppose most of labour law scholars have been either unable or unwilling to accept that the idea of labour law, including collective labour relations and disputes, is merely a product of simplistically understood materialism. Law should embody (or at least affirm) certain values; it being a mere product of class struggle is not enough²⁷.

²³ B. HEPPLE: The Right to Strike in International Context. *Canadian Lab. & Emp. L.J.*, 15, (2009-2010) 133, 135.

²⁴ M. ROMAŃSKI: *Wolność strajków*. Drukarnia Narodowa, 1907. 87.

²⁵ B. HEPPLE: *Factors Influencing the Making and Transformation of Labour Law in Europe*. In: DAVIDOV-LANGILLE op. cit. 30

²⁶ On labour law as a function power see also P. DAVIES – Mark FREEDLAND: *O. Kahn-Freud's Labour and the Law*. Stevens & Sons, 1983. 15.

²⁷ In the same vein, for example H. COLLINS: *Theories of Rights as Justifications for Labour Law*. In: DAVIDOV-LANGILLE op. cit. 137.

In Poland, this approach was present – even with regard to the strike – already in the interwar period of 1918-1939. Article 108 of the Polish constitution of 1921 read: Citizens have the right of association and unionization, of assembly, and of founding associations and unions. The prevalent view was that the strike was included in the right of association and unionization, and thus had the status of a constitutional right.²⁸ Strike was thought to be implicitly included in Article 108 and treated as a secondary category with regard to the named right of association and unionization.

Lawyers pondered the philosophical foundations not only of the 1921 constitution as such, but also of the right of association and unionization in general.²⁹ The debate was driven by the search for ‘fixed notions, certain absolute truths’. It was argued that current events should not be framed ‘solely in view of temporary political situations, but rather in a long-term perspective: the social and spiritual aspect of each issue.’³⁰

In pre-WWII labour law literature, there was a clear expression of the need to find the underlying absolute values. The position of Stefan Rosmarin provides a good example. He noted that ‘no legal order rests on itself, with no regard for values that exist externally to it. [...] each value is justified by another, of a relatively higher order, until the recurs runs its course. Thus each sequence of values which provide legitimacy and for which legitimacy is provided, which provide justification and for which justification is provided, begins [...] with a value that is considered absolute.’³¹

In the People’s Republic of Poland, i.e. under communist rule, Polish labour law steered clear of the entire issue of values. The focus was on general categories, such as the principles of labour law and the roles it serves.³² Other than that, the strike remained for a long time after 1945 beyond the scope of labour law theory. It was only in connection with the 1997 (current) Constitution that ‘values were incorporated into legislation on a large scale.’³³ The provisions of the Constitution were expected to have ‘axiological justifications in a coherent value system.’³⁴

If the strike is considered an element of a coherent system of categories placed beyond the legal system itself, such as values, the question is inescapable: What value is realized by the strike? What value justifies its existence? In the next part of the paper, I will focus on the intrinsic value(s) behind the right to strike.

²⁸ B. WERTHEIM: *Pojęcie i wolność strajku w świetle prawa*. Księgarnia F. Hoesicka, 1933. 31.

²⁹ J. G. WENGIEROW: *Przedstawicielstwo pracownicze a państwo*. Organizacja Młodzieży Pracującej, 1935. 12.

³⁰ Ibid. 15.

³¹ S. ROSMARIN: *Zbiorowe umowy pracy*. Instytut Administracyjny Wydziału Prawa Uniwersytetu Jana Kazimierza, 1933. 112.

³² ŚWIĘCICKI op. cit. 28, 30. More generally on Polish labour law during communism period L. FLOREK: Problems and dilemmas of Labour Relations in Poland. *CLLPJ*, 13., (1991-1992) 111, 111 ff.

³³ GIARO op. cit. 13.

³⁴ J. MIKOŁAJEWSKI – M. SMOLAK: Zasada demokratycznego państwa prawnego w aksjologii Konstytucji Rzeczypospolitej Polskiej. In: WRONKOWSKA (ed.) op. cit. 91

4. The right to strike from state or individual perspective

Two perspectives are possible once again. Firstly, the strike may be justified from the point of view of the state, which acknowledges and regulates something that occurs in reality. Secondly, the strike may be justified from the point of view of the individual.

The two perspectives are intertwined. At present, the latter one seems to prevail. It is based on the eminently sensible idea that the law should primarily serve the people and their needs, rather than the needs of the state. Today, when human rights are placed centre stage, the individual perspective dominates. It is the individual, the person, the worker that is the starting point for all considerations about the justifications of legal constructs.³⁵

This is not a perspective that should be challenged. Yet specific solutions may indicate that by accepting in this role e.g. human dignity, a certain legal regulation is justified by another value too. This other value may fit easily with the assumption of the individual being in the centre, but also may modify this assumption or be in opposition to it. This is natural, because an individual lives in a society, and the individual's interests must be balanced against the interests and needs of others. Following this logic, the individual-oriented justification for the strike may also fit within the perspective of the state, because it is the responsibility of the state to outline the boundaries of conflicting interests within the community.³⁶

4.1. State's Perspective

4.1.1. Absence of State in Collective Disputes

The first category of circumstances that justify the strike is derived from perceiving the role of the state in labour relations as an independent observer or a 'watchdog.' In this view, the inherent value of the right to strike can be summarized as follows: social partners have the freedom (autonomy) to determine their legal positions.

This view is based on the notion that 'the struggle of labour and capital is a peaceful one, but it is a struggle nonetheless, and this must never be disregarded.'³⁷ The state must accept that in a capitalist system, both parties endeavour to further their interests by, on the one hand, collectively stopping to work or, on the other hand, continuing to offer employment at an establishment. This laissez-faire, liberal justification for the right to strike was in the past illustrated with the example of state policy with regard to price collusion: 'the law no longer opposes grain merchants when they withhold the grain in their possession from the market to drive the prices upwards. For a long time now the law

³⁵ On human rights in labour law see, for instance, C. FENWICK – T. NOVITZ (eds.): *Human Rights at Work*. Hart Publishing, 2010.; V. MANTOUVALOU: Are Labour Rights Human Rights? *European Labour Law Journal*, Vol. 3, Issue 2, 2012. 151 ff.

³⁶ Z. HAJN: *Zbiorowe prawo pracy. Zarys systemu*. Wolters Kluwer, 2013. 191.

³⁷ MIKŁASZEWSKI op. cit. 55.

has been treating all instances of price collusion with leniency, when their objective is to increase the prices of goods that are most essential in people's lives; why would the same law then forbid a worker in any branch of industry to make efforts to determine the price of labour, i.e. the price of that worker's own life and strength?'³⁸

It follows from this position that the strike is a flexible mechanism of response to changing market circumstances, as opposed to the mechanisms provided by contract law, which lack flexibility. 'Civil law requires that the contracts be sacrosanct, while real life makes them wobbly by nature, and thus gives each party the right to constantly watch the conditions on the market. [...] Under the circumstances, there is no reason to see strikes as a special violation of the law by the working class; the parties are in more or less equal positions, both have the right to terminate the contract and both accept the consequences of this termination.'³⁹ Strikes are thus perceived as a form of *rebus sic stantibus* clause, adaptable to the changing market circumstances; a response by the involved parties to economic and social shifts.

4.1.2. State as an Observer – An Guarantor of Parity between Social Partners

These opinions assume that in general, the state abstains from interfering with collective relations, including collective labour disputes. They are motivated by the belief that labour and capital are overall equal, and the state cannot favour either of them. Already in the interwar era, the opposite view was present: that the state may not abstain from taking a position in collective disputes.⁴⁰ Jerzy Wengierow argued that a collective dispute is so important 'for the parties and for the general economy that leaving it free from interference is impossible,' which consequently constitutes 'sufficient grounds for the state to interfere.'⁴¹ If we also agree that the positions of the employer and the workers (collectively) are not actually equal, then the only actor capable of ensuring that the power of the capital and labour is balanced is the state. It was therefore expected that the state should either institutionalize or, at a minimum, accept the expression of worker's solidarity in the form of a strike.

We may acknowledge that the strike is a necessary element of the legal system, because it is the only way to ensure equal footing of the parties in collective labour relations. The positions of the employer and the workers are only equal when the workers are granted the right to form trade unions (which, incidentally, was the objective of the strikes at the beginning of the trade union movement). The power of unionization was that the workers confronted the employer as a collective. 'The factory owner will be much more reluctant to hurt an organized worker than he used to do with a worker who

³⁸ Ibid. 28.

³⁹ Ibid. 47.

⁴⁰ W. MAKOWSKI: *Państwo społeczne*. (no publisher, 1936) 78–79.

⁴¹ J. WENGIEROW: *Ustawodawstwo o stosunkach zbiorowych pracy w Polsce na tle ustawodawstwa w tej dziedzinie w innych krajach. Praca i Opieka Społeczna*, 3, (1928) 260, 268.

stands on his own. This is the essence of the trade union.⁴² It was thought impossible that the parties' standing could be equal by ensuring the right of association without the right to strike. The employer could decide not to recognize the unions as representatives of the workers' interests, until forced to do so by a strike. The right of association without the right to strike was perceived as 'an empty sound.' In short, without the strike there is no freedom to form trade unions and consequently, there is no equality of the parties.

Another option is to assume that the strike is a necessary element of a legal system because it ensures equality in the process of collective bargaining; this is the so-called equilibrium argument.⁴³ Workers unionize not just in order to associate with others of similar interests, but in order to actively pursue those economic interests together.⁴⁴ Thus the workers want to enter into an arrangement directly with the employer in such a manner that the arrangement covers each individual worker (a collective agreement). They want to be heard and they want to renegotiate the conditions of work. With no possibility of exerting pressure (coercion) by means of a strike – which is the only potentially effective instrument – collective bargaining becomes “collective begging”.⁴⁵ Without the option of a strike, there can be no genuine right to collective bargaining and in result, again, no equality of the parties.

4.1.3. State as a Regulator – Ensuring Social Justice

The role of the state may be even more extensive and more active. The state does not have to stop at ensuring equal standing of employers and trade unions (workers) in their struggle. The strike may be also perceived as an auxiliary instrument of fulfilling the state's essential responsibilities. It has been argued that the strike is justified by the principle of justice. Strikes were the crucial measure of ending exploitation (low wages, unlimited working time, child labour, hazardous working conditions) and thus contributed to making life more just – this is the so-called social justice argument.⁴⁶ This was fully in line with the interests of the state itself. The strike may also facilitate just redistribution of profits generated by labour – *nemo potest superabundare, nisi alter deficiat*.⁴⁷ Feliks Perl noted that ‘factory owners will never of their own free will make concessions to workers, even if their business is most clearly thriving.’ Perl argued that ‘it would be ridiculous [...] to expect that capitalists will waive even a small part of their massive profits without coercion. And thus we see that the workers’

⁴² ROMAŃSKI op. cit. 86.

⁴³ HEPPLÉ op. cit. 139.

⁴⁴ That is a difference between the general “freedom of association” and the “right to form and join trade union”.

⁴⁵ A. JACOBS: *Labour and the law in Europe: A satellite view on labour law and social security law in Europe*. Wolf Legal Publishers, 2011. 127.

⁴⁶ NOVITZ op. cit. 50.

⁴⁷ On social justice in labour law see F. HENDRICKX: Foundations and Functions of Contemporary Labour Law. *European Labour Law Journal*, Vol. 3, Issue 2, 2012. 115.

wages are highest not in those industries where the entrepreneurs do best business, but in those where the workers' organizations are the strongest and most energetic in their fight for better conditions.⁴⁸

4.1.4. State as a Regulator – Democracy at Workplace

Another possible justification for the right to strike is the need to ensure democracy in labour relations, in the sense of less authoritarian management of the employer's enterprise, with more input from the workers on how the enterprise evolves. Democracy – argue the proponents of this view – cannot be restricted to politics only, and should be present in the economy as well.⁴⁹ In this logic, workers may go on strike to demand not only better conditions of work and pay, but also to influence business decisions of the employer; after all, the workers' economic interests are contingent upon how the enterprise is managed. The employer may decide to restructure the enterprise, fold its operations, decrease production, distribute profits, etc.⁵⁰

The view that the right to strike is rooted in the principle of democracy and in the need to increase the worker's impact on management of the enterprise may be interpreted by the trade unions broadly, so as to encompass classic mechanisms of power. Often strikes are organized for the purpose of protecting the interests of workers not by targeting the employers but by also engaging the state (the government). In this manner, the workers attempt to change the state's social policy they find unacceptable.⁵¹

4.2. *The Right To Strike From Individual Perspective*

Another approach is to seek the justification of the right to strike not through the lens of the collective (the trade unions, the state), but of the individual, i.e. the worker. This is an approach that was originally developed in liberal democracies and then found solid support in the instruments of human rights protection.

4.2.1. Freedom Of Work

For example, justification for the right to strike may be perceived as stemming from the freedom of work. Zygmunt Fenichel argued, on the basis of Article 101(1) of the Polish constitution of 1921 ('Each citizen has the freedom [...] to choose their occupation and ways of earning'), that 'the freedom to work, as a fundamental basis of today's system, and consequently the freedom to not work, also

⁴⁸ PERL op. cit. 10.

⁴⁹ B. NKABINDE: The Right to Strike, an Essential Component of Workplace Democracy: Its Scope and Global Economy. *Md. J. Int'l L.*, 24, (2009) 270, 277.

⁵⁰ NOVITZ op. cit. 59.

⁵¹ Ibid. 63.

results in the freedom to strike.⁵² Before him, Aleksander Mikłaszewski argued that ‘freedom of work is impossible without legal and civic equality of the contracting parties, without the freedom of unions and without strikes to protect interests, and without the acknowledgement of these principles peaceful progress is impossible [...]’.⁵³ Freedom of work was combined with personal freedom, for which justification was sought in natural law: ‘the right to strike is a natural right of a person and without it the contract for the working class to work for money would be incomplete.’⁵⁴

Others took this argument further, positing that the strike as a legal institution is justified by the prohibition of forced or compulsory labour.⁵⁵ This reasoning was based in particular on the conventions of the International Labour Organization: C029, Convention concerning Forced or Compulsory Labour and C105, Convention concerning the Abolition of Forced Labour. Under Article 2(1) of C029, the term forced or compulsory labour shall mean ‘all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily.’ Thus if the workers are unable to stop working when they wish to do so, i.e. to go on strike, this constitutes forced or compulsory labour.⁵⁶

4.2.2. The Right to Strike and Freedom of Speech

Directly related to this reasoning is the opinion that the freedom to strike has its basis in the freedom of speech.⁵⁷ The strike is intended to facilitate the expression of one’s opinions in the workplace. Relevant here is the case of *International Longshoremen’s Association v Allied International Limited*, where the crews declined to load and unload goods outgoing to and incoming from the Soviet Union after it had invaded Afghanistan. The trade unions believed that maintaining trade relations between the employer and the aggressor was unacceptable in a justice-oriented view, and went on strike in support of this view.⁵⁸

4.2.3. The Right to Strike and Workers’ Dignity

The strike has also been perceived as an instrument of protection of human dignity and thus as an institution justified thereby.⁵⁹ The emphasis on workers’ dignity has its likely roots in the notion articulated clearly for the first time in the provisions of Article 427 of the Treaties of Versailles, often summarized as ‘labour should not be regarded merely as an article of commerce’ (or, in more

⁵² Z. FENICHEL: *Prawo pracy. Komentarz*. Księgarnia Powszechna, 1939. 124.

⁵³ MIKŁASZEWSKI op. cit. 2.

⁵⁴ Ibid. 5–6, 12.

⁵⁵ NOVITZ op. cit. 69–71.

⁵⁶ BEN-ISRAEL op. cit. 25.

⁵⁷ DAVIES op. cit. 223.

⁵⁸ NOVITZ op. cit. 72.; NKABINDE op. cit. 281.

⁵⁹ HEPPLE op. cit. 140.

contemporary terms, 'labour is not a commodity').⁶⁰ Perceiving labour as a commodity, without a reflection on the persons involved in it, results in the loss of the 'moral basis' on which the relations between the employer and the worker should rest.⁶¹

The notion of dignity has become the foundation of modern human rights. It is therefore hardly surprising that basis of the legal protection of the right to strike is also sought in political and social human rights or civil liberties.⁶²

5. Death of the right to strike?

What are the conclusions? Whichever one of these two concepts we choose – strike as justified by values, or strike as an expression of power of organized labour – the above considerations demonstrate that the strike is always an instrument, something secondary to another primary category. The strike never exists on its own.

If we accept this conclusion, we must then proceed to ask about the potentially temporary nature of the strike in a historical perspective. If the strike is not self-justifiable, but instead if it always serves the purpose of securing other values (interests), then the full realization of these values (interests) by means of other, maybe more proportional means, might make the continued existence of the strike debatable. Already at the beginning of the 20th century a time was anticipated when 'the strike will no longer play a significant part as a weapon in the economic struggle. Just like the industrial democracy will no longer require the use of the weapon of an economic strike, a mature democracy will have no need for the weapon of a political strike.'⁶³ A similar process, it has been argued, is observable in international public law, in particular with regard to the use of force.⁶⁴ It is also argued today that a gradual shift in the relations between the employer and the workers from confrontational to participatory will result in a partnership-based model of running a business, with no necessity (and no place) for strikes.⁶⁵

It could therefore be posited that the strike was only justified – factually, and possibly even morally⁶⁶ – in the early stages of capitalism, but that today it is a foreign body in the culture of collective dispute resolution; a relic of an old age. Today, the opposing interests of the parties clash under very different

⁶⁰ See in more details for instance S. EVJU: Labour Is Not a Commodity: Reappraising the Origins of the Maxim. *European Labour Law Journal*, Vol. 4, Issue 3, 2013. 222 ff.

⁶¹ HENDRICKX op. cit. 111.

⁶² NOVITZ op. cit. 49 ff.

⁶³ BERNSTEIN op. cit. 75.; Similarly B. Hepple who was of opinion the right to strike 'will be of declining importance' B. HEPPLE: *Laws Against Strikes: Between Change and Tradition*. In: R. BLANPAIN – F. HENDRICKX (eds.): *Labour Law Between Change and tradition: Liber Amicorum Antoine Jacobs*. Kluwer Law International, 2011. 98.

⁶⁴ P. GRZEBYK: *Criminal Responsibility for the Crime of Aggression*. Routledge, 2013. 9.

⁶⁵ DAVIES op. cit. 227.; A. G. LAWRENCE: *Employer and Worker Collective Action. A Comparative Study of Germany, South Africa, and the United States*. Cambridge University Press, 2014. 34.

⁶⁶ IOANNES PAULUS PP. II.: *Laborem Exercens*, point 20, https://w2.vatican.va/content/john-paul-ii/en/encyclicals/documents/hf_jp-ii_enc_14091981_laborem-exercens.html (accessed 29 Febr. 2016).

social and economic circumstances and in a different legal environment. At least five arguments were put forward to support this opinion.

It has been argued that, first of all, the strike is in conflict with the rule of law, because it relies on the unilateral use of force/coercion with the intent to do harm.⁶⁷ Other arguments were also brought forward.

Secondly, the strike is staged not on the basis of an objective assessment of the interests of the workers, but on the basis of a subjective assessment, often detached from the economic reality. The same applies to any arrangements achieved under the threat of strike.⁶⁸ By bringing in a third party (e.g. the court) to determine whether there are grounds for the workers' demands puts the dispute into a more rational and less emotional dimension.

Thirdly, today's labour law regulations are relatively good, and effective enforcement mechanisms are in place (of course it is rather an European perspective).⁶⁹ In Poland, for instance, the rights granted in acts of law, in collective agreements, and in labour contracts are fully enforceable: the satisfaction of claims arising thereunder may be sought in labour courts.⁷⁰ The gradual expansion of the role of labour courts has been an important instrument in bringing to fruition the same goals that had been previously achieved by means of the strike. The right to create and join trade unions has followed a similar course: legal safeguards regarding the right of association and unionization meant the end (at least in Poland) of strikes organized to protect the right to unionize.⁷¹ These two examples point to a tendency in the development of the law related to strikes. The gradual "juridization" of labour relations appears to be limiting the role played by strikes in those areas where regulation becomes extensive.⁷²

Fourthly, it is sometimes proposed – but with no specific examples offered – that the balance of power is achievable in collective labour relations in general, and collective bargaining in particular, by means of solutions that are not as out-of-proportion as the strike.

And finally, it has been argued that there is no coherent justification why the strike precludes liability (both in terms of contracts and in terms of torts/delicts) with regard to damage caused by the striking workers. This is cited as a weakness in the theoretical construct of the right (freedom) to strike.

⁶⁷ N. NARITOMI: From the Rule of Force to the Rule of Law in Labour-Management Relations. A Lawful and Peaceful Alternative to Strike or Use of Force as Means of Settling Labour Disputes. *The Business Lawyer*, 15, (1960) 607, 608.

⁶⁸ Judgment of the Supreme Court from 20.05.2013, I BP 8/12, LEX no 1554827.

⁶⁹ NARITOMI op. cit. 629.

⁷⁰ In fact, the effectiveness of the court system in terms of enforceability underlies Article 4(1) of the Polish act on collective dispute resolution (Journal of Laws 1991, no 55 pos. 236): A collective dispute may not be entered to support individual claims of employees that may be settled in proceedings before the competent body for settling disputes concerning individual employee's claims.

⁷¹ J. CZARZASTY: Związki zawodowe w sieciach handlowych w Polsce – niespełnione marzenie o korporatywizmie w sektorze prywatnym. In: J. CZARZASTY – A. MROZOWICKI (eds.): *Organizowanie związków zawodowych w Europie*. Scholar, 2014. 114 ff.

⁷² LAWRENCE op. cit. 47 ff.

5.1. *The Rule of Law and the Right to Strike*

It is interesting to contemplate the arguments citing the rule of law with reference to Poland's specific situation. Can the principle of rule of law, stipulated in Article 2 of the Polish Constitution (The Republic of Poland shall be a democratic state ruled by law and implementing the principles of social justice)⁷³, be reconciled with the right to strike, and if yes, then how?

The rule of law posits a certain ideal of the relations between the public authorities and the individual. It is a very broad concept, and one that is quickly evolving. The specific components of the rule of law are generally not applicable to horizontal relations.⁷⁴ Instead, the focus is on determining 'the position of the individual in the state and non-arbitrary operations of the public authorities.'⁷⁵ Therefore, if we could prove that actions by social partners should also be viewed through the lens of the rule of law (which is hardly an easy task) this would mean that the compatibility of the rule of law with the right to strike should also be examined.

With regard to the principles that can be interpreted out of Article 2 of the Polish Constitution, it appears most sensible to analyze the right to strike in the light of the principle of *pacta sunt servanda*. The Polish Constitutional Tribunal considers this principle a necessary instrument of ensuring public trust in the state and in the legislation the state produces. It has been argued that *pacta sunt servanda* is an 'invaluable' principle, the alternative to which must be 'force and fear.'⁷⁶ Workers enter into a contract with the employer to work at the agreed wage and under agreed conditions. If these conditions are not in violation of any laws, why should we tolerate – or even protect as a right – the conduct of striking workers? This conduct might actually be considered unlawful, in the sense that it violates the contract with the employer. In today's Poland, it could be argued, the workers are not subject to coercion, and their wages are not below acceptable norms, as it often was in the 19th and early 20th century – which could be considered a defence to the charge of unlawfulness of violating the contract by means of a strike.⁷⁷ The level of protection of workers' rights in Poland is decent, with the court system effectively serving its fundamental functions. The principle of *pacta sunt servanda* could therefore be used to challenge the right to go on strike for the purpose of protecting the workers' interests, i.e. securing new, not previously agreed upon, conditions of work.

Just as an experiment, let us try to imagine a democratic state observing the rule of law. Let us also imagine that in this state no strike was ever organized. The notion of strikes is absent from the legal

⁷³ *Journals of Law* 1997 no 78 pos. 483, see also online: <http://www.sejm.gov.pl/prawo/konst/angielski/kon1.htm> (accessed 29 February 2016).

⁷⁴ B. SKWARA: Poziome obowiązywanie praw człowieka w świetle Konstytucji RP. *Homines Hominibus*, 5, (2009) 47, 66.

⁷⁵ S. WRONKOWSKA: *Charakter prawny klauzuli demokratycznego państwa prawnego (art. 2 Konstytucji Rzeczypospolitej Polskiej)*. In: WRONKOWSKA (ed.) op. cit. 110.

⁷⁶ E. MORAWSKA: *Klauzula państwa prawnego w Konstytucji RP na tle orzecznictwa Trybunału Konstytucyjnego*. TNOiK Dom Organizatora, 2003. 250.

⁷⁷ FENICHEL op. cit. 360.

awareness. The level of protection of workers' rights is similar to today's Poland. In this state, let us now imagine that the workers collectively stop working, saying that the contracts they signed are no longer binding for them, because now their expectations with regard to the employer are greater, and thus the principle of *pacta sunt servanda* is suspended. It seems that most lawyers accustomed to the principle of the rule of law would be hesitant to defend the workers' position. This would likely be true even if the workers had made an attempt at bargaining before going on strike.

In this scenario, proponents of the rule of law would certainly ask why it is considered necessary during negotiations (should they come to an impasse) to resort to coercion and threaten the other party with damage if their demands are not met. Should the decision not be left to the relevant judicial body, where the workers would be guaranteed a strong platform? Yet questions like that go practically unasked today.

5.2. Social Dialogue and the Right to Strike

In the context of the Constitution, the existence of the strike in Poland is associated with the dialogue between the social partners. Under its Article 20, a social market economy, based inter alia on dialogue and cooperation between social partners, is 'the basis of the economic system of the Republic of Poland'.

Relevant literature includes the observation that the wording 'dialogue and cooperation' has no clearly delimited legal meaning. Instead, it references certain values that should provide the foundation for the social market economy. Leszek Garlicki notes that in procedural terms, this wording requires that a system of amicable dispute resolution must be established (which is further specified in Article 59(2) and 59(3) of the Constitution⁷⁸). The dialogue is intended to ensure that the negotiating positions of the partners are as equal as possible, but should also prevent a deadlock.⁷⁹ On the one hand, the strike may be perceived as a component of the social dialogue.⁸⁰ Another view, however, is also represented: that to include the strike in the definition of dialogue is to 'abuse the term'.⁸¹

The latter view is accurate. Dialogue that is impossible without coercion (in the form of the strike) is no real dialogue. The two values – one expressed in Article 20 – social dialogue – and the other in Article 59(3) – the right to strike – of the Polish Constitution are not complementary. On

⁷⁸ Article 59 (2): Trade unions and employers and their organizations shall have the right to bargain, particularly for the purpose of resolving collective disputes, and to conclude collective labour agreements and other arrangements.; Article 59 (3): Trade unions shall have the right to organize workers' strikes or other forms of protest subject to limitations specified by statute. For protection of the public interest, statutes may limit or forbid the conduct of strikes by specified categories of employees or in specific fields.

⁷⁹ L. GARLICKI: *Konstytucja Rzeczypospolitej. Komentarz, IV, art. 20*. Wydawnictwo Sejmowe, 2005. 13–15.

⁸⁰ A. SOBczyk – A. DASZYŃSKA: Dialog społeczny jako narzędzie zbiorowego prawa pracy. In: J. STELINA (ed.): *Dialog społeczny w praktyce przedsiębiorstw*. Fundacja Rozwoju Uniwersytetu Gdańskiego, 2010. 13.

⁸¹ W. SANETRA: Dialog społeczny jako element ustroju społecznego i politycznego w świetle Konstytucji RP. In: A. WYPYCH-ŻYWIKA – M. TOMASZEWSKA – J. STELINA (eds.): *Zbiorowe prawo pracy w XXI wieku*. Fundacja Rozwoju Uniwersytetu Gdańskiego, 2010. 19.

the contrary, they clash. Consequently, they must be weighted against each other, in line with the principle of proportionality.⁸² Therefore, the value which is expressed in the right to strike may have to give precedence to another value, or may be restricted by another interpretation intended to find a compromise. Indeed, it might be argued that the relationship between Article 20 and in Article 59(3) is another example of the axiological eclecticism of the Polish Constitution. Whether the strike does or does not fall into the category of social dialogue is also further evidence of the above-mentioned historical tendency. With the rule of law becoming the reality, force and coercion as methods of operation of workers' representatives are being eliminated.⁸³ We are, slowly but surely, moving away from the rule of force and towards the rule of law.

6. Justification of the right to strike in history, power and values – an attempt to resume

In the past, any challenge to the right to strike ended with the members of the working class rallying against this perceived attempt to rob them of a freedom they had won through hard struggle: 'the working class [...] however only stands on its own, and therefore must hold on to the right to use the weapon of last resort in its arsenal, i.e. the strike, should all attempt at mediation and negotiation fail. [...] making negotiations compulsory would in effect ban strikes, which of course the working class could not accept.'⁸⁴ Not much has changed today. The institution of the strike has evolved alongside capitalism. It is this history that gives it legitimacy. In Poland, the additional collective memory of the Solidarity movement of the 1980s comes into play.

The following argument may thus be put forward: the collective historical memory of the communities where the trade unions, using a variety of instruments which included strikes, managed to achieve goals in the area of social policy (and in Poland, also politics) which later came to be considered uncontroversial, disallows the possibility that the right to strike might be eliminated or restricted, even in today's social and economic reality.⁸⁵

Workers and other proponents of the right to strike rely essentially on one crucial argument: without the strike, employers will disregard the demands of workers. Without the strike, there is no collective bargaining and no formal equality between labour and capital. Realists who speak 'the language of power and interests rather than ideals and norms'⁸⁶ may accurately argue the following: to believe that the right to strike has outlived its time and must be phased out is astoundingly naïve, and also

⁸² B. ZDZIENICKI: Aksjologia Konstytucji RP. In: J. KUCIŃSKI (ed.): *Piętnaście lat Konstytucji RP z 1997 roku. Inspiracje, uregulowania, trwałość*. Fundacja Rozwoju Uniwersytetu Gdańskiego, 2012. 69.

⁸³ W. SANETRA: Przedstawicielstwo związkowe w zakładzie pracy w świetle prawa unijnego. In: Z. HAJN (ed.): *Związkowe przedstawicielstwo pracowników zakładu pracy*. Wolters Kluwer, 2012. 73.

⁸⁴ P. ZIEMIĘCKI: Transcript of 18th Parliament's session on 26.03.1919, column 1041.

⁸⁵ See the Supreme Court judgment; 2.02.2007, I PK 209/06, OSNP 2008/5-6/65, in which 'in dubio pro libertate' rule was declared.

⁸⁶ Robert O. KEOHANE: *Realism, Neorealism and the Study of World Politics*. In: R. KEOHANE (ed.): *Neorealism and Its Critics*. Columbia University Press, 1986. 9.

symptomatic of a thorough lack of understating of the true power of capital nowadays. The strike appears to be the sole method of neutralizing the negative effects of workers' economic dependence and employers' strong bargaining position. If the strike is truly necessary to ensure justice in labour relations, this must of course be acknowledged. However, it is impossible to claim at the same time that the situation is a result of dialogue and cooperation between social partners.

Under the rule of law, the state must work towards achieving justice, including in the area of labour relations.⁸⁷ The strike is an issue that stands out as a constant reminder that the struggle between the social groups representing various interests is not as abstract as the values decreed officially in the Polish Constitution. Thus we return to the perspective noted at the beginning of this paper: the right to strike is an expression of the power of organized labour, which continuously seeks to justify the existence of this right in extra-legal categories. By framing the right to strike as an issue of values, actions taken to protect the interests of workers are showcased as morally justified.

7. Conclusions

The paper touches upon several problems associated with the right to strike. Some of them require further discussion. Yet even at this stage, a number of general conclusions may be drawn.

1. The significance of how the right to strike is justified goes far beyond theoretical concerns. In fact, it impacts the scope of this right and determines the interpretation of the provisions that regulate the freedom to strike.
2. Historically, the development of collective labour law provides grounds for the following two types of views.
 - a) Law is a function of power and an instrument of either dominance or emancipation.
 - b) Law is more than a function of the power struggle; it creates, confirms, and realizes certain specific values.
3. Justification for the right to strike must be sought taking into account these two opposing views.
4. When seeking the justification of the right to strike in values, two perspectives are possible: (i) focused on the state that acknowledges and regulates the existence of strikes, (ii) focused on the individual. Each of these perspectives points to a different justification of the right to strike.
5. The gradual 'juridization' of labour relations makes the strike less effective as a weapon and limits the role of this instrument as regulation continues to expand to cover new areas of life.
6. Poland's Constitution of 1997 marked the entry of the discourse of values into codified law. Consequently, the values embodied in the institution of the strike may have to give precedence to other values, or may be restricted by another interpretation intended to find a compromise. The preponderance of the rule of law, as well as the idea and the implementation of social

⁸⁷ ZDZIENICKI op. cit. 72.

dialogue (alongside the freedom to strike) offer some support to the argument that the state's system is progressing towards limiting force- and coercion-based methods of collective dispute resolution. The regulatory framework has been consistently shifting away from the rule of force and towards the rule of law.

7. Collective historical memory disallows the possibility that the right to strike might be eliminated or severely restricted, even in today's social and economic reality, which demonstrates that the legitimacy of the right to strike is derived from the history of trade unions' struggle to protect the interests of the working class.
8. In a realistic view of social and economic life, the strike appears to be the sole method of neutralizing the negative effects of workers' economic dependence and employers' strong bargaining position. By framing the right to strike as an issue of values, actions taken to protect the interests of workers are showcased as morally justified.