

The IVR was founded in 1909, and was headquartered in Germany until after the Second World War. Professor Utz, of Fribourg University, Switzerland, was responsible for reviving the IVR after the war. As a member of the Executive Committee for many years, Professor Utz established a membership throughout Western and Eastern Europe. Professor Utz was invariably kind and helpful to Professor Dorsey when AMINTAPHIL planned the 1975 IVR World Congress on Equality and Freedom. This event was held in St. Louis as a part of the American Revolution Bicentennial celebration. In 1979, during Professor Dorsey's tenure as new organization President, the membership elected Professor Utz Honorary President.

IS THE RIGHT TO STRIKE A HUMAN RIGHT?*

A. F. UTZ**

I. THE SOCIAL LIMITATION OF HUMAN RIGHTS

There should be no doubt that the freedom of association, which includes the so-called freedom of coalition, is one of the fundamental rights of human beings in the sense of natural law. Just as a human being has to be free to structure his life according to self-determined values, he must also be granted freedom to associate with like-minded people.

Still, neither the freedom to conduct one's life as one wishes nor the right of association is unlimited. The conduct of individuals also affects others. Today's problems regarding drug addicts and especially AIDS victims clearly indicate that the individual's conduct affects the entire society—not only because one person could "contaminate" the other, but also because the evil which an individual inflicts on himself eventually poses an evil for the entire society. This is not meant to emphasize the fact that health insurance, which is also paid for by members of society with healthy lifestyles, is burdened by those with unhealthy lifestyles. Rather, the reason is simply that it is part of a generally accepted standard of values not to waste one's abilities by abusing drugs. After all, as

* Translated by Hildegard Pietsch of St. Louis, Missouri.

** Professor, Fribourg University, Switzerland; Honorary President AMINTAPHIL.

a member of a community, everyone has, along with individual rights, the obligation to cooperate in the realization of common goals.

This isolated and still largely abstract view of subjective rights does not clarify the question: Who in social life has the authority and the right to define the public interest, through which subjective individual rights are confined? Generally speaking, it is the authority of the national community. In the era of enlightenment and democratization, doubts grew about the intellectual and moral strength of the authority of state power. Thus, the largely individualistically viewed declaration of subjective rights arose, especially in the U.N. declaration of human rights of 1948. Almost every article of the U.N. declaration begins with "every person" or "every individual has the right" Article 20, clearly states that every person has the right to form associations freely and must not be forced to participate in them. The penultimate (29th) article states, however, that the individual has obligations to the community in which he alone can find his free and full development. In addition, the 29th article requires that the exercise of his rights and the enjoyment of his liberties are submitted "only" to legally formulated restrictions regarding the respect of rights and liberties of third parties and the "just" demands of morality, public order, and public welfare in democratic society.

II. THE FREEDOM OF ASSOCIATION IN WESTERN DEMOCRACIES

During the discussion of the U.N. Declaration, Pavlov, the representative of the USSR, fought energetically for a "democratic state" in lieu of a "democratic society." The representative of the Philippines responded that under the Soviet proposal, rights would be surrendered to determination by the state. The full assembly unanimously adopted the article with the wording "democratic society". The socialist countries could, after all, be content with this outcome since they equated the public interest with the state. According to the understanding of the USSR, as indicated by the remarks of Boris Tchechko on July 25, 1948, the freedom of coalition can be understood only within the context of the classless state of socialism. Concerning political freedom, he said that the USSR would view it as a right to be free from the capitalist state. In the discussion he quoted Stalin's statement in front of the Eighth Soviet Congress, namely that several parties could exist only in a society in which there were antagonistic classes fighting against each other, and that no such classes would exist in the USSR. Article 29 would provide the USSR with ample leeway to interpret the freedom of coalition according

to their philosophy of the state, as provided by paragraph 2 of article 29, which notes the limitation on individual action by the public interest as expressed in law.

The constitutional democracies would also have to recognize this limitation. Eventually, both of these societies will need legal limits to prevent anti-social claims to liberty from growing excessive to the detriment of public interest.

On the economic level, the freedom of coalition was removed from state jurisdiction in liberal democracies by viewing the autonomy of collective wage agreements as the autonomy of both sides in the negotiations (labor unions and employer federations). Under this view both sides to the negotiation, to an extent, can develop free of legal intervention. Both sides to the negotiations act, so to speak, in a field free of the state. In fact, there is a labor court to resolve controversies in labor disputes, but not to determine the lawfulness of collective bargaining demands. The court does not intervene unless there is legal action, and the labor court only determines whether and how the rules of labor negotiations have been violated in the individual case. Because many countries have no law on labor disputes (e.g., in West Germany), the court decides cases on the basis of previous legal developments, and decisions are made in accordance with the common law. We are not concerned here with complaints about this common law. Rather, we are concerned with the relationship of collective bargaining autonomy and the right of strike and lock-out.

In principle, the freedom of coalition must remain within the framework of state jurisdiction. With this, we again confront the dilemma that we encountered already in the U.N. Declaration of Human Rights: whether the freedom of association will become illusory because, after all, the state can determine what is to be understood as the freedom of association. As indicated above, the Soviet Republic recognizes the freedom of association only within the framework of a communist system. In western democracies, in which the legal system is constructed at lower, discrete levels and connected to the highest levels of public law, one understands freedom of association as the right to determine goals and means of an association autonomously. But within this Western framework we find ourselves confronting a new dilemma. Should autonomous determination of goals mean that the state authority no longer has custodial power over the social sphere? If this proposition were true a labor union could force its goals and means in a manner that would undermine the present state organization.

Indeed, this question is not merely theoretical. For example, the strike of French railroaders and employees of the state electric power company in December 1986 and January 1987, clearly illustrates that some wanted the strike to become a test of the government's strength.

An attack on the government with an eye to a change of government does not, as such, amount to an attack on the identity of the state. Such a challenge led by communists bears the danger that the economic order might lose its liberal foundation. From there it would be an easy step to bring about a totally planned state from a planned society. This applies not only for the strong French communist labor union, but generally for all labor unions which pursue their goals and means on a political level. Granted that just demands of employees have to be heard in a legal arena, if a labor union acts as if it were a political party, then the use of the economic threat of strike must be prohibited from the outset.

In a liberal democracy, the freedom of coalition of trade federations can be understood only by recognizing a distinction between the society and the state. It has not yet been decided whether the right to strike is part of collective bargaining autonomy where labor unions and employer federations remain strictly within the framework of society. One can speak of the right to labor lock-outs, naturally, only after settling the issue of the right to strike and knowing precisely what kind of strike is involved. Contrary to the opinion of labor unions, the meaning of the term "strike" is not clear, as we will discuss below.

Collective bargaining autonomy means the freedom of employers and employees to negotiate for wage and working conditions. This applies, first of all, generally to the individual as well as to coalitions. It is a purely practical question whether collective bargaining and collective bargaining contracts should occur only among coalitions. To point this out specifically is significant because labor unions tend to reserve the monopoly of collective bargaining autonomy for themselves. The circle within which collective bargaining autonomy is entitled to act must be considered. Legitimately, this sphere is economic. Questions of school, education and general culture are not about collective bargaining autonomy. Politics is even less related to collective bargaining. But the conception of unions regarding their own role very often takes a different turn. This is discussed further below.

There is obviously no difference between economy, society and social order in the state philosophy of labor unions. The German Labor Union Congress views itself as an organization totally involved in social policy.

This trend came to light early in the public rallies for the right to abortion. Certainly, these three realms (economy, society, and social order) are not, contrary to the liberalist version, separated into neat compartments. Still, this view circulates to this day in the universities, where conclusions are drawn on the basis of models rather than on the basis of reality. To be sure, the three realms are closely related to each other. But they have their own principles of action, which must be respected to maintain a democracy in which individual rights have priority over collective rights, especially those of the state.¹ Labor unions of various countries disregard this division, which is vital for a liberal democracy. In this respect, these countries tend towards "totalitarian democracy."

It is from collective bargaining autonomy that labor unions and others set forth grounds for the "right" to strike. Much of the blame for this view of collective bargaining autonomy can be attributed to the U.N. Declaration of Human Rights, which for its part is rooted in modern subjectivism. As shown, the U.N. declaration of human rights begins with individual rights and then adds, as a corrective device, the obligation towards society and the submission within the legal system. Thus, the concept of order, which properly has a prior role, is relegated to a qualifying one. Initially, the subjective right of the individual and the freedom of coalition appear isolated and removed from the sphere of the state. Labor unions indeed view collective bargaining autonomy as a legal construct in itself, which is regulated only through the competition of interests between employees and employers. This competition is viewed as the only regulatory principle. According to the old liberal concept, the state plays at most the role of a night watchman, a notion that nicely serves the purpose of labor unions today.

The freedom of association, as stated in several national constitutions, is based on this old liberal conception of human rights. The right to demonstrate is very often associated with the freedom of association. The intention behind this is to shield the rights of the individual against the state as effectively as possible. In practice, this intention is certainly justifiable. One needs only a different premise to leave open the possibility that the custodian of the public interest, the state, can put an end to the free play of competition between employees and workers in cases where the public welfare might be endangered. But this is not part of the thinking of western democrats among whom the old liberal notion that

1. See A.F. UTZ, *SOZIALETHIK, III. TEIL: DIE SOZIALE ORDNUNG* 21-54 (1986).

collective bargaining autonomy includes labor unions' right to strike survives (a notion matched by lock-out rights on the side of employers). Simultaneously, collective bargaining autonomy became, through its connection with strike and close-out, a right to dispute.

One has to keep this old liberal definition of collective bargaining autonomy in mind when such autonomy is discussed. The collective bargaining autonomy, with its fundamental link to strikes and close-outs, is a typical instrument of a society of conflict, solely regulated according to the principle of "power and countervailing power."

Today, we must seriously ask ourselves whether we can still uphold the unrestricted right to strike in the sense of collective bargaining autonomy. Today strikes can no longer be justified on the basis of extreme hardship when they cause inestimable public damage.

III. FREEDOM OF COALITION AND COLLECTIVE BARGAINING AUTONOMY IN A SOCIETY OF CONFLICT

Subjectivism, which informed the conception of human rights, has naturally changed the entire social philosophy. From the viewpoint of subjectivism, it is no longer possible to define an objective, generally recognizable public welfare. Public welfare has become a public interest that can be determined through the democratic vote.

In earlier social philosophy, this objective public welfare was viewed as a value superordinated to individuals; now it is equated to a common denominator resulting from many subjective value judgments. Thus, one speaks of value pluralism. The pluralism of values requires on-going communication of the various intellectuals in a society. J. Habermas, who did not want to drop the objective contents of public welfare, thus called for an elite who should define the true public interest. His concept is to be interpreted as an attempt to transcend the modern theory of a society of conflict. Thus, the society of conflict faces the dilemma of not being a genuine community at all, since only subjective value judgments predominate in it, judgments that are in conflict with each other. Our goal here is not to discuss the theories of Habermas. It is only emphasized that this theory has aimed to rescue an important element from the earlier social philosophy. (It is an open question as to which earlier social philosophy.) This element alone is the objective, generally valid value which makes a multitude of persons into a community. Included in the social philosophers to whom this objective value was important were those who leaned towards communism, like Plato and Marx. Out

of fear of such a philosophy, all social philosophers who still talk about an objective public welfare, were generally lumped together with communists. This is clearly the case in K.R. Popper's work *THE OPEN SOCIETY*. Popper's "open society" became a model of a society of conflict. In this society the principle of "power and countervailing power" (J. K. Galbraith) is valid.

The subjectivist interpretation of human rights could welcome nothing more than the theory of a society of conflict, which suits it. This theory nourishes the modern view of collective bargaining autonomy with its conception of dispute parity, which we will encounter more often. In a conflict society, individual groups determine according to their interest what social justice consists of. Thus, what matters is simply to formulate the rules of the game in a society of conflict. The basic rule here is dispute parity, which labor unions use to base their arguments against lock-out.

IV. HOW DO LABOR UNIONS CHARACTERIZE THEMSELVES?

The collective of employees, that is labor unions, developed out of the practical awareness that the individual employee could not, on his own, rescue himself from economic exploitation as it existed in the 18th and 19th century. The labor unions' notion of their role developed from this basis. The labor unions have retained this interpretation of their existence and function, although much in the economy's legal organization has changed, and the social situation of employees has improved markedly.

If the initial issue was a minimal subsistence wage, the current issue that labor unions maintain is the "lasting social progress of employees," for which, however, essential parts of the liberal economic system may have to be sacrificed. Because the larger portion of those who are active in the economy consists of employees, it is not surprising that the interests of employees are also expressed in other areas, namely society and politics. This is mainly because labor unions view themselves as a dynamic social force. The larger their successes in the area of wage and economic conditions, the higher the standard of living for employees becomes, and the more labor union functionaries have to prove their efficacy. In order to prove their efficacy, these functionaries strengthen the power of labor unions not only in the area of collective bargaining, but also by encroaching on different areas of social order and even on politics. The labor union functionaries reject a "static" characterization of

labor unions, according to which the labor union would be allowed to be active only in a defined field. Rather, they declare the goals and also the means of labor union action each time anew. Thus, there should be no characterization of a labor union as such, but only of its strategy.

From the viewpoint of social ethics, such a declaration is not tenable. Historically developed social constructs have to be judged from a normative point of view, if they really are to be institutions. The labor union is only one group in a society united by the state. It is part of a more extensive association and has to submit to regulatory norms of the society, even at the risk of having to give up its historically determined self-concept. The logical consequence is that union functionaries have to be retrained or resign. That is, after all, the fate of social "movements."

Now, if a social construct which has assumed a permanent social responsibility, as labor unions do, derives its norms of action from the historical process, and if, in doing so, it assumes that all perspectives are interest-oriented, thus historical, and therefore would have to be viewed from their changing interests which adjust to new situations, that process reveals an epistemological error. In reality, employees' interests are defined by the trade union functionaries on their own authority. The epistemological method according to which one can reflect upon practice only through practice calls to mind Marxist epistemology, expressed with sophistication by J. Habermas in the theory of communicative competence.²

Naturally, a social construct which determines its goals and means on the basis of the dialectics of perspective and interest, cannot do without a relatively stable definition of the goal. But goal definition, according to the self-concept of labor unions, is only the extension of power. The drive towards political involvement is only one consequence of such definition.

Of course, the self-concept of labor unions, which is based on the dialectics of perspective and interest, also affects the definition of strike. It is assumed that strikes, the ultimate means of union self-realization, always follow the self-interest of unions. Thus, the union definition of strike becomes unassailable to attack from a different standpoint. This means that the labor union is always right.

2. J. Habermas, *Vorbereitende Bemerkungen zu einer Theorie der kommunikativen Kompetenz*, in J. HABERMAS, N. LUHMANN THEORIE DER GESELLSCHAFT ODER SOZIALTECHNOLOGIE? 101-41 (1971).

V. COLLECTIVE BARGAINING AUTONOMY AND STRIKE FROM THE VIEWPOINT OF NATURAL LAW

Only natural law can be the basis for a social-ethical judgment of concrete social conditions. Natural law has been understood over the course of this century to mean many different things. In this context, "natural law" does not encompass the subjectivistic empiricist orientations of John Locke, Samuel Pufendorf, Christian Thomasius and Christian Wolff. Collective bargaining autonomy, as understood in article 9 of the German constitution, is a result of this philosophy of the enlightenment. Likewise, the U.N. Declaration of Human Rights, which we have previously analyzed briefly, is influenced by empiricism. Empiricism does not recognize that norms exist that are not derived from the individual, but which unite the many individuals into a collective "humanity". Indeed, one can only define individual rights from this perspective. It is true that Marxism also follows this path, but it does not see the collective as a community of free persons endowed with autonomy. Contrary to the philosophy of the natural law of the enlightenment, there is no individually based human right. The individual has "his" right, only if he views himself as part of an extensive social order. The right to work, as pronounced for the first time during the French Revolution on February 25, 1848, is not possible as a purely individual right. The pitiful bankruptcy of state owned workshops, which were supposed to demonstrate this putative subjective right, support this conclusion. It is true that every person has the right to determine his profession, and to choose freely his place of work. But the general right to work is limited by legitimate concerns not only of others, but of the entire society. Fundamentally, the general right to work is nothing but everybody's right to full employment politics.³ The freedom to choose one's career in the sense of a clearly circumscribable subjective right has never existed and is inconceivable in terms of social philosophy. Provided that they are rights *qua* liberties, which require protection from external force but not a directly positive service from society, one may speak of a certain unvariable application of natural law on the particular social situation (freedom of consciousness and religion). Yet, as soon as these liberal rights are actively externalized (freedom of expression), they approach social limitations.

Quite different from the individualistic representatives of natural law is

3. See A.F. UTZ, *Rech auf Arbeit*, in 38 ARCHIV FÜR RECHTS — UND SOZIALPHILOSOPHIE 385-400 (1949-50).

Thomas Aquinas. He sees the norms of natural law primarily as regulatory norms, but—in contrast to Hegel and Marx—he views these as regulatory norms of the community, which is a custodian of personal values. Such a natural law cannot be expressed in a concise phrase. It is true that one can say that all people have the right of self-realization, but it is self-realization within the community. How individual rights are formulated, with regard to the right to work, on the basis of natural law was illustrated earlier. The norms of natural law are not primarily rights one is entitled to claim from the community, but norms of the organization with regard to general human values. Today we have lost this regulatory thinking completely. The collective bargaining autonomy, as it is viewed today, clearly indicates this fact. Both employer and employee are subjectivists of our society; both are privileged through positive law. Other members of society have to stand by and watch how a strike develops as if this labor dispute were not of interest to them, notwithstanding how they suffer from it when their electricity is switched off, when they can no longer ride the trains or when their garbage left in front of their door is no longer picked up — threatening an epidemic. Nobody in this state of affairs questions the reasonableness of such a strike for the population. The custodian of public welfare is left only with the task of finding a substitute for the strikers.

Even though the regulatory norms of natural law are based on the collective and not on the individual, the individual interest must still be attributed a protected status lest individual rights be delivered over to the head of state. Thus, it lies within the application of the norms of natural law to search for a formulation which takes into account both the entire order and limits to governmental power. The individual right of accepting or rejecting a job offer is also valid in Thomas Aquinas' perception of natural law. This right does not, however, entail that the individual is offered the job of his choice. Moreover, the freedom of job choice is linked to the obligation to work not only in one's own interest, but also in the interest of the entire community. Under this presupposition of economic politics which subjects itself to public welfare, the rejection of any job offer can no longer be justified. Thus, the employment refuser assumes the entire risk. This also applies to claiming, without regard to the public interest, the freedom of refusing collectively an employment contract offer (including work and wage conditions). Apart from this, a collective (the labor union) carries a larger responsibility for the community because the collective walk-out means greater damage to

the community than the mere individual walk-out. Thus, the notice of termination of a collective labor contract is ethically more irresponsible than the individual walk-out. The opinion of the Supreme German Labor Court (court order of January 28, 1955), that the observance of contracts tightly binds the individual, but does not bind the collective with regard to strike, can no longer be justified in ethical terms, as we will note below. This court order reveals perhaps most clearly the inconsistency which lies in today's perception, namely that the collective bargaining autonomy is viewed only as an instrument of subjectively interpreted self-interests. Behind this perception lies the philosophy of natural law of the enlightenment.

According to the classical philosophy of natural law, as represented by Thomas Aquinas, collective bargaining autonomy is to be formulated as follows: Collective bargaining autonomy is the right of the individual employee and employer as well as that of their collectives to negotiate the wage and working conditions freely with consideration of the public interest. The concept of public interest includes the competence of the state authority to intervene in any way necessary when the public interest is threatened. With this, the outcome of the negotiations as well as the means of reaching an agreement are, in principle, subordinated to governmental authority. Such is the case in the entire area of contractual business. The state can and, under certain circumstances, must enact appropriate laws for this contractual business.

From this point of view on human rights, that is, from the standpoint of natural law, it is simply the general statement that every person is free to accept or decline a certain job offer. Thus, the individual bears the risk of choosing to decline a job offer. If he is already covered by an employment contract, then (from the viewpoint of human rights) he can terminate this contract only if the conditions of this contract have changed substantially, and the contract has become inhumane. The employee's unilateral contract termination through walk-out thus takes place because of an emergency, and is in this case at his own risk. Additionally, this view supposes that the employees are not protected, at a minimum subsistence level, through support at the expense of the entire society. If employees are supported through self-financed insurance, this is a different matter. But it is always, in as far as one remains on the level of natural law, a pure walk-out, or in more precise legal parlance, a retention of employment slots. No consideration is given to the struggle against the entrepreneur to force concessions from him as the concept of

strike implies. Only in the case of emergency can workers legally refuse to work while retaining their jobs. Emergency means, in this context, an injustice which is generally considered to be manifest. The criterion of this manifestation is not only derived from the testimony of the employee. Furthermore, this criterion need not be only one of minimum subsistence level. A gross injustice of distribution, although above the subsistence minimum, can also be the cause of walk-out. One must not identify injustice which lies above the subsistence minimum, however, as injustice against a minimum of subsistence. In order to speak of human rights in a concrete case, a certain general, spontaneous perception of the facts is necessary. Human rights should always be justified by appeal to an objective state of affairs which is spontaneously recognizable through human reason, not from a subjective value sentiment. Undoubtedly, this objective criterion can be determined with regard to a subsistence minimum, but not above this level. Above the subsistence minimum, the employee, who refuses to work because of employer injustices, must be supported through unmanipulated public opinion. Only in this way can he certify his action as generally recognizable through reason.

Fundamental rights or human rights can, however, be effectively asserted only if they are somehow legally formulated. For this reason, the charter of human rights cannot be legally enforced if it has not been undersigned by a state. As long as the fundamental right of walk-out has not been formulated by the legislator in terms of positive law, the walk-out is completely at the employee's risk, exactly like the citizen's resistance to state authority.

Naturally, the human right to strike can be used individually as well as collectively. But it cannot be emphasized enough that the *human right* of walk-out is not the same as the *right of strike*, which is now valid in many countries. Strike is a particular kind of walk-out. It has a foundation different from that of the ordinary walk-out which one describes as a human right. To guarantee in the constitution the right to "strike", as for instance the Spanish state constitution does, is a fundamental error. In the German "basic law", the right of freedom to form economic coalitions (labor unions and employers' federations) is included (art. 9, 3), but the right to strike is not mentioned. It is true that some German jurists believe that the right of coalition is associated with the right to strike. This interpretation, however, is not necessary. Only actual human rights belong in the constitution. The right to strike is, however, no human right.

Strike has its foundation in the subjective value sentiment of an employee that his wages and working conditions are unfair. It is never only an individual, but always a collective walk-out. What is more, the employees do not inquire of public opinion when they strike. They engage in a work stoppage because they themselves are of the opinion that they can demand more and more of the employers. Their attitude is accounted for by the principle of a competitive struggle in the market economy. Naturally, employers try to make clear to employees in negotiations that their demands will adversely affect the entire economy and thus, will also endanger their jobs. Under certain circumstances, the employees drive a hard bargain, even though their strike results in price increases. The public is not asked its view. On the contrary, the strike harasses the public in an attempt to gain public support for the employees' demands.

VI. COLLECTIVE BARGAINING AUTONOMY, STRIKE, AND LOCK-OUT IN THE MODEL OF A MARKET ECONOMY

In the market-economy model, economic equilibrium is defined according to the balance of supply and demand (with respect to purchasing power). In the same sense, social balance is defined according to the equally represented power of employees' coalitions (labor unions) and employers' federations. Because, as is generally the case in the market, the price of goods is set by their value in exchange, labor is also appraised according to its exchange value. Insofar as the laws of the market are realized in perfect competition, both parties to a collective wage agreement should achieve equilibrium (parity) and thus a result which, economically speaking, is fair for both parties. If there is market parity between the entire group of employees and the entire group of employers, a lock-out is unnecessary. During a conflict, the employees do nothing more than decline the job offer of the entrepreneurs, breaking the employment contract. They are consequently dismissed. According to the law of supply and demand, every offer lapses when it does not find consumers on the market. In this context, the apodictic assertion that a strike would require a lock-out by the other side, is a rash statement. It anticipates something which exists or seems to exist, but on a level different from that of the market-economy model.

Note that it is a model, and that this model includes the *entire* group of employees and the *entire* group of employers. This model spawns the union argument that lock-out is an employer's instrument that destroys

parity. The union argues that employers are sufficiently protected without lock-out because job offers are at their disposal. The argument of the unions becomes untenable as soon as the model no longer has a foundation in reality. And in de facto terms, this is precisely what happens.

The model, in its entirety, never captured reality and never will. First, a pure market economy cannot be a guarantor of social equilibrium. Secondly, and this is more important in our context, workers and employers are not juxtaposed, neither at the national nor the international level. This, however, is implied by the model, because it refers to employee and employer in an abstract, purely conceptual way.

To picture this model, one can think of a large factory in which the entire group of employees is opposed to one entrepreneur. At the moment the employees stop work, they are automatically dismissed, and there is no need for a lock-out. De facto, the strikers give their notices through their strike. It is supposed, according to the law in most countries, that a strike does not repeal the labor contract. This is *nonsense*. As long as a contract is valid, strike is a breach of contract. If the labor contract has expired and new wage negotiations are being conducted and the employees do not accept the employers' offer, they are not striking. Rather they are simply rejecting the offer and leaving the company. In this case, no lock-out is necessary. Such is the model.

It is assumed, however, by a considerable number of interpreters of the West German Constitution that the right to strike necessarily follows from collective bargaining autonomy. Strictly according to the model of a market economy, collective bargaining autonomy only means the right of each partner to conclude or terminate a labor contract freely and without external force. The *model*, which is conceived *purely* in terms of a *market economy*, does not say anything about the social components of collective bargaining autonomy. These components consist, for example, of the material or personal risks that one or both partners assume if an offer is declined, be it a matter of labor or the work site.

On the basis of this model, one cannot refer to strike and lock-out in common legal usage. For this, the model is too abstract. This fact cannot be emphasized enough. Economic theory speaks of market economy in a purely formal sense. If one were to apply this model in a realistic setting, then one would have to think of the aforementioned factory, in which all employees of all times and in all nations are united. This uniformity of employees and employers does not exist in reality. There are many national economies, many sectors within these economies, and

many individual enterprises within these sectors. The point is that the unity of the model is not realistic. Today we know this well, because everyone complains about protectionism, which would not exist if the market economy model were realized worldwide.

The social goal indicated in this model is to obtain the maximum and best supply of material goods for society. The motivating force is the self-interest of both employer and employee. In this connection, all social interests that go beyond those participating in the economic process (family members, the sick, the disabled, etc.) are taken into account only through the self-interest of employees. The market-economy model knows no social-ethical preconceptions. Those are taken into account solely in the so-called *social* market economy. This topic, however, belongs to economic politics found in the real economy. If, in the current situation, unions demand absolute parity in the labor struggle, the presuppositions of the market-economy model, from which this demand arises, would also have to be fulfilled—primarily the condition that the employees enjoy no social support except their own means. This makes it easier for them to strike.

In a market economy, the self-interest of participants should ideally include the preservation of the order of a market economy. For instance, wage demands should ideally give more consideration to the future of the economy, and to the sound development of the production process. Likewise, entrepreneurs should have an interest in manpower being spared to a large degree in order to promote productivity, and in the environment not being exploited. But since *individual* self-interest is in the forefront of the market-economy model, expectations that such considerations would be included are exaggerated. In the self-governing corporations of Yugoslavia, this disharmony clearly manifests itself between short term and long term self-interest, which goes beyond the everyday situation. An older employee close to retirement is, for example, more concerned with his immediate income than with the company's prospects in the distant future. Also, in a capitalist economy, the employees who make decisions that affect the future of the company, and even the entrepreneurs themselves, can give too little attention to the company's survival. This lack of attention may, for example, result from an unwillingness to adapt to technological development, or more frequently from proposing exaggerated benefit plans or company retirement plans, which cannot be financed by a shrinking staff.

For the self-interest of those participating in the economy not to sup-

press intertemporal, political economy concerns, a higher agency which can effectively enforce such considerations is necessary. Here, we touch on a thought which is alien to a collective bargaining autonomy understood in purely procedural terms and devoted to conflict theory.

To deal with this abstract market-economy model is increasingly important to understand collective bargaining autonomy and the topic of strike/lock-out, which is usually discussed in the same context. Unions draw their concept of strike from natural law and assume that the right to strike is a human right. However, they take their arguments for parity in labor struggle and against lock-out from the abstract market-economy model which, in concrete applications, must undergo many revisions and transformations.

Collective bargaining autonomy, derived from the market-economy model, must take into account the cartel concept. If an individual contract, as a result of its economic effect, influences the market strongly, it must be subject to the control of cartel law. In the past, wage contracts were contracts of (smaller) unions with individual companies which did not influence the market beyond this realm. Today, economy-wide wage contracts in fact function like federal laws. Thus, wage contracts must be subject to the control of the Cartel Office.

VII. THE SOCIAL-ETHICAL JUSTIFICATION OF THE MARKET ECONOMY AND OF COLLECTIVE BARGAINING AUTONOMY

According to general experience, humans act out of self-interest. Social politics, concerned with the realization of public interest, must take this self-interest into account. According to the subsidiary principle, it will thus give priority to personal decisions, to insure effective performance, even though they are motivated by self-interest. The limit, of course, is always the public welfare, which is ultimately determined by state authority. Persons and groups should be able to stand in mutual competition.

This demand presupposes, however, an at par relationship between the individual members of a society. What is to be viewed as genuine parity can be judged only from the standpoint of public welfare. Thus, a philosopher of social ethics cannot agree to the unqualified dominance of society in conflict. As stated, the upper norm and extreme limit of competition, or of conflict, always remains public welfare as defined by state authority. Because, however, state authority cannot determine *a priori* public interest in detail, even though it has to formulate broad fun-

damental values (e.g. the fundamental rights of a person and the preservation of natural institutions, such as marriage and family), the competitive activity of individual groups is indispensable. This socio-ethical conception implies, however, the conviction that one cannot dispense with justice, at least roughly definable and "objective" justice in any society.

In a modern pluralist democracy, however, considerable skepticism exists about whether there is any objective definition of justice. A desire exists to define justice purely methodologically, that is as a result of the exchange or conflict between the individual and various interest groups. There is no longer any desire to credit any social authority with the knowledge and the responsibility regarding a universally accepted concept of justice. Some suggest that modern pluralist democracy could only be understood methodologically, that is as a society in progress in the empirical sense, as an universally open society.⁴

Union politics is still dominated by the idea, long obsolete, that progress in society can only be achieved through class struggle. Labor unions can indeed point out the results of labor struggles of the past. But those were the days in which the strike was still associated with the walk-out in the definition of natural law.

Pluralist society, which develops not from a plan from above but from the initiative of individuals or of groups formed by them, must create some kind of regulatory mechanisms that achieve the desired services for the public welfare through individual initiatives with some probability. In the field of supply of material goods, this regulatory system is the market economy. It is the best guarantee of the necessary services, without which the public welfare would not materialize. In this context, service is to be understood not only as the utilization of manpower, but also as care for the optimal utilization of producer's goods on the basis of ownership rights. This ultimately ties the risk of decision over capital to one person or, as in corporate enterprises, to several persons.

Thus, one can use the market-economy model to orient oneself in the economic system. This means that to the extent that it is socially tenable, one can leave the relations between employee and employer to the market laws of supply and demand. This is where collective bargaining autonomy begins. The dynamics of the market economy demands autonomy of decisions on the sides of labor and capital. But what are the

4. See DIE OFFENE GESELLSCHAFT UND IHRE IDEOLOGIEN (Utz ed. 1986).

conditions of this autonomy and what are the means of their accomplishment?

As shown, it is presupposed in the model that the laborers' free demand for work stands opposite to the employers' free supply of work. This means of accomplishment consists, on one side, of the bilateral freedom to refuse to accept a job offer and, on the other side, the freedom to refuse to offer different work conditions. In reality, however, collective bargaining autonomy looks different.

VIII. THE BALANCE OF POWER IN THE REAL MARKET ECONOMY

In reality, as already stated, the economy is no all-encompassing construct in which power relations between all employees and all employers are settled at one time. Many national economies compete with each other. Wage and labor conditions cannot be negotiated independently of foreign trade considerations. Otherwise, a nation's capital would be consumed. Thus, an imbalance in power relations to the disadvantage of employers occurs which, of course, also affects employees in the long run, because they would lose their jobs. Employees do not take this consequence into account, however, during labor conflicts.

In addition, wage and work conditions are only negotiated in particular economic sectors or regions. Thus, calls for parity which stem from the model are fulfilled neither on a national nor on an international level. Without exception, only a fraction of the employees of a sector or even of an individual business is on strike. To an alarming degree, however, the consequences reach further than the strike itself.

From this realistic viewpoint, the protection of property and of businesses requires the possibility of lock-out. Defenders of lock-out emphasize in particular the preservation of the company, and relatively little attention is given to ownership rights. The preservation of companies is, of course, the most obvious reason for lock-out. But in the liberal economy, the continued existence of businesses depends substantially on the right to own production goods, to which the right of disposition is closely linked. The *right* of lock-out is to be seen from the viewpoint of the individual holding the property right and the corresponding right of disposition over production goods. Those who offer manpower are distinct from those who control the means of production.

If the employees themselves were the owners of the company, no strike would occur and lock-out would of course be unnecessary. Labor unions

have well understood this state of affairs; namely, that regarding the right of lock-out, the ownership of property is what ultimately matters. They cite as a reason for banning lock-outs that the entrepreneur derives sufficient bargaining power from his status as a property owner. Thus they fall back upon an argument that was valid within the framework of the market-economy model but does not apply to the real economy. The right of lock-out as a defense against strike becomes an indispensable companion to the right of ownership of production goods (naturally always under the presupposition that the right to strike is valid). Therefore, under this condition, the lock-out creates no disparity in the labor dispute. It is only in this concrete context that the argument of employers as well as that of the German Federal Labor Court, namely that lock-out is justified by the distribution of property and by the continued existence of companies, is conclusive.

Lock-out is, as stated, a counter measure against strike, primarily against strikes that target specific sectors. But it receives its justification not on the basis of a putative right of retaliation but rather from the right of property or, more precisely, the right of disposition over property which must be protected for the preservation of the company. The striker violates the exercise of the owner's disposition right, which has been guaranteed in the contract. This is true even without any destruction of the company's production goods or items of furniture.

The argument of labor unions that entrepreneurs do not need lock-out because they own the means of production is incorrect for several reasons. First, it rests on the abstract market-economy model and does not apply to reality. Second, the private ownership of production goods entails burdens as well as rights. These burdens can be borne only if there is production. During the strike, however, the machines stand idle. Despite his property right, the employer is powerless if employees refuse to work.

Employees are justifiably outraged if an entrepreneur manages his company poorly and thus endangers jobs. But there is less discussion of the detrimental effect of strikes, and even less of the fact that strikes involve contract violations. Also none consider that the employee like any other person has an obligation to work despite his job choice, especially when he is under contract. By fighting against lock-outs with the argument that employers possess sufficient bargaining power simply through their ownership of production goods, the unions presuppose that their strike is a self-evidently justified means through which the unions achieve

their subjectively determined goals. With this, the contract violation aspect is concealed.

Most dubious from the viewpoint of social ethics is the opinion, held by the West German Labor Court and others, that the collective could break the labor contract through strike while the individual is not entitled to such a right. But, the obligation of contractual fidelity applies equally to the collective and to the individual. Labor lawyers assert that workers who strike in order to improve their employment conditions do not terminate their employment and thus do not elect to hand in their notices. But why would this apply only to the collective and not to the individual? Moreover, such an "interruption" of the employment relation would be conceivable only in the case of a *substantial* change in the conditions under which the labor contract was concluded. For in that case, the law provides the individual with the possibility of giving notice that he will no longer honor the contract and also offers the legally enforceable right to adapt a contract due to the termination of the transaction basis.

Today's collective bargaining autonomy is derived from the freedom to engage in labor disputes and requires a parity of the parties, similar to the formal competition in the market-economy model. This parity is never practicable. Today, the unions have means of exerting pressure so that not only the employer but also the entire economy is affected. It is finally time to become liberated from the perceptions of the eighteenth and nineteenth centuries. Today, the issue is no longer the attainment of a subsistence wage for the employees. Rather the issue is only a dubious wage increase and the further reduction of already reduced working hours. For such purposes, the economically disastrous means of strike is employed as if a substantial emergency still existed.

Today, one can generally no longer speak of a walk-out as based on natural law and thus on human rights. No longer does a walk-out usually arise from a critical employment situation which would itself entitle the employees to strike. In modern industrial states, the employee can draw on multiple sources of social welfare protection against the subsistence minimum. Strikes are paid for *de facto* by the entire society, especially by tax payers and consumers. Is, for example, a strategically devised strike targeting the piston industry, which paralyzes, in the long term, the entire automobile industry and related supporters, objectively justified?

On the basis of the modern legal form of collective bargaining auton-

omy, a strike is not justified, for instance, when employees refuse to negotiate even though there is still hope of settlement. This procedural criterion of justice, however, does not suffice to justify a strike objectively. The real norm of justice is public welfare, which includes the rights of employees as well as employers and consumers, that is, of all members of society.

The theory of society in conflict, which belongs to the concept of pluralist democracy, provides only for procedural public welfare. Accordingly, the employee-employer relationship is not definable according to appropriate norms. At most, one can speak of moral behavioral norms, the observance of which one may expect from both sides of industry. But such moral expectations are not sufficient to rehabilitate society in conflict. If the conflict involves an equal distribution of power and has been carried out according to the rules of the competition, the outcome of the conflict is fair. Bringing the matter before the labor court is thus motivated only by a legal challenge to a disproportionate exercise of power. Moreover, it is the labor unions involved that determine when a strike is justified.

How far the individualistic concept of interest has advanced into legal practice or perhaps had to advance under the influence of modern thinking, becomes obvious in the written opinion of the highest West German labor court (3/11/1986) concerning the prohibition on utilizing the absence of employees. The court stated that the employee has an interest in "not giving the employer prompt and economically accessible information about times of absence and sickness." If this information were in any way disadvantageous to the employee, which cannot be excluded, one would have to confront these disadvantages with different legal means.

If the entire society were regulated according to such subjectivistic, methodological standards, those who do not have power massed in groups would be soon excluded from society. Under this aspect, the largest union is not more just than the small ones. The abstract conflict model, which clearly bears the characteristics of old liberal philosophy, corresponds most closely to the industrial labor union, which would naturally like to represent all groups of employees. Those who fail to join are at a disadvantage. Thus, the employee is compelled to join this one union, regardless of how strongly the individual employee might disagree with its ideological orientation. The individual perhaps has an abstract right to make his opinion known in such an industrial labor union, but he

must, in any case, surrender to the majority. This is the means of finding justice in a society of conflict.

According to unions, conflicts have an important innovative function for social progress. Strike fulfills this necessary function by contributing to social progress through rational conflict settlement. Thus, modernization is the result of conflict.

It is widely acknowledged that the strike has served this useful function in social history. For Germany, this consequence of union strikes is indisputable. Yet, one must be skeptical of generalizations, particularly improve the quality of life of employees. F.A. Hayek raised some remarkable objections regarding the "beneficial" activity of unions:

It is indeed more than likely that in countries in which labor unions are very strong, the general level of real wages is lower than it would be without them. This certainly applies to most European countries, where labor union politics is even reinforced by the general use of restrictive practices, such as "job promoting" utilization of manpower, which is not in demand.⁵

After the right to strike has been viewed as part of a catalogue of fundamental rights of labor unions and is, in addition, understood purely strategically, a criterion of justice for strikes no longer exists outside the sphere of dispute parity thinking. An exception can exist in the case of a ruinous strike; however, even a strike with this intent can be disguised and is not provable legally, including a strike with political goals. On the basis of labor law, the right to a lock-out is not to be ruled out. Thus, one is on an infinite parallel of parties entitled to dispute. Where should this end? How does one get out of this muddle, which began with talk of the subjective right to strike without any mention of standards, and the higher ruling authority which legally formulates the highest norm?

Even a market economy founded on the liberty of contract presupposes a governmental authority that must watch over the preservation of everybody's freedom to contract, and restrict through cartel laws, the contract rights for those who have, or try to achieve, too much market power. Collective bargaining autonomy, however, which can continue its existence only in the market economy, pays no price for this liberty. On the contrary, through its claim to the right to collectively violate legally concluded individual contracts, the labor union abolishes the institution of liberty of contract, additionally supported through strike as a means of coercion. Here begins the inconsistency with law and justice

5. F.A. HAYEK, DIE VERFASSUNG DER FREIHEIT 345 (1971).

and the incompatibility of collective bargaining autonomy, understood in purely social conflict terms, with the market economy.

Collective bargaining autonomy, as it exists *de facto*, levels wages and thereby makes everyone equal. It shortens working hours of laborers to 35 hours, while managerial employees, managers and independent business people work 60 to 70 hours (without social insurance).

Even without the right to strike, which should be obsolete because of its adverse economic consequences, collective bargaining autonomy retains its social significance. It is not clear why both partners do not have a duty in a collective wage agreement to subordinate themselves to an arbitration tribunal if they cannot reach a compromise. The keen defenders of pure market economy fear that workers and employers could join forces and transact wage settlements, which would disrupt price formation in the market economy. But in reply it can be asked: Do strikes and lock-outs guarantee fair wages in a market economy, or do they instead amount to a compromise between two cartels at the expense of those social members excluded from the negotiations? With regard to the concern that price formation in a market economy would suffer with a ban on the right to strike, it should be noted that international competition alone could insure that entrepreneurs would not simply rely on passing on the costs of increased wages. How the arbitration court would have to be structured, how it would be composed, and at which point in time it would have to go into action during disputes, is a question that is left to pragmatists. But one legal prescription is necessary: that an arbitration court would have to end the conflict in an extreme case in order to avoid a strike.

Of course, it would be ideal if one were able to leave, without such a legal prescription, both sides of the industry with the responsibility for resolving their conflict on the basis of a correctly understood collective bargaining autonomy. This requires, however, that one presuppose that both sides of industry fulfill their obligation towards the public welfare. It corresponds to the subsidiary principle that small communities first have the right, prior to state action, to prove their autonomy. In this construction principle, the responsibility and the efficiency for the public welfare play a decisive role. But this is no longer evident in today's dispute parity. It is doubtful too, whether in this highly complicated industrial society, involving international competition, both partners of industry are still in the position to find beyond their own interests a just resolution that would include all members of society. In any case, the

German Trade Union Federation has not recently furnished proof that it is capable of fulfilling these conditions. To threaten rashly a strike, even if it is only a warning strike, indicates clearly that the public welfare is being confused with self-interest.

IX. ULTIMA RATIO

From the viewpoint of natural law, the *ultima ratio* lies in the notion that a critical situation for employees, which is manifestly significant and unreasonable, can be abolished only through walk-out. In such an emergency, an error regarding justice is out of the question. The *ultima ratio*, understood in the sense of an unquestionably gross injustice, applies to every economic system. Essentially, it is not a strike in the sense of labor dispute law, but merely a right of job retention.

But the framework of collective bargaining autonomy does not mention this. The issue here is compliance with a regulatory system with regard to collective, universally applicable negotiations of work conditions. Thus, when the employees cannot go along or, more accurately, do not want to go along with the suggestions of entrepreneurs in any way, one speaks of *ultima ratio* as justifying a strike on this level. It justifies a strike because in a society of conflict the bargaining positions, which are motivated by interests, have priority over any objective norm of justice, even though the employees may be *morally* obliged to remain proper and to take the public welfare into account.

X. SUMMARY

1. From the viewpoint of natural law, that is, of social *ethics* and thus of pre-positivistic law, the right to strike is an emergency right. Here, emergency is to be understood as (a) employment conditions below subsistence minimum, a self-evident state. A walk-out, however, is effected at the striker's own risk similar to the right of resistance against state authority, and is justified (b) in a broader, analogous sense, by any other state of manifest social injustice which, however, must be supported by unmanipulated public opinion. Even in this case, the striker bears the entire risk.

2. Collective bargaining autonomy does not necessarily entail the right to strike.

3. Collective bargaining autonomy, even though a fundamental right

of both sides in a dispute, must not be carried out within a sphere beyond the state. Its boundaries must be legally defined.

4. In modern industrial society, the right to strike has become generally obsolete as a consequence of:

- a) the high standard of living of employees,
- b) the social protection of employees through various social institutions,
- c) the disastrous consequences for the national economy and its international competitiveness, and
- d) damage done to third parties, who are not active in the economy, under certain circumstances especially the unemployed.

5. To view the right to labor dispute as an indispensable ingredient of collective bargaining autonomy is a fundamental error in today's understanding of collective bargaining autonomy, which has its foundation in the subjectivistic theory of conflict society.

6. It is inconsistent with social ethics to view collective bargaining autonomy merely as a procedural mode which necessarily involves parity in the dispute.

7. A social ethical investigation of strike and lock-out which begins with dispute parity is no longer ethics, but rather a theory of strategy. In addition, considerations of material elements (social differences between dispute parties) does not lead beyond a purely procedural examination. The necessary involvement of objective justice disallows any purely modal or procedural definition of justice in the sense of dispute parity.

8. In terms of social ethics and constitutional law it is necessary to re-establish and preserve the monopoly power of the state.

9. In the case of a collective bargaining conflict which cannot be resolved by the parties in the dispute, arbitration procedures should be conducted. In the last instance, there should be an agency that can be called upon for a proper legal ruling in order to prevent a strike. With this, a judgment about warning strikes has been implicitly made. The putative right to strike has to be overcome in a similar manner as the feudal law which became obsolete through eternal domestic peace.

10. The loss of power of labor unions and the working class in general, a consequence of restrictions on the right to strike, is substituted by the increasing influence of employees via worker participation at the internal company and entrepreneurial level. In a co-determined economic constitution, primitive means of labor struggle no longer have any place.

11. Given what we have said about the right to strike, the lock-out becomes superfluous. The right to lock-out could be discussed only on the grounds of the theory of dispute parity. Here would be its justification as a defense measure of employer federations against strikes. The notion that a legal dispute between both sides of industry is to be conducted, so to speak, exclusively on the grounds of dispute parity, has to be attributed to the ill-considered adoption of the modern theory of society of conflict.
