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Concerted work stoppage as a source of trades unions' obligation to compensate damages caused by strike action – some reflections on civil liability for strikes in Polish Labour Law.

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1. Introduction

Bronisław Wertheim well before the World War II accurately encapsulated that "from the very essence and the nature of strike, it need to cause damages; strike remains an act of fight and is triggered in such a circumstances in which inflicted damages force the other party to capitulate. Laborers' tactic is based on an simple idea to damage entrepreneur as severe as possible. Yet we have seldom encountered situation in which a sole intention of strikers was to damage entrepreneur; normally damages are a side-effect of strikes, however inextricably interlinked with achieving the main goal"[1].

This paper deals with the abovementioned issue of civil liability of trade unions for damages caused by strike, in according with Polish labour law regulations.

The paper's central question is: to what extent making possible trade unions to be sued for damages caused by concerted work stoppage influence the constitutionally guaranteed right to strike? Further and detailed considerations on the issue allow to draw some general conclusions on the way strike is being contemporarily comprehend as an legal construct.

In the first part, as an introduction, I sketch out an international background for Polish labour law provisions. This will help us to understand a legal framework for Polish legislator to regulate civil liability for damages caused by strike. Then I picture, from historical perspective, "developmental tendencies" of a process of making trades unions responsible for any harms and losses resulting from strikes and place them in three periods; inter-war (1918-1939), communist (1949-1982) and after transformation (od 1991).

2. International background

Article 9 ("The Republic of Poland shall respect international law binding upon it") and more importantly art. 59 (4) of Polish Constitution („The scope of freedom of association in trade unions and in employers' organizations and other trade unions rights may only be subject to such statutory limitations as are permissible in

[1] B. Wertheim, Skutki cywilne strajku, Nowy Kodeks Zobowiązań 1934, no 29, p. 109.

accordance with international agreements to which the Republic of Poland is a party") confirms a special and highly influential role of international law on labour law standards in Poland[2].

In case of the right to strike, the most impact comes from ILO Conventions[3] (particularly no 87 and 98[4]). The Freedom of Association Committee of the Governing Body of the ILO in fact did not to deal expressly with the issue of civil liability for damages resulting from strike[5]. Yet it is noteworthy to present two excerpts of the Digest of decisions and principles of the FAC[6]. In the first one (p. 664) it was stated that: „The Committee could not view with equanimity a set of legal rules which: (a) appears to treat virtually all industrial action as a breach of contract on the part of those who participate therein; (b) makes any trade union or official thereof who instigates such breaches of contract liable in damages for any losses incurred by the employer in consequence of their actions; and (c) enables an employer faced with such action to obtain an injunction to prevent the commencement (or continuation) of the unlawful conduct. The cumulative effect of such provisions could be to deprive workers of the capacity lawfully to take strike action to promote and defend their economic and social interests".

In the second one Committee recapitulates (p. 670) that „Fines which are equivalent to a maximum amount of 500 or 1,000 minimum wages per day of abusive strike may have an intimidating effect on trade unions and inhibit their legitimate trade union activities, particularly where the cancellation of a fi ne of this kind is subject to the provision that no further strike considered as abusive is carried out".

First above-quoted opinion actually do not refer to legal issues to be analysed in the paper, but concerns unacceptable and "in bulk", as it were, treatment of every single strike actions (including legal one) as unlawful, which opens for those who

[2] L. Florek, Zakres ograniczenia wolności związkowych (art. 59 ust. 4 Konstytucji), PiP 2000, no 12, p. 3 i n., L. Florek, Glosa do wyroku SN z dnia 7 grudnia 1999 r., I PKN 438/99, OSP 2000, nr 11, poz. 174.

[3] Poland made reservation and did not accept art. 6 paragraph 4 of European Social Charta. See. http://www.coe.int/t/dghl/monitoring/socialcharter/CountryFactsheets/Poland_en.pdf. A. M. Świątkowski, Karta Praw Społecznych Rady Europy, Warszawa 2006, p. 340-342.

[4] J-M. Servais, International Labour Law, Alphen aan den Rijn 2011, p. 108, L. Florek, Niektóre problemy prawa do strajku w ujęciu porównawczym, Państwo i Prawo 1980/10, p. 27 ff.

[5] B. Gernigon, A. Odero, H. Guido, ILO Principles Concerning the Right to Strike, ILO Geneve 1998, p. 43.

[6] Freedom of association - Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO. Fifth (revised) edition, 2006.

suffered to be compensated. Second opinion touches on penalties imposed by the State's organs and ILO monitoring body assessed application of those rather "penal" measures and not those "compensatory" in nature. The latter are being exercised only when harmed individuals (an employer or third party) decide to do so[7].

ILO's opinions on civil liability for damages resulting from strikes, gives enough leeway for member states to create and retain their system with their own characteristics. Given said that, it is worth to list several states in which do exist similar to Polish regulations. Moreover it appears, most of states when decided to regulate consequences of collective actions, also introduced provisions on trade unions' (other workers' representatives) civil liability for illegal strikes (collective actions)[8]. The following list of countries may be indicated; among post-communist states – Czech Republic[9], Lithuania[10], Hungary[11] Russian Federation[12] and Slovenia[13]. Except the last one, all others states allows at the same time courts declare strike illegal(*ex ante*) in special proceeding. In practice, the same body of law exists in Western European countries like for instance; the Nederlands[14], Germany[15], France[16] and of course Great Britain[17]. Outside Europe we can point out several

[77] Differently T. Cohen, R. le Roux, Liability, Sanctions and Other Consequences of Strike Actions [in] B. Hepple R. le Roux, S. Sciarra [ed.] Laws Against Strikes. The South African Experience in an International and Comparative Perspective, Milano 2015, p. 152.

[8] CAs of Ecuador. See F. E. Huacón, The Right to Strike: Ecuador [in] B. Waas [ed.] The Right to Strike. A Comparative View, Alphen aan den Rijn 2014, p. 189.

[9] P. Hůrka, The Right to Strike: Czech Republic [in] B. Waas [ed.] The Right to Strike. A Comparative View, Alphen aan den Rijn 2014, p. 174.

[10] D. Petrylaité, The Right to Strike: Lithuania [in] B. Waas [ed.] The Right to Strike. A Comparative View, Alphen aan den Rijn 2014, p. 381,

[11] E. Kajtár, A. Kun, The Right to Strike: Hungary [in] B. Waas [ed.] The Right to Strike. A Comparative View, Alphen aan den Rijn 2014, p. 296.

[12] N. Lyutow, The Right to Strike: Russian Federation [in] B. Waas [ed.] The Right to Strike. A Comparative View, Alphen aan den Rijn 2014 p. 463.

[13] P. Končar, The Right to Strike; Slovenia [in] B. Waas [ed.] The Right to Strike. A Comparative View, Alphen aan den Rijn 2014, p. 474,

[14] T. Jaspers, Collective Actions in The Nederlands [in] E. Ales, T. Novitz [ed.] Collective Actions and Fundamental Freedoms in Europe, Antwerp 2010, p. 163. M. Houwerzijl, W. Roozendaal, The Right to Strike: The Netherlands [in] B. Waas [ed.] The Right to Strike. A Comparative View, Alphen aan den Rijn 2014, p. 425

[15] B. Waas, The Right to Strike: Germany [in] B. Waas [ed.] The Right to Strike. A Comparative View, Alphen aan den Rijn 2014, p. 256.

[16] F. Kessler, The Right to Strike: France [in] B. Waas [ed.] The Right to Strike. A Comparative View, Alphen aan den Rijn 2014, p. 230, M. Forde, Liability in Damages for Strikes: A French Counter-Revolution, The American Journal of Comparative Law 1985/33, p. 447 ff.

[17] J. Pressl, The Right to Strike: United Kingdom [in] B. Waas [ed.] The Right to Strike. A Comparative View, Alphen aan den Rijn 2014, p. 562.

countries in which workers representatives (trade unions) may be liable for damages from illegal strike; Australia[18], Mexico[19] or South Korea[20].

3. Historical perspective on civil liability for damages resulting from strike in Polish Labour Law.

In next part of the paper I present different approaches to civil liability for strikes implemented in Poland during almost one hundred year period when political, economic and social environment was changing rapidly in this part of Europe, what obviously must have influenced existing laws.

3.1. Inter-war period (1918-1939)

The new Polish State, rebirth after the World War I, did function in a historical period in which work stoppage became an natural element of social and economic scenery. The primary aim of the State was to define its attitude towards, already complicated phenomena, of strike[21]. Despite existing patterns in foreign countries (Republic of Weimar, France), strike law had been designed *ab initio*[22].

In legal literature at that time, strike was considered as a source of obligation to compensate individuals in two possible regimes; *ex contracto* and *ex delicto*[23], typically for continental law systems. *Ex contractu* liability referred exclusively to workers as an party to an contract of employment and was based on art. 471 § 3 Code of Obligation of 1933 ("if an employee terminated a contract of employment without any good reason, or at his fault gave a good reason to terminate a contract of

[18] M. J. Pittard, R. Naughton, The Right to Strike: Australia [in] B. Waas [ed.] The Right to Strike. A Comparative View, Alphen aan den Rijn 2014, p. 112,
[19] A. S. Sánchez, The Right to Strike: Mexico [in] B. Waas [ed.] The Right to Strike. A Comparative View, Alphen aan den Rijn 2014, p. 410.
[20] L. Kwang-Taek, The Right to Strike: South Korea [in] B. Waas [ed.] The Right to Strike. A Comparative View, Alphen aan den Rijn 2014, p. 503.
[21] P. Grzebyk, Zarys prawa zatargów zbiorowych pracy w Drugiej Rzeczypospolitej [in] Metamorfozy społeczne 8, Państwo i społeczeństwo Drugiej Rzeczpospolitej, J. Żarnowski, Warszawa 2014, p. 241 i n. S. Mateja, Tendencje prawa pracy, Praca i Opieka Społeczna 1934, no 4, p. 418. B. Wertheim, Pojęcie i wolność strajku w świetle prawa, Warszawa 1933, p. 5-6.
[22] J. G. Wengierow, Przedstawicielstwo pracownicze a państwo, Warszawa 1935, p. 32, B. Wasiutyński, Ewolucja prawa robotniczego, Ruch Prawniczy Ekonomiczny i Socjologiczny 1928, z. 4, p. 425.
[23] B. Wertheim, Skutki cywilne strajku, Nowy Kodeks Zobowiązań 1934, no 28, p. 107.

employment by an employer, an employer may demand compensation of damages, resulting from non-performance of a contract of employment" [24]

In *ex delicto* regime all harms and loss caused by strike might have been compensated by workers (so called "fault in breaching the law" - art. 134 od Code of Obligations "whoever by his fault has caused damage to another person is obliged to redress it"), but also trade unions organising strike action could have been found responsible[25].

Moreover, *ex delicto* liability of workers and trade unions could have been based also on art. 135 Code of Obligations ("whoever by his fault or negligence has caused damage to another person, by exercising his right, is obliged to redress it, if only he exceeded the limits of that right, stipulated by good faith or aim of the right").

Those two provisions – art. 134 and art 135 Code of Obligations distinguished two types of liability within *ex delicto* regime. Firstly, for illegal strike, which always entails workers and trade unions liability for damages and secondly for legal strike but "event then improper"[26]. Strike which was not illegal but still improper was the one qualified as against "good customs, morality and public order"[27]. From todays' strike laws perspective in Poland this category of an "improper strike" appears to be much informative and inspiring, however further speculation on this specific matter goes far beyond the scope a subject of my paper.

One important observation should be made however as a side note, namely interwar legislator and scholarship took it for granted that damage as a unavoidable consequence of strike (contrary to aims and measures of strike) did not by itself render collective work stoppage action contradictory to "good customs, morality and public order".

It was alleged that „the generally awarded and accepted right to strike even with limitations posed by public law, still remains the workers' right to harm enterprise; that what is the essence of strike and in practice hardly any entrepreneur would have in mind going before the court of law to seek for compensation of all his losses. Quite the opposite, it is in his interest to put an end to strike and not to engage in another dispute"[28].

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[24] B. Wertheim, Skutki cywilne strajku, Nowy Kodeks Zobowiązań 1934, no 27, p. 103.
[25] B. Wertheim, Skutki cywilne strajku, Nowy Kodeks Zobowiązań 1934, no 28, p. 107.
[26] B. Wertheim, Skutki cywilne strajku, Nowy Kodeks Zobowiązań 1934, no 28, p. 107.
[27] B. Wertheim, Skutki cywilne strajku, Nowy Kodeks Zobowiązań 1934, no 29, p.111.
[28] B. Wertheim, Skutki cywilne strajku, Nowy Kodeks Zobowiązań 1934, no 29, p. 109.

3.2. Communist era (1949-1982)

In this paper by the era of Communist State I understand period between; on the one hand 1949 – date of a new act on trade unions which repealed inter-war trade unions regulations – and, on the other hand 1982 – date of entry into force an act on trade unions, which already contained a detailed provisions on trade disputes resolution.

In communist state in Poland strikes were supposed not to exist anymore. It is characteristic that not only legislation but also scholarship left an issue of strike basically outside a scope of its interests.

The Law on Trade Unions of 1st July 1949 (Journal of Law 1949/41/293) guaranteed in art. 1 that "blue- and white-collar workers have the right to be freely associated in trade unions and the right to active participation in exercise of people's power". However, exercise of this “freedom of coalition” (die Koalizionfreiheit) or exercise of people’s power should not be supported by a collective cessation of work.

Solidarity Festival in 1980 has forced communist government to pass a new Act on Trade Unions of 8 October 1982. (Journal of Laws 1985/54/277), which in its fifth chapter regulated trade disputes, including “the right to strike". There were only few opinions referring expressly to an issue of trade unions’ liability for damages caused by strike. Yet, these opinions were contradictory.

Some have argued that civil liability for damages for illegal strike "is in Polish legal system baseless". Indeed it was claimed that an overall regulations on position of trade unions in the Act of 1982 excludes application of "sanctions" other than those specified therein, in particular those "drawn from other branches of law"[29]. The only sanction stipulated in the Act was listed in art. 55, which provided for an “imposition of fines on trade union”, “request of an election of a new board under threat of suspension of action of union” in case of found out "authorities of trade union operates in a way violating the law".

In case of ineffectiveness of above sanctions or when "trade union operates contrary to the Constitution of the Polish People's Republic and other laws," a court could expunge trade union from the register. Thus, some commentators excluded by

[29] G. Bieniek, Odpowiedzialność związku zawodowego [in] W. Sanetra [ed.] Odpowiedzialność zbiorowych podmiotów prawa pracy, Wrocław 1987, p. 117.

definition any civil liability of trade unions for damages caused by a strike within *ex delicto* regime. At the same time, however, it was possible to claim damages in *ex contractu* (i.e.; as a result of violation of a collective labour agreement) [30].

Others argued that before Act on solving collective labour trade disputes of 1991 was in force "legal base for civil liability for any damages resulting from illegal strike was in art. 415 of the Civil Code"[31].

3.3. After-transformation period (from 1991 onwards).

In 1991 Act on solving collective labour disputes came into force. Its art. 26 paragraph 3 states as follows; "The organizer of a strike is liable, in accordance with rules determined in the Civil Code, for all damages resulting from a strike or other protest action organized contrary to the provisions of this Act". Given the content of art. 2 paragraph 1 ("The rights and collective interests of employees […] shall be represented by trade unions") and Art. 3 paragraph 4 ("On behalf of employees of an establishment in which none trade union operates, collective dispute may be conducted by the trade union authorized by employees to represent their collective interests") of Act on solving collective labour disputes establishing a "union monopoly" to represent the interests of workers in trade dispute, is clear a concept of "organizer" refers primarily to trade unions[32].

Implementation of a new art. 26 paragraph 3 raised doubts among few scholars in Poland (primarily by W. Masewicz[33]). Firstly, he criticized the rigorous liability regime and its unlimited scope. It was mainly about extending the circle of parties demanding compensation not only to an employer, but also to third parties affected by strike.

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[30] G. Bieniek, Odpowiedzialność związku zawodowego [in] W. Sanetra [ed.] Odpowiedzialność zbiorowych podmiotów prawa pracy, Wrocław 1987, p. 117.

[31] B. Cudowski, Odpowiedzialność prawna uczestników nielegalnego strajku – część I, PiZS 1996, no 2, p. 53; A. Chabrowska, Odpowiedzialność pracownika za zorganizowanie i udział w nielegalnym strajku, Z Problematyki Prawa Pracy i Polityki Socjalnej, t. 11, Katowice 1994, p. 55; A. M. Świątkowski, Uprawnienia, wolności, przywileje, obowiązki i immunitety w prawie związkowym, Studia Iuridica 1992, p. 171.

[32] M. Kurzynoga, Glosa do wyroku SN z 24.09.2013 r. III PK 90/12, OSP 2015 no 4, p. 567. B. Wagner, Odpowiedzialność za zorganizowanie i udział w nielegalnym strajku, PiZS 1992, no 1, p. 42, 47.

[33] K. W. Baran, Z problematyki odpowiedzialności cywilnej za nielegalny strajk lub inną akcję protestacyjną [in] M. Rycak, J. Wratny [ed.] Prawo pracy w świetle procesów integracji europejskiej. Księga Jubileuszowa Profesor Marii Matey-Tyrowicz, Warszawa 2011, p. 514.

Secondly, objections was raised because scope of responsibility which is now "determined not by an ability of strike organizers to pay compensation, but by an amount of damages".

Thirdly, it was raised new legislation and consequently claims against trade unions may negatively affect the whole workers' movement – it may bring unions to financial ruin and have negative impact on freedom to strike[34].. Except W. Masewicz, hardly any researcher has so expressly presented any critical opinions on art. 26 paragraph 3 of Act of 1991.

The draft law on Collective Labour Law of 2007 in its art. 341 essentially repeats art. 26 paragraph 3 of Act on resolving collective labour disputes; "For damages caused by a strike or other protest action organized contrary to the provisions of the Code, the organizer is liable in accordance with provisions of the Civil Code". It is a clear-cut confirmation that among the most distinguished Polish labor law experts, who prepared a draft law on Collective Labour Law of 2007, the current body of law dealing with trade unions' liability for illegal strike do not cause any doubts whatsoever[35].

In practice however, art. 26 paragraph 3 of Act on resolving collective labour disputes remains a dead letter. It is not only employers who do not institute proceedings based on this provisions, which may be explained by their reluctance to exacerbate situation with trade unions, as well as low chances to successfully execute damages awarded by the court's verdict[36], but also third parties affected by strike (for instance employers' contractors)[37].

With no possibility to lock-out workers (which is a case of Poland), employers are vitally interested in relocating a collective dispute (especially at an early stage of organizing strike) to courts, also in order to prevent potential damage that probably

[34] W. Masewicz, Zatarg zbiorowy pracy, Bydgoszcz 1994, p. 195.
[35] Also A. M. Świątkowskiego and M. Wujczyka are of opinion that art. 26 paragraph 3 Act of 1991 doeas not contradcit art. 6 § 4 of Revised European Social Charter; A. M. Swiątkowski, M. Wujczyk, Polskie regulacje z zakresu rozwiązywania sporów zbiorowych w świetle standardów europejskich na przykładzie prawa do strajku [in] Zbiorowe prawo pracy w XXI wieku, red. A. Wypych-Żywicka, M. Tomaszewska, J. Stelina, Gdańsk 2010, p. 288.
[36] B. Cudowski Spory zbiorowe w polskim prawie pracy, Białystok 1998,p. 183-184. P. Grzebyk, Odpowiedzialność za szkodę wyrządzoną bezprawnymi działaniami zakładowej organizacji związkowej – problem podmiotu odpowiedzialności [in] Związkowe przedstawicielstwo pracowników w zakładzie pracy, Hajn Z., Wolters Kluwer 2012, p. 398 i n.
[37] B. Cudowski, Odpowiedzialność prawna uczestników nielegalnego strajku – część I, PiZS 1996, no 2, p. 55.

will not be compensated in the future[38]. That is the primarily reason of recent emergence in Poland of cases on so-called “no-strike injuctions", as we understand courts decisions, upon request of an employer, to prohibit organising an illegal strike or demand immediate cease of the ongoing one[39].

For example, in the judgment of Court of Appeal in Warsaw of 23 July 2013, VI ACa 299/13, LEX no. 1397000, it was stated, laconically, that employer's request to declare a strike organized at plaintiff’s plant is not in accordance with the Act of 23 May 1991 on solving collective labour disputes cannot be decided by the court, since courts in general lack competence to hear that sort of cases.

Another example is a case of an employer who, in order to prevent an illegal strike, invoked art. 439 of the Civil Code ("whoever is threatened by a direct damage resulting from the behaviour of another person, may demand that person to undertake measures indispensable for averting the imminent danger, and if necessary also to give an appropriate security”). Based on quoted provision, the Board of Jastrzębska Spółka Węglowa (one of the biggest mining company seated in Poland) managed to receive a civil law court decision prohibiting collective action[40].

4. Circumstances of introducing art. 26 paragraph 3 Act of 1991.

Example of art. 26 paragraph 3 of the Act of 1991 proves of general regularity - the law itself is "a manifestation of mental and moral values inherent in the nation"[41], which even more refers to collective labour law, which is largely a result of "national factor, resulting from the characteristics of national character, cultural level, temperament, level of prosperity and a whole range of local conditions, which together produce specific national autonomy"[42].

Transformation in Poland in 1989, started just after collapse of the communist system, forced the State to regulate collective labour relations in almost an express tempo. The role of legislation in this area should however rely more on sanctioning

[38] K. Pawlak, Glosa do wyroku SN z 17.05.2012 r. I PK 217/11, OSP 2014, no 4, p. 487.
[39] M. Kurzynoga, Prawo pracodawcy do wystąpienia z powództwem o ustalenie nielegalności strajku i wnioskiem o zabezpieczenie roszczenia w drodze zakazu zorganizowania strajku, PiZS 2014, no 5, p. 16 i n.
[40] P. Haiduk, A. Wiluś, Cywilizowanie strajków, Rzeczpospolita z 6 czerwca 2011 r.
[41] W. Komarnicki, Przewodnia idea Konstytucji marcowej [in] Wacław Komarnicki o ustroju państwa i konstytucji, Warszawa 2000, p. 30.
[42] J. G. Wengierow, Przedstawicielstwo pracownicze a państwo, Warszawa 1935, p. 91.

developments of practice of social partners, what in a long term guarantees more respect for passed statues and observance of rules introduced by the State[43]. Poland, like other countries in the Region could not afford a comfort of shaping standards of collective labour law through a gradual evolution, which would lead to an adoption of rules created as an "customary law" by social partners. It appears then art. 26 paragraph 3 of 1991 Act was in fact implemented into Polish system solely as a result of inspiration by foreign laws. As practice of over the last 20 years has shown, those inspirations were not fully aligned with Polish social, political and cultural background.

This leads to two conclusions that can be applied not only to question of how to regulate in a best manner industrial relations.

Firstly, often reception of foreign practice and comparative legal studies are sketchy. Ludwik Florek in a transition period in Poland aptly invoked famous phrase of Clyde Summers; "the primary value in making comparisons in labor law, it seems to me, is that it helps us better understand our own system by seeing it from a different perspective […] we may realize that certain elements which we have assumed were essential for the system to work are more a product of history than of necessity […] comparisons in labor law do open our minds to the need for change, the possibility for change, and the range of potential solutions"[44].

Secondly, introducing legislation to solve specific issues is too often treated as the most accurate method of organizing social and economic matters, ignoring a question of eventual effectiveness of regulation introduced.

5. Two theoretical models of strike and civil liability for damages caused by strike.

Polish experience in regulating industrial relations by statues and especially a case of civil liability for illegal work stoppage allows me to present a following observations. Strike may be framed into at least two opposing theoretical models that determine shape of specific and detailed provisions. It is clear that any proposed model is imperfect, because a number of additional factors may impair a "structural

[43] L. Florek, Democratic Institutions of Industrial Relations: A Polish Perspective, Mich. J. Int'l L. 1990-1991, p. 622-623.
[44] L. Florek, Democratic Institutions of Industrial Relations: A Polish Perspective, Mich. J. Int'l L. 1990-1991, p. 629.

purity" of suggested division, which is, however, a disadvantage of any theoretical models in social sciences. Yet, it is important to show general trends rather that a dogmatic purity.

Firstly, strike can be understood in a way characteristic for modern liberal democracies, which have based its political and economic system primarily on private property and economic freedoms of those who own means of production. This model dominated in Poland in the interwar period (1918-1939) and has been in force since 1991. At the moment, the main features of the system is primarily decreed in art. 20 of Polish Constitution ("A social market economy, based on the freedom of economic activity, private ownership, and solidarity, dialogue and cooperation between social partners, shall be the basis of the economic system of the Republic of Poland").

Due to topic of my research, I want to concentrate only on the role of law (criminal, civil, and labour law) and the State's bodies, including courts, they playe in balancing tensions between wage labour and capital. Current stage of my research proves the law and courts have consistently uphold two fundamental values – ownership (property) and economic freedom – on which rests the whole system. Those fundamental values explain and justify State's interference in the right to strike, which applies also to liability for damages.

Secondly, strike can be regarded as a phenomenon that is left almost entirely to be regulated by interested parties themselves (wage labour and capital). The role of law and State is limited to a minimum, if not excluded at all. This model was the product of classical liberal political thought, which is a variant of a theory of voluntarism (autonomy) described in the context of strike law by Otto Kahn-Freund. It assumed the State refrain from regulating and adjusting tensions between wage labour and capital[45]. A similar model, certainly not inspired by Western European idea of liberalism, is currently in force in Uruguay, which certainly is merely an exotic oddity for Europeans[46]. It is important to note, however, that alike understanding of strike (coming from completely different points of departures) dominated Polish theory of law in the post-war period, basically until 1982. The Communist State did not accept so called "conflict of classes", characteristic of bourgeois states. For this

[45] B. Hepple, The Freedom to Strike and its Rationale [in] B. Hepple R. le Roux, S. Sciarra [ed.] Laws Against Strikes. The South African Experience in an International and Comparative Perspective, Milano 2015, p. 39.
[46] H. F. Brignoni, The Right to Strike: Uruguay [in] B. Waas [ed.] The Right to Strike. A Comparative View, Alphen aan den Rijn 2014, p. 592, 594.

reason, in principle, the communist State was not interested in passing any specific legislation on work stoppage.

Reminiscences of this way of thinking about industrial relations in general are still present in legal discourse in Poland. The most representative piece of reasoning comes from resolution of the Supreme Court of 23rd May 2001, III ZP 17/00, OSNP 2001/23/684. Court noted that “mutual obligations” of two parties to collective labour agreement are not actionable (contrary to those provisions of collective labour agreement which constitute “normative part” of collective labour agreement), so could not be enforced by proceedings before the courts of law. This does not mean, however, that a failure to fulfil those mutual obligation arrangements is devoid of sanctions. Such sanctions are prescribed by collective labour regulations, in particular by provisions of Act of 23 May 1991 on resolving collective labour disputes[47].

There is no doubt that today dominates the first model described above, which I believe also applies to Poland. Its essential element is a need to balance by State’s bodies (courts), two opposite primary values.

On the one hand, private law systems remain to be influenced by the Roman rule; *neminem laedere*[48] – which amounts simply to a duty not to harm another individual. It goes hand in hand with a special status of property rights as one of the pillars of the modern State ruled by law (Art. 20 of Polish Constitution).

On the other hand, we noticed organized groups of workers (employees) won freedom to strike to be elevated almost to the same level of legal protection as property rights. The process of constitutionalisation of "freedom to strike" must result in theoretical and practical implications and cannot be limited only to political declaration.

Thus, it can be argued that: 1) strongly rooted in liberal views on state and law perspective allows us to draw a conclusion that legal system demands to protect the rights of ownership and derogates this rule in specified situations (for instance in case of strike), 2) the other approach, which may be called as social one put the matter other way round. The legal system acknowledges a harmful nature of

[47] L. Florek, Ustawa i umowa w prawie pracy, Warszawa 2010, p. 329 i n.
[48] J. M. Kondek, Bezprawność jako przesłanka odpowiedzialności odszkodowawczej, Warszawa 2013, p. 72 i n.

concerted work stoppage as an necessary instrument of fighting for rights and economic interests of workers and derogates this rule only in specified situations[49].

It can be argued that liberalism in its classical form, while giving sufficient instruments to safeguard interests of propertied classes did not need an assistance from the state and its courts. Only increasing strength of trade unions, demonstrated by successful strike actions, forced to redefine a meaning and role of law and state authorities.

The same argument can be applied to a state ruled in accordance with a Marxist ideology. The bankruptcy of an opinion about disappearance of traditional conflict between "classes" in a communist state, also forced those countries to intensify intervention in industrial relations.

It is then interesting to present civil liability for strikes also in this broader perspective, which perfectly well demonstrates how classic institution of civil law (compensation for damages) is being used as an instrument of balancing interests of different groups in modern society.

6. Implications for the future of strike law in Poland.

As for Poland there should be no doubt that the existence of art. 26 paragraph 3 of Act on resolving collective labour disputes will foster to grant competence of labour courts to examine *ex ante* legality of strikes, which in a long run may excuse even wider "penetration" of industrial relations by law and courts. This process named as a “gradual juridization of labour law relations”[50] is not indifferent to trade unions movement and consequently to the freedom of strike[51]. The decision to make labour courts to be involved in the settlement of certain elements of collective disputes must have further consequences. The courts will apply methods of deciding upon individual labour law disputes, they deal on regular basis. Given said that, there is a real danger of lack of accuracy in deciding upon industrial relations issues by traditional judicial bodies like courts of law. Cases of balancing of interests between

[49] K. W. Baran, Z problematyki odpowiedzialności cywilnej za nielegalny strajk lub inną akcję protestacyjną [in] M. Rycak, J. Wratny [ed.] Prawo pracy w świetle procesów integracji europejskiej. Księga Jubileuszowa Profesor Marii Matey-Tyrowicz, Warszawa 2011,p. 506.
[50] P. Grzebyk, Uzasadnienie istnienia prawa do strajku – od rządów siły do rządów prawa, PiZS 2015, no 6, p. 8.
[51] G. Mundlak, Labor Rights & Human Rights – Why Don’t the Two Tracks Meet? Journal of Comparative Labor Law and Policy, 2012, vol. 34, p. 217 i n.

wage labour and capital should be heard, if there is at all such a necessity, by special, impartial, well prepared special bodies.

The decision made circa 20 years ago to make it possible to sue trade unions for damages caused by illegal strike, even despite the fact art. 26 paragraph 3 of 1991 Act remains a dead letter, still is of great importance in a process of shaping developmental trends of collective labour law in Poland. It is also a natural element of the composition and strengthening the first of above-described models of strike.

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. From the very essence and the nature of strike, it need to cause damages; strike remains an act of fight and is triggered in such a circumstances in which inflicted damages force the other party to capitulate. Laborers' tactic is based on an simple idea to damage entrepreneur as severe as possible. However; normally damages are a side-effect of strikes, inextricably interlinked with achieving the main goal.
2. Poland is in special position. During almost one hundred year period when political, economic and social environment was changing rapidly in this part of Europe, we witnessed at least three period when strike laws, including civil liability for damages, was changing considerably.
3. In first theoretical model, strike can be understood in a way characteristic for modern liberal democracies, which have based its political and economic system primarily on private property and economic freedoms of those who own means of production. This model dominated in Poland in the interwar period (1918-1939) and has been in force since 1991.
4. In second theoretical model, strike can be regarded as a phenomenon that is left almost entirely to be regulated by interested parties themselves (wage labour and capital). The role of law and State is limited to a minimum, if not excluded at all. That understanding of strike dominated Polish theory of law in the post-war period, basically until 1982. The Communist State did not accept so called "conflict of classes", characteristic of bourgeois states. For this reason, in

principle, the communist State was not interested in passing any specific legislation on work stoppage.

5. The decision made circa 20 years ago to make it possible to sue trade unions for damages caused by illegal strike, even despite the fact art. 26 paragraph 3 of 1991 Act remains a dead letter, still is of great importance in a process of shaping developmental trends of collective labour law in Poland. It is also a natural element of the composition and strengthening the first of above-described models of strike.