



Horyzonty Polityki
2015, Vol. 6, N° 16

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DOI: 10.17399/HP.2015.061607

Social Dialogue as a Legal Opportunity for Reviving the European Social Model?¹

Summary

A unified concept of the EU citizenship does not guarantee similar social and economic rights to the nationals of the Member States of the European Union. In the author's opinion, it is necessary to build a common "platform" of rights in order to safeguard, at the EU level, observance by the Member States of employment and social rights of the persons employed within the common market. Because of the diverging interests among Member States, the social dialogue itself does not guarantee uniform protection of employees' rights considered fundamental human rights. It is necessary that the European Union and all EU Member States ratify the treaty of the Council of Europe – the Revised European Social Charter of 1996.

KEYWORDS

social dialogue, social partners, social peace,
employment and social rights, Revised
European Social Charter

1 Paper presented at the 21st World Congress of the International Society for Labour Law and Social Security Law, Cape Town, South Africa, International Convention Centre 15 to 18 September 2015

DIALOG SPOŁECZNY JAKO PRAWNA
SZANSA REWITALIZACJI EUROPEJSKIEGO
MODELU SOCJALNEGO?

Streszczenie

Zunifikowana koncepcja obywatelstwa Unii Europejskiej nie gwarantuje obywatelom państw członkowskich Unii jednakowych praw społecznych i ekonomicznych. Zdaniem Autora, konieczne jest zbudowanie wspólnej „platformy” uprawnień stanowiących unijne zabezpieczenie przestrzegania przez władze państw członkowskich UE jednakowych uprawnień pracowniczych i socjalnych osób zatrudnionych w ramach wspólnego rynku. Ze względu na różnice interesów państw członkowskich Unii dialog społeczny sam w sobie nie gwarantuje bowiem jednolitej ochrony praw pracowniczych uznawanych za fundamentalne prawa człowieka. Konieczne jest ratyfikowanie przez Unię Europejską oraz wszystkie państwa członkowskie tej międzynarodowej organizacji regionalnej w Europie traktatu Rady Europy – Zrewidowanej Europejskiej Karty Społecznej.

SŁOWA KLUCZOWE

dialog społeczny, partnerzy społeczni, pokój społeczny, prawa pracownicze i socjalne, Zrewidowana Europejska Karta Społeczna

INTRODUCTION

The economic crisis and the globalisation caused erosion of the European Social Model. This model may be revived with the concept and through the process of continuous social dialogue. This requires that the social dialogue be conducted by the social partners and other civil society organisations with the participation of public and state bodies at every stage of their mutual relations. The above applies in particular in the case of labour dispute which is the last – non-peaceful – phase of development of the collective labour relations.

In particular, the social dialogue method may be used to revive the European Social Model through ratification by the European Union of the Revised European Social Charter, a treaty of the Council of Europe of 3 May 1996 and imposition by the EU bodies on the

EU Member States of an obligation to ratify the provisions of the Charter. The Revised European Social Charter established a uniform platform of social rights, in particular the right to strike, allowing the social partners and other non-government organisations operating in democratic societies of the Member States to conduct the social dialogue, on an equal footing, during the labour disputes. This, in turn, guarantees to the employed persons and their representative bodies, mainly trade unions, the equal position in their relations with employers and employers' organisations as well as public and state bodies.

The social dialogue as a labour law concept enables all the parties involved in a labour dispute to equally influence the activities undertaken in the European Union and in the democratic Member States of the European Union with a view to protect the social peace, legal and social security, therefore the values which may be achieved with the revival of the European Social Model. The present article describes the mutual dependencies, governed by the EU laws, between the social dialogue and the European Social Model.

SOCIAL DIALOGUE AND THE RIGHT TO STRIKE

Because of the lack of interest among workers and employers in negotiating collective agreements in local labour relations, the European Union started to use the social dialogue between the social partners functioning within the common market as a tool for the creation of the European Social Model. The contemporary economic crisis hampered the development within the Union (in parallel with the common market) of a cohesive area of freedom, safety and justice with social peace considered its most characteristic feature. A report of the Commission of October 2010 still considers the social dialogue a foundation of this model in social relations governed by labour laws and driven by the Union social policy [Industrial Relations Report 2010, p. 173] since according to the Treaty of Lisbon the social dialogue is one of the measures for the democratisation of the European Union [Syrpis 2008, p. 227]. According to the provisions of 8a TEU, the functioning of the Union shall be founded on representative democracy (8a(1)). They guarantee to every citizen the right to

participate in the democratic life of the Union (8a(3)). According to article 8b(2) TEU the Union institutions are obliged to maintain an open, transparent and regular dialogue with representative associations and civil society. Article 8b(3) TEU imposes on the European Commission an obligation to carry out broad consultations with the concerned parties, not only with social partners, in order to ensure that the Union's actions are coherent and transparent [Benchmarking 2011, p. 85]. The author of this article deliberates on whether the process of representative democracy initiated by the Union institutions is an effective method to revive the European Social Model. The Union institutions argue that the social partners are not the only the guarantors of social peace in the EU labour relations. According to a new approach (article 2(1) TEU), peace within the Union and therefore social peace in labour relations can be guaranteed by open and transparent social dialogue carried out with representatives of civic society, churches and religious associations, philosophical and non-confessional organisations, foundations and non-governmental organisations (article 17(3) TFEU). In the professional literature that deliberates on the issue of social dialogue in matters regulated in Title X "Social policy" of TFEU, it is emphasized that the *Europe 2020 Strategy* makes no reference to social dialogue. The planned strategy of the Union activities is limited to reduction of poverty [Bogg, Dukes 2013, p. 466]. Perhaps the above strategy is an immediate response of the Union institutions to undertake research and produce studies which are to be published in the Member States concerning poverty and social exclusion, prepared on the occasion of announcing the year 2011 as European Year for Combating Poverty and Social Exclusion [*Polska bieda* 2012]. However, the fact that the Report on the social aspects of the functioning of the European union in the current decade of 2011-2020 made only a marginal reference to the social partners, cannot be coincidental [The Social Dimension of the Europe 2020 Strategy 2011, p. 8].² The minimal and unsuccessful activity of

2 The report mentions social partners once and considers them the entities with which – next to government authorities and civil society – cooperation should be maintained since the success of the social strategy depends on a "close cooperation between all levels of government, social partners and civil society."

the Commission in matters relating to amendment of directives³ has inspired the lawyers specializing in the European labour law to develop and present proposals aimed at upgrading the social dialogue in the collective labour relations. A book titled *Resocialising Europe in a Time of Crisis*, published in 2013 by Cambridge University Press, includes several dozen studies concerning the revival of the European social model. This was not the first time that European lawyers specializing in labour law presented the economic crisis as a chance and necessity for restructuring the institutions of individual labour law [Świątkowski 2010, p. 81-82]. In the collective labour relations the economic crisis – causing drastic limitation of tripartite social dialogue at the European level leading to adoption of normative agreements implemented in the European labour law through directives and substantial expansion of practice of concluding non-normative agreements – inspired lawyers specialising in European and international labour law to submit two proposals. They are both associated with the necessity to amend TFEU and require that certain categories of matters listed in article 154(5) TFEU are not excluded from the competence of the European Union. Strikes, lockouts and other collective actions should be uniformly regulated in the labour laws of the European Union. A. Bogg and Ruth Dukes firmly state that “(...) what is needed for an effective European social dialogue is a transnational right to strike” [Bogg, Dukes 2013, p. 486]. I share their opinion concerning harmonisation of the right to strike by means of a framework agreement negotiated by social partners carrying out a supranational social dialogue and concluding a normative agreement concerning regulation of both the right to strike and the right of employers to organize a lockout and regulation of the basic rules and procedures for carrying out the social dialogue by the social partners in particular Member States of the European Union. A. Bogg and R. Dukes limited their proposal to cover exclusively a harmonised regulation of the right to strike within the common European market. In their opinion, the right to strike regulated in the European labour laws, is an essential condition to restore balance in the collective labour relations and a chance to achieve permanent social peace

3 In 2010 the social partners were asked only twice to give their opinion on amendment of directives.

since the ability of the trade unions to organize a strike will equalize the position of ETUC in negotiations carried out as part of the social dialogue with employers' organizations. For the quoted authors it is obvious that ETUC is a weaker social partner.⁴ They also add that the social dialogue is carried out by the social partners "within the constitutional and legislative framework which strongly prefers no action in the field of social policy." However, what they have regard to is not an inability to organize collective actions by the European Trade Union Confederation (ETUC), but an absence of regulated procedures to carry out negotiations by the supranational social partners. They emphasize that there are no legal grounds in article 154 TFEU for intervention by the Commission which – in their opinion – should have the possibility of exerting pressure on the European organisations representing the interests of employers to modify their standpoint and make certain concessions in favour of the collective of European workers. If this were to fail, the social dialogue would cease and social problems that are subject to the social dialogue would be regulated independently by competent Union institutions (Council and European Parliament or Parliament). According to A. Bogg and R. Dukes, because of the absence in article 154 and article 155 TFEU of the clause "negotiate or we will legislate" significantly weakens the position of ETUC in negotiations with employers' organisations. Therefore it contributes to the reduction of importance of the social dialogue in the collective labour relations. This means that the balance between the social partners in the collective labour relations is a necessary element of social peace. Such balance can be maintained through direct intervention of public authorities. In this case such a balance can be guaranteed by the Union legislative bodies. It can also be achieved by way of granting a trade union organisation representing the interests of workers the right to organise strikes. I share the opinion that the equal position of the social partners is the *sine qua non* for the achievement of a balanced normative agreement which would guarantee the social peace. I do not agree with the opinion that it is necessary only to regulate EU labour laws on the right to strike. I stand by the opinion expressed in the previous parts of the

4 They wrote: "It is undoubtedly true that the ETUC is the weaker of the social partners (...)", p. 481.

book according to which the collective of workers and the union organisation representing the rights of such collective enjoy the freedom to strike since such freedom is a necessary element of the freedom to act within the autonomy guaranteed by fundamental international standards. Regulation of the foundations and conditions for the enjoyment of the above freedom may reduce such freedom. Since only an authentic social dialogue may guarantee the achievement of the social peace, the “threat” which may arise as a result of introduction in article 154 and article 155 TFEU of a provision addressed by the Commission to both social partners: “continue the social dialogue with the available legal means of pressure or an official legislative procedure will be initiated” requires regulation of not only the workers’ right to strike but also the employers’ right to lockout. According to A. Bogg and R. Dukes the main argument for granting to ETUC the right to organise strikes are legal and organisational obstacles in the enjoyment of such a right by this trade union confederation which would arise if the above postulate was fulfilled and if the right to strike was granted to workers under primary European laws. They refer to the statutes of the trade union confederation (ETUC) and indicate that they are entitled to organise collective actions which are almost exclusively trade unions and trade union federations. ETUC was established exclusively to represent the interests of the collective of workers at the EU level. Therefore, if the right to strike was regulated in the primary European labour law – in which case it would be necessary to make certain amendments in article 153(1) TFEU and introduce a new provision which would guarantee to workers the right to unite in trade unions, the freedom to conduct union activity and organise strikes – ETUC, as a trade union confederation, would not be able to exercise the above right despite the fact that now and in the future. Moreover, if TFEU is amended as proposed by the above mentioned authors, it enjoys and will still enjoy the freedom to strike which is based on the autonomy and independent and self-governed union activity consisting in European representation of the interests of workers’ collective during negotiation (as part of the social dialogue) of the framework normative agreements.

TOWARDS SOCIAL PEACE IN THE EUROPEAN UNION

In my opinion, a significant guarantee of social peace in the collective labour relations (after the social partners are vested with the right to organise collective actions during negotiating a normative agreement) is to authorise an independent body to supervise the legality of collective actions organised by the social partners. In the European Union this function is exercised by the European Court of Justice which in the past (as I have previously mentioned) dealt with disputes based on the European collective labour laws. The Court controlled enjoyment by the workers of their freedom to strike and examined representative rights of the social partners to participate in the social dialogue and to conclude supranational normative agreements considered by the EU institutions a condition necessary for the achievement of the social peace. The intervention of the Court in the social dialogue was strongly criticised in the European labour law literature [Bercusson 2009, p. 584]⁵. The quoted author expressed an opinion that judicial authorities are not “the best to decide on such issues” as they violate the sphere which B. Bercusson considers (from the perspective of the social dialogue) “sovereign and saint” (it “trespasses on the sovereignty and sanctity of the bargaining process”). In the constitutional model of the European Union adopted in TFEU the Court of Justice of the European Union supervises compliance by all obliged entities with the European laws which guarantee that the Union is an area of freedom, safety and justice; in particular, where, in cases relating to respect of fundamental rights (article 67(1) TFEU), there are no grounds to question the competences of the Union’s judicial authority in matters relating to evaluation of enjoyment of the union freedom, in particular enjoyment of the freedom to strike by workers and union confederation operating in the European space. A. Bogg and R. Dukes use the “bargaining in the shadows of the law” metaphor which was expressed years ago by B. Bercusson to illustrate the legal instruments applied by the Union legislator in article 138(4) TEC (now article 154(4) TFEU) to encourage the

5 According to [Bogg, Dukes 2013, p. 475] B. Bercusson considered the intervention of the Court of Justice of the European Union an “illegitimate usurpation of authority.”

supranational social partners to start and continue the social dialogue “directed” by the Council in order to conclude framework normative agreements. I have already explained the meaning of that metaphor. In this fragment of the monograph I would only like to emphasize that the above metaphor is not related to collective actions initiated by social partners so that ETUC can exert pressure on employers’ organisations for the latter to enter into a framework agreement negotiated under terms and conditions defined by the union confederation representing the interests of the European workers collective. The Court’s exercising of competences in relation to controlling the legality of strikes and other collective actions organised by trade unions cannot be treated, as described by A. Bogg and R. Dukes, as a “shadow of the Union jurisdiction over the social dialogue.” The social partners do not conduct the social dialogue bearing in mind that the Union’s judicial authority will intrude in their competences to enter into a normative agreement if the agreement is not reached. A constitutional paradigm invoked by the quoted authors does not confer on the European Court of Justice any rights to create autonomous sources of European labour law. The EU treaties, as constitutional sources of European law, do not provide for any competences of the European Court of Justice to undertake any legislative activities. Perhaps it is characteristic of the Anglo-Saxon labour law doctrine (which is very clearly visible in the analysed works of the British theoreticians of law) to understand the autonomy of the social partners, in particular the autonomy of trade unions, in such a way that it means a sphere absolutely free from any interference by the state, by state authorities, and above all public judicial authorities. B. Bercusson, as a prominent representative of that social group, is seriously concerned that the EU justice “calls into question the autonomy of the social partners involved in the social dialogue.” His concern as to the involvement of the European Court of Justice in several categories of affairs excluded in article 154(5) TFEU from the competence of EU legislator, is explained as a long-established tendency among the British unions and lawyers representing workers’ and unions’ rights who take the point of view expressed by the unions regarding social relations governed by the British collective labour laws (which since the era of conservatists under direction of Margaret Thatcher until now have been to a large extent regulated by laws established

by state authorities). A. Bogg and R. Dukes cite the views expressed in the middle of the 70s. by A. Flanders who believed that the lack of trust of the trade unionists in courts is determined genetically by a voluntary, based on specific concept of customary law (which guaranteed almost exclusively the legal protection to contracts and ownership), approach of the British courts to the collective labour law [Flanders 1974, p. 352]. By reference to the rulings of the Court of Justice in *Laval* and *Viking*, A. Bogg and R. Dukes present the views prevailing among the British lawyers specialising in the EU labour law, presented among others by E. Szyszczak [United Kingdom 2009a, p. 167] and T. Novitz [United Kingdom 2009b, p. 177], in the previously cited publication on the conflict of freedoms protected by the primary European laws and conflicting interests of entrepreneurs from the “new” and “old” Member States of the European Union. A. Bogg and R. Dukes [p. 490] recommend that the above presented response of the groups concerned, mainly trade unions, to the judgments of the Court of Justice, should be treated with a “certain dose of scepticism,” although they invoke a publication whose title suggests a parallel between the rulings of the European Court of Justice in the cases referred to above and the Loch Ness Monster [Nicole 2011, p. 307]. The cited authors do not take a clear position “pro” or “contra” regarding the judicial control of collective actions and other decisions taken by social partners at the various stages of the social dialogue. They conclude that the Union institutions are responsible for promoting and supporting the social dialogue in the European space. They believe that because of a combination of different external circumstances, such as: the global economic crisis, which is particularly harmful to the Member States in the southern Europe, the weak position of trade unions in the majority of the EU Member States, the poor impact of the collective agreements, the Union institutions should support more strongly the social dialogue. This is possible on the one hand by a return to the previous practice of tripartite social dialogue, “directed” by the Commission, the normative effects of which – framework agreements as sources of law characteristic for both systems of law (European and national) – will be still implemented in the legal systems of the Member States in a regular EU legislative procedure, i.e. through directives of the Council and/or the European Parliament. However, they emphasize that the new,

based on the previous principles, practice of social dialogue, should include, next to the social partners, other civil society stakeholders. They have not developed this postulate. They only emphasize that the concept of the enhanced social dialogue should be developed at the EU level. EU institutions, in particular the Commission, should be responsible for launching legal and organisational procedures according to which an open, transparent and regular social dialogue will be conducted by the Union institutions, social partners and entities listed in article 17(3) TFEU (religious associations and philosophical organisations). Not all social policy matters listed in article 153(1) TFEU may be a subject-matter of the social dialogue between EU institutions, social partners and other entities listed in article 17(3) TFEU at the same time. It seems that according to A. Bogg and R. Dukes the subject-matter of the social dialogue is less significant than the legal requirements which should be adhered to by the organisers of the social dialogue. These include firm foundations for negotiation of collective agreements and strong trade unions in the EU Member States. To strengthen both of these foundations of the permanent and effective social dialogue, the cited authors join the postulate presented in the European labour law doctrine [Ewing, Hendy 2010, p. 2] regarding the necessity for the accession of the European Union to the European Convention of Human Rights of 4 November 1950 [Ovey, White 2002, p. 290]. Accession of the European Union to this international treaty obliges the Member State to respect both aspects (positive and negative) of the fundamental right to form trade unions and the resulting freedom of trade unions to organise themselves. This means a general necessity to accept the workers' freedom to strike. According to A. Bogg and R. Dukes the economic crisis is a chance for the European Union and its Member States to strengthen the legal guarantees of the social peace in the area of collective labour relations. The experiences of Greece [Koukiadaki, Kretsos 2012, p. 276] – where the ultra-neoliberal approach of the state authorities to the practice of the negotiation of collective agreements, which are an important foundation of the social dialogue, ensured that the social peace was violated – prove that the best guarantee of social peace in labour relations are strong social partners, a balance of power in collective labour relations, an obligation to conduct social dialogue, collective agreements and other

framework normative agreements. In their support of the absolute necessity for the European Union and its Member States to accept international standards of fundamental human rights A. Bogg and R. Dukes, make a typical mistake. They do not take into account the previously mentioned European Social Charter. They refer only to article 11 of the European Convention for the Protection of Human Rights. They do not take into account the case law of the European Court of Human Rights which paid particular attention to so called "negative trade union freedom."⁶ They do not take into consideration the fact that European Court of Human Rights rarely dealt with the issues of collective actions, in particular the freedom to organise strikes [Harris, O'Boyle, Warrick 1995, p. 417].

REVISED EUROPEAN SOCIAL CHARTER AND ITS REGULATION OF COLLECTIVE LABOUR HUMAN RIGHTS

Moreover, the Court of Human Rights adopted a very careful attitude in matters relating to organising strikes [Świątkowski 2009a, p. 67-68]. It is usually based on the quasi-judicial output of the European Committee of Social Rights (formerly the Committee of Independent Experts), an international body appointed by the Council of Europe to supervise compliance by the Member States with the standards regulated in the provisions of the European Social Charter of 1961 and a Revised European Social Charter of 1996 [Świątkowski 2004, p. 36]. For that reason it is more justified to call the European Union to ratify the Revised European Social Charter, an international treaty of the Council of Europe which in its article 5, article 6(1-3) and article 6(4) guarantees freedom of association of social partners (workers in trade unions, employers in employers' organisations), a right to conduct a social dialogue in a form of consultations and negotiation of

⁶ Young, James and Webster v. United Kingdom, judgment of 13.8.1981, Series A. No. 44 (1982), 4 EHHR, p. 38; Sigurdur A. Sigurjónsson v. Iceland, judgment of 30.6.1993 r., Series A, No. 264-A (1993), 16 EHHR, p. 562; Sibson v. United Kingdom, judgment of 20.4.1993, Series A. No 258-A (1994), 17 EHHR, p. 193; Gustafsson v. Sweden, judgment of 25.4. 1996, (1996), 22 EHHR, p. 409; Sorensen v. Denmark and Rasmussen v. Denmark, judgment of 11.1.2006, Council of Europe Printing Office, Strasbourg 2006.

collective agreements, as well as the right to organise collective action, in particular the workers' right to strike [de Schutter 2005, p. 111]. Ratification of the Revised European Social Charter could lead to the creation by international organisations – the Council of Europe and International Labour Organisation dealing with protection of fundamental human rights – of a uniform “platform of social rights” in Europe. It would be an effective response to the economic and social globalisation phenomenon which in labour relations takes the form of a social dumping. Globalisation of social rights, in particular rights included in the category of fundamental human rights governed by the labour laws (right to social dialogue, consultations, negotiation of collective agreements, organisation of strikes), consisting in unification of standards of the legal protection of such rights, extending to them the international protection similar with this applicable to civic rights and freedoms protected by the European Convention on the Protection of Human Rights, would substantially contribute to the achievement and maintenance of social peace in the collective labour relations. For that reasons, in chapter 19 of the latest collective work titled *Resocialising Europe in a Time of Crisis* [Countouris, Freedland 2013]) which is dedicated to the issue of the revival of the European social model, A.M. Świątkowski presented a proposal for the restoration and revival of the European social model based on the protection of the right to social dialogue (association, consultation, collective agreements, strike) guaranteed in the European Social Charter) [Świątkowski 2013, p. 390].

Adoption in the Lisbon Treaty of a uniform concept of citizenship of the European Union, according to which the Union citizenship cannot be treated by the Union authorities and citizens of the EU Member States solely as the right to move freely among the national labour markets of the Member States (therefore as a *sui generis* gateway to the common Union market) but also as a confirmation of the right to exercise the political, social and economic rights guaranteed by the European labour laws, has created the obligation to adopt a uniform regulation of the foundations of the workers' rights [Świątkowski 2009b, p. 123]. The Union citizenship should be associated with a uniform legal status of citizens of the Member States and the respective rights regulated also by labour laws guaranteed by the national systems of labour law of the EU Member States. Therefore,

it is necessary to build, at the EU level, a “law platform,” a legal structure which would prevent competition between the authorities of the Member States of the Union in attracting international entrepreneurs to the national markets by reducing labour costs – limiting the workers’ rights and social rights of the Union citizens, extensive liberalisation of protective labour laws, allowing the employers to apply completely flexible model of management of labour forces [Deakin, Wilkinson 1994, p. 289]. Since the legal constructs and terminology applied in the labour law are full of concepts characteristic for neoliberal economists, the fundamental workers’ rights may only be protected by legal mechanisms and procedures applied for the protection of human rights. A right to live in peace is one of the fundamental human rights. Therefore, the European Union by ratification of the European Social Charter (with its legal guarantees of respect for social peace in the collective labour relations based on the obligation of the Member States to promote the social dialogue by way of consultations and negotiations between the social partners (direct and/or tripartite), balance of the means of pressure in a form of collective actions which the social partners may apply during negotiations) would make a huge progress towards guaranteeing uniform standards of protection of the social peace in the collective labour relations. International standards regulated in the European Social Charter, guaranteeing the social peace, were regulated in accordance with the previously mentioned sequence. They are based on equal guarantees of workers and employers to create and join the organisations of social partners: trade unions and organisations of employers (article 5). The Member States to which the international standards regulated in the European Social Charter are addressed, were obligated to actively promote joint consultations between workers and employers (article 6(1)). They are obligated to support, where necessary and appropriate, the voluntary negotiations of the social partners aimed at conclusion of collective agreements and other normative agreements. If there is a difference in the opinions presented by the negotiating social partners, it is the obligation of the Member States to establish such legal mechanisms and to regulate appropriate procedures so that the social partners can, with no detriment to the idea of the social dialogue, voluntarily use their joint efforts to reach amicable resolution of a labour dispute (article 6(3)). The European

Social Charter also obligates the Member States to respect the rights of workers and employers to initiate collective actions in case of conflicts of interests which cannot be resolved through negotiations, mediation or arbitration (article 6(4)). The most significant contribution of the European Social Charter and the European Committee of Social Rights of the Council of Europe (a body which supervises compliance by the Member States with the provisions of the Charter and which fully specified the international labour law standards expressed in the Charter) is the aspiration to ensure balance at each stage of the process enabling establishment and maintenance of the social peace in the collective labour relations. At a stage of a collective dispute the Member States were obligated either to respect the freedom to strike or to guarantee to workers a general protection of right to organise and attend strikes. Article 6(4) of the European Social Charter does not differentiate between legal and illegal strikes. It only guarantees to workers the right to strike that is organised lawfully. Lawful strikes are those which are initiated by workers associated and non-associated in trade unions to protect their own or others' economic and social rights and union freedoms. In fact, a condition necessary for a strike to be legal is that such collective action should be organised by a trade union organisation. Only where the national labour law systems limit workers freedom to establish trade unions or hampered the procedures for establishment of union organisations does the European Committee of Social Rights consider that strikes organised by *ad hoc* strike committees are in accordance with international standards [Świątkowski 2007, p. 227]. The right to strike is in fact a general right. However, it is subject to certain limitations established by laws enacted by the Member States, provisions of collective agreements negotiated by the social partners or rulings of judicial authorities. Harmonisation of the national provisions and practices in application of the collective labour laws of the Member States is guaranteed by uniform or related strike procedures concerning democratic decisions on the declaration of strike, warning an employer of the planned collective action, application by the social partners of the methods of an amicable resolution of disputes, obligations connected with making it possible for the employer to manage the work establishments during a strike. Social peace in relation to collective labour relations may be preserved not only with the social

peace clauses but also by obligating organisers of the strike to ensure the continuous functioning of the work facilities which cannot be stopped given the need to protect common interests. Organisers of a collective action are obliged to maintain regular contacts and continue systematic cooperation with an employer in order to minimise the risk of damage to the work establishment as a common good. A philosophy of the social dialogue in the course of the collective dispute which reached the last, most drastic phase means – for the collective of striking workers and a trade union – that organisers and participants of the strike are obligated to take care of the common good – the strike-bound establishment. And on the part of an employer and employers' organisations representing the interests of the employer or employers affected by the strike, ensuring social peace in labour relations means their inability to take such legal actions which seek to terminate employment relations with the striking workers for this reason only that they decided to take part in the legal collective action. In the context of international standards established in the European Social Charter which all systems of the Member States of the Council of Europe should satisfy, a strike is an expression of the will of the workers' collective (workers employed by a given establishment) to cease work in order to exert pressure on the employer. A key principle of the individual labour law – an obligation of the employer to pay remuneration exclusively to workers who are employed and ready to perform work – is fully applicable. Therefore, during a strike the workers are not entitled to remuneration. However, they retain other workers' rights and social rights depending on their seniority. A legal strike is not considered a circumstance which would guarantee to the strikers an immunity protecting them from civil and criminal liability for damage caused and for offences committed during the strike.

Article 6(4) of the European Social Charter obligates the Member States to respect freedom of employers and employers' organisations to act collectively. As I have already mentioned, the legal basis for the freedom to organise lockouts is article 3(1) of Convention No. 87 ILO which guarantees to the social partners' organisations an independence and freedom to act in order to protect the employers' rights in the collective labour relations. Therefore, article 6(4) of the European Social Charter obligates the authorities of the Member

States to respect the full freedom of employers to organise lockouts and obligates the Member States to regulate in the national collective labour law the limits of exercising the above right. Because of the fact that the right of employers to organise lockouts was not clearly expressed in article 6(4) of the Charter, the European Committee of Social Rights concluded that the above mentioned right is not given protection equal to the protection of the right to strike provided for in the Charter [Conclusions VIII, 95]. In the monograph referred to below I called this argument “risky.” Lack of guidelines concerning the rights of the Member States to regulate the right of employers to organise lockouts cannot be considered an argument that article 6(4) of the Charter provides lesser protection to a legal lockout than to a legal strike. The legal mechanism of transformation of the basic freedoms resulting directly from the freedom of the social partners to associate in unions and professional organisations is identical. Regulation in the national collective labour laws of the rights of social partners to organise collective actions may only set out the procedures to exercise the freedom guaranteed under Convention no. 87 of the ILO. Striking was mentioned in article 6(4) of the Charter only as an example. Apart from striking, trade unions representing workers’ interests may also organise other collective actions, not mentioned in the cited article. The freedom of association and the resulting freedom of the social partners to act were repeated in article 6(4) of the Charter. It covers not only the right of workers to strike but also the right of employers to lockout. The absence of a legal basis in the national collective labour laws for exercising such freedom does not justify the allegation that the international standards expressed in article 6(4) of the Charter are violated if a Member State does not confirm the right of employers to organise lockouts [Conclusions II, 87 Cyprus]. The European Committee of Social Rights held that the judicial authorities of the Member States may introduce, *a casu ad casum*, certain limitations in exercising the above freedom by the employers [Conclusions VIII, 95]. Although formally the case law of the European Committee of Social Rights does not contain an *expressis verbis* definition of a principle of equality of the means of pressure which the social partners may exert on each other during the collective dispute, the lockout is considered an acceptable legal measure applied by the employers in order to maintain full balance between

the social partners. The European Committee of Social Rights finds that contrary to international standards of the collective labour law are such national collective labour laws which consider a lockout a labour law tort and allow the competent public authorities, in particular Member States, to apply criminal sanctions (impose a fine) on employers who exercise the freedom to organise lockouts as a means of pressure on the workers' collective prohibited under national laws [Conclusions III,38; Conclusions VI, 40; Conclusions IX-2,48-49; Conclusions XV-1, vol. 2, 367]. The lockout is treated by the European Committee of Social Rights as a legally acceptable means of the defence of interests of the employer threatened by collective actions (strikes) initiated by workers. Therefore, the Committee approves defensive lockouts which constitute a response to a threat of collective action organised by workers. Therefore, the European Committee of Social Rights has in fact endeavoured, though to a lesser extent than in the case of the protection of strike, to keep a balance between the means of pressure applied by the social partners so that the chance to reopen the social dialogue between the social who are temporarily parties to a collective dispute is not lost.

CONCLUSIONS

The modern concept of collective labour relations developed in the European Union is based on a well-established opinion that the continuous social dialogue between the social partners and representative organisations representing their interest is a necessary condition for ensuring a permanent social peace in the collective labour relations. A hallmark of the modern European concept of collective labour relations, dynamically spreading throughout the world, is the European Social Model. Its basic elements include: the idea of partnership and a regular, open social dialogue. The bilateral or trilateral dialogue, moderated by the state authorities, is a continuous process at all stages (peaceful and contentious) of the collective labour relations. The active "players" in this process are social partners' organisations, the government and the non-government organisations representing the social groups of the democratic local community interested in maintenance of the social peace. The collective agreements, normative

agreements and other arrangements – social pacts ensuring fair distribution of goods jointly produced by the social partners are one of the fundamental legal guarantees of maintenance of social peace in labour relations. The social peace clause included in the obligation provisions of collective agreements is considered a formal legal guarantee that employees will refrain from initiating labour disputes. The material guarantees of the social peace are: legally guaranteed balance of power of social partners' organisations in the collective labour relations and a transparent regulation of the principles, modalities and procedures for the collective bargaining and for the application by the social partners' organisations, under supervision of judicial authorities, of legal instruments, in particular peer pressure. From the legal perspective, the key prerequisite of efficient guarantees enabling achievement and maintenance of the social peace in labour relations is efficient introduction in the collective labour law system of the stimulants encouraging the social partners and organisations representing their interests to continuous, active use of the social dialogue methods at every stage of collective labour relations.

In the modern European concept of collective labour relations:

- the conflict of interests of the parties to collective labour relations is no longer highlighted and focus is placed on the need to protect the social peace as the overriding common interest;
- instruments are created in the provisions of labour law which inspire the social partners and representatives authorised to bargain collectively to conduct the social dialogue and replace the state's laws with autonomous legal acts.

For those reasons, ratification by the European Union of the Revised European Social Charter would significantly contribute to revival of the social dialogue conducted on an equal footing by the social partners equally interested in attainment of permanent social peace.

BIBLIOGRAPHY

Bogg, A., Dukes, R., 2013, *The European Social Dialogue: From Autonomy to Here*, in: Countouris, N., Freedland, M., (eds.), *Resocialising Europe in a Time of Crisis*, Cambridge University Press, Cambridge.

- Benchmarking Working Europe 2011, ETUI/ETUC, Brussels.
- Bercusson, B., 2009, *European Labour Law*, Cambridge University Press, Cambridge.
- Industrial Relations Report, 2010, European Commission Directorate-General for Employment, Social Affairs and Inclusion, October 2010, p. 173.
- Conclusions: III,VI, VIII,IX-2,XV-1, XV-2 of the European Committee of Social Rights, Council of Europe, Strasbourg.
- Deakin, S., Wilkinson, F., 1994, *Rights versus Efficiency? The Economic Case for Transnational Standards*, "Industrial Law Journal", vol. 23.
- Ewing, K.D., Hendy, J., 2010, *The Dramatic Impact of Demir and Baykara*, "Industrial Law Journal", Vol. 39.
- Flanders A., 1974, *The Tradition of Voluntarism*, "British Journal of Industrial Relations", vol.12.
- Harris, D.J., O'Boyle, M., Warrick, C., 1995, *Law of the European Convention on Human Rights*, Butterworth, London, Dublin, Edinburgh.
- Industrial Relations Report, European Commission Directorate-General for Employment, Social Affairs and Inclusion, October 2010.
- Nicole, D., 2011, *Europe's Lochner Moment*, Public Law.
- Koukiadaki, A., Kretsos, L., 2012, *Opening Pandora's Box: The Sovereign Debt Crisis and Labour Market Regulation in Greece*, "Industrial Law Journal", Vol. 41.
- Ovey, C., White, R., 2002, *The European Convention on Human Rights*, Oxford University Press, Oxford.
- Polska bieda w świetle Europejskiego Roku Walki z Ubóstwem i Wykluczeniem Społecznym [Poverty in Poland and European Year for Combating Poverty and Social Exclusion]*, 2012, ed. H. Kubiak, Kraków.
- Schutter, O. de, 2005, *Anchoring the European Union to the European Social Charter: The Case of Accession*, in: De Búrca, G., De Witte, B., with the assistance of Ogertschnig, L., (eds.), *Social Rights in Europe*, Oxford University Press, Oxford.
- Syrpis, P., 2008, *The Treaty of Lisbon: Much A do...But What About What?*, "Industrial Law Journal".
- Świątkowski, A., 2004, *Quasi-judykacyjna funkcja Komitetu Praw Społecznych Rady Europy [Quasi-judicial function of the Committee of Social Rights of the Council of Europe]*, „Państwo i Prawo”, nr 9.
- Świątkowski, A.M., 2007, *Charter of Social Rights of the Council of Europe*, Kluwer Law International, AH Alphen aan den Rijn.
- Świątkowski, A.M., 2009a, *Ochrona praw człowieka w świetle przepisów prawa pracy i zabezpieczenia społecznego [Protection of human rights in the light of labour laws and social security laws]*, in: *Każdy ma prawo do...* [Everyone has the right to...], Warsaw.

- Świątkowski, A.M., 2009b, *European Union Citizenship and the Rights of Access for Welfare State: A Comparison with Welfare Rights Guaranteed by the Council of Europe as Seen from the Perspective of a New Member State*, in: Neegaard, V., Nielsen, R., Roseberry, L.M., *Integrating Welfare Functions into EU Law – From Rome to Lisbon*, DJØF Publishing, Copenhagen.
- Świątkowski, A.M., 2010, *Ustawa antykryzysowa z komentarzem [Anti-crisis law with commentary]*, Biblioteka Monitora Prawa Pracy, C.H. Beck, Warsaw.
- Świątkowski, A.M., 2013, *Resocialising Europe through a European Right to Strike modelled on the Social Charter?*, Countouris, N., Freedland, M., (eds.), Cambridge University Press, Cambridge.
- Świątkowski, A.M., 2014, *Labour Law: Council of Europe*, Wolters Kluwer Law & Business, AH Alphen aan den Rijn.
- The Social Dimension of the Europe 2020 Strategy: A Report of the Social Protection Committee, 2011.
- United Kingdom 2009a, in: Blanpain, R., Świątkowski, A.M., (eds.), *The Laval and Viking Cases. Freedom of Services and establishment v. Industrial Conflict in the European Economic Area*, "Bulletin of Comparative Labour Relations", No. 69.
- United Kingdom 2009b, in: Blanpain, R., Świątkowski, A.M., *The Laval and Viking Cases. Freedom of Services and establishment v. Industrial Conflict in the European Economic Area*, "Bulletin of Comparative Labour Relations", No. 69.