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SPIS TREŚCI

INTRODUCTION

Labour law is viewed as a branch of law which combines some elements of private autonomy and public intervention. The emergence and development of labour law may be treated as a response to the lack of equilibrium between the owners of the means of production and the workers carrying out their duties in a condition of subordination. As a result, the deepest justification for the determination of labour standards by public authorities is the protection of the employee as a weaker party to the employment relationship. The same role is in fact played by collective labour law, which establishes a legal framework for the social dialogue conducted by employers or their organizations and collective bodies representing employees. As a rule, the position of trade unions and other subjects representing workers is equal to the position of the employer. Thank to this, the legislation may leave room for free negotiations. From this perspective, collective labour law reflects the ideas of freedom and democracy. In many countries the autonomous process of shaping the conditions of work and pay constitutes one of the foundations of the socio-economic system.

In Poland, the position of collective labour law is more complicated. Before 1989 there was no room for real negotiations, bargaining and collective agreements. The state was the main owner and organizer of any and all economic activity. As a result, employment standards were determined mainly by statutory provisions. The situation changed when the transition to the new socio-economic system began. The foundation of the system should be social dialogue leading to the creation of autonomous sources of labour law. The Constitution and the legislation guarantee freedom of association and the functioning of the social partners. They are able to negotiate freely to determine employment conditions. Unfortunately, the social dialogue is undergoing a deep crisis. Trade union membership has significantly decreased, there are no alternative elected bodies and the employers' organizations are also weak. As a result, only a relatively small group of Polish employees are covered by collective agreements. This leads to two observations. Firstly, there is a huge discrepancy between the constitutional

declarations and the reality. Secondly, despite the glorious history of the Polish trade unions (the "Solidarity" movement), the main role in shaping the employment relationships is still played by legislation.

Finally, it is necessary to stress that collective labour law in Poland is undergoing a continuous evolution. The legislation is being adjusted to the changing circumstances. A very important role is being played by the economic crisis as well as by the changing structure of employment. At the moment, a large number of workers are engaged on civil law contracts (contracts for services, self-employed). Until now, the protection offered to them by collective labour law has been very limited. The majority of workers employed outside the employment relationship did not have the right to form and to join trade unions. These rights were granted to employees only (with some exceptions) while the ILO's standards cover workers. The concept of worker is treated as a broader one than the concept of employee in a strict sense. A broader approach to the freedom of association may be also derived from constitutional provisions: the Republic of Poland shall ensure freedom for the creation and functioning of trade unions (Art. 12); the freedom of association in trade unions shall be ensured (Art. 59.1)[1]. The current solution will have to be changed due to the judgment of the Constitutional Tribunal of 2 June 2015[2]. The Tribunal stated that the provisions of the Law on Trade Unions that limit the rights of persons employed outside the employment relationship (persons performing gainful activity) are inconsistent with Art. 59(1) in conjunction with Art. 12 of the Constitution. According to the Tribunal, the legislator is not absolutely free in determining the personal scope of the freedom of association. As a result, it is necessary to reconstruct its legal framework. The Law on Trade Unions must not overlook the rights of workers who are not employees (including those engaged on civil law contracts). The ruling did not undermine the definition of the employee arising from the Labour Code. At the moment, we are awaiting the amendment to the Law on Trade Unions. We are also looking forward to another important change. The Tripartite Commission for Socio-Economic Affairs is going to be replaced by the Council of Social Dialogue. The new institution is intended to promote and to support social dialogue, which is undergoing a serious crisis (particularly at the national level). The Council will consist of representatives of employees, employers and the government. The members of the council will be designated by main (representative) trade unions and employers' organizations. There is also a plan to establish provincial councils of social dialogue. The Law on the Council of Social Dialogue and other institutions of social dialogue was enacted on 25 June 2015. The legislative process has not been completed yet.

[1] Translation of the Constitution of the Republic of Poland on sejm.gov.pl.

[2] Case K 1/13.

Finally, it is necessary to explain the idea behind this volume. Over the recent years there has been no comprehensive set of texts in English that would discuss the specific features and the current situation of collective labour law in Poland. A great opportunity appeared in 2010 with the international scholarly conference commemorating the 30th anniversary of "Solidarity" that took place in Gdańsk. The scholars prepared a series of articles covering the main aspects of the contemporary collective labour law in Poland[3]. After this conference, we decided that there is a need to adapt these texts for foreign readers. Consequently, the texts were revised so as to enable such readers to understand the development, the legal constructions and the future prospects of collective labour law in Poland. These essays constitute the core of this volume. The articles discuss the situation of the social partners, the instruments of social dialogue (collective negotiations and bargaining, collective agreements) as well as some forms of employee engagement in company matters. We do hope that this journal may be very important for all those who want to read about the Polish collective institutions in English – for scholars, students, but also entrepreneurs and foreign companies. We believe that such a collection may play an important role in development of the Polish academia, being also a contribution to supporting the social dialogue in Poland.

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Łukasz Pisarczyk

[3] The texts were published in Polish: *Zbiorowe prawo pracy w XXI wieku* [Collective Labour Law in 21st Century], A. Wypych-Żywicka, M. Tomaszewska, J. Stelina (ed.), Gdańsk 2010.

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THE AUTONOMOUS LABOUR LAW – *DE LEGE LATA* AND *DE LEGE FERENDA*

1. The notion of autonomous labour law is a highly ambiguous one and happens to be understood differently by the labour law doctrine[1]. More than often the notion is used to cover all[2] sources of law not enumerated in Art. 87 of the Constitution of the Republic of Poland, viz.:

– company-level acts of non-individual nature, established by the employer, at times with the participation of bodies representing employees (e.g. regulations, articles)[3];

– corporative non-individual acts established by organisations associating employees or employers (e.g. articles)[4];

– accords of non-individual nature concluded by entities representing employees and the employer(s).

[1] Cf. E. Chmielek-Łubińska, *Szczególne właściwości źródeł prawa pracy. (Zagadnienia wybrane)*, (in:) *Studia z zakresu prawa pracy i polityki społecznej*, [Particular Features of Labour Law Sources – Selected Issues, (in:) Studies in Labour Law and Social Policy], A. Świątkowski (ed.), Kraków 1999/2000, p. 31–32, 40 *et seq.*; L. Florek, *Autonomiczne (pozaustawowe) źródła prawa pracy*, (in:) *Księga pamiątkowa poświęcona Czesławowi Jackowiakowi* [Autonomous (Non Statutory) Sources of Labour Law, (in:) Commemorative Book in Honour of Prof. Czesław Jackowiak], Warszawa 1999, p. 91 *et seq.*

[2] Cf. for instance. Z. Kubot, T. Kuczyński, Z. Masternak, H. Szurgacz, *Prawo pracy. Zarys wykładu* [Outline of Labour Law], Warszawa 2008, p. 47–48.

[3] Cf. E. Chmielek, *Wewnątrzzakładowe normy prawa pracy* [Company Labour Law Regulations], ZNUJ, Vol. 83, Kraków 1979, p. 147 *et seq.*

[4] Cf. e.g. Z. Hajn, *Status prawny organizacji pracodawców* [The Legal Status of Employer Organisations], Warszawa 1999, p. 47; K. W. Baran, *Zbiorowe prawo pracy* [Collective Labour Law], Kraków 2002.

The author believes that all the above mentioned categories of non-individual acts have the feature of special[5] or specific[6] sources of labour law. In his opinion the notion of autonomous labour law should be reserved, though, only to the last group of sources, based on the idea of an autonomous dialogue of social partners held under industrial relations. The core of the law is collective agreements[7] concluded by all subjects authorised to represent the employees in industrial relations[8]. Viewed in the functional plane, they are all based on the principle of freedom of decision, mutual recognition of partners' interests and the common good.

2. From the normative point of view, of particular importance for the characteristics of the autonomous labour law is Art. 59 par. 2 of the Constitution of the Republic of Poland. It proclaims so-called freedom of collective baragining in employment relationships authorizing trade unions and employers as well as their organizations to conclude collective labour agreements[9] and other accords (atypical collective agreements)[10]. As regards its objective aspect, it does not limit conclusion of the said other collective accords. And thus, in view of the *in dubio pro libertate* rule there exists, according to the said provision, an open catalogue which, under the freedom of collective bargaining scheme, can be filled with contents by social partners at their full discretion.

Those other accords mentioned above have differentiated normative nature. The criteria for their differentiation are specified in Art. 9 par. 1 of the Labour Code (hereinafter referred to also, in short, as L.C.). The said does not mean, though, that non-individual agreements which do not meet the conditions speci-

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[5] See for instance M. Włodarczyk, *„Swoiste" źródła prawa pracy – kilka refleksji na temat ich genezy i funkcji*, (in:) *Z zagadnień współczesnego prawa pracy. Księga jubileuszowa Profesora Henryka Lewandowskiego* [The „Autonomous" Sources of Labour Law – A Few Remarks Concerning Their Origins and Function, (in:) Commemorative Book in Honour of Professor Henryk Lewandowski], Z. Góral (ed.), Warszawa 2009, p. 107 *et seq.*; J. Wratny, *Regulacja prawna swoistych źródeł prawa pracy. Uwagi de lege lata i de lege ferenda* [Legal Rules Concerning the Autonomous Labour Law Sources. Remarks *de lege lata* and *de lege ferenda*], PiZS 2002, Vol. 12, p. 4 *et seq.*

[6] See, for instance, L. Kaczyński, *Wpływ art. 87 Konstytucji na swoiste źródła prawa pracy* [The Impact of Art. 87 of the Constitution on Autonomous Sources of Labour Law], „Przegląd Sądowy" 1997, Vol. 8, p. 65–66; W. Uziak, *Specyficzne źródła prawa pracy (Uwagi do dyskusji)* [The Autonomous Labour Law Sources (Remarks to the Discussion)], GSP 2007, Vol. VI, p. 29–30.

[7] Cf. J. Jończyk, *Prawo pracy* [*Labour Law*], Warszawa 1992, p. 39; G. Goździewicz, *Charakter prawny porozumień zbiorowych w prawie pracy* [Legal Nature of Collective Agreements in Labour Law], PiZS 1988, Vol. 3, p. 18–20; B. Cudowski, *Charakter prawny porozumień zbiorowych* [Legal Nature of Collective Agreements], PiP 1998, Vol. 8, p. 65 *et seq.*

[8] They do not have to provide for rights and obligations of parties to the employment relationship.

[9] Peculiar features of collective agreement rules are discussed by G. Goździewicz, *Szczególny charakter norm prawa pracy* [Peculiar Features of Labour Law Rules], Toruń 1998, s. 46 *et seq.*

[10] Cf. B. Cudowski, *Charakter prawny porozumień*…, p. 59 *et seq.*

fied in the provision do not have the feature of autonomous labour law. They do also, directly or indirectly, provide for the functioning of employment relationships[11]. The same remark can be referred to agreements concluded between non-trade union employee representations and the employers[12].

It is against that background that there arises a problem of admissibility of agreements of that kind in the context of subjective limitations stated by Art. 59 par. 2 of the Constitution of the Republic of Poland. I share the view[13] accepted in the labour law doctrine that the provision in question does not make a normative hindrance to agreements concluded between employers and non-trade union entities representing the employees. Such an inference is based on the principle of admissibility of intensive interpretation of permit- or competence-giving norms. The said does not mean complete demonopolisation of agreements whereby the autonomous labour law is formed on the employee side, as *de lege lata* (under the law as it is) the monopoly of trade unions is established by norms of ordinary (non-constitutional) legislation. An example of that is provisions regulating the concluding of collective labour agreements. They explicitly authorize only the relevant body of a supra-national trade union organization[14] to conclude multi-establishment collective labour agreements, and as far as company-level CLAs are concerned – the relevant company (Art. 241^{23} of Labour Code) or inter-company (Art. 241^{30} of the Labour Code) trade union organization. A monopolistic legal scheme like that that raises doubts under conditions of market economy[15], while pushing masses of employees out of the area of CLA regulations. The author takes

[11] Cf. for instance M. Seweryński, *Porozumienia generalne*, (in:) *Księga jubileuszowa Profesora Henryka Lewandowskiego* [General Agreements, (in:) Commemorative Book in Honour of Professor Henryk Lewandowski], Warszawa 2009, p. 79 *et seq.*

[12] Cf. B. Wagner, *Porozumienia zawierane na gruncie ustawy o informowaniu pracowników i prowadzeniu z nimi konsultacji*, (in:) *Informowanie i konsultacja pracowników w polskim prawie pracy* [Agreements Concluded under the Act on Employee Information and Consultation, (in:) Informing and Consulting Employees in Polish Labour Law], A. Sobczyk (ed.), Kraków 2008, p. 114 *et seq*.; L. Florek, *Porozumienia zbiorowe dotyczące informacji i konsultacji pracowniczej*, (in:) *Księga jubileuszowa Profesora Henryka Lewandowskiego* [Collective Agreements Concerning Informing and Consulting Employees, (in:) Commemorative Book in Honour of Professor Henryk Lewandowski], Warszawa 2009, p. 67 *et seq.*

[13] Cf. W. Sanetra, *Konstytucyjne prawo do rokowań zbiorowych* [The Constitutional Right to Collective Bargaining], PiZS 1998, Vol. 12, p. 8.

[14] Cf. for instance J. Sierocka, *Reprezentacja praw i interesów pracowniczych w układach oraz innych porozumieniach zbiorowych*,(in:) *Reprezentacja praw i interesów pracowniczych* [Representation of Employee Rights and Interests in Collective Labour Agreements and Other Collective Accords, (in:) Representation of Employee Rights and Interests], G. Goździewicz (ed.), Toruń 2001, p. 150 *et seq*.; Z. Hajn, *Nowa regulacja prawna zdolności układowej związków zawodowych* [New Legal Rules Concerning Trade Union Capacity to Conclude CLAs], PiZS 2001, Vol. 4, p. 2 *et seq*.

[15] Cf. e.g. Z. Hajn, *Związkowa reprezentacja praw i interesów pracowniczych a zasada negatywnej wolności związkowe*, (in:) *Reprezentacja praw i interesów pracowniczych* [Trade Union Representation of Employee Rights and Interests and the Rule of Negative Trade Union

a moderate approach to the issue, believing that where there are no trade unions at specific employers, concluding CLAs on the company level should be available to bodies of worker participation[16] (for instance works councils[17]). Implementing the scheme in the law would definitely favour extension of the practice of concluding collective labour agreements in industrial relations, a thing most important given permanent reduction of trade union density rate.

The proposal to extend the CLA-related freedom in the subjective scope, as presented above, does not violate trade union rights in any material way. Actually, more radical solutions in the field are possible. For instance, concluding of a company CLA by a worker participation body could be allowed in a situation where there is no a representative trade union organization within the meaning of Art. 241^{25a} par. 1 of the Labour Code[18]. In such a situation the works council definitely has a stronger legitimacy to appear for the staff, being a body appointed under a general election scheme. In addition, a similar solution would reduce the threat that CLAs could include biased schemes, providing preferential solutions to employees associated in trade union organisations being the parties to the CLA. Should, however, the option be accepted, normative mechanisms supporting cooperation of trade unions with the participation bodies would be necessary to introduce. It could be assumed, for instance, that a refusal to take up cooperation under a joint representation scheme within a specified time-limit would result in a temporary loss of the capacity to represent employees in collective bargaining aimed at conclusion of a CLA. A regulation like that would sufficiently secure interests of trade union organizations, at the same time meeting the requirements set in Art. 3 par. 2 of the ILO Convention No. 154 which prohibits using collective bargaining with worker representation bodies to undermine the position of trade unions.

3. An important aspect of the freedom to bargain collectively with the view of concluding a CLA is the subjective scope of the freedom, viewed from the side of its beneficiaries[19]. *De lege lata* (under the law in force) the use of the tool of collective labour agreements is limited in the public sector by Art. 239 par. 3 of

Freedom, (in:) Representation of Employee Rights and Interests], G. Goździewicz (ed.), Toruń 2001, p. 74.

[16] Such a practice is approved by ILO. Cf., in particular, Sec. II.2.1. of recommendation No. 91 concerning collective labour agreements and cases quoted by A. Świątkowski, *Międzynarodowe prawo pracy. Międzynarodowe publiczne prawo pracy – standardy międzynarodowe* [International Labour Law. Public International Labour Law – International Standards], Vol. 1, part 2, Warszawa 2008, pp. 59–60.

[17] For the ILO detailed requirements In that respect cf. A. Świątkowski, *Międzynarodowe prawo*..., p. 64.

[18] With at least one representative trade union organisation operating at the employer's, the principle of the trade union monopoly to conclude CLAs would stay in force.

[19] Cf. W. Sanetra, *Strony i uczestnicy układów zbiorowych* [Parties to and Participants of Collective Labour Agreements], „Przegląd Sądowy" 1993, Vol. 6, p. 34 *et seq.*; J. Piątkowski,

the Labour Code[20]. Although the limitation established there is one of enumerative nature and may not be put to extensive interpretation, the range of groups of employees to whom it pertains is, in my opinion, definitely too broad. This holds particularly true as regards limitations imposed in item 3 of the article onto employees of the local government entities. Proposed solutions of Art. 110 of the drafted Collective Labour Code developed in April 2007 by the Labour Law Reform Committee deserve credit. The drafted Code has considerably extended the subjective scope of CLAs, limitations being retained only as regards judges, public prosecutors and those whose employment relationship is based on appointment. Statutorily determined exclusions were admitted as regards the latter case, though. As opposed to them, any limitations concerning local government employees were repealed. Considering that dimension, the drafted law does keep both the spirit and letter of Convention No. 151. Liberalisation going that deep raises doubts as to the situation of those employed in local government units as elected employees. Given their special position within structure of the local government and the fact that it is themselves that have the powers to decide in processes of collective bargaining I would find it reasonable to include that category of employees into the negative catalogue contained in Art. 110. A preventive mechanism should thus be established, to avert pathologies that could arise in the sphere of remuneration and other benefits to those co-determining the contents of CLAs.

An essential element regarding the subjective scope of the existing legal schemes is the issue of concluding multi-establishment CLAs in the entities of the public (governmental) sector. I believe that under the law in force it is allowed to conclude both single- and multi-establishment collective labour agreements there. The statement can be corroborated by the *lege non distinguente* argument, as applied to provisions of Art.77^3 § 1 of the Labour Code. The provision explicitly allows for concluding a CLA, without specifying whether it could be a single- or a multi-establishment one. Inferring from that argument, it is thus justified to state that for employees of the governmental sector entities either a single- or a multi-establishment CLS can be concluded, depending on the scope of the bargaining. There are no legal barriers for concluding both, either. The directive of competence for them will be provided by Art. 241^{26} § 1 of the Labour Code.

When providing reasons to the above presented standpoint as to both categories of CLAs being available to employees of public (governmental) entities

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Uprawnienia zakładowej organizacji związkowej [Powers of the Company Trade Union Organisation], Toruń 2005, pp. 116–123.

[20] Cf. J. Skoczyński, *Reprezentacja praw i interesów pracowników służby publicznej*, (in:) *Reprezentacja praw i interesów pracowniczych* [Representation of Rights and Interests of Public Sector Employees, (in:) Representation of Employee Rights and Interests], G. Goździewicz (ed.), Toruń 2001, pp. 271–274.

norms of the Constitution should be mentioned in the first place[21]. Art. 59 par. 2 of the Constitution, when providing for the right to bargain collectively, explicitly oriented activities of social partners towards concluding collective accords, collective labour agreements in particular. Within that context no legal rule, including that of Art. 77^3 § 1 of the Labour Code should be interpreted restrictively, as one reducing the constitutional freedom to bargain collectively. It is thus obvious that provisions of Art. 59 par. 2 of the Constitution of the Republic of Poland are applicable also to employees of the public (governmental) sector entities. Any doubts in that respect, following the *in dubio pro libertate* rule should be dispelled in favour of the freedom to conclude CLAs. The conclusion stems from the *a completudine* argument assuming comprehensiveness of law interpretation covering legal norms of various position in the hierarchy.

Discussing the issue of CLA as the basic source of the autonomous labour law it is worthwhile to devote some space to its subjective aspect. *De lege lata* the scope of the freedom to bargain collectively does not raise doubts. Amendments to the Labour Code of November 2000 lifted last[22] barriers[23] in that respect, standards established in international law being thus met.

4. Under Polish conditions the issue of implementation of CLA provisions is a vital issue. While there is no doubt that CLA provisions of normative nature can be enforced through court without any obstacles, implementation of the welfare provisions[24], where it is the entire staff as a collective that is the beneficiary, has not been provided for by law. There thus exists an objective loophole in Polish legislation regarding the enforcement of collective rights through court. For trade unions being a party to the CLA, the only efficient way of forcing the employer(s) to implement social provisions lies, *de lege lata*, in institution of a collective dispute, just like the procedures specified in the CLA itself provide.

Considering the said, I *de lege ferenda* suggest that recourse to law should be open to trade unions being a party to the CLA, when asserting the staff's welfare

[21] Essential arguments for the admissibility of concluding CLAs for public sector employees are provided by norms of international law. I have in mind, in that respect, Art. 6 of the European Social Charter (Journal of Laws of 1999, No. 8, item 67) and rules of ILO Convention No. 98 (Journal of Laws of 1958 , No. 29, item 126).

[22] Cf. J. Wratny, *Zakres przedmiotowy układów zbiorowych pracy w świetle przepisów prawa pracy*, (in:) *Układy zbiorowe w demokratycznym ustroju pracy* [The Objective Scope of CLAs in the Light of Labour Law Provisions, (in:) Collective Labour Agreements under the Democratic Labour System], J. Wratny (ed.), Warszawa 1997, pp. 28–31.

[23] Certainly enough, imperative norms will be retained within the labour law system.

[24] For a more detailed discussion cf. G. Goździewicz, (in:) *Kodeks pracy. Komentarz* [The Labour Code. A Commentary], W. Muszalski (ed.), Warszawa 2009, p. 1096–1098; G. Uścińska, *Działalność socjalna w postanowieniach układów zbiorowych pracy*, (in:) *Układy zbiorowe w demokratycznym ustroju pracy* [Company Welfare Activities in Provisions of Collective Labour Agreements, (in:) Collective Labour Agreements under the Democratic Labour System], J. Wratny (ed.), Warszawa 1997, p. 141 *et seq.*

rights. Provisions of Art. 8 par. 3 of the Act of 4 April, 1994 on Company Welfare Fund can set an example in that respect. In my opinion also in case of other categories of collective rights (like, for instance, that of subsidizing commercial insurance) there should exist a legal possibility for the trade union being a party to the CLA to file a suit against the employer to labour court . Such a solution would considerably reduce the threat of a break of collective dispute, which move invariably brings about a dysfunctionality within the industrial relations.

5. When analysing the objective aspect of collective labour agreements one meets with the problem whether trade unions are allowed to renounce their right to strike[25]. Given the dual nature of the right, in practical terms it is renouncement of the right to organize a strike that is concerned. It is quite obvious that trade unions being a party to the CLA may not renounce, on behalf of the employees, the right to participate in the strike if the latter is organized by a trade union not being a party to the CLA.

Under the law in force it is thus allowable to the trade union party to renounce, in the obligational part of the CLA, the right to organize a strike. The right is not an absolute one, hence it is possible to waive it temporarily. Such interpretation is seconded by provisions of Art. 4 par. 2 of the Act on Settlement of Collective Disputes. The latter provides that where it is the contents of the collective labour agreement (to which agreement the trade union organization is a party), that is the object of the dispute, institution and conducting of a dispute over amending the CLA may take place no sooner than as on the date of the notice to terminate. From the *a maiori ad minus* argument I infere that once it is not allowed to institute a collective dispute, it is even more not acceptable to conduct a strike. I do not see any normative barriers for a trade union to renounce, for the time of the collective labour agreement staying in force, the right to organize a strike also as regards matters not covered by the CLA[26]. The above said pertains, *mutatis mutandis*, also to protest actions other than strike. In the obligational part of the CLS the parties may even enumerate the types of non-strike protest that will not be allowed. What is more, admit payment of indemnities for losses sustained by the employer owing to a strike or protest action organized in violation of the CLA provisions.

6. Talking about the rules of the Labour Code providing for collective labour agreements, attention should be paid to the issue of freedom to bargain collectively. *De lege lata* it is considerably limited, as parties are obligated, under Art. 241^1 § 3 of the Labour Code, to take up negotiations. The provision is not

[25] Cf. T. Zieliński, *Strajk. Aspekty polityczno-prawne* [The Strike. Political and legal Aspects], PiP 1981, Vol. 4, p. 5 *et seq.*; B. Paździor, *Strajk w orzecznictwie organów kontrolnych Międzynarodowej Organizacji Pracy* [Strike in Judicial Decisions of ILO Control Bodies], PiP 2002, Vol. 1, p. 45 *et seq.*

[26] For a closer discussion cf. L. Florek, *Ustawa i umowa w prawie pracy* [The Legislation and the Contract of Employment in Labour Law], Warszawa 2010, p. 261.

correlated with ILO standards, as freedom is explicitly required by Art. 4 of Convention No. 98 in that respect. Meanwhile, the letter of Art. 241^2 § 3 of the Labour Code highly restricts social partners. Whereas items 1 and 3 of Art. 241^1 § 3 of the Labour Code are specific enough, and thus acceptable[27], item 2 of the norm leaves the active party excessive freedom in assessing whether there is a need to bargain. The legislator has used highly vague notions in it, such as an"essential change of the situation" and "deterioration of financial standing". The said can result, in practical terms, in demands to take up negotiations being made arbitrarily, and the freedom being thus grossly restricted. This is why I advocate, *de lege ferenda*, removal of the norm from Poland's labour law system, as it contradicts normative regulations of universal nature.

7. The above presented issues are not the only normative problems related to collective labour agreements; I have just focused on those aspects that are material for industrial relations. In further parts of the paper I should like to concentrate on matters other than those pertaining to CLAs, as it also them that shape, to an ever greater extent, the autonomous labour law within its broad limits set out by Art. 59 par. 2 of the Constitution of the Republic of Poland. The provision in question does not limit concluding other collective accords beyond the subjective sphere. In industrial relations based on free game of market forces these bear, from the very nature of things, a differentiated character, the criteria for the differentiation being specified in Art.9 § 1 of the Labour Code. The provision must not be interpreted extensively, following the *exceptiones non sunt excendendae* rule. The status of a "different accord" can be assigned, according to it, to the accords meeting two conditions jointly. They have to have a statutory basis[28] and provide for rights and duties of parties to employment relationship.

De lege lata the following categories of accords have been provided a statutory basis:

– accord on implementation of a collective labour agreement (Art. 241^{10} of L.C.);

– accord on suspension of implementation of a collective labour agreement (Art. 241^{27} § 1 L.C.)[29];

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[27] In the light of the views of the ILO Committee of Experts on the Application of Convention and Recommendation limitations of the voluntary nature and freedom of collective bargaining should be regarded as exceptional and be applied only insofar as they are necessary (cf. ILO *Committee of Experts on the Application of Convention and Recommendation*, (in:) *General Survey, Committee of Experts*, Geneva 1983, p. 104).

[28] Cf. L. Florek, *Ustawa i umowa*…, pp. 187–189.

[29] Cf. L. Kaczyński, *Zawieszenie zakładowego układu zbiorowego pracy*, (in:) *Prawo pracy, ubezpieczenia społeczne, polityka społeczna. Wybrane zagadnienia* [Suspension of the Single-Establishment Collective Labour Agreement, (in:) Labour Law, Social Security, Social Policy. Selected Issues], B. M. Ćwiertniak (ed.), Opole 1998, p. 291 *et seq*.; Z. Salwa, *Uprawnienia związków zawodowych* [Trade Union Powers], Bydgoszcz 1998, pp. 64–65.

– agreement relative to transfer of the work establishment onto a new employer (Art. 26^1 par. 3 of the Trade Union Act);

– agreement on suspending labour law provisions (Art. 9^1 of L.C.)[30];

– agreement on application of less favourable terms of employment (Art. 23^{1a} of L.C.)[31];

– agreement on terms of use of telework (Art. 67^6 of L.C.)[32];

– conciliation agreements concluded under a collective dispute (Art. 9 of the Act on Settlement of Collective Disputes);

– mediation agreement concluded under a collective dispute (Art. 14 of the Act on Settlement of Collective Disputes);

– arbitrage-related agreements concluded under a collective dispute (Art. 16 par. 7 of the Act on Settlement of Collective Disputes in connection with § 9 of the Ordinance on the Mode of Procedure Before Social Arbitration Boards);

– strike (or post-strike) agreements concluded under a collective dispute (Art. 9 or Art. 14 in connection with Art. 17 of the Act on Settlement of Collective Disputes)[33];

– agreement concerning mass lay-offs (Art. 3 par. 1 of the Act on Particular Rules for Termination of Employment Relationships with Employees for Reasons not Concerning the Employees)[34];

– anti-crisis agreements;

– agreements on the increase of an average salary (Art. 4 of the Act on Negotiation-Based System of Increase of Average Salaries in Business Units).

The above presented list does not, by the very nature of things, have enumerative character, as the employer is free to find a statutory "support" to further types of agreements.

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[30] Cf. K. Rączka, *Porozumienia zawieszające przepisy prawa pracy* [Accords Concluded to Suspend Labour Law Provisions], PiZS 2002, Vol. 11, p. 28; J. Stelina, *Charakter prawny porozumienia o stosowaniu mniej korzystnych warunków zatrudnienia* [Legal Nature of the Accord on Application of Less Favourable Terms of Employment], PiP 2003, Vol. 9, p. 85 *et seq.*

[31] Cf. L. Pisarczyk, *Porozumienia kryzysowe jako instrument dostosowania przedmiotu świadczenia stron stosunku pracy do zmieniających się okoliczności*, (in:) *Indywidualne a zbiorowe prawo pracy* [Crisis-Related Agreements as a Tool to Adjust the Object of Performance of Parties to the Employment Relationship to the Changing Circumstances, (in:) Individual and Collective Labour Law], L. Florek (ed.), Warszawa 2007, p. 123 *et seq.*

[32] Cf. A. Sobczyk, *Telepraca w prawie polskim* [Telework under Polish Law], Warszawa 2009, p. 50–53.

[33] Cf. K. W. Baran, *Porozumienia zawierane w sporach zbiorowych jako źródła prawa pracy* [Collective Agreements in Collective Labour Dispute], Monitor Prawa Pracy 2008, No. 9, *passim*.

[34] Cf. A. Leszczyńska, *Porozumienia w sprawie zwolnień grupowych*, (in:) *Źródła prawa pracy* [Agreements Concerning Mass Lay-offs, (in:) Labour Law Sources], L. Florek (ed.), Warszawa 2000, p. 126 *et seq.*

Under the concept of freedom to bargain and conclude collective agreements, parties to such agreements can provide for various issues in the latter. Ideally, three main options are available, the agreements providing for:

– only rights and duties of parties to the agreement;

– rights and duties of both parties to the agreement and parties to the employment relationship;

– only rights and duties of parties to employment relationship.

8. The category of accords mentioned in item 1 does not have impact on terms of employment of workers, so in the light of Art. 9 § 1 of L.C. the accords do not have the feature of labour law provisions. The remaining two categories of agreements have such feature insofar as they provide for rights and duties of parties to employment relationship. The said means that they can give rise to claims that can be asserted in court.

In practical terms it is "transfer" of provisions of other accords specifying concrete rights and duties of employees to an individual employment relationship that often remains a problem. *De lege lata* there is an objective loophole in that respect, this is why I suggest that a norm similar to that of Art. 241^{13} of L.C. should be introduced into the system of collective labour law.

A serious problem in industrial relations is also caused by lack of rules for making amendments in other collective accords and for termination of those. In particular lack of general rules concerning the latter issue, more specifically – giving a notice to terminate them – proves very painful to social partners and violates the negative freedom to conclude collective agreements. The existing legal solutions force either termination of only periodical agreements (a thing hardly acceptable for social reasons) or application – using the *a simili* argument – of provisions of Art. 241^{7} of L.C.

As far as obligational provisions of other accords are concerned, regulations concerning obligational provisions of CLAs should be *ab exemplo* applied. The presented interpretation option is rooted in *a coherentia* and *a completudine* arguments. The first of those stresses coherence, the other completeness of the legal system in its functional dimension.

In my opinion, the autonomous labour law also includes accords concluded between the employer and non-union forms of employee representation. Under the law in force it is the subjective aspect that seems to be of particular importance in that respect. The existing labour law solutions provide for wide opportunities to conclude accords of that kind[35] with representatives of employers appointed in the way arbitrarily set forth by the employer. Under such conditions there exists a serious threat of manipulating the way of the appointment, in the various dimen-

[35] Cf for instance Art. 9^{1} § 2 in fine, 23^{1a} § 2. See also K. W. Baran, *Ogólna charakterystyka ustawodawstwa antykryzysowego na tle funkcji prawa pracy* [General Characteristics of the Anti-crisis Legislation against the Background of Labour Law Functions], PiZS 2009, Vol. 9, p. 19.

sions of the latter. From the social perspective the optimum solution seems to be a statutory-based procedure allowing the staff to appoint their representatives by means of a secret ballot. I believe that only a body of representation appointed in such a way will have a mandate broad enough to conclude agreements having impact on employee rights and duties with the employer.

Against that background there arises a question whether Poland's works councils can be viewed as a representation "appointed in the way adopted at a specific employer's". I favour a positive answer to the issue if the employer falls into the scope of operation of Art. 1 of the Act on Informing and Consulting Employers and the staff[36] made use of the right, having appointed the works council[37]. It should be remembered that under industrial relations the bodies in question are the most representative ones, as they are elected by all employees in a system of common and democratic voting. Hence in my paper I will focus on the accords concluded with the works councils[38]. It is well-worth stressing, though, that the discussion presented here will be applicable, *mutatis mutandis*, also to other accords concluded by non-trade union representations enjoying participation powers, including those appointed *ad hoc* in the mode adopted at a specific employer.

The point of departure lies in the statement that the accords between the employer and the non-trade union form of worker representation are ones of differentiated legal nature depending on the rights and duties established by them. And thus, where the accord concerns only its parties, it has obligational nature, whereas if rights and duties are provided for by the accord it is one of normative character. In the former case it is thus, consequently, not a source of labour law within the meaning of Art. 9 § 1 of the Labour Code, and a source of law in the latter. As it seems, an example of the first category mentioned here is agreements concluded pursuant to Art. 5 of the Act on Informing and Consulting Employees, as they provide only for mutual obligations of the parties[39]. Quite different is the situation of the agreement concluded under Art. 14 par. 2 item 5 of the said Act. It can contain provisions concerning rights and duties of parties to the employment relationship and within such objective scope the accord will be one of normative nature, parties of employment relationships being authorized to enforce their claims through court. As regards obligational provisions, *de lege ferenda* I would suggest granting works councils the right of action (like the one granted to trade

[36] For a more detailed discussion see K. Walczak, G. Orłowski, *Załoga a rada pracowników*, (in:) *Informowanie pracowników w polskim prawie pracy* [The Workforce and the Works Council, (in:) Informing Employees under Polish Labour Law], A. Sobczyk (ed.), Kraków 2008, p. 105 *et seq.*

[37] Cf. A. Sobczyk, *Zmiany w ustawie o radach pracowników* [Amendments to the Works Councils Act], MPP 2009, Vol. 9, pp. 459–460.

[38] Cf. B. Wagner, *Porozumienia zawierane*…, p. 114 *et seq.*

[39] Cf. for instance B. Raczkowski, *Gdy powstaje rada – obowiązki pracodawcy* [When the Works Council Is Established – Duties of the Employer], MPP 2006, Vol. 8, p. 419–420.

unions pursuant to Art. 8 par. 3 of the Act on Company Welfare Fund). It should be taken into account, by the way, that the councils do not have, *de lege lata*, the right to conduct collective disputes to enforce implementation of the accords.

There can arise, in practice, a problem of collision of provisions concerning rights and duties of parties to the employment relationship. It seems that the general collisions directives should be applied in such case. It is, first of all, the *lex posterior*, *lex xpecialis* and *lex posterior generalis non derogat legi priori speciali* rules that should be taken into account. Where doubts cannot be cleared up, though, the interpretator should be guided by the rule of dispelling them in favour of the employee.

9. When analyzing the status of the autonomous sources of labour law, it is worthwhile to discuss their position within the system of sources of Poland's labour law in general. The point of departure for further considerations is the observation that position of that category of sources within the hierarchy of legal norms is not specified by the Constitution of the Republic of Poland. There is no doubt, though, that they rank lower than the universally binding norms do. That view is supported by the fact that Art. 9 § 2 of L.C. in its objective dimension provides for primacy of normative acts over acts of the autonomous labour law[40].

Mutual hierarchical relations have not been unmistakably determined within the set of the specific labour law sources, either. These are implicitly set by Art. 9 § 3 of the Labour Code, which ranks CLAs and other accords higher. Provisions of Labour Code do not, however, set "internal" relations between sources of the autonomous labour law, more specifically between CLAs and other accords. Their status, as determined by the said provisions, each time is set by means of conjuction. Consequently, it should be assumed that in the supra-individual plane they all enjoy equal legal power. In practical terms the said means that if there are no contradictions between them in the objective dimension, provisions of both acts should be applied. Where there does occur such a contradiction, though, general collision directives of both the second and third degree should be followed. In case of "level-type" differences between sources of the autonomous labour law (e.g. a multi-establishment collective labour agreement vs. company-level one) it is allowed to refer, *per analogiam*, to Art. 241^{26} § 1 of the Labour Code.

10. When discussing the status of the autonomous sources of labour law in the hierarchy of sources of law in general it seems necessary to devote some space also to their relation to the company-level sources of law, the regulations in par-

[40] Cf. T. Zieliński, (in:) *Kodeks pracy. Komentarz* [The Labour Code. A Commentary], A. Zieliński (ed.), Warszawa 2000, p. 144–145; E. Chmielek-Łubińska, (in:) *Kodeks pracy. Komentarz* [The Labour Code. A Commentary], B. Wagner (ed.), Gdańsk 2008, pp. 35–36.

ticular[41]. Let us begin by forwarding the thesis that collective labour agreements and other accords may provide for terms of employment less favourable than those established in the regulations. Reasons supporting the view come from the *a contrario* argument applied to Art. 9 § 3 L.C. stating that provisions of the regulations must not be less favourable than those contained in collective labour agreements and accords. And thus it is right to infer from the reasoning that CLAs and collective accords may contain provisions less favourable to the employee than regulations do. Consequently, rules contained in the regulations may be repealed by them. As regards the employer, the consequence of such a change, viewed from the perspective of an individual employment relationship is the requirement to make a notice to change the terms of employment in the mode prescribed by Art. 42 § 1–3 of L.C.

It should be stressed against the background of the discussion of the autonomous labour law that distinction should be made between the hierarchy of labour law sources, which hierarchy has a universal nature, and the precedence of application of norms regarding an individual employment relationship. It is the rule of favourability that governs here. The consequence of its application is the precedence of rules of lower rank (including those of autonomous labour law) against norms occupying a higher position in the hierarchy. In the practice of industrial relations this results in the shift of order of application of norms of higher and lower rank, which phenomenon can be described as the diffusion of labour law norms.

To sum up, it seems right to state that despite the thirty years that have lapsed since the socio-political breakthrough of August 1980, norms of the autonomous labour law keep playing a secondary role in Poland's industrial relations. I have no doubt, though, that their importance will gradually rise as the free market mechanisms will gain in strength and become more mature. Achieving that may, however, be possible, through deregulation and making statutory law, restricting freedom to bargain in industrial relations in many aspects, more flexible. The statutory law should just set minimum standards for social partners who, within the framework of norms negotiated between them would determine the status of parties to an individual employment relationship.

[41] The below presented observations are, *mutatis mutandis*, applicable to articles of incorporation. As regards the latter category of legal acts see: A. Jedliński, L. Kaczyński, *Statut jako źródło prawa pracy* [The Articles of Incorporation as a Labour Law Source], PiP 1999, Vol. 4, p. 35 *et seq.*

ABSTRACT

The notion of autonomous labour law is usually used to cover all sources of law not enumerated in Art. 87 of the Polish Constitution. However, in the opinion of the author, it should be reserved only for accords of non-individual nature concluded by entities representing employees and the employer(s), especially for collective labour agreements (CLAs). The CLAs (and other accords concluded between the employer and the trade unions) are the main topic of this paper. The first problem is the proposal to extend the CLA-related freedom. At present, it is largely the monopoly of trade unions. The author suggests that the extend the right to conclude CLAs be extended to non-union representative-bodies, especially taking into account work councils. The next problem is the range of groups of employees are covered by CLAs. It is, in opinion of the author, definitely too broad. The CLAs should be allowed also in entities of the public (governmental) sector. The provisions of Art. 59 par. 2 of the Constitution of the Republic of Poland and the freedom of collective bargaining are applicable also to employees of the public sector. The third problem raised by the author is the enforcement of collective rights through court. There should exist a legal possibility for a trade union that is a party to a CLA to file a suit against the employer to labour court. The next issues considered by the author are the problem of the "transfer" of provisions of CLAs to an individual employment relationship and the lack of rules for making amendments in CLAs and for terminating them. The author makes also some comments as to the status of the autonomous sources of labour law (especially CLAs and other accords concluded between the employer and the trade unions) in the hierarchy of the sources of law. In the opinion of the author, their importance will gradually increase. Achieving that may be possible in particular through deregulation and changes making statutory law, which restricts the freedom of collective bargaining, more flexible.

AUTONOMICZNE ŹRÓDŁA PRAWA PRACY – WNIOSKI *DE LEGE LATA* I *DE LEGE FERENDA*

Streszczenie

Pojęcie autonomicznego prawa pracy jest zwykle używane w odniesieniu do wszystkich źródeł prawa niewymienionych w art. 87 Konstytucji. Niemniej jednak, zdaniem autora, powinno być ono zarezerwowane dla zbiorowych aktów zawieranych pomiędzy podmiotami uprawnionymi do reprezentowania pracowników i pracodawców,

w szczególności do układów zbiorowych pracy. Układy zbiorowe pracy (i inne porozumienia zbiorowe) są głównym przedmiotem niniejszego opracowania. Pierwszy problem dotyczy rozszerzenia prawa zawierania układów zbiorowych w znaczeniu podmiotowym. Aktualnie jest to przede wszystkim domena związków zawodowych. Autor sugeruje rozszerzenie prawa do zawierania układów zbiorowych na reprezentacje pozazwiązkowe, i w szczególności ma tutaj na myśli rady pracowników. Kolejne zagadnienie dotyczy grupy pracowników, do których stosuje się postanowienia układów zbiorowych pracy. Zdaniem autora, jest ona określona zdecydowanie zbyt wąsko. Zawieranie układów zbiorowych powinno być dopuszczalne także w sektorze publicznym (rządowym). Postanowienia art. 59 par. 2 Konstytucji RP oraz swoboda prowadzenia rokowań zbiorowych odnosi się także do pracowników sektora publicznego. Trzeci problem tu poruszany to kwestia dochodzenia praw, wynikających z porozumień zbiorowych, przed sądem. Związki zawodowe będące stronami porozumień zbiorowych powinny mieć zapewnioną prawną możliwość wniesienia pozwu przeciwko pracodawcy do sądu pracy. Kolejne kwestie poruszane w tym artykule to problem przenoszenia warunków zatrudnienia wynikających z porozumień zbiorowych do indywidualnych stosunków pracy oraz brak regulacji dotyczących dokonywania zmian i wypowiadania porozumień zbiorowych. Autor odnosi się również do miejsca autonomicznych źródeł prawa pracy (w tym w szczególności układów zbiorowych i innych porozumień zbiorowych) w hierarchii źródeł prawa. W ocenie autora ich znaczenie będzie rosło. Osiągnięcie tego jest możliwe w szczególności poprzez deregulację i uczynienie przepisów ustawowych, ograniczających swobodę prowadzenia rokowań zbiorowych, bardziej elastycznymi.

KEYWORDS

autonomous labour law, sources of law, collective labour agreement, accords of non-individual nature, trade union, non-union representations, work councils, public sector, freedom of collective bargaining, collective rights, individual employment relationship, autonomous sources of labour law

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autonomiczne prawo pracy, źródła prawa, układ zbiorowy pracy, porozumienia zbiorowe pracy, związek zawodowy, przedstawicielstwa pozazwiązkowe, rady pracowników, sektor publiczny, wolność rokowań zbiorowych, prawa zbiorowe, indywidualny stosunek pracy, autonomiczne źródła prawa pracy

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EMPLOYEE REPRESENTATION IN COLLECTIVE LABOUR DISPUTES – *DE LEGE LATA* AND *DE LEGE FERENDA*

1. The issue of employee representation in industrial relations is an extremely complex one, the fact being a result of, first of all, no uniform model of representation of employee collective rights and interests having been developed under Poland's labour law legislation. By far, the organization most important among those established to represent collective interests of the employees is trade unions. The union membership, however, has been permanently on the decline. At many companies there have been no trade unions at all. As opposed to the situation, in certain areas of industrial relations there exist works' councils, employee councils, European works councils or representations elected *ad hoc* by the company staff. In recent years many essential legal solutions concerning the issue discussed in the paper have been added as well. It is thus natural for Polish labour law doctrine to take permanent interest in the issue of representation of employee rights and interests[1]. There is no doubt that under the current social market economy schemes representation of collective employee rights and interests has gained weight. Representation like that lacking, the situation of an individual employee gets considerably deteriorated.

An area of specific importance within industrial relations is collective labour disputes. For a long time now legal regulations concerning the sphere have been giving rise to doubts and controversies.

2. Prior to starting discussion of the main thread of the paper it is necessary to resolve the issue of who is, in fact, entitled to conduct a collective dispute. As

[1] Cf. for instance L. Florek, *Ochrona praw i interesów pracownika* [Protection of Employee Rights and Interests], Warszawa 1990, pp. 126–178; *Reprezentacja praw i interesów pracowniczych* [Representation of Employee Rights and Interests], G. Goździewicz (ed.), Toruń 2001 or J. Stelina, *Zbiorowa reprezentacja pracowników w Polsce – stan obecny i perspektywy*, (in:) *Problemy kodyfikacji prawa pracy. Wybrane zagadnienia zabezpieczenia społecznego* [Collective Representation of Employees in Poland – Current Status and Further Prospects, (in:) Problems of Labour Law Codification], Gdańsk 2007.

Art. 1 of the Act on 23rd May, 1991, on Resolution of Collective Disputes[2] has it, it is employees that can be a party to a collective dispute. In addition, according to Art. 6 of the said Act, its provisions are applicable respectively to the persons mentioned in Art. 2 paras. 1 and 2 of the Act of 23rd May, 1991, on Trade Unions[3]. The persons in question are members of cooperative farms, agents (not being employers themselves) and home workers. The law does not directly provide for the capacity of members of so-called uniformed services to conduct collective disputes. From Art. 1 of the Act it follows that collective disputes may be conducted not only by employees, but also those groups of job-holders that have the right to form trade unions, it thus being justified to state that the right to conduct a collective dispute is a consequence of the right of coalition. It can be inferred from the said that where the right to form a trade union is enjoyed by a specific category of job-holders, the people are also entitled to conduct a collective dispute. The matter has been provided for in various pieces of legislation, first of all in Art. 2 par. 7 of the Trade Union Act, in service regulations, Constitution of the Republic of Poland, and – indirectly – in the Act on Collective Disputes.

In the context of the present discussion, all job-holders (officers, employees and people doing work under civil law contracts) can be divided into three groups. Included in the first one are those having a limited right to form trade unions. The group is comprised of officers of the Police, Frontier Guard, Prison Guard and State Fire Brigade (Art. 2 of the Trade Union Act). The officers in question have the right to conduct a collective dispute but no right to strike. Also officers of the Customs Service, under Art. 144 of the Act of 27th August, 2009 on Customs Service[4] are allowed to form trade unions following the rules set forth in the Trade Union Act. They may not go on strike, though, nor take up activities that would disturb regular operation of the service (Art. 124 item 2 of the Act on Customs Service). Not entitled to establish trade unions are officers of the Internal Security Agency, Foreign Intelligence Agency, Central Anticorruption Bureau, Military Counterintelligence Service, Government Protection Bureau and regular soldiers. Trade union membership prohibition pertains also to persons occupying top positions in public service, as mentioned in the Constitution of the Republic of Poland. Further on, the prohibition affects certain professional groups, the members of which otherwise enjoy the status of employees, like judges. There is a variety of opinions on the problems in labour law doctrine[5], the main issue being compli-

[2] Journal of Laws, No. 55, item 236, with further amendments - hereinafter referred to as the "Act".

[3] Consolidated text: Journal of Laws of 2014, item 167.

[4] Consolidated text: Journal of Laws of 2013, item 1404, with further amendments.

[5] Cf. K. W. Baran, *Wolności związkowe i ich gwarancje w systemie ustawodawstwa polskiego* [Trade Union Freedoms and Their Gurantees in Polish Legislation], Bydgoszcz–Kraków 2001, pp. 40–48 and J. Skoczyński, *Reprezentacja praw i interesów pracowników służby publiczne*, (in:) *Reprezentacja praw i interesów pracowniczych* [Representation of Rights and Interests of Public

ance of Polish solutions with international law. The third group of job-holders are people enjoying full rights to form trade unions and conduct collective disputes, including the right to strike. Besides employees, the group includes members of cooperative farms and persons doing work under the contract of agency, provided that they are not employers themselves.

Considering the above said, it can be stated that the right to conduct collective disputes is enjoyed by those employees, officers and persons that have the right to form trade unions. It can be thus assumed that provisions of the Act on Resolution of Collective Disputes are applicable to them. Job-holders other than employees are mentioned by the Act only where the latter provides for prohibitions to strike. The remaining provisions of the said Act, including those on industrial actions, concern employees. From the entirety of provisions of the Act, its Art. 1 in the first place, it stems, however, that the piece of legislation may be applicable also to other professional groups enjoying the freedom to form trade unions. And vice versa, employees and officers who are not allowed to form trade unions and bargain collectively are not entitled to conduct collective disputes under provisions of the Act on Resolution of Collective Disputes. The capacity to organize collective protests in other forms, beyond the framework of the said Act, is yet another issue[6].

As the earlier said reveals, it is the freedom to form trade unions and the right to bargain collectively that determines the capacity to conduct a collective dispute. The issues thus outlined are, however, extremely vast and would require devoting a separate study to them[7].

When evaluating Poland's legal schemes in the discussed respect, reference should be also made to the Community and international legislation. Sources of primary law of the EU provide for employee guarantees to organize trade unions and bargain collectively. At the same time a rule was adopted that issues of employee freedom of association, the right to strike and lockout should remain beyond the scope of the EU legislative powers. The Lisbon Treaty entering into force did not change anything in the matter. Article 151 (the former Art. 136 of the Treaty establishing European Community)[8] makes reference to the European Social Charter signed in Turin on October 18, 1961 and to the Community Charter of Workers' Fundamental Social Rights of 1989, signed in Strasbourg. Both Char-

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Service Employees, (in:) Representation of Employee Rights and Interests], G. Goździewicz (ed.), Toruń 2001.

[6] See: B. Cudowski, *Pozastrajkowe środki prowadzenia sporów zbiorowych* [Non-strike Ways of Conducting Collective Disputes], MPP 2009, Vol. 4.

[7] For a further discussion of the matter see Z. Hajn, *Autonomia rokowań zbiorowych w świetle Konstytucji*, (in:) *Konstytucyjne problemy prawa pracy i zabezpieczenia społecznego* [Autonomy of Collective Bargaining in the Light of the Constitution, (in:) Constitutional Issues of Labour Law and Social Security], H. Szurgacz (ed.), Wrocław 2005.

[8] *Consolidated version* of the *Treaty on the Functioning of the European Union,* Official Journal of the *European Union,* C 115/47.

ters provide for the right to organize, to bargain collectively and take collective actions. Legal nature of each of the acts is, however, different. Provisions of the Community Charter are not binding and can only be regarded as a political declaration. Meanwhile, ratification of the European Social Charter makes it binding on a specific state. An essential issue is Art. 6 par. 4 of the Charter not having been ratified by Poland (to be discussed further on). Both Charters, however, provide for (confirm) the right to organize and conduct collective disputes, doing it in a very similar way. At the same time, from Art. 153 (the former 137 of TEC) par. 5 of the Treaty on the Functioning of the European Union (TFEU) it stems that the issues of the right to association as well as the rights to strike and to lock-out remain beyond the scope of responsibilities of the EU. The above mentioned, seemingly contradictory relationship can be explained as follows: the Union does not neglect the principles of freedom to associate, to conduct collective disputes and take collective actions, but finds their implementation at the national level as fully sufficient[9]. As an initial analysis allows to state it, Polish legal schemes do not infringe principles of Community law. Nor is, in principle, Polish law inconsistent with international legislation[10]. The said does not, of course, predetermine results of the assessment of detailed issues and Polish legal solutions regarding the freedom of coalition and the right to conduct collective disputes. Final conclusions regarding employee representation in labour collective disputes can, however, be drawn only upon discussion of more specific issues.

To sum up this part of the considerations it must be stated that Poland's legislation makes it a rule to condition the right to conduct a collective dispute upon the right to form a trade union. The problem of prohibitions to strike is a separate issue in that respect.

3. As Article 2 par. 1 of the Act on Resolution of Collective Disputes puts it, employee rights and interests are represented in a collective dispute by trade unions. The Act does not provide for any exclusions from the rule. The said means that trade unions enjoy, in fact, a monopoly to represent the employee side in a collective dispute. Considering the content of Article 7 par. 1 of the Trade Union Act of 23rd May, 1991[11] it can be stated that the trade union represents all employees, whether trade union members or not.

The right of trade unions to represent employee collective rights must not be contested, as trade unions are just formed to represent and protect rights and interests of employees. They thus have to be vested in the right to represent employees in labour collective disputes. An essential problem, however, is that in

[9] Such a position is taken by L. Florek, *Prawo pracy Unii Europejskiej*, (in:) *Europejskie prawo pracy i ubezpieczeń społecznych* [Labour Law of the European Union, (in:) The European Labour Law and Law of Social Security], L. Florek (ed.), Warszawa 1996, p. 81.

[10] Cf. K. W. Baran, *Wolności związkowe…*, pp. 43–48.

[11] Consolidated text: Journal of Laws of 2014, item 167.

a majority of workplaces no trade unions operate, there being no signs that the situation may change in future. Consequently, under the existing legal environment employees at such places do not have the capacity to protect their collective rights and interests by conducting collective disputes. It is thus justified to contemplate a possibility to allow non-unionised employee representation to participate in a collective dispute.

The right to represent employees in industrial relations has been granted to trade unions under Art. 59 paras. 2 and 3 of the Constitution of the Republic of Poland. The provisions in question grant trade unions the right to bargain, in particular in order to resolve a collective dispute, to conclude collective labour agreements and agreements of other kind and to organize strikes and other forms of protest within the limits set by law. It can be thus assumed that the statutory provisions only confirm the constitutional right of trade unions to represent employees in collective disputes. Whether the constitutional rules prevent operation of non-trade union employee representation in a collective dispute is another issue. For a long time, substantiated views have been expressed in Poland's labour law doctrine that the role of the Constitution consists only in recognition of trade union freedoms and determination of the minimum standards in a democratic legal order. Consequently, no meaning should be assigned to trade union freedoms that would result in employee collective rights getting monopolized by trade unions[12]. It can be thus acknowledged that Art. 59 par. 3 of the Constitution of Poland does not prevent a non-unionised employee body from representing the employee side in a collective dispute[13].

The issue of the right to associate, to conduct collective disputes and take collective actions has been tackled by a few sources of Community law. In that respect the Community Charter of Workers' Fundamental Social Rights, the Charter of Fundamental Rights of the European Union and the (revised) European Social Charter (the latter adopted by the Council of Europe) should be named. The right of the employees to collective actions has been recognized by all the acts. From Art. 13 of the Community Charter of Workers' Fundamental Social Rights and Art. 6 par. 4 of the European Social Charter it follows that the right to take collective actions, including the right to strike, is vested in employees. Meanwhile, Art. 28 of the Charter of Fundamental Rights of the European Union provides that the right is enjoyed by employees or their relevant organizations.

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[12] Such a view has been presented by M. Seweryński, *Problemy statusu prawnego związków zawodowych*, (in:) *Zbiorowe prawo pracy w społecznej gospodarce rynkowej* [Issues of the Legal Status of Trade Unions, (in:) Collective Labour Law in Social Market Economy], G. Goździewicz (ed.), Toruń 2000, p. 120.

[13] M. Seweryński, *Wybrane problemy konstytucyjne kodyfikacji prawa pracy*, (in:) *Konstytucyjne problemy prawa pracy i zabezpieczenia społecznego* [Selected Constitutional Issues of Labour Law Codification, (in:) Constitutional Issues of Labour Law and Social Security], H. Szurgacz (ed.), Wrocław 2005, p. 24

The above mentioned pieces of law do not even mention the right of trade unions to conduct collective disputes. Considering this, it can be claimed that introducing non-trade union representation of employees in a collective dispute would not contradict Community law. Based on that statement, a view was expressed that employees should be free to decide whoever should represent them in a collective dispute[14]. An opinion was also voiced that the prohibition of a strike, when not organized by a trade union, would go against the rules of the Charter[15]. According to the position taken by the European Committee of Social Rights of the Council of Europe (the former Committee of Independent Experts), granting trade unions a monopoly to organize collective actions and strikes under national industrial relation legislation is inconsistent with international labour law standards. The Committee did, however, also state that a trade union monopoly to represent employee interests, as established in the national legislation, can be accepted provided that requirements concerning formation of trade unions would not be excessive[16]. European regulations in that respect cannot thus be found unambiguous. This is why it is also being claimed that national regulations granting the right to organize and conduct strikes only to trade unions are admissible as well[17].

It should be noted in passing that the Community Charter of Workers' Fundamental Social Rights is not a binding act. Similar nature has the Charter of Fundamental Rights of the European Union, considering that Poland has joined the British protocol limiting application of the Charter. Nor has Art. 6 par. 4 of the European Social Charter been ratified by Poland. Consequently, it can be claimed the Polish solutions regarding representation of the employee side do not comply with the European standards, a need to amend the legislation being justified by the same.

The international law solutions, as contained in ILO Convention No. 154 and Recommendation No. 163 supplementing the latter provide for a possibility of collective bargaining conducted by non-unionised employee representatives. It should be assumed as a result that also the right to conduct a collective dispute should be granted to a non-trade union employee representation.

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[14] H. Lewandowski, *Komentarz do ustawy o rozwiązywaniu sporów zbiorowych*, (in:) *Prawo Pracy* [Commentary to the Act on Settlement of Collective Disputes, (in:) Labour Law], Vol. III, Z. Salwa (ed.), Warszawa 1999, p. III/E/158-4.

[15] R. Blanpain, M. Matey, *Europejskie prawo pracy w polskiej perspektywie* [The European Labour Law in Polish Perspective], Warszawa 1993, p. 290.

[16] Cf. A. M. Świątkowski, *Karta Praw Społecznych Rady Europy* [The European Social Charter of the Council of Europe], Warszawa 2006, p. 326–330.

[17] Cf. W. Sanetra, *Standardy ochrony praw społecznych określone w Zrewidowanej Europejskiej Karcie Społecznej a polskie prawo pracy i zabezpieczenia społecznego*, (in:) *Dorobek Rady Europy w zakresie kształtowania i ochrony praw społecznych* [Standards of Protection of Social Rights as Provided for in the Revised European Social Charter vs. Polish Labour Law and Law of Social Security, (in:) The Council of Europe Output in the Field of Development and Protection of Social Rights], A. M. Świątkowski (ed.), C.H. Beck 2005, p. 160.

In a number of various countries the right of non-unionised representatives to represent employees in collective disputes is recognized. The reason quoted to justify it is the fact that at many workplaces there are no trade unions operating or the trade union may be employer-controlled or that there is not a sufficient number of members or sufficient support by employees for winning recognition or approval[18].

It must be also noted that the scope of responsibilities of a non-trade union employee representation gets even wider in Poland's legislation. Examples include the right to conclude crisis-related agreements, a company agreement on establishment of an employee retirement programme, participation in information and consultation procedures regarding mass redundancies and opining on the rules for the redundancies, responsibilities related to the determination of the list of hazardous types of work and consultation on matters of occupational health and safety.

It should be stressed that granting the rights to a non-trade union employee representation does not entail limitation of the trade union role, as the rights are granted to the representation only where there is no trade union operating at the employer's. The Polish law-maker has also enacted provisions applicable where there is no trade union at a specific workplace. As Art. 3 par. 4 of the Act of Resolution of Collective Disputes has it, a collective dispute can be conducted, on behalf of employees of the workplace with no trade union operating, by a trade union organisation approached by the employees asking the organisation to represent their interests. In practical terms, however, instances of employees being represented in a collective dispute by a trade union from beyond the workplace are absolutely unique. The provision in question does not thus meet the goal for which it was enacted.

Considering the above quoted reasons, regulations giving trade unions a monopoly to represent employees in a collective dispute should be amended. It is, in fact, necessary, in order to secure due protection of collective rights and duties of employees at workplaces with no trade unions operating. As it is had been stated earlier, current legal solutions of the issue of employee representation in collective disputes are non consistent with Community legal standards. In opinions of labour law doctrine expressed some time ago, a possibility for the existence of a non-trade union representation of the staff was objected, considering lower reliability of such representation[19] or a threat of anarchisation of social

[18] Cf. *Procedury pojednawstwa i rozjemstwa w zatargach zbiorowych* [Procedures of Conciliation and Arbitration in Collective Disputes], B. Skulimowska (ed.), „Materiały z Zagranicy" IPiSS 1982, Vol. 2, p. 25.

[19] W. Masewicz, *Prawna regulacja sposobów rozwiązywania sporów zbiorowych pracy. Doświadczenia polskie* [Legal Rules Concerning Settlement of Collective Disputes. Polish Experience], PiZS 1994, Vol. 2, p. 14.

relationships at the workplace[20]. It has been noted, however, that such a state of affairs seems to actually hit at employee rights and interests and violate the equality before the law principle[21]. In later opinions it is an opposite view that prevails. According to the latter, employees of a workplace with no trade union operating could be represented by a non-trade union body[22]. It should be raised, in addition, that not allowing a non-unionised representation in a collective dispute means violation of the "negative" trade union freedom. Considering the said, it seems right to proclaim oneself in favour of the possibility for a representation of the workplace staff to conduct a collective dispute.

Introducing a non-trade union employee representation in collective disputes would only be possible through amendments made to the legislation in force. An amendment like that has been proposed in the drafted Collective Labour Law Code developed by the Labour Law Codification Committee in 2006. As Article 142 of the draft provides, at a workplace with no trade union operating employees could be represented in a collective dispute by a protestation committee appointed to that end. As far as the draft's part concerning the strike is concerned (Art. 164 par. 2), it is proposed that the appointment of the committee should be notified to the relevant district labour inspector. The draft also provides that the protestation committee should be formed of three persons, the members being entitled to protection similar to that offered to trade unionists organizing a strike. The draft does not include any, even general hints as to the rules for election of the protestation committee. A serious practical problem would thus arise, should the drafted provisions become law. Providing for general rules concerning election of the employee representation or at least giving a statutory authorization to a meeting of the staff to enact them is, consequently, advisable. Making reference to the rules observed at a specific employer's does not seem to suffice.

The proposed solutions should be given a positive assessment. Also reasons for extension of rights of the workforce, as presented by the Committee, deserve recognition. There should be no doubts about consequences stemming from the rule of negative trade union freedom, namely that non-unionised employees must not be granted less rights than those being trade union members are vested in. It can be thus finally stated that protection of employee rights and interests must not

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[20] G. Goździewicz, Z. Myszka, J. Piątkowski, *Uprawnienia związków zawodowych w stosunkach pracy* [Trade Union Powers in the Sphere of Employment Relationships], Gdańsk–Poznań 1992, p. 185.

[21] J. Piątkowski, *Uprawnienia zakładowej organizacji związkowej* [Powers of the Company Trade Union Organisation], Toruń 2005, p. 276.

[22] Cf. M. Seweryński, *Problemy statusu…*, p. 121–122, B. Cudowski, *Reprezentacja praw i interesów pracowniczych w sporach zbiorowych pracy*, (in:) *Reprezentacja praw i interesów pracowniczych* [Representation of Employee Rights and Interests in Collective Labour Disputes, (in:) Representation of Employee Rights and Interests], G. Goździewicz (ed.), Toruń 2001, p. 314–316; A. M. Świątkowski, (in:) *Zbiorowe prawo pracy. Komentarz* [Collective Labour Law. A Commentary], J. Wratny, K. Walczak (eds.), Warszawa 2009, p. 298.

be a trade union monopoly. A suggestion like that does not violate trade union rights. At a workplace with a trade union operating, only the latter would be authorized to represent employees in their dispute with the employer. And with non-trade union representation being admitted to starting a collective dispute, a balance would be struck as to the position of parties to industrial relations regarding conducting collective labour disputes.

4. The rule of trade union pluralism, as applicable at the workplace level now, results in a few, more than ten or even a few tens of trade union organizations operating sometimes at a single employer's. In a situation like that, considering Art. 3 par. 1 of the Act, each of them is allowed to represent, in a collective dispute, interests being the object of the dispute. The employer must not refuse conducting the dispute with each and every trade union. It can thus happen necessary to conduct more than one collective dispute about the same issue, even where the demands prove impossible to reconcile. Under Art. 3 par. 2 of the Act, formation of a single trade union representation is possible, though. It is, actually, even desirable, considering a possibility to avoid divergence of positions and problems related to conclusion of agreements ending the collective dispute. Formation of a joint trade union representation is, however, conditioned upon trade unions operating at the workplace agreeing to do so.

In no sense does the Act require of the trade union to be representative. It is only required that the trade union should "operate" at the workplace. Nor does there exist, under the law in force, any condition regarding the numbers of trade union structures. A much broader - and controversial – issue is that the currently effective legislation actually forces establishment of company trade union organizations[23]. Meanwhile, a company trade union structure with membership smaller than 10 persons, does not enjoy the powers of a "company trade union organization".

As the above made remarks show it, under the current legal environment even a trade union organization of very small membership can conduct a collective dispute with the employer and represent all those employed by him. That no requirement of representativeness has been imposed by the law-maker should be regarded as a serious drawback of the adopted legal solutions, as it may happen that a collective dispute be conducted by such an organization, no opinion of the employees being sought by it. In such a situation it would be natural to recognize that the body representing the staff is not actually legitimized to conduct the collective dispute on behalf of all the employees.

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[23] As regards the issue, cf. Z. Hajn, *Ustawowy model organizacji polskiego ruchu związkowego i jego wpływ na zbiorowe stosunki pracy*, (in:) *Prawo pracy a wyzwania XXI wieku. Księga Pamiątkowa Profesora Tadeusza Zielińskiego* [The Statutory model of Organisation of Polish Trade Union Movement and Its Influence on Industrial Relations, (in:) Labour Law and Challenges of the 21st Century. A Commemorative Book in Honour of Professor Tadeusz Zieliński], Warszawa 2002.

The non-existence of the requirement of trade union representativeness in a collective dispute has been noticed by Polish labour law doctrine and has met with unanimous criticism there[24]. There should be no doubt that that an amendment to the legislation in force is needed, and either a requirement of representativeness or that of seeking the staff's support should be imposed. The drafted Collective Labour Law Code does include a provision whereby such a requirement would be introduced. Representative at the company level would be the trade union winning , under a secret ballot scheme, support of the greatest number of employees of the company covered by its operation (Art. 144 in connection with Art. 3 par. 3 of the draft). The suggested amendment deserves approval, as only one trade union organization could gain the status of a trade union representative at the company level. At the same time, joint representation could be formed by all trade union organizations (Art. 10 of the drafted Code), just as the case is now. The collective dispute and strike would be carried out on behalf of the trade union as a whole.

Carrying the presented proposals into effect would result in really essential changes in civil law liability for damages inflicted by the organizer of an illegal strike or industrial action; the liability would be borne by the entire trade union. An additional argument to support the opinion is the fact that under Art. 34 of the drafted Code trade union structures are not supposed to gain the status of legal persons. There is no doubt that in such case the decision to organize a strike or collective action would have to be very-well considered, including a check if statutory requirements for the strike or action have been met. The issue of cooperation between company trade union structures with the trade union authorities in that respect would be an internal matter of the trade union in question.

The problem of trade union representativeness looks differently as far as organization of the strike is concerned. One of preconditions for legality of the latter is winning the consent of employees of the company. As Art. 20 par. 1 of the Act states, a company strike is proclaimed by a trade union organization having won consent of a majority of voting employees provided that at least 50% of the employees of the company participated in the ballots. A dubious side of the solution is that it might be, in fact, a minority of the company staff that would decide about the strike being launched. An amendment to the law in force, to introduce a requirement of winning the consent of a majority of the company staff would thus be desirable. That proposal has been taken into account in the drafted Code, and the suggested provision includes a requirement that the consent of a majority of all the employees, given under a secret ballot scheme, would be demanded.

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[24] B. Cudowski, *Reprezentacja praw…*, p. 318–322, M. Latos-Miłkowska, *Reprezentatywność w zbiorowych i indywidualnych stosunkach pracy*, (in:) *Indywidualne a zbiorowe prawo pracy* [Representativeness in Industrial Relations and Employment Relationships, (in:) Individual and Collective Labour Law], L. Florek (ed.), Wolters Kluwer 2007, p. 142.

5. As the above presented considerations reveal, legal provisions concerning representation of the employee side in a collective dispute should be essentially amended. First of all, the trade union monopoly to represent the employee side in a collective dispute should not be retained. The legal schemes being in force now violate Community and international legal standards, and the normative principle of the negative trade union freedom. A result of such a situation is also lack of collective protection of employee rights and interests at companies with no trade unions operating. Giving employees a chance to be represented in a collective dispute by a non-trade union representation would also secure a balance of positions of both sides of industrial relations in collective disputes[25].

The capacity to conduct a collective dispute is conditioned upon the employees' right to form a credit union. It is possible to accept the opinion of L. Florek that if non-unionised employees, while being able to form a trade union of their own, do not do that, they actually agree, in an implied way, to representation of their interests being provided by an existing trade union(s)[26]. It must not be assumed, though, that if there is no trade union operating at a company at all, the employees – giving up the idea of establishing one – waive the right to conduct a collective dispute at the same time. One can, of course, discuss, if the staff would use their right to initiate a collective dispute under such circumstances. It should finally, however, be stated that the right to conduct a collective dispute may be conditioned upon the right to form a trade union, and not upon the circumstance whether – or not - the employees have made any use of it.

To conclude, the proposed amendments to the law in force, included in the drafted Code and consisting in allowing the company community to be represented by a non-trade representation in a collective dispute and in introducing the requirement of representativeness for a trade union deserve approval. They are fully supported by views expressed in labour law doctrine and the need to make the amendments seems to be fully justified.

ABSTRACT

The author concentrates on the problem of employee representation in collective labour disputes. According to the Polish Act on Resolution of Collective Disputes, employee rights and interests are represented in a collective dispute

[25] See more at B. Cudowski, *Pozycja stron sporu zbiorowego pracy*, (in:) *Ochrona praw człowieka w świetle przepisów prawa pracy i zabezpieczenia społecznego* [Position of Parties of the Collective Dispute, (in:) Protection of Human Rights in the Light of Labour and Social Security Law], A. M. Świątkowski (ed.), C. H. Beck 2009.

[26] L. Florek, *Ochrona praw*…, p. 152.

by trade unions. The trade unions enjoy, in fact, a monopoly to represent the employee party in a collective dispute. An essential problem is that in a majority of workplaces there are no trade unions. Consequently, in the existing legal environment employees at such places do not have the capacity to protect their collective rights and interests by conducting collective disputes. In the opinion of the author, this justifies the possibility of allowing non-unionised employee representative bodies to participate in a collective dispute. It is necessary in order to secure due protection of collective rights and duties of employees at workplaces with no active unions operating. The Constitution of Poland and Community law does not prevent a non-unionised employee body from representing the employee party in a collective dispute. In a number of countries, the right of non-unionised representatives to represent employees in collective disputes is recognized. The second problem pointed out by the author is that in the current legal environment, even a trade union organization of very small membership can conduct a collective dispute with the employer and represent all those employed by him. There is no requirement of representativeness. In such a situation, the body representing the staff is not actually legitimized to conduct the collective dispute on behalf of all the employees. Also in this area an amendment to the legislation in force is needed.

REPREZENTACJA PRACOWNIKÓW W SPORACH ZBIOROWYCH – WNIOSKI *DE LEGE LATA* I *DE LEGE FERENDA*

Streszczenie

Autor koncentruje się na zagadnieniu reprezentacji pracowników w sporach zbiorowych. Zgodnie z polską ustawą o rozwiązywaniu sporów zbiorowych prawa i interesy pracowników w sporze zbiorowym są reprezentowane przez związki zawodowe. Związkom zawodowym został *de facto* przyznany monopol w zakresie reprezentowania pracownika w sporze zbiorowym. Podstawowy problem polega na tym, że w większości zakładów pracy nie działają związki zawodowe. W konsekwencji, w aktualnym stanie prawnym pracownicy w takich zakładach pracy nie mają możliwości obrony swoich praw i interesów poprzez prowadzenie sporów zbiorowych. Zdaniem autora, uzasadnia to rozważenie możliwości dopuszczenia do uczestniczenia w sporze zbiorowym pozazwiązkowych reprezentacji pracowniczych. Jest to niezbędne ze względu na zapewnienie rzeczywistej ochrony zbiorowych praw i interesów pracowników zatrudnionych w zakładach pracy, w których nie działają związki zawodowe. Ani Konstytucja RP, ani prawo unijne nie sprzeciwiają się dopuszczeniu pozazwiązkowych reprezentacji pracowniczych do reprezentowania strony pracowniczej w sporze zbiorowym. W wielu

krajach reprezentacjom pozazwiązkowym przysługuje prawo reprezentowania pracowników w sporach zbiorowych. Drugi problem wskazywany przez autora sprowadza się do tego, że w aktualnym stanie prawnym nawet organizacja związkowa o bardzo małej liczbie członków jest uprawniona do prowadzenia sporu zbiorowego z pracodawcą i reprezentowania wszystkich zatrudnianych przez niego pracowników. Nie ma żadnych wymogów dotyczących reprezentatywności. W takiej sytuacji organizacja reprezentująca pracowników nie ma legitymacji do prowadzenia sporu zbiorowego w imieniu wszystkich pracowników. Również w tym zakresie konieczna jest nowelizacja aktualnie obowiązujących przepisów.

KEYWORDS

employee representation, collective labour dispute, Act on Resolution of Collective Disputes, trade union, non-unionised employee representation, collective rights and duties

SŁOWA KLUCZOWE

reprezentacja pracowników, spór zbiorowy, ustawa o rozwiązywaniu sporów zbiorowych, związek zawodowy, pozazwiązkowa reprezentacja pracownicza, prawa i interesy zbiorowe

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THE NOTION AND SCOPE OF TRADE UNION FREEDOM

1. The notion of trade union freedom is used in Art. 59 par. 4 of the Polish Constitution. According to the provision, it means freedom of association in trade unions and is distinguished from "other trade union freedoms".

The notion refers to the French term *liberté syndicale* which is a basic concept to denote the right of association in trade unions in French literature[1] and international Francophone literature[2]. The English term *freedom of association*, widely used in international regulations and literature, is more general and corresponds to the Polish concept of freedom of association (*wolność zrzeszania się* in Polish). Therefore, it is often supplemented by the expression *for trade union purposes*[3].

The notion of trade union freedom in the international labour law is also used **in a broader sense**, including the right to strike, in addition to the right of association[4]. One of the reasons for that is the desire to guarantee the right to workers, despite the absence of clear legal grounds in the ILO conventions. Sometimes it also includes the right to collective bargaining. In that context, the concept of trade union freedom means not only the right of association, but also both fundamental and inalienable rights of trade unions. The documents of the International Labour Organisation does not, present, however, consistent views on the matter. Studies of the same thematic scope use the notion of trade union freedom to denote also collective bargaining[5] or treat it as a separate issue[6].

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[1] Such is, for example, the title of a chapter devoted to the trade union law in the manual by J.-C. Javillier, *Droit du travail*, L.G.D.J. 1998, p. 487 *et seq.*

[2] Cf. e.g. *Liberté syndicale et négociation collective. Etude d`ensemble de la Commission d`experts pour l`application des conventions et recommandations*, BIT, Geneve 1993.

[3] Cf. N. Valticos, G. von Potobsky, *International Labor Law*, Kluwer 1995, p. 92 *et seq.*

[4] Cf. *ibidem*, p. 98.

[5] Cf. *Freedom of Association, Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO*, Geneva 2006.

[6] Cf. *Freedom of Association and Collective Bargaining. International Labour Office. General Survey by The Committee of Experts on the Application of Conventions and Recommendations. Report III (Part 4b)*, Geneva 1994, or the earlier *Freedom of Association and Collective*

The Constitution of Poland distinguishes between the rights in question. It is, however, the term of "trade union freedoms" that is used in it to define them. This occurs in the context of restrictions which may apply to those rights. This is justified to the extent that these restrictions are based on the same international agreements and are subject to similar rules arising from the Constitution and from the international labour law.

The notion of trade union freedom **in a narrower sense** includes only the right to associate in trades unions. It is narrower than the freedom of association which also serves socio-professional organisations of farmers and employers' organizations (cf. Art. 59 pars. 1 & 4 of the Constitution). The concept includes not only the freedom to form trade unions, but also the freedom of trade union activities. Pursuant to Art. 12 of the Constitution both these freedoms, taken together, add up to form one of the main features of the socio-political system of the Republic of Poland. It is justified to the extent that the freedom to form trade unions without the freedom of trade unions to operate could lead to depriving the latter of actual importance. Therefore, it can be assumed that the **freedom of association in trade unions includes the freedom to form trade unions and their freedom to operate**. Such is also the concept of trade union freedom in the meaning discussed here, being the subject of further considerations.

2. **The scope of trade union freedom** is not defined in our Constitution, but in ordinary legislation, which concerns specially the Trade Union Act of 23 May 1991[7]. The Constitution does not contain any authorisation to regulate the issue of trade union freedom by acts of Parliament, which is the case with many of its other provisions, especially those relating to individual rights of employees where the phrase "the statue shall define" is used (cf. Art. 65–67). Nevertheless, the said does not mean that it is prohibited to regulate trade union freedom by laws. Following the *a maiori ad minus* argument, if a law may impose restrictions on that freedom (cf. Art. 59 Par. 4), it may all the more define the guarantees for it. The lack of reference to acts of Parliament in Art. 59 par. 1 of the Constitution also means that the trade union freedom is guaranteed by the Constitution directly. This is particularly clear when compared to the right to strike, which is granted "within the limits specified in the Act" (Art. 59 par. 3).

3. The scope of trade union freedom should be **consistent with the obligations arising from international agreements**. A confirmation of that can be found in Art. 9 of the Constitution whereby Poland respects the international law by which it is bound. The said refers primarily to the ratified International Labour Organization Conventions which govern the scope of trade union freedom in the

Bargaining. General Survey by The Committee of Experts on the Application of Conventions and Recommendations. Report III (Part 4b), Geneva 1983.

[7] Consolidated text: Journal of Laws of 2014, item 167.

most detailed manner, particularly Convention No. 87 of the International Labour Organisation of 1948 related to freedom of association in trade unions and protection of trade union rights[8]. That convention, along with other conventions lay down general principles of trade union freedom which should be respected by the Member States[9]. That applies specially to conventions ratified by specific states. Conventions Nos. 87 and 98[10] ensure a minimum level of protection of trade union rights, which should be supplemented by legal guarantees of individual countries and the activities of trade unions as well as collective bargaining of trade unions and employers[11]. The trade union freedom does not include the powers that have been granted to trade unions under collective agreements (collective labour agreements or other accords).

The trade union freedom is also regulated by: the Covenants on Economic and Political Rights of 1966[12], the Convention for the Protection of Human Rights and Fundamental Freedoms of 1950[13] and the European Social Charter of 1961[14] which have been ratified by Poland. The right of everyone to form and join trade unions to protect his or her interests is also guaranteed in Art. 12 of the Charter of Fundamental Rights of the European Union.

The Polish law may not stipulate the trade union freedom more narrowly than it is guaranteed by the above quoted international standards. Therefore, even if the provision of Art. 59 par.4 did not exist, it would not be possible to restrict the trade union freedom, unless the latter were provided for by the mentioned international standards, especially the most detailed of those, such as ILO Convention No. 87. In comparison with the acts of a universal nature, such as the Universal Declaration of Human Rights or the Covenant on Economic, Social and Cultural Rights and the Covenant on Civil and Political Rights, the ILO Conventions generally provide for more detailed and comprehensive protection of the trade union freedom.

Where international agreements provide for various restrictions on the trade union freedom, the option applied is one more favourable to employees, i.e. the one which permits narrower restrictions. This also means respecting all other agreements that are less favourable to employees. A different approach would mean that a more favourable agreement is not respected, while less favourable one is, which would be in conflict with the obligation to respect the international law. Sometimes a potential collision between two international agreements is resolved

[8] Journal of Laws of 1958, No. 29, item 125.

[9] Cf. *Freedom of Association, Digest*…, p. 7 & 9.

[10] ILO Convention No. 98 of 1949 on the Right to Organise and Collective Bargaining (Journal of Laws of 1958, No. 29, item 126).

[11] Cf. *Freedom of Association, Digest*…, p. 10, note 22.

[12] Journal of Laws of 1977, No. 38, items 167 & 169.

[13] Journal of Laws of 1993, No. 61, item 60.

[14] Journal of Laws of 1999, No. 8, item 67.

by the agreement itself. In particular, pursuant to Art. 8 Par. 3 of the International Covenant on Economic, Social and Cultural Rights of 1966, none of the provisions of Article 8 of the Covenant (concerning the right to form trade unions and the right to strike) authorizes states which have signed ILO Convention No. 87 to take legislative steps or apply the law in any way that the would breach the guarantees stipulated in the Convention. This means that in case of doubt priority should be given to Convention 87 of the International Labour Organisation. As a specialised organisation, the ILO regulates the trade union freedom issues more comprehensively than the Covenant on Economic Rights does.

4. From Art. 12 of the Constitution it follows, in particular, that employees have the **right to form trade unions**. It specially means the possibility to form trade unions of their choice. The right to join an existing union is one being a derivative of the above right.

Forming a trade union cannot be dependent on seeking prior consent of the state authorities. The **duty to register trade unions in court** in not inconsistent with the above right. It stems from Art. 58 par. 3 of the Constitution which allows a statutory definition of the types of associations requiring such registration. A trade union is an association, as Art. 59 par. 1 of the Constitution confirms. Pursuant to Art. 58 par. 3 of the Constitution, the obligation to register is imposed on trade unions by the Trade Union Act of 23 May 1991. The duty does not contradict the international obligations of Poland (cf. Art. 59 par. 4 of the Constitution). Interpretation of the ILO conventions concerning trade union freedom (including, in particular, Convention No. 87), permits introducing registration requirements provided that the law stipulates objective criteria that have to be fulfilled by the association applying for registration, and that the registration itself is a mere formality, not providing an occasion to discretionally decide whether a trade union may be formed or not[15].

Trade union freedom does not mean that trade unions should have the right to extra-judicial (internal, sometimes referred to as statutory) registration of their organisational units. If permitted, this could, as a matter of fact, lead to unequal treatment of trade unions. Membership of trade unions which have a possibility to register workplace trade union organisations under an internal trade union registration scheme can grow much faster as a result[16].

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[15] For a broader discussion of the issue, see: L. Florek, M. Seweryński, *Międzynarodowe prawo pracy* [International Labour Law], Warsaw 1988, p. 128 and the references therein and *Freedom of Association and Collective Bargaining, General Survey by the Committee of Experts on the Application of Conventions and Recommendations, Report III (Part 4b)*, ILO Geneva 1994, p. 35 *et seq.*

[16] Not without significance is also the fact that such registration had existed until 1980, yet it was challenged by a resolution of Poland's State Council of 13 September 1980 on the registration of newly formed trade unions (Official Gazette No. 22, item 104) providing for court registration of the trade unions in question.

Article 12 of the Constitution guarantees to trade unions **the right of freedom to operate**. Thus, it prevents interference of the state or other entities both in the internal affairs of a trade union (like determining the articles of incorporation and programme of activity, election of governing bodies, etc.) and in external activities of the trade union, provided that they are not in conflict with the laws. The same is confirmed by Art. 8 Par. 1 of ILO Convention No. 87 whereby workers and employers and their organisations, when exercising the powers granted to them by the Convention, should adhere to the laws applicable in a given country.

5. The concept of freedom primarily means the existence of a realm that is free from imperious interference of the state, both by means of legislation as well as in other forms, such as administrative actions[17]. Pursuant to ILO Conventions Nos. 98 and 135[18] it also includes protection and facilities afforded to trade unions as an extension of their freedom to operate. The concept of trade union freedom does not include powers granted by the state to trade unions for protection and representation of workers, except for the right of collective bargaining (cf. Art. 4 of ILO Convention No. 98) and the right to strike derived from Convention No. 87[19]. This, in particular, concerns specific participation of trade unions in the law-making process at a supra-company level, and especially to the powers of the company trade union organisation related to individual and collective rights and interests of workers. None of the ILO Conventions or other international agreements **vests trade unions in powers in that respect**. It is assumed that a freely formed and operating trade union exercising collective bargaining rights and the right to strike is able to effectively defend the interests of workers. The lack of such possibilities in the past time was counterbalanced development of a catalogue of detailed rights of trade unions. The process was taking place under control of the state authorities which determined the nature and extent of those powers, at the same time ruling out a possibility for trade unions to acquire other rights by means of negotiations and collective bargaining. The restoration of democratic industrial relations did not involve revoking of the powers granted by law. In practice, despite the introduction of freedom of collective bargaining and concluding collective labour agreements, trade unions have based their activities mainly on the powers granted to them by the state before and after 1989.

[17] Cf. also the ruling of the Court of Appeal in Warsaw of 24 April 1998, I ACa17/98, Apel. Warszawa 1998/1/8 Warsaw stating that under Art. 12 and Art. 58 of the Constitution the freedom of association counts among civil liberties that allow people concerned to act by their free will, regardless of the state and its laws and that it cannot be granted to individuals and then revoked. In case of a dispute it is a state agency that should indicate the legal basis for restricting the liberty of citizens.

[18] ILO Convention No. 135 of 1971 concerning protection of workers' representatives in enterprises and the facilities afforded to them (Journal of Laws of 1977, No. 39, item 178).

[19] Cf. B. Gernigon, A. Odero, H. Guido, *Freedom of association*, (in:) *International Labour Standards*, *A global approach*, ILO Geneva 2001, p. 30 *et seq.*

International agreements that guarantee the freedom do not make any reference in that respect to bargaining or collective agreements, but impose on states an obligation to ensure the freedom in question. And thus **restrictions of trade union rights stemming from collective agreements or accords would not be a restriction of the trade union freedom**.

In other states it is often non-trade union workers' representation that is vested, at the company level, in rights similar to those granted by the Polish laws to trade unions. The phenomenon is reflected in law of the European Union whereby many powers exercised in Poland by trade unions are granted to workers' representatives. Pursuant to provisions of a number of directives, the term "workers' representatives" means workers' representatives within the meaning of the laws or practices of the Member States[20]. A solution like that is due to the diversity of workers' representation systems in individual countries. Hence the definition of workers' representatives must be general enough to accommodate various national systems. It is on that basis that each country may freely determine who is to be considered as workers' representatives. Therefore, the powers that serve workers' representatives are addressed to either a trade union representation or one that does not bear such a character, and the European legislation reflects legal solutions adopted in the Member States. Without the said legal solutions taken into consideration hardly would it be possible to adopt directives and other legal acts unanimously (or by a majority of votes at least). In the European Union countries there exist workers' representations of trade union nature (or lacking such a character), especially at the company level. Should any type of them be skipped in the provisions, protection of workers in a given country would be limited. For that very reason, the term must refer to both types of representation. Therefore, the powers of workers' representatives concerning, for example, the transfer of an undertaking or part thereof or collective redundancies cannot be regarded as a manifestation of trade union freedom within the meaning of international agreements and, consequently, the Constitution. That is clearly confirmed by Art. 153 Par. 5 of the Treaty on Functioning of the European Union, whereby the powers of the European Union do not include, *inter alia*, the right of association. Thus, the Union is not authorised to decide about the scope of trade union freedom.

The election of workers' representation may be restricted under Art. 5 of Convention No. 135[21] concerning protection and facilities to be afforded to workers' representatives in the undertaking. Pursuant to the provision, where there are both trade union representatives and elected representatives operating in the com-

[20] In the English text: *workers' representatives" means the workers' representatives provided for by the laws or practices of the Member States.* Also Art. 3 of ILO Convention No. 135 states that workers' representatives are persons recognized as such by national law or practice, regardless if they are representatives of trade unions or elected representatives.

[21] Ratified by 83 states by April 2009, including Poland in 1977 (Journal of Laws No. 39, item 178) and other European Union Member States.

pany, appropriate steps should be taken, if necessary, to ensure that the presence of elected representatives does not undermine the position of the trade unions concerned or their representatives. It cannot be therefore excluded that a state, which on the grounds of the EU law is free to determine which representation is vested in the powers under the law, may be restricted in the choice by the quoted provision of the Convention. For should it be assumed that the latter also falls within the scope of trade union freedom, granting of special powers by the state to a non-trade union representation may be considered a violation of the freedom.

6. As provided for in international agreements to which Poland is a party and in the Constitution, the concept of trade union freedom also **includes protection of trade union members and activists**. Pursuant to Art. 1 of Convention No 98 workers should be provided proper protection against any acts of discrimination aimed at violation of trade union freedom in respect of work. The scheme should, in particular, protect the worker from conditioning of his/her employment upon his/her joining a trade union or ceasing to be a trade union member and from being dismissed or harmed in any other way because of his/her membership or participation in trade union activities out of the working hours or during the working hours with the employer's consent. And Art. 1 of Convention No. 135 provides that workers' representatives in the undertaking shall enjoy effective protection against any act prejudicial to them, including dismissal based on their status or activities as workers' representatives or on union membership, or participation in union activities, in so far as they act in conformity with existing laws or collective agreements or other jointly agreed arrangements. **Hence trade union freedom includes protection against dismissal due to trade union membership or activity**, and not protection against dismissal in connection with the worker's conduct which is not related to trade union membership or activities. Consequently, it is not absolute protection, irrespective of the circumstances of dismissal from work[22]. In particular, the reason for a dismissal may be a serious misconduct by a union activist[23]. Furthermore, this protection is provided on condition that the law as well as collective arrangements and agreements are respected by union activists[24]. The form of such protection is not stipulated in the international agreements. This leads to the conclusion that **trade union freedom**

[22] Cf. a clear statement on the issue at: *Freedom of Association, Digest*…, p. 161, note 801. The English text reads: *The principle that a worker or trade union official should not suffer prejudice by reason of his or her trade union activities does not necessarily imply that the fact that a person holds a trade union office confers immunity against dismissal irrespective of the circumstances.*

[23] Cf. *Freedom of Association, Digest*…, p. 161, note 804. In the English text: *these officials may not be dismissed, either during their period of office or for a certain time thereafter except, of course, for serious misconduct.*

[24] Cf. *Freedom of Association, Digest*…, p. 161, note 800. As the English text puts it: *workers' representatives in the undertaking shall enjoy effective protection against any act prejudicial to them, including dismissal, based on their status or activities as workers' representatives or on union mem-*

would not be impaired if the existing protection were weakened, if only it corresponded to the conditions set out in the above regulations and in their interpretation.

The discussed protection has been further specified in ILO Recommendation No. 143 which supplements Convention No. 135. Article 6 of the Recommendation stipulates that if the laws of a given state do not provide sufficient protection to all workers, special safeguards for workers' representatives (elected by the union or its members) should be established. Those guarantees should include: the employer's duty to clearly specify reasons for dismissal, the obligation of the employer to obtain an opinion or approval for dismissal from work, a procedure for appeal against the employer's decision in that respect, a possibility of reinstatement to work or compensation, protection from unjustified deterioration of terms of employment and precedence in retaining the job in the case of redundancies. In Article 7 of the Recommendation it is suggested that the above protection should also apply to workers who are candidates for trade union functions or have ceased to perform such functions. The latter also – in accordance with Art. 8 of the Recommendation – should be guaranteed the right to return to their job (if, considering their function, they were released from the duty to do work) and should not suffer any negative consequences as regards salaries/wages or seniority. The above said guarantees should not be considered as part of trade union freedom, though. Art. 59 par. 4 of the Constitution refers only to limitations which "are permitted by international agreements binding upon the Republic of Poland" and the ILO recommendations are not subject to ratification because they are not of a binding nature.

7. Trade union freedom also includes the obligation to **facilitate union activities**. Pursuant to Art. 2 par. 1 of Convention No. 135 workers' representatives in the company shall be afforded such facilities as may be appropriate in order to enable them to carry out their functions promptly and efficiently. Considering Art. 2 par. 2 and par. 3 the characteristics of the industrial relations system in the country and the needs, size and capabilities of the undertaking concerned should also be taken into account. The granting of such facilities should not impair the efficient operation of the undertaking in question.

The scope of trade union freedom **is not clear in that respect**. When introducing such regulations the state should assess both the needs of trade unions and the interest of employers. This also means that **restricting the facilities in question will not constitute violation of the trade union freedom**, if they continue to comply with the conditions laid down in Art. 2 of Convention No. 135.

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bership, or participation in union activities, in so far as they act in conformity with existing laws or collective agreements or other jointly agreed arrangements.

8. Trade union freedom does not include **freedom of collective bargaining**. On the grounds of the Constitution it should be considered as a separate freedom, serving the trade unions and employers. The freedom of collective bargaining refers to negotiating and concluding collective labour agreements and collective accords. The international laws do not actually distinguish between those legal acts. They are usually referred to as *collective agreements*, which is usually meant to denote both collective labour agreements and collective accords. It is the content of a specific international act that determines which of the concepts is more appropriate at a specific situation. For example, in accordance with Par. 2.2 of ILO Recommendation No. 91 of 1951 concerning collective agreements, the term "collective agreement" means any written agreement between employers and workers' organisations or other workers' representatives. Sometimes, however, the international labour law terminology makes a distinction between the two notions as is the case with Art. 1 of ILO Convention No. 135, which refers to "collective agreements or other jointly agreed arrangements".

Neither the freedom of collective bargaining nor trade union freedom cover a right of trade unions to give consent to specific legal acts, especially to works regulations, regulations concerning salaries/wages or employee welfare benefits. Art. 4 of ILO Convention No 98, supplemented broadly by its interpretation provided by the Commission of Experts and the Committee on Freedom of Association features the basic principle of the legal scheme in question, viz. the voluntary nature of collective bargaining. It means, above all, that public authorities should refrain from any interference that would restrict the right or prevent its lawful execution[25]. Neither the interpretation of the quoted Art. 4 nor any other international agreements to which Poland is a party provide for trade union rights to approve specific autonomous acts of the employer, though.

9. To conclude, the Polish Constitution provides guarantees of trade union freedom, but defines the latter only generally, as a right to form trade unions which are free to conduct their activities. (Art. 12 and Art. 59 par. 1). The notion of trade union freedom includes those aspects of formation and functioning of trade unions which are guaranteed under international agreements ratified by Poland, including ILO Conventions Nos. 87, 98 and 135 in particular. The notion of trade union freedom does not include trade union powers in respect of individual and collective worker issues. Their shape is determined by law and possibly by collective agreements (accords) between the employer and trade unions. Thus, their restriction or modification would not constitute infringement of trade union freedom within the meaning of Art. 59 par. 1 of the Constitution. Trade union freedom does not include the rights in which trade unions are vested under collective labour agreements (accords). The rights that are granted by EU legislation

[25] B. Gernigon, A. Odero, H. Guido, *Collective bargaining*, (in:) *International Labour Standards, A global approach*, ILO Geneva 2001, p. 46.

to workers' representatives do not fall within the scope of trade union freedom. They may be, in fact, exercised by other workers' representations. Determining by the state which workers' representation is vested in the rights stipulated in the EU legislation may not breach the provisions of Art. 5 of ILO Convention No. 135 (the presence of elected representatives does not undermine the position of the trade unions concerned or their representative). Covered by the trade union freedom is only protection against dismissal due to trade union membership or activity, and not dismissal for any reason, including – in particular – a serious breach of employee duties. The trade union freedom does not include the right to express consent to company-level legal acts coming from the employer.

ABSTRACT

This paper is an analysis of the various aspects of the trade union freedom guaranteed in Art. 59 sec. 4 of the Polish Constitution. The Polish Constitution defines trade union freedom only in a general way, as a right to form trade unions which are free to conduct their activities. Such a general definition raises many doubts as to the scope of that notion and it is the author's main point of interest. The notion of trade union freedom includes those aspects of formation and functioning of trade unions which are guaranteed under international agreements ratified by Poland, including conventions of the International Labour Organisation. In particular, it covers the protection of employment against dismissal due to trade union membership or activity. On the other hand, it does not include trade union powers in respect of individual and collective worker issues, which are determined by the law and possibly by collective agreements between the employer and trade unions. Also the rights that are granted by EU legislation to workers' representatives do not fall within the scope of trade union freedom.

POJĘCIE I ZAKRES WOLNOŚCI ZRZESZANIA SIĘ W ZWIĄZKACH ZAWODOWYCH

Streszczenie

Niniejsze opracowanie stanowi analizę różnych aspektów wolności zrzeszania się w związki zawodowe, zagwarantowanej w art. 59 ust. 4 Konstytucji RP. Konstytucja RP definiuje wolność zrzeszania się w związki zawodowe w bardzo ogólny sposób, jako

prawo do tworzenia związków zawodowych, które zachowują niezależność w prowadzeniu swojej działalności. Taka ogólna definicja powoduje liczne wątpliwości co do zakresu tego pojęcia, i to właśnie stanowi główny punkt zainteresowania autora niniejszego opracowania. Pojęcie wolności zrzeszania się w związki zawodowe obejmuje te aspekty związane z tworzeniem i funkcjonowaniem związków zawodowych, które zostały zagwarantowane w umowach międzynarodowych ratyfikowanych przez Polskę, włączając w to konwencje Międzynarodowej Organizacji Pracy. W szczególności pojęcie to obejmuje ochronę stosunku pracy przed jego rozwiązaniem z powodu członkostwa w związku zawodowym lub prowadzenia działalności związkowej. Nie obejmuje natomiast uprawnień związku zawodowego odnoszących się do indywidualnych i zbiorowych spraw pracowniczych, określonych w przepisach prawa powszechnie obowiązującego i ewentualnie w porozumieniach zbiorowych zawartych pomiędzy pracodawcą a związkiem zawodowym. Podobnie w zakres wolności zrzeszania się w związki zawodowe nie wchodzą prawa zagwarantowane przedstawicielom pracowników przez prawo unijne.

KEYWORDS

trade union freedom, Polish Constitution, trade union, international agreements, International Labour Organisation, individual and collective worker issues, collective agreements, workers' representatives

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wolność zrzeszania się w związki zawodowe, Konstytucja RP, związek zawodowy, umowy międzynarodowe, Międzynarodowa Organizacja Pracy, indywidualne i zbiorowe sprawy pracownicze, porozumienia zbiorowe, przedstawiciele pracowników

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20 YEARS OF SOCIAL DIALOGUE IN POLAND

1. In the literature on diversification of contemporary capitalism a discussion about the models used to describe national political economies in post-communist countries is being held. As for us, we are going to explore the corporate aspect of the models and attempt at finding an answer to the question whether, and if so, to what extent, the aspect is present in models describing Poland's political economy.

Corporatism is defined as "a form of social organization in which key economic, political and social decisions are made by corporate groups or by such groups jointly with the state. Individuals can only exert influence through their participation in corporate bodies. These include trade unions, professional associations, business corporations, political pressure groups or lobby groups and voluntary associations"[1].

The modern democratic corporatism is often referred to as "neo-corporatism" to distinguish it from older forms of state and/or fascist corporatism[2]. Corporatism takes many forms and has had many theoretical interpretations. Regardless of the differences, it was expected to eliminate the shortcomings of parliamentary democracy, i.e. lack of sufficient participation of stakeholder groups in decision-making within public policies. We hereby assume that corporatism is a gradable feature with the intensity measure being the degree of institutionalisation of social partnership whereby dialogue takes place and, possibly, group interests are harmonised (concerted), while agreements and social pacts are made. Dialogue takes place either in the triangle: governments – trade unions – employers' organizations, or in a binary (also referred to as autonomous) system involving trade unions and employers' organizations.

Although in recent years social dialogue in Europe was developing on a smaller scale, (attempts being even take to weaken it), it is still regarded as one of the cornerstones of the European Social Model and is located in the centre of

[1] N. Abercormbie, S, Hill, B. S. Turner, *The Penguin Dictionary of Sociology*, Penguin Books, London 2000.

[2] The term "corporatism" will be used in this text.

the practical operation of the International Labour Organisation (ILO). The ILO has promoted dialogue in the new post-communist members states of the European Union, as well as beyond the latter (in the Ukraine and other countries of the former USSR).

Dozens of solidly grounded studies devoted to dialogue and its forms[3] and to the research methodology of social dialogue have been developed under the ILO's research programs. A series of precise methodological tools have been designed to measure the dialogue[4].

2. The evolution of European social dialogue after World War II reveals its marked wave-like nature. In the boom period after World War II, when Fordism was prominent, governments sought to incorporate the labour class into the political system. Strong trade unions were becoming partners of governments, participated in economic planning bodies and took substantial part in making decisions concerning public policies. The key economic as well as social doctrine followed by European governments during the post-war Fordism was Keynesianism, which brought in a macroeconomic policy of the demand-oriented path of development and an active role of the state. As Bob Jessop, a representative of the regulation school, claimed, Fordism was at its best with the policy pursued by social democrats and the social-democratic variant of the welfare state.

Should we take the 1960's as the starting point, at least three periods in which the European social dialogue would bring, as a result, social pacts can be distinguished. The first period is the neo-corporatism of the industrial era. It came to an end in the 1970's with a wave of social pacts which were Keynesian in nature (these were so called 'income policy' pacts[5]). They originated from the need to face energy and financial crises. In that period, trade unions were strong and the pacts were relatively of a win-win nature. We call them "exchange" pacts as trade unions had a sufficient veto and deterrence power to prevent or make it very difficult for governments to accomplish the macroeconomic objectives which would result in deterioration of working conditions and living standard of the working class. In that context, governments were forced to offer sufficiently high compensation to the working class and to the trade unions. Exchange pacts in our understanding are pacts whereby trade unions can effectively block actions of governments, hence the exchange follows a scheme which is roughly of a win-win nature.

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[3] For example: J. Ishikawa, *Key Features of National Social Dialogue. A Sociological Dialogue Resource Book*, International Labour Office, Geneva, November 2003.

[4] See in particular: L. Kenworthy, B. Kittel, *Indicators of Social Dialogue: Concepts and Measurements*, Working Paper No. 5, International Labour Office, Geneva May 2003. It is particularly Jacek Sroka, University of Wroclaw professor who deals with theses issues in Polish literature.

[5] J. Visser, *The Institutionalisation of Social Pacts*, NewGow, project no. CITI-CT-2004-506392, 31 August 2008.

The initiative of entering into agreements and pacts was taken mainly by governments, interested in limiting wage increases. To achieve the goal they had to offer to the trade unions a compensation from the resources of the then welfare states. An ideal type of that corporatism was designed by Philippe Schmitter. The essential feature was the existence of organizations that had a monopoly on representing the interests of a specific trade group with membership in the organisations made compulsory. It should be noted that the scheme provided a balance of power in the relations of governments – trade unions – employers' organizations. Moreover, social partner organizations participated in the entire legislative process, and tripartite arrangements were made rather by consensus than voting.

Based on the experience of the 1960's and 1970's it was discussed whether corporatism might be treated as a separate, comprehensive system of social order of the same range as feudalism, capitalism, socialism, or whether it was a specific subsystem of the market system. The very fact that the issue has appeared in the literature indicates the important role of corporatism in the times of Fordism[6].

3. Corporatism ceased to be considered as an alternative economic and social order with the crisis of Fordism related to the oil crises of the 1970's. We have pointed out above some features of an ideal type of corporatism in the Fordism period. During the crisis of Fordism, when phenomena known as post-Fordism would emerge, a new socio-economic context was being developed. International competition increased, oligopolistic structures in the economy disappeared and the role of nation states declined, while the working class experienced deconcentration, employment in traditional sectors of industry decreased, the role of the services sector and the private sector in particular grew, the number of employees in the small and medium-sized enterprise sector fell down and the level of trade union membership went down. The weakened trade unions started to lose their veto power. Keynesianism was being replaced by monetarism – the demand path in economy development was replaced by the supply path. All that was the reason why the policy of aimed at working class incorporation into the system started to disappear from government agendas.

That universal solution would clash with national models of labour relations, welfare state types and national trade union models. Contrary to the views of proponents of unilateral modernization expecting a rapid convergence of political economies, divergence continued. The theory of Varieties of Capitalism received additional arguments in the form of a variety of ways in which European countries responded to the crisis of Fordism and to globalisation. It was at that time that there appeared the differences which Hall and Soskice interpreted by designing two socio-economic market economy types: Coordinated Market Economy

[6] L. Panitch, *Recent Theorizations of Corporatism: Reflections on a Growth Industry*, "The British Journal of Sociology" 1980, Vol. 31, No. 2.

(CME) and Liberal Market Economy (LME)[7]. The coordinated market economy was conductive – to some extent – to maintaining the social partnership, while corporate solutions began to vanish quickly in countries which were close to the LME model.

In the decade of the 1980's the process of negotiation and entering into pacts slowed down. Nevertheless, two subsequent waves of corporatism, also termed as competitive corporatism[8], appeared in the late 80s. This took place in a situation which was much less favourable to the working class. What was then the reason for entering into pacts after all, despite the profound imbalance of power between governments, capital and labour? It should be added that some researchers believed that no agreements or social pacts would be entered into under the new conditions.

Pacts were made mainly on the initiative of governments, which was also the case in countries where trade unions were not strong and where social pacts had not been made before. In the late 1980's governments faced a necessity to meet the requirements set forth in Maastricht and to maintain the competitiveness of national economies. Wage settlements made under social pacts were to lead to a faster reduction of the inflation rate. These pacts, compared to incomes policy pacts, had a relatively limited range, and they did not tackle many difficult issues, such as deep reforms of public policies: most of the European pension reforms were not negotiated under the tripartite dialogue. Nonetheless, the governments were able to offer some benefits to the working class – too modest in places where trade unions were strong, yet satisfactory for weaker unions, for example in Ireland or Portugal.

The intensity of the process of negotiation and conclusion of pacts slowed down when the Monetary Union had been introduced. It was argued again that negotiations of agreements and pacts would end due to further weakening of the working class, which however did not happen, although the last wave of agreements and pacts gave little to the labour side. David Ost defines that corporatism as "illusory" and he has recently put forward a thesis that trade unions should not negotiate social pacts at all as the latter would bring only losses to the working class[9].

4. In the literature on social dialogue in post-communist countries it has been stressed that dialogue appeared in our part of Europe as a result of imitation of Western solutions, while at the same time it served different functions than in the

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[7] *Varieties of Capitalism. The Institutional Foundations of Comparative Advantage*, P. A. Hall, D. Soskice (eds.), Oxford University Press, Oxford 2001.

[8] M. Rhodes, *The Political Economy of Social Pacts: 'Competitive Corporatism' and European Welfare Reform*, (in:) *The New Politics of the Welfare State*, P. Pierson (ed.), Oxford 2001.

[9] D. Ost, *"Illusory Corporatism" Ten Years Later*, "Warsaw Forum of Economic Sociology", v. 2, no. 3 (in print).

old countries of Western Europe. West European solutions were imitated mainly due to the desire to introduce the institution perceived as a solution strengthening the parliamentary democracy and instrumental in fighting the alienation of power, but above all, as David Ost strongly emphasized, facilitating reforms and burdening the working class with their reforms.

According to analysts, one of the main causes of the difficulties with the implementation of the dialogue was weakness of trade unions and the domination of governments over social partners, with total lack of balance, unfavourable for the trade unions, ensuing. As a result, the dialogue served different functions than in the West. It should be noted, though, that the situation in Poland was somewhat different than in other post-socialist countries, the fortunes of the social dialogue in our country being rather atypical for the region, especially during the initial period (1989–1993/4).

5. By implementing top-down reforms pushing Poland towards the liberal market economy (LME) model in the period of Tadeusz Mazowiecki and Jan Krzysztof Bielecki acting as prime ministers of the country, within a short time the government changed the relations between large social groups, thus causing degradation of the working class and effectively dismantling the institutional system left by the authoritarian socialism (with limited acquiescence by a majority of the working class, though). When reforming the country the government was, for some time, the only active player on the socio-political scene and enjoyed a great amount of autonomy.

In the period 1989–1994 a greater part of the Polish trade union movement underwent processes of deep degradation. Those led to imbalance between the parties to labour relations (to the detriment of the working class) that hardly could partnership be spoken of. Trade unions were deprived (or even deprived themselves) of their assets: their social functions were reduced or eliminated, they lost the vocational education system (Vocational Training Establishments) and were not able to take on new functions related to insurance against unemployment (a Polish variant of the Ghent system was thus not created). They also agreed on degradation of the then worker participation schemes, and it should not be forgotten that the presiding bodies of workers' participation after 1989 were controlled by Solidarity members in the majority of enterprises. As a result, trade unions were not able to help the working class under the conditions of rising unemployment, and consequently, they lost the capacity to mobilize not only wide groups of workers but their own members as well. The lack of the "deterrence power" revealed itself during the first unsuccessful 2-hour general strike which the Solidarity announced in connection with an increase in energy prices by the government, done without consultations. Moreover, a mechanism of confrontational pluralism emerged within the union movement. Two large central union organizations – Solidarity and the All-Poland Alliance of Trade Unions (OPZZ) stood

opposite each other and became involved (or involved themselves) in politics, in the struggle for power. They were not only associated with the opposing political blocs, but also directly participated in political formations and sometimes created them, as was the case with Akcja Wyborcza Solidarność [the Solidarity Electoral Action] which governed Poland in the years 1997–2001.

As a result, a two-dimensional situation was shaped – the unions were losing their capacity in terms of labour relations, while retaining a political role for many more years. Despite performing the role they were not a major actor in the field of labour relations and sectoral policies (which partly resulted from the divisions within the trade union movement). Putting it simply, owing to their entanglement in politics and presence in the parliament, trade unions had a say on the labour legislation, but lost the institutions which they had had in the days of authoritarian socialism and thus could hardly exert actual influence on real public policies.

In a short time trade unions, including Solidarity, were socially delegitimised, and the lack of social dialogue and social partnership at the time of a systemic breakthrough prevented Poland's political economy from entering the corporate path. Moreover, researchers of Polish social dialogue have observed that it was the culture of competition, power and domination that prevailed in our country, there being a shortage of a culture of compromise.

Why, however, was the institution of social dialogue established in Poland? It happened as a result of a wave of strikes caused by fear of privatisation, the need to establish dialogue with the most militant group of workers – coal miners (1992) and the conclusion of the State Enterprise Pact of 1993. The pact included a provision appointing the Tripartite Commission (TC), however, it was as late as in 1994 that the Commission was established as a result of subsequent pressure exerted by Solidarity. The TC participants were only those organizations which had signed the State Enterprise Pact in 1993 (the so-called "historical" criterion for participation[10]).

The two initial years (1994–1996) of operation, when the TC was chaired by Andrzej Bączkowski until his premature death proved to be most fruitful. At that time, the TC was not absorbed by the political segment yet. The key issue was the educational work carried out by Bączkowski. He was highly esteemed both by participants of the negotiations and the two successive governments. He proved in practice that it was possible to work out compromises, even in the absence of mutual trust between the major trade union centres, and that concessions from various ministers could also be achieved, once the positions of all trade unions and employers' organizations (initially there was only one such organization, rep-

[10] The trade unions were represented by Solidarity, OPZZ and a group of seven small organisations, while the employers' side was represented by the Confederation of Polish Employers (now referred to as PracodawcyRP – Employers of the Republic of Poland). The only large private business organization in those times, the Business Centre Club did not participate in the negotiations of the pact for various reasons and it was not allowed to take part in the TC.

resenting managers of state-owned enterprises in the TC) were agreed[11]. Prof. Kazimierz Frieske, a researcher of the TC proceedings in that period writes about long, arduous negotiations that would exhaust the participants to a degree allowing them to adopt a common position after several hours of clashing of the views. As follows from the talks, Bączkowski was putting on the agenda individual intervention issues which in principle should not have been dealt with by the TC at all. This strengthened the participants' identification with the dialogue, though – they were able to demonstrate to their organizations that "they were dealing with something tangible".

When remembering the person of Andrzej Bączkowski the unique role of the man should be emphasized. He turned out to be politically neutral, deeply dedicated to the building of the institutions of dialogue and exceptionally honest.

In the days of Andrzej Bączkowski people learned how to talk to one another despite ideological differences, although this was done at the cost of avoidance of disputable issues, often of a fundamental nature. It should be also noted that representatives of private employers were absent from the TC work at that time.

In the times of the next Labour Ministers who chaired the TC, the Committee became involved in politics which eventually resulted in its activities having been blocked. In the times of left-wing government, Solidarity – then in opposition – took on a very active multi-level political mission, trying to unite the Polish right wing, and undertook a task of drafting the Constitution. The political conflict was transferred to the Commission, a manifestation of which was Solidarity's blocking of the agreement concerning the wage growth index (the union put forward an unrealistic demand concerning the level of the index). It having been rejected by the government, Solidarity abandoned the Commission's session and did not participate in plenary meetings for some time. It was, at the same time, a precedent that opened the way for a similar conduct of the All-Poland Alliance of Trade Unions (OPZZ) further on. And it was also a signal that the TC had become one of the institutions "conquered" by the political segment of social life, and consequently, it became the ground on which a political battle was fought. Fortunately, this appropriation by politics was not total, as some margin for positive work was left. TC Task Teams in which public policies were discussed and even some compromises were reached operated all the time.

[11] I was told about such situations by an experienced Solidarity negotiator: "Bączkowski would grab the phone and call another minister in out presence, he tried to persuade him to make major concessions. You could feel he was a man of some mission, really wanting to strike compromises, and that he did not play with "marked cards". For if someone is manipulating, it will always come out sooner or later. And with him you were sure he was not playing with marked cards. I do not know if he had not made arrangements with those ministers that he would be calling and if he had not warned them, but event if it was the case, you would not feel it, absolutely not. I was convinced he was authentic" (an interview conducted in 2004).

Having been absorbed by the political segment, the political dialogue was made barren, despite the work of the said Task Teams. The devastation led to dialogue's marginalisation – it was reduced to the role of an institution solving just minor problems. Attention should be drawn to the fact that the level of mutual trust was low and hit-and-run tactics was often used by the organizations participating in the TC work. Characteristic of the trade union side in the TC was internal competition which hindered strategic alliances that could be concluded in the interest of the working class and made it difficult to conduct joint reasonable compromise-aimed negotiations with employers. As the rivalry grew, when one of the union centres took some initiative which was positive from the standpoint of the working class interests, the other side could not join it, facing the threat of "losing face" before its own members. Therefore, after some time, the side would propose a similar initiative being, however, its "own" one at that time. The situation was depicted by the All-Poland Alliance of Trade Unions (OPZZ) leader in a talk with us in 2004 in the following way: "if we had supported a right initiative of our rival, we would have not only legitimated the rival's actions but we would have been dominated as well, the other party would have not refrained from announcing their victory. On the other hand, if we had not supported a right initiative, we would have had to account for it. The only thing to do was to develop our own competitive concept concerning the same issue. "This was the case in 1998 when the All-Poland Alliance of Trade Unions (OPZZ) prepared "The Pact for the Polish Family" to which Solidarity responded with their own pro-family policy concept.

Let us go back to a brief description of the work done on a Tripartite Commission Act. Several debatable issues were raised in the course of the work. First of all, the government proposed to maintain a principle that the parties should reach a joint understanding by way of agreement, and not by a majority vote, as was stipulated in the resolution of the Council of Ministers of 1994. The postulate was rejected. It was a right decision as it protected the Commission against a single organization's withdrawal which would entirely paralyse the Commission's work (as was the case in the 1990's, both with Solidarity and the All-Poland Alliance of Trade Unions – OPZZ).

Finally, during the sitting on 6 July 2001 the Sejm (the lower chamber of the Polish Parliament) adopted the "Act on the Tripartite Commission for Socio-Economic Issues and Voivodship Commissions for Social Dialogue". The Senate (or the upper chamber of the Poland's Parliament) did not make and amendments in its provisions and passed it unanimously on 2 August 2001. It entered into force on 18 October 2001.

To recapitulate the first period of dialogue (1994–2001) certain benefits derived by the organizations from participating in the TC (trade unions in particular) should be indicated. Since a stable group of regular TC task team members was formed, a group of trade union leaders and experts emerged. Dealing

with certain issues for years, they became partners of ministry officials (from the Ministry of Labour in particular). The TC was periodically paralysed by political disputes, it is true, but when observing the teams at work professionalism of discussion, genuine teamwork, the ability of pragmatic communication on specific issues, and sometimes even bonds between representatives of trade unions that were in opposition to each other[12] could be noticed.

6. Factors which changed the situation of social dialogue and should be mentioned here include, in the first place , consequences of the Act of 2001. The Act replaced the "historical" criterion of participation with the statistical criterion of "representativeness" measured by the number of members of an organization (in case of trade unions) or the number of workers employed by a company belonging to an organization (in case of employers' organisations)[13]. This opened the way to the TC for the Polish Confederation of Private Employers (PCPE, Polish: PKPP, currently PKPP Lewiatan) established in 1999, and later for BCC and the Polish Craft Association[14]. In addition, it resulted in the consolidation of the trade union movement and the formation of the Trade Union Forum[15]. It was also important that the Act was opening a possibility of proceeding with the work even if one organization should withdraw, which paralysed the TC's work several times in the years 1994–2001.

A thing of particular importance was the Commission's work being joined by PCPE. The organization in question represented the viewpoint of private capital, reluctant to redistribution of means to traditional industrial stakeholders[16]. The PCPE sought to reduce public spending, lower the taxes and support private enterprises. Thus, the TC gained a partner offsetting the trade union and government orientation. Although the TC participant representing employers – the Con-

[12] That professionalism acquired in a practical way applied only to some labour law and social policy issues, though, it was not actually possible to make up for a lack of economic knowledge in such a way. The social partners were not able to organize any research support for themselves, either.

[13] 300 000 members in case of trade unions, 300 000 workers employed by companies belonging to a given organization as regards employers' organizations.

[14] An indicator of the value represented by participation in the CT may be the resistance which was first given by CPE (Confederation of Polish Employers) to the prospect of admitting PCPE (Polish Confederation of Private Employers), and then the of resistance of PKPP against the aspirations of BCC. In case of trade unions it was the resistance of OPZZ against the prospect of admitting a new trade union central organisation established in 2002 – the Trade Union Forum.

[15] Seven smaller trade union organisations that participated in the TC before 2001 proved to be unrepresentative (they had fewer than 300 000 members). It was one of the reasons for the establishment of a new confederation, to represent mainly public service workers – the Trade Unions Forum.

[16] Henryka Bochniarz, PCPE chairwoman, professional economist, guided an economic institute in the past. She was also a minister in the leftist government of Jan Krzysztof Bielecki (January – December 1991). Critical of the central bureaucracy apparatus, she knew of its negative power hindering reform efforts.

federation of Polish Employers (CPE) – was losing its role as a representative of state sector enterprises due to the progress of privatisation, a majority of members of this organization continued to be large state-owned enterprises and privatised state enterprises. Later activities of the TC revealed some differences of interest between the PCPE and the CPE resulting from the different clientele.

7. As was the case with the TC before, the policy pursued by the Chairman was an issue of great importance. In 2001 Professor Jerzy Hausner, Minister of Labour became the Commission Chairman. He had theoretical and practical experience in social dialogue and in the operation of government administration, he also had a clear idea of what the role of social dialogue in Poland should be in the face of modernization challenges.

One of the first targets, indicating the direction which the new minister wanted to pursue, was a social dialogue unification scheme. Jerzy Hausner knew the threat posed by the interests of industries, especially the heavy industry, inherited from the authoritarian socialism (he devoted much attention to the issue in his research work). Having taken the chair of the TC he wanted to stop the trend that had continued since 1992 whereby industrial groups were growing and becoming independent. This independence along with the increasing number of such groups brought, as he repeatedly pointed out, the danger of externalisation of costs. Therefore, he wanted the TC to monitor the activities of industry groups by including them in the TC structures. However, this concept was received with reluctance by all the parties involved in social dialogue, as well as by the officers from his own administration[17]. Finally, he managed to standardize the regulations of the industry groups which nonetheless remained independent.

An important intent was to sort out the rules of dialogue. Jerzy Hausner developed a general concept of social dialogue in Poland, corresponding to the Western European models. A relevant document was adopted by the Council of Ministers in October 2002. The document stressed the systemic nature of social dialogue and outlined a vision of extending social dialogue to include civil dialogue (including non-governmental organizations in the TC).

The major initiative of Jerzy Hausner was to commence works on a social pact ("The Pact for Work and Development") at the turn of 2002/2003. The idea of the pact was of a modern nature: it was not to be a Keynesian pact, based on exchange within the meaning ascribed to the term in this paper, but it was to be a post-Fordist competitive pact. It was designed in an analogous way as the Western pacts from the 1990's. i.e. the pacts that were a response to the need of societies to meet the requirements of international competition, the Maastricht criteria and the times of reform of public finances.

[17] The ministerial administration's arguments gave the impression of being justified. The relatively few staff members serving the existing TC teams would have to cover numerous industry teams in which work would be much more complex.

Implementation of that ambitious project involved, as it can be presumed, a new definition of the situation which was proposed by Jerzy Hausner in 2002. We are writing about a new definition, as in the 1990's Hausner himself spoke many times sceptically about the possibility of economically effective social dialogue in Poland – one which would rather strengthen than weaken the competitiveness of the economy. Hausner himself was an advocate of dialogue, nevertheless he believed – as early as in 1994 – that it should fulfil the conditions which were not yet mature in Poland due to the continued strong industry interests[18]. Eighteen months after his appointment as minister, he did make an attempt to negotiate a social pact.

What were the phenomena that made Jerzy Hausner believe, contrary to his own earlier concerns, that he would succeed in concluding a social pact? It seems that in addition to the faith that the difficulties and challenges facing Poland were felt equally strongly by all social partners, there must have also been some objective reasons: the trade unions, especially Solidarity, but also the All-Poland Alliance of Trade Unions (OPZZ), lost more than gained through their involvement in politics in the years 1989–2001. Hence, the official line in both trade unions before the parliamentary elections of 2001 was that the unions should stay independent of political parties, while they could enter into contracts with such parties, (however, without entering the party structures)[19]. In that situation, it seemed that the trade unions would lose the ability to directly influence the decision-making process through the governing parties and would recognize the TC as an important institution to influence the process of socio-economic decision-making.

A second issue was the earlier mentioned fact that the Commission was joined by the employers' organizations (PCPE, and BCC later), as well as a new trade union centre (the Trade Union Forum). This extended the range of interests represented in the TC.

The determinative issue from Jerzy Hausner's standpoint was, however, the economic situation of the country. Firstly, it was necessary to start reforms of public finance and receive the trade unions' acceptance for the process. Secondly, it was necessary to begin wider reforms of many public services and – generally speaking – modernization of the state. The government had a relatively weak position in the parliament, therefore most government members represented rather conservative attitudes. Jerzy Hausner, Minister of Labour and Deputy Prime Minister later,

[18] J. Hausner, *Formowanie się systemów stosunków pracy i reprezentacji interesów w Polsce w warunkach transformacji ustrojowej*, (in:) *Negocjacje. Droga do paktu społecznego* [Formation of Systems of Labour Relations and Representation of Interests in Poland under Conditions of System Transformation, (in:) Negotiations. The Road to the Social Pact. Experience, Contents, Partners], T. Kowalak (ed.), Warsaw 1995.

[19] Those decisions did not actually require sacrifices: the party, Akcja Wyborcza Solidarność [Solidarity Election Action] did not enter the parliament, while the victorious left-wing party – SLD quickly gave OPZZ to understand that they would be treated in the spirit in which the TUC trade unions were treated by Tony Blair in Britain – as a "poor relative" who is reluctantly invited further than the hallway.

backed by the Prime Minister Leszek Miller, decided that it was the TC, whose chairman he was and whose works were controlled by him to a large extent, that might become an institution supportive of carrying out the changes.

What was the offer of Jerzy Hausner, how did he want to encourage the social partners to start to negotiate the pact? The offer made to the trade unions was that he gave them a chance to participate in preparing a reform programme. The reforms were to involve some social costs, and it was the trade unions' participation in the modernization process that could help mitigate them.

The importance of the "Pact for Work and Development" could be seen in the range of issues which it was supposed to include. These were fundamental issues: reform of the state finance, the budget, fight against unemployment, healthcare reform, etc. A draft pact was prepared, which was fundamental in terms of the country's modernization. Hausner's intention was that the draft pact should receive the support of the whole TC (which would strengthen its position in subsequent negotiations concerning the reforms both within the government and in the Parliament).

During a TC presiding body field meeting, the subject matter scope of the pact was agreed, the partners' preferences were taken into account and an agreement to start negotiations was signed. However, as early as on the next day it turned out that the National Committee of Solidarity did not accept the decision of its Chairman, and he was forced to withdraw its signature from the agreement on starting negotiations. At the TC plenary meeting during which the Solidarity chairman officially withdrew his signature, Marian Krzaklewski, one of the top Solidarity leaders said that the National Commission refused to agree to start negotiations for two reasons: it strengthened the position of the left-wing government against which the union was in opposition and it contained no clear indication of what the working class and the trade unions would gain in exchange for possible acceptance of the changes proposed by Hausner. Thus, if a classic "exchange" trade pact (like the State Enterprise Pact of 1993 when workers received free shares of privatised companies) had been offered to the trade unions, Solidarity could have joined the negotiations, however, when there were no explicitly stated benefits for the working class, negotiations with the left-wing government were out of the question.

After some time the negotiations were recommenced – however, they did not concern a "pact" but an "agreement" which was proposed by BCC. Solidarity agreed, though with reservations, and works on the agreement lasted for eight months. Many TC presidium meetings were held, including field meetings, TC teams met very often, and regularly plenary sessions were also organized. Such intensive work resulted in a series of agreements, although these concerned minor issues from the viewpoint of Hausner's intents[20].

[20] The wage growth indices were determined, some labour law solutions were agreed, a joint position was reached regarding the Social Care Act, the Act on Freedom of Business Activity, the Act on Employee Pension Schemes and Individual Pension Accounts, the Act on Retirement and

Let us now consider in more detail a description of the dialogue conducted when the Pact for Employment and Development was being negotiated. The negotiations can be divided into several periods. The first period was a time of "optimistic negotiations." Those started with a systematic and fairly precise division of the issues into domains of individual TC Task Teams and with identification of those issues that gave hope for reaching agreement and those that were deeply dividing the partners and gave no such hope. The intensive work of the Teams was often evaluated during the TC presidium meetings, which were usually field meetings. Soon it was realized that it was impossible to reach any closer understanding as far as important issues were concerned.

After that relatively optimistic period, a turning point came. An indicator that no agreement would be reached on important issues was the attempt to have the chairpersons of organizations join the Task Teams. It was believed that the difficulty in reconciling the positions arose from the low decision-making powers of the persons delegated to the Task Teams by individual organizations. Still, it turned out that there were fundamental differences of interest and the presence of leaders rather inflamed than moderated the situation.

The turning point was followed by a period of decline. The atmosphere during subsequent negotiations can be characterized as follows: on the one hand, the employers' organizations, mainly the PCPE, sought to negotiate an agreement, even without the participation of Solidarity[21]; on the other hand, Solidarity stiffened its position and refused to resign from any of the rights the workers had. There was also a different approach towards the law adopted by the All-Poland Alliance of Trade Unions (OPZZ) and Solidarity: OPZZ assumed that the compromise negotiated with employers would be respected, while Solidarity was much more sceptical in this respect.

What were the foreground reasons for the failure of negotiating an agreement in 2003? First of all the "competitive" and not exchange-based nature of the proposed pact, the scope and depth of the reforms proposed by Hausner, the lack of trust on the part of Solidarity toward the left-wing government of the Democratic Left Alliance (SLD) and – last but not least – the memory of the costs that Solidarity had to pay for the reforms implemented by the Solidarity Electoral Action (AWS) government.

Disability Pensions from the Social Security Fund as well as changes in the Tripartite Commission Act.

[21] During their meetings, the PCPE (Polish Confederation of Private Employers) as well as the CPE (Confederation of Polish Employers) frequently referred to the example of Spain where pacts were concluded even in a situation of some partners not consenting thereto. It seems, however, that a pact or agreement without the participation of Solidarity would be of little importance to Jerzy Hausner (as it would not improve the prospects for successful negotiations in the government and Sejm).

And yet the failure to negotiate an agreement gave many additional (positive) effects. Above all, the unique intensity of works and the participation of the elites of organizations (organization chairpersons) in a number of field presidium meetings allowed not only to form informal ties between them but also resulted in better understanding of the partners' determinants. In 2004 the Solidarity President put it as follows: "the very fact we have started to communicate is important. The Tripartite institution had not operated like that before. Contacts with Ms. Bochniarz (PCPE Chairwoman) took place only via television, or sometimes there was a clash on the air, where a conflict, a dispute was almost provoked, where it was sparking. There were no other common grounds to have a meeting, and it was difficult to talk in a peaceful way, considering the mutual reluctance. However, here, we had mutual contacts (...), it turned out that both sides included reasonable people and there were areas where it was possible to meet, despite all the differences. It was tempting, it provoked to enter into talks".

These contacts strengthened the bilateral dialogue that had been conducted between OPZZ and the PCPE before[22]. When the negotiations and agreement on the pact had failed, in November 2003 the employers' organizations and two trade unions – the All-Poland Alliance of Trade Unions (OPZZ)and Trade Union Forum (without Solidarity)[23] began talks concerning an autonomous agreement (i.e. one without participation of the government) which was concluded at the end of December 2003[24]. The agreement was, however, criticized by Solidarity which carried a wide-scale campaign undermining the credibility of the All-Poland Alliance of Trade Unions (OPZZ) among the working class[25].

The period of Hausner's chairmanship should be compared to the times when the State Enterprise Pact was negotiated in 1993. Over the decade of 1993/4–2003 the partners' disposition to strike compromises – though still not very high – was nevertheless growing. The observation of several TC teams showed that participants in the negotiations of the Labour and Development Pact in 2003 were able to depart from the rigid defence of their arguments. On the other hand, the decision-making circles and influential social partner organizations were under the ballast of mutual distrust. Some organization leaders who conducted negotiations

[22] The dialogue was conducted in 1999 when OPZZ suspended their participation in the TC, and the newly established PCPE (Polish Confederation of Private Employers) was not a TC member yet.

[23] The Forum Trade Union withdrew from the agreement at the very last moment (the time of the strike of rail workers who belonged to the Forum).

[24] The focal point of the agreement was changes in the legal regulation of fixed-term contracts, a draft amendment to the law on collective disputes, the new rules for selecting mediators, the adoption of the principle that employee salaries/wages would be paid before management salaries.

[25] Two documents were sent out: one was a copy of the text of the agreement, signed by OPZZ and the other was a copy of the letter of the PCPE leaders to their members in which the Confederation pointed out that the employers was the winning party to the negotiations, hence it was trade unions that bore a higher cost.

in the TC presidium met with suspicion of their own boards – not because it was feared that they would be disloyal, but because their negotiation skills were distrusted ("they will be deceived" – it was said).

A question may be asked about the functions which the TC did and did not serve. The social partners treated the TC as an important institution which gave them access to the process of government decision-making and to information. In addition, participation in the Commission offered the negotiators personal prestige and certain privileges. Hence, even partners who were in conflict with one another at a given time sought to strengthen the TC. However, the Commission did not perform the function of harmonization of interests – it was focused rather on negotiating specific issues with the government side.

8. The leadership circles of Law and Justice which governed in the years 2005–2007 introduced the dialogue and pact idea in the party's electoral programme, thus implementing, in a sense, a provision contained in a civic constitution bill developed by Solidarity in the 1990's[26]. PiS vision of dialogue had significant limitations, though, namely it was believed that the dialogue, if any, should be conducted with the organizations that did not represent the "post-communist" system. Among trade unions with which agreements could be reached Solidarity was clearly pointed out as the sole representative of the working class interests. The same was true about employers' organizations, some of them being treated as more and some as less credible. The trade unions belonging to the All-Poland Alliance of Trade Unions (OPZZ) centre were clearly burdened with the sin of having originated in the period when Wojciech Jaruzelski was in power and unfriendly actions were taken against them.

The positioning of the TC and the dialogue changed significantly at the times of that government. The TC chairwoman was the Minister of Labour from the coalition party called "Self-Defence" [Samoobrona] which did not enjoy authority in the government at that time. As a result, the TC, which was a meeting place with the government elite at the time of Jerzy Hausner, found itself on the sidelines then. It was frustrating, especially for the TC presidium members who proposed that the chairman duties should be taken by a politician having a stronger position in the government.

Including the social dialogue and pact idea to PiS programme was not, however, accompanied by any concept how this dialogue should look like, what functions it should serve, etc. The conversations we had with PiS experts in 2006 showed that the governing bodies of the party believed that the pact could be prepared fully in advance, and that it should take the form of not only the overall concept, but be accompanied by the implementing legislation, to be then adopted by the government. Subsequent events, as well as the statements of PiS chairman

[26] According to the account of one of the experts, the provision concerning the social pact was included in the Law and Justice's programme under the pressure of Solidarity.

indicated that the government side wanted to make a pact with Solidarity only. The PiS leaders made a proposal to Professor Jerzy Wratny asking him to prepare suitable solutions and he developed the concept of the pact[27]. A kind of a manual was prepared which explained the principles of dialogue, and described the practice of concluding pacts and the role of governments in preparing, negotiating and concluding them. Although the European treaty procedures were described very briefly there, they became the inspiration for the PiS government. Eventually, the government adopted the following procedure for preparing the pact: the social partners together with government representatives would define their preferences, then the prime minister would appoint a government team under his leadership (in practice the team would be led by one of PiS seasoned politicians originating from Solidarity) who would develop draft solutions for specific issues. In the next move the output of the government team's work would become the subject of TC teams' work. The efforts of the government team lasted for about a year, but their effect did not actually become the subject of the TC teams' work.

The prime minister's official statement, given on the occasion of completion of the governmental team's work showed that despite the guidelines given by Wratny, he wanted to negotiate and sign a social pact only with the representation of Solidarity (he had conducted talks concerning this issue with Solidarity already in the course of the work of the government team). This would of course mean inhibition of social dialogue. Although Solidarity supported the PiS government, they did not, nevertheless, agree to such a solution (putting aside an agreement on the minimum wage increase concluded in the last months of the government).

9. In 2007 the government passed into the hands of the coalition of the Civic Platform (CP – Polish abbr. PO) and Polish Peasant Party (PPP – PSL in Polish). The dominant role is played by the PO which is liberal by programme and which was assessed by trade unions before the election as a party reluctant to social dialogue. Despite these concerns the new government strengthened the TC institution in the initial period of its operation. The Deputy Prime Minister (at the same holding the post of the Minister of Economy) became the TC Chairman, and some ministers, including the Finance Minister became Commission members. Both the Deputy Prime Minister and the Minister of Labour, just a deputy ministers of key government departments participated regularly in the proceedings of the TC presidium, the Task Teams, the plenary assembly and the Industry Teams, operating side by side with the TC *in pleno*.

And yet the intensified participation did not mean that the PO-PSL government would adopt a more corporative orientation than the former governments did. It was very clearly indicated by Prime Minister Donald Tusk during a meet-

[27] J. Wratny (ed.), M. Kabaj, B. Balcerzak-Paradowska, M. Latos-Miłkowska, *Umowa społeczna "Gospodarka-praca-rodzina-dialog"* [Social Contract, "Economy-Work-Family-Dialogue"], Warsaw 2006.

ing with the TC presidium in late 2008. The Prime Minister's statement clearly emphasized that the government would pursue a policy of sovereignty in its relation to the trade unions and that the government side was well-aware that it was impossible for the trade unions to exercise the real power of veto against the direction of public policies. On the other hand, a conflict with trade unions, especially an open one, would entail costs, which the government definitely wanted to avoid. The Prime Minister reiterated, in fact, the theses that were repeatedly formulated by Deputy Prime Minister Jerzy Hausner in the early 2000's.

And what was the practice of dialogue like? Owing to limitations of space, let us confine ourselves to a few selected issues absorbing the TC from 2007.

The first clash of the government and social partners took place in 2007 and was related to so-called "Szejnfeld's plan". Deputy Minister Adam Szejnfeld tried to gain the support of social partners for a bill to change the regulations in the mini-enterprise sector (with up to 10 employees). The plan was presented to the Task Team, but it was rejected by the union side. The essence of the plan was to relax some of the code requirements for micro-enterprises, which was reasonable from the standpoint of operation of the smallest business units. Trade unions, distrustful of the government, feared that once the relaxation would be introduced, it would be later extended to include large companies as well. Eventually the government relented and abandoned the work on amending the labour law, although they later introduced several changes in line with Szejnfeld's plan.

A major action of the PO-PSL government on the TC forum was taken in 2008 and referred to the early retirement reform (reduction of the number of jobs where early retirement was allowed). The government entered into negotiations with social partners in the TC Team, leaving some room to manoeuvre. Following several months of negotiations, the government accepted a number of exclusions proposed by the trade unions. The original plan was to reduce the number of employees who were entitled to such early retirement from approximately 1,200,000 to 130,000. Following the negotiations in the TC, the number was increased to 250,000. Eventually, the negotiations reached a stalemate: although some employee groups, most important for the trade unions, were excluded, nonetheless the unions could not officially accept the fact that about a million of other workers would be deprived of the earlier retirement rights. Hence, they protested against the pension reform program, without organizing any demonstrations, though.

One of the important postulates of the trade unions was and still is to raise the minimum wage. For several years the unions did not agree to the wage level proposed by the government. A doubtless success of the PO-PSL government's social dialogue was that they twice managed to reach an agreement on the minimum wage, which agreements were negotiated in the dialogue between social partners and the Minister of Labour. In 2010 an agreement was not reached. This was due to the trade unions' postulate that the government should present a "roadmap" to

show the point where the minimum wage would reach 50% of the average wage (the government promised to prepare such a map) and that the minimum wage in 2011 should significantly rise compared to the level of 2010. The government did not agree, and imposed the wage level without having entered into any negotiations with the trade unions. The unions protested leaving the plenary meeting of the TC in late July 2010.

Although not being a part of the TC, the Industry Teams operate side by side with the TC, in some cases undertaking functions arising from certain institutional shortcomings in the Polish industrial relations, particularly a small number of collective labour agreements. However, it appears that there are industries where the existing problems require cooperation of employers and trade unions to be solved. Employers are reluctant to agree to engage in negotiations on collective bargaining agreements, they are particularly afraid of commitments concerning wage growth. In that situation, at least in the case of two industries, the Industry Team or its autonomous independent counterpart (the team without participation of government representatives) took the role of regulating certain employee issues. The case was similar to that when the government administration had to resolve certain issues concerning industries (not necessarily related to restructuring). Social dialogue forums proved useful for establishing, on their ground or side by side with them, certain *ad hoc* teams to deal with difficult issues.

Autonomous Dialogue 2009 (excluding the government) began in February 2009 and ended in May of the same year by the social partners' adoption of a drafted anti-crisis pact. According to the observations of Western researchers, an important factor stimulating social dialogue is crisis. Such was also the case that time: the autumn of 2008 marked the beginning of crisis phenomena in Poland which further escalated in the early months of 2009. It was an exceptionally advantageous moment to look for an agreement between social partners. The trade unions were seeking to protect jobs and they were willing to make concessions concerning work regulation issues, employers found themselves trapped in currency options and expected support from the government, the government faced crisis challenges, such as several bankruptcies of large companies and the threat of a rapid increase in unemployment and the involved emergence of social unrest. The government prepared a crisis prevention program, yet social partners considered it insufficient and decided to develop an anti-crisis pact of their own. The chairpersons of all the seven organizations participating in the TC started talks. This was an unprecedented event (autonomous dialogue had never been conducted by all partners, one of them always breaking ranks). The partners also adopted the assumption that the negotiations would be of a package-like and symmetrical nature (concessions by the unions in exchange for concessions by employers). It was mainly the trade union side that insisted on the package issue fearing that if specific issues were negotiated in isolation from others, those being in the interest of employers and the government would be resolved while workers'

interests would be disregarded. Such package-based approach to the anti-crisis pact was accepted by the employers and a package of 12-symmetrically arranged problems was created in May as a result, following 3-month negotiations conducted usually within a small group of 7 chairmen. Obviously the package did not include any specific solutions or bills, these had still to be developed[28]. Eventually, the social partners succeeded in signing an agreement, but the success was not made the most of – a crisis that hit Poland was weaker than expected, the employers were the first to start withdrawing from some of their obligations, and the case was the same with the trade unions later. The Government finally "extracted" from the package the proposals which they considered feasible and carried them through the parliamentary procedure. This gave grounds to the trade unions to protest against the government's actions. Nevertheless, the protest did not involve any strikes or demonstrations.

10. Institutionalised social dialogue performs specific functions, only partially coinciding with those reflected in the Act and in the regulations, and relatively distant from the functions performed in the old democracies, similar to the Coordinated Market Economy (CME) model. In this paper I will show how the functions of dialogue were perceived by the chairpersons and vice-chairpersons of employers' organizations and trade unions[29] during the research conducted in 2009. According to the persons in questions, these included:

– influence on legislation and the possibility of appealing to the Constitutional Tribunal;

– reaching people in the government[30], the capacity to influence decisions concerning labour relations, informal contacts with high-rank officials;

– building a position in the European Union, participation in the European Economic and Social Committee and other European institutions;

– possibility of contact with other organizations, "reading the mood" and direct contacts with leadership circles of these organizations. It is particularly important for those organizations of employers that have trade unions operating in their companies;

– participation in a number of important government institutions (the Council of Social Security, the Council of Labour, etc.);

[28] A trade union lawyer told us several months later that the package's structure was only apparently symmetrical, as it contained many postulates impossible to implement owing to the profound differences of interest.

[29] J. Gardawski, *Dialog społeczny w Polsce. Teoria, historia, praktyka* [Social dialogue in Poland. Theory, History, Practice], Ministry of Labour and Social Policy, Warsaw School of Economics – Department of Economic Sociology, Warsaw 2009, pp. 248–257.

[30] The representatives of employers pointed out that Poland lacked a legitimised forum for exchange of information with decision-making circles, and that a mechanism for reasonable, pathology-free lobbying was missing.

– protection of industrial relations, at least to some extent, against open conflicts. Owing to the TC it was learned how to solve immediate problems, albeit to a limited extent;

– receiving funds (which is particularly important for trade unions). The funds are used mainly for training, obtaining expert opinions, agreements, contracts, legal counselling;

– currently, under the conditions prevailing in Poland, an employers' or trade union organization remaining outside the TC faces the danger of marginalisation.

The functions do not include harmonization of interests to achieve important social objectives. During a session held on the occasion of the 15th anniversary of the TC in 2009 Jerzy Hausner put it in the following way: "we are relatively successful with the operating dialogue. The dialogue that serves mutual communication, exchange of information, alleviation of current conflicts. Here, a very positive role was played by the Tripartite Commission presidium and the dialogue conducted among the chairperson of specific organizations". But the dialogue does not lead to solving development problems, "here there are no such great, significant achievements which would contribute to positive changes. It reminds me of the year 2003 and the moment when we were eventually failing in an attempt to conclude the Pact for Labour and Development (...).In Poland there is little balance between a dialogue aimed at regulating a social conflict and preserving social peace and a dialogue aimed at solving difficult social problems and forming partnership for development".

Hausner's thesis stemmed from his own experience with the attempts to negotiate the Pact for Labour and Development and an analysis of economic and social modernization attempts undertaken by the current PO-PSL government. Modernization always involves social costs, violates someone's interests, typically the lower layers of the working class. Without strong crisis pressure social partners are not motivated to abandon defending the existential interests of their clientele, particularly in situations of organizational pluralism.

11. Let us evaluate the social dialogue in Poland from the angle of some variables formulated by Western researchers. The government dominates over the social partners, trade unions in particular, striking a balance between the parties in a longer perspective is out of question. In that respect, the power of the Polish government has been greater than in most countries of the "old" European Union. Trade unions have very small veto power. Unlike most of the trade unions of the "old" European Union countries they have a very limited ability to mobilize the working class. On the other hand, the processes of decreasing membership in the main union organisations (Trade Union Forum, Solidarity and the All-Poland Alliance of Trade Unions (OPZZ)) have stopped, and the Polish presence in the European Union somewhat strengthened the Polish trade union movement. The trade unions have changed their attitude towards politics after

2001, they are not involved in it directly any longer, nevertheless they are still endangered by political involvement. On the one hand, they are pushed thereto by their weakness in the sphere of labour relations (close participation in politics gives, as some leaders believe, a chance of having influence on decision-making processes, compensating for the said weakness), on the other hand they are lured by politicians to a larger or lesser extent. At the time when this paper is going to the publishers, Solidarity is trying to build a new strategy – increase the distance to political parties (even to their closest ally – Law and Justice) and mobilize the working class, organize strikes and negotiate with the government from the position of power. The thesis of crisis having impact on social dialogue has been confirmed: entering into autonomous negotiations between social partners in 2009 and signing a draft anti-crisis pact was a result of strong concerns about the crisis, justified at that time. Once the severe symptoms of crisis had receded, the motivation of social partners to make concessions to the other party and to conclude a pact with them vanished away (the employers being the first to withdraw). The culture of compromise has strengthened to a small extent only. An opinion of one of the foremost leaders of the employers' side noted in 2009 is worth quoting. He said that representatives of organizations would not listen to each other's arguments, they would not seek to solve problems, and it was not their aim to reach a common position, hence it was so rare that the latter would be agreed. It is possible only when all parties find their particular interest in a solution. Such behaviour originates from the culture inherited from the authoritarian socialism. Social dialogue has become institutionalised and performs vital functions, nonetheless, those functions are not related to harmonisation of interests or reaching important decisions in the field of public policies by consensus. The government perceives the dialogue as a tool to measure social peace, one that serves to consult plans and implement corrections. On the other hand, social partners gain some influence on the legislative process . They are presented with an opportunity to contact the political elite and other partners, gaining access to European institutions and funds. Is coordinated market economy, liberal market economy or economy corresponding to trans-national liberal values being formed in Poland? To what extent is such economy rooted? Is pluralistic, corporate or job-oriented governance created in terms of representation of interests? Bearing in mind possible simplifications of such classification it can be assumed that at the present time the concept of a dynamic model reflects our situation better than any other one: the state, as the dominant actor, introduces a liberal market economy, yet it makes use of the tool of institutionalised consultation with social partners. It thus happens that partners not only consult governmental projects and put forward their postulates (as the case of the early retirement law was), but also develop their own proposals which are accepted by the government particularly in crisis situations (the Telework Act, the Workers' Councils Act, the drafted anti-crisis pact).

12. The recent years have brought a significant crisis of the social dialogue in Poland[31]. This is true of all levels of negotiations including the functioning of the Tripartite Commission for Socio-Economic Affairs. At the same time, the labour market is facing new challenges caused by the economic crisis and the growing number of civil law contracts. This requires a reaction of social partners. One can also observe some changes on the political scene. The year 2015 is the year of two general elections: presidential and parliamentary. They may entail serious consequences in the position of trade unions and employers' organizations as well as in the approach of the government to social matters. The power of trade unions will be also strengthened by the judgment of the Constitutional Tribunal of 2 June 2015 in which the Tribunal stated that the provisions of the Law on Trade Unions that limit the rights of persons employed outside the employment relationship (persons performing gainful activity) are inconsistent with Art. 59(1) in conjunction with Art. 12 of the Constitution. The Law on Trade Unions must not overlook the rights of workers who are not employees (including those engaged on civil law contracts). We are also looking forward to another important change. The Tripartite Commission for Socio-Economic Affairs is going to be replaced by the Council of Social Dialogue. The Law on the Council of Social Dialogue and other institutions of social dialogue was enacted on 25 June 2015. The legislative process has not been completed yet.

ABSTRACT

The author presents a summary of the evolution of European Social Dialogue after World War II, starting from the 1960's. He describes the main trends in the evolution of that dialogue, in the countries of the old European Union on the one hand and in the post-communist countries on the other hand. In particular, the paper focuses on the evolution of social dialogue in the Third Republic of Poland. The author has divided the process of that evolution into several periods. The first period is until 2001. In that period of time the main difficulties with the implementation of the dialogue were the weakness of trade unions and the domination of the governments over social partners. The institution of social dialogue was established in Poland as a result of a wave of strikes caused by the fear of privatisation, resulting in the appointment of the Tripartite Commission (TC). After 2001 and the adoption of the "Act on the Tripartite Commission for Socio-Economic Issues and Voivodship Commissions for Social Dialogue", the way to the TC has been opened for the employers' organizations and new trade union organizations. However, Polish trade unions still have a very limited ability

[31] The main part of the article was prepared in the year 2013.

to mobilize the working class and are still endangered by political involvement. A look at the functions of the TC and the social dialogue shows that they do not include harmonization of interests to achieve important social objectives.

20 LAT DIALOGU SPOŁECZNEGO W POLSCE

Streszczenie

Autor prezentuje podsumowanie rozwoju europejskiego dialogu społecznego po II wojnie światowej, zaczynając od lat 60-tych. Pokazuje główne trendy w rozwoju tego dialogu, z jednej strony w krajach starej Unii Europejskiej, a z drugiej strony w krajach postkomunistycznych. W szczególności koncentruje się na rozwoju dialogu społecznego w III Rzeczpospolitej. Autor dzieli proces tego rozwoju na kilka okresów. Pierwszy okres obejmuje lata do 2001 r. W tym czasie podstawową trudnością we wdrażaniu dialogu społecznego była słabość związków zawodowych i dominacja rządu nad partnerami społecznymi. Instytucja dialogu społecznego została w Polsce ukształtowana dopiero w rezultacie fali strajków spowodowanych obawą przed prywatyzacją i skutkowała powołaniem Trójstronnej Komisji. Po 2001 r. i przyjęciu ustawy o Trójstronnej Komisji do Spraw Społeczno-Gospodarczych i wojewódzkich komisjach dialogu społecznego dostęp do Trójstronnej Komisji uzyskały organizacje pracodawców oraz kolejne związki zawodowe. Niezależnie od tego polskie związki zawodowe mają ciągle ograniczoną zdolność mobilizowania klasy robotniczej i nadal są podatne na wpływy polityczne. Patrząc na funkcje Trójstronnej Komisji i dialogu społecznego, nie ma wśród nich dążenia do ujednolicenia interesów i osiągania ważnych celów socjalnych.

KEYWORDS

social dialogue, Tripartite Commission, trade union, employer's organizations, social partners, political involvement

SŁOWA KLUCZOWE

dialog społeczny, Komisja Trójstronna, związek zawodowy, organizacje pracodawców, partnerzy społeczni, wpływy polityczne

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COLLECTIVE LABOUR AGREEMENTS AS A FUNDAMENTAL TOOL OF TRADE UNION OPERATION

1. Emergence of the institution of collective labour agreements (CLAs) has been inextricably linked with development of trade unions as an employee representation, the aim of which representation, since the very beginning, consisted in protection of rights and interests of the labour[1]. Putting the issue in historical perspective, the germs of collective labour agreements were agreements ending a collective dispute between employees and the employer, most frequently post-strike agreements consolidating benefits achieved by the employees, wage raises in particular. As time went by, however, the subject matter of the agreements started including also other terms and conditions of work, provided that the regulations were more favourable to the employees (when compared to the standards set forth by the universally binding legislation). Using the instrument of a collective labour agreement, attempts were also made to reinforce the position of trade unions vis-à-vis the employers, by including relevant provisions concerning workers' representation and its rights in employment relationships into CLAs[2]. The development of the practice of concluding collective labour agreements was backed rather early by the State, as it was rightly perceived as instrumental in maintaining social peace which contributes to economic development of the country. Hence from the very beginning the State saw the positive role played by collective labour agreements in socio-economic life and attempted at creation of relevant enabling legislation that would favour development of that labour law scheme. A particular sign of the interest taken by the State in development of CLAs was extension of the binding force of collective labour agreements onto employers not associated in the organization which was a party to or participant in the agreement (so-called generalization of a CLA). This was aimed not only at gradual alignment of terms of employment in a specific line of business or profession, but also at prevention of practices of unfair competition between employers

[1] Cf. W. Szubert, *Układy zbiorowe pracy* [Collective Labour Agreements], Warszawa 1960, p. 8 *et seq*.

[2] M. Święcicki, *Prawo pracy* [Labour Law], Warszawa 1968, p. 92 *et seq*.

by reducing labour costs (lower wages/salaries for those not covered by a CLA), which could result in lower prices of goods or services offered in the market. Gradually, under specific labour law systems a prohibition to use a so-called differentiating clause was introduced (under which clause it had been possible to apply CLA provisions only to members of the trade union that was a party of the collective labour agreement)[3].

Under conditions of so-called real socialism in Poland and other countries of Central and Eastern Europe collective labour agreements did not, on the whole, play a significant role, although it must be stressed that in specific periods of history of what was termed as the People's Polish Republic the practice of concluding CLS varied (the instrument being used more intensely in the years 1945–1949 and after the October political breakthrough of 1956). In that respect Poland was an exclusion among other socialist countries. The model of a CLA in those periods differed essentially from the model established under the capitalist system and developed under the market economy framework. Under the real socialism system the object-related scope of CLAs was considerably limited (as they were concluded at a trade or profession level with the option to only concretize terms of remuneration and other benefits within the centrally set remuneration-related rules and terms of employment of a specific nature). The actual weakness of the CLAs concluded and effective at that time consisted, however, in lack of genuine social partners, both on the employee and the employer side. This was naturally reflected in numerous components of legal solutions concerning collective labour agreements, such as: the capacity to conclude them, object-related scope of the instruments and freedom of collective bargaining related to it or almost complete inability of the parties to introduce into contents of the CLA the so-called obligational (obligation-related) part, where mutual obligations of the parties would be provided for[4].

Certain (rather unsuccessful) attempts to change the model of collective labour agreements were taken towards the end of the existence of the socialist system, by means of an Act of Parliament of 24 November, 1986 amending chapter XI of the Labour Code[5]. The fact was connected with efforts of Poland's government of that time to reform the system of state-owned enterprises so as to make them more financially sustainable. So-called company-based collective agreements were then introduced, as a more detailed shape of what was termed as framework CLAs concluded at supra-company level. The said concerned, however, only those state-owned enterprises and organizational units that had been allowed, under an earlier Act of 26 January, 1984[6], to independently establish

[3] In Poland such a prohibition was already imposed by the Act of 14 April, 1937 on Collective Labour Agreements (Journal of Laws No. 31, item 242).

[4] Cf. J. Wratny, *Związki zawodowe w prawodawstwie polskim w latach 1980–1991* [Trade Unions in Polish Legislation in the Years 1980–1991], Lublin 1994, p. 14.

[5] Journal of Laws No. 42, item 201.

[6] The Act on Development of Company Remuneration Systems.

company systems of remuneration by means of collective agreements concluded by trade unions and manager of the work establishment with the involvement of the body of employee self-administration[7]. In addition to that two-level regulation of terms of employment there existed also trade-related collective labour agreements concluded between the minister responsible for a specific division of governmental administration and general management board of a relevant trade union. The most essential weak point of that intricate CLA system was, generally speaking, lack of freedom in shaping the contents of a CLA. For as Art. 79 of the Labour Code in its wording of that time provided, terms of remuneration and granting of other benefits could only be done within the limits of the rules set by the Council of Ministers (the government). As regards working conditions and employee rights connected with them, they had to be strictly related to the nature of the work done in a specific line of business or profession and within that scope could be more favourable from the statutorily-based ones. It was allowed, at the same time, to reduce by means of CLA provisions, the level of statutorily-guaranteed employee benefits as regards remuneration for idle hours and extra pay for work done overtime.

2. Although, after the transformation of socio-economic and political system of Poland started in 1989, the collective labour agreements were retained in the Labour Code effective in this country, from the very beginning attempts were taken to work out a new model of the discussed instruments which would suit the conditions of market economy. In the drafting of legal solutions reflecting the changed realities of the country trade unions ("Solidarity" in particular) were very strongly involved as a party to the future collective agreements concluded at various organizational levels[8].

The current legal shape of collective labour agreements, as provided for in chapter XI of the Labour Code, has resulted from the Act of 29 September 1994 Amending Labour Code and Certain Other Acts of Parliament[9] which preceded the large-scale amendments to the entire Labour Code made in 1996. The new model of CLAs adjusted to the requirements of social market economy was based on the fundamentals worked out in negotiations of social partners under the "Pact

[7] For a broader discussion see: G. Goździewicz, *Miejsce zakładowych porozumień płacowych w systemie źródeł prawa pracy* [The Position of Company-Level Pay Agreements in the System of Labour Law Sources], PiP 1985, Vol. 2.

[8] The course of the legislative work done to give collective labour agreements their modern shape was presented, *inter alia*, in the following publications: H. Lewandowski, *O projekcie ustawy o zakładowych układach zbiorowych pracy* [On the Drafted Law on Single-company Collective Labour Agreements], PiZS 1991, Vol. 1 and G. Goździewicz, *Propozycje rozwiązań prawnych dotyczących układów zbiorowych pracy w ramach rządowego projektu „Paktu o przedsiębiorstwie państwowym"* [The Proposed Legal Schemes Concerning Collective Labour Agreements under the Governmental Draft of the "Pact on State-owned Enterprise"], PiZS 1992, Vol. 12.

[9] Journal of Laws No. 113, item 547, as amended.

on State-Owned Enterprise in the Process of Transformation" of 1993, where an active role was played by the trade union side, mostly "Solidarity" Trade Union. An attempt was made to restore the traditional role of CLA as an act providing for terms with which contents of the employment relationship should comply, the terms taking into account nature of the type of employment and being more favourable than the universally binding sources of law prescribe. Hence the state monopoly to shape employment relationships was broken and a shift was made from unilateral determination of terms of work and remuneration to the method involving collective agreements with representatives of employers and those of employees (trade unions) participating on equal terms.

The prestige of CLA and other collective agreements was raised thanks to the labour law scheme having been provided for in the Constitution of the Republic of Poland of 1997, where – in Art. 59 par. 2 of the act – trade unions, just like employers and their associations were guaranteed the right to bargain collectively, in particular with the aim to resolve collective disputes and to conclude CLAs. An amendment to the Labour Code of 2000, regarding collective labour agreements, was mostly aimed at alignment of the law in force with international standards and standards of international agreements binding on Poland. Meanwhile, in practical terms, it was aimed at providing greater efficiency to the process of bargaining and concluding CLAs.

Under the new socio-economic and political system **collective labour agreements were made acts of universal application**, the fact meaning that they may be concluded in all work establishments, both in production and in entities of the public sector where funds for employee salaries come from the central budget (save for the nominated and appointed employees of public offices and selected local government employees, judges and public prosecutors). A certain tradition existing in Poland was thus broken, one of collective labour agreements concluded solely for employees of material production sphere. The new model of CLAs also confirmed the rule, adopted as early as in the Polish Act on Collective Labour Agreements of 1937, forbidding the application of the already mentioned so-called differentiating clause, according to which clause provisions of a collective labour agreement could be applicable only to members of the trade union being a party to the CLA. In a way similar to that followed in pre-war time the binding power of CLA provisions was modeled to mean, as a general rule puts it, that relationships between the legislation, collective labour agreements and a contract of employment (just like other bases for employment relationship) are founded upon the principle of employee favourability.

3. As opposed to it, the **freedom to bargain collectively**[10], the essence of the entire process of concluding a CLA, was being introduced gradually. The right

[10] Initially, Art. 240 par. 1 of the Labour Code provided that the agreement could not determine: 1) rules for extended protection of employees against termination of the employment rela-

to bargain collectively is a founding principle of not only the law pertaining to collective labour agreements, but the collective labour law as a whole. Although neither constitutional nor international standards limit collective bargaining only to CLAs, other collective accords and resolution of collective disputes, but contain a formula of open-end bargaining, that form of collective actions is, nevertheless, most fully implemented when it comes to conclusion of CLAs. It is under the collective bargaining aimed at concluding a collective labour agreements that the widest use can be made of trade union rights. As a party to a future CLA or collective agreement trade unions operate on equal terms with the employer. When shaping terms of employment, those concerning wages/salaries in particular, it is possible not only to present trade unions' (and hence also employees') own position on specified issues but also, by arriving at a common solution (often being a compromise) to achieve specific objectives. An issue closely related to collective bargaining problems is that of autonomy of social partners, so-called **collective autonomy**, being a derivative of the contractual autonomy of parties in relationships resulting from an obligation. The freedom of parties to a collective labour agreement concerns, in particular, the possibility to choose the type of the CLA (a single- or a multi-establishment one) and the level on which it can be concluded, a broad formula of specification of terms with which contents of the employment relationship should comply, and other matters that have not been provided for in labour law in an imperative way, not to mention mutual obligations of parties to the CLA. Parties to the agreement have also been provided full freedom as regards determining the circle of the subjects to be covered by provisions of the CLA (retirees, pensioners, family members, as well as those working under a legal scheme other than employment relationship), there being no option of including the earlier mentioned differentiating clause there. Further examples of collective bargaining autonomy include: the possibility to include a procedure of resolution of collective dispute related to conclusion of a CLA, amendments to the contents of the agreements by means of additional protocols and termination of a CLA. Also provisions whereby CLA freedom is limited may be encountered in the law on CLAs. This holds particularly true as regards collective labour agreements concluded in the public sector[11]. An application to register such CLAs should include a statement by the agency that created such an entity or took over the function of the agency that the performances to the employees, as provided for in the CLA can be financed under the financial resources granted to the entity. The freedom of collective bargaining gets also limited in case of so-called generalization of a multi-establishment collective agreement, i.e. the

tionship; 2) employee rights in case of unfair or illegal notice to terminate or termination of the employment relationship without notice, save for remuneration or compensation on account of the said; 3) responsibility for keeping to order or disciplinary responsibility; 4) maternity leaves and leaves to raise the children; 5) protection of salaries/wages.

[11] Similarly L. Florek, *Prawo pracy* [Labour Law], Warszawa 2006, p. 310.

situation where the application of a CLA is extended by an ordinance of the minister of labour, in whole or in part, onto employees of an employer not covered by any multi-establishment CLA, involved in business activity similar or close to the activities of the employers covered by the CLA. The limitation of the freedom to bargain collectively affects in that case mostly the employer who does not take actions to conclude a collective labour agreement, it is true, yet a joint application is required from the employers' organization and the trade union organizations that concluded the CLA, supplied with additional reasons for the extension of the agreement, indicating the existence of a public interest justifying the same. When considering the criterion, principles of labour law should be taken into account, the rule of equal treatment of employees[12] in particular, as well as the principle of equal treatment of social partners. In the latter case it is the issue of counteracting unfair competition principles that is at stake.

4. Trade unions, as organizations of the working people, established to represent and protect their rights, professional and social interests fulfill themselves best as a party to collective labour agreements. It is only in that very form that the trade union may most effectively meet its fundamental tasks. The law-maker has vested trade unions – just like employers and their associations – in the **capacity to conclude collective labour agreements** as a feature indispensable to participate in collective bargaining aimed at concluding CLAs and other collective accords[13]. From the very start of development of the new CLA model in Poland the matter of precise determination of the party to collective labour agreements concluded at various levels was a highly controversial issue, both at the stage of drafting relevant solutions and in their practical implementation. Difficulties in formation of the trade union side would arise whenever employees were represented by various trade union organizations and all of them or only some ones expressed their intent to conduct collective bargaining in order to conclude a CLA. The thus emerged situation is a consequence of trade union pluralism and great differentiation of organizational structures existing at various levels. The current system of formation of the party to the CLA is a complicated and multi-level one (from the attempt to form a joint representation out of the trade unions participating in collective bargaining to trade unions acting independently to only representative trade unions being admitted to the bargaining). Hence demands are raised to considerably simplify the effective legal solutions in that respect, and allow – for instance – for appointment of a trade union enjoying trust among the staff as a party to the CLA by means of a referendum among the employees. Other suggestion concerns amending legal

[12] Cf. L. Kaczyński, *Generalizacja układu zbiorowego pracy* [Generalisation of the Collective Labour Agreement], PiP 1998, Vol. 5, p. 10.

[13] The issue of the trade union capacity to conclude CLAs has been tackled, in particular, by J. Stelina, *Związkowa zdolność układowa* [Trade Union Capacity to Conclude CLAs], Poznań 2001 and the literature quoted there.

provisions being in force now (Art. 238 and 241[14a] of the Labour Code) that limit the freedom of concluding collective labour agreements as regards supra-company trade organizations not being all-Poland ones and limitations imposed in that respect on trade union federations/confederations[14].

5. The broad scope of collective bargaining, particularly as regards the conditions with which contents of employment relationship should comply is not, in practical terms, fully made use of. The reasons for that are multifold, the most important of them being, it seems, relatively highs standards of labour law legislation, supplemented by Community law standards which Poland has to observe as a EU Member State. This results in frequent amendments to the universally binding sources of law, the Labour Code in particular. The high standards of labour law legislation considerably narrow the area in which bargaining between the social partners may take place and make it difficult to many employers (particularly those smaller ones) to meet just the statutorily-based standards regarding employee rights. Another reason is structural and ownership-related transformation of our economy, high fragmentation of business units, or organizational bonds within the framework of an industry, trade or a profession having got weakened. Owing to the factors, after 1989 the practice of signing CLAs considerably shrunk in Poland, an a majority of the now effective CLAs are ones of company-level type. Even as far as that group of CLAs are concerned, however, the basic difficulty is lack of trade unions that could be a party to the collective labour agreement. Marginalisation of trade unions in work establishments results not only from aversion of the employers or even hostile actions occasionally taken by them against those willing to establish a trade union. It is also a result of limited interest in trade union membership on the part of the employees themselves, considering modifications of production processes caused by technological changes. All that has also translated into changes in structure of the employment, causing a decline in the numbers of workers and growth of engineering/technical staff, as well as development of new forms of employment.

Reduced trade union activity in the field of collective bargaining has been also caused by changing attitudes of trade union leaders or decomposition of the activities their undertake, there being a marked readiness on their side to cooperate with the employer for the benefit of all employees, in the feeling of responsibility for good economic standing of the firm, maintenance of jobs in particular.

6. Various functions are played by a collective labour agreement. These include: an **economic** function, consisting in stimulation of economic growth and

[14] Cf. G. Goździewicz, *Układy zbiorowe pracy w Polsce – problematyka stron układu*, (in:) *Prawo polskie. Próba syntezy* [Collective Labour Agreements in Poland – the Issue of the Contracting Parties, (in:) Polish Law. A Synthesis], T. Guz, J. Głuchowski, M. R. Pałubska (eds.), Warszawa 2009, p. 964.

maintenance of social peace in relationships between social partners and a **promotional** function regarding development of new solutions, hitherto unknown to the common labour law; in addition, CLAs **provide greater flexibility to commonly applied legal schemes**[15]. These are clearly reflected in Labour Code provisions concerning protection of remuneration for work whereby a possibility to pay the remuneration partly in forms other than cash (Art. 86 § 2) or payment of the remuneration other than to the hands of the employee (Art. 86 § 3) are offered. It is even to a broader extent that references to CLAs are made by the law-maker as regards regulation of selected issues of working time: the interrupted working hours (Art. 139 § 3), a working time break lasting up to 60 minutes (Art. 141 § 2), determination of the number of overtime hours in the calendar year differently from the Labour Code solutions (Art. 151 item 4). The *ratio legis,* or the reason for those statutory renvoys to CLAs, lies in reasonable differentiation of detailed legal schemes by means of CLA provisions, taking into account the conditions and type of the work done at a specific company or in a given profession. There is, however, a well-grounded fear that, as far as increasing of the limit of overtime hours by a CLA is concerned, this may result in weakening of the employees' position[16].

The trend towards making statutory solutions more flexible by means of collective labour agreements, as observed during last years, may sometimes lead to reduction of the standards guaranteed in labour law sources to all employees. The flexibility is being justified by the intent to reduce costs of labour and those related to labour protection. Given the trend, trade unions should examine all kinds of legal solutions proposed by employers in the course of collective bargaining particularly thoroughly and consider to what extent they really are needed from the economic point of view and in what reduction of employee protective standards they can result.

7. The role of a CLA as an essential tool of collective actions taken by trade unions also changes in the times of heavy market, both at a microscale (company level) or the scale of a specific business lines, and – in an economic crisis situation – in a macroscale (at the national/international level).

A legal scheme closely related to collective labour agreements, allowing trade unions to have a conclusive say regarding legal situation of employees are **collective arrangements suspending employee rights** as guaranteed under CLA provisions. The schemes, introduced under the new model of CLAs in 1995, originally had a limited scope of operation (as they could be concluded for a period of one year only and under conditions of imminent mass redundancies). After

[15] Cf. L. Florek, *Ustawa i umowa w prawie pracy* [Legislation and Contract of Employment in Labour Law], Warszawa 2010, p. 165.

[16] *Ibidem*, p. 166 and a judgment of the Constitutional Tribunal of 24 February, 2004 referred to there, (K 54/2002, OTK-A 2004, No. 2, item 10).

amendments to the Labour Code enacted in 2002, though, the sole premiss for conclusions of such an arrangement is the employer's financial standing, and the period of duration of such an arrangement has been extended up to 3 years. Additionally, it became legally possible to conclude the arrangements concerning all autonomous labour law sources (including collective agreements not being CLAs, rules and articles – Art. 9^{1} of the Labour Code), as well as individual contracts of employment (Art. 23^{1a} of the Labour Code). The suspension of provisions of CLAs and other aforementioned acts must not, however, lead to a situation of employment conditions applied to the employees being less favourable than those statutory ones. The reason for concluding the arrangements lies in attempts to liberalise labour law and reduce costs of employment in the volatile economic situation of the employers, SMEs in particular. Reflected in conclusion of the arrangements is not only trade union care for the good of the work establishment, but also solidary actions aimed at maintenance of jobs, cuts-downs being inflicted on salaries/wages. The arrangements are, in fact, aimed to remedy or alleviate the employer's situation and, usually, to protect employees against mass redundancies or at least postpone the latter[17]. The position of a trade union as a party to such arrangements is particularly important and entails high responsibility. Acceptance for suspension of employee rights that were negotiated with the employer and covered by a CLA hardly is an easy task to do, as not always will the employees, concerned about their particular interest, meet the trade union's standpoint with understanding. It is thus an important role of the trade union to inform the staff of the motives the trade union was guided when concluding the arrangement in question, and to justify it.

8. The traditional role of a CLA has always consisted in making the contents of individual employment relationships more favourable to employees compared to the contents of the statutory provisions, the latter setting, at the same time, guarantee standards that could not possibly be lowered by parties to the CLA in their negotiations. Meanwhile, stipulations of the contracts of employment and other acts on which employment relationships were based could not be less favourable to the employee than the CLA provided, as they were automatically replaced,

[17] Cf. G. Goździewicz, *Dylematy związane z porozumieniami zawieszającymi uprawnienia pracownicze*, (in:) *Człowiek, Obywatel, Pracownik. Studia z zakresu prawa pracy. Księga Jubileuszowa poświęcona Profesor Urszuli Jackowiak* [Dilemmas Related to the Accords Suspending Employee Rights, (in:) Human Being, Citizen, Employee. Labour Law Studies. Commemorative Book in Honour of Professor Urszula Jackowiak], "Gdańskie Studia Prawnicze" 2007, Vol. XVII, p. 101 *et seq.* Cf. also L. Kaczyński, *Zawieszenie zakładowego układu zbiorowego pracy*, (in:) *Prawo pracy, ubezpieczenia społeczne, polityka społeczna. Wybrane zagadnienia* [Suspension of the Company Collective Labour Agreement, (in:) Labour Law, Social Security, Social Policy. Selected Issues], B. M.Ćwiertniak (ed.), Opole 1998, p. 293 and J. Stelina, *Charakter prawny porozumienia o stosowaniu mniej korzystnych warunków zatrudnienia* [Legal Nature of the Agreement on Application of Less Favourable Terms of Employment], PiP 2003, Vol. 9, p. 76 *et seq.*

by virtue of law, by CLA provisions more favourable than those included in the contract of employment (the rules of unchangeability, legal automatism and legal preferential treatment)[18]. Nor are effective the provisions that violate the rule of equal treatment in employment, as contained in CLAs, other collective agreements, company rules and articles (Art. 9 par. 4 of the Labour Code)[19]. The provision in question stems from alignment of Poland's labour law with EU standards detailed in Chapter IIa of Part One of the Labour Code.

Under conditions of market economy times of buoyancy of the economy are intertwined with period of low market, stagnation, or even collapse of specific business entities. Hence, when modeling the new shape of CLAs in 1994, the law-maker envisaged a possibility of occurrence of phenomena that could affect financial standing of employers and provided for a scheme whereby the particularly costly employee benefits included in the CLA could be suspended. Should the financial standing of the employer get deteriorated even more, the CLA-based method of providing for terms and conditions of employment could be dropped either by means of an agreement between the parties or by **giving a notice to terminate the CLA**, concluded for an indefinite period, by any of its parties. The other way of withdrawal from a CLA was, over the last years, a bone of contention between trade unions and employers. A peculiar feature of Poland's legal developments effective until 2002 was that the CLA being terminated or even already having been terminated (after the lapse of the period of notice to terminate) was supposed to be applied until a new collective labour agreement would come into force, unless the parties to it had expressly stated their intention not to conclude a new CLA (Art. 241^7 par. 4 of the Labour Code). The mechanism in question prevented a situation in which no CLAs would exist in relations between the employer and employees. Its weak point consisted in there being no sanction against the social partner who would either pretend negotiating a new CLA/amending the existing one or would just stall for time in the negotiations[20]. The legal scheme was brought before the Constitutional Tribunal by employers' associations claiming its inconsistency with Art. 59 par. 2 of the Constitution of the Republic of Poland, Sec. 4 of ILO Convention No. 98 concerning the Application of the Principles of the Right to Organise and to Bargain Collectively and Art. 6 par. 2 of the European Social Charter of 18th October, 1961, as well as Art. 20 of Poland's Constitution. In its judgment of 18th November, 2002 (K 37/01, OTK-A 2002, No. 6 item 82), the Tribunal shared the opinion of the employers and found the provision of Art. 241^7 par. 4 of the Labour Code to be non-compliant with the Constitution. In reasons to the judgment the Tribunal indicated that the employers' inability to effectively free themselves of the CLA would lead to "a certain restriction of the freedom to do business, as employers being entrepreneurs could

[18] Cf. in particular W. Szubert, *Układy zbiorowe*…, p. 179 *et seq.*

[19] The provision has been in force since 1 January, 2004.

[20] Cf. W. Szubert, *Układy zbiorowe*…, p. 293.

not fully and adequately react to changes of the environment in which the business is carried out (…).

The situations of emergency, caused by the economic crisis not only on a national scale but even in a global dimension make individual states resort to extraordinary legal developments. In Poland, social partners struck a national agreement on implementation of a so-called **anti-crisis pact**, reflected in the Act of 1st July, 2009 on Appeasement of Economic Crisis Effects to Employees and Entrepreneurs[21]. The Act was enacted to stay effective for a strictly determined period, i.e. until 31st December, 2011. Formally, it was repealed on the 21st November 2013 by the Law of 2013 on specific measures relating to the conservation of the posts of work[22] (art. 33). Some solutions were taken over to the Labour Code[23]. The labour law developments which deserve particular attention in it are ones which allow to make arrangements, usually not just different but also less favourable for employees, as regards matters of special importance, like extension of account periods regarding working time systems to 12 months, the permit to set individual working time schemes as well as the suspension of the employment relationship or reduction of the working hours to employees for a period not exceeding 6 months and not more than down to half of the regular working time, the salaries/wages being reduced on a *pro rata* basis. All those legal developments are aimed at more efficient and reasonable use of labour force in work processes and only where there is a demand for work. They are supposed, first of all, to alleviate the impact of the crisis situation on employers' interests at the expense, however, of maintenance of jobs in companies covered by the Act. Despite certain protective financial measures, covered from public funds, the employees may be deprived part of their salaries/wages either because of the reduced working time, or –where the account period is extended – a number of overtime hours[24]. The lowering of employee right standards by the anti-crisis law must not be applied directly. A precondition for its implementation is entering the measures in the collective labour agreements, or by means of an arrangement concluded with the company's trade union organisations. Where there are no trade unions operating at an entrepreneur suffering temporary financial difficulties the schemes may be introduced in agreement with employee representatives elected in a mode accepted at the employer's. It is thus easy to notice that the law-maker attempts at bolstering the employee (first of all trade union) representatives' confidence.

[21] Journal of Laws No. 125, item 1035.

[22] The Law of 11 October 2013 r. on Particular Solutions to Protect the Places of Work, Journal of Laws, item 1291.

[23] The Act of 12 July 2013 on Amendments to the Labour Code and the Law on Trade Unions (Journal of Laws, item 896). It concerns the reference periods (which may be extended to 12 months) as well as the introduction of flexible schemes of work.

[24] Cf. J. Stelina, M. Zieleniecki, *Regulacje antykryzysowe z zakresu prawa pracy* [Labour Law Anti-crisis Legal Schemes], PiZS 2009, Vol. 11, p. 16.

They become co-responsible for deterioration of employment conditions of the staff, though.

9. The right to bargain collectively in order to conclude collective labour agreements and to settle collective disputes (including the right to strike) is the most essential trade union right stemming from trade union freedoms as an emanation of human rights. The rights are confirmed by constitutions of all democratic states, including the Constitution of the Republic of Poland of 1997. It is, in particular, through the machinery of collective bargaining aimed at concluding a CLA that trade unions can protect employee rights and interests most fully and effectively. As a party to the collective agreement, a trade union not only exercises its powers to set legal standards concerning working conditions, conferred on it by the state, but it also bears co-responsibility for the course of the bargaining and the right attitude to its subject. It is vital that attempts at striking a reasonable compromise should be taken, economic standing of the employers not being lost of sight and demands that obviously may not be satisfied by the employers, given the standing, being refrained from. Under the law in force trade unions hold a monopoly on concluding collective labour agreements. This results from historical facts and the high social standing and authority still enjoyed by trade unions among employees. As an entity which is subject to registration by court, a trade union is a legal person so it can participate in legal transactions and contract civil law obligations. The trade union usually has a more or less formalized structure, is a social partner operating at various organizational levels and takes collective actions involving employers, employers' associations, as well as state agencies. The economic changes that took place in Poland and economically developed countries over the last years have resulted in a rapid drop in trade union membership. The change is one of universal nature. Among major reasons for the situation the following ones are quoted: popularity of employment not based on labour law and introduction of atypical contracts of employment, a marked rise of employment in the sector of services, IT ones in particular, development of SMEs and shrinking of mining and heavy industry, the natural area of trade union operation[25].

Over the last years, the number of employees being trade union members would oscillate around **14–17%** of the general number of those employed, with a gradual drop of the percentage owing to the reduced size of enterprises and their privatization[26]. As a result, in a majority of companies, the smaller ones in

[25] Cf. J. Wratny, *Związki zawodowe. Znaczenie w życiu politycznym i społeczno-gospodarczym*, (in:) *Związki zawodowe a niezwiązkowe przedstawicielstwa pracownicze w gospodarce posttransformacyjne* [Trade Unions. Importance in Political and Socio-Economic Life, (in:) Trade Union and Non-Unionised Employee Representations in Post-Transformation Economy], J. Wratny, M. Bednarski (eds.),. M. Rycak M. Derlacz-Wawrowska, Warszawa 2010, p. 43.

[26] Such are the data quoted by J. Wratny, see above and M. Gładoch, *Przedstawicielstwo pracowników w dobie rozwoju gospodarki globalnej* [Employee representation in the Time of

particular, the practice of collective bargaining vanished completely, given lack of the partner to conduct such bargaining. At present **7,465 company-level collective labour agreements** are registered and 826 are being applied (as regards a majority of the latter, notices to terminate them have already been given by one of the parties to them, usually the employer)[27]. A marked decline can be observed in the respect in question[28]. It is also certain employers that should be blamed for the state of affairs, those harbouring a dislike of trade unions and their activists and often even adopting unfriendly measures towards employees willing to establish a trade union. The practice of concluding multi-establishment collective labour agreements can be met with to a very limited extent. The reasons have remained unchanged since 1995 when the new model of CLAs was introduced in Poland: broken business and organizational ties between companies belonging to the same line of business, which fact results from privatization and transformation of business entities, differentiated economic standing of companies not allowing to introduce certain equal standards of employee rights, relatively high level of labour law legislation. Considering the said, as of 31st March, 2010, the acts registered by the Minister of Labour included: **169 multi-establishment collective labour agreements**, 292 additional protocols to the said CLAs, as well as 46 agreements concerning application (in in whole or in part) of another concluded multi-establishment collective labour agreement plus 8 additional protocols to such agreements concerning the application. Covered by multi-establishment collective labour agreements are, altogether, about **391 thousand of employees** (employees of municipally-owned education institutes, employees of entities financed from the central budget like national parks, water management entities, military and penitentiary system entities, brown coal-fueled power sector entities, defense sector, the telecommunications TP S.A. company, "Orbis" S.A. tourist company, "State Forests" National Forest Holding)[29].

Stripping trade unions off their exclusive right to bargain and conclude collective labour agreements would definitely disturb their special position and their strength as regards influence on employment relationships. The supporters of the idea to allow employee representations (other than trade union ones) to negotiate and conclude CLAs stress the capacity of employees to have a real say about the level of their powers and protection of rights and interests. Should the *status quo* be retained, a majority of those working will lack such a capacity.

Development of Global Economy], PiZS 2009, Vol. 8, p. 2. The authors quote relevant papers of J. Gardawski on the issue.

[27] The data come from the State Labour Inspection, the district inspectorates of which state service register company level collective labour agreements and maintain the register in question.

[28] As at 31 December, 2004 there were 9,132 company level collective labour agreements registered – www.abc.com.pl.

[29] See www.dialog.gov.pl.

It should be also stressed that the integration processes within the European Union and the developing globalization of business relations also considerably change the modeling of employment relationships. An essential problem that will require resolving in the nearest future is determination of the role and standing of trade unions in the fluctuating socio-economic environment. Time will show to what extent trade unions will retain their status as the main organisation of the working class, established to represent and protect the rights, trade and social interests of the people on the national scale and whether they will take up the new challenge and extend their activities also as the international dimension is concerned. Striving to reach the latter objective should be accompanied by reinforcement of above-the-company trade union structures, capable of instituting collective bargaining at various levels, so that a dialogue with the central management of an international corporation regarding employment conditions of their staff could be conducted[30].

ABSTRACT

The paper concentrates on the nature and development of collective labour agreements (CLAs) as one of the fundamental tools of trade unions activity. The author presents the historical development of the concept of CLAs and – in more detail – the new model of CLA adjusted to the requirements of social market economy. The traditional role of CLAs is making the provisions of individual employment relationships more favourable to employees compared to statutory provisions. CLAs are also an instrument that makes it possible to maintain social peace between social partners. Under the new socio-economic and political system, CLAs were made acts of universal application. They play various important functions: an economic function (in stimulation of economic growth and maintenance of social peace in relationships between social partners), a promotional function (regarding development of new solutions) and, they in addition, provide greater flexibility to commonly applied legal schemes. Under the law in force trade unions hold a monopoly on concluding CLAs. The economic changes that took place in Poland and economically developed countries over the last years have resulted in a rapid drop in trade union membership, resulting in a lower number of CLAs. Time will show to what extent trade unions will retain their status as the main representatives of employees.

[30] Cf. M. Gładoch, *Przedstawicielstwo pracowników…*, p. 6.

POROZUMIENIA ZBIOROWE JAKO PODSTAWOWE NARZĘDZIE DZIAŁANIA ZWIĄZKÓW ZAWODOWYCH

Streszczenie

Artykuł koncentruje się na charakterystyce i rozwoju porozumień zbiorowych jednego z podstawowych narzędzi działania związków zawodowych. Autor prezentuje historyczny rozwój koncepcji porozumień zbiorowych oraz – w sposób bardziej szczegółowy – nowy model porozumienia zbiorowego, dostosowany do realiów społecznej gospodarki rynkowej. Tradycyjna rola porozumień zbiorowych sprowadza się do zapewnienia, aby warunki zatrudnienia wynikające z indywidualnych stosunków pracy były bardziej korzystne dla pracowników, aniżeli warunki wynikające z regulacji ustawowych. Porozumienia zbiorowe stanowią również narzędzie pozwalające na zachowanie pokoju społecznego pomiędzy partnerami społecznymi. W nowym systemie społeczno-ekonomicznym i politycznym porozumienia zbiorowe stały się aktami o powszechnym zakresie zastosowania. Pełnią one różne ważne funkcje: funkcję ekonomiczną (stymulując wzrost gospodarczy i przyczyniając się do utrzymania pokoju społecznego w relacjach między partnerami społecznymi), funkcję promocyjną (poprzez wspieranie nowych rozwiązań) oraz dają większą elastyczność w stosowaniu powszechnie obowiązujących rozwiązań prawnych. W aktualnym stanie prawnym związki zawodowe mają monopol na zawieranie układów zbiorowych pracy. Zmiany ekonomiczne, zachodzące w ciągu ostatnich lat w Polsce oraz w innych krajach rozwiniętych ekonomicznie, spowodowały drastyczny spadek poziomu uzwiązkowienia, co z kolei przełożyło się na spadek liczby zawieranych porozumień zbiorowych. Czas pokaże, w jakim zakresie związki zawodowe zachowają w przyszłości swój status podstawowego przedstawicielstwa pracowniczego.

KEYWORDS

collective labour agreement, trade union, social market economy, social peace, social partners

SŁOWA KLUCZOWE

porozumienie zbiorowe pracy, związek zawodowy, społeczna gospodarka rynkowa, pokój społeczny, partnerzy społeczni

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COLLECTIVE REPRESENTATION OF PUBLIC SECTOR EMPLOYEES

1. The history of struggle for people's rights is, to a great extent, the history of workers' struggle for the right to associate. The path that had lead to guarantees for such a right in case of those employed in the public sector, and in particular to civil servants, has been much longer than in case of other professional groups. In many countries it was as late as in the interwar period that civil servants' association in trade unions was still subject to various restrictions[1]. The same holds true about solutions provided for in the Polish Civil Service Act of 1922 (Art. 25, item 2)[2]. There is no doubt that the situation resulted from legal nature of employment in public administration. The idea of subordination of civil servants' personal interests to the interest of the state collided with the right to coalition. Moreover, it was believed that the obligation of loyalty (faithfulness) to the state actually ruled out a possibility of trade union claims, if any, raised towards the state. In the light of the classic (traditional) law governing civil service, the latter was regarded as service to the state "rewarded to the extent securing maintenance of the civil servant and his family", and it was at least from that very fact that the necessity of "limiting the possibility of association of civil servants into independent associations of civil servants" had been derived[3]. And yet associations of civil servants would more and more frequently become a fact of life and they would be gradually legalized by the state as well. Although collective representation of professional interests of civil servants was, in fact, recognised as an unavoidable consequence of transformations in the sphere of "civil service" employment, the "employee" side of the legal status of those working in the public sector becoming ever more conspicuous, attention was, nevertheless, drawn to the fact that the special type of tasks carried out by civil servants, just like the special nature of the employer, might have impact on the scope in which certain trade union pre-

[1] A. Raczyński, *Polskie prawo pracy* [The Polish Labour Law], Warsaw 1930, p. 321.
[2] Journal of Laws No. 21, item 164.
[3] W. Jaśkiewicz, *Studia nad sytuacją prawną pracowników państwowych* [Studies on the Legal Situation of Employees of the Public Sector], Vol. 1, Poznań 1961, p. 45.

rogatives can be enjoyed. The said applies, for instance, to the use of the collective bargaining as a method of determining terms of employment, and above all to exercising the right to strike.

2. The right of persons employed in the public sector to associate is nowadays a generally recognized international standard. It does not have a universal dimension, though, which means that exceptions of various nature are allowed. They certainly should not be neglected when it comes to evaluation of Polish legal solutions applicable in that respect[4]. It should also be noted that in the context of international regulations on the right to coalition, the notion of an employee is usually used in a sense departing from the linguistic convention adopted in the Polish labour law system where the employee only means a party to the employment relationship within the meaning of Art. 2 of the Labour Code. From the perspective of this study it is important to note that employment in the public service can – as examples of various countries show – take place not only within the employment relationship, but also within a service relationship governed by the administrative law. The freedom of association being considered in the broad subjective scope, typical of the acts of international law, such differences in the legal grounds for employment and affiliation of provisions regulating the latter to this or that branch of law recede, however, into the background.

Without going into details of how the right of coalition is provided for in international agreements (since the issue has already been the subject matter of many studies), it is perhaps sufficient at this point to indicate the scope of exceptions (exclusions) made in respect of the right of association of those employed in the public sphere. By far, the smallest number of the exceptions may be found in ILO Convention No. 87 of 1948 concerning Freedom of Association and Protection of the Right to Organise[5]. While it is provided in the Convention that workers and employees, without any distinction whatsoever, have the right to establish and join organisations of their own choosing, the act also allows to specify in the national laws or regulations the extent to which the guarantees provided for in the Convention may apply to the armed forces and the police (Article 9). The Convention sets out a generally accepted standard as regards exceptions from the principle of universality of the right of association in trade unions. Regulations contained in other instruments of international law should be interpreted in accordance with the standard thus prescribed, as the UN International Covenant on Economic, Social and Cultural Rights of 1966 clearly confirms. While stipulating the right of "everybody" to form and join trade unions of his choice it is,

[4] This is broadly described by, *inter alia*, J. Skoczyński, *Reprezentacja praw i interesów pracowników służby publicznej*, (in:) *Reprezentacja praw i interesów pracowniczych* [Representation of Rights and Interests of Public Servants, (in:) Representation of Employee Rights and Interests], G. Goździewicz (ed.), Toruń 2001, p. 251 *et seq.*

[5] Journal of Laws of 1958, No. 29, item 125.

nevertheless, allowed by the act to impose "lawful restrictions" not only on the armed forces and the police, but also on the state administration. The said should not lead to "taking legislative measures which would prejudice, or apply the law in such a manner as would prejudice, the guarantees" provided for in Convention No. 87 if the state concerned is a party to the Convention, though (Article 8, Clause 3). It is also well-worth noting that even the manner in which the formula adopted by the ILO is understood varies at times. In addition to statements that it allows exclusion of the right to form trade unions in the armed forces and the police[6], an opinion is also voiced that it imposes only a restriction on (and not the exclusion of) the guarantees provided for in Article 9 of the Convention[7].

In the light of the above said, it is not possible to derive any more extensive exclusions on the right to coalition from other acts of international law, especially from other ILO documents. Hence, their function is only to determine the scope of possible restrictions on the use of various aspects of the right[8]. This is how the provisions of ILO Convention No. 98 of 1949 on the Right to Organise and Collective Bargaining, and ILO Convention No. 135 concerning Protection and Facilities to be Afforded to Workers' Representatives in the Undertaking should be interpreted. An explicit exclusion of the provisions of the former convention in relation to civil servants (Article 6) does not prejudice "their rights or status in any way", particularly the right to organise in trade unions, as stipulated in Convention 87. Hence, if provisions of Convention 98 do not apply to civil servants, it means that it is only the guarantees of protection against discrimination regarding trade union membership and the measures to promote voluntary collective bargaining stipulated in the instrument that do not apply to them. These particular aspects of freedom of association of persons to whom the quoted exclusion applies are the subject of a separate regulation set out in ILO Convention No. 151 of 1978 concerning protection of the right to organise and procedures for determining terms of employment in the public service. The provisions of Convention No. 151 also apply to the subject matter that was regulated by Convention No. 135, but only with respect to "workers' representatives in the undertaking". i.e. outside the civil service area.

To conclude, it must be noted that the international law does not provide any grounds for exclusion of the right to associate in trade unions regarding those employed in the public sphere, with but one exception made concerning the armed forces and the police (which is, by the way, a subject of different interpretations).

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[6] *Liberté syndicale et négotiation collective. Etudes d'ensemble*, Cl. 55, OIT, Geneva 1994.

[7] Cf. M. Seweryński, *Problemy statusu prawnego związków zawodowych*, (in:) *Zbiorowe prawo pracy w społecznej gospodarce rynkowej* [Problems of Legal Status of Trade Unions, (in:) Collective Labour Law in the Social Market Economy], G. Goździewicz (ed.), Toruń 2000, pp. 112–113.

[8] J. Skoczyński, *Reprezentacja praw…*, pp. 258–259; A. Dubowik, *Prawo zrzeszania się w związki zawodowe pracowników sektora publicznego* [The Right of Public Sector Employees to Associate in Trade Unions], PiZS 2002, Vol. 6, p. 20.

The international standard does contain, though, certain restrictions and modifications in the exercise of freedom of association which may be extended onto the public sphere. The said must be borne in mind when discussing the rule contained in Art. 59 of the Polish Constitution which guarantees freedom of association in trade unions while providing a possibility for introduction of statutory restrictions (but only ones that are permitted by international agreements binding upon the Republic of Poland).

3. The Polish legislation expressly excludes the right of association in trade unions first of all in respect to professional soldiers[9]. The prohibition was a subject of interest of the Constitutional Tribunal. In the ruling of 7 March 2000 (K 26/98)[10], the Tribunal confirmed that the prohibition rested in compliance with the Constitution and international law, pointing, however, to a need to provide some degree of legal protection to aspirations of soldiers in that respect, in particular through the creation of representative bodies of the professional staff (in the current Act these are the representative bodies of various corps of professional staff of the Armed Forces). The Tribunal made a reference to the provision contained in ILO Convention No. 87 whereby "the extent to which the guarantees provided for in this Convention shall apply to the armed forces and the police shall be determined by national laws or regulations". In legal literature the interpretation was, however, found to be excessively discretional. It was argued that the phrase "the extent to which" should be referred to the guarantees of association provided for in the act regarding not just a representation of some kind but trade unions[11]. In addition to the armed forces the prohibition of association in trade unions applies to officers of the Internal Security Agency and Intelligence Agency, the Central Anticorruption Bureau and the Government Protection Bureau. Justification for these exclusions may be found in the wording of Article 9 of ILO Convention No. 87, although assuming that the officers employed in those institutions, at least in the first two cases, have the police status, raises some doubts in this respect, which doubts have their source in other regulations. This concerns, in particular, Art. 5 of the European Social Charter differentiating the situation of police officers and armed forces ("The extent to which the guarantees provided for in this Article shall apply to the police shall be determined by national laws or regulations")[12]. It is interpreted in a way suggesting that the freedom of association can only be restricted in respect of police officers[13].

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[9] Act on Military Service of Professional Soldiers of 11 September 2003, consolidated text: Journal of Laws of 2014, item 1414.

[10] Journal of Laws No. 17, item 227.

[11] M. Seweryński, *Problemy statusu prawnego*…, p. 113.

[12] Journal of Laws of 1999, No. 8, item 67.

[13] As A. Dubowik, *Prawo zrzeszania się*…, p. 25, observes; cf. A. M. Świątkowski, *Karta Praw Społecznych Rady Europy* [The European *Social* Charter of the Council of Europe], Warsaw 2006, p. 299–300.

As regards other military-type services, the Polish legislator has not decided to fully deprive their members of the right of association in trade unions. In principle, officers of certain categories of service have been subject in that respect to the rules contained in the Trade Union Act[14] of 23 May 1991, applied appropriately, however, restrictions arising from other laws being taken into account. As regards the right to coalition the restrictions have been set for the Police, Border Guards and Prison Service. A principle of union monism was applied there, meaning that the officers had the right to organise in a single, job-specific union. The fire-fighters employed by the State Fire Service and Customs Service officers can associate on the terms set out in the Trade Union Act.

4. Persons employed in the public sphere under contracts of employment are entitled to form and join trade unions as the general rules provide. Pursuant to Art. 2 par. 1 of the Trade Union Act, employees have the right regardless of the basis of their employment. The said gets fully confirmed by the standards of international law (account being taken of the above discussed exceptions applying to officers of the armed forces and the police only). It should be noted, though, that when it comes to certain categories of persons employed in the public sphere significant restrictions on execution of the right are set by separate laws, raising more or less serious doubts in the legal doctrine.

First of all, instances of total exclusion of the right of association should be indicated. These are partly based on the Constitution. The trade union membership prohibition has been imposed on Constitutional Tribunal judges (Art. 195, par. 3), the President of the Supreme Chamber of Control (Art. 205, par. 3), the Ombudsman (Art. 209, par. 3), members of the National Council of Radio and Television (Art. 214, par. 2), the President of the Polish National Bank (Art. 227, par. 4), judges of courts of law (Art. 178, par. 3). By separate Acts of Parliament the right to coalition has been denied to the Monetary Policy Council members (who are expected to suspend their trade union activities for the duration of their term of office)[15], the Commissioner for Public Interest[16] and the President of the Institute of National Remembrance[17]. In judging the exclusions, it is hard to avoid asking a question whether they are actually anchored in the standards of international laws ratified by Poland. They surely do not find confirmation in ILO Convention No. 87. This draws our attention to Convention No. 151 of 1978, and

[14] Consolidated text: Journal of Laws of 2014, item 167.

[15] Art. 14 par. 2 of the National Bank of Poland Act of 29 August 1997, consolidated text: Journal of Laws of 2013, item 908, as amended.

[16] Art. 17b of the Act on Disclosure of Employment or Service in or Cooperation of Persons Performing Public Functions with the State Security Service in the Years 1944–1990, consolidated text: Journal of Laws of 1999, No. 42, item 428, as amended.

[17] Art. 11 par. 3 of Act of 18 December 1998 on the Institute of National Remembrance – Commission for the Prosecution of Crimes against the Polish Nation, consolidated text: Journal of Laws of 2014, item 1075, as amended.

particularly the provision whereby "the extent to which the guarantees provided for in this Convention shall apply to high-level employees whose functions are normally considered as policy-making or managerial, or to employees whose duties are of a highly confidential nature, shall be determined by national laws or regulations" (Art. 1, par. 1, item 2). It would be hard to deny that most of above mentioned positions meet the conditions. Still, it does not seem that Convention 151 could provide grounds for complete deprivation of the persons of the right to organise in trade unions[18]. The attempt to justify the exclusions by means of functional interpretation of the rules set in ILO Convention No. 87 and Article 5 of the European Social Charter is also regarded as questionable[19].

The trade union membership ban imposed by the Constitution on judges deserves a separate discussion. It is surmised that the basis for setting the ban lay in a belief that involvement of judges in trade union activities might not only pose a threat to the proper fulfilment of their mission, but would be, in fact, superfluous given the constitutional guarantee whereby "judges shall be ensured the working conditions and remuneration consistent with the dignity of the office and the scope of their duties" (Art. 178, par. 2). Consequently, concern for the employee interests of this professional group rests with the state and does not require articulation characteristic of the trade union mode of operation. Not always does the assumption prove to be true, though, as recent protests of judges concerning their salaries, organised – in the absence of a union organisation – by "IUSTITIA", the Association of Polish Judges, show.

5. The fortunes of collective representation of those employed in public administration would vary in recent decades. Keeping in mind August 1980 as an obvious historical turning point, it is worth noting that significant changes regarding the right to associate occurred as of that date also in the employee group in question. As it has been observed, "the wave of neo-trade unionism did not actually pass by employees of the public sector"[20]. An end to the changes was put by the martial law, and was later confirmed by the Act on Employees of State Offices of 16 October 1982, which imposed significant restrictions on the right to associate in public administration. The earlier rapidly growing trade union pluralism was replaced by the concept of trade union monism, according to which idea employees of state offices had the right to organise in one trade union only, and high-level employees (termed very broadly) were denied the right to associate. In the latter case, ILO Convention No. 151 was revoked (and hastily ratified)

[18] A. Dubowik, *Prawo zrzeszania się*…, p. 24. A different view seems to be presented by K. W. Baran, *Zbiorowe prawo pracy. Komentarz* [Collective Labour Law. A Commentary], Warsaw 2007, p. 138.

[19] J. Skoczyński, *Reprezentacja praw*…, p. 261.

[20] Z. Sypniewski, *Związki zawodowe w aparacie państwowym*, (in) *Prawo o związkach zawodowych i zrzeszeniach zawodowych* [Trade Unions in Public Administration, (in:) The Law on Trade Unions and Collective Organizations], J. Jończyk (ed.), Warszawa 1983, p. 95.

to provide justification. This was, of course, a distortion of the spirit, and even the letter of the rules contained therein (as emphasized above), as the provisions actually give no grounds for any exclusions of the right to coalition, allowing only certain restrictions to be put on the scope of guarantees provided for in the Convention. This having been taken into account, the persons to whom the discussed law applied were afforded the right to organise in trade unions by the amendment of 1994. The same was done somewhat earlier in relation to those employed in the re-activated local government on whom provisions of the Trade Union Act of 1991 were extended[21].

The said does not mean, however, that a full right to coalition is shared by all those employed in the public administration at the moment. It is still subject to restrictions in case of employees of governmental control agencies and civil service officials. As far as the control administration agencies are concerned the reservations apply only to employees of the Supreme Chamber of Control. The right to organise in trade unions is respected in other state control institutions. For instance, this is the case with employees of the State Labour Inspectorate.

As regards the staff of the Supreme Chamber of Control, the situation is controversial in that the provisions imposing restrictions on their right to coalition were put to the Constitutional Tribunal's proceedings twice. In the original version of the Act on Supreme Chamber of Control it was not only the SCC President, Vice-Presidents and General Director, but also the supervising and auditing staff that were deprived of the right to organise in trade unions (Article 86)[22]. It was part of the provision relating just to the latter group of employees that was appealed against to the Constitutional Tribunal, which confirmed its non-compliance with the existing constitutional order, particularly with the guaranteed freedom of association[23]. Making, in reasons for the decision, reference to Art 1, par. 2 of ILO Convention No. 151, the Tribunal resolved that the SCC staff conducting supervising and auditing activities did not fall within the subjective scope of any of the stipulated restrictions. As it has been rightly noted in the literature, the view is incorrect, as it could be recognised, in consequence, that the prohibition to organise in trade unions should apply to persons falling into the scope in question (particularly high-level employees), which would be inconsistent with ILO Convention No. 87[24] ratified by Poland. As a result of the referenced decision of the Constitutional Tribunal, the Supreme Chamber of Control Act was amended in 1997[25]. Restrictions on the right of association were introduced in a new form, the scope of exclusions of the right having been limited to include the President,

[21] Z. Góral, *Prawo pracy w samorządzie terytorialnym* [Labour Law in Local Government], Warsaw 1999, p. 215 *et seq*.

[22] Consolidated text: Journal of Laws of 2012, item 82, as amended.

[23] Constitutional Tribunal ruling of 21 November 1995, K 12/95, OTK 1995, Cl. 3, item 15.

[24] J. Skoczyński, *Reprezentacja praw…*, p. 263.

[25] Journal of Laws No. 96, item 589.

Vice Presidents, General Director and Deputy Directors of organisational units of the Supreme Chamber of Control and advisers of the SCC President. And as far as supervising and auditing staff is concerned, a rule was established that they may be members of one union associating that very category of SCC employees. Also that regulation was put to consideration by the Constitutional Tribunal[26], the Tribunal deciding that it complied with the constitutional order and the international agreements ratified by Poland. In reasons for the decision, special attention was drawn by the Tribunal to those standards of international law which allowed to put restrictions on the freedom of association in a democratic state in consideration of national security or public order or protection of the rights and freedoms of other persons (Covenant on Economic, Social and Cultural Rights and the Convention for the Protection of Human Rights and Fundamental Freedoms). In the Constitutional Tribunal's opinion the high degree of confidentiality required of the supervising and auditing employees, when exercising their duties, satisfied the conditions for imposing restrictions, especially if the latter did not mean a full deprivation of the right of association. However, also in that case, the omission of the provisions of Convention No. 87 in the reasons for the decision was a source of serious doubts as to the ruling's accuracy[27], especially when considering the position of the ILO control bodies. These exclude admissibility of regulations providing for the existence of only one trade union in a specific office or division of public service (the possibility of creating so-called mixed unions being ruled out)[28].

No express trade union membership prohibition is stipulated in Poland's civil service legislation[29]. So was the case with almost all previous legal regulations, the current Act of 28 November 2008[30] being no exclusion. In the past, the prohibition of association in trade unions was stipulated only by the Act of 5 July 1996[31] and applied solely to civil servants belonging to the so called Category "A", i.e. those occupying high-level positions. That regulation met with critical opinions, also as regards its compliance with the provisions of Convention No. 151[32]. The exclusion has been abandoned since 1998[33]. Still, it was decided to impose another restriction addressed not to all civil servants, but only to those having the status of nominated civil service officials. Although trade union membership was not expressly forbidden to them[34], a possibility for holding official functions in trade

[26] Constitutional Tribunal ruling of 17 November 1998, K 42/97, OTK 1998, Cl. 7, item 113.

[27] J. Skoczyński, *Reprezentacja praw…*, pp. 265–266.

[28] *Liberté syndicale…*, item 86.

[29] J. Stelina, *Prawo urzędnicze* [Civil Servants Law], Warsaw 2009, p. 221.

[30] Consolidated text: Journal of Laws 2014, item 1111, as amended.

[31] Journal of Laws No. 89, item 402, as amended.

[32] J. Skoczyński, *Status prawny urzędnika służby cywilnej – cz. 1* [The Legal Status of a Civil Servant. Part 1], PiZS 1996, Vol. 11, p. 51.

[33] Journal of Laws of 1999, No. 49, item 483, as amended.

[34] H. Szewczyk, *Zatrudnienie w służbie cywilnej* [Employment in Civil Service], Bydgoszcz–Katowice 2006, pp. 180–181.

unions by a civil service official was ruled out. Meanwhile, it was not specified to which functions the exclusion applied, so it seems to have referred both to functions held in a trade union organisation and at higher tier (supra-workplace) structures. Should we attempt at finding a justification for the material restriction, attention should be paid to the principle of impartiality of civil servants, and also – at least to some extent – the principle of political neutrality (which factors do have some weight, considering political affiliations of some trade unions). And yet the restriction applying to civil servants aroused far-reaching doubts as to their compliance with international standards. Hardly could it be ignored that prohibiting a civil servant to hold a function in a trade union was tantamount to the lack of a possibility for civil servants to form their own organisations, associating only them, as such organisation definitely could not operate without organisational functions existing and being held there[35]. The basis for such restrictions cannot actually be found in any of the acts of international law, ILO Convention No. 87 in particular. Even if grounds for such restrictions were to be sought in Convention No. 151, a majority of civil service officials do not meet the criteria which allow the legislator put restrictions on the guarantees provided there (as the officials are not high-level employees whose functions are normally considered as policy-making or managerial or employees whose duties are of a highly confidential nature)[36]. The latter objection does not seems to apply to the provisions of the law in force. Thus, pursuant to Art. 78, par. 6 it is not a civil servant but a member of the civil service corps occupying a high-level position in such service that cannot hold functions in trade unions. Obviously also other reservations lose their weight although, at least theoretically, further considerations on admissibility of creation of trade unions associating only members of the corps holding high-level positions in the civil service could perhaps be possible. In such case the question whether the restrictions provided for in Art. 78, par. 6 of the Act comply with the international law would remain valid.

6. A precondition for effective representation of public service employees is to guarantee to them the right to organise in trade unions. Whether the employees would be willing to exercise the right or not depends on the powers granted to the unions by the legislator. Hence, the attractiveness of such a form of employee representation is conditioned by the scope of its powers. There is no doubt that the attractive force of trade unions has, generally speaking, significantly decreased over the years that passed, and declining trends in trade union movement can be talked of. The phenomenon is observed in many countries, not just Poland, numerous reasons accounting for it[37]. Without tackling the issue more broadly at the moment, it should be emphasized that the attractiveness of trade unions in

[35] J. Skoczyński, *Reprezentacja praw*…, pp. 266–267.
[36] H. Szewczyk, *Zatrudnienie w służbie*…, p. 182.
[37] *Ibidem*, pp. 43–44.

the public service, especially in public administration, seems to be even lower[38]. A thorough (sociological in particular) research would be required to explain the phenomenon. Not without significance, however, is the extent of responsibilities granted to trade union organisations, which should be based on the right of coalition and stem therefrom. The rights to conduct collective bargaining and to conclude collective labour agreements are well-worth indicating at this point. Obviously there are more such powers, such as the right to participate in the process of law-making, not to mention powers related to the employer's decisions concerning individual employment relationships.

Undoubtedly, a fundamental prerogative of trade unions is their right of collective bargaining and concluding agreements. Viewed traditionally, that method of regulating terms of employment and salaries was not applied in the sphere of public service. Gradually, however, a belief developed and strengthened that the right to conduct negotiations in order to enter into a collective labour agreement is only a natural consequence of the freedom to associate in trade unions. This was reflected in the amendments to the Labour Code in the 1970's whereby collective labour agreements became a generally applied instrument and covered, in principle, also public service employees. The principle has been always subject to significant limitations, though. Above all, exclusions related to specific employee groups were made (Art. 239, par. 3 of the Labour Code), their weight being rather varied, though. The exclusions from collective bargaining imposed on employees of governmental agencies (except for those being civil servants) and local government employees meant but a slight limitation of the rights, as they did not pertain to persons employed under contracts of employment (who definitely dominate in the two segments of public administration). The exclusion pertaining to civil servants should be viewed differently, though. A collective labour agreement is not concluded for those employed under contracts of employment nor nominated civil service officials. As a result, the bargaining method is completely eliminated in that segment of public administration. Although the exclusion of collective labour agreements in respect of the above mentioned categories of public employees does not clearly contradict international standards (especially provisions of ILO Convention No. 98 and ILO Convention No. 151 which also allow participation of representatives of public service employees in determining the conditions of their employment[39]), certain doubts are, nevertheless, expressed in respect of Labour Code regulations concerning restrictions affecting all civil service corps members[40]. Different treatment of civil servants employed under a contract of employment and other persons performing official functions under a contract of employment does not have any reasonable argument behind it. A separate issue is lack of clear room for negotiations (concerning pay issues in particular), which

[38] J. Stelina, *Prawo*…, p. 79.

[39] J. Skoczyński, *Reprezentacja praw*…, p. 271.

[40] Cf. H. Szewczyk, *Zatrudnienie w służbie*…, p. 198.

hinders attempts to enter into a collective labour agreement even in case of those employees for whom such agreements can be concluded.

A second fundamental right of trade unions regarding employee representation is the right to initiate collective disputes and organise collective actions including strike. The right is clearly confirmed by the Constitution stating that trade unions have the right to bargain, particularly for the purpose of resolving collective disputes (Art. 59, par.2) and are entitled to organise workers' strikes and other forms of protest within the limits specified in the Act (Art. 59, par. 3). Restrictions or prohibition concerning industrial actions may be established for certain categories of employees considering the "public good" (Art. 59, par. 4), account being taken of binding international agreements (Art. 59, par. 5). In the laws and regulations effective in Poland it is difficult to find any explicit restrictions concerning collective disputes as conducted by trade unions operating in the sphere of public service. The said does not mean that there are no doubts concerning the issue, though. These arise when provisions of the Collective Disputes Resolution Act[41] of 23 May 1991 are confronted with the international standards established in this regard. According to Polish law, the employer may be a party to any collective dispute, while in the most important international act in that respect – ILO Convention No. 151 – it is assumed that it is the public authority that can play that role (Art. 7 & 8). The management-based concept of the employer adopted in the Polish legislation (as opposed to the ownership-based one) means that the employer is an organisational unit (a public office in particular) where public service employees are employed. However, initiating a collective dispute with such an entity, unable to make independent decisions in reaction to the demands of trade unions is devoid of rational justification[42].

Reservations are also voiced concerning the way and scope of restrictions on the right to strike in the public service that have been introduced by the Polish legislator. The law has treated the issue differently with regard to members of the civil service corps and other employees of the sector. Pursuant to Art. 78, par. 3 of the Civil Service Act members of the corps are not allowed to participate in an industrial action interfering with normal functioning of the office. The wording of Art. 19, pars. 2 & 3 of the Collective Disputes Resolution Act is of key importance as regards other employees. Pursuant to par. 3 those employed in public offices, central and local government agencies, courts and public prosecutor offices do not have the right to strike. As the quoted provisions show, the

[41] Journal of Laws No. 55, item 236, as amended.

[42] Cf. Z. Hajn, *Pracodawca i organizacje pracodawców jako podmioty zbiorowego prawa pracy (wybrane problemy)*, (in:) *Zbiorowe prawo pracy w społecznej gospodarce rynkowej* [Employer and Employers' Organisations as Entities of Collective Labour Law (Selected Issues), (in:) Collective Labour Law in the Social Market Economy] G. Goździewicz (ed.), Toruń 2000, p. 144, *et seq*.

scope of exclusions is very extensive[43]. A question arises, however, whether the exclusions are not excessive considering, in particular, the constitutional condition of the restrictions (public good) and international standards. As regards the latter, it is particularly the position of the ILO supervisory authorities (based on the interpretation of the provisions of Convention No. 87, which does not regulate the right to strike expressly) that is representative in that respect. In the light of the ILO position, a strike may be restricted or excluded only with regard to those employees who act as representatives of the public authority[44]. Given that members of civil service corps perform official duties (hence it is not only nominated officials that are taken into account) it could be assumed, in principle, that the criterion has been formally met, nevertheless the extent of the exclusion does not seem to be justified by the "public good". The provision included in the Collective Disputes Resolution Act raises even more substantial objections. First of all, it gives room for divergent interpretation of the term "employed in the bodies of state government and local government administration."[45]. In particular, it is not clear whether this concerns all the jobs in this administration, or only those of a civil service nature. Acceptance of the former option would be in clear contradiction with acceptable limits of exclusions from the right to strike formulated by the ILO supervisory bodies and would go beyond the needs of the public good[46].

ABSTRACT

The author concentrates on the collective representation of public sector employees. The path that had led to guarantees for the right of coalition in the case of those employees has been much longer than in case of other professional groups. The idea of subordination of civil servants' personal interests to the interest of the state collided with the right of coalition. Nowadays, the right of persons employed in the public sector to associate is a generally recognized international standard, guaranteed especially in the conventions of the International Labour Organization. Of course, exceptions of various nature are allowed. In Poland, persons employed in the public sphere under contracts of employment are generally entitled to form and join trade unions. However, it does not mean that a full right to coalition is shared by all those employed in the public administration. The Polish legislation expressly excludes the right of association in trade unions

[43] A detailed catalogue of employees who do not enjoy the right to strike has been provided by K. W. Baran, *Zbiorowe prawo*…, p. 419–420.

[44] „qui exercent des fonctions d'autorité au nom de l'Etat" in: *Liberté syndicale*…, item 158.

[45] For a broaded discussion see: Z. Góral, *Prawo pracy*…, p. 229.

[46] J. Skoczyński, *Reprezentacja praw*…, p. 279.

with respect to, for example, professional soldiers, officers of the Internal Security Agency, the Central Anticorruption Bureau and the Government Protection Bureau, Constitutional Tribunal judges, the President of the Supreme Chamber of Control, the Ombudsman, judges of courts of law and many others. Moreover, as the author stresses, whether the employees would be willing to exercise the right of coalition or not depends on the powers granted to the unions. The author describes the fundamental prerogatives of trade unions in the public sector, especially their right to engage in collective bargaining and to conclude agreements, as well as the right to initiate collective disputes and organise collective actions (including strikes).

REPREZENTACJA ZBIOROWA PRACOWNIKÓW ZATRUDNIONYCH W SEKTORZE PUBLICZNYM

Streszczenie

Autor koncentruje się na reprezentacji zbiorowej pracowników sektora publicznego. Droga, która doprowadziła do zagwarantowania tym pracownikom prawa koalicji, była znacznie dłuższa, aniżeli w przypadku innych grup zawodowych. Idea podporządkowania indywidualnych interesów pracowników interesowi państwa koliduje z ich prawem koalicji. Obecnie prawo zrzeszania się pracowników sektora publicznego jest powszechnie akceptowanym międzynarodowym standardem, zagwarantowanym w szczególności w konwencjach Międzynarodowej Organizacji Pracy. Oczywiście są dopuszczalne różnego rodzaju wyjątki. W Polsce osoby zatrudnione w sektorze publicznym na podstawie umów o pracę są generalnie uprawnione do zrzeszania się w związki zawodowe. Niemniej jednak nie oznacza to nieograniczonego prawa koalicji w przypadku pracowników administracji publicznej. Polskie prawo wyraźnie wyłącza prawo zrzeszania się w związkach zawodowych np. przez żołnierzy zawodowych, oficerów Agencji Bezpieczeństwa Wewnętrznego, Centralnego Biura Antykorupcyjnego czy Biura Ochrony Rządu, sędziów Trybunału Konstytucyjnego, Prezesa Najwyższej Izby Kontroli, Rzecznika Praw Obywatelskich, sędziów sądów powszechnych i wielu innych. Co więcej, jak podkreśla autor, to, czy pracownicy będą skłonni skorzystać z przysługującego im prawa koalicji, czy nie, jest w szczególności uzależnione od tego, jakie uprawnienia zostaną przyznane związkom zawodowym. Autor omawia najważniejsze uprawnienia związków zawodowych w sektorze publicznym, zwłaszcza ich prawo do prowadzenia rokowań zbiorowych i zawierania porozumień zbiorowych, oraz prawo wszczynania sporów zbiorowych i organizowania akcji zbiorowych (w tym strajków).

KEYWORDS

collective representation, the public sector employees, the right of coalition, public sector, the International Labour Organization, public administration, the right of association in trade unions, collective bargaining, collective disputes

SŁOWA KLUCZOWE

reprezentacja zbiorowa, pracownicy sektora publicznego, prawo koalicji, sektor publiczny, Międzynarodowa Organizacja Pracy, administracja publiczna, prawo zrzeszania się w związkach zawodowych, rokowania zbiorowe, spory zbiorowe

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THE RIGHT OF ASSOCIATION IN TRADE UNIONS – THE RIGHT OF EMPLOYEES, OR THE RIGHT OF THE WORKING PEOPLE?

1. The scope *ratione personae* of the right of association in trade unions and thus of trade union freedom was defined in the Polish law by detailed indication of the categories of persons who are allowed to form trade unions and join them. The current Trade Union Act of 23 May 1991[1] follows, in that respect, the way in which this issue was provided for under the Trade Union Act of 8 October 1982[2]; the latter granted the right to employees (in the legal meaning) and to strictly identified other social groups. The law of 1982 initially limited the right to associate in trade unions to persons performing work under a contract of employment, and then (as of 10 August 1985) it also granted the right to persons performing home-based work and work under an agency contract, unless they were employers themselves[3]. The provisions in question were construed restrictively and were recognized as reflecting the legislator's intention to limit the group of people who had the right to organize in trade unions to employees only, non-employee groups being excluded[4]. Opinions were, however, voiced that regardless of the justification provided to the referenced laws, limiting collective protection only to employees within the meaning of individual labour law was an anachronism[5]. There existed also certain concerns about the compliance of the restriction with the principle of trade union freedom as stemming from acts of the international

[1] Consolidated text: Journal of Laws of 2014, item 167.

[2] Journal of Laws of 1982, No. 32, item 216, as amended.

[3] Art. 1 in conjunction with Art. 10, and Art. 11 as of 25 November 1985.

[4] See the Supreme Court ruling refusing the right to members of agricultural production cooperatives (Decision of 4 November 1983 I PRZ 83/83, OSNC 1984/6/103 and the resolution of 30 January 1990 III PZP 55/89, OSNC 1990, No. 6, item 75) and to persons performing work under a contract to do home-based work and work under an agency contract (Resolution of 7 Judges of 21 February 1983, III PZP 72/82, OSNC 1983, No. 8, item 113).

[5] Such was the opinion of T. Zieliński, a gloss to the above cited resolution of 21 February 1983 r. III PZP 72/82, OSP 1984, No. 4, item 69.

laws[6]. And it was also pointed out that in accordance with international law, freedom of association in trade unions was basically a universal law of all people gainfully employed by owners of production/service facilities and other work establishments. The only exception — in the light of ILO Convention – are public sector officers who may enjoy the right with the restrictions impose by laws of the countries which have ratified the conventions[7].

2. Article 1 of the Trade Union Act being in force now defines the trade union as an organization of working people. It follows from the provision that it is not only employees who have the right to form trade unions and be their members. The principle is, in fact, albeit to a different degree, carried into effect in respect of specific groups of "working people". According to the literal wording of Art. 2 of the Trade Union Act, the right to associate in trade unions, similarly as was the case with the Act of 2 October 1982, is granted to employees (within the legal meaning of the word) and to categories of persons employed on other legal grounds enumerated in the provision. The most privileged group are employees within the meaning of the Labour Code who enjoy the rights in question in general, with some exceptions set out in specific laws (Art. 2. par. 1 of the Trade Union Act). Officers of the state uniformed services referred to in Art. 2 par. 6 of the Trade Union Act, i.e. officers of the Police, Border Guards, Prison Service and the State Fire Service may associate subject to the constraints arising from separate laws. A similar rule applies to employees of the Supreme Chamber of Control. Legal regulations concerning the right to associate of other working people who are not employees are more complex. Art. 2 par. 1 and par. 5 of the Trade Union Act grants the right to form and join unions to members of agricultural cooperatives, persons performing work under an agency contract unless they are employers, and persons performing alternative military service. On the other hand, home-workers cannot form unions. They can only join a union operating in the business where they perform their work. The case is similar with pensioners who are entitled to remain members of their trade union and to join the existing trade unions. Unemployed people retain the right of union membership and may join unions in cases and on the terms defined in the unions' articles (Art. 2 par. 4 of the Trade Union Act).

It is hard to resist the impression that the described regulation bears traits of a legislative discretion and the criteria for granting the right of association to specific groups of working people or the scope of that freedom are not very transparent. Having apparently recognized that it was essentially employees that

[6] Cf. glosses of W. Masewicz (OSP 1991, No. 1, item 17) and S. Płażek (PiZS 1990, No. 10, p. 59ff) to the above cited resolution of the Supreme Court of 30 January 1990, III PZP 55/89.

[7] Cf. T. Zieliński, *Prawo pracy. Zarys systemu. Część III* [Labour Law System Outline, Part III], Warszawa–Kraków 1985, p. 278 *et seq.* Cf. statements by other authors taking a critical attitude towards the regulation of the discussed issue in the Act of 1982, as quoted by T. Zieliński.

should be entitled to associate in trade unions, the legislator granted the right to other persons earning their living from gainful employment at the legislator's discretion: the full right of association was granted to some (e.g. members of agricultural cooperatives), the right to join a union only was granted to others (e.g. homeworkers), and yet another group was granted the right to both form and join a union at their workplace only (alternative military service). Hardly can a clear idea be seen behind the allocation of the considered rights (freedoms). It is difficult to tell, for example, why homeworkers who are a separate group of people gainfully employed on a permanent basis under contracts for doing home-based work cannot form trade unions, while the right has been vested in members of agricultural cooperatives, agents, and even a small group of persons performing alternative military service where the maximum duration of service is 18 months[8].

In legal literature a proposal has been raised to extend the list of persons entitled to associate, contained in Art. 2, to include other categories of non-employees, in particular persons performing work under contracts of civil law and self-employed people[9]. At the same time it is unanimously recognized that the scope *ratione personae* of the freedom of association in trade unions is exhaustively defined *de lege lata*, in Art. 2 of the Trade Union Act. It should be noted in passing that the compliance of the regulation with the principle of trade union freedom, as stipulated in international law and in the Polish Constitution, is not questioned[10].

That standpoint does, however, raise certain doubts, and more consideration is required to see if the scope *ratione personae* of the right to associate in trade unions, as provided for in Art. 2 of the Trade Union Act is correct in the light of international law and the Constitution of the Republic of Poland[11].

3. The most important regulation in that respect is Convention No 87 of 1948 concerning the Freedom of Association and Protection of the Right to Organise[12].

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[8] Art. 3 of the Act on Alternative Military Service of 28 November 2003, consolidated text: Journal of Laws of 2014, item 1027, as amended.

[9] Cf. e.g. M. Seweryński, *Problemy statusu prawnego związków zawodowych*, (in:) *Zbiorowe prawo pracy w społecznej gospodarce rynkowej* [Problems of the Legal Status of Trade Unions, (in:)[Collective Labour Law in Social Market Economy], G. Goździewicz (ed.), Toruń 2000, pp. 110–112; J. Wratny, in an interview *W firmie powinien być jeden związek zawodowy* [There Should Be One Trade Union in a Company], "Gazeta Prawna" of 4 February 2008, No. 24.

[10] Cf. e.g. M. Świątkowski, *Konwencja nr 87 MOP dotycząca wolności zrzeszania się pracowników w związkach zawodowych*, (in:) *Z zagadnień współczesnego prawa pracy. Księga jubileuszowa Profesora Henryka Lewandowskiego* [ILO Convention No. 87 on Freedom of Association and Protection of the Right to Organise, (in:) Issues of Contemporary Labour Law, A Jubilee Book in Honour of Professor Henryk Lewandowski], Z. Góral (ed.), Warsaw 2009, pp. 227–230.

[11] Doubts concerning this issue have been outlined by me in: *Autonomia rokowań zbiorowych w świetle Konstytucji*, (in:) *Konstytucyjne problemy prawa pracy i zabezpieczenia społecznego* [Autonomy of Collective Bargaining in the Light of the Constitution, (in:) Constitutional Problems of Labour Law and Social Security] H. Szurgacz (ed.), Wrocław 2005, pp. 63–65.

[12] Journal of Laws of 1958, No. 29, item 125.

In accordance with Art. 2 of this Convention, workers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organization concerned, to join organizations of their own choosing without previous authorization. The key issue as regards determination of the scope of the right of association is clarification of the concept of "workers". It should be noted that the term used in the Polish language version of ILO Convention No. 87/1948 ("*pracownicy*") corresponds to the English word "*workers*" and the French word "*travailleurs*", meaning not only the *employee* in the legal sense, as the terms "*employee*" (English) and "*employé*" (French) do, but generally a person who works on a professional basis[13]. For that reason, in the Polish language where there are no words that could render the distinction, the use of the word "worker" needs not be understood as the intention to give the right of freedom of association in trade unions only to employees in the legal meaning. It should also be taken into account that the English and French versions of the Convention are its original versions (Article 21). Considering that, the essential meaning should follow from the interpretation of the term made by the authorized bodies, recognizing nevertheless the obvious principle that international agreements should be interpreted uniformly by all signatories, regardless of any differences in the wording. It is not acceptable that different national interpretation versions of the Convention should exist.

Prior to making an attempt to outline the interpretation of the term "workers" in Art. 2 of ILO Convention No. 87/1948, it is worth noting that it is even the so-called systemic interpretation of the Convention that indicates that the term goes beyond the legal concept of the employee understood as a party to a contract of employment. The Convention allows to impose restrictions on the freedom of association in trade unions for the armed forces and the police. Article 9 provides that "The extent to which the guarantees provided for in this Convention shall apply to the armed forces and the police shall be determined by national laws or regulations". The provision is commonly interpreted as limiting the scope *ratione personae* of the right of association, and therefore makes up an exception to Art. 2 of the Convention. Given that the officers of the services are not employees, Art. 9 would be redundant if the term "workers" were to be applicable to employees in terms of the employment relationship only. Hence a strong suggestion that the term "worker" has a broader meaning there.

4. The need for extensive interpretation of this term is emphasized by official publications of the ILO bodies. In several of its reports the Committee on Free-

[13] The term "workers" (*travailleurs*) is used also in Art. 5 Clause 1 of the European Social Charter (Journal of Laws of 1999, No. 8, item 67) which provides that: „With a view to ensuring or promoting the freedom of workers and employers to form local, national or international organisations for the protection of their economic and social interests and to join those organisations, the Parties undertake that national law shall not be such as to impair, nor shall it be so applied as to impair, this freedom".

dom of Association has stated that the existence of an employment relationship is not the criterion that would allow to determine persons covered by the right of association in trade unions. The relationship in question is often non-existent, as is the case with agricultural workers, self-employed workers and those performing liberal professions and who should, nonetheless, enjoy the right of association[14]. When interpreting the expression "Employees and employers without distinction whatsoever" contained in Art. 2 of Convention 87, the Committee of Experts on the Application of Conventions and Recommendations stated that the right of association should be understood as a general rule whereto only one exception regulated in Article 9 of the Convention relating to the armed forces and police would apply[15]. The Committee has also pointed out many times that the right to associate in trade unions applies not only to employees in the legal sense. For example, in its recent report of 2010[16] the Committee has indicated that the right to form and join trade unions is applicable, among others, to the following groups of workers:

– agricultural workers – p. 75;

– workers in social and health services and childcare services defined by law as "independent workers" who have been "divested of the status of employee" – pp. 92–93;

– self-employed workers – 184;

– self-employed workers, homeworkers and apprentices – p. 206.

It is also indicated in legal literature, including publications appearing under the auspices of the ILO, that the Convention applies not only to employees but to other workers[17] as well, or that it applies to workers – including persons not employed under contracts of employment[18]. It should be added that the author of an extensive article devoted to interpretation of the concept of "workers without distinction whatsoever" in ILO Convention No. 87/1948 assumes that cov-

[14] Cf. e.g. Freedom of Association, Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO, Geneva 1996, p. 51, item 235; International Labour Office, Report of the Committee on Freedom Of Association, 342nd Report of the Committee on Freedom of Association, Geneva, June 2006, p. 120, para. 479.

[15] International Labour Conference 81st Session – 1994, Freedom of Association and Collective Bargaining, International Labour Office, Geneva 1994, pp. 23–24; International Labour Conference, 99th Session, 2010, Report of the Committee of Experts on the Application of Conventions and Recommendations, Report III (Part 1A), International Labour Office Geneva, e.g. pp. 91 & 200. As regards the role of the Committee in interpretation of ILO standards cf. M. Seweryński, (in:) L. Florek, M. Seweryński, *Międzynarodowe prawo pracy* [International Labour Law], Warsaw 1988, p. 74.

[16] *Ibidem*.

[17] L. Swepston, *Human Rights Law and Freedom of Association: Development through ILO Supervision*, "International Labour Review" 1998, Vol. 137, No. 2, p. 179.

[18] D. Tajgman, K. Curtis, *Freedom of Association: A users Guide. Standards, Principles and Procedures of the International Labour Organisation*, Geneva 2000, p. 13.

ered by the notion are workers in the broad sense, i.e. also self-employed persons performing work without an employer, including those practicing liberal professions[19]. Such an interpretation of the term "workers" in Art. 2 of ILO Convention No. 87/1948 is also fully supported by the logic of the freedom of association in trade unions which includes "workers and employers, without distinction whatsoever". The fact that both workers and employers are covered by that freedom shows that the objective of the Convention is to guarantee the freedom to all people performing professional work gainfully. Hence the view that there is a group of people earning their living by their own work, who are divested of the freedom has no grounds whatsoever. It follows from the above that all people performing professional work gainfully, save for the exceptions permitted by international agreements binding upon Poland, should be able to associate in trade unions or employers' organizations.

5. The wide scope *ratione personae* of the right of association in trade unions is also apparent from the instruments of international law which use the word "everyone" to determine the circle of persons entitled to association in trade unions. The considered scope is defined in that way in the Universal Declaration of Human Rights of 1948[20], the International Covenant on Civil and Political Rights of 1966[21], the International Covenant on Economic, Social and Cultural Rights of 1966[22] and the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention) of 1950[23].

The word "everyone", as appearing in the quoted provisions, clearly shows the intention to include a wide circle of people within the scope of the right to associate in trade unions. This is clearly confirmed by, for instance, Art. 22 par. 2 of the Covenant on Civil Rights which provides that "No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order, the protection of public health or morals

[19] J. Hodges-Aeberhard, *The Right to Organise in Article 2 of Convention No. 87. What is Meant by Workers „without distinction whatsoever"?*, "International Labour Review" 1989, Vol. 128, No. 2, p. 188–189.

[20] Art. 23 Par. 4: Everyone has the right to form and to join trade unions for the protection of his interests.

[21] Journal of Laws of 1977, No. 38, item 167, Art. 22 Par. 1: Everyone has the right to free association with others including the right to form and to join trade unions for the protection of one's interests.

[22] Journal of Laws of 1977, No. 38, item 167, Art. 8 Par. 1 Cl. 1: The States – Parties to this Covenant undertake to ensure: a) the right of everyone to form and join unions of their choice, in order to promote and protect their economic and social interests, subject only to the statutory regulations of the organization.

[23] Journal of Laws of 1993, No. 61, item 284, as amended, Art. 11, Par. 1: Everyone has the right of free and peaceful assembly and the right of free association including the right to form and to join trade unions for the protection of one's interests.

or the protection of the rights and freedoms of others". Analogous regulations are included in the Covenant on Economic and Social Rights and (Art. 8. par. 1.a *in fine*) and the European Convention (Art. 11.2). Nonetheless, the word "everyone" must not be understood literally as it would lead to absurd conclusions. Interpretation of the term must take into account limitations of its scope arising, in particular, from the link between the right of association in trade unions and the interest of the person wishing to exercise the right. Hence the right is not vested in everyone in the literal sense, but in everyone "to protect his interests" (Universal Declaration and the European Convention), "in order to protect his interests" (Civic Covenant), "to promote and protect his economic and social interests" (Economic and Social Pact), "to protect his economic and social interests" (European Social Charter, Article 5). And it is not any interests that are meant here, but the interests related to the performance of professional work and ones that make up the object of trade union activities. The essence thereof is economic and social interests of members, as has been clearly indicated in the Covenant on Economic and Social Rights and in the European Social Charter. A broader term used in the other analysed instruments including the phrase "their interests" follows from the recognition that trade unions frequently have to fight also for the civil rights, which was explicitly emphasised during the preparatory works done on the Civic Convention[24]. No matter, however, whether the meaning of the term is narrower or wider, the essence still lies in the economic and social interests of the working people[25].

It can be noted in passing that also the French constitutional definition of the scope *ratione personae* of freedom of association using the phrase "any person" is not interpreted as the definition of all people, but as a term denoting all persons practising a profession as employers, employees or self-employed people[26].

6. Notwithstanding general restrictions on the right of association in trade unions shown above, most of the discussed international covenants introduce also explicit personal constraints. These allow to impose lawful restrictions on the exercise of the right by members of the armed forces and the police[27]. The European Convention also provides for the imposition of lawful restrictions on the exercise of trade union rights by members of the state administration (Art. 11). The admissibility of divesting some groups of public employees of the right of

[24] Cf. M. J. Bossuyt, J. P. Humphrey, *Guide to the* Travaux préparatoires *of the International Covenant on Civil and Political Rights*, Dordrecht–Boston–Lancaster 1987, p. 426.

[25] D. Gomien, D. Harris, L. Zwaak, *Law and Practice of the European Convention on Human Rights and the European Social Charter*, Council of Europe 1996, p. 307.

[26] Such is the view of M. Despax, J. Rojot, *Labour Law and Industrial Relations in France*, Deventer 1987, p. 155.

[27] Art. 22 Par. 2 of the Covenant on Civil and Political Rights, Art. 8 Par. 2 of the Covenant on Economic and Social Rights, Art. 5 of the European Social Charter, Art. 9 of ILO Convention 87/1948.

association in trade unions is stipulated in ILO Convention No. 151 which has been ratified by Poland. The right to associate in trade unions is guaranteed to public employees in Art. 9 of this Convention. Art.1 par. 2 provides for the admissibility of limitations on the guarantees stipulated in the Convention to high-level employees whose functions are normally considered as policy-making or managerial, or to employees whose duties are of a highly confidential nature. In Art. 1 par. 3 national legislation is left free to determine the extent to which the guarantees provided for in this Convention will apply to the armed forces and the police.

Under the above findings it is possible to conclude that the interpretation of the provisions of international agreements defining scope *ratione personae* of the right of association in trade unions leads to the conclusion that the right is granted to workers in the broad, social sense of the term including both employees in the strict sense as well as other persons for whom the source of income is their professional work, regardless of the legal basis for its performance. Those persons include civil servants (and members of uniformed services) whose professional status is defined by the administrative law, agricultural workers, homeworkers and other service-providers who work under civil law contracts, self-employed persons, persons practicing liberal professions. Such is the conclusion that follows both from the interpretation of the term "workers" in ILO Convention 87/1948 and the European Social Charter and the term "everyone" appearing in the Universal Declaration, the Covenant on Civil Rights, the Covenant on Economic and Social Rights and the European Convention.

7. In Polish Constitution the scope *ratione personae* of the right of association in trade unions is defined in Art. 12 whereby: "The Republic of Poland shall ensure the freedom of forming and operation of trade unions, socio-occupational organizations of farmers, associations, citizens' movements, other voluntary associations and foundations.", in Art. 59 par. 1 ensuring "The freedom of association in trade unions, socio-occupational organizations of farmers and employers' organizations", and in par. 4 providing that "the scope of freedom of association in trade unions and employers' organizations and other trade union freedoms may be subject only to such statutory limitations as are permitted by the international agreements binding on the Republic of Poland."

The above quoted provisions of the Constitution support the conclusion that the act provides for a very broad scope of freedom of association. Neither Art. 12 nor Art. 59 par. 1 of the Constitution impose personal limitations. In accordance with Art. 59 par. 4 the only permissible limitations are those stipulated in the binding international agreements. Hence, in the light of the earlier made findings which concern definition of the freedom in international law it is justified to say that the Constitution recognizes the right of association in trade unions of not only employees but also other citizens within the meaning of the terms "everyone" and "workers" used in the international instruments analysed above.

8. The explicit wording of Art. 2 of the Trade Union Act, confirmed by the unanimous interpretation of the provision indicates that, in accordance with the intent expressed by the legislator, the right to associate in trade unions is limited to employees in the legal sense of the word and to enumerated categories of other working people. Large occupational groups, persons employed under civil law contracts not listed in Article 2 in particular (especially persons performing services under contracts to perform services), the self-employed and persons practicing liberal professions have been divested of the right. According to the earlier findings those exemptions should be regarded as contrary to the above-quoted provisions of international conventions, in particular Art. 2 of ILO Convention No. 87/1948 and Art. 12 and Art. 59 of the Polish Constitution. It should be thus considered that the quoted provisions of international agreements take precedence over Art. 2 of the Trade Union Act being a provision contradictory to those agreements. For obvious reasons, it is also Articles 12 and 59 of the Polish Constitution, guaranteeing the right to associate in trade unions, and thus the freedom of association to all working people (workers in the social sense) covered by the freedom under international agreements binding upon the Republic of Poland to the extent set out in these agreements, that take precedence over Art. 2 of the Trade Union Act.

Notwithstanding the indicated inconsistency with the international law and the Polish Constitution, it seems justified to say that Article 2 of the Trade Union Act also relies on the assumption (taken over from the Act of 1982) whereby citizens are only allowed whatever has been clearly indicated to them as such[28]; this rests in contradiction with the very nature of the right to associate in trade unions, as based on the concept of freedom. It is also inconsistent with the principle of the state ruled by law.

It should also be noted that a significant number of people divested of their right of association in trade unions, especially those self-employed and working under contracts on performance of services (similar to the contract of mandate) are persons forced to continue the work earlier based on a contract of employment (or unable to find a job under a contract of employment.) They thus belong to a category of working people who are in a particularly difficult social situation. Also for that reason they should actually enjoy freedom of association and collec-

[28] Art. 11 of the Trade Union Act which "allows" to form national federations and confederations of trade unions has been worded in such a way. Despite the said, the Supreme Court, quoting international law and pointing out to the nature of human rights and freedoms has come to a conclusion that registration of other trade union organisations is also permissible (Resolution of 7 Supreme Court Judges of 15.10.1992, I PZP 35/92, OSNCP 1993, No. 1–2, item 3). A possibility to use a similar method of interpretation to demonstrate that the rule is not inconsistent with provisions of the Constitution and international agreements (as the enumeration of persons entitled to freedom of association contained therein does not prevent recognising that also other persons are entitled to this right), is arguable due to the pettiness of Art. 2 of the Trade Unions Law and the established interpretation of the provision.

tive protection, as ensured by the operation of trade unions. That freedom should be, in fact, available to all workers in the social sense (working people).

The above considerations justify putting forward a postulate to amend Art. 2 of the Trade Union Act by deleting the provisions which limit the right of association in trade unions in case of working people other than employees, as the limitations rests in contradiction with the above referenced rules of the Constitution and international laws.

9. The doubts raised in the article have been recently confirmed by the Constitutional Tribunal. In the judgment of 2 June 2015 the Tribunal stated that the provisions of the Law on Trade Unions that limit the rights of persons employed outside the employment relationship (persons performing gainful activity) are inconsistent with Art. 59(1) in conjunction with Art. 12 of the Constitution. According to the Tribunal, the legislator is not absolutely free in determining the personal scope of the freedom of association. As a result, it is necessary to reconstruct its legal framework. The Law on Trade Unions must not overlook the rights of workers who are not employees (including those engaged on civil law contracts). The ruling did not undermine the definition of the employee arising from the Labour Code. At the moment, we are awaiting the amendment to the Law on Trade Unions[29].

ABSTRACT

The author analyses the Polish regulations on the right of association in trade unions, from the point of view of their compliance with international standards in this area. The scope *ratione personae* of the right of association in trade unions was defined in the Polish law through detailed enumeration of the categories of persons who are allowed to form trade unions and join them. The current Trade Union Act of 23 May 1991 grants this right to employees (in the legal meaning) and to strictly identified other social groups. According to international law, the freedom of association in trade unions is basically a universal law of all working people. The most important regulation in that respect is Convention No 87 of the International Labour Organization. The term used in the Polish language version of the Convention No. 87 ("*pracownicy*") corresponds to the English word "*workers*", meaning not only the *employee* in the legal sense, as the English term "*employee*", but generally a person who works on a professional basis. This leads to the conclusion that the right of coalition is granted to workers in the broad sense of the term, including both employees in the strict sense as well as other persons for whom the source of income is their professional work, regardless of the legal basis for its performance. It justifies putting forward a postulate that the Polish

[29] Parragraf added by editors.

Trade Union Act be amended by deleting the provisions which limit the right of association in trade unions in the case of working people other than employees.

PRAWO ZRZESZANIA SIĘ W ZWIĄZKI ZAWODOWE – PRAWO PRACOWNIKÓW CZY PRAWO OSÓB WYKONUJĄCYCH PRACĘ?

Streszczenie

Autor poddaje analizie polskie regulacje prawne dotyczące praw zrzeszania się w związki zawodowe z perspektywy ich zgodności ze standardami międzynarodowymi dotyczącymi tego obszaru. Zakres podmiotowy prawa do zrzeszania się w związki zawodowe został określony w polskim prawie poprzez szczegółowe wskazanie kategorii osób uprawnionych do tworzenia i przystępowania do związków zawodowych. Aktualnie obowiązująca ustawa z dnia 23 maja 1991 r. o związkach zawodowych przyznaje to prawo pracownikom (w rozumieniu prawa pracy) oraz ściśle określonym innym grupom osób. Zgodnie z prawem międzynarodowym swoboda zrzeszania się w związkach zawodowych jest zasadniczo powszechnym prawem przysługującym wszystkim osobom wykonującym pracę. Najważniejsze regulacje w tym zakresie zawiera Konwencja nr 87 Międzynarodowej Organizacji Pracy. Termin „pracownicy" używany w polskiej wersji językowej Konwencji nr 87 jest tłumaczeniem anglojęzycznego terminu *workers*, oznaczającego nie tylko pracowników w rozumieniu prawa pracy, tak jak anglojęzyczny określenie *employee*, ale generalnie każdą osobę wykonującą pracę zawodową. To prowadzi do konkluzji, że prawo koalicji jest przyznawane wszystkim pracownikom w szerokim rozumieniu tego słowa, włączając w to zarówno pracowników w ścisłym tego słowa znaczeniu, jak i wszystkie osoby, których źródłem utrzymania jest praca zawodowa, niezależnie od podstawy prawnej, na jakiej jest ona wykonywana. Uzasadnia to postulat zmiany Polskiej ustawy o związkach zawodowych poprzez usunięcie postanowień ograniczających prawo zrzeszania się w związkach zawodowych w przypadku osób wykonujących pracę na innej podstawie niż stosunek pracy.

KEYWORDS

the right of association in trade unions, trade union, the Trade Union Act, freedom of association in trade unions, working people, the International Labour Organization, worker, employee, right of coalition, professional work

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prawo zrzeszania się w związki zawodowe, związek zawodowy, ustawa o związkach zawodowych, swoboda zrzeszania się w związki zawodowe, ludzie wykonujący pracę, Międzynarodowa Organizacja Pracy, pracownik, prawo koalicji, praca zawodowa, stosunek pracy

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COLLECTIVE LABOUR LAW CASES BEFORE THE CONSTITUTIONAL TRIBUNAL

1. During the 25 years of its existence, the Constitutional Tribunal has passed many judgments in collective labour law cases. The matters covered by the judgments included, in particular: freedom of association in trade unions and employers' organisations, trade union rights, equality and representativeness of trade unions, collective labour agreements and other autonomous sources of labour law, information and consultation of employees.

2. Freedom of association was tackled, among others, by two judgments of the Constitutional Tribunal concerning Art. 86 par. 2 of the Act of 23rd December, 1994 on the Supreme Chamber of Inspection (Journal of Laws of 1995, No. 13, item 59).

The first judgment, of 21st November, 1995, (K 12/95,OTK 1996, No. 1, item 15), passed under so-called Little Constitution of 1992, concerned Art. 86 of the Act on the Supreme Chamber of Inspection (the SCI Act) in its original wording which stripped the President, Vice-Presidents and Director General of the Supreme Chamber of Inspection, as well as SCI supervisory employees and those performing inspection activities (i.e. all professional employees of the Chamber) of the right to join a trade union.

The Constitutional Tribunal held that Art. 86 of the SCI Act (in the then wording of the Article) contravened, in its part concerning supervisory employees and those performing inspection activities, Art. 84 in connection with Art. 1 and Art. 67 of the constitutional provisions that had been upheld as effective by Art. 77 of the Constitutional Act of 17th October, 1992 on Mutual Relationships between Legislative and Executive Authority of the Republic of Poland and on Local Government (Journal of Laws No. 84, item 426 as amended), in that it violated the constitutionally-based trade union freedom by excessive limitation of the SCI employees' freedom to form and join trade unions.

In its reasons to the judgment, the Constitutional Tribunal stated that depriving all professional employees of SCI of the right to associate in trade unions violated the standards concerning the allowed limitations of the right, as specified

in ILO Convention no. 151 and Art. 11 of the European Convention, since it hit at the very heart of the right to associate.

It is well-worth reminding that Art. 1 par. 2 of ILO Convention no. 151 allows national laws and regulations to limit trade union freedoms only to high-level employees whose functions are normally considered as policy-making or managerial, or to employees whose duties are of highly confidential nature.

Given the first argument, it is certainly allowed to limit the freedom of association of the President, Vice-Presidents and Director General of the Supreme Chamber of Inspection, hence the limitation (or, more precisely, deprivation) was not found unconstitutional by the Tribunal. As regards other employees, performing supervisory or inspection activities, the particular confidentiality of their responsibilities was put to scrutiny as the premise for the limitation. At that time the Tribunal found, however, that limiting (actually depriving) all professional, not just executive employees of SCI of the right to associate could not be justified by their (and other employees of the Chamber) duty to keep secret the information acquired by them in connection with performance of their official duties, as there are no grounds to believe that enjoying the right to associate poses a particular threat to the official (professional) secret. Stripping such a vast group of SCI employees of the right, added the Tribunal, contravened also the constitutional rule of equal treatment of citizens (Art. 67 of the above quoted Constitutional Provisions), considering that, at that very time, other laws lifted the existing limitations of the right to associate that concerned even such groups as judges and public prosecutors.

In a commentary on the judgment of the Constitutional Tribunal Lech Kaczyński[1], then already an ex-President of the Supreme Chamber of Inspection, while accepting, in principle, the conclusion of the judgment, criticized its reasons. He also pointed out to the fact that among the group of supervisory employees and ones performing inspection activities managers and vice-managers of SCI organisational units should be distinguished, which people, in his opinion, should be regarded as persons whose functions are managerial ones within the meaning of ILO Convention No. 151 allowing to limit trade union freedom of that group of employees.

Another commentator of the same judgment[2] noted that – according to the standpoint of the ILO Committee of Experts, Freedom of Association and Collective Bargaining of 1983[3], the limitation of the right to associate in trade unions of

[1] L. Kaczyński, *Kwestia zgodności z Konstytucją artykułu 68 ustawy o Najwyższej Izbie Kontroli* [The Issue of Conformity of Article 68 of the Act on the Supreme Control Chamber with the Constitution], "Kontrola Państwowa" 1996, Vol. 2.

[2] A. Świątkowski, Gloss to judgment of the Constitutional Tribunal of 21 November, 1995, K 12/95, PIP 1996, Vol. 7, p. 99 *et seq*.

[3] ILO Committee of Experts, Freedom of Association and Collective Bargaining. General Survey, Geneva 1983.

high-rank state officials can even go so far as to consist in stripping them of the right, although this only may concern the officials authorized to perform legal transactions (make decisions) on behalf of public authorities (the office where they are employed). The author classified with the group, besides the President, Vice-Presidents and Director General of SCI, also managers of organisational units and advisors of the President. Those employees can, in his opinion, be legally deprived of the right to associate in trade unions.

Further on, the author states that currently it would be difficult to justify the exclusion of public employees from the right to form and joint trade unions, claiming a highly confidential nature of the duties they perform. It is possible, however, to limit the rights in the question, quoting the reason. He also points out to the fact that limitation of trade union rights of the employees whose duties are highly confidential is aimed at preventing a conflict between employee duties of the persons and their statutory obligations as members of a trade union and thus eliminating the problem of double loyalty.

In execution of the above said judgment of the Constitutional Tribunal, Art. 86 of the SCI Act was amended by the Act of 21st May, 1997 (Journal of Laws, No. 96, item 589) to deprive of the right to form and join trade unions the President, Vice-President and Director General of SCI, managers and vice-managers of organisational units and advisors of the Presidents. All other employees, supervising and performing inspection activities, were allowed to join only the trade union in which solely SCI employees are associated.

Art. 86, in its new wording, was also challenged by National Committee of „August '80" Trade Union, as regards its part stripping the supervisory and inspection-performing employees of the right to join a freely selected trade union. Contravention of Articles 2, 12 and 59 of the Constitution of the Republic of Poland of 1997 was quoted as the reason.

At that occasion the Constitutional Tribunal, in its judgment of 17th November 1998 (file ref. K 42/97, OTK 1998, No. 7, item 113) stated compliance of the challenged provision with all the standards mentioned in the application, i.e. both with the rule of freedom to associate in trade unions (Art. 12 and 59 of the Constitution) and the rule of the democratic state of law (Art. 2 of the Constitution).

In reasons to the judgment the Tribunal referred – via Art. 59 par. 4 of the Constitution – to ILO Convention No. 151 concerning the right to organise and procedures for determining conditions of employment in the public service. It assumed that under the Convention it is allowed to limit (actually deprive) the right of association of the President, Vice-Presidents and Director General of SCI, since they occupy elevated state positions and are responsible for policy making as regards both the state itself and the institution managed by them. As for the managers and vice-managers of organisational units of SCI, as mentioned in Art. 86 par. 1, the Tribunal quoted, as the reasons, the fact that they performed managerial functions.

As regards compliance with the Constitution of the limitation of the right to associate, affecting all those supervising or performing inspection activities (allowed to be members only of the trade union where solely SCI employees are associated) was justified by the Tribunal with the fact that their duties were "highly confidential" within the meaning of Convention no. 151 (i.e. differently than in the reasons to the judgment in K 12/95 case). The Tribunal stressed that SCI controlled, *inter alia*, operation of governmental agencies, including security and military forces, Chancelleries of the Sejm (Diet), Senate and President of the Republic of Poland, General Inspector of Protection of Personal Data, and in the course of the inspection proceedings the SCI employees were entitled to have insight into all documents of the inspected entities (also – under specific rules – those secret ones).

The Tribunal observed that "in the social realities of the Republic of Poland trade unions play a role of quasi-political parties" and that they "carry out, to a major extent, political activity", hence their free operation in an institution like SCI, where access to most secret information is possible, a grave threat to the functioning of the state could arise, and political indifference – the basic features SCI professional employees should possess along with impartiality – could be questioned.

The work done for SCI, combined with membership of a trade union which operates not only inside the structure of the Chamber, but also beyond it could, in addition, under certain circumstances give rise to a conflict of loyalty.

3. A second judgment of the Constitutional Tribunal, concerning solely the right to associate in trade unions, was the judgment of 7th March, 2000, file ref. No. K 26/98 and was passed following an application by the Ombudsman asking the Tribunal to state that Art. 70 par. 1 sentence 1 of the Act of 30th June, 1970 on Military Service of Professional Soldiers (unified text – Journal of Laws of 1997, No. 10, item 55 with further amendments), which forbade professional soldiers to form and join trade unions contravened Art. 31 par. 3, Art. 32 and Art. 59 par. 1 and 4 of the Constitution of the Republic of Poland and Art. 11 par. 2, 14 and 17 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

The Ombdusman substantiated his application first by indicating that Art. 59 par. 1 of the Constitution, providing for freedom to associate in trade unions, did not mention, as those enjoying the freedom, only employees and members of some other groups of people, but that the freedom – as a common opinion had it – could be enjoyed by all working people. Second, he pointed out that Art. 59 par. 4 and Art. 31 par. 3 of the Constitution provided only for an option to statutorily limit the scope of the freedom, and not for deprivation of it. Also the European Convention , while providing for the right to freely associate (including the right to form trade unions) , stated in Art. 11, par. 2, sentence 2 that "this article shall

not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State." The Ombudsman also observed that the professional soldiers found themselves in the position of a professional group discriminated compared to officers of other uniformed services (e.g. the Police, Prison Guard and Frontier Guard) whose freedom to associate in trade unions had been secured by legislation, albeit following rules much more restrictive that those contained in the Trade Union Act.

He quoted a resolution of the European Parliament of 12th April, 1984 on the right of the Armed Forces to form associations and a resolution of the Council of Europe Parliamentary Assembly No. 903 of 30th June, 1998 on the right of the members of armed forces to associate, calling on – respectively – Member States of the EU or all states of the Council of Europe to grant members of the Armed Forces in the time of peace, the right to form, join and actively participate in trade associations to protect their social interests.

The Constitutional Tribunal did not share arguments of the Ombudsman and found the challenged provision of the Act o Military Service of Professional Soldiers compliant with Art. 31 par. 3 and Art. 59 par. 1 and 4 of the Constitution of the Republic of Poland and with Art. 11 par. 2 of the European Convention (other standards mentioned in the application having been found inadequate to the subject of the challenge).

The Tribunal stated that "the duty to fully respect freedom of creation of trade unions, as stemming from Art. 59 par. 1 of the Constitution does not refer to members of the Armed Forces. It is Art. 26 of the Constitution that precludes full application of the Trade Union Act in that respect and determines that members of the Armed Forces may be made subject to even the most far-reaching limitations of the trade union freedom compared to all other public officers" (save for judges, whose trade union membership is explicitly forbidden by Art. 178 par. 3 of the Constitution). The freedom to form and join trade unions is a political freedom and a majority of trade union rights are strictly political. Meanwhile, under Art. 26 par. 2 of the Constitution the Armed Forces stay neutral as regards political issues. Professional military service is undertaken voluntarily, with all limitations attached to it. Given Art. 68 par. 3 and Art. 70 par. 2 of the Act on Military Service of Professional Soldiers, a candidate to the service has to take into account his/her limitations of certain civic freedoms.

In the opinion of the Constitutional Tribunal, the international agreements binding on Poland, to which Art. 59 par. 4 of the Constitution refers, distinguish members of the Armed Forces and Police as a separate category of persons even among other public officers whose freedom to associate in trade unions may be subject to the said most far-reaching limitations, including a complete prohibition to associate, provided that due "compensation" (particular protection of their interests) is secured by the state itself and that they are free to join any other organisations of non-political nature.

The Tribunal also stressed that the Act on Military Service of Professional Soldiers charged the Polish state with the task to protect social interests of soldiers in lieu, as it were, of the trade unions which they are not allowed to form. The soldiers may, however, associate in non-political organisations, including ones aimed at improvement of their welfare, social position of the Armed Forces and protection of dignity of the military.

Matters of the freedom to associate were tackled by the Constitutional Tribunal also when considering other cases which I am not going to discuss here[4]. I would just like to mention that in the judgment of 23rd October, 2001 (K 22/01, OTK 2001, No. 7, item 215) the Constitutional Tribunal recognized, under Art. 59 of the Constitution, that trade union freedoms may be subject not only to statutory limitations allowed by international agreements that are binding on the Republic of Poland, but also ones which stem from other provisions of the Constitution (for instance its Articles 20 and 22).

4. Numerous judgments of the Constitutional Tribunal concern various trade union rights – from opining on drafts/assumptions for legal acts or the right of making applications to the Constitutional Tribunal to protection of employment relationship stability of trade union officers and issues of trade union assets. Compare to them, the number of judgments directly concerning rights of employers' associations is much smaller.

5. Under – respectively – Art. 19 of the Trade Union Act and Art. 16 of the Act on Employers' Associations, trade unions and employers' associations being representative ones within the meaning of the Act on Tripartite Committee for Socio-Economic Matters and Voivodship (Province) Social Dialogue Committees (hereinafter referred to as the Tripartite Committee Act) are entitled to opine on assumptions for or drafts of legal acts falling into the scope of their responsibilities.

The Constitutional Tribunal has many a time expressed its opinion on the issue of the responsibilities (which were viewed by it as the rights to participate in the law-making process) while examining compliance with Constitution of pieces of legislation which were blamed for not having been consulted upon (with the representative trade union organisations, as a rule), and thus being flawed with a procedural fault. As the constitutional standard in that respect served the rule of legality (Art. 7 of the Constitution). The following judgments of the Tribunal

[4] Cf. in particular the following judgments: of 12 January, 1999, P 2/98, OTK 1999, No. 1, item 2; of 13 March, 2000, K 1/99, OTK 2000, No. 2, item 59; of 27 March, 2000, K 26/98, OTK 2000, No. 2, item 57; of 18 November, 2002, K 37/01, OTK 2006, No. 8A, item 111; of 24 February, 2004, K 54/02, OTK 2004, No. 2A, item 10.

can be named in that respect: of 30th November 1993, K 18/92[5], of 19th November 1996, K 7/95[6], of 18th January 2005, K 15/03[7].

Among later judgments of the Constitutional Tribunal concerning trade union participation in the legislative procedure, attention should be drawn to the judgment of 18th January 2005, K 15/03[8], following the application by "Solidarity" Trade Union to examine certain provisions of the Act of 17th December, 2001 amending the Act on Higher Education Institutes, for compliance with the Constitution, Art. 7 of the Constitution in particular, considering that the consultation procedure, as mentioned in Art. 10 the Trade Union Act and Art. 31 par. 3 of Standing Orders of the Sejm (Diet), had not been observed. Infringement of the procedure consisted in the fact that the bill was sent to representative trade unions on the same day when it was brought in to the Sejm.

The Tribunal stated that, when passing the Act, violation of Art. 19 of the Trade Union Act did take place. It also stated, however, that the fact itself did not have to mean that the Act, adopted under such a procedure, was unconstitutional. "First of all, it was not provisions of the Constitution that were directly infringed, but ones of statutory level, which may (but in a particular case does not have to) mean violation of constitutional rules. In the discussed situation (including a shift of government occurred a month earlier and a need to amend the drafted budget drawn up by the preceding government, yet – in the opinion of the new one – putting the budget balance into jeopardy – T.L.) it is justified to reason that the lawmaker (in the broad meaning of the word) was acting (…) in a kind of a state of necessity, i.e. it could choose between infringement – by not fully observing the procedure – a statutorily-based rule of consultation of the bill with trade unions and violation of the constitutional principle of care for the public finance." Following its judgment of 17th November, 2003[9], which concerned another budget-related piece of legislation from the same year the Tribunal expressed an opinion that an urgent need to save budget balance "in the conditions of most unfavourable standing of the public finance" made it a priority to adhere to the constitutional value of budget balance even at the expense of observance of time limit for consultation of the bill with trade unions, which limit was not fully kept to.

Not without importance was – in the Tribunal's opinion – actual participation of trade union representatives in the work of parliamentary committees and the fact that relevant trade union structures passed to the Sejm opinions on the bill. Although the said does not substitute the formally determined consultations, it nevertheless means that representatives of the trade union actually had an opportunity to present their position on the issue, which is the essence of the formalized

[5] OTK 1993, item 41.
[6] OTK 1996, No. 6, item 49.
[7] OTK 2005, No. 1, item 5.
[8] OTK 2005, No. 1A, item 5.
[9] K 32/02, OTK 2003, No. 9A, item 93.

consultations in question. It can be thus acknowledged, the Tribunal said, that "at the stage of the parliamentary work the consultations held were partial, incomplete, faulty, i.e. ones that could be possible to carry out under specific conditions (..) yet it may not be recognized that they were completely lacking."

That thread of discussion of Constitutional Tribunal's judgments concerning the opining on laws or assumptions for those should be completed by a note that never has the Tribunal found any examined provision unconstitutional only because requirements of Art. 19 of the Trade Union Act were not applied when enacting it.

6. Certain labour laws or ordinances concerning specific occupationalgroups provide for other forms of trade union participation in law-making. Art. 4 par. 2 of the Act of 26th January, 1982, Teachers' Chart[10], provides, in particular, that: "Ordinances and orders, as required by the law to be enacted, shall be subject to agreement with trade unions representing teachers". The provision was the subject matter of considerations of the Constitutional Tribunal when ordinance of the Minister of National Education of 19th March, 1992 on teachers' salaries[11] was challenged by "Solidarity" Trade Union owing to infringement, while it was being enacted, of the mode specified in Art. 4 par. 2 of the Teachers' Chart and, consequently, Art. 7 of the Constitution.

In reasons to its judgment stating that the challenged provisions was compatible with the Constitution the Tribunal said that the "are subject to arrangement" phrase, as used in the provision, "puts stress not on the result of the arrangement, i.e. the striking of consensus, but rather on the very process of arriving at the consensus."

In the opinion of the Tribunal, neither the phrase, nor the "in agreement" or "in arrangement" wordings, as used in the provisions concerning enactment of normative acts "support the thesis that the subject entitled to those forms of participation acquires a law-making competence by the same and is co-responsible for the enacted normative act (since competences, those concerning law making in particular, may not be presumed)". The thesis is further strengthened by the fact that the Constitution of Poland provides for a closed system of sources of law and rather strictly determines the circle of entities supplied with law-making competences. The influence which certain entities (trade unions in particular) may exert on the content of normative acts in the above said forms pertains to the stage of preparatory work preceding enactment of the law. Not only does it assume a duty of the law-making body to inform the entities about the content of the draft, but it also requires that discussions should be held on the content of the draft so as to arrive at a possibly "joint and optimum law-making decision. The influence of the partners on the content of the normative act, assumed to take that very form,

[10] Consolidated text: Journal of Laws of 2014, item 191, as amended.

[11] Journal of Laws, No. 29, item 126.

makes it necessary, in the event of a divergence between various contents of the solution and the need to accept the drafter's version, to properly justify the need".

Also one of the latest judgments of the Constitutional Tribunal of 28th April, 2009, K 27/07[12] concerning the role of the trade union in the creation of an autonomous source of labour law within the meaning of Art. 9 of the Labour Code (namely articles of incorporation providing for rights and duties of parties to employment relationship)[13], is well-worth attention. The National Committee of "Solidarity" Trade Union, as the applicant in the case, requested that Art. 58 par. 1 of the Act of 27th July, 2005 – the Law on Higher Education Institutes[14] be found non-compliant with Art. 59 par. 2 of the Constitution insofar as it neglects rights of trade unions operating at a non-public higher education institute to opine on amendments to the latter's articles of incorporation. The Tribunal acceded to the request and found the provision non-compliant with the indicated constitutional standard.

In reasons to the judgment the Tribunal observed, in the beginning, that the right to opine on drafted legal acts had not been directly expressed in the Constitution but that trade unions had been granted it by virtue of an ordinary Act of Parliament. It should be added that the earlier discussed opining on drafts of or assumptions for normative acts under Art. 19 of the Trade Union Act does not actually concern acts like articles of incorporation of a higher school (as the articles are not laid down by bodies mentioned in the said Art. 19). The Tribunal acknowledged, however, that from Art. 59 par. of the Constitution the law-maker's duty to guarantee such a right to trade unions should be derived, considering the fact that rights and duties of parties to employment relationship are determined by the articles.

The Tribunal advocates, in fact, a broad interpretation of the "right to bargain", considering the latter in the context of political principles of: freedom to form and operate trade unions (art. 12 of the Constitution) and social dialogue (Preamble and Art. 20 of the Constitution). Following the opinion of W. Sokolewicz (Commentary on Art. 59 [in:] Constitution of the Republic of Poland. Commentary. Vol. IV. L. Garlicki (ed.), Warszawa 2005), the Constitutional Tribunal claims that crystallized in the constitutionally-based right to bargain are principles of social dialogue and subsidiarity.

While fully accepting the conclusion of the judgment the author of this paper, nevertheless, has objections as to its reasons, first of all because the intensive interpretation of the notion of "other collective accords" was not actually needed in order to settle the issue. In my opinion, it was sufficient to indicate that Art. 59 par. 2 of the Constitution, by using the "in particular" phrase does not leave doubts

[12] OTK 2009, No. 4A, item 54.

[13] Cf. judgment of the Constitutional Tribunal of 10th June, 2003, SK 37/02, Journal of Laws of 2003, No. 109, item 1037, also concerning articles of incorporation.

[14] Journal of Laws, No. 164, item 1365, as amended.

that the list of purposes of bargaining is not enumerative in nature. From Art. 59 par. 2, in connection with Art. 20 of the Constitution, it follows unmistakably that social partners have not only the right, but are actually obliged to be in permanent dialogue on issues covered by the scope of their tasks, matters of employment relationships in the first place, and that the law-maker's duty is to create legal instruments for them to carry the dialogue and cooperate with each other. Under the Act on Higher Education Institutes, the articles of a higher training institute provide, to a broad extent, for employment relationships of employees of the institutes, which fact – in the context of Art. 59 par. 2 and Art. 20 of the Constitution – means that trade unions, operating in the institutes, should have the rights to represent the employee side when contents of the articles are determined. Under the Act on Higher Education Institutes in force such rights have been granted to trade unions operating in public institutes. It is thus necessary (considering also the equal treatment rule) that similar rights should be granted to trade unions at non-public schools, all the more that articles of those schools provide for employee issues to an even greater extent than articles of public institutes do.

7. Under Art. 191 par. 1 item 4 of the Constitution, national managing bodies of trade unions and employers' associations, as well as professional organisations have the right to file applications with the Constitutional Tribunal motioning to examine compatibility of a normative act with the Constitution (its constitutionality) if a specific normative act concerns matters falling into the field of their operation. They belong (beside other subjects mentioned in Art. 191 par. 1 item 2 of the Constitution – the National Council of the Judiciary of Poland, legislative bodies of local government, as well as churches and other trade unions) to subjects enjoying limited (so-called functional) capacity to initiate the abstract constitutional control; they are authorized to make applications to the Constitutional Tribunal solely as regards matters concerning their scope of activities (art. 191 par. 2 of the Constitution).

A certain line of thought has been formed in judicial decisions of the Constitutional Tribunal from which there stems an imperative to narrowly interpret provisions of Art. 191 par. 1 item 2 and par. 2 of the Constitution. And hence, as a rule, in each case where the applicant is a trade union or employers' association (or any other subject of limited capacity to initiate the proceedings) the Tribunal, prior to starting consideration of merits of the case, examines whether the subjective and objective premises to file the application are met. The Tribunal is not free of the duty to examine the formal side of the application at further stages of the proceedings, either (cf. decisions of the Tribunal to discontinue proceedings for that reason, *inter alia* in K 31/99 case).

From the subjective side, the capacity of trade unions (just like that of employers' associations) to initiate the proceedings gets limited by Art. 191 par. 1 item 2 of the Constitution, as the latter requires that the applicant should be a "national

body of trade unions". The provision, of somewhat unhappy wording, refers the "national" adjective to a trade union body, yet it is assumed by the Tribunal that "it is only a trade union whose operation covers the entire country, i.e. a national trade union, that can have national bodies" (decision of 12 February, 2003, Tw 72/02, OTK, item 78). The Act of 20 August, 1997 on the National Court Register (Journal of Laws of 2001, No. 17, item 209 with further amendments) provides for a uniform register of trade unions, there being no data on national nature of a trade union among those entered in the register.

That legal situation considered, the Tribunal found that "control of the right of action of an applicant registered as a trade union must not be limited to the reading of its name nor declaration contained in its articles of incorporation. The fact that the name includes the word of "national" under no circumstances may be found to be conclusive for determining the capacity of such a trade union to initiate the abstract constitutional control. Nor may a provision of the articles of incorporation be conclusive in that respect. Establishing that a specific organisation has the capacity to initiate proceedings before the Constitutional Tribunal must be preceded by an assessment, based on merits of the issue, whether the organisation in question does have the nature of a national trade union. In the Tribunal's opinion, the assessment should be made based, first of all, on data published in the register, entries contained in section 1, column 3 in particular, where field units or branches of the organisation are recorded (Tw 72/02)".

Attention must be drawn at that occasion to the statement found in reasons to the decision of 20 January, 2003, Tw 58/02: "The national nature of a trade union is not determined, either, by mere indication in its articles of incorporation relevant organisational structures supposed to operate locally. For if a specific trade union does not actually have an organized structure founded upon duly established field bodies, it cannot be recognized as a national trade union." Given the rules of the Tribunal, it refused to recognize, *inter alia*, the capacity of the National Academic Trade Union to initiate the proceedings (decisions of 20 January, 2003, Tw 58/02, OTK 2003, item 159; of 12 February, 2003, Tw 72/02, OTH 2003, item 78; of 21 August 2003, Tw 58/02). For the same reasons the Trade Union of Flying and Board Personnel of the Republic of Poland was not recognized by the Constitutional Tribunal as a national one (decision of 1 September, 2003, Tw 15/03, OTK 2003, item 102 and of 5 May, 2004, Tw 15/03).

In my opinion both legal provisions concerning the capacity of trade unions as subjects entitled to initiate proceedings and the trail of the Tribunal's judgments in that respect give raise to serious doubts.

A second limitation of the capacity of trade unions (and employers' associations alike) to start the proceedings is the requirement that the application should concern a normative act providing for issues falling into the scope of operation of the trade union (employers' association). Also on that premise a narrowing construction is put by the Tribunal.

When considering the objective aspect of the applicant's capacity to initiate proceedings, the Tribunal takes into account:

1) the contents of the challenged provisions;

2) the contents of the provisions specifying tasks of the trade union or employers' association (the Trade Union Act and the Act on Employers' Association in the first place, but also other pieces of legislation of the collective labour law, the Labour Code and the Code of Civil Proceedings;

3) articles of incorporation of the trade union. By comparing the content of the challenged act with the content of provisions of law and the articles determining the "scope of operation of the trade union" (employers' association) it is possible to find out whether the challenged legal provisions concern issues covered by the trade union's (employers' association's) field of operation.

Of primordial importance for determining the scope of operation of trade unions is, in the opinion, of the Tribunal, Art. 1 of the Trade Union Act providing that a trade union is a voluntary and self-administering organisation of the working people, established to represent and protect their rights, professional and social interests. The issue who should be deemed the "working people" is, according to the Tribunal, resolved by Art. 2 of the Trade Union Act providing for the categories of people entitled to form and join trade unions. Let me add at this occasion, that in that very case, opposing the rule it has worked out itself, the Constitutional Tribunal interprets the Constitution from the angle of an ordinary piece of legislation. In Art. 1 of the Trade Union Act „it is thus representation of professional and social rights and interests directly related to the employee (or employee-like) status being a precondition for having the right to be a trade union member that is at stake" (decision of 18 November, 1998, K/20/98 (OTK 1999, No. 1, item 5).

In its decision of 24 September, 1996 the Tribunal refused to put in train the application by Management Board of the National Trade Union of Medical Doctors who challenged the Budget Act for the year 1996 claiming that it violated Art. 70 of the Constitutional Provisions in that the expenditures on public healthcare systems were too limited to allow for execution of the citizens' right to free medical care.

In reasons to the decision the following can be read: "(…) the application to the Constitutional Tribunal has to be directly related to the legal interest of a specific organisation as such or with legal interest of members of the organisation, for the protection of which interest the organisation has been established. Organisations of that kind are, however, not supposed to turn to the Constitutional Tribunal with applications concerning all-state or all-society matters which, by the very nature of things, concern legal interests of all the citizens or a group much broader than those represented by the organisation." In favour of such narrow interpretation of the capacity to initiate proceedings calls, according to the Tribunal, the fact that

in the democratic state of law there exist specific institutions and procedures for protection of rights of all the citizens and control of compatibility of operation of the Parliament with law and general public interest. In that context a somewhat puzzling is the position taken in the Tribunal's decision of 12 March, 2003, Tw 72/02 that provisions of the ordinance on disciplinary proceedings in case of medical doctors being academics, concerning openness of the proceedings before the disciplinary committee, do not have immediate connection with purposes of a trade organisation of the doctors (for a broader discussion of the object-related capacity of trade unions to initiate proceedings see the Tribunal's judgment of 28 April, 2009, II 27/07 and the judgments quoted therein).

Another example of negative determination of the object-related capacity of trade unions to initiate proceedings provides decision of the Tribunal of 20 December, 2000, K31/00 (OTK 2000, item 304) concerning an application by the federation of Trade Unions of Telecommunications Employees in the Republic of Poland . The application concerned an amendment to the Telecommunications Act giving yet another group of Telekomunikacja Polska S.A. company the right to acquire company's shares free of charge. In its reasons to the decision the Tribunal stated that: "Trade union tasks do not include questioning employee rights. In the considered case the trade union questions rights not only of employees of another work establishment, but also those of its own establishment, some of the employees probably being members of the trade union (…); consequently (…) the application contravenes, in particular, Art. 7 par. 1 of the Trade Union Act, burdening trade unions with the task to represent rights and collective interests of all the employees, as well as those retired/pensioned or having become unemployed (art. 2 of the said Act)."

As regards employers, the most complete discussion of their right to initiate proceedings was provided by the Tribunal in its judgment of 7 May, 2001, file ref. K 19/00 in the case filed by the Confederation of Polish Employers which concerned the Act of 3 March, 2000 on Remuneration of Persons Managing Certain Legal Entities (popularly referred to as the "Skyrocketing Salaries Act", Journal of Laws, No. 26, item 306). The Tribunal stated in it that falling into the category of "employers' organisations" entitled under Art. 191 par. 1 item 4 of the Constitution to initiate proceedings before the Tribunal is not determined by a merely formal criterion of operation under the Act on Employers' Organisations. The Act actually provides for the legal status of three types of employers' organisations: employers' associations, federations of employers' associations and confederations of employers' associations.

From the linguistic point of view an "employers' organisation" is an organisation whose membership includes only entities being employers. It is, however, assumed by the Tribunal that the right of the federations and confederations to initiate the proceedings can be a derivative of the right in which, as a rule, the employers' associations being members of the organisation are vested. For that

reason the Tribunal found it necessary to resolve whether the contested Act concerned the scope of operation of employers' associations being members of the Confederation. Finally, it recognized the Confederation's right to act, since its membership includes, among others, public employers to whom the "Skyrocketing Salaries Act" is applicable.

It is required by the Tribunal that the applicant of a limited capacity to initiate proceedings should indicate the legal basis for its application. It is also expected that a resolution of a (collegiate) body representing the whole organisation should be filed, providing the authorization to file the application in a strictly specified scope, i.e. including the details of the contested provision and the standards against which the latter is to be examined (cf. K 19/00).

8. Many a time the Constitutional Tribunal has passed judgments concerning collective labour agreements (CLAs). Of particular importance are three judgments made in a relatively short time after the Constitution of 1997 had come into force: those of 21 October, 2001, K22/01, OTK 2001, No. 7; of 18 November 2002, K 37/01, OTK 2002 in A6, and of 24 February, 2004, K 54/02, OTK 2004, No. 2A, item 10.

Considering that – as the common opinion of legal scholars holds it – the Constitution has established a closed (within its entire text) catalogue of universally binding sources of law, a problem of further effectiveness of so-called specific (autonomous) sources of labour law, the CLAs in particular[15], arose. The issue is of immense significance, while a most complicated one and deserves a separate discussion, which already has – to a certain extent – been provided[16]. Given that circumstance, I will restrict myself to a brief reminder of the most essential arguments of the judgments in question.

As everybody knows, the collective labour agreement has not been mentioned in the catalogue of universally binding sources of law (Art. 83) nor the internal ones (Art. 93 of the Constitution). Still, it is expressly mentioned in Art. 59 par. 2 of the Constitution as one of the objectives pursued by social partners when bargaining collectively. The constitutionally-based status of CLAs makes the establishment and effectiveness of such acts uncontested as regards the operation of social partners. The state is obliged to recognize the binding force of a CLA if concluded in compliance with law.

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[15] Cf. in particular L. Kaczyński, *Wpływ art. 87 Konstytucji na swoiste źródła prawa pracy (uwagi wstępne)* [The Impact of art. 87 of the Constitution on Specific (Autonomous) Sources of Law (Initial Remarks)], PiP 1997, Vol. 8, p. 61 *et seq.*; L. Kaczyński, *W sprawie zgodności przepisów prawa pracy z Konstytucją – polemika* [On the Issue of Conformity of Labour Law Provisions with the Consitution – A Polemic], PiZS 1998, Vol. 3, p. 40 *et seq.*; L. Florek: Zgodność przepisów prawa pracy z Konstytucją [Conformity of Labour Law Provisions with the Constitution], PiZS 1997, Vol. 11, p.8 *et seq.*

[16] Cf: M. Zubik, *Trybunał Konstytucyjny a układy zbiorowe pracy* [The Constitutional Tribunal and Collective Labour Agreements], PiZS 2005, Vol. 3, p. 2 *et seq.*

As the Constitutional Tribunal holds, from Art. 59 of the Constitution there stems a duty of the State to secure (both to trade unions and employers' associations):

– the right to take the initiative to conclude a CLA;

– the right to participate in collective bargaining concerning a CLA;

– a possibly wide freedom to shape the contents of a CLA.

It is mostly the social partners themselves that shape their mutual relationships, yet the State must not remain indifferent to the issue, as is it burdened with the Constitution-imposed duty to protect labour (Art. 24). Although Art. 59 of the Constitution does not expressly authorize the law-maker to limit the right to conlude collective labour agreements, it nevertheless may, the Constitutional Tribunal says, impose limitations concerning the contents of CLAs, provided that such limitations are needed to protect other constitutional values (art. 3//1 par. 3 of the Constitution), and introduce instruments and procedures whereby the limitations can be lifted, such as, in particular, the category of a representative trade union or a time limit for starting the bargaining aimed at concluding a CLA. Nor does the Constitution preclude statutory regulation of the procedure of concluding a CLA. Under conditions of trade union pluralism, the law-maker also has to take into account possible conflicts between trade union organisations.

In K 37/01 case the Tribunal examined, in great detail, compatibility of provision of Art. 241^7 § 4 of the Labour Code stating that "where a CLA is terminated, until a new CLA comes into force provisions of the current CLA remain in force, unless the parties have agreed in the CLA or will have agreed on another time limit for the application (…) of the terminated CLA", with Art. 59 par. 2 and Art. 20 of the Constitution. The Tribunal shared the objections of the applicant (the Confederation of Private Employers) that the provision limits freedom of bargaining and disturbs equality of the parties by providing advantage to trade unions in bargaining over amending a CLA.

In the same case the Tribunal considered a charge of infringement of the right to voluntary bargaining by provisions of Art. 241^1 § 1–5 of the Labour Code allowing for a so-called generalization of a collective labour agreement, i.e. extension of its binding force, by virtue of an order of the minister competent for matters of labour, onto employers and their employees not covered by any multi-establishment CLA. Rejecting the charge the Tribunal quoted in the reasons, *inter alia*, the fact that the extension may take place "solely at the request of the concerned employers and trade union organisations after additional conditions specified in the provision have been met".

The Constituional Tribunal did not directly address the issue of legal nature of a collective labour agreement as a source of law. Whatever has been pronounced by it on the matter must not be lost of sight, though:

– that a CLA is constitutionally-based and that the State has to recognize its binding force;

– that the legal system, as provided for by the Constitution, is a dichotomous one (including the universally binding law and that internal) and that there are no grounds for seeking a "third system" (cf. the judgment of 28 June, 2000, K 25/99, OTK 2000, No. 5).

Considering the said I believe that it is possible to state that – according to the position taken by the Constitutional Tribunal – a CLA is a source of universally binding law[17] (as, by will of the makers of the legal system, it provides for rights and duties of all subjects that can enter employment relationships, including individuals). It is, at the same time, a specific (autonomous) source of labour law considering the subjects that create it, the way in which it is created, and the fact that the subject matter of its provision can only include issues that fall into the scope of operation of social partners[18].

9. The Tribunal has also made judgments on other issues of collective labour law which judgments, considering parameters of space of this paper, cannot be tackled here. Let me just mention the issue of trade union representativeness, considered in the context of equal treatment, to which subject the judgments of 11 December, 1996, K 22/01 and of 23 October 2001, K 22/01 (OTK 2001, item 215) refer. Both praise representativeness as a factor that helps streamline CLA-related bargaining and consolidate trade union movement.

Also particular protection of employment relationship stabilization in case of trade union officers has drawn the attention of the Tribunal at least several times (cf. the judgment of 27 April 2003, P7/02, OTK 2003, item 29).

The subject matter of judgments of the Constitutional Tribunal has also included provisions concerning: collective dispute resolution (e.g. judgment of 24 March 1997, K 19/96, OTK 1997, item 6); information and consultation of employees (judgment of 1 July 2008, K 23/07, OTK 2008, No. 6, item 100); trade union assets lost owing to the imposing of martial law (judgment 25 February 1992, K 4/91, OTK 1992, item 2; judgment of 3 December 1997, K 1/97, OTK 1997, item 68); Workers' Holiday Fund (judgment of 3 June, 1998, K34/97, OTK 1998, item 49).

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[17] Such is the view expressed, for instance, by E. Gdulewicz, (in:) *Polskie prawo konstytucyjne* [Polish Constittutional Law], W. Skrzydlo (ed.), Lublin 1997, p. 203; A. Gwiżdż, *Kilka uwag o tworzeniu prawa pod rządem nowej Konstytucji* [A Few Remarks on Law-Making under the Rule of the New Constitution], "Gdańskie Studia Prawnicze" 1998, Vol. III, p. 102–103; K. Działocha, *Zamknięcie systemu źródeł prawa w Konstytucji RP*, (in:) *W kręgu zagadnień konstytucyjnych* [The Catalogue of the Sources of Law in the Constitution of the Republic of Poland, (in:) In the Circle of Constitutional Issues], Katowice 1999, p. 125–126.

[18] Cf, for instance, P. Sarnecki, *System źródeł prawa w Konstytucji Rzeczypospolitej Polskiej* [The System of Sources of Law in the Constitution of the Republic of Poland], Warszawa 2002, p. 26–27.

The above presented review of Constitutional Tribunal's judgments in the field of collective labour law makes it clear that they account for a significant part of the Tribunal's judicial output, deserving a thorough examination.

ABSTRACT

The author presents an analysis of the Constitutional Tribunal's activity in collective labour law cases. During the 25 years of its existence, the Constitutional Tribunal has passed many judgments in that field. The matters covered by the judgments included, in particular: freedom of association in trade unions and employers' organizations, trade union rights, equality and representativeness of trade unions, collective labour agreements and other autonomous sources of labour law, information and consultation of employees and many other issues from the area of collective labour law. The author describes in more detail each of these fields of the Tribunal's activity. In particular, numerous judgments of the Constitutional Tribunal concern various trade union rights – the right to opine on drafts of legal acts or the right to make applications to the Constitutional Tribunal. Under Art. 191 par. 1 item 4 of the Constitution, national managing bodies of trade unions and employers' associations have the right to file applications to the Constitutional Tribunal to examine compatibility of a normative act with the Constitution if a specific normative act concerns matters falling into the field of their operation. The review of Constitutional Tribunal's judgments in the field of collective labour law presented by the author makes it clear that they account for a significant part of the Tribunal's judicial output.

SPRAWY Z ZAKRESU ZBIOROWEGO PRAWA PRACY PRZED TRYBUNAŁEM KONSTYTUCYJNYM

Streszczenie

Autorka poddaje analizie aktywność Trybunału Konstytucyjnego w sprawach z zakresu zbiorowego prawa pracy. Przez 25 lat swojego istnienia Trybunał Konstytucyjny wydał wiele orzeczeń dotyczących tego obszaru. Sprawy poruszane w orzeczeniach Trybunału dotyczą w szczególności wolności zrzeszania się w związkach zawodowych i organizacjach pracodawców, uprawnień związków zawodowych, równości i reprezentatywności związków zawodowych, układów zbiorowych pracy oraz innych autono-

micznych źródeł prawa pracy, informowania i konsultowania pracowników oraz wielu innych kwestii z zakresu zbiorowego prawa pracy. Autorka opisuje w szczegółach każdy z tych obszarów aktywności Trybunału. W szczególności liczne orzeczenia Trybunału Konstytucyjnego dotyczą różnego rodzaju uprawnień związkowych – uprawnienia do opiniowania projektów aktów prawnych czy prawa zgłaszania wniosków do Trybunału Konstytucyjnego. Zgodnie z art. 191 ust. 1 pkt 4 Konstytucji ogólnokrajowe organy związków zawodowych oraz ogólnokrajowe władze organizacji pracodawców mają prawo wystąpienia do Trybunału Konstytucyjnego z wnioskiem o zbadanie zgodności aktu normatywnego z Konstytucją, jeżeli dany akt normatywny dotyczy spraw z obszaru ich działalności. Przegląd orzecznictwa Trybunału Konstytucyjnego w obszarze zbiorowego prawa pracy dokonany przez autorkę pokazuje, że stanowi ono istotną część całego dorobku orzeczniczego Trybunału.

KEYWORDS

the Constitutional Tribunal, collective labour law, freedom of association in trade unions, trade union, employers' associations

SŁOWA KLUCZOWE

Trybunał Konstytucyjny, zbiorowe prawo pracy, wolność zrzeszania się w związki zawodowe, związek zawodowy, organizacje pracodawców

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COLLECTIVE REDUNDANCIES IN POLAND

1. Over the last years, the laws concerning the termination of the employment relationship have undergone a significant evolution. They have become more flexible in many countries. This tendency has had various causes, including technical and organisational changes and economic crises. There are, however, some protective standards that have remained almost unchanged. One of the finest examples are the rules concerning collective dismissals. Their importance is underscored by the fact that they constitute a part of the international[1] as well as European[2] legal order[3]. The main idea of the legislation is to create a legal framework for redundancies and to enhance the social dialogue. As a result, the law protects employees against the consequences of the restructuring of enterprises.

From this perspective, the evolution of the Polish law seems very interesting. Before 1989 there were no special rules concerning redundancies. At that time, the law was influenced by the specific attributes of the economic system in which the dominant role was played by the state as the main owner and organizer of any and all economic activity. The state wanted also to hide unemployment and to

[1] The ILO Convention No. 158 concerning Termination of Employment at the Initiative of the Employer, hereinafter referred to as "Convention" which refers to both individual and collective aspects of redundancies. See more: International Labour Organisation, *Termination of Employment Digest*, International Labour Office, Geneva 2000.

[2] Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies (OJ L 225, pp. 0016–0021), hereinafter referred to as "Directive", which replaced Council Directive 75/129/EEC of 17 February 1975 on the approximation of the laws of the Member States relating to collective redundancies (OJ L 48, p. 29), as amended by Directive 92/56/EEC (OJ L 245, p. 3). The 1975 directive was one of the first European legal acts concerning labour law (enacted during so called first social action in 1970's). The European legislation assumed that the employees should be protected against the negative consequences of the restructuring of enterprises (R. Blanpain, *European Labour Law*, "Kluwer Law International" 2013, p. 823).

[3] The Convention and the Directive provide for two main protective measures: consultation with workers' representatives and notification to the competent public authority. The Convention guarantees in addition severance allowances.

create – even artificially – jobs. Consequently, there was no room for collective redundancies in the strict sense. The situation changed when the transition to a new economic and social system began. Poland gave up the centrally-planned economy. The Parliament adopted measures necessary to introduce the free market system. In a longer perspective, this had positive consequences, but at the beginning of the 1990's it entailed numerous bankruptcies, liquidations and mass dismissals. The labour law played an ambiguous role at that time. On the one hand, it was necessary to facilitate the transformation. As a result, the legislation accepted the restructuring and destruction of inefficient structures. On the other hand, the labour law had to protect employees affected by the changes[4]. Consequently, in December 1989 the first Law on Collective Dismissals was enacted. The law was replaced in 2003, on the brink of Poland's accession to the European Union, by the Law of March 13, 2003 on Special Principles Concerning the Termination of Employment for Reasons not Related to Employees)[5]. The new legislation was intended to adjust the Polish regulations to European standards.

2. The result of this evolution is a body of rules concerning dismissals and redundancies. The most general regulations can be found in the Law of June 26, 1974 – the Labour Code[6]. The Labour Code applies to all employees unless otherwise provided. It regulates such issues as: the methods of the termination of the employment relationship, the requirements applying when the employer intends to terminate the employment contract, finally the remedies for unlawful dismissals (reinstatement or compensation). The provisions of the Labour Code are modified by the Law on Collective Redundancies[7]. The law applies when workers are made redundant – for one or more reasons not related to individual employees. Compared to the Directive, the Law on Collective Redundancies has a broader scope of application, covering both the public and the private sector. The law applies in all branches and sectors, unless otherwise provided. Exclusions are provided in the case of nominated employees (in parts of the public administration[8], teachers) or temporary workers.

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[4] See more M. Seweryński, *Polish Labour Law from Communism to Democracy*, Warszawa 1999, pp. 33–35.

[5] Journal of Laws 2015, item 192 and 1662, as amended, hereinafter referred to as "CRA" or "Law on Collective Redundancies". In this text the translation by LEX (Wolters Kluwer) has been used.

[6] Journal of Laws 2014, item 1502, as amended, hereinafter referred to as "the Labour Code", "the Code" or "LC". In this text *Polish Labour Code, Bilingual edition Polish-English* with English translation by K. Michałowska, C.H. Beck 2003 has been used.

[7] About the Polish regulation see more e.g. L. Krysińska-Wnuk, *Regulacja zwolnień grupowych pracowników* [Collective Redundancies Regulation], Warszawa 2009.

[8] Their interests are protected in a different way. For instance, civil servants employed on the basis of nomination are entitled to monthly payments from the state budget for a period not longer than 6 months.

The application of the Law on Collective Redundancies depends, however, on the level of employment. Employers with fewer than 20 employees apply the general rules concerning the termination of the employment relationship[9]. This solution is, to a certain extent, disputable. On the one hand, they do not have to pay severance allowances to redundant workers. This is a form of support for smaller employers[10]. On the other hand, they cannot exercise the right to dismiss employees without further restrictions (which is provided for by the Law on Collective Redundancies). This may be dangerous because small and medium enterprises usually need special treatment when it comes to dismissing workers. The lack of special legal instruments facilitating redundancies may cause economic difficulties. The Law on Collective Redundancies is applied during liquidation and insolvency procedures.

According to the European Law, it is necessary to ensure that the employers' obligations as regards information, consultation and notification apply independently of whether the decision on collective redundancies emanates from the employer or from the undertaking which controls that employer. The Polish law does not distinguish the employer's position depending on the source of the decision. Consequently, the obligations provided by the law must be fulfilled even if a decision was taken by the controlling enterprise.

3. The main goal of the law on collective redundancies is to protect employees. The legislation tends to achieve this target in different ways. One can distinguish collective and individual measures, as well as instruments of administrative nature. As regards collective instruments, the law provides for an information and consultation procedure with the involvement of employee representatives – trade unions or elected representatives. The idea is to avoid redundancies or, at least, to limit their scale. When it is impossible, the social partners should look for measures mitigating the consequences of dismissals. The legislation provides for a strong form of consultation: the employer and trade unions should negotiate with a view to reaching an agreement. The procedures covers also the involvement of public authorities that must be informed about the envisaged dismissals. This mechanism protects employees in an indirect way, by helping to improve the situation on local labour markets. Finally, the individual dimension of protection is connected with additional employee rights, such as severance payments and the right to return to work[11] (despite their individual dimension, those rights are still connected with collective redundancies).

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[9] The Law on Collective Redundancies does not apply if at the moment of the issuing of the employer's declaration of will the level of employment is under 20 (the judgment of the Supreme Court of 28 May 2013 r., III PK 59/12, OSNP 2014, No. 7, item 99).

[10] Compare the judgment of the European Court of 30 November 1993 in the case C-189/91 *Petra Kirsammer-Hack* v. *Nurhan Sidal*, 1993 ECR, I-06185.

[11] Compare M. Seweryński, *Polish Labour Law…*, pp. 33–35. See also L. Florek, *Labour Law*, (in:) *Introduction to Polish Law*, S. Frankowski (ed.), Zakamycze-Kluwer 2005, p. 285.

Although the protection of employees is a key aspect of the legislation, it does not constitute the only objective of the redundancy law. It must take into account the economic circumstances and the requirements of the free market. Consequently, the law helps to adjust the level of employment to the current situation of the employer, by eliminating employment relationships that are not economically and organisationally justified[12]. This must entail some restrictions on the protection granted to employees. Consequently, the law on collective redundancies mitigates both the general and the special protection against dismissal. As a result, almost all groups of workers may be covered by dismissals (with some exceptions expressly indicated by the law). To summarize, the legislation is searching for a balance between the protection of employees and the employers' needs related to the functioning of enterprises[13].

4. According to Art. 1.1 CRA, the term "collective redundancies" denotes dismissals effected by an employer for one or more reasons not related to the individual workers concerned where, over a period of 30 days, the number of redundancies is: at least 10 if the employer employs at least 20 and fewer than 100 workers, at least 10 % of the number of workers if the employer employs at least 100 but fewer than 300 workers, at least 30 if the employer employs 300 workers or more. The law refers to all types of employment contracts including fixed-term contracts if they are terminated before their expiration date[14]. It also covers a unilateral change in working conditions which may lead to the expiration of the employment contract[15]. For the purpose of calculating the number of redundancies, terminations of an employment contract which occur by mutual consent for one or more reasons not related to the individual workers concerned are included in the total number of redundancies, provided that there are at least five such terminations (other than redundancies in the strict sense). The 30-days period for the calculation of dismissals begins on the date of the first legal action leading to

[12] Compare K.-P. Stiller, *Der Bestandschutz des Arbeitsvehältnisses in der sozialen Marktwirtschaft*, (in:) *Die Sozialordnung in Polen und Deutschland in einem zusammenwachsenden Europa*. *Gedächtnisschrift für Czesław Jackowiak*, B. von Maydell, T. Zieliński (eds.), Warszawa 1999, p. 157 *et seq*.

[13] The assessment of the protective aspect was rather negative: "*In practice, however, its protective provisions have often turned out to be largely illusory*..." (M. Seweryński, *Polish Labour Law*…, p. 35).

[14] The judgment of the Supreme Court of 4 December 2008, II PK 137/08, Monitor Prawa Pracy 2009, No. 1.

[15] The judgment of the Supreme Court of 17 May 2007, III BP 5/07, OSNP 2008, No. 13–14, item 188. The judgment provoked many doubts and was, partially, modified – if the unilateral amendments constitute a consequence of the change or termination of a collective agreement (the judgment of the Supreme Court of 30 September 2011, III PK 14/11, LEX item 1106746). The conclusion is that the procedure of collective redundancies should be applied if the employer wants to terminate the employment relationships.

the termination of the employment relationship[16]. To apply the Law on Collective Redundancies, the termination must be due to a reason not related to individual workers (a subjective element of collective redundancies). This is a broad concept covering all circumstances on the part of the employer (financial difficulties, reorganization, technological changes) as well as of independent character (*force majeure*[17]). As a rule, the Polish law is consistent with the European standards. A number of questions, however, arises.

The first problem is the subjective scope of the regulation. It refers only to employees in the strict sense (engaged on the basis of the employment relationship). Other groups of workers fall outside of the regulation. On the one hand, this can be disputable from the perspective of the Polish labour market, where a large group of working people are engaged on the civil law basis. Moreover, one should not forget that the Directive refers to workers, which may suggest a broader scope of the application. On the other hand, it is a consistent policy of the Polish legislator to limit the subjective scope of the labour law within the sphere of freedom granted by the European law. In the future, this problem will have to be rethought as a part of a broader discussion concerning the boundary between labour law and other branches of law.

Next, according to the judgments of the European Court[18] and the statement of the doctrine[19], collective redundancies should cover all cases where the termination of a contract of employment is not sought by the employee[20]. The Polish law excludes from the legal definition those instances in which the employer terminates the contract unilaterally and without a period of notice. The reasons for such termination include a serious misconduct on the part of the employee (Art. 52 LC) or a longer absence from work – caused e.g. by illness or the need to take care of a child (Art. 53 LC). Another problem are programs of voluntary redundancies. In such cases, the termination of the employment contract is encouraged by the employer (e.g. by financial incentives) and may constitute a part of early retirement schemes. In Poland, there is a tendency to exclude such situations from

[16] The deciding moment is the date of the declaration of will of the employer (although the termination itself occurs on a later date). This is consistent with the conclusions arising from the judgment of the European Court of 27 January 2005 in the case C-188/03 *Irmtraud Junk* v. *Wolfgang Kühnel*, 2005 ECR, I-885.

[17] See judgment of the European Court of 13 may 2015 in the case C392/13 Andrés Rabal Cañas v. Nexea Gestión Documental SA.

[18] The judgment of the European Court of 12 October 2004 in the case C 55/02 *Commission* v. *Portuguese Republic*, ECR 2004, 9387.

[19] See e.g. C. Barnard, *European Employment Law*, Oxford 2012, pp. 630–631.

[20] On the other hand Article 1(1) of the directive must be interpreted as not precluding national legislation according to which the termination of contracts of employment of a number of workers, whose employer is a natural person, as a result of the death of that employer, is not classified as collective redundancy (the judgment of the European Court of 15 February 2007 in the case C-270/05 *Athinaïki Chartopoïïa AE* v *L. Panagiotidis and Others*, 2007 ECR I-1499).

the scope of collective redundancies, even though the conditions set by the Directive can be met (if the redundancies are for reasons not related to the individual workers)[21].

Another question concerns the method of accounting for terminations based on mutual consent. They are included if they are caused by reasons not relating to employees (initiated by the employer). The problem is that the law provides that mutual agreements are taken into account if there are at least 5 such agreements, while the Directive refers to at least five redundancies[22]. Consequently, the Polish law may be inconsistent with the requirement that in order to calculate the number of redundancies provided for in the definition of collective redundancies, other forms of termination of employment contracts resulting from the initiative of the employer should be treated as redundancies, provided that there are at least five redundancies.

Next, the Law on Collective Redundancies refers to the employer and not to the establishment. This entails serious consequences because one employer may have a number of organizational units. Only some of them may be affected by collective redundancies but the threshold must be calculated in relation to all employees engaged by a given employer (employed in various establishments)[23].

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[21] See more C. Barnard, *European Employment Law*…, p. 631.

[22] According to Art. 1.1 Directive for the purpose of calculating the number of redundancies provided for in the first subparagraph of point (a), terminations of an employment contract which occur on the employer's initiative for one or more reasons not related to the individual workers concerned shall be assimilated to redundancies, provided that there are at least five redundancies. It reads the same in the French (*pour le calcul du nombre de licenciements prévus au premier alinéa, point a), sont assimilées aux licenciements les cessations du contrat de travail intervenues à l'initiative de l'employeur pour un ou plusieurs motifs non inhérents à la personne des travailleurs, à condition que les licenciements soient au moins au nombre de cinq*) and in the German (*für die Berechnung der Zahl der Entlassungen gemäß Absatz 1 Buchstabe a) werden diesen Entlassungen Beendigungen des Arbeitsvertrags gleichgestellt, die auf Veranlassung des Arbeitgebers und aus einem oder mehreren Gründen, die nicht in der Person der Arbeitnehmer liegen, erfolgen, sofern die Zahl der Entlassungen mindestens fünf beträgtversions*).

[23] This solution must be disputable from the perspective of the judgment of the European Court of 7 December 1995 in the case C-449/93 *Rockfon A/S* v. *Specialarbejderforbundet i Danmark*, ECR 1995, I-4291. The Court stresses that the term "establishment" is a concept of the European law and should not be understood and applied in the way enabling the evasion of the directive. In particular the unit (entity) to be regarded an establishment needs neither legal nor factual autonomy. Consequently, the term establishment is the unit in which the redundant employees are carrying out their duties. It is, moreover, in this spirit that the Court has held that it is not essential, in order for there to be an 'establishment', for the unit in question to be endowed with a management which can independently effect collective redundancies. Nor must there be a geographical separation from the other units and facilities of the undertaking (the judgment of the European Court of 15 February 2007 in the case C-270/05 *Athinaïki Chartopoïïa AE* v *L. Panagiotidis and Others*, 2007 ECR I-1499). See also judgments of the European Court of 13 may 2015 in the cases C-182/13 *V. Lyttle and Others* v. *Bluebird UK Bidco 2 Limited* and C392/13 *Andrés Rabal Cañas* v. *Nexea Gestión Documental SA*. The Court decleared, *inter alia*, that national legislation that introduces the undertaking and not the establishment as the sole reference unit is contrary to the

Moreover, the Polish law does not refer to average employment like the Directive does (establishments "normally employing"). The deciding moment for the calculation is the beginning of redundancies. In both cases, the employer has room to influence the structure of employment to avoid the procedure of collective dismissals. This may lead to a conflict with the European standards.

The next problem is that collective redundancies appear only when it is "necessary" to terminate the employment relationships. From this perspective, it is important to stress that the Polish law provides for some legal instruments which are not intended to terminate contracts, but they may have precisely such an effect. According to Art. 42 § 1 LC, the employer may propose an alteration of working conditions. If the employee rejects the employer's proposal, the employment contract terminates after a period of notice. As a result, on the date of the employer's initial proposal, the result of the action is not clear. The Polish courts concentrate on the employer's intentions, which must be seen in a broader context. For example, it is not necessary to establish the collective dismissal procedure if the change of working conditions is a consequence of the termination or alteration of an collective agreement, because the employer just wants to adjust the conditions of work and pay to changing conditions arising from a collective agreement[24]. The purpose of the employer's action are not redundancies in the strict sense, although they might be the final result. In this situation as well, it is disputable whether the Polish law meets the requirements determined at the European level.

Apart from the main category of collective redundancies, the Polish law introduces two additional constructions. It recognizes large redundancies and defines monitored redundancies. Both constructions are provided for by the Law of 20 April 2004 on Promotion of Employment and Labour Market Institutions[25] and were introduced in connection with labour market instruments. Large redundancies occur when more than 50 employees are to be made redundant within three months. Monitored redundancy means a termination of an employment relationships when there are additional services (labour market services) for the redundant worker. In this case some additional obligations towards employees and public authorities apply.

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directive where the effect of the application of that criterion is to preclude the information and consultation procedure provided for in the directive, when the dismissals would have been considered 'collective redundancy' had the establishment been used as the reference unit. Replacing the term 'establishment' by the term 'undertaking' can therefore be regarded as favourable to workers only if that element is additional and does not mean that the protection, which would have been afforded to workers had the number of dismissals required under the directive for the purposes of 'collective redundancies' using the concept of establishment been reached, is lost or reduced. The idea was to eliminate the situations that would be excluded from the directive (R. Blanpain, *European Labour Law…*, p. 829).

[24] Judgment of Supreme Court of 30 September 2011, III PK 14/11, LEX item 1106746

[25] Journal of Laws 2015, item 149, as amended, hereinafter referred to as "PEA" or "Act on Promotion of Employment". In this text the translation published on www.mpips.gov.pl has been used.

5. The first part of the procedure covers information and consultation with employee representatives[26]. In some cases the law provides for a stronger form of consultation – the social partners should negotiate with a view to reaching an agreement. In other cases the employer issues unilaterally the rules concerning redundancies taking into account the employees' proposals. Both documents (the agreement and the unilateral regulations) may be treated as social plans in a broad sense.

As far as employee representation is concerned, as a rule it is constituted by trade unions – more precisely by trade union units active in the given establishments[27]. The representation by trade unions guarantees a relatively high level of protection. Unfortunately, only a minority of Polish employees are represented in this traditional way. This situation is a consequence of the decreasing level of unionization and the requirement that the unions must act *via* formal structures created at a plant level. When there are no trade unions, the employer must consult employee representatives elected according to the procedure applicable at the given employer's. This solution is subject to criticism from various perspectives. Firstly, the law does not regulate the election procedure. The decision may be left to the employer. This lead to abuses – in some cases employers even try to designate workers who are going to represent the staff. Secondly, *ad hoc* representatives do not enjoy any protection against dismissals and other restrictions on the employer's power. This makes their position much weaker than the position of trade unions. The only solution seems to be to create a permanent elected representation that could act as a real alternative when there are no trade unions. The weak position of elected representatives is reflected by the fact that they are involved only in the information and consultation procedure and are not authorized to conclude collective agreements regulating redundancies. Because of this, the fulfillment of the objectives of the Directive is, to an extent, disputable.

The employer is obliged to commence the procedure with employee representatives if it is considering collective redundancies, which means before the decision has been made[28]. The timeline is connected with the objectives which are to be achieved thanks to the consultations of the social partners. The procedure is intended to avoid collective redundancies or to limit their scope. If it is impossible, the social partners should consider how to mitigate the consequences of dis-

[26] The procedure and particularly the involvement of trade unions is considered to be an element of the employees protection (M. Seweryński, *Polish Labour Law…*, pp. 34–35).

[27] To perform the rights granted by the law the organization must unite at least 10 members employed by a given employer (Art. 25^1 § 1 of the Law of 23 May 1991 on Trade Unions, consolidated text: Official Journal 2014, item 167, hereinafter referred to as "TUA").

[28] Which is consistent with the standards set up by the European Court, e.g. in the judgment of 27 January 2005 in the case C-188/03 *Irmtraud Junk* v. *Wolfgang Kühnel*, 2005 ECR, I-885 and in the judgment of 10 September 2009 in the case 44/08 *Akavan Erityisalojen Keskusliitto and Others* v. *Fujitsu Siemens Computers Oy*, 2009 ECR, I-8163.

missals. To avoid or to limit the redundancies, the social partners may conclude a so-called "anti-crisis collective agreement" which allows for the deterioration (for a period not longer than 3 years) of the conditions of work and pay[29]. The main problem is that the decrease in remuneration is not compensated for (e.g. from public funds). Public intervention appears in the case of entrepreneurs affected by special type of problems[30]. By means of collective agreements, the social partners may introduce lay-offs (the suspension of the employment relationship) or reduced working time – with a proportional decrease in remuneration. The remuneration lost by employees is partially compensated for by the employer and public institutions. The practical meaning of the above-mentioned institutions is, however, very limited.

The first step of the procedure is the obligation of the employer to inform employee representatives about the following: the reasons for the redundancies; the number of employees and professional groups to which they belong; professional groups affected by redundancies; the timeline of the redundancies; the criteria of the selection of employees for redundancies; the order in which employees are to be made redundant; the employees' issues connected with the intended collective dismissals (e.g. financial benefits, the method of calculation and assistance in seeking new employment). The information must be submitted in good time, so as to enable employee representatives to make their proposals during the consultation procedure (Art. 2.4 CRA). The representatives may demand further information relevant to the consultation (Art. 2.5 CRA).

The final objective of the procedure is to conclude a collective agreement creating a legal framework for the intended redundancies. The agreement is concluded with trade unions. As a rule, the employees should be represented by all union organisations active in a given establishment. If the conclusion of the agreement with all the unions is impossible, the employer may negotiate with the strongest (the most representative) organisations[31]. Thanks to this solution, the social dialogue may be conducted even if employee representation is divided. During the negotiation process, the trade unions represent all employees. Consequently, the agreement covers trade union members as well as employees who do not belong to unions. It guarantees a real protection of employee interests. One should not also forget that the agreement may introduce only such provisions that are favourable for employees (Art. 9 § 2 LC). Consequently, the legislation assumes that the negotiated conditions are accepted by employees.

[29] The Labour Code provides for three types of such agreements: suspending collective agreements (Art. 241^{27} LC), suspending other autonomous sources of labour law (Art. 9^{1} LC) and worsening employment standards arising from individual employment contracts (Art. 23^{1a} LC).

[30] It is regulated by the Law of 6 November 2013 on Special Solutions Concerning the Protection of Workplaces (Official Journal 2013, item 385, as amended).

[31] The criteria are set up in Art. 241^{25a} LC.

The protective function of the procedure is limited by the fact that in some instances there is no agreement with employee representatives. Firstly, the agreement is concluded only with trade unions but not with elected representatives. This regulation excludes numerous workers from the protection stemming from the process of collective negotiations. When there are no trade unions, the employer issues rules concerning collective redundancies unilaterally after consultations with *ad hoc* representation. One could raise doubts whether this solution meets the Directive's requirement that the consultations should be conducted with a view to reaching an agreement. Secondly, Art. 3.1 CRA provides that the agreement should be concluded within 20 days. The social partners may, of course, extend the deadline for negotiations[32] but if they cannot reach an agreement, the employer is entitled to regulate dismissals unilaterally.

Both collective agreements and unilateral regulations issued by the employer are treated as autonomous sources of labour law (Art. 9 § 1 LC). Consequently, they are of normative character, which means that their provisions are binding not only for the parties (employers[33] and trade unions) but also for third parties – employees covered by those acts. The agreements and regulations may not worsen the situation of the employees (compared to acts which are higher in the hierarchy). The regulations are intended to determine the collective redundancy procedures, as well as the employer's obligations, to the extent necessary to resolve other employee-related matters connected with the projected collective redundancy (Art. 3.2 CRA). The content of the regulations is strictly connected with the subject of information and consultation. Usually, the regulations refer to such issues as: criteria of the selection for dismissals, the timing of the redundancies, the order of redundancies and special (additional) rights of employees who are made redundant (including severance payments). As regards the procedure for the dismissals, the regulations may establish special bodies that select the employees[34].

The most problematic element is the character of the criteria of selection for redundancies that should be applied. The Polish law does not require the application of the principle "last in, first out". As a rule, the employees should be selected on the basis of performance at work, e.g. their productivity. Social criteria (the employee's material or family situation) are accepted additionally. As a result, the regulations may indicate negative criteria of the selection – protecting some groups of employees[35]. Criteria of discriminatory character are not binding (Art.

[32] The judgment of the Supreme Court of 2 March 2004, I PK 387/03, OSNP 2005, No. 9, item 124.

[33] The employer must not depart from the rules arising from the regulations (the judgment of the Supreme Court of 20 June 2006, II PK 323/05, OSNP 2007, No. 13–14, item 186).

[34] The judgment of the Supreme Court of 2 September 1998, I PKN 284/98, OSNAP 1999, No. 18, item 579.

[35] The judgment of the Supreme Court of 16 September 1997, I PKN 259/97, OSNAP 1998, No. 12, item 363.

18 § 3 LC). For instance, the agreement may not protect only trade union members (discrimination due to trade unions membership). At the same time, entitlement to retirement pension[36] can be a valid criterion. The criteria determined in the agreement or regulations are binding. The employees cannot challenge them in court[37]. Sometimes the social partners determine the list of workers who are going to be made redundant.

Another problem are the remedies available when the employer fails to comply with the obligations arising from the law. According to the European Court, the sanctions should be effective, proportionate and dissuasive[38]. In Poland there are no special rules concerning the infringement of the collective redundancies procedure. As a result, the general regulations concerning dismissals must be applied. If the employer has contravened its duties arising from the procedure, the redundancies are deemed to violate the law. There are, however, still effective[39]. The employee is entitled to challenge the individual employer's decision and to request that the notice is ineffective, to apply for reinstatement or compensation (Art. 45 LC)[40]. But in the light of the Directive it is disputable that there are no procedures that would reflect the collective character of redundancies[41].

Apart from the procedure of collective redundancies in a strict sense, there is an independent information and consultation procedure with the involvement of work councils[42]. The procedure covers, *inter alia*, the situation, structure and probable development of employment within the undertaking or establishment and any anticipatory measures envisaged, in particular where there is a threat to employment as well as decisions likely to lead to substantial changes in the organization of work or in contractual relations (Art. 13 ICA). This procedure may take place at an earlier stage of the decision-making process.

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[36] The judgments of the Supreme Court of 15 October 1999, I PKN 111/99, OSNAP 2001, No. 5, item 143 and of 8 June 1999, I PKN 105/99, OSNAP 2000, No. 17, item 641.

[37] The judgment of the Supreme Court of 2 September 1998, I PKN 284/98, OSNAP 1999, No. 18, item 579.

[38] The judgment of the European Court of 8 June 1994 in the case C 383/92 *Commission of the European Communities* v. *United Kingdom of Great Britain and Northern Ireland*, 1994 ECR I-02479. The infringements must be penalized by means of legal instruments which are analogous to those applicable in the case of the infringement of national law.

[39] Unlike in some other European countries where there are null and void (see C. Barnard, *European Employment Law…*, p. 642).

[40] The judgment of the Supreme Court of 23 January 1991, I PR 452/90, "Praca i Zabezpieczenie Społeczne" 1991, No. 5. This does not apply if the breach of the procedure does not influence the termination of the employment relationship.

[41] Compare the judgment of the European Court of 16 July 2009 in the case C-12/08 *Mono Car Styling SA, in liquidation* v. *Dervis Odemis and Others*, 2009 ECR, I-6653.

[42] The procedure is regulated by the Law of 7 April 2006 on Information and Consultation with Employees (Official Journal 2006, No. 79, item 550, as amended), hereinafter referred to as "ICA".

6. Another element of the procedure is the employer's obligation to inform the public authorities. The Polish law obliges the employer to inform an appropriate labour office. The information is submitted two times: at the beginning of the procedure (information submitted to employee representatives) and after the conclusion of the agreement (or after the unilateral regulations have been issued). In the latter case, the employer provides information on the arrangements adopted in connection with the collective redundancy, including the number of employees normally employed and the number of employees to be made redundant, the reasons for the redundancy, the period over which the redundancy is to be effected, and on the consultations relating to the projected collective redundancy with the trade unions active in the employer's work establishment or with the employee representatives appointed in accordance with the standard procedure adopted by the employer (Art. 4.1 CRA). The employer is obliged to forward a copy of the notification to employee representatives, who may submit their comments to the labour office (Art. 4.2 CRA).

The idea behind this notification requirement is to guarantee the time necessary to prepare the local labour market in the face of collective redundancies, whereas the labour office is not authorised to intervene against redundancies themselves[43]. Consequently, the law protects not only the interests of redundant workers (in an indirect way) but also other persons active in the labour market. To achieve this goal, the legislation combines the notification with the termination of employment relationships. Firstly the declaration of will leading to the termination of the employment relationship must not be issued before the employer has submitted the information to the public authorities. Secondly, the termination of the employment relationship may occur not earlier that 30 days after the information has been delivered.

Additional employer's duties are provided for by the law on the Promotion of Employment. In the case of large redundancies, the employer is obliged to determine, in cooperation with an appropriate labour office, the forms and scope of support for employees who will be made redundant. The support covers work exchange services, vocational counselling, professional training (Art. 70.1 PEA). If the redundancies are monitored, the employer is obliged to establish a program covering labour market services. The program may be financed with the participation of the employer and public administration. All those measures are intended to strengthen the market position of employees and to facilitate the conclusion of another employment contract. The problem is that in practice the above-mentioned solutions seem to be insufficiently effective.

7. The Law on Collective Redundancies combines the protection of employees with market mechanisms. Consequently, it facilitates the termination of employ-

[43] The role of public authorities is disputable from the perspective of the European standards. See more C. Barnard, *European Employment Law*…, p. 641.

ment contracts when this is justified by economic, technological or organisational reasons. This objective is achieved at various levels.

The most important consequence of collective redundancies is the elimination of the special protection of employees. As a result, the employer may terminate employment contracts even with those employees who are protected in a special way due to their personal situation or functions they carry out. Only in some instances, expressly indicated by the Law on Collective Redundancies, the employer must not terminate the employment contract. The protection is maintained in relation to the following employee groups: employees in the pre-retirement period, pregnant women, employees during maternity (or similar) leaves, trade union officials, members of various bodies representing employees (e.g. work councils, special negotiating bodies or European Work Councils), social work inspectors and employees during their military service[44]. During the periods of protection, the employer may only change the conditions of employment. If this action entails a decrease in remuneration, the employee is entitled to a special bonus which compensates for the decrease. The protection against termination is abolished entirely in the case of the employer's bankruptcy or liquidation when, as a rule, the entire workforce must be laid off, unless the undertaking or its part are taken over by another employer[45].

Next, the Law on Collective Redundancies limits the so-called general protection against dismissal granted to all employees engaged for an indefinite term (Art. 38 LC). If the employer has concluded with trade unions a collective agreement regulating redundancies, there is no obligation to consult individual dismissals with trade unions (Art. 5.2 CRA). It is also possible to terminate the employment contracts of employees who are on their annual leaves and who are absent from work (in the case of longer absences)[46]. The employer may also change their working conditions. Moreover, it is also possible to terminate fixed-term contracts before their expiration date (with a 2-week notice[47]). Finally, in all cases when the

[44] At the moment the obligatory military service is suspended.

[45] L. Florek, *Labour Law*…, p. 285.

[46] If the period of their absence justifies the termination without period of notice (Art. 53 LC).

[47] The period of notice does not depend on the period of employment. This solution was challenged by the European Court. According to the Court, clause 4(1) of the Framework Agreement on fixed-term work must be interpreted as precluding a national rule which provides that, for the termination of fixed-term contracts of more than six months, a fixed notice period of two weeks may be applied regardless of the length of service of the worker concerned, whereas the length of the notice period for contracts of indefinite duration is fixed in accordance with the length of service of the worker concerned and may vary from two weeks to three months, where those two categories of workers are in comparable situations. The judgment of the European Court of 13 March 2014 in the case C-38/13 *Małgorzata Nierodzik* v. *Samodzielny Publiczny Psychiatryczny Zakład Opieki Zdrowotnej im. dr. Stanisława Deresza w Choroszczy.* The regulation is going to be changed due to the amendment of the laws on fixed-term contracts (the amendment of the Labour Code and other laws enacted on 25 June 2015). The law will introduce similar standards of terminating open-ended and fixed-term contracts.

employer is terminating the employment relationship due to a reason not relating to individual employees, it is entitled to shorten the 3-month period of notice to one month. The employee is, however, entitled to compensation equal to the remuneration for the lost period (Art. 36^1 LC).

The regulations facilitating lay-offs may be considered to be a compromise. They enable the employer to adjust the level of employment to the real situation of the enterprise, while tending to maintain the protection of some specific groups of employees. Additional protection may be granted during the negotiations with employee representatives.

8. Employees who have been made redundant within collective redundancies are entitled, first of all, to a severance payment which mitigates the negative consequences of the termination of the contract. It compensates for the loss of job, and it may play a social role helping the employee to adjust to the changing circumstances. The social importance of the severance payment increases when there is no sufficient support from external sources (e.g. public funds[48]).

The amount of the severance payment depends on the period of employment with the given employer and amounts to: 1 month's wages if the employee has been employed less than 2 years; 2 months' wages, if the employee has been employed no longer than 8 years; 3 months' wages, if the employee has been employed longer than 8 years (Art. 8.1. CRA). The amount of severance payment must not exceed 15 times the statutory minimum wage (Art. 8.4 CRA). As a result, the level of payments must be assessed as relatively low. Consequently, it does not create a real obstacle in terminating the employments contracts. Moreover, it cannot be treated as a sufficient form of support for redundant workers. Collective agreements and individual employment contracts may, however, introduce provisions more favourable for employees.

Employees who have been made redundant within collective redundancies have also the right to the re-employment if the employer decides to recruit workers again (Art. 9 CRA). There is, however, a number of conditions that must be met. Firstly, the employee must apply for the reinstatement within one year after the termination of the employment contract. Secondly, the employee's entitlement is valid if the employer recruits employees within 15 months since the dismissal occurred. Thirdly, the obligation to reinstate the employee exists only when the employer is going to engage workers in the same professional group. The regulation reflects the fact that the employees were made redundant due to reasons not relating to them – usually because of the economic problems or structural changes. Consequently, they should regain their employment if the employer increases employment. This solution may be treated as one of the elements of the general protection against dismissal, which assumes that employees who perform

[48] B. Hepple, *Flexibility and Security of Employment*, (in:) *Comparative Labour Law and Industrial Relations in Industrialized Market Economies*, Kluwer 1993, s. 264.

their duties appropriately and diligently should have the possibility to continue their employment unless there are some objective reasons for the dismissal.

9. Over the last 25 years the law on collective redundancies has evolved. The first regulations were introduced at the beginning of the transformation to enable the restructuring of the economy but also to protect employees. The next step was the adjustment of the domestic rules to the European standards, which constitute the main criterion of the evaluation of the current legislation. The law has created a comprehensive set of protective measures of collective as well as individual character. Employee protection is supplemented by labour market instruments. At the same time, the law accepts redundancies enabling the employer to adjust the level of employment to the current situation of the enterprise. Consequently, the law is considered to be a compromise between the needs of employees and employers' interests. There are, however, some doubts and problems. Firstly, the legislation must be entirely adjusted to the European standards (e.g. as regards the concept of collective redundancies or *ad hoc* representation). Secondly, it is necessary to consider an increase in the rights granted to redundant workers. The finest example is the level of severance payments which is relatively low. Thirdly, the law will not be efficient enough without stronger public support. Nowadays the burden of structural changes and economic crises is borne mainly by the parties to the employment relationship. To summarize, the Polish law needs to be remodelled to guarantee full consistency with the EU standards as well as efficient protection of employees.

ABSTRACT

The article discusses the institution of collective redundancies under the Polish law. The author outlines the historical development of this institution as well as the objectives which the legislation is meant to achieve. The text also contains analyses of the collective procedure with the participation of employee representatives (trade unions or elected representation), the employer's duties towards public authorities, facilitations in terminating employment relationships and additional rights granted by the law to redundant employees. The regulations are assessed from the perspective of protective standards as well as in the light of the European Union law. The author attempts to point out the weaker elements of the existing system and to formulate some *de lege ferenda* proposals.

ZWOLNIENIA GRUPOWE W POLSKIM PRAWIE PRACY

Streszczenie

Tekst prezentuje instytucję zwolnień grupowych w polskim prawie pracy. Autor przedstawia jej historyczny rozwój oraz cele, którym mają służyć badane regulacje. Tekst zawiera analizę procedury zwolnień grupowych z udziałem podmiotów zbiorowych reprezentujących pracowników, obowiązki pracodawcy wobec podmiotów publicznych, ułatwienia w rozwiązywaniu stosunków pracy i wreszcie uprawnienia przysługujące zwalnianym pracownikom. Przepisy są oceniane z perspektywy standardów ochronnych, jak również wymagań prawa Unii Europejskiej. Autor wskazuje kwestie budzące wątpliwości oraz formułuje wnioski *de lege ferenda*.

KEY WORDS

employment, relationship, contract, employer, employee, collective, redundancy, dismissal, termination, trade unions, protection, agreements

SŁOWA KLUCZOWE

stosunek pracy, umowa, pracodawca, pracownik, zbiorowy, zwolnienie, rozwiązanie, zakończenie, związek zawodowy, ochrona, porozumienie

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WORKERS' REPRESENTATION IN FRANCE

1. The following paper deals with issues concerning the origin, development and operation of institutions representing employees in France. The right to create organisations representing employees is closely related to the general right of association.

In France the citizens' right to associate in order to represent and protect rights and interests has been provided for in the Constitution[1]. The provisions being now in force refer to the preamble of the Constitution of the French Republic of 27 October, 1946, according to which preamble „each human being can protect his/her rights and interests by trade union activities and be a member of the trade union selected by himself/herself", and „each employee takes part, through his/her delegates in collective determination of terms of employment as well as in company management."

The notion of „trade union" is referred in France to organisations representing both employees and employers. The above mentioned rules of the Constitution recognise the right of association of both employees and employers, as well as the principle of a double representation of employees, characteristic of France. The latter representation includes trade union representation operating at each level of social dialogue (that of the company, line of business and country as a whole, and representation elected by the entire workforce; the latter, by the very nature of things, exists on the work establishment level.

France has ratified Convention No. 87 of the International Labour Ogranisation (ILO) of 1948 concerning freedom of association and protection of the right to organise and ILO Convention No. 98 of 1947 on the right to organise and collective bargaining and has adhered to the principles of freedom of association, self-administration and independence as set therein, which principles are standards applicable

[1] J.-M. Verdier, *Syndicats et droit syndical, Volume I Libera, structures, action*, (in:) *Traité Dalloz de Droit du travail tome 5*, Direction G.H.Camerlynck, Paris 1987, pp. 138–139.

on a worldwide scale[2]. Also in ILO the notion of a trade union and protection of trade union rights is referred to the unions of employees and employers.

There exists a strict connection between development of labour law as a whole and the history of trade union movement. It would be difficult to talk about sources of labour law without mentioning the role of trade unions in development and practical implementation of those[3]. Many solutions existing within French labour law have been established thanks to the inspiration of the trade union movement and under pressure from it. Among the issues in question the idea of strike and collective bargaining as well as the role and powers of institutions representing the workforce of the company can be named[4]. The matters of workers' representation in France should be viewed against the background of French collective labour law as a whole. This is why the presented paper deals with those issues of employer organizations which concern their cooperation with institutions representing employees.

Reflected in the labour law system is a set of legal bonds existing between three types of subjects: employees and their organizations, employers and their associations, and the state. That very set of bonds determines the existence and development of most essential labour law institutions and social nature of the law. Crucial for the shape of the labour law model in a specific country is the degree of state intervention in employment relationships[5].

Mutual relations between social partners, i.e. trade unions (and other representatives of employees) and individual employers, groups of employers or their organisations are referred to as the bilateral (autonomous) social dialogue. In the social dialogue conducted at the national level, concerning major social and economic issues, the government can also take part (the tripartite social dialogue)[6].

Social partners represent and protect rights and interests of employees and employers respectively. Mutual relations between trade unions (and other representatives of employees) and individual employers, groups of employers or their organisations, referred to as social dialogue, have existed for a long time and, in practical terms, take various forms of mutual contacts, communication and coop-

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[2] *Ibidem*, p. 202–205; N. Valticos, *Droit international du travail*, (in:) *Traité Dalloz de Droit du travail*, Direction.G.H.Camerlynck, t. 8, Paris 1983, pp. 250–253, 257–259 and "Liberté syndicale et négociation collective" BIT Genewa 1994, pp. 110–112.

[3] G. Couturier, *Traité de droit du travail*, 2 Les relations collectives de travail, Ed. PUF Paris 1991, p. 317.

[4] G. Lyon-Caen, *Droit syndical et mouvement syndical*, „Droit Social" 1984, pp. 12–14.

[5] W. Szubert, *Refleksje nad modelami prawa pracy* [Reflections on Models of Labour Law], „Państwo i Prawo" 1989, Vol. 10, p. 5–6 and W. Szubert, *Réflexions sur les modèles de droit du travail*, Droit Polonais Contemporain, „Polish Contemporary Law" 1990, Vol. 1 (85), p. 5–6.

[6] E. Sobótka, M. Pliszkiewicz, *Dialog społeczny. Instytucje, regulacje prawne, praktyka. Polskie rozwiązania na tle porównawczym*, (in:) *Regionalna szkoła dialogu społecznego. Przewodnik* [Social Dialogue. Institutions, Regulations, Practice. Polish Solutions against a Comparative Background, (in:) Regional School of Social Dialogue. A Handbook], Gdańsk 2000, p. 17–63.

eration of the subjects in question: transfer of information, consultations held *ad hoc* or on a systematic basis, negotiations conducted to resolve an existing collective dispute, collective bargaining which may lead to concluding a collective labour agreement or other collective accord, up to joint development of assumptions for and plans of economic and social policy of the country. It must not be forgotten that whatever is referred to as a „social dialogue" now has existed long and has been inextricably linked with „industrial relations" (*relations professionnelles*, *kollektive Arbeitsbedingungen*) and "collective labour law".

Mutual relations between the above mentioned participants of social dialogue can take place:

– informally, following the rules set through the will of the participating subjects;

– within existing institutions, following the rules specified in the articles or other acts providing for the origin and operations of the institutions[7].

As far as so-called civic dialog (a multilateral scheme) is concerned, this can be talked of when its participants include, besides representations of employees and employers, also representatives of other social groups: industrial producers, farmers, carriers, tradesmen, craftsmen, learned professions and social organizations. The subject of the dialogue is broader compared with that of social dialogue and embraces major economic, social and cultural issues. Institutions of the civic dialogue are usually bodies that operate solely in the consultative capacity[8].

In France, partners of the social dialogue on the employer side include individual employers, their national organisations (federations) and inter-trade organisations operating at the national level. As far as the state is concerned, it is governmental agencies that participate in the social dialogue. The latter form a complex structure, as the state plays numerous and highly diversified roles (those of an employer, administrator, public power, the body participating in negotiations and being, at the same time, the subject matter of those)[9].

It is not only traditional social partners, but also other subjects that take part in France's social and civic dialogue. Legal regulations concerning the dialogue are comprehensive and complex, as they result from a long evolution. A characteristic feature of the dialogue is a multitude of its participants. The trade union movement is diversified and internally divided. New trade unions emerge, owing mostly to splits of the existing ones[10]. Meanwhile, trade unions are accused of inefficiency,

[7] *Ibidem*.

[8] *Ibidem*.

[9] A. Lyon-Caen, *L'organisation fonctionnelle et institutionnelle de la réglementation des conditions de travail*, (in:) *La réglementation des conditions de travail dans les Etats membres de la Communauté européenne*, Commission des Communautés Européennes, Europe Sociale, Vol. 2, Supplément 5/93, Bruxelles 1993, p. 101 and F. Favennec, P.-Y. Verkindt, *Droit du travail*, 2e éd., Paris 2009, pp. 66–67.

[10] Cf. Infra, chapter II.

inability to cooperate with one another and excessive involvement in politics. National employers' asociations include numerous trade and professional organisations, which fact hinders coordination of their activities and collaboration[11].

Social dialogue in France takes the shape of bi-, tri- and multilateral schemes. It takes place in various forms: transfer of information, mandatory and voluntary consultations, voluntary and – at times – mandatory collective bargaining and signing of collective agreements. The dialogue is conducted informally, according to rules established through the will of those participating or within the framework of the existing institutions[12], pursuant to the rules established in their articles of incorporation or other acts whereby the origin and operation of the institutions has been provided for.

Characteristic of France is the multitude of institutions in whose work representative organisations of trade unions and employers participate. The forms of cooperation of institutions supporting social dialogue are many and diversified; these include co-management of specific institutions or public funds by social partners. Another group of the institutions is organizations aimed at solving major socio-economic problems, discussion on drafted pieces of legislation, participation in development and acceptance of various reports and opinions, and research activities[13] on both the national and company level. That group includes institutions referred to in France as the "institutions of participative democracy"[14].

Legal solutions (and practical experience of France in the area of workers' representation) are of high interest to us, as there exist similarities between legal systems of France and Poland, both systems being based on a vast state-enacted labour law legislation. Also the structure of the trade union movements is similar in both countries. It is pluralistic, diversified in terms of political sympathies and ideological outlook, and strongly fragmented. The said brings about the need to precisely determine the rules providing for representativeness and legality of operations of those representing employees under social dialogue schemes, as a party to collective bargaining in particular[15].

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[11] *Ibidem*.

[12] E. Sobótka, *Rady Gospodarczo-Społeczne w krajach Unii Europejskiej, jako zinstytucjonalizowana forma dialogu społecznego* [Economic and Social Councils in EU Member States as an Institutionalised Form of Social Dialogue], PiZS 1994, Vol. 10–11, p. 1–16.

[13] M. Pliszkiewicz, *Systemy wsparcia eksperckiego dla uczestników dialogu społecznego w wybranych krajach Unii Europejskiej. Francja*, (in:) *W kierunku dialogu opartego na wiedzy* [Systems of Expert Support to Participants of Social Dialogue in Selected Countires of the EU. France, (in:) Towards Knowlegde-Based Dialogue], A. Zybała (ed.), Ministry of Labour and Social Policy, Centrum Partnerstwa Społecznego „Dialog" im. A. Bączkowskiego, Warszawa 2009, pp. 96–122.

[14] G. Caire, *France*, (in:) *Toward Social Dialogue: Tripartite cooperation In national economic and social Policy-making*, A.Trebilcock (ed.), Interational Labour Office Geneva, Geneva 1994, p. 165 *et seq*.

[15] *Negocjacje zbiorowe we Francji* [Collective Bargaining in France], M. Pliszkiewicz (ed.), Wyd. Biblioteka Dialogu Społecznego, Ministerstwo Pracy i Polityki Socjalnej, Warszawa 1997, pp. 7–8.

Between legal systems of France and Poland there exist also differences. These are of interest to us, too, as they concern legal solutions and problems which are important for the discussion about development and reconstruction of Poland's system of labour law. In a short future we are likely to be faced with a discussion on the drafted labour code and the code of collective labour law.

The issue of workers' representation in France, discussed in this paper, is very broad. It seems also interesting from the perspective of the development of Poland's industrial relations. Considering limitations of space, it is major problems that will be discussed here. These will be presented within the following chapters: II – origins and development of trade unions, III – representation of employees and employers at the national level, IV – trade union participation in institutions of social and civic dialogue, V – workers; representation at the workplace level and VI – Conclusions.

2. Representation of interests of various professional groups in France can be traced back down to the mediaeval times. The entities of representation were formed as mutual assistance associations (associations d'entreaide) and referred to as "fraternities" (confréries). Some fraternities would be established as associations of specific professions and were then called "corporations"[16].

As far as history of representation of workers' interests is concerned, it begun towards the end of the 18th century, during the revolution of 1789. The Declaration of Human Rights adopted on 16th August, 1789, recognised „freedom to express one's views and opinions" which also meant freedom of press and assembly, but did not mention freedom of association at all. Although the decree of 13th and 14th November, 1790 stated that the „citizens have the right to assemble peacefully and establish companies freely", as early as in 1791 professional corporations got illegalized under the Allard Decree. In addition, the so-called Le Chapelier Law adopted in the same year (14th and 15th June, 1791) established a ban on workers' associations and the law of 18th August 1792 liquidated fraternities and mutual assistance associations. And, finally, creation of political clubs was forbidden by the law of 7th Thermidor, year III[17].

Under the Directorate, freedom to form political associations was recognised, as was also recognised freedom of joint-stock companies established with a prior permit of the authorities (real estates being returned to the Church) and the exist-

[16] M. Pliszkiewicz, *Znaczenie stowarzyszeń w Europie na przykładzie Francji*, (in:) *Stowarzyszenia i towarzystwa a społeczeństwo obywatelskie, życie gospodarcze i przestrzeń społeczna* Importance of Associations in Europe as Exemplified by the Case of France, (in:) Associations and Societies and Civil Society, Business Life and Social Space], A. Czech (ed.), published at the occasion of the 60th anniversary of the Polish Economic Society (PTE), Katowice branch, Katowice 2008, pp. 94–98.

[17] B. Gibaud, *Révolution et droit d'association: au conflit de deux libertés*, Ed.Fédération nationale de la mutualité française 1989 and J. Rivero, J. Savatier, *Droit du travail*, PUF, Paris 1991, pp. 43–53.

ence of charity and mutual associations. Creation of associations of employers and employees was banned, though.

Napoleon forbade creating corporations and fraternities under penalties provided for by the Criminal Code. "Getting associated" was proclaimed to be a crime. Non-professional associations could be established freely if their membership did not exceed 20 persons and had been given a discretionary permit by the government.

After the revolution of 1848 a new change took place. The law of 22nd July 1848 and the Constitution of 4th November 1848 established freedom of association. Towards the end of the 19th century development of charity, youth, school, teachers' associations went on, often without seeking authorization by the public authority.

It was, however, only the law of 21st March, 1884 that established the right of employees and employers to freely create their associations. It should be stressed, however, that trade unions were regarded by the law as trade associations whose aims consisted in "protection of economic, industrial, commercial, agricultural" interests of their members. The freedom thus concerned not only employees, but also employers, representatives of learned professions and farmers[18].

The law of 12th March 1920 extended the right to create trade unions and allowed them to operate freely, although trade union organisations operated outside of companies until as late as 1968. Following negotiations of representatives of the government, employers and trade unions, under a so-called Protocol of Grenelle[19], developed yet not signed by the negotiators, the government undertook, *inter alia*, to submit to the Parliament a bill providing for execution of trade union rights within the company. The law, passed on 27th December, 1968 allowed to create trade union sections at enterprises and appoint trade union delegates there. The rights were further reinforced by the law of 28th October, 1982.

With the right returning to power in 1986 new legislation was adopted, allowing for greater flexibility as regards, for instance, working hours under new, atypical contracts of employment, less favourable to employees (contrats précaires). The law of 3rd July, 1986 introduced a procedure whereby laying off employees for economic reasons became easier as no consent of the labour administration had to be sought. As opposed to the scheme, the law of 30th December, 1986, strengthened control of dismissals due to economic reasons by bodies representing the staff[20]. Starting from 1990's labour legislation focused on issues related to employment and counteraction of unemployment. The important laws passed at that time concerned the long process of reduction of working hours (initially implemented by means of collective bargaining), as did the laws of 13th June 1998

[18] G. Couturier, *Traité de droit*…, p. 317–318.

[19] *L'Accord de Grenelle. Projet de Protocole d'accord*, „Droit Social" 1968, Vol. 7–8, p. 449.

[20] F. Favennec, P.-Y. Verkindt, *Droit*…, p. 20–21.

and 19th January, 2000. The latter piece of legislation reduced the weekly working hours down to 35[21].

Through a number of laws EU directives were transposed to the French legislation, examples being the directives on informing and consulting employees, as well as on equal treatment of employees and ban on discrimination. From the perspective of this paper, a most important reform was made by the Act of 4th May, 2004 on lifelong vocational training and social dialogue[22].

3. The oldest trade union organisation – CGT[23] (General Labour Confederation) – was established at the Congress of Limoges on 23 and 24 September, 1895. In 1922 a minority group related to the Communist Party abandoned CGT to form a new United General Labour Confederation (CGTU)[24]. In 1936 CGTU returned to CGT. A second split took place in 1948. That time the minority was a group related to the socialist tradition. They left the ranks of CGT and established a new confederation referred to as the General Labour Confederation – Workers' Power (CGT-FO)[25].

CFTC[26] – the French Confederation of Christian Workers – was established on 1–2 November, 1919, but the first Christian trade union (Trade Union of Paris Commerce and Industrial Employees) was already formed in 1887. In 1964, at the Extraordinary Meeting of CFTS the members who decided to strike off references to Christian morality in trade union operation from the articles formed the French Democratic Labour Confederation (CFDT[27]).

The French Confederation of Executives (CFE) was created on 15th October, 1944. On May 21, 1981, its name was extended to include a new element reading the General Confederation of Executives (CGC). Both elements are included in the name used by the organization now (CFE-CGC)[28].

New trade union organizations would emerge as a result of split of those already existing. In 1948, when CGT was divided, a federation of trade unions operating in the sectors of education, scientific research and culture emerged (FEN)[29], with membership reaching about 550,000 people in early 1970's, much more than certain confederations recognized as representative ones had. In 1992

[21] Rola porozumień zbiorowych przy skracaniu czasu pracy we Francji, (in:) Czwarty przegląd układów zbiorowych pracy. Materiały z Konferencji NSZZ "Solidarność" [The Role of Collective Agreements in Working Time Reduction in France, (in:) A Fourth Review of Collective Labour Agreements. Materials of Conference of "Solidarity" Trade Union], Kraków 23–24.03.2000, p. 35–43.

[22] *Ibidem*.

[23] Confédération Générale du Travail.

[24] Confédération générale du travail unitaire.

[25] Confédération générale du travail – Force Ouvrière.

[26] Confédération française des travailleurs chrétiens.

[27] Confédération française démocratique travail.

[28] Confédération française de l'encadrement – Confédération générale des cadres.

[29] Fédération de l'éducation nationale (FEN).

the Federation got transformed into the Uniform Trade Union Federation (FSU)[30], and in 1993 in the National Union of Autonomous Trade Unions (UNSA)[31]. In 1998 a trade union organization named SUD[32] emerged from CFDT.

4. The representativeness of a trade union means its particular capacity to appear in certain issues of industrial relations on behalf of all employees[33]. The percentage of trade unionists among French employees is very low, reaching some 8–9% of them[34]. The criterion of the number of members is thus not sufficient and numerous additional criteria of representativeness have been set.

On 31 March, 1966 the Premier together with the Minister of Social Affairs and Employment signed a resolution on recognising five trade union confederations as representative ones. These were: General Labour Confederation (CGT), General Labour Confederation – Workers' Power (CGT-FO), French Confederation of Christian Workers (CFTC), French Democratic Labour Confederation (CFDT) and French Confederation of Executives – General Confederation of Executives (CFE-CGC).

Trade unions not associated in one of the 5 above mentioned confederations had to prove their representativenesss. Pursuant to the former Art. L.133-2 of the French Labour Code, representativeness of trade union organisations was determined using the following criteria: number of members, independence, contributions, experience and period of existence of the trade union, and patriotic attitude during the occupation.

Two further criteria of representativeness were set by the rulings of the Social Chamber of the Court of Cassation. These are: the number of followers and operation of the trade union. When assessing the number of trade union members, according to a ruling of the Court of Cassation of 1952 also a number of followers of a specific trade union should be taken into account, expressed as the number of votes falling to candidates of the trade union at the election of the trade union delegates and members of committee of the enterprise. Actual and permanent operation of the trade union, campaigns launched and influence by non-associated workers are, as the ruling of the Court of Cassation of 1986 states, a criterion of representativeness conforming independence and experience of the trade union.

There is a number of rights which are enjoyed in France only by the representative trade unions (their federations and confederations). They are entitled

[30] Fédération Syndicale Unitaire (FSU).

[31] L'Union Nationale des Syndicats Autonomes (UNSA).

[32] Solidaires, Unitaires, Démocratiques (SUD).

[33] M. Pliszkiewicz, M. Seweryński, *Problemy reprezentatywności w zbiorowych stosunkach pracy* [Problems of Representativeness in Industrial Relations], "Państwo i Prawo" 1995, Vol. 9, p. 3.

[34] *Le travail dans le monde. Relations professionnelles, démocratie et cohésion sociale 1997–1998*, BIT Genève 1997, p. 252 and F. Favennec, P.-Y. Verkindt, *Droit*…, p. 63.

to appoint their representatives at many tri- and mulitalteral institutions where social dialogue is conducted (Economic and Social Council, National Board of Collective Bargaining, administrative boards of social security institutions etc.), participate in national, inter-trade, trade and work-establishment level collective bargaining, nominate candidates in the first round of the election of workforce delegates and members of the committee of the enterprise, designate trade union delegates in enterprises etc.

There has been a long discussion in France in which strong criticism was expressed towards the system of determining trade union representativeness by means of an administrative decision. The creation and operation of new trade union organisations, being – in many cases – larger and more active than the five confederations initially recognized as representative, has had a considerable impact on a change of legal solutions in that respect.

On 9th April, 2008, a „Common Position"[35] was adopted by social partners, in which position new rules and criteria of representativeness of trade unions were determined for each (national, trade, company) level at which collective bargaining may be conducted by the trade unions. In addition, it was decided that where a trade collective labour agreements so allowed, a company-level agreement could be – subject to certain reservations – concluded not only by the trade union delegate, but also by the workforce delegate or even by an employee authorized to do so by the trade union covering a specific line of business. And a decision was also made that validity of the agreement would depend on whether it was signed by a majority of social partners.

Following the „Common Position" of 9th April, 200, unified criteria of representativeness[36] were set forth by the Act of 20th August, 2008, to gradually replace, over a period of 5 years to follow, the earlier presumption of representativeness. In order to gain the status of a representative trade union, the following criteria have to be jointly met by the trade union organization:

– respect to republican values, freedom of political, philosophical or religious opinions in particular, and fight against any forms of discrimination;

– independence from the employer;

– financial transparency (consisting in development of duly supported and published financial statements);

– at least a 2-year period of trade union existence;

[35] B. Gauriau, *La position commune 9 avril 2008: première lecture sur la représentativité syndicale*, "Juris-Classeur périodique. La Semaine juridique Edition social" 2008, Vol. 16, p. 3–6.

[36] Art. L-2121-1 of the Labour Code, G. Borenfreund, *Le nouveau régime de la représentativité* syndicale, "Revue de Droit du Travail", Décembre 2008, pp. 712–722; F. Petit, *Représentation syndicale et représentation élue des personnels de l'entreprise depuis la loi nr 2008-789 du 20 août 2008*, "Le droit ouvrier", Janvier 2009, pp. 22–39; F. Favennec-Héry, *La représentativité syndicale*, „Droit Social", Juin 2009, nr 6, pp. 630–640.

– gaining at least 10% of employee votes at the election to the committee of the enterprise, uniform representation of the staff, and where the latter is missing – at the election of the workforce delegate;

– importance of the trade union (in terms of its operation and experience);

– a sufficient number of fee-paying members.

Within the period of 5 years the criteria will gradually replace the previous presumption of representativeness, as well as criteria of representativeness at the election to the committee of the enterprise, uniform representation of the staff, and where the latter is missing – at the election of the workforce delegate.

5. At the national level employers are represented by 3 organisations recognised as representative ones. These are: the Movement of France's Enterprises – Medef[37], General Confederation of Small and Medium-Sized Enterprises (CGPME)[38] and Union of Craft Employers (UPA)[39].

The biggest employers' association of France is the Movement of France's Enterprises – Medef operating since 1998. Its predecessor was an employers' association existing since 12th June, 1946, referred to as the National Board of French Employers (CNPF)[40] which later changed its name and was transformed into Medef.

Represented by Medef to state authorities, trade unions and the public are enterprises of various size, belonging to all sectors and lines of business. The organisation associates about 1 million of industrial, commercial and service enterprises employing roughly ¾ of the total of France's employees[41]. MEDEF includes 85 trade federations associating enterprises of the same business line, organised into 681 trade union chambers and 51 employers' associations at the local level, 86 at the departmental level and 26 at the regional level[42]. Membership of MEDEF also includes federations of organisations of industrial employers, like the Union of Metal Trades and Professions (UIMM)[43] with its 15,000 businesses, Union of Chemical Industry or the Federation of Mechanical and Metal Processing Industry.

CGPME – the General Confederation of Small and Medium-Sized Enterprises was formed in 1944. According to the data of 2005 it embraces 300 federations with over 150 employers' associations (which cover about 80% industrial, commercial and service professions) and 122 territorial structures (departamental

[37] Mouvement des entreprises de France.

[38] Confédération générale des petites et moyennes entreprises.

[39] Union professionnelles artisanale.

[40] Conseil national du patronat français.

[41] A. Lyon-Caen, *L'organisation fonctionnelle*…, p. 101.

[42] Quid 2007, p. 1612.

[43] Union des industries et métiers de la métallurgie.

and regional unions). The Confederation represents about 1.6 million enterprises and organisations[44].

UPA – the Union of Craft Employers was established in 1975. It consists of 50 federations and about 4,500 employers' associations at the level of department and has 110 regional and departmental structures[45]. The Union associates over 250,000 craftsmen being members of craft organisations involved in construction, manufacturing, service and foodstuff production[46].

6. The French model is referred to as the „social etatism"[47], in which model – unlike in the states of socio-democratic systems – civic organisations, including trade unions, are weak. Given the said, since the end of World Waw II it is the state that has been the major subject operating in the social sphere and playing crucial role in distribution of welfare resources[48].

The state exerts strong influence on the dialogue and cooperation of social partners, considering the extremely broad and detailed legal regulation of the dialogue as well as the existence of the dialogue's numerous institutions at the national and regional level. Within the institutions the state is represented in relations with trade unions and employers' associations by relevant ministers or their plenipotentiaries. There are, however, institutions (like the Socio-Economic Council) where governmental agencies are not directly represented by their representatives.

7. The institutionalised social dialogue is carried out at the national and regional level. Representative organizations of trade unions and employers operate in numerous bi-, tri- or multilateral social dialogue institutions together with representatives of the state and possibly other partners. As it has already been mentioned in the Introduction, the above said are schemes supporting social dialogue, under which schemes social partners co-manage certain institutions or public funds and institutions aimed at resolving major social and economic problems, discussion on drafted pieces of legislation, participation in development and acceptance of various reports, opinions etc. New institutions emerge and organizational changes take place in the existing institutions supporting dialogue and cooperation between social partners[49].

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[44] Quid 2007, p. 1611–1612.

[45] Quid 2007, p. 1613.

[46] Quid 1992, p. 1430.

[47] P. Rosanvallon, as quoted in the paper by P.-E. Tixier, *Quelle nouvelle donne pour le syndicalisme?*, (in:) *La formation syndicale*, "Education permanante" 2003, Vol. 154, p. 61 *et seq.*

[48] J. D. Reynaud, *L'action collective et la régulation sociale*, Paris 1989.

[49] For instance the below discussed institutions of ANPE and UNEDIC got merged; since 16 October 2008 new institutions called "Pôle emploi" (The Employment Pole) have been formed. These have been fully operable since the end of 2009.

The most important of the institutions are: the Economic and Social Council (CES)[50], National Bureau of Employment (ANPE)[51], Supreme Employment Council (CSE)[52], National Board of Collective Bargaining (CNNC)[53], National Council of Vocational Education, Social Promotion and Employment (CNFPPSE)[54], Supreme Council of Handicapped Employee Grading (CSRTH)[55], Administrative Council of Social Security and Family Benefits Institutions (CACSSAF)[56], Council for Pension Matters (COR)[57], Society for Management of Funds for Professional Employment of the Handicapped (AGEFIPH)[58], National Union for Employment in Industry and Commerce (UNEDIC)[59] associating regional Societies for Employment in Industry and Commerce (ASSEDIC)[60], Employment, Income and Social Cohesion Council (CERC)[61], Employment Council (COE)[62], National Council of Employment (CNE)[63].

Some of the above named institutions have their regional counterparts of a similar structure and scope of operations. The counterparts of the Economic and Social Council are regional economic and social councils operating at the regional councils (local government bodies elected under general election scheme). The counterparts of the National Bureau of Employment are regional and departmental employment committees of similar composition. This allows to decentralise the operation of the National Bureau.

A characteristic feature of the social dialogue in France is the fact that representative trade unions and employers' associations manage specified funds, e.g. unemployment insurance funds formed mostly from contributions (from which funds benefits to the unemployed are paid). These are so-called parity organisations[64]. Representative social partners delegate their representatives to adminis-

[50] Conseil Economique et Social.

[51] Agence Nationale pour l'Emploi.

[52] Conseil supérieur de l'Emploi.

[53] Commission Nationale des Négociations Collectives.

[54] Conseil National de Formation Professionnelle, de Promotion Sociale et de l'Emploi.

[55] Conseil Suprême du Ragement des Travailleurs Handicapés.

[56] Conseil Administratif des Caisses de Sécurité Sociale et des Allocations Familiales.

[57] Conseil d'orientation des retraites.

[58] Association de Gestion des Fonds pour l'Insertion Professionnelle des Personnes Handicapées.

[59] Union Nationale pour l'Emploi dans l'Industrie et le Commerce.

[60] Associations pour l'Emploi dans l'Industrie et le Commerce.

[61] Conseil de l'emploi, des revenus et de la cohésion sociale.

[62] Conseil d'orientation pour l'emploi.

[63] Conseil National de l'emploi.

[64] A. Supiot, „Parité égalité, majorité dans les relations collectives du travail", (in:) *Le Droit collectif du Travail; questions fondamentales-évolutions récentes*, Etudes en hommage H. Sinay, N. Aliprantis, F. Kessler (ed.), Peter Lang, Frankfurt a/Main–Berlin–Bern–New York–Paris–Wien 1994, p. 59–68.

trative boards of social security institutions[65] (CNAM[66], CNAF[67], CNAV[68]). They are released from the duty to do work for the time of participation at the meetings, plenary sessions and work of the boards and can also participate during their working hours in training sessions organised for them in connection with performance of their functions.

The administrative boards of the said institutions vote on the amount of subsidies earmarked to that end and transfer the monies to trade unions. In 2003 the subsidies amounted to € 3.3 million, evenly distributed among trade union confederations. Social security institutions are not allowed to remunerate members of the administrative board for their work, regardless of the functions they perform. They can, however, reimburse to companies the costs related to the absence of their employee participating in management of a social security institution. Moreover, they can reimburse travel costs and other costs related to performance of the function to members of the board.

Social security institutions also transfer to trade unions subsidies allowing them to cover the remuneration of technical experts whose task consist in assisting members of the administrative boards to work a position on the issues resolved. The subsidies, being rather low, allow to remunerate a limited number of persons per each trade union.

Other institutions and organizations managed on a parity basis, such as APEC[69], UNEDIC[70], ARRCO[71], AGIRC[72] also provide subsidies and reimburse trade unions whose members sit on their administrative boards. No sufficient data are available allowing to assess the amounts.

By estimates, the resources paid from public funds for participation in management of parity institutions dealing with collection of funds for vocational training of employees and for participation in management of social security institutions account for the following percentage of all income derived by individual trade union confederations: CGT – 34% , FO – 57% ,CFDT – 50%, CFTC – 20%, CGC – 40%[73].

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[65] Pursuant to Art. L.231-2 of the Code of Social Insurance.

[66] *Caisse Nationale d'Assurance* Maladie (CNAM).

[67] Caisse nationale des allocations familiales (CNAF).

[68] *Caisse nationale d'assurance vieillesse* (CNAV).

[69] Association pour l'emploi des cadres (APEC).

[70] Union nationale interprofessionnelle pour l'emploi dans l'industrie et le commerce (UNEDIC).

[71] Association pour le régime de retraite complémentaire des salariés (ARRCO) – Association for Employees' Supplementary Schemes.

[72] L'Association générale des institutions de retraite complémentaire des cadres (AGIRC) – a scheme similar to that mentioned above, in note 71, which ensures iterscheme demographic compensation for executive workers.

[73] Source : *Liaisons sociales*, 1 Sept. 2004, p.28 and 32.

8. In France there is a double representation of workers at workplace level. It includes the trade union representation and that elected by the workforce[74]. The trade union representation is composed of the trade union section (la section syndicale – SS) and the trade union delegate (le délégué syndical – DS), as well as the trade union delegate sitting on the committee of the enterprise. The workforce representation is composed by delegates elected by the whole staff (les délégués du personnel – DP) to the committee of the enterprise (le comité d'entreprise – CE) and to the committee of occupational safety and hygiene and working conditions (le comité d'hygiène, de sécurité et des conditions de travail – CHSCT). In practical terms, however, trade unions exert considerable influence on election of staff representatives to both committees. Under the existing mechanism the trade unions has the exclusive right to nominate candidates of the staff in the first round of the election. Should their candidates not gain 50% of votes, in the second round other candidates may be nominated by the employees as well.

As far as trade union representation at workplaces is concerned, representative trade unions are entitled to create trade union sections[75] in each enterprise[76] regardless of its form and size[77]. The section represents financial and moral interests of its members, enjoying lots of rights facilitating performance of trade union activities at the workplace. The section may appoint a trade union delegate (delegates). The number of the delegates depends on the number of employees (and varies from 1 delegate at workplaces with 50 to 999 employees to 5 delegates where numbers of those employed at the workplace exceed 10,000). A trade union delegate represents its trade union to the employer and carries out trade union activities at the workplace (collecting fees, organising meetings, distributing documents etc.).

It is worthwhile to stress that as far as collective bargaining on establishment-level collective agreements and accords is concerned, it is the trade union delegate and non trade union section that is the partner to the employer. The employer and representatives of the representative trade union (with delegate of

[74] J.-C. Javillier, *Syndicats et représentations élues dans l'entreprise*, „Droit Social" 1984, Vol. 1, p. 31–40.

[75] Trade union representation at workplace level operates under the Trade Union Act which came into force on 27 December, 1968. It provides for creation of a trade union section at the workplace, appointment of a trade union delegate and designation of a trade union representative on the enterprise committee.

[76] No special form is required as regards the establishment of a trade union section or notification of the decision to establish one. It is sufficient to advise the employer, by means of a registered letter or one delivered personally against receipt. The section is not a legal person.

[77] Until 1982 it could be established only at workplaces with more than 50 employees. At present, theoretically, at a workplace with, for instance, 8 employees, 2 of those while being members of CGT-FO trade union confederation representative at the national level, can establish a trade union section . See: J.-E. Ray, *Droit du travail. Droit vivant*, Paris 1993, p. 253.

the trade union mandatorily participating) are obligated to negotiate the issues of[78]: remuneration for work, length and distribution of working hours (every year), conditions of execution of freedom of speech (every 3 years at workplaces where there exist agreements on the issue and every year where such agreements have not been concluded)[79].

Trade union delegates have to be also consulted on:

– measures that must be taken to retrain employees having met with an occupational accident;

– measures facilitating employment of the handicapped;

– application of provisions concerning vacation holidays;

– making construction workers temporarily unemployed owing to changing weather conditions.

The delegates approach the committee of enterprise and committee of occupational safety and hygiene and working conditions on all matters falling into the scope of their responsibilities.

As far as representation of the entire staff is concerned, a major role is played by workforce delegates. They represent employees to the employer and labour inspector, provide consultations on issues of working conditions and employment and cooperate with other institutions representing the staff, i.e. with the committee of the enterprise (CE) and the committee of occupational safety and hygiene and working conditions (CHSCT). They submit to the employer individual and collective requests of the employees concerning application of labour law provisions, collective labour agreements and collective accords (in particular in the field of occupational safety and hygiene and working conditions, remuneration, vacation holidays) as well as legal acts concerning social protection. At the request by an employee the delegate can take part in his/her meeting with the employer preceding dismissal or administration of a penalty to the employee, if any. The delegate also represents employees from other enterprises doing work at his/her enterprise and temporary workers. Where human rights or individual freedoms have been violated, the employer is advised about the fact by the workforce delegate and is obligated to carry out investigation in the case (the delegate participating) and make necessary decisions.

Workforce delegates may turn to the labour inspector in any issues concerning labour law and pass to him/her observations concerning labour law deficiencies. Where the labour inspector visits the enterprise at a request by the workforce del-

[78] Until 1968 negotiations at enterprises were held in case of a conflict. Only the advent of the right to appoint a trade union delegate at workplaces with at least 50-person workforce made it possible to take up negotiations not only where a conflict occurred. A true development of workplace-level negotiations started, however, only after the law of 13 November had been adopted. The latter imposed a duty to negotiate certain specified problems on an annual basis.

[79] *Ibidem*, p. 368–373 and *Negocjacje zbiorowe*…, p. 37.

egate, the latter should be advised about it in advance. The delegate may accompany the inspector during his/her work at the enterprise[80].

It is well-worth remembering that workforce delegates is, historically, the oldest institution of employee representation at workplaces. The institution was established under the legislation of 1936[81] which provided that a collective labour agreement should include a stipulation concerning appointment of workforce delegates at each workplace with at least 11 employees. Further on, the law of 24th June, 1938 provided that workforce delegates should be appointed even at workplaces not covered by a CLA[82]. Despite expectations of employees and trade unions who were counting on more, the role of workforce delegates was reduced to submitting employee queries and demands to the workplace management. It was only the post-war legislation that extended the scope of workforce delegate responsibilities (the laws of 16th April, 1946 and 28th October, 1982), and the law of 20th December, 1993 extended their period of office from 1 to 2 years.

Workforce delegates are elected by the staff for a period of 2 years in all work establishments of the private and state sector (save for state administration entities amenable to public law) having at least 11 employees as at the date of the first round of the election. Numbers of the workforce delegates depend on the number of those employed at a specific workplace[83]. In work establishments with more than 1,000 employees 1 additional delegate and 1 deputy are elected per every 250 further employees. The number of the delegates can be increased by means of a collective labour agreement or other collective accord.

Besides the above presented system of staff and trade union representations, in French work establishment there operate two more bodies in which dialogue between representatives of the staff and the management takes place: committees of the enterprise (CE) and committees of occupational safety and hygiene and working conditions (CHSCT). Their specific features lie in the fact that membership of the committees includes representatives of the staff, trade unions, but also

[80] Workforce delegates have additional rights at workplaces with no enterprise committee (CE) or a committee of occupational safety and hygiene and working conditions (CHSCT) operating. These cover the responsibilities which CE and CHSCT are entrusted with.

[81] This was created under a so-called Matignon Agreement under the law of 24 June, 1963 on collective labour agreements. Cf. J. Rivero, J. Savatier, *Droit*…, p. 191 *et seq.*

[82] G. Aubin, J. Bouveresse, *Introduction historique au droit du travail*, PUF, Paris 1995, p. 283.

[83] The number of delegates falling to a specified number of employees has been determined as follows:

from 11 to 25 employees – 1 delegate and 1 deputy; from 26 to 74 employees – 2 delegates and 2 deputies; from 75 to 99 employees – 3 delegates and 3 deputies; from 100 to 124 employees – 4 delegates and 4 deputies; from 125 to 174 employees – 5 delegates and 5 deputies; from 175 to 249 employees – 6 delegates and 6 deputies; from 250 to 499 employees – 7 delegates and 7 deputies; from 500 to 749 employees – 8 delegates and 8 deputies; from 750 to 999 employees – 9 delegates and 9 deputies.

management of the work establishment. Managers of the establishment or their representatives even perform functions of the chairpersons of the bodies.

Committees of the enterprises were established in 1945 and are regarded as the „privileged places of social dialogue at the workplace level"[84]. They are elected by the staff, for 2 years, in all work establishments of the private and state sector[85] with at least 50 persons employed for at least 12 (not necessarily subsequent) months over a period of 3 years preceding the election.

The committee is chaired by the work establishment manager or a person appointed by him/her, e.g. the human relations manager (supervisor). In addition, it is composed of members and deputy members elected by the staff. Number of the staff representatives depends on the number of employees at a specific work establishment[86]. Besides the persons in question, membership of the committee includes representatives appointed by representative trade union organizations[87]. They do not have the right to vote, though. Those participating in the activities of the committee may also include: collaborators of the chairperson, experts (*inter alia* the company medical doctor, labour inspector, accountant) and an assistant to the committee' secretary[88], none of them having the right to vote.

Responsibilities of the committee of the enterprise include two groups of tasks: (1) representing and expressing collective interests of the employees in all matters concerning management as well as business/financial development of the enterprise, work organisation and conditions, vocational training and welfare matters; (2) execution or control of social and cultural activities run at the enterprise for the employees and their families. Employers are obligated to pass to the committee information on the above mentioned issues and carry out consultations with the committee. The employer should pass, on a systematic basis, information concerning the following fields: legal situation, business and financial standing of the work establishment; remuneration (structure, minimum and maximum salaries/wages etc.); vocational training; employment; qualifications and staff management; production methods; occupational health; safety training;

[84] *Les institutions représentatives du personnel*, La documentation française, Paris 1994, p. 57.

[85] The exclusion is public administration entities governed by public law.

[86] The number of workforce delegates depends on the number of employees at a specific workplace and amounts from 3 members and 3 deputies (at workplaces with 50 to 74 employees) up to 15 members and 15 deputies at workplaces with more 10,000 employees. The number of members may be increased by provisions of collective labour agreements or other collective accords.

[87] The representative of a trade union represents his/her trade union at the enterprises committee and receives all the information passed to the committee. He/she participates in the work of the committee in an advisory capacity.

[88] Deputies of CE members participate in the work of the committee with no right to vote. The secretary of the enterprise committee is elected by a majority of votes, from among the elected members (the chairperson participating in the voting). The same mode of election applies to the treasurer, albeit it is also a deputy member that may be elected to perform the function.

employee participation in benefits from enterprise development; comparison of situation of men and women; situation of the handicapped employees[89]. Consultations have to be held in the areas of: business, legal and financial development of the enterprise; enterprise organization; employment and staff management; working conditions; occupational safety and health; working hours; vocational training; research policy and technological development; professional equality; establishment of a unified staff representation (in work establishments with less than 200 employees).

As regards committees operating at enterprises with 50 to 199 employees, the manager of the enterprise may establish a uniform workers' representation to perform[90] the function of a workers' delegation to the committee (the number of workforce delegates is increased then).

A later emerged institution of social dialogue at the workplace level are committees of occupational safety and hygiene and working conditions (CHSCT). These were established under the law of 23rd December, 1982, amended by the law of 31st December, 1991. Responsibilities of the body include dealing – in a comprehensive way – with occupational health and hygiene, as well as working conditions and demonstrating that the employees are capable of taking care of their working condition themselves. The committee carries out analyses of the work establishment's situation as regards issues of labour and passes to the employer opinions on all issues falling within the scope of the committee's responsibilities.

The committee's composition includes the employer or his/her representative as the chairperson and representatives of the staff from among workforce delegates and elected members of the committee of the enterprise. Their number depends on the number of the employees[91].

Employers are burdened with many duties towards bodies representing employees at the work establishment. Meeting them, if only as regards information and consultation, requires a lot of time and resources, which is a considerable

[89] At enterprises with workforce smaller than 300 employees the employer may produce to the committee an annual report concerning, in particular, standing of the enterprise, remuneration, employment, qualifications and workforce management, as well as comparison of the situation of men and women at the enterprise.

[90] Number of the delegates is determined as follows: from 50 to 74 employees – 3 delegates and 3 deputies; from 75 to 99 employees – 4 delegates and 4 deputies; from 100 to 124 employees – 5 delegates and 5 deputies; from 125 to 149 employees – 6 delegates and 6 deputies; from 150 to 174 employees – 7 delegates and 7 deputies; from 175 to 199 employees – 8 delegates and 8 deputies.

[91] The number of representatives is determined in the following way: from 50 to 199 employees (3 representatives, including 1 being a member of the technical or executive staff); from 200 to 499 employees (4 representatives, including 1 being a member of the technical or executive staff); from 500 to 1499 employees (6 representatives, including 2 being members of the technical or executive staff); over 1500 (9 representatives, including 3 being members of the technical or executive staff). The number of workforce representatives at CHSCT may be increased under an agreement concluded with the employer.

burden to the employer, at small and medium-sized enterprises in particular. This is probably why actions and solutions aimed at creation of a uniform workers' representation at work establishments with less than 200 employees have been undertaken. The same holds true as regards the option of passing a great deal of the information required by law in a single installment, by using the annual report to that end. It should not be lost of sight, though, that the duty to inform employees and hold consultations with them prior to making decisions which are of importance to them and to the enterprise makes it possible to take actions preventing, for instance, mass lay-offs for economic reasons.

The employer would find it rather difficult to meet similar duties towards each trade union section. For that very reason it is useful to have at the work establishment a representation elected by the workforce. But in France, regardless of the social dialogue conducted with the employer by bodies representing the staff, each employee can conduct the dialogue on one's own, directly with the employer or his/her representative. This stems from the employee right to free speech (le droit d'expression). It was established by law No. 82-689 of 4th August, 1982 for the private sector and law No. 83-675 of 26 July 1983 as regards the state sector[92]. Rules for execution of the right are made a subject matter of mandatory negotiations held every 3 years or on an annual basis[93].

9. Discussed in the paper are selected, major problems concerning workers' representation in France at the national and workplace level. Presenting them provides a good basis for making certain conclusions. The legal regulations of the issues, as being in force in France, are of interest to us. Meanwhile, the regulations are very extensive and complex, the fact resulting from long evolution of the social dialogue in France. A characteristic feature of the dialogue is a multitude of its entities and institutions, both at the national and workplace level.

The labour law of France has been the object of permanent debates and disputes as regards both its economic and political aspects. On the one hand it is criticized for not taking into consideration realities of market competition, on the other hand it is accused for not providing due protection to employees. The most important topics in the discussion, raised after 2000, include excessive complexity of legal solutions and the need to enhance the role of social partners in the process of adoption and application of labour law.

French labour law is not only extensive but also detailed. Owing to the general belief that certain simplification of the law is needed, the laws of 2nd July 2003 and 9th December 2009 authorised the government to take up due legislative work aimed at making labour law more transparent. A few important resolutions were

[92] J.-C. Javillier, *Droit du travail*, LGDJ, Paris 1996, p. 505 *et seq.*

[93] See above.

taken by the government on the issue[94]. A decision to re-codify labour law[95] was made under the authorisation contained in Art. 84 of law No. 2004-1343 of 9th December, 2004. The work was supposed to end by 2006, but it actually took longer to complete. Statutory-level provisions of the Labour Code were published as resolution No. 2007-329 of 12th March, 2007 on re-codification of labour law. The resolution, after a decision of the Constitutional Council confirming compliance of the Labour Code with the Constitution had been made, was approved by law No. 2008-67 of 21 January, 2008. In March 2008 executory acts to the Code were enacted.

The new Labour Code came into force on 1 May, 2008[96]. It is composed of eight parts preceded by a new introductory chapter concerning social dialogue. New numbering of the articles was adopted. This contains 4 digits preceded by letter "L" for a statutory provision or by letter „R" to denote the provision of an executory act.

Social partners have long demanded a greater role in the process of creation and application of labour law. On 31st October, 1995, the Inter-Trade Agreement on Collective Bargaining was concluded. Social partners demanded the establishment of a link between collective bargaining as run at all the three (national, branch and workplace) levels and reinforcement of social dialogue and the role of social partners in the area of social policy, including consultations preceding the drafting of legal acts. The Agreement found its continuation in the "Common Position on Ways and Measures of Collective Bargaining Intensification" adopted on 16 July, 2001 by Medef, CGPME and UPA on the employers' side and by CFDT, CFE-CGC, CFTC and CGT-FO. It outlined expectations of trade unions in the area of the social dialogue[97]. Following adoption of the act, the legislator "solemnly" undertook not to carry out major labour law reforms without prior consultation with social partners[98]. The obligation was transformed into a legal duty under provisions of the law of 31st January, 2007 on social dialogue modernization[99]. Currently the matter is provided for in Articles L.1 to L.3 of the Labour Code. Any project of a reform in the sphere of law (labour law in particular), employment or vocational training has be to earlier discussed with representative

[94] F. Favennec, P.-Y. Verkindt, *Droit*…, p. 25–26.

[95] The French Labour Code is not a single piece of legislation, but a compilation of all laws and executory acts from the area of labour law, collected to form one document divided into parts, books, titles, chapters, sections and articles.

[96] B. Teyssié, *Un nouveau Code du travail: quel résultat?*, Juris-Classeur périodique. La Semaine juridique 2007, act. 140.

[97] F. Favennec, P.-Y. Verkindt, *Droit*…, p. 146–147.

[98] The legislator did this in the reasons to law no. 2004-391 of 4 May 2004 on vocational training and collective bargaining, "Droit Social" 2003, p. 92 and F. Favennec, P.-Y. Verkindt, *Droit*…, p. 27–29.

[99] Loi du 31 janvier 2007 de modernisation du dialogue social, B. Teyssié, *A propos de la rénovation sociale*, "Droit Social" 2009, Vol. 9, pp. 627–629.

social partners having the right to take up negotiations, the result of which is binding on the legislator. Drafted laws are submitted by the government to the following institutions (according to their sphere of responsibilities): National Board of Collective Bargaining, National Council of Employment or National Council of Permanent Vocational Training. Major directions of the government's activities in the area of law, labour law, employment or vocational training, as well as the time-table of the activities have to be the subject of a discussion at the National Board of Collective Bargaining.

A good example of enhancement of the role of social partners was adoption of the law of 20th August, 2008 on modernisation of social democracy and reform of working time[100], preceded by negotiations with the social partners. On 9 April, 2008 they adopted the above discussed "Common Position", the provisions of which act were recognized by the legislator and included in the law.

ABSTRACT

This paper discusses selected major problems concerning workers' representation in France at the national and workplace level. The regulations in that area are very extensive and complex, which is a consequence of the long evolution of the social dialogue in France. A characteristic feature of the dialogue is a multitude of its entities and institutions, both at the national and workplace level. As of 1 May, 2008 the new Labour Code came into force. It is composed of eight parts preceded by a new introductory chapter concerning social dialogue. Social partners have an important role in the process of creation and application of labour law. Any project of a reform in the sphere of labour law must be first discussed with representative social partners who have the right to take up negotiations, the result of which is binding for the legislator. Major directions of the government's activities in the area of labour law, as well as the time-table of the activities, have to be the subject of a discussion at the National Board of Collective Bargaining.

[100] Loi n° 2008-789 du 20 août 2008 portant rénovation de la démocratie sociale et réforme du temps de travail.

REPREZENTACJA PRACOWNIKÓW WE FRANCJI

Streszczenie

W ramach niniejszego opracowania zostały omówione najważniejsze, wybrane problemy dotyczące reprezentacji pracowników we Francji na poziomie krajowym oraz na poziomie zakładu pracy. Regulacje w tym obszarze są bardzo liczne i złożone, co wynika z długotrwałego procesu ewolucji dialogu społecznego we Francji. Charakterystyczną cechą tego dialogu jest wielość podmiotów i instytucji uprawnionych do jego prowadzenia na poziomie zarówno krajowym, jak i zakładowym. Z dniem 1 maja 2008 r. wszedł w życie nowy Kodeks pracy. Składa się on z ośmiu części poprzedzonych rozdziałem wprowadzającym, dotyczącym dialogu społecznego. W procesie tworzenia i stosowania prawa pracy ważną rolę odgrywają partnerzy społeczni. Każdy projekt zmian w sferze prawa pracy musi być wcześniej skonsultowany z reprezentatywnymi partnerami społecznymi, uprawnionymi do wszczęcia i prowadzenia negocjacji, których wynik jest wiążący dla organów stanowiących prawo. Główne kierunki rządowej aktywności w sferze prawa pracy oraz harmonogram podejmowania działań w tym zakresie muszą być każdorazowo przedyskutowane w ramach Narodowej Rady Negocjacji Zbiorowych.

KEYWORDS

workers' representation, France, social dialogue, labour law, social partners

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reprezentacja pracowników, Francja, dialog społeczny, prawo pracy, partnerzy społeczni

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SPECIAL PROTECTION OF EMPLOYMENT STABILITY OF TRADE UNION OFFICIALS

1. Employment relationships of trade union officials are subject to special protection. The protection is aimed at ensuring security to trade union officials feel more secure in the social dimension. It also gives them the possibility to be autonom from the employer when representing and protecting the rights of the workers and their professional and social interests. It is no secret that while pursuing their trade union functions which consist in representing the interests of the working people (most of whom are employees), trade union officials often tend to get involved in conflicts with the employer. In order to protect them against being victimized, a prohibition to give termination notice and terminate employment with trade union officials has been introduced by provisions of the Trade Unions Act of 23 May 1991 (consolidated text: Journal of Laws of 2001 No 79, item 854, with subsequent changes), hereinafter referred to as the TUA. In this context it is worth to mention the judgment of the Supreme Court dated 26 November 2003 (I PK 616/2002)[1], according to which the objective of the protection granted to trade union officials consists solely in giving them a guarantee of independent position in the exercise of relevant functions. The ruling also states that the legal provisions which outline the scope of the protection shall be considered special regulations, and as such they have to be interpreted in the strict sense. Trade union activities may not constitute an alleged reason to favour some employees in an unjustified manner, in relation to spheres that are not at all linked to the trade unions functions performed by such an employee.

The discussed issue is a so-called wider construction of the prohibition of termination, meaning that in the course of the protected period the employer may neither give a notice of termination nor terminate the employment contract. This particular protection of employment stability of a trade union official includes also a ban on giving a notice of termination amending terms and conditions of employment of such employees and prohibits terminating their employment con-

[1] LexPolonica No. 367812, "Prawo Pracy" 2004, No. 6, p. 34.

tract without notice. The above-mentioned prohibitions are of a relative character, as they may possibly be rescinded should the board of the company trade union organisation endorse such a notice of termination or termination of employment. Some representatives of the legal doctrine, however, claim that in such case the issue is not one of dealing with a prohibition on giving a notice and terminating employment, but concerns a requirement that a relevant authorisation to do so must be obtained. The prohibition of giving a notice and terminating employment suspends the employer's right to undertake such legal activities within the protected period, while the requirement to obtain a relevant authorisation does not suspend such a right but only limits the employer's freedom to make decisions on giving a termination notice or terminating employment[2]. It seems, however, according to the wording of Article 32 of TUA, that in this case we are dealing with a suspension of the right to give a termination notice or terminate employment until the board of the company trade union organisation has given its authorisation enabling the employer to proceed with the above-mentioned activities.

Special protection of employment stability of a trade union official is excluded where specific provisions of the law so provide. Such an exception can be found for example in Article 41[1] § 1 of the Labour Code, which states that provisions on enhanced protection of employees against receiving a termination notice and termination of employment shall not apply when liquidation or bankruptcy of the employer has been announced.

2. Pursuant to provisions of Article 32 paragraph 2 of TUA, the protection of employment relationship of a trade union official lasts for a period provided for in the resolution of the board of the trade union organisation indicating the person taking advantage of such a protection, and, upon its expiry, by a period equal to half of the above-mentioned period, which, however, may not exceed one year after the expiry thereof. It should be added here, however, that the resolution of the board indicating a person subject to special protection and the period of such protection might be modified at any time. The fact that the resolution initially indicated a two-year period does not necessarily mean that it is absolutely binding. The trade union's board may extend or limit the period at any time. Considering the said, it is well-worth to quote the judgment of the Supreme Court of 23 February 2005 (III PK 77/2004), according to which the protection of employment stability of a trade union official shall be considered granted from the moment when the employer has been notified of the resolution of the company trade union organisation indicating the person entitled to such a protection[3]. A decision made

[2] Cf. in particular Z. Salwa, *Uprawnienia związków zawodowych* [Trade Union Rights], Bydgoszcz 1998, p. 169.

[3] OSNP 2005/21, item 331.

by the company trade union organisation on dismissing one of its members from the trade union function is not subject to judicial control[4].

Article 32 paragraph 1 of TUA provides that protection may be granted to a member of the board of the company trade union organisation or to "any other employee who is a member of the company trade union organisation in question and who is authorised to represent this organisation against the employer or any other body or person carrying out activities falling within the scope of labour law". The text of the legal provision quoted above shows that protection is not granted to all trade union members (ones who do not perform any special duties), but is limited only to members who are "entitled to represent" the trade union. There immediately arises a question how the character and scope of such an "authorisation to represent" should be understood? It seems that the legal situation of such an employee may be compared to a plenipotentiary of the company trade union organisation acting in its name and on its behalf. The authorisation of such a person to act shall stem from a resolution of the board of the trade union in question. The authorisation may be either general or cover only a specific range of matters; it may also be either individual (in such case one employee may individually represent the trade union) or collective (in which case effective representation shall require joint actions of two or more people). The authorisation may be granted, for example, to the president of a department-level trade union organisation who has been authorised to represent all members of the trade union and non-affiliated third parties working in one of the establishments owned by the employer in question before the said employer.

According to the judgment of 3 October 2008 (I PK 53/2008), the fact of being a member of the board of a trade union company organisation provides protection against dismissal only if the employer has been informed thereof. It is not necessary to communicate the wording of the relevant resolution or any other documents to the employer[5].

3. The number of protected trade union officials depends mainly on the fact whether the company trade union organisation is representative or not within the meaning of Article 24^{1}[25a] of the Labour Code. It should be reminded here that in the light of the said Article a company trade union organisation is representative if:

– it is a member of a supra-company trade union organisation being itself representative within the meaning of the Act on the Tripartite Commission for Social and Economic Affairs and Regional Social Dialogue Commissions, provided that at least 7% of employees of the employer in question are members of the company organisation; or

– at least 10% of employees of the employer in question are members of the company organisation; or

[4] Judgment of the Supreme Court of 15.03.2001, I PKN 303/2000, LexPolonica No. 357410, OSNAPiUS 2002/24, item 589.

[5] LexPolonica No. 2039862.

– (where none of the company trade union organisations meets the requirements set out above) the company organisation which has the biggest number of members from among employees of the employer in question.

In the case of a representative trade union organisation distinction has to be made between two different ways used to determine the number of protected trade union officials. Pursuant to the provisions of Article 32 paragraph 3 of TUA, special protection of employment stability may be granted to the number of people corresponding to the number of members of the managerial staff of the employer in question; pursuant to paragraph 5 thereof the managerial staff at the employing establishment (the employer in question) shall mean the following persons:

– persons who individually manage the employment establishment or deputies thereof; or

– persons who are members of collegial bodies charged with managing the employment establishment in question;

– as well as other persons designated to carry out activities falling within the scope of labour law on behalf of the employer.

While it should be fairly easy to identify persons belonging to the first and the second category, some doubts may arise with respect to the third one. In order to dispel such doubts reference should be made to Article 3^1 paragraph 1 of the Labour Code, which states that acts falling within the scope of labour law shall be carried out on behalf of the employer (understood as an organisational unit) by a person or body charged with managing this organisational unit, or by any other person designated to that end. Pursuant to paragraph 2 of the said Article, this rule shall apply accordingly to the employer being a physical person, unless s/he personally carries out the acts falling within the scope of labour law. Designating a person to carry out acts falling within the scope of labour law for the employer may take place either on the basis of a legal provision, or on the basis of relevant provisions of the articles of the legal person in question or any other constitutive act of the organisational unit being the employer. Such a designation may also result from a power of attorney given to a specific person. The scope of the right to represent the employer and to perform acts falling within the scope of labour law shall be understood broadly; it includes both legal acts and other activities which have their legal consequences in the sphere of individual and collective labour law. The designation may either be quite general and include an authorisation to perform all acts falling within the scope of labour law, or it might be limited to a specific type of acts; it may also refer to all the employees, or just to a specific group thereof.

The provisions of Article 32 paragraph 4 of the TUA introduce an alternative method of determining the number of representative company trade union officials who may be entitled to special protection. According to this provision their number depends on the number of trade union members being employees. The company trade union organisation with up to 20 members may indicate 2 employ-

ees entitled to special protection. On top of that a trade union with a greater number of members is entitled to indicate additional employees entitled to special protection:

– for organisations of 20 to 50 members there will be one such employee for each group of 10 employees who are members of the organisation in question or part of this group. In an organisation of 50 employees there will be a maximum of 5 such employees;

– for organisations of 51 to 150 members there will be one such employee for each group of twenty employees who are members of the organisation in question or part of this group. In an organisation of 150 employees there will be a maximum of 10 such employees;

– for organisations of 151 to 300 members there will be one such employee for each group of thirty employees who are members of the organisation in question or part of this group. In an organisation of 300 employees there will be a maximum of 15 such employees;

– for organisations of 301 to 500 members there will be one such employee for each group of forty employees who are members of the organisation in question or part of this group. In an organisation of 500 employees there will be a maximum of 20 such employees;

– for organisations of over 500 members there will be one such employee for each group of fifty employees who are members of the organisation in question or part of this group. For example in an organisation of 1000 employees there will be a maximum of 30 such employees.

The board of the company trade union organisation shall be entitled to make an autonomous choice of one of the above-mentioned methods of calculation.

If the trade union organisation in question is not representative within the meaning of Article 241^{25a} of the Labour Code, then, pursuant to the provisions of Article 32 paragraph 6 of the TUA, special protection shall be granted to only one employee indicated by the board thereof.

Article 32 paragraph 7 of the TUA grants special protection of employment security also to members of the company trade union organisation's founding committee. The protection is valid for 6 months, starting from the date of establishment of the founding committee of the organisation in question, with the following reservation: unlike the previously mentioned protection is not available to all members of the founding committee, but to a of maximum 3 employees, designated in a resolution of the founding committee.

Should the management board of the trade union organisation fail to notify the employer about an employee or employees who are to enjoy special protection of employment stability, then, pursuant to the provisions of Article 32 paragraph 8 of the TUA, such protection will be granted exclusively to the president of the trade union or chairperson of the founding committee.

Pursuant to provisions of Article 32 paragraph 9 of the TUA, special protection of employment stability shall also be granted to an employee performing a trade union function as an elected representative outside of the trade union organisation, who at the same time benefits from an unpaid leave or who is not required to report for duty in his or her employment establishment; the protection in question covers the period referred to above plus one year following its expiry. In this case the authorisation to rescind the prohibition to terminate employment or give a termination notice shall be expressed by the competent body of the trade union organisation for which the employee performs or has performed this function, as indicated in its articles.

The detailed principles and procedures used by the employer to inform the board of the company trade union organisation about the number of people who are members of the managerial staff in the employment establishment in question, as well as by the board and the founding committee of the company trade union organisation to designate the employees subject to special protection, have been outlined in the ordinance of the Ministry of Economy, Labour and Social Policy dated 16 June 2003[6].

4. The provisions of Article 34^2 of TUA contain separate specific rules applicable to determining the range of protection offered to intercompany trade union organisation officials. The provisions of this Article contain separate regulations relative to special protection of employment stability in the case of:

– an intercompany trade union organisation which, in at least one employing establishment (employer) where it is active, has sufficient members to apply for the status of a representative trade union organisation within the meaning of Article 241^{25a} of the Labour Code;

– an intercompany trade union organisation which does not have sufficient number of members to claim the status of a representative trade union organisation within the meaning of Article 241^{25a} of the Labour Code in any of the employing establishments (employers) where it is active.

The first case takes place if the number of members of an intercompany trade union organisation operating at one of the employers covered by the union's scope of activity resulting from its articles reaches the level required by Article 241^{25a} of the Labour Code. In other words, if members of the organisation in question wanted to establish a company trade union organisation, it would be a representative one within the meaning of Article 241^{25a} of the Labour Code. In such a situation the board of such an intercompany organisation may grant special protection of employment stability:

– to the number of employees determined pursuant to the provisions of Article 32 paragraph 3 or 4 of the said Act; or

[6] Journal of Laws No. 108, item 1013.

– to the number of employees determined pursuant to the provisions of Article 32 paragraph 2 or 3 for one employer indicated by the organisation in question from among all employers covered by its scope of activities, where the organisation has enough members to become representative, within the meaning of Article 241^{25a} of the Labour Code, increased by the number of remaining employers covered by the scope of activities of the said organisation, resulting from its articles, if they employ at least 10 members of the organisation in question.

In the second case the number of employees covered with special protection of employment stability may not exceed the number of employers covered by the scope of activities of the intercompany trade union organisation resulting from its articles, if they employ at least 10 employees who are members of this trade union organisation.

In the context of the above-mentioned regulations pertaining to the protection offered to officials of intercompany trade union organisations, some doubts may arise as to the number of persons who may be considered members of the managerial staff, which is the criterion used to determine the number of trade union officials entitled to enhanced protection of employment security. Comparative analysis of the wording of Article 34^2 paragraph 1 item 1 and 2 reveals that the number of members of managerial staff shall be determined jointly for all employers covered by the scope of activities of the intercompany trade union organisation, as resulting from its articles. Article 34^2 paragraph 1 item 2 of the Act clearly indicates that alternatively to applying the provisions of paragraph 1 item 1 of the same Article, the number of officials subject to special protection may be determined pursuant to the provisions of Article 34 paragraph 3 of the Act for one employer indicated by the intercompany trade union organisation, and then increased by the number of the remaining employers covered by the scope of activities of the trade union organisation in question, if they employ at least 10 members of this organisation. As the method for determining the number of protected trade union officials introduced by Article 34^2 paragraph 1 item 2 of the Act is an alternative to the method described in paragraph 1 item 1 of the same Article, it must necessarily mean that the number of members of managerial staff taken into account in order to specify the number of protected trade union officials pursuant to the provisions of Article 34^2 paragraph 1 item 1 of the Act shall be determined by taking into account all employers covered by the scope of activities of the intercompany trade union organisation, as specified in its articles; the legal provision in question does not invoke the number of managerial staff members of one selected employer, but makes a general reference to the method for determining the number of protected trade union officials outlined in Article 32 paragraph 3 of the Act.

In this context we should also mention the fact that the number of members of managerial staff shall be determined taking into account only those employ-

ing establishments (employers), where members of the intercompany trade union organisation are employed. If an employer covered by the scope of activities of such an organisation (pursuant to its by-laws), does not employ any members thereof, then the total number of managerial staff shall be determined without taking into account any members of the managerial staff of that employer.

5. A breach of the prohibition of giving a termination notice and terminating employment of a trade union official shall result in the relevant statement of will being defective and it will also give rise to claims referred to in Chapter 4 and 6 of Title 2 of the Labour Code. The issue of courts refusing to enforce the claims of an employee being a trade union official has given rise to a number of judgments of the Supreme Court. The general line of the Court's judicial decisions relative to the issue has been summarised in the judgment of 3 August 2007 (I PK 82/2007)[7] stating, *inter alia*, that the Polish jurisprudence seems to favour an opinion that protection granted under Article 32 of TUA should not be considered absolutely mandatory, and that depending on the behaviour of the employee in question and the circumstances of the case it is permissible to refuse his or her claim to reinstatement to work under Article 8 of the Labour Code, not only in a situation where it would be justified to terminate employment under Article 52 of the Labour Code, but also in the case of termination with notice. However, in its judgment of 6 April 2006 (III PK 12/2006)[8] the Supreme Court stated that, pursuant to the provisions of Article 8 – a claim to be reinstated filed by an employee covered by special protection against termination of employment, where such termination constituted a manifest infringement of Article 32 of the TUA, may be dismissed only in exceptional circumstances, where a particularly blatant breach of the employee's duties or binding provisions of law has taken place. This opinion had already been expressed in the judgment of the Supreme Court of 18 April 2000 (I PKN 601/99)[9], according to which Article 8 of the Labour Code may not be interpreted as a provision introducing a principle whereby every serious breach of employee's duties by an employee who is a member of the founding committee of a trade union and therefore subject to special protection against receiving notice of termination and termination of employment, would entail a justification for a dismissal of the employee's claims to be reinstated or compensated.

6. The legal construct of special protection of employment stability granted to a trade union official contains a specific axiological dysfunction, linked to the fact that the decisive say on whether the termination notice may be given and employment terminated has been granted to the company trade union organisation of which the person in question is a member. Taking into account the fact that

[7] LexPolonica No. 1785854; "Gazeta Prawna" 2008, No 1, p. 18.
[8] LexPolonica No. 1276075, OSNP 2007/7–8, item 70.
[9] LexPolonica No. 352599, OSNAPiUS 2001/19, item 5769.

such protection is usually provided to a member of the board of the company trade union organisation, and the authorisation to carry out legal acts leading to termination of employment is to be granted by the board of the same organisation (see Article 32 paragraph 1 of TUA), we are in a way facing a situation when one is "judging one's own case". This paradox is extremely visible when termination of employment without notice due to the employee's fault is concerned. As a result the construction of some of elements of special protection of employment stability offered to trade union officials should be given a second thought. It should be considered whether a decision to rescind a prohibition of termination should not be entrusted to a body which is not directly interested in the case, for example to a competent state labour inspector, or whether dismissal on disciplinary grounds should be altogether excluded from the scope of the prohibition of termination. Should the latter solution be adopted, the employer (and at the same time the trade union official) would be entitled to relevant compensation in a situation where the labour court judged that the termination of employment has violated the law.

ABSTRACT

This paper is an analysis of the legal aspects of special protection of employment of trade union officials, which gives them a guarantee of independent position in the exercise of their functions. It is prohibited to give termination notice and terminate employment with a trade union official without consent of the board of the company's trade union organisation. The protection may be granted to a member of the board of the company trade union organisation or to member who is "entitled to represent" the trade union. The special protection of employment is effective only if the employer has been informed thereof. The author concentrates particularly on the reasons for granting the special protection, the period of the protection, number of protected trade union officials and the methods of determining that number, the obligation to inform the employer about the granting of the special protection to a trade union official and on the abuse of the special protection. According to the general line of the Supreme Court's judicial decisions, protection granted to trade union officials should not be considered absolutely mandatory and may be refused under Article 8 of the Labour Code, depending on the behaviour of the employee in question and the circumstances of the case. The author also makes some comments on how to amend and improve the institution of the protection, especially by entrusting the decision to rescind the prohibition of termination to a body which is not directly interested in the case.

SZCZEGÓLNA OCHRONA ZATRUDNIENIA DZIAŁACZY ZWIĄZKOWYCH

Streszczenie

Niniejsze opracowanie stanowi analizę prawnych aspektów funkcjonowania szczególnej ochrony zatrudnienia działaczy związkowych, przyznawanej w celu zagwarantowania im niezależności w wykonywaniu funkcji. Sprowadza się ona do zakazu wypowiedzenia i rozwiązania stosunku pracy z działaczem związkowym bez zgody zarządu zakładowej organizacji związkowej. Ochrona może zostać przyznana członkowi zarządu zakładowej organizacji związkowej oraz członkowi organizacji związkowej, uprawnionemu do jej reprezentowania. Przyznanie szczególnej ochrony zatrudnienia jest skuteczne, jeżeli pracodawca został o tym poinformowany. Autor opracowania koncentruje się w szczególności na okolicznościach uzasadniających przyznanie szczególnej ochrony, okresie ochronnym, liczbie działaczy związkowych objętych ochroną oraz metodach ustalania tej liczby, obowiązku poinformowania pracodawcy o objęciu działacza związkowego szczególną ochroną oraz na przypadkach nadużywania szczególnej ochrony zatrudnienia. Zgodnie z utrwalonym orzecznictwem Sądu Najwyższego szczególna ochrona zatrudnienia przyznawana działaczom związkowym nie może być postrzegana jako absolutna i może zostać uchylona na podstawie art. 8 Kodeksu pracy, w zależności od zachowania pracownika, którego dotyczy ochrona oraz szczególnych okoliczności sprawy. Autor daje ponadto wskazówki, w jaki sposób zmodyfikować instytucję szczególnej ochrony zatrudnienia działaczy związkowych, zwłaszcza poprzez powierzenie decyzji w przedmiocie ewentualnego uchylenia zakazu rozwiązania stosunku pracy niezależnemu podmiotowi, niezainteresowanemu w sprawie.

KEYWORDS

special protection of employment, trade union official, prohibition to give termination notice of employment, prohibition to terminate employment, company trade union organisation

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szczególna ochrona zatrudnienia, działacz związkowy, zakaz wypowiedzenia stosunku pracy, zakaz rozwiązania stosunku pracy, zakładowa organizacja związkowa

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SOCIAL DIALOGUE AS AN ELEMENT OF POLISH SOCIO-POLITICAL SYSTEM IN THE LIGHT OF THE CONSTITUTION OF THE REPUBLIC OF POLAND

1. In order to begin deliberations on social dialogue we should attempt to clarify the way in which this term is understood. Social dialogue is an expression used in the language of the law (language of legal acts, the constitutional language) and legal language, but it is also present in colloquial and scientific language or the language of journalism. As there are no binding specifications of its meaning, especially binding legal definitions, we can see that in scientific practice, including legal science and journalism, the term "social dialogue" tends to have different (and varied) meaning, imparted on it on a free or intuitive basis. As the notion of "social dialogue" is increasingly used in various legal acts, we strongly need some effort aimed at ensuring a more unambiguous and precise understanding of this term. Otherwise, if this advanced terminological volatility of this term were maintained, it would result in undermining practical meaning of legal regulations which contain a reference to the "social dialogue".

At the same time it would be hard to deny that either the legislator or the legal doctrine (especially labour law doctrine) have attempted to bring more clarity to the way the term "social dialogue" is understood. For example indirect clarification of the contents of the term results from the provisions of the Act on the Tripartite Commission for Social and Economic Affairs and Regional Social Dialogue Commissions of 6 July 2001[1], which, in its Article 1, states that the Tripartite Commission for Social and Economic Affairs shall be a forum for social dialogue carried out in order to reconcile interests of the employees,

[1] Journal of Laws No. 100, item 1080, as amended. The Tripartite Commission for Socio-Economic Affairs is going to be replaced by the Council of Social Dialogue. The new institution is intended to promote and to support social dialogue, which is undergoing a serious crisis (particularly at the national level). The Council will consist of representatives of employees, employers and the government. The members of the council will be designated by main (representative) trade unions and employers organizations. There is also a plan to establish provincial councils of social dialogue. The Law on the Council of Social Dialogue and other institutions of social dialogue was enacted on 25 June 2015.

the employers and the society. The Commission's activities consist in striving for achieving and maintaining social peace, and its competences include conducting social dialogue relative to remuneration and social benefits, other social and economic issues, as well as performance of any other tasks referred to in separate pieces of legislation. The Act also specifies that social dialogue shall be conducted by various parties represented within the Commission, including representatives of the government, employees, and employers. In addition, it provides for the objectives of such social dialogue, without defining the social dialogue itself. In this context we may wonder whether the notion of social dialogue may be limited to the dialogue as conducted by the representatives of the government, employees and employers and by parties involved in the works of regional social dialogue commissions (these commission include, apart from the three parties mentioned hereabove, also a local government representative, namely the Marshal of the relevant region). A slightly different approach and terminology has been proposed in the draft version of a Collective Labour Code, although it has been certainly drafted with reference to the Act on the Tripartite Commission for Social and Economic Affairs. The draft includes a separate, third part concerning the dialogue and cooperation between employees and employers, featuring provisions relative to:

– collective bargaining;
– information and consultation with employees;
– works councils;
– employee representatives in the company's supervisory board;
– Tripartite Commission for Labour Dialogue;
– Regional Commissions for Labour Dialogue; and
– the National Labour Dialogue Consultant.

Pursuant to Article 81 of the draft version of the said Act the Tripartite Commission for Labour Dialogue should become a forum for dialogue between social partners and the government representatives, designed to reconcile the interests of employees and employers, as well as the public interest, striving to win mutual respect for represented interests and to maintain social peace.

2. Another approach to social dialogue is presented in the Act on Employment Promotion and Institutions of the Labour Market of 20 April 2004[2], which provides for "social dialogue and partnership" on the labour market. Under its Article 21 the labour market policy implemented by public authorities shall be based on dialogue and cooperation with social partners, in particular within the framework of:

– activity of employment councils;
– local partnerships;

[2] Consolidated text: Journal of Laws 2013, item 674, as amended.

– supplementing and extending the offer of public employment services provided by social partners and employment agencies.

This approach seems to support a conclusion that – within the context of social policy – dialogue and cooperation is supposed to be carried out not so much between social partners (representing the employees and employers via specific organisational structures), as between such partners and administrative and local government bodies. This dialogue shall take the form of opinion-forming and advisory activities of employment councils (composed *inter alia* of social partners), and not e.g. in consulting or negotiating anticipated solutions or making joint decisions. The Supreme Employment Council is a consultative and advisory body to the minister in charge of work-related issues relative to the labour market. Regional and county (*poviat*) employment councils shall play a similar role – they shall be consultative and advisory bodies for, respectively, the marshal of the region or the governor (*wojewoda*). The councils are composed of members of representative trade union organisations (within the meaning of the Act on the Tripartite Commission for Social and Economic Affairs) and employer organisations (along with representatives of local government, NGOs, socio-professional farmers' organisations and representatives of scientific circles). It can be generally said that in the light of solutions featured in the Act on Employment Promotion and Institutions of the Labour Market social dialogue is understood in a specific way, as it consists in carrying out consultative and advisory activities, which meaning is not an identical with the standard understanding of the term "social dialogue", i.e. the presenting of different opinions and arriving at a consensus, and not just advising or giving opinions on someone else's activity. The discussed approach has also been linked with specifically shaped organisational structures (employment councils), designated as institutions with which such a dialogue is to be carried out. This brings us to a conclusion that social partners include, apart from employee and employer organisations, also local government bodies, NGOs, socio-professional farmers' organisations and representatives of scientific circles (and in practice – representatives of such structures and circles).

It is also interesting to analyse solutions found in the Employee Information and Consultation Act of 7 April 2006[3]. According to Article 2.3 of this Act carrying out consultations shall mean exchanging ideas and initiating dialogue between the employer and the works' council. Such a statement may be easily reversed by assuming that dialogue between the employer and the works' council consists in carrying out consultations and exchange of ideas. In the light of the provisions of Article 14 paragraph 2 of the said Act it would mean that dialogue (consultations) between the employer and the works' council, i.e. between social partners:

– should take place observing the deadlines, form and scope enabling the employer to take action in matters covered by such dialogue;

[3] Journal of Laws No. 79, item 550, as amended.

– depending on the subject of discussion should be carried out at a relevant level of management;

– on the basis of information transmitted by the employer or of opinions presented by the works' council, as well as dissenting opinions expressed by members of the works' council;

– in a manner enabling the works' council to hold a meeting with the employer in order to hear the employer's reasoned decision, in situations where the reasons given contain a reference to the council's opinion; and

– should be conducted in order to reach an agreement between the works council and the employer.

Due to the subject matter of regulations included in the Employee Information and Consultation Act the term "dialogue", as used in it, refers exclusively to the employer and the works' council, and therefore the dialogue in question is a non-trade union scheme (with no participation of trade unions as an employee-representing partner), and what is more, it is also conducted exclusively at the level of the employing establishment (the employer).

3. Solutions featured in the provisions of EU law should be discussed in a separate chapter. Pursuant to the wording of Article 152 of the Treaty on the Functioning of the European Union (introduced by the Lisbon Treaty) the Union recognises and promotes the role of the social partners at its level, taking into account the diversity of national systems, facilitating dialogue between the social partners, and respecting their autonomy. The Tripartite Social Summit for Growth and Employment shall contribute to social dialogue. Moreover, according to the provisions of Article 154 of the Treaty, the European Commission shall have the task of promoting the consultation of management and labour at Union level and shall take any relevant measures to facilitate their dialogue by ensuring balanced support for the parties. To this end, before submitting proposals in the social policy field, the Commission shall consult management and labour on the possible direction of Union action. If, after such consultation, the Commission considers Union action advisable, it shall consult management and labour on the content of the envisaged proposal. Management and labour shall forward to the Commission an opinion or, where appropriate, a recommendation. On the occasion of the consultation, management and labour may inform the Commission of their wish to initiate the process aimed at entering into a collective agreement, and the duration of this process shall not exceed nine months, unless the management and labour concerned and the Commission decide jointly to extend it. Pursuant to the provisions of Article 155 of the Treaty dialogue between the management and labour at Union level may lead to contractual relations, including agreements, if the parties so desire. Agreements concluded at Union level shall be implemented either in accordance with the procedures and practices specific to management and labour and the Member States or, in matters covered by Article 153, at the joint request of

the signatory parties, by a Council decision on a proposal from the Commission. The European Parliament shall be informed in such a case[4]. A Member State may entrust management and labour, at their joint request, with the implementation of directives, or, where appropriate, with the implementation of a Council decision.

In this case, the Member State concerned being required to take any necessary measure enabling it at any time to be in a position to guarantee the results imposed by that directive or that decision, it shall ensure that, no later than the date on which a directive or a decision must be transposed or implemented, management and labour have introduced the necessary measures by agreement (Article 153 paragraph 3 of the Treaty on the Functioning of the European Union). Those regulations and the context in which they are placed show in particular that, first of all, social partners are understood as the labour (employees) and management (employers), namely specific organisations of employees and employers. The second conclusion is that dialogue between these partners may in particular lead to entering into a collective agreement. Thirdly, they clearly state that, apart from social dialogue conducted by social partners on the domestic level, there exists also dialogue between social partners at the EU level and that such dialogue is supposed to be supported and facilitated by the European Commission. And finally, implementation of directives and decisions in a Member State may be entrusted to social partners, who shall adopt relevant measures by way of agreement, which in practice means entering into relevant collective labour agreements.

4. Legal provisions referred to hereabove may constitute an encouragement to focus on some specific issues while discussing certain notions applicable to the solutions in the sphere of social dialogue. The first issue refers to defining the parties (subjects) of the social dialogue. The second one is about indicating the objective, subject matter and contents of such dialogue. Another task is to define the level at which the dialogue should take place (for example dialogue at the level of the European Union or domestic dialogue). And finally, some attention should be focused on showing the legal basis for social dialogue (Treaty on the Functioning of the European Union, the Constitution of the Republic of Poland, international treaties, acts of law, and secondary legislation). This paper – in line with the suggestion put forward by the organisers of this conference – will not aim at presenting an exhaustive and in-depth coverage of all issues relative to social dialogue in its legal dimension (or, even more so, of any of its non-legal aspects), but it will analyse the dialogue in the light of solutions adopted in the Polish Constitution, under the limiting assumption

[4] As far as the analysis of relevant provisions of the Treaty on the Functioning of the European Union is concerned, see: W. Sanetra, *Źródła europejskiego prawa pracy po zmianach traktatowych* [Source of European Labour Law after Amendments to the Treaties], PiZS 2010, Vol. 3, p. 3 *et seq*.

that only social dialogue constituting an element of the social and economic system will be discussed. Social dialogue is invoked in the preamble of the Constitution of the Republic of Poland (hereinafter referred to as the Polish Constitution). It states that the Constitution has been established as the basic law for the State, based on respect for freedom and justice, cooperation between the public powers, social dialogue, as well as on the principle of subsidiarity in strengthening the powers of citizens and their communities. The provisions of Article 20 of the Polish Constitution are more important in this context, due to their clearly normative character (while nature of provisions of the preamble is not that certain). Under this article social market economy is based on the freedom of economic activities, private ownership and solidarity, as well as dialogue and cooperation of social partners, and as such it constitutes the basis for the economic system of the Republic of Poland. We may, in particular, conclude that social market economy is based, among other things, on dialogue and cooperation between social partners, which constitutes one of the fundamental constitutional principles. I think that in the context of this principle we should acknowledge that dialogue between social partners is the essence of the social aspect of market economy (just next to "solidarity" and "cooperation" between such partners). As the freedom of carrying out business activities and private ownership constitute the market base of economy and at the same time reveals a certain part of its essence, then the social dimension of economy consists in solidarity, dialogue and cooperation of social partners.

The social essence of market economy, as well as the market-based character of economy as such, may of course be linked to some elements of their defining features, other than those which have been inserted into Article 20 of the Polish Constitution. We become fully aware of this as early as at the stage of analysing differences in wording and of the normative context in which the notion of social market economy has been put into the Constitution. The same differences can be noticed in the context of the term "social market economy" introduced into Article 3 paragraph 3 of the Treaty in European Union. According to this Article the Union shall establish an internal market and at the same time "work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment." It shall also promote scientific and technological advance. It shall combat social exclusion and discrimination, and promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child. Analysing this provision leads us to the conclusion that it associates the social sense of market economy with striving for "full employment and social progress, and a high level of protection and improvement of the quality of the environment". In this case the principle of social market economy is not linked to dialogue and

cooperation between social partners, which does not mean, though, that in the context of EU law the social character of economy does not consist in offering social partners the possibility to conduct dialogue, or that the term "social market economy" in the context of the Treaty on European Union is not in any way related to such dialogue[5].

Under Article 20 of the Constitution social market economy constitutes a basis of the whole Polish economic system (the market is just a part of it), which means that the social dimension pervades, in an indirect manner, not only the market economy as such, but also the whole Polish economic system. The Polish Constitution certainly does not define the notion of social market economy, or the country's economic system, or social dialogue, or the social partners themselves, or relationships between these two concepts. This task has been left to those who will interpret the law and to bodies supposed to apply the provisions of the Constitution. The Polish Constitution does not give a definion of either the country's social system or its political system. The political system, the economic system and the social system are separate categories of ideas, just as the sphere of politics is separated from the world of politics and social affairs, although at the same time they are strongly interconnected. As a result it is not possible to draw any precise or clear distinction between them. Both politics and economy have their social aspects, be it just in the sense of their aim of serving the society, which they actually pursue. It is important to take this into account while discussing social dialogue as an element of the social and political system. Dialogue of social partners has a specific sense and importance for the market economy, and also indirectly for the whole Polish economic system, and as such it also constitutes a part of this economic system. It is, however, quite a special element, as it introduces a social dimension into the political system and the (market) economy. In this context it is also a part of the Polish social system. In the course of dialogue between social partners no material goods are produced nor any services are provided, so in this context a statement that such dialogue is external to economy may be justified. At the same time, however, social dialogue plays a vital role in shaping and influencing the conditions in which such goods are produced and services are rendered. In this sense it is a part of the economic system as well, although it mainly belongs to the sphere of the social system.

5. As I have just mentioned, the Polish Constitution does not define the notion of "social partners", but the context in which this term is used in Article 20 and

[5] Cf W. Sanetra, *Prawo pracy po Traktacie z Lizbony* [Labour Law After the Lisbon Treaty], "Europejski Przegląd Sądowy" 2010, Vol. 2, p. 4 *et seq.*; W. Sanetra, *Prawo pracy w projekcie Konstytucji dla Europy* [Labour Law in the Draft Constitution for Europe], "Przegląd Sądowy" 2004, Vol. 9, p. 3 *et seq.*; W. Sanetra, *Social market economy in Constitution of the Republic of Poland and in the Draft Constitution for Europe*, (in:) *Darbo teise suvienytoje Europoje*, 2003 m. Spalio 16–18 d. Tarptautines mokslines konferencijos medziga, Vilnius 2004, p. 31–38.

the intuitive meaning which has been and still is associated with it by the legal science and legal practice, make it justified to claim that the notion refers to the so-called employee and employer side. It reflects the well-known opposition between work and capital (dialogue between the world of work and the world of capital). This dialogue is maintained by specific organisational structures, which are considered authorised to represent such parties. As far as the employer side is concerned, the fact that it is represented by particular employers and their organisations, established pursuant to the Employers' Organisations Act of 23 May 1991[6], usually does not raise any doubts. More doubts, however, may arise in relation to the question whether dialogue on the employees' side may be carried out exclusively by trade unions, or also by other structures established for the purpose of expressing interests, aspirations and expectations of employees working in a specific employing establishment, featured in Article 20 of the Polish Constitution. I am referring in particular to bodies operating within the framework of the so-called involvement of employees and staff self-management in state-owned enterprises. In the first case the law refers, in particular, to bodies operating pursuant to the provisions of the Employee Information and Consultation Act of 7 April 2006[7], in the latter case – to the general meeting of employees and the employee council established pursuant to the provisions of the Act on Staff Self-Management in State-Owned Enterprises of 25 September 1981[8]. In this context we can and should talk about non-union institutions and bodies reprsenting company-level social partners on the employees side. In my opinion, within the meaning of Article 20 of the Polish Constitution, social partners on the employees side shall include, apart from company trade unions and company trade union organisations and their bodies – also other organisational forms and structures established within any work establishment for the purpose of expressing the will, interests and demands of its employees, which shall in particular mean non-union company-level employee bodies. Dialogue between social partners understood in this way shall be the foundation of social market economy and therefore also the whole Polish economic system, at the same time expressing its social dimension.

The notion of social partners is *prima facie* broader than the notion of parties who have the constitutional right to negotiate and enter into collective labour agreements and other collective arrangements. Pursuant to Article 59 paragraph 2 of the Polish Constitution such a right has been granted to trade unions, employers and organisations of employers. As far as the right to negotiate is concerned, it has been granted in particular for the purpose of solving collective disputes. If we stick to literal interpretation of Article 59 paragraph 2 of the Constitution, we should assume that on the employees side the constitutional right to negotiate and enter into collective labour agreements and other collective arrangements has

[6] Journal of Laws No. 55, item 235, as amended.
[7] Journal of Laws No. 79, item 550, as amended.
[8] Journal of Laws No. 24, item 123, as amended.

been granted exclusively to trade unions. However, while defining the subjective scope of this right, we should also take into account the "right" to conduct dialogue granted to social partners under Article 20 of the Constitution. Therefore we should also assume that at the company level such a dialogue may also be carried out by non-union structures. As a consequence it is necessary to admit that social partners have the right to negotiate and enter into collective labour agreements and other collective arrangements, and that social partners on the employees side may also include company-level non-union structures. Anyway, the Constitution does not prohibit the legislator to grant such a right to non-union structures. This refers in particular to carrying out negotiations and entering into agreements, which view is supported, among other things, by the provisions of Article 9^1 § 2 of the Labour Code, according to which the agreement referred to in Article 9^1 § 1 of the Labour Code (and also in Article 23^{1a} § 1 of the Labour Code) shall – unless the employer in question is covered by the operation of a trade union organisation representing employees – be entered into by the employer and the employee representation appointed in the manner provided for by this employer.

It is also important to note that in the context of Article 20 of the Polish Constitution it is possible to make an assumption that employees (the staff of a certain employment establishment) are the social partners. They may act directly or through their representation, and the role of such a representation is usually played by trade unions. Such an assumption may not, on the other hand, be made in the case of Article 59 § 2 of the Polish Constitution, which, next to employers and employers' organisations mentions only trade unions, without taking into account the staff of employment establishments (the totality of employees employed by a specific employer, where such a group is treated to a certain extent as a separate holder of rights and obligations). In any case adopting extensive interpretation going in a different direction (according to which the right to negotiate and to enter into collective labour agreements would be the right granted to the total of employees and trade unions) may be considered highly doubtful in the context of Article 59 paragraph 1 of the Polish Constitution. Such a broad interpretation is possible, though, in the light of the fact that Article 20 of the Polish Constitution uses the expression "social partner", which is not quite clearly defined and therefore relatively wide-ranging. Under such approach the employee side – as a social partner – includes not only organisational structures established expressly in order to represent the employees, especially trade unions, but also employees as a whole, acting as a certain group.

6. Article 20 of the Constitution of the Republic of Poland does not specify the objective of dialogue carried out by social partners, just stating that social market economy shall be based on such dialogue. This is supposed to mean that social dialogue should add social dimension to market economy (as a scheme taking into account and pursuing social goals), while reflecting the social sense of

the economy. The objectives of social dialogue have been defined in a more specific way within the Act on the Tripartite Commission on Social and Economic Affairs. Its provisions may lead to a conclusion that the objective of social dialogue consists in reconciling the interests of employees and employers, as well as the public interest, at the same time achieving and maintaining social peace. Respectively, we may claim that the general objective of dialogue between social partners referred to in Article 20 of the Polish Constitution consists in reconciling the interests of employees and employers and achieving social peace in that way. The objective has both a social dimension (reconciling the interests of the world of work and the world of capital) and a political one (ensuring social peace and thus providing a guarantee of peace in the whole country).

Defining the subject matter of dialogue between social partners in the context of the principle expressed by Article 20 of the Polish Constitution is a separate issue. The provision in question links dialogue of social partners with social market economy and the political system of the Republic of Poland. It leads us to the conclusion that social dialogue should be focused on issues of essentially social and economic character, and not exclusively on social issues (which are somewhat distanced from the economic context) or just technical aspects of business activities. Such a combined socio-economic character is mainly typical for issues (social relationships) that are covered by the provisions of labour law. This results in a conclusion that the constitutional notion of dialogue of social partners is mainly linked to the sphere of social relationships covered by labour law. The same conclusion results also from the analysis of the subjective aspect of dialogue between social partners within the meaning of Article 20 of the Polish Constitution, according to which provision social partners include employees and employers represented by their respective organisational structures. Therefore social dialogue should be mainly focused on issues that are important from the perspective of protecting interests of both employees and employers, i.e. the issues that are, in general, covered by labour law regulations. These include issues relative to remuneration for work, other work-related benefits, conditions of employment, labour protection, and broadly understood labour costs, where both social and economic aspects are strongly interrelated. A similar approach to the subject matter of social dialogue (dialogue of social partners) may be noticed in the Act on the Tripartite Commission for Social and Economic Affairs. The Act states that social dialogue shall cover remuneration for work, social benefits, other socio-economic issues, as well as other issues that refer to implementing tasks specified in other pieces of legislation.

7. The question of form and content of dialogue between social partners requires a separate analysis. We should focus in particular on asserting whether social dialogue should be understood exclusively as an exchange of thoughts and opinions in any format (orally, in writing), or whether such dialogue actually

means something more, under the assumption that such an exchange of thoughts and opinions is supposed to take place in an institutionalised manner and be expressed in further-reaching activities: transfer of information, negotiations, bargaining procedures, arrangements, expressing opinions or seeking agreement on relevant issues, making collective arrangements, entering into collective labour agreements, drafting work regulations and statutes, or solving collective labour disputes. If we take dialogue between social partners seriously (which is a necessary thing, as such dialogue belongs to fundamental constitutional principles), then its essential scope may not be limited to literal or colloquial understanding of the word "dialogue". One of the results of such reasoning is that the dialogue of social partners may be carried out in various forms (orally, in writing, by adopting resolutions, as well as by making, adopting and rejecting proposals). Social dialogue may cover in particular exchange of information, consultations, negotiations or bargaining procedures. The objective of such negotiations (bargaining procedures) consists in particular in striving to enter into a collective labour agreement or to enact yet another legal act falling into the category of the so-called autonomous labour law sources. In my opinion, dialogue of social partners as such does not, in principle, include establishing a legal act belonging to that category, even though one of the main reasons and goals in the pursuit of which social dialogue is and should be carried out should be successful enacting of a legal act of the kind in question. The expression "dialogue between social partners" may hardly be interpreted in a manner enabling full coverage of various situations which are referred to as "collective disputes" and which are covered by the provisions on the Settlement of Collective Disputes Act of 23 May 1991[9], especially if a strike action has been initiated as a result of such a dispute. In such case dialogue means in fact a harsh struggle (collective dispute), which may evolve into a regular fight involving certain coercive measures (violence). Should it be assumed that such a situation might also be included in the definition of dialogue of social partners, a serious terminological abuse would be committed, at the very least. This reservation, however, does not hold in the context of the initial phase of a collective dispute (the starting phase of a dispute), the phase of mediation, the possible agreements entered into by the parties to the disputes, drafting the record of divergences, or initiating proceedings before the social arbitration commission. One may argue that despite the collective dispute being under way and despite tensions between social partners, there is still some exchange of opinions and positions, and thats some form of a dialogue is being conducted as a result. There is no doubt that introducing the principle of dialogue between social partners has resulted in creating an opportunity for entering into collective labour agreements (collective arrangements and other acts of autonomous labour law) and enactment of regulations relative to the principles governing collective disputes procedures.

[9] Consolidated text: Journal of Laws of 2014, item 167.

Although it is difficult to extend the notion of dialogue of social partners onoto activities involving enacting autonomous labour law and pursuing collective disputes without any reservations, there are certainly some close functional correlations between those phenomena and normative categories. In other words, the constitutional principle of dialogue of social partners has the consequence of giving those partners the opportunity to enact autonomous labour law and to conduct collective disputes. In that sense the right to negotiate, in particular in order to settle collective disputes, and to enter into collective labour agreements (Article 59 paragraph 2 of the Polish Constitution) may also be derived from Article 20 of the Polish Constitution, and putting it more precisely – from the principle of dialogue of social partners featured therein. It may also lead to a hypothesis, that in the broader constitutional and functional meaning the dialogue of social partners includes also establishment of acts of autonomous labour law and settlement of collective disputes. At this point it is important to take into consideration the fact that a dialogue limited to non-binding discussions and talks between social partners or even to negotiations and consultations taking part between those partners, which, however, does not result in binding agreements translated into effective legal rulse, could not be considered as a basis (foundation) for the social market economy, as provided for in Article 59 paragraph 2 of the Polish Constitution. For that very reason the provisions of Article 59 paragraph 2 of the Polish Constitution may be regarded as a kind of a more detailed manifestation of the principle of social partners' dialogue introduced by its Article 20. I should be noted, however, that the right to negotiate referred to in Article 52 paragraph 2 of the Polish Constitution (covering in particular the right to conduct collective disputes) and the right to enter into collective labour agreements and arrangements of other kind is essentially not an autonomous right granted to trade unions, employers and employers' organisations. In reality it constitutes a kind of their shared right, which may be exercised only by undertaking simultaneous activities on the employee and employer side. Such negotiations may not be conducted by trade unions among themselves, just as a collective labour agreement may not be entered into by an employer and employers' organisation, irrespective of the employer being one of the members of the organisation. We are therefore referring to dialogue of social partners also in that respect. In the situation described above dialogue between social partners finds its expression in taking common actions (and also in being jointly involved in a collective dispute), and not in a solution based on an assumption that since a trade union is authorised to enter into a collective labour agreement then the employer has a duty to enter into such an agreement or that if a trade union is entitled to initiate a collective dispute, then the employer is obliged to agree to the trade union's demands. The right to negotiate, including the right to conduct collective disputes, and the right to enter into collective labour agreements, is a joint right of trade unions, employers and employers' organisations and is primarily intended to be exercised against the

state, as it were. The state should, in particular, introduce legal regulations facilitating application of that right in practice through negotiations, collective disputes and their resolution, as well as by entering into collective agreements and other collective arrangements. Trade unions are of course rightly entitled to expect that employers and their organisations will behave in a specific way in the course of negotiations and negotiation-related activities, while the employers and their organisations may likewise expect certain behaviour (which has been expressed as a principle of mutual loyalty or respect of the principle of good faith), but these principles are not the essence of rights expressed under Article 59 paragraph 2 of the Polish Constitution. The key conclusion to be drawn from this provision is that the state shall not, in particular, limit the freedom of negotiations, conducting collective disputes and entering into collective labour agreements, and, what is more, it should enact such legal regulations which will make it possible and, in certain cases (in the context of collective labour agreements) will ensure actual effectiveness of activities undertaken within the framework of the freedom.

8. We should also examine the level on which dialogue between social partners should take place and on which it is actually conducted. The dialogue has both European and domestic dimension. It is at the same time obvious that Article 20 of the Polish Constitution refers to dialogue of social partners on the domestic level. There is no doubt at all that social market economy referred to in this provision shall mean Polish economy and not the economy of any of the European Union member states or the economy of the EU as a whole, the latter being understood as a specific international (supranational) organisation to which its member states have transferred a certain part of their competences. Should we limit our analysis to the domestic dimension, three levels of dialogue between social partners can be distinguished. The dialogue on the lowest level is conducted within the employing establishment, between the employer, the employees, and organisational structures representing such employees (trade unions and non-trade union organisations). The highest-level dialogue is conducted on a national (central) scale, by nationwide organisations of employers and nationwide trade union organisations. It is also possible to distinguish an intermediate level of social dialogue between those two levels, which may be characterised either by its territorial dimension (in regions, counties or communes) or industry-related dimension (stemming from the "professional" nature of trade unions), and in some cases by both territorial and industry-related character. Such a dialogue is certainly conducted within a specific legal framework, mostly resulting from the provisions of law concerning trade unions, employee information and consultation, employers' organisations, settlement of collective disputes and from the Labour Code. In the light of the above we can yet again conclude that social dialogue is an institutionalised concept.

Provisions of the Act on the Tripartite Commission on Social and Economic Affairs represent a specific approach to the institutional character of social dia-

logue. As its name indicates, the Commission is composed of three parties: the government, employees and employers. Representatives of local government bodies also participate in the work of the Commission and act in an advisory capacity as regards issues relative to performing public tasks by local government units. Representatives of the President of the National Bank of Poland and President of the Polish Central Statistical Office also take part in the operation of the Commission as advisors. The social dialogue commissions established on the voivodship (regional) level are composed of members representing four (and not three) different parties: the governor (*wojewoda*) – as the government representative, employees, employers and the marshal of the voivodship in question – as a representative of local government structures. The voivodship (regional) social dialogue commission may invite representatives of *poviats* and communes from the territory to participate in its meetings. Members of such a social dialogue commission are appointed and dismissed by the governor who acts as its chairperson. In such commissions only the representatives of employees and employers are social partners and for them such commissions may become a distinct forum on which such dialogue may take place. The provisions of Article 2 paragraph 4 of the Act on the Tripartite Commission on Social and Economic Affairs confirm the hypothesis, stating that the employees and employers may enter into multi-company collective labour agreements, covering all the employers who are members of representative organisations (within the meaning of the Act) or a group of employers and employees they employ, as well as agreements which define mutual obligations of those parties. The said Act (in its Article 2a) also features a possibility of entering into agreements by all parties of the Tripartite Commission for Social and Economic Affairs – these are the so-called tripartite agreements, whose legal status is not entirely clear, though. As far as dialogue of social partners within the framework of the above-mentioned commissions is concerned, we may even say that its institutional character has got doubled, in a sense, as it is subject to the provisions of the acts referred to hereabove (the Labour Code), and at the same time takes place within the framework of a separate institution: the Tripartite Commission for Social and Economic Affairs, and voivodship social dialogue commissions.

9. Establishing social dialogue commissions and other similar bodies renders it necessary to make a clear distinction between social dialogue and dialogue of social partners. Let us refer respectively to the provisions of the Polish Constitution, which include both terms: whereas "social dialogue" is mentioned in its preamble, "dialogue of social partners" is governed by the provisions of Article 20. The two terms represent two different notions, which are, however, closely interrelated. The scope of the concept of social dialogue is slightly broader than that of the notion of dialogue of social partners, in that it may take place not only between employees and employers. Social dialogue may just as well involve three different parties (including government representatives) or even four parties

(including government and local government representatives, as is the case with voivodship social dialogue commissions). In an instance like that, the dialogue is different from social partners' dialogue, because participation of the government or local government representatives adds certain new quality and strongly attenuates or obscures contradictions between the interests of the world of labour and the world of capital. Especially the fact that the Tripartite Commission for Social and Economic Affairs includes government representation raises some doubt as to whether this commission is actually a forum for "social dialogue", as stated in the relevant provisions. Of course it may be argued that the government, just as the state apparatus itself, is a social institution in the broad sense of the term, but such approach does not actually hold reasonable in that particular case, where institutions (bodies), activities or other social categories are at stake (nor should it be, in particular, neglected that the government or the state apparatus are not social bodies or organisations under customary meaning of the terms). Therefore it is quite misleading to say that the dialogue carried out with the participation of government representatives is automatically qualified as social dialogue. The term "social dialogue" should refer exclusively to situations in which the discussions and decisions – which are socially and legally binding to a larger or lesser extent – result from activities undertaken by social entities, the dialogue between social partners being a particularly important instance of a dialogue of that kind. This hypothesis has its constitutional and EU-related dimension, as revealed for example in Article 152 and 155 of the Treaty on the Functioning of the European Union, and in Article 20 of the Polish Constitution. Irrespective of this, it is still difficult to ignore the fact that under the binding legal provisions the Tripartite Commission for Social and Economic Affairs constitutes a forum for social dialogue, and according to the Act on Promoting Employment and Institutions of the Labour Market, social dialogue shall mean dialogue between public authorities and social partners. As this has been decided so by the legislator, it is quite difficult to question this fact in the *de lege lata* perspective. In the future, however, it would be necessary to introduce a more systematic approach and terminological coherence, based mainly on the solutions which may be derived from the provisions of the Polish Constitution. The Constitution features the concept of a "dialogue of social partners", justifying the hypothesis that such partners include representatives of the employees and employers, and at least providing grounds for the conclusion that neither the government nor the state apparatus may be regarded as a social partner. Moreover, from the language context, in which the words "social dialogue" have been used in the preamble of the Polish Constitution, taking into account the colloquial meaning which is usually attributed to them, we may conclude that the notion of such dialogue does not include any forms of dialogue in which the government (state apparatus) may participate. In this context the scope of social dialogue is in principle limited to dialogue between social structures (social institutions, social bodies, social organisations).

Dialogue between social partners is a special and at the same time a particularly important case of such a dialogue, due to the fact that it has become a basis for a separate constitutional principle (article 20 of the Polish Constitution). If we ignored the terminological shortcut introduced by the wording of the said legal provisions and by the legal practice, we would have to say that the notion of social dialogue carried out by different social (non-state) bodies (or structures) includes the notion of dialogue between social partners, or dialogue between the representatives of employees and employers (which actually means the same thing). At the same time social partners' dialogue is not just a special case of social dialogue, as shaped by the provisions of the Tripartite Social and Economic Commission Act, insofar as the dialogue is conducted by the representatives of the government, employees and employers (since it is, in fact, a socio-governmental dialogue or dialogue between the government and the social partners). However, as far as collective agreements concluded by trade unions and employers' organisations within the framework of activities of this Commission are concerned, the acts is just an element of dialogue of social partners, which – according to the wording suggested above – has a double institutional character, in a sense. In that respect it is a special case of a social dialogue in the constitutional context.

10. The dialogue of social partners (which is a special case of social dialogue) is one of the basic elements of the Polish social system, or, putting it more precisely, of the Polish socio-economic system. It is also one of the elements of the political system in Poland, which system includes, in particular, various rules defining the ways in which law is made, for legal rules is the key tool for exercising power and setting policies. Social dialogue (dialogue of social partners) is an element of the country's political system to the extent in which it is aimed at enacting certain legal norms. If we look at the situation from a different perspective, we can even arrive at a conclusion that this is also the case when enacting such norms is considered equivalent to conducting that type of a dialogue (meaning carrying out activities covered by the notion of social dialogue). There is absolutely no doubt that such legal provisions constitute a source of labour law within the meaning of Article 9 of the Labour Code, irrespective of the fact whether autonomous sources of labour law, including in particular collective labour agreements and other collective arrangements, are recognised as sources of generally binding law in the Republic of Poland (under Article 87 of the Polish Constitution). What is more, in practice, and in particular in court rulings, they are regarded as sources of generally binding law[10]. Should we thus assume that

[10] Cf for example W. Sanetra, *Źródła prawa pracy w świetle Konstytucji RP*, (in:) *Źródła prawa pracy* [Labour Law Sources in the Light of Constitution of the Republic of Poland, (in:) Source of Labour Law], L. Florek (ed.), Warszawa 2000, p. 9 *et seq.*; L. Kaczyński, *Czy postanowienia układów zbiorowych pracy mają moc powszechnie obowiązującą?* [Are Provisions of Collective Labour Law Generally Binding?], "Przegląd Sądowy" 1999, No. 11–12.

acts of autonomous labour law is a result of dialogue of social partners or even one of the elements of dialogue of social partners and as such belong to the category of social dialogue, we should have to acknowledge that such dialogue is an essential element of the Polish political system. It has to be stressed at this point that, within the framework of the system of labour law sources, the acts of autonomous law, collective labour agreements in particular, play a fundamental role and at the same time determine the distinct and specific character of that law, as compared to the systems of sources of other branches of law. They facilitate contrasting and at the same reconciling contradictory interests of employees and employers, thus helping to ensure social peace. Also in that sense and for that very reason they should be regarded as part of the Polish political system. Dialogue conducted by social partners within the framework of collective disputes between those partners plays a similar role, which means that also in that context dialogue of social partners is one of the elements constituting the country's political system.

In the context of participation of social partners in the process of law-making, a totally different question may be asked concerning the situations where the social partners take part in it and where their participation does not result in joint drafting of legal rules (in particular of collective labour agreements and other collective arrangements), but in initiating or expressing opinions within the process of law making carried out by other entities. In such case a reference can be made to a situation where trade unions and organisations of employers exercise the competences granted to them under Articles 19–20 of the Trade Union Act and Articles 16–16[2] of the Organisations of Employers Act. According to the first group of provisions a trade union organisation which is considered to be representative within the meaning of the Act on the Tripartite Commission for Social and Economic Affairs, shall be entitled to express its opinions concerning the assumptions for and draft versions of acts of law falling within the scope covered by the sphere of competences of trade unions. This principle, however, does not apply to the assumptions of the draft version of the national budget and to the drafted budget act, where the procedure for expressing an opinion is governed by separate provisions. The government and its agencies, as well as local government bodies, are required to consult certain assumptions and projects with competent statutory bodies of a trade union, indicating a deadline in which they expect to hear the unions' opinion, which, however, may not be shorter than 30 days (this deadline may be reduced on the grounds of important public interest). Should the opinion expressed by a trade union be rejected in total or in part, the relevant government or local administration body shall inform the trade union thereof in writing, giving the reasons for such a rejection. Moreover, a representative trade union (within the meaning of the Act on the Tripartite Social and Economic Commission) is entitled to file requests for enacting or amending a law or another legal act pertaining to issues covered by the trade union's competences. Requests relative to laws are addressed to MPs or other bodies having the right of legislative

initiative, while in the case of secondary legal acts it is entities that are competent to issue such acts that should be approached. The public body which has received such a request shall present its opinion to the trade union within the deadline of 30 days; should the opinion be negative, it should be supplied with relevant justification. Moreover, the representative trade union organisation in question shall be entitled to express opinions on consultative-type documents of the European Union. Similarly, employers' organisations (if they are considered representative within the meaning of the Tripartite Social and Economic Commission Act) have some competences relative to expressing opinions on assumptions for and drafts of legal acts and initiating their enactment and amendment, equivalent to the competences of the representative trade union organisation described above.

In the above-mentioned situations reference is made not to relationships between social partners (trade unions and employers and their organisations), but to relationships between some of the social partners (those representing employees and employers) and executive and administrative bodies of the central or local (territorial) government concerning law-making. These relationships result from specific legislative competences granted to representative trade unions and representative organisations of employers, as well as the related duties. As such they do not fall within the scope of dialogue of social partners or social dialogue. Dialogue which may take place between government administration bodies and trade unions or between such bodies and organisations of employers and which concerns assumptions or drafts of legal acts or exercising legislative initiative in order to adopt or modify a specific law is neither dialogue of social partners nor social dialogue, because government administration agencies are not social partners and have a different legal and organisational nature. The statutory competences of trade unions and employers' organisations relative to drafting and initiating legal acts which have been discussed above is a manifestation of their political role (the fact that they carry out certain political functions), but irrespective of this they do not fall within the scope of the notion of dialogue of social partners and social dialogue, which is a part of not only social and economic system of a specific country, but also of its political system. Political sense of such dialogue is expressed mainly through empowering social partners to shape the provisions of autonomous labour law (or broadly understood collective agreements law) and not statutory legislation. At the same time dialogue between social partners interpreted in this way (as social dialogue) is rooted in the Polish Constitution. Trade unions, as well as employers and employers' organisations, should concentrate on this type of dialogue, because such is their constitutional duty. However, competences of trade unions and employers' organisations relative to expressing opinions and initiating drafting legal acts of a statutory character are subject to different principles. They are of course referred to in the Trade Union Act and the Employers' Organisations Act, but they are not anchored in the provisions of the Polish Constitution, or at least it is quite doubtful whether they may be inferred from its provisions. What is

more, such competences would lead to excessive strengthening of political features of the trade union movement and of the employers' organisations and distracting them from their main objectives, i.e. the striving to shape legal and employment relationships through mutual agreements between social partners. The anchoring of dialogue of social partners (social dialogue) in the Polish Constitution should not be considered by these organisations as a basis or an opportunity to retreat to the world of politics and to justify their willingness to focus predominantly on political action. Dialogue of social partners is of course one of the elements of Poland's social system, but as a result the perception of the constitutional significance of this dialogue (the same being true about social dialogue) should take into account the context of general assumptions behind the Polish Constitution and the conclusions resulting from correct interpretation of its provisions. This leads to a conclusion that the dialogue between social partners should not be understood in an extensible or arbitrary manner. Adopting a different approach towards this issue may lead to excessive involvement of the trade union movement and employers' representatives and organisations in politics, while politics (which includes legislative functions) does not fall within the scope of main tasks of social partners. Ideally, they should act as main actors involved in shaping secondary normative acts, which should result from their joint negotiations and decisions. Only within this sense and scope may they be considered as one of the elements of the political system dictated by the Polish Constitution.

11. To conclude our discussion we should focus for a while on a general terminological issue related to the fact that the Polish legislator and legal doctrine make reference to certain specific expressions, such as "social dialogue", "dialogue between social partners", "dialogue of social partners", "dialogue between the employer and the works' council", and "dialogue with social partners". "Social dialogue" and "dialogue of social partners'" have been actually transposed to the Polish legal language and to the language of the law from the countries of Western Europe, where they have been spreading quite fast also due to their clearly positive emotional connotations. In the context of this phenomenon I consider it pertinent to repeat what I have already said, on another occasion, on the flexibility of employment[11]. Expressions such as "employment flexibility", "liberalisation of employment", "deregulation of labour law", or "flexicurity" are becoming excessively popular in Western Europe, just as the notion of "social dialogue" or "social partners dialogue" do, and as such they have been imported to Poland. As far as

[11] W. Sanetra, *O pojmowaniu i uwarunkowaniach elastyczności zatrudnienia*, (in:) *Ochrona praw człowieka w świetle w świetle przepisów prawa pracy i zabezpieczenia społecznego. Referaty i wystąpienia zgłoszone na XVII Zjazd Katedr/Zakładów Prawa Pracy i Zabezpieczenia Społecznego. Kraków 7–9 maja 2009 r.* [The Meaning of and Conditions for Flexibility of Employment, (in:) Human Rights Protection in the Light of Labour Law and Social Security. Papers and Interventions at the 17th Congress of Chairs and Departments of Labour Law and Social Security, Cracow, 7–9 May, 2009], A. Świątkowski (ed.), Warszawa 2009, p. 165, 167.

"flexibility of employment" is concerned, I have come to a conclusion that due to its semantic "elusiveness", especially as regards the "flexibility" aspect, the term in question may hardly be used for the purpose of scientific description and analysis of facts pertaining to the sphere of labour law, and I am even tempted to say it is not useful at all. This expression may be (and actually is) successfully used in discussions and disputes of ideological nature and in journalism, but otherwise it is difficult to make it sufficiently accurate, unambiguous and precise so that it can become a fully useful tool for carrying out theoretical and dogmatic research in the area of labour law. High degree of vagueness and ambiguity of "employment flexibility" results in the fact that a global assessment whether in a specific case employment is flexible or not and what the degree of that flexibility is cannot actually be verified in a reasonable manner. This elusive character of the contents and meaning of the expression is, at the same time, quite practical, in that in ideological (or journalistic) disputes it enables all parties to seemingly strike a compromise or reach consensus , while actually allowing the participants of the dispute in question to stick to their initial opinions, judgements and reasoning. The notion of "social dialogue" is treated in a similar way on even a larger number of occasions. The expressions in question may be thus clearly identified as elements of the democratic language, the characteristic features of which language (such as permanent use of abstract words) were described many years ago by Alexis de Tocqueville. Abstract terms "which abound in democratic languages, and which are used on every occasion without attaching them to any particular fact, enlarge and obscure the thoughts they are intended to convey; they render the mode of speech more succinct and the idea contained in it less clear". In the age of democracy "men have a special tendency (…) to multiply words of this kind, to take them always by themselves in their most abstract acceptation, and to use them on all occasions, even when the nature of the discourse does not require them"[12]. Legal terminology and the language of the law, however, are expected to be significantly more strict and precise than the terminology used solely in the democratic, political and ideological discourse. Moreover, in the case of "social dialogue" and "dialogue of the social partners" the situation is a bit different due to the fact that they are not used exclusively by the representatives of legal doctrine and legal practice, but they have also been inserted into normative acts, in particular into the Polish Constitution and the Treaty on the Functioning of the European Union. Therefore it is particularly important to be able to decide how these expressions may and should be understood in the context of each of these normative acts. Making an attempt at achieving maximum precision and accuracy in understanding these terms (belonging both to the language of the law and to the legal language) is a very difficult task, as it seems that they have been introduced into normative acts in a quite

[12] A. Tocqueville, *O demokracji w Ameryce* [Democracy in America], Warszawa 1976, p. 315–316.

intuitive and rash manner, either under the influence of some sort of a trend or in a situation where the drafters were not able to come up with better expressions. At the same time specific effort aimed at a more precise delimitation of the scope and contents of expressions such as "social dialogue", and "social partners' dialogue" are essential in order to ensure correct functioning of the whole legal system, both in Poland and in the European Union.

ABSTRACT

The author analyses the notion of the "social dialogue" in an attempt to clarify the way in which this term should be understood. Social dialogue is analysed in the light of solutions adopted in the Polish Constitution, under the assumption that social dialogue constitutes an important element of the Polish social and economic system. In particular, the author makes references to the wording of normative texts, for example to the Act on Tripartite Commission for Social and Economic Affairs, to the draft version of The Collective Labour Code and to the acts of the European law. The social dialogue is an expression used in the language of the law and legal language, but it is also present in colloquial and scholarly language or the language of journalism. There are no binding specifications of its meaning, especially binding legal definitions. The author attempts to create such a definition, by defining the parties of the social dialogue; the objective, subject matter and contents of such dialogue; the levels at which the dialogue should take place (for example dialogue at the level of the European Union or domestic dialogue) and finally showing the legal basis for social dialogue. The author also makes a distinction between social dialogue and dialogue of social partners. The dialogue of social partners (which is a special case of social dialogue) is one of the basic elements of the Polish socio-economic system.

DIALOG SPOŁECZNY JAKO ELEMENT POLSKIEGO USTROJU SPOŁECZNO-POLITYCZNEGO W ŚWIETLE KONSTYTUCJI RZECZPOSPOLITEJ POLSKIEJ

Streszczenie

Autor poddaje analizie pojęcie dialogu społecznego, usiłując wyjaśnić, w jaki sposób powinno być ono rozumiane. Dialog społeczny jest poddawany analizie przez pryzmat rozwiązań przyjętych w Konstytucji RP przy założeniu, że dialog społeczny

stanowi ważny element polskiego systemu społeczno-ekonomicznego. Autor odwołuje się w szczególności do brzmienia aktów normatywnych, w tym do ustawy o Trójstronnej Komisji do spraw społecznych i gospodarczych, do projektu Zbiorowego Kodeksu Pracy oraz do aktów prawa europejskiego. Pojęcie dialogu społecznego jest używane w języku prawnym i prawniczym, ale również w języku potocznym i naukowym oraz w języku dziennikarzy. Pojęcie to nie ma ustalonego w sposób wiążący znaczenia, w tym zwłaszcza brakuje legalnych definicji tego pojęcia. Autor usiłuje stworzyć taką definicję poprzez zdefiniowanie stron dialogu społecznego, celów oraz przedmiotu tego dialogu, poziomów, na jakich dialog społeczny może być prowadzony (przykładowo dialog na poziomie Unii Europejskiej czy dialog krajowy), czy wreszcie pokazując podstawy prawne dialogu społecznego. Autor wyraźnie rozróżnia przy tym pojęcie dialogu społecznego i pojęcie dialogu partnerów społecznych. Dialog partnerów społecznych (będący szczególnym przypadkiem dialogu społecznego) jest jednym z podstawowych elementów polskiego systemu społeczno-ekonomicznego.

KEYWORDS

social dialogue, the Polish Constitution, the Tripartite Commission for Social and Economic Affairs, Collective Labour Code, dialogue of social partners, the Polish socio-economic system

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dialog społeczny, Konstytucja RP, Komisja Trójstronna do spraw społeczno-gospodarczych, Zbiorowy Kodeks Pracy, dialog partnerów społecznych, polski system społeczno-ekonomiczny

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NON-UNION FORMS OF REPRESENTATION WITHIN THE COLLECTIVE EMPLOYEE REPRESENTATION SYSTEM – CURRENT SITUATION AND TRENDS

1. The concept of employee representation has not been formally defined either by the Polish labour law or any other legal provisions, neither has the notion of collective employee representation. However, both these notions are clear enough under literal interpretation. Therefore, in my opinion, no in-depth analysis is necessary at this stage. Possible controversies in this context may be linked exclusively to some very specifics forms of such representation. I therefore assume that employee representation exercised within the system of collective representation of interests shall mean all forms of employee representation which have been given competences relative to consultation, information, control, co-decision and co-management in the context of issues which may, either directly or indirectly, influence legal, economic or social situation of employees as a group, or at least of a part of that group.

I also assume that by adopting the term "representation" we have chosen to ignore situations where the staff (workforce) as a whole plead in their own interest. I have introduced this assumption for the sake of clarity and discipline in thought, without claimining that staff members do not have any rights to protect their own interests. My opinion is that in any situation where certain rights have been attributed to the representation or representatives of employees, such rights belong to the staff as a whole, with the exception of cases where direct competences[1] have been granted to the staff.

2. For the sake of clarity it is important to note that legal regulations concerning the broadly understood employee participation are very strongly rooted in supranational sources of law. First of all we should mention the Workers' Representative Convention No 135 developed by the International Labour Organisation. It grants protection to employee representatives in companies and introduces

[1] For example Article 145 of the Labour Code; Article 225 of the Labour Code; Article 237^{11a} of the Labour Code, as well as Article 7 of the Act on Employee Self-Management in State-Owned Enterprises of 25 September 1981, Journal of Laws No. 24, item 123, as amended.

some facilitating solutions. It should be noted, however, that its preamble contains a reference to another ILO Convention: Convention No 98 concerning the Application of the Principles of the Right to Organise and to Bargain Collectively adopted in Geneva on 1 July 1949 and the said Convention governs the operation of trade unions. On the other hand, the provisions of Convention No 135 are not that explicit, as a general notion of "workers' representatives" has been adopted. Article 1 introduces protection of workers acting as employee representatives, which is clearly distinguished from protection granted to them due to their involvement in trade unions. A similar and this time fully explicit differentiation is also visible in Articles 3, 4, and 5. I will not analyse the interpretation of the wording of the Convention in too much detail, but it is important to mention some of its provisions, namely ones introducing the principle of protection of employee representatives from retaliations by the employer as well as measures facilitating exercising their functions in a fast and efficient manner, taking into account the type of professional relationships applicable in the country in question, as well as the needs, size and capacities of a specific establishment, assuming that these rights should be exercised in a manner which does not hinder effective operation of the said establishment.

Article 5 of the Convention is also worth mentioning. The Convention states that where there exist in the same undertaking both non-trade union and trade union representatives, appropriate measures shall be taken in order to ensure that the existence of elected representatives is not used to undermine the position of the trade unions concerned and to encourage co-operation on all relevant matters between the elected representatives and the trade unions concerned and their representatives.

While discussing supranational legal provisions, it is also important to mention relevant EU directives[2]. The most important ones include Council Directive 94/45/EC of 22 September 1994 on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purpose of informing and consulting employees[3]; Directive 2002/14/EC of the European Parliament and of the Council of 11 March

[2] Cf J. Wratny, *Zasada informacji i konsultacji pracowniczej w prawie europejskim. Uwagi dotyczące implementacji prawa europejskiego do prawa polskiego*, (in:) *Informowanie i konsultacja pracowników w polskim prawie pracy* [The Principle of Employee Information and Consultation in Community Law, (in:) Information and Consultation of Employees in Polish Labour Law], A. Sobczyk (ed.), Kraków 2008, p. 9 *et seq*., also L. Florek, *Informacja i konsultowanie pracowników w prawie europejskim* [Information and Consultation of Employees in European Law], PiZS 2002, Vol. 10, p. 2–7; Ł. Pisarczyk, *Wybrane problemy dostosowania prawa polskiego do wspólnotowych standardów w zakresie informowania i konsultowania pracowników* [Selected Problems of Alignment of Polish Law with Community Standards Regarding Information and Consultation of Employees], PiZS 2005, Vol. 12, p. 2–9.

[3] Implemented into the Polish legal system by the European Works Councils Act of 5 April 2002 (consolidated text: Journal of Laws 2012, item 1146). The directive itself has been discussed

2002 establishing a general framework for informing and consulting employees in the European Community[4]; Council Directive 2001/86/EC of 8 October 2001 supplementing the statute for a European company with regard to the involvement of employees; and Directive 2005/56/EC of the European Parliament and of the Council of 26 October 2005 on cross-border mergers of limited liability companies.

Some individual directives should be added to the above-mentioned catalogue, such as Council Directive 98/59/EC on the approximation of the laws of the Member States relating to collective redundancies[5]. The regulations included in this directive are limited to a statement that workers' representatives should be involved in the process of consultations relative to issues covered by the Directive. The Directive also defines the subject matter of such consultations, without stating explicitly whether trade union or non-trade union representations are to be consulted. Directive 2008/104/EC of the European Parliament and of the Council on temporary agency work also mentions the duty to inform workers' representatives, however without giving any further details. The activities of a works council may just as well implement the consultative provisions.

Some general provisions on the workers' representation are also included in the Council Directive 2001/23/EC on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses.

3. During our initial reflections we should note that the intention of this paper is to analyse various aspects of non-union representation. This may suggest that such type of workers' representation may be present exclusively in a situation where no trade unions exist in the establishment in question. Such an assumption is, however, not correct. Non-union representation may either:

– exist in parallel with trade union representation;

– exist independently for customary reasons – despite the fact that trade unions also exist in the establishment in question;

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by J. Wratny, *Europejska Rada Zakładowa (Nowa instytucja wspólnotowego prawa pracy)* [European Works Council (A new Institution of Community Labour Law)], PiP 1996, Vol. 8–9, p. 104.

[4] Official Journal of the European Union, L series 2002/80/29, special edition in Polish 2005/4/219, hereinafter referred to as the "Directive" or "Directive 2002/14". This directive has been discussed in detail by: L. Florek, *Informacja i konsultowanie…*, p. 2 *et seq.*; Ł. Pisarczyk, *Wybrane problemy…*, p. 2 *et seq*., M. Tomaszewska, *Informacja i konsultacja z pracownikami w przedsiębiorstwach i zakładach funkcjonujących na terenie Wspólnoty Europejskiej*, (in:) *Zatrudnienie i ochrona socjalna. Acquis communautaire* [Information and Consultation of Employees in Undertakings and Establishments Operating on the Territory of the European Community, (in:) Employment and Social Protection. Acquis communautaire], Z. Brodecki (ed.), Warszawa 2004, p. 360 *et seq.*; S. Koczur, P. Korus, *Dialog społeczny – prawo pracowników do informacji i konsultacji* [Social Dialogue – the Right of Employees to Information and Consultation], Kraków 2003, p. 153 *et seq.*

[5] OJ EU L.98.225.16.

– exist independently for legal reasons – despite the fact that trade unions also exist in the establishment in question;

– be appointed by trade unions.

Works councils[6] and employee councils[7] are currently a typical example of non-union employee representation structures operating in a situation where trade unions are present as well. Employee representation in governing bodies of capital companies has been organised in a similar way, under the provisions of the Privatisation and Commercialisation Act.

Non-union employee representation may co-exist with trade union representation for customary reasons, although it should be added that such a solution is usually adopted after trade unions have expressed their consent. Quite a typical example of the solution may be noted in cases where trade unions agree to non-unionised employees participating in the commissions for matters of company welfare funds.

Other non-formalized forms of representation of non-associated employees may sometimes be established for customary reasons or upon clearly expressed will of the employer. Such bodies are usually established against the will of trade union organisations present in the establishment in question. Employers tend to welcome such solutions as alternative, non-union employee communication and consultation channels. Such representations certainly do not have any formal rights. It seems, however, that irrespective of the monopolistic role played by trade unions in the area of representing collective interests of employees, such practices are fully legal.

A non-union employee representation may also become active in a situation where trade unions operating in an establishment do not have relevant union rights. Such a situation is of course quite rare and mainly results from the application of Article 25[1] of the Trade Union Act[8], namely when some trade unions do exist in the establishment, but they have less than 10 members each[9].

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[6] Act on Informing and Consulting Employees of 7 April 2006, Journal of Laws No. 79, item 550, amended.

[7] Act on Employee Self-Management in a State-Owned Enterprise of 25 September 1981, Journal of Laws No. 24, item 123, as amended.

[8] Consolidated text: Journal of Laws of 2014, item 167.

[9] Cf S. Płażek, A. Sobczyk, *Wątpliwości wokół interpretacji nowych przepisów ustawy o związkach zawodowych* [Doubts Concerning Interpretation of the Amended Provisions of the Tarde Union Act], PiZS 2003, Vol. 8, pp. 23–26. K. W. Baran also advocates for depriving such an organisation of all rights granted to a company trade union organisation, claiming that the discussed provisions of Article 25[1] of the Trade Union Act do not introduce any object-related differentiation. Cf K. W. Baran, *Zbiorowe prawo pracy. Komentarz* [Collective Labour Law. A Commentary], Warszawa 2007, p. 225; Likewise: A. Dubowik, *Zakładowa organizacja związkowa po nowelizacji ustawy o związkach zawodowych* [Company-Level Trade Union Organisation in the Amended Trade Union Act], PiZS 2003, Vol. 9, pp. 19–28.

And finally it is time to discuss the last and the most controversial case, that is a situation where employee representation is appointed by trade unions, but at the same time has some non-union characteristics. This refers for example to employee representatives sitting on special negotiation bodies, European works councils or other forms of supranational representation on the European level. Polish laws have introduced, as a rule, a monopoly of representative trade unions in the context of electing members of such bodies, at least in all situations where the Polish law applies. However, a works council, special negotiating body or any other representative body itself do not have trade-union characteristics. What is more, in the absence of trade unions or of agreement between existing trade unions, employees themselves elect members of a special negotiating body. As a result such a body has a non-union nature. For this reason I think that the above-mentioned forms of representation should be included in the non-union category.

4. Analysing legal provisions brings us to a conclusion that an extremely varied system of non-union representation has been established by the legislator. Depending on the criteria and the resulting spheres of activity, such representations may be divided into the following groups:

– domestic and European representations;

– institutional and *ad hoc* representations;

– representations that must be elected (or appointed) by employees and representations which are free from this obligation;

– decision-making and consultative representations.

5. The division into domestic and European representations (the latter will be further referred to as supranational or international ones) is quite clear. The second group includes members of the special negotiating body of a European company, members of a representative body, as well as members of the supervisory or administrative board of a European company, appointed according to the provisions of the Act on the European Economic Interest Grouping and the European Company of 4 March 2005[10], members of the special negotiating body of a European cooperative, of the representative body and of the supervisory or administrative board appointed in line with the provisions of the European Cooperative Act of 22 July 2002[11], members of the special negotiating body and European works council appointed pursuant to the provisions of the European Works Councils Act of 5 April 2002[12], as well as members of the negotiating body, representative body and supervisory board of a company established as a result of a cross-border merger of companies pursuant to the provisions of the Act on Employee Partici-

[10] Journal of Laws No. 62, item 551, as amended.

[11] Journal of Laws No. 146, item 1077, as amended.

[12] Consolidated text: Journal of Laws 2012, item 1146.

pation in a Company Established as a Result of a Cross-Border Merger of Companies of 25 April 2008[13].

All the remaining representations fall within the category of domestic bodies.

6. In my opinion institutional representations display the following important features: they are appointed for a specific term of office and have been granted competences that are not limited to a single and specific case. As a result, institutional representations include works councils, employee councils, staff representatives sitting on commercial companies' bodies, the European works council, the employee representation body and membership in a supervisory or administrative board pursuant to the legal provisions on supranational representation referred to hereabove. Finally, staff representation in the OSH commission is also a special case of institutional representation. This group, however, does not include consultations carried out pursuant to the provisions of Article 237^{11a} of the Labour Code[14].

The types of *ad hoc* representations are quite numerous and heterogeneous. They include representations established for example for the purpose of suspending the provisions of labour law, suspending the application of contractual provisions, introducing work regulations relative to telework, consultations on a number of OSH issues, consultations on the intention as well as terms and conditions of implementing the collective redundancy procedure, etc.

A more detailed analysis of legal regulations relative to domestic *ad hoc* representations reveals their strong homogeneity, which clearly shows in the concepts and exact terms of those regulations. Some of those legal provisions refer to an employee elected by the staff to represent their interests, some of them mention a representation, and some refer to representatives.

Without assessing reasonableness of various regulations, we may notice a difference between the notion of "representatives" and "representation". The difference lies in the fact that one person may perform the task of representation. However, if the term "representatives" is used, it will automatically be construed to refer to a collective representation carried out by several persons. As I have mentioned above, I do not think that such a differentiation is reasonable. What is more, if we were to analyse the importance of tasks and competences of these bodies, the prerogatives of representations (which may be made up of a single person) strangely enough happen to be more important that the prerogatives of representatives. Suffice it to say that pursuant to Article 9^{1} and 23^{1a} of the Labour Code representations have exceptionally strong competences in the context of shaping agreements that strongly influence the rights of employees.

In my opinion such reasoning results in a conclusion that in this case the legislator has not been following any coherent idea. The only concept we may iden-

[13] Journal of Laws No. 86, item 525.

[14] Likewise J. Wratny, *Niezwiązkowe przedstawicielstwa*…, pp. 246–247.

tify here refers exclusively to differentiating between representations appointed according to a procedure applicable in the establishment in question and representations whose appointment is not governed by such procedures. We may then take a risk of putting forward a hypothesis that the function of the latter is exclusively consultative and that introducing a requirement of any, even imperfect, form of appointment, will be out of proportion as compared to the objective to be achieved. What is more, situations where the labour code does not specify that employee representatives shall be appointed according to the procedure binding with the employer in question occur exclusively in the context of company's OSH internal rules. Perhaps the legislator assumed that the specific character of consultations required the participation of people who are in a position to provide real and substantial input due to the subject matter covered by consultations, in which specific expert knowledge may be needed.

7. The provisions of labour law are quite heterogeneous as far as procedures for appointment of non-union representatives are concerned. We may distinguish the following solutions:

– representations appointed in a formalised procedure;
– representations appointed in a non-formalised procedure;
– representations which may be appointed unilaterally by the employer.

The first group includes first of all works councils, employee councils, employee representatives in various bodies of capital companies and all forms of international representations. We should note here that the process of appointing employee representations with the participation of trade unions might be carried out by way of designation.

The second group includes those cases where the representative(s) or representation are elected according to a procedure applicable in the establishment in question.

The third group is composed of representations in relations to which no specific form of appointment is required by the provisions of the law. We may of course argue that in order to become a representative it is necessary to obtain a mandate from those who are to be represented (from the staff in this case), but in my opinion an interpretation according to which the above-mentioned representatives may be appointed by the employer is justified as well, taking into account both the subject matter – for which the provisions of the labour code do not require any form of election – and the presumption of rationality of the legislator. As the legislator has not imposed any duty of electing a representative in this case and, on the other hand, did so under other provisions of the same legal act, we may assume that the representatives may be simply and lawfully appointed by the employer.

8. Finally, I would like to present yet another classification of representatives, based on their decision-making and consultative competences. In this category

the dominant role is played by consultative bodes. To me decision-making competences mean that specific changes of existing legal situation or activity are not possible without a consent expressed by this representation. Such rare cases of decision-making competences of representations include:

– right to resign from or modify the amount of allocation to the welfare fund;

– periodical suspending of application of the provisions of labour law;

– periodical suspending of application of the provisions of employment contracts;

– entering into an agreement on the specification of work activities carried out at night;

– some of the competences of employee councils.

The remaining forms of representations are of a consultative and informative character. Only works councils are quite problematic in this context. We should note that according to the provisions of Article 13 of the Information and Consultation Act the employer should aim at reaching an agreement with the council. It should be added straight away that a failure to reach such an agreement does not limit the possibility of taking action by the employer. Therefore our final conclusion should be that – in line with the exact wording of the Act's title – the competences of a works council are just of an informative and consultative character.

9. The multitude of non-union forms of employee representation and the lack of systematic approach (as discussed above) require us to verify the contents of binding regulations in the context of coherent distribution of competences. Analysis shows that inconsistencies in this respect are mainly present in the case of formalised and *ad hoc* representations. The latter have very specific competences, which is due, among other things, to a strongly casuistic method of regulation. I think, moreover, that it is justified to claim that the law has introduced the principle of presumption of restricted scope of competences of *ad hoc* representations. If such a representation has been elected for the purpose of carrying out a specific activity falling within the scope of labour law (such as giving a consultation on the regulations on collective redundancies or expressing consent to liquidation of the company welfare fund) then it is not, in my opinion, entitled to represent employees in relation to any other issues. If employee representation has not been appointed exclusively for the purpose of performing a specific activity, then we should assume that such a representation is entitled to provide consultation also on other issues, which should be of course explicitly communicated to the employees electing such a representative. It should be added here that more liberal opinions relative to employee representations and representatives are being presented in various publications, where such bodies are considered to be entitled to represent employees in all circumstances described in the Labour Code.

Real problems relative to the distribution of competences can be identified in the context of relationships between institutional representations and *ad hoc* rep-

resentations. This problem is particularly pertinent in the context of works councils and employee councils. The scope of competences of such councils is wide enough to overlap with the competences of some of the *ad hoc* representations.

10. Analysing existing provisions on the forms and competences of non-union employee representations enables drawing a number of conclusions, which are quite different for various categories of representations. For the purpose of this part of my paper I will maintain the non-disjunctive division into supranational representations, domestic institutional representations and *ad hoc* representations. My comments *de lege ferenda* will also refer to a separate issue that is still closely connected with the subject matter of this discussion, namely mixed representations which combine trade union and non-union features.

11. As I have already mentioned above, the basic problem resulting from the current regulations on international representations is related to the mode of their appointment and the role trade unions play in this process. Polish acts of law establish a monopolistic role of representative trade unions, if such trade unions operate in the establishment in question. A legal solution like that is highly questionable. In reality the requirements to be met by trade unions to be representative are relatively limited and the scope of competences of international representations is, to a large extent, different from the competences of trade unions defined in the Polish law. Although various publications have presented quite firm views defending the above-mentioned solutions, it is difficult to ignore the similarities of informative and consultative competences of those bodies to the competences of employee councils. In the case of the latter the Polish Constitutional Court has expressed quite an unambiguous view on the role played by trade unions[15]. Even if we decide to ignore this legal aspect, the currently adopted solution is not beneficial in the context of supporting and developing the principle of employee participation. Giving trade unions the right to appoint members of representative bodies described above, at the expense of democratic elections, eliminates the desired result: increasing involvement of employees in broadly understood employee participation. I will not even mention the fact that trade unions are by definition better organised and disciplined and as such they have a significant advantage over non-affiliated employees.

12. Works councils are of course the major group of domestic institutional representations described in this paper. Without belittling the role of employee

[15] S. Pawłowski defends the current legal solution and presents a broad polemics with the judgment of the Constitutional Court No. K 23/07 of 1 July 2008 in: S. Pawłowski, J. Stelina, A. Wawerka, M. Zieleniecki, *Ustawa o europejskim zgrupowaniu interesów gospodarczych i spółce europejskiej z komentarzem* [The Act on the European Economic Interest Grouping and the European Company with a Commentary], Warszawa 2008, p. 133 *et seq*.

councils in state-owned enterprises, we have to say that their importance is decreasing systematically.

The opinions on appointment, scope and mode of operation of works councils expressed by the representatives of legal doctrine concern a number of controversial aspects of the Act providing for the bodies. In fact, we may point out to a number of solutions which raise serious doubts, at least of a procedural character[16].

Some of these solutions may seem to be even quite ridiculous. The scope of protection of confidential information constituting a company secret seen in the context of other provisions which refer to the protection of company secret may be a good example[17]. Equally startling is introducing judicial review to overrule the imposed confidentiality and at the same time exlusion of judicial review in the case of a refusal to provide information without invoking confidentiality of information[18]. In my opinion all these elements are of a secondary character in the light of serious imperfections of the law in question, such as indeterminate subject matter of information and consultation duty and an excessively general procedure. This lack of legal certainty and fear of decision-making paralysis is a basic reason for uncertainty among employers, which results in aversion to cooperating with works councils. Absurd conclusions may result for example from literal definitions of the duty to provide information on the activities of the employer – the council tends to understand this as a right to be informed about each transaction, which may even cover the purchase of office supplies[19]. Such a situation would

[16] For a discussion on a number of dilemmas relative to application of this legal act, cf: J. Stelina, M. Zieleniecki, *Ustawa o informowaniu pracowników i przeprowadzaniu z nimi konsultacji z komentarzem* [The Act on Informing and Consulting Employees with a Commentary], Gdynia 2006; M. Gładoch, *Ustawa o informowaniu pracowników i przeprowadzaniu z nimi konsultacji* [The Act on Informing and Consulting Employees], Toruń 2007; A. Pabisiak, M. Wojewódka, *Informowanie pracowników i przeprowadzanie z nimi konsultacji. Komentarz do ustawy* [Informing and Consulting Employees. A Commentary to the Act], Warszawa 2007; A. Sobczyk, *Rady pracownicze – komentarz* [Works Councils – A Commentary], Warszawa 2007.

[17] Cf *inter alia* D. Dorre-Nowak, *Ochrona interesów pracodawcy a proces informowania i konsultacji*, (in:) *Informowanie i konsultacja pracowników w polskim prawie pracy* [Protection of Employer's Interests and the Process of Information and Consultation, (in:) Information and Consultation of Employees in Polish Labour Law], A. Sobczyk (ed.), Kraków 2008, pp. 187–192; A. Sobczyk, *Rady pracowników…*, p. 97 *et seq*.

[18] Cf R. Flejszar, *Status rady pracowników w postępowaniu cywilnym – uwagi na tle art. 16 ustawy z dnia 7 kwietnia 2006 r. o informowaniu pracowników i przeprowadzaniu z nimi konsultacji*, (in:) *Informowanie i konsultacja pracowników w polskim prawie pracy* [The Status of Works Council in Civil Proceedings – Remarks Concerning Art. 16 of the Act of 7 April 2006 on Informing and Consulting Employees, (in:) Information and Consultation of Employees in Polish Labour Law], A. Sobczyk (ed.), Kraków 2008, p. 201–202 *et seq*.

[19] Cf *inter alia* J. Stelina, *Pojęcie i procedura konsultacji z radą pracowników*, (in:) *Informowanie i konsultacja pracowników w polskim prawie pracy* [The Notion and Procedure of Consulting the Works Council, (in:) Information and Consultation of Employees in Polish Labour Law], A. Sobczyk (ed.), Kraków 2008, p. 134–135; also A. Sobczyk, *Przedmiot i procedura informowania rady pracowników*, (in:) *Informowanie i konsultacja pracowników w polskim prawie pracy*

not have raised any doubts and would not have been inconsistent with EU regulations had the Act introduced some additional explanations (such as the duty to provide information in the case of situations important for social security of employees), or some quantitative qualifiers, expressed as a certain indication of transaction value, or any other forms of clarification on the subject matter of consultation and information obligations.

The same proposal also concerns both information and consultation procedures. We can in particular notice the lack of minimum and maximum deadlines for taking action by social partners. If we assume at the same time that the process of information and consultation should, as a rule, be carried out prior to decision-making, then leaving those issues to agreement between the employer and the council seems to be illegitimate in the light of mistrust typical for the initial stage of cooperation between the parties.

While discussing further the consultation procedure, we should mention the fact that the Act should not introduce notions which in fact cannot be reasonably explained. I am thinking about the proposal featured in Article 14 of the Act, which refers to consultations in order to reach agreement between the works council and the employer. The problem with this provision is that after all we are not quite certain if an agreement should be entered into or not. Either we introduce a provision that an agreement should be entered into if possible, or we completely abstain from introducing provisions of this kind. Anyway, there is no doubt that pursuant to this provision such an agreement is not obligatory. For the time being, however, the council is left with a bitter taste of unfulfilled statutory promise, and the employer fears that a failure to reach an agreement may be construed as a violation of the provisions of the Act in question.

Finally we have to raise a very important issue, which has up till now been treated as a kind of a taboo – special protection of employment relationship of members of the councils. There is absolutely no doubt that this institution has been strongly disgraced under Article 32 of the Trade Union Act. I do not see any reasons for defending the current legal situation. In the currently effective wording this protection it is not proportional to the objective to be achieved. As a result the role of works councils has been reduced to being an effective threatening device influencing the behaviour of employers, due to which such works councils will continue to be unpopular. It is absolutely necessary to introduce a certain deadline for expressing or refusing consent by a competent body and judicial review for situations where such a consent has been refused, both in the present case and, on the basis of the same principle, in other cases where special protection has been granted.

[Subjet Matter and Procedure of Informing the Works Council, (in:) Information and Consultation of Employees in Polish Labour Law], A. Sobczyk (ed.), Kraków 2008, pp. 145–149 *et seq.*

13. Basic proposals to be made in the context of regulations relative to *ad hoc* representations are focused on a few specific issues. First of all, the terminology used in this context should be harmonised. As I have shown above, it is currently highly heterogeneous and at times even bizarre, because it may be interpreted as resulting in situations where one single person can represent the total of employees in the context of issues of key importance to them.

Secondly, it would be desirable if the legislator introduced at least some basic election rules. Such rules should impose at least some minimum requirements relative to voting attendance and introduce a negative catalogue of requirements for the exercise of the right to be elected. We should finally request introduction of some minimum requirements relative to the size of the representation. Of course it all depends on the scale of the employer. If such principles are not generally applicable, they should apply at least to those representatives who make decisions which are extremely important for all employees, such as decisions concerning an agreement about refraining from establishing a welfare fund, reducing allocations to the welfare fund, suspending the application of certain sources of law or provisions of employment contracts.

Thirdly, legal provisions should introduce some elements of protection and security for employee representatives against any pressures from the employer. Such protection should also be granted to employees – it should protect them from the results of activities of employee representatives. Such standards should yet again be applicable mainly to the representatives with decision-making competences. I am not an advocate of introducing special protection, such as has been provided in Article 32 of the Trade Union Act. However, introduction of an unambiguous prohibition of terminating employment contract for reasons relative to the performed function would be strongly advisable. I am thinking of solutions similar to the ones featured in the Labour Code, relative to the so-called negative reasons for termination.

Finally, we should request the introduction of at least minimum formal requirements for information and consultative processes, in particular in the context of the form of relevant agreements. I would like to stress once again that some of the competences of *ad hoc* representatives refer to absolutely basic employee rights, and on the other hand legal provisions do not even require that such agreements are made in writing or that selected choices have to be documented in some way.

The suggestions presented above are not in contradiction with a solution where some *ad hoc* representatives, especially those endowed with detailed or even technical competences, are appointed either by the employer from among those members of the staff who are interested in a specific solution, or who have been elected by the group of employees interested in the solution in question. The reflections presented above refer in particular to the issues relative to OSH.

Finally I would like to express an opinion that on one hand all the analysed issues have a lot in common, but on the other hand are quite dispersed. They may

be efficiently covered by a single, coherent piece of legislation (for example as an additional part of the Information and Consultation Act) or be introduced into the Labour Code as a separate chapter. We should also take note of the far-reaching opinions according to which it would be necessary to introduce standing employee representations[20].

14. Finally I would like to present one more comment *de lege ferenda*. The need to appoint mixed representations combining both trade union and democratic principles should be considered in a situation where a specific prerogative has not been strictly assigned to trade unions. The above refers for example to appointing works councils and representative bodies in supranational economic structures. It seems that introducing even minimum levels (parities) of representation for trade unions and non-affiliated employees would be a desirable solution, even if those minimum values were not sufficient to reflect the proportional distribution of those employee groups. Currently – especially under the regulations relative to works councils – we may imagine both a situation where efficient, well-organised and disciplined trade unions appoint members of the works council themselves, and an opposite scenario, where trade unions will be completely ignored in the works council appointment process, which entails a risk of encouraging destructive competition between these two institutions. I will not even mention quite an awkward situation of trade unions whose informative and consultative competences tend to become quite hazy and limited as a result of applying the *a contrario* interpretation of legal provisions on works councils discussed above.

15. We should assume that broadly understood employee participation is a constant element of industrial relations. If at the same time we assume that a situation where trade union organisations are becoming less and less popular is a fact (without getting involved in a reflection on reasons for it), we may consider it justified to claim that non-union employee representations will remain a stable element of industrial relations. In these circumstances it seems reasonable to introduce at least some fundamental structure into binding regulations, in particular in the context of *ad hoc* representations. However, promoting communication between the employer and employees requires applying balanced measures, which are not based on the presumption of bad faith of both parties. Therefore introducing more formal requirements for some of the discussed elements I have called for should be coupled with eliminating certain overlapping competences and streamlining the so-called special protection of employees who act as representatives. I definitely think that introducing general provisions relative to *ad hoc*

[20] Which would also be aimed at introducing certain standards of employee protection, cf M. Gładoch, *Uczestnictwo pracowników w zarządzaniu przedsiębiorstwem w Polsce. Problemy teorii i praktyki na tle prawa wspólnotowego* [Employee Participation in Company Management in Poland. Problems of Theory and Practice Against the Community Law], Toruń 2008, p. 201.

representatives is a correct option, which will enable us to limit existing ambiguities (or even disorder). Maybe organising and streamlining legal solutions in such a way will result in making the employers less mistrustful, which is an absolutely crucial requirement for any cooperation to succeed.

ABSTRACT

The intention of this paper is to analyse various aspects of non-union employee representation. An analysis of the existing provisions on the form and competences of non-union employee representation makes it possible to draw a number of conclusions. On the one hadn, Polish acts of law establish a monopolistic role of representative trade unions. On the other hand, the importance of work councils is decreasing systematically. The main problems are the indeterminate subject matter of the information and consultation duty and the lack of legal certainty. It is necessary to introduce a fixed deadline for expressing or refusing consent by the council and judicial review for situations where such a consent has been refused. Also the *ad hoc* representation demands more detiled regulation. The terminology should be harmonised. At least some basic election rules, minimum formal requirements for information and consultative processes and some elements of protection should be introduced. There is also a need to for the appointment of mixed representations combining both trade union and democratic principles, in a situation where a specific prerogative has not been strictly assigned to trade unions.

POZAZWIĄZKOWE FORMY REPREZENTACJI W SYSTEMIE REPREZENTACJI INTERESÓW ZBIOROWYCH PRACOWNIKÓW – AKTUALNA SYTUACJA I KIERUNKI ROZWOJU

Streszczenie

Celem niniejszego opracowania jest analiza różnych aspektów funkcjonowania pozazwiązkowych form reprezentacji pracowniczej. Analiza istniejących regulacji dotyczących poszczególnych form i kompetencji pozazwiązkowych reprezentacji pracowniczych pozwala na sformułowanie wniosków. Polskie akty prawne przyznają monopol reprezentatywnym organizacjom związkowym. Z drugiej strony, rola rad pracowników systematycznie maleje. Głównymi tego powodami jest niedookreślony charakter obo-

wiązków informacyjnych i konsultacyjnych oraz brak pewności prawnej. Niezbędne jest wprowadzenie konkretnych terminów na wyrażenie lub odmowę wyrażenia zgody przez radę oraz sądowej kontroli na wypadek odmowy wyrażenia zgody. Bardziej szczegółowych regulacji wymaga również instytucja tzw. przedstawicieli *ad hoc*. Ponadto powinna zostać ujednolicona terminologia. Należy też wprowadzić przynajmniej minimalne standardy dotyczące wyboru przedstawicieli pracowników, procesu informowania i konsultacji oraz pewne elementy ochrony tych przedstawicieli. Istnieje również potrzeba powołania mieszanych form reprezentacji, łączących w sobie elementy związkowe i demokratyczne, w sytuacjach, w których związkom zawodowym nie przysługują szczególne uprawnienia do występowania w imieniu pracowników.

KEYWORDS

non-union employee representation, work council, trade union, *ad hoc* representation, information and consultation duty

SŁOWA KLUCZOWE

reprezentacja pozazwiązkowa, rada pracowników, związek zawodowy, przedstawiciele *ad hoc*, obowiązek informacyjny i konsultacyjny

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THE REPRESENTATIVE FUNCTION OF TRADE UNIONS

1. Among all types of worker representantions operating in modern world, trade unions keep playing a peculiar role. Looking from the historical perspective, trade unions were the first autonomous organisations to provide collective protection of wage-earners. One could venture to say that it was the initial experience of the emerging trade union movement that determined further fate and attitudes of trade unions as well as the shape of the gradually emerging legal regulations that gave rise to modern labour law. It was in the hard times of the fight for the most basic social rights of the working class that operation of the first trade unions was characterized by two values, contradicting each other to a certain extent. On the one hand trade unions demonstrated a confrontation attitude, being permeated with the spirit of fight and readiness to make sacrifices on their way to the goals set, on the other hand they showed certain amount of conciliatoriness, i.e. inclination to resolve conflicts in an amicable and formal way and shape the legal position of those working through negotiations. Those very features determined the labour law model in democratic states throughout almost the entire 20th century and definitely had impact on the shape and attitude of the trade union movement. The enormous merits of trade unions in the creation and development of labour law do not mean, though, that the organizations have earned, by the same, any special rights or privileges. Just the opposite, as soon as all other kinds of worker representations started emerging, trade unions were forced not just to win workers' favour, but also to keep their hitherto occupied position of the main representative of the working class and retain a number of rights attached to that. The growing role of the non-trade union forms of collective protection of the working class certainly results in changes of the status of the trade unions. Of importance in that respect is also the actually weakening position of trade unions, reflected in permanent drop of the trade union density, which phenomenon, save for but a small group of countries, is global in nature[1]. This is why it is the trend

[1] In Scandinavian countries the number of workers associated in trade unions reaches 80–90%. See national reports in: *Freedom of association of Workers and Employers in the Countries*

of changes within the trade union movement that is perhaps the most fascinating social and legal issue of industrial relations and possibly labour law as a whole. It is on that very trend that the future model of workers' representative depends, in fact. Various scenarios concerning the further course of the said processes are possible at the moment. The experience of the last two years seems to indicate that the end of trade union had been been prophesied prematurely. The global economic crisis has resulted in a stoppage of trade union members' outflow; in some cases the latter has been even reversed. Facing the unstable economic situation and low job security level workers started perceiving trade unions again as a force that could effectively protect their jobs. The attitudes of trade unions have changed as well. They are now more reliable partners to employers in solving the numerous current and strategic social problems locally. In such a way trade unions have succeeded in increasing their efficiency (and also prestige) on the company level. This is a most positive symptom, as certain asymmetry in trade union activities could be observed earlier, the trade union movement consolidating its position and focusing mostly on the supra-company(usually national and transnational, i.e. Community) level.

2. The main objective of the operation of trade unions as corporative-type organizations is protection of their members or – where law requires so – also other workers. Since trade unions are fully voluntary organizations, they are free in setting their goals. The rule is confirmed by Poland's Trade Union Act which provides that objectives and tasks of trade unions should be included in the trade unions' articles of incorporation. The said does not mean that full discretion in determining the objectives is enjoyed by trade unions, though, as the organisations have a specific legal status, as resulting from the statutory law. Consequently, only the organization that has the constitutive features of a trade union (including, *inter alia*, specific goals for which it was established to operate) deserves enjoying the name and the qualification of one. Considering that, freedom of trade unions setting their goals and tasks has to be contained within the general and supreme objective – the representation and protection of professional and social rights and interests of the working people.

The strategic goals stemming from provisions of law allow to identify functions performed by trade unions. Ideally, three basic functions can be pointed out to, including: the protective, control and representative ones[2]. The classifications is not complete, though, as trade unions happen to perform some other, more specific functions well (like the creative function, consisting in the right to appoint or

of the European Union, F. V. Dal-Ré (ed.), Madrid 2006 – N. Bruun, *Finland*, p. 245, C. Jørgensen, *Denmark*, p. 189 and P. Herzfeld Olsson, *Sweden*, p. 709. As far as Poland is concerned, trade union density can be estimated to reach some 7% of adult citizens of the country (i.e. about 15% of the general number of wage-earners), trade union structures operating at about 5% of the employers.

[2] K. W. Baran, *Zbiorowe prawo pracy* [Collective Labour Law], Kraków 2002, p. 179.

indicate members of certain bodies of representation[3]). Given trade union structure and objectives, special meaning should be ascribed to the protective function which consists, putting in very generally, in protection of rights and interests of the working class. In fact, an overwhelming majority of rights and powers of trade unions is aimed, directly or indirectly, at fulfillment of the protective function. In each and every aspect of their operation trade unions should be guided by interests of the working community. This is why the representative function, as analysed here, is – just like the control function – of secondary and executive nature when compared to the protective function having the primary meaning.

Unlike, however, the control powers being entirely ancillary to the supreme goal of protection of rights and interests of the workforce, the representative function of trade unions exerts a far wider impact. Representing means taking a position or making statements for and on behalf of those working; in that sense it also plays, first of all, the protective function. It is well-worth mentioning, though, that representation within the meaning in question also corresponds to more widely perceived trade union activities. Sometimes the organizations are vested in the rights of an "intermediary", as it were, between employers/other entities and work establishment staff. As far as information-related rights are concerned, in particular, it can be claimed that workers' representations, including trade unions (e.g. in case of mass redundancies) make up a kind of a channel for transfer of the information obtained, as well as an exponent of a collective will of the employees. For pragmatic reasons the information-related duties are usually met by workers' representations of all kinds.

3. Polish law differentiates trade union representation of the working class using, as the criterion, nature of matters the representation pertains to. That factor considered, representation in individual matters and those collective can be distinguished. The former type includes taking a position towards the employer (more seldom towards other entities) on issues from the sphere of rights or interests of individual employees (or other working persons). The representation in individual matters most often takes place at the company level where the threat of violation of an individual right or interest is relatively high. When it comes to collective representation, the range of matters is much broader. First, the representation takes place both on the company level and on the supra-company one, secondly it includes various kinds of activities, highly differentiated from the legal point of view[4], thirdly – in collective issues the trade union is a statutory representative of all the working people, whether being trade union members or not.

[3] E.g. of European works' councils, employment councils etc.

[4] M. Gładoch, *Uczestnictwo pracowników w zarządzaniu przedsiębiorstwem w Polsce. Problemy teorii i praktyki na tle prawa wspólnotowego* [Employee Participation in Company Management in Poland. Issues of Theory and Practice against the Background of Community Law], Toruń 2005, p. 49.

The representative powers of trade unions can be characterized in various ways. Taking into consideration the nature of trade union powers, those determinative and those opinion-giving ones can be distinguished, the criterion being whether the trade union organisation has the right to decide or co-decide on specific matters. In collective labour law the effectiveness of legal actions taken is often made conditional upon a consent by the trade union partner (an example being the conclusion of collective agreements). In other cases the role of trade unions is limited to expressing an opinion or to initiation of a certain action. Quite often rather intricate normative constructions are created by the law-maker, consisting – for example – in distribution of determinative powers among various social partners (like tripartite agreements or a requirement that a common standpoint should be submitted by a few trade union organisations), specification of the time limit for exercising the responsibility (e.g. when it comes to enactment of workplace regulations) or differentiation of the nature of the powers depending on a specific situation at a given work establishment (e.g. when remuneration regulations are being established at work establishments with one or more trade union organizations operating there)[5].

From the functional perspective various kinds or mechanisms of implementation of the representative function by trade unions can be indicated. Taking into account complexity and differentiation of collective law provisions in that respect, the powers in question should be divided into: information and consultation (in the strict meaning), law-making and functions to it, as well as all other ones.

The first group of the rights pertains to the issues in which workers' representative function (within the Community meaning) is performed by trade unions. Although the basic legal act on informing and consulting employees at work establishments[6], was implemented into the Polish legal system by means of a law[7] which provides for establishment of special non-trade union representation bodies (works' councils), it is, nevertheless, trade unions that keep playing the role according to provisions of a number of earlier enacted pieces of legislation. Issues of mass redundancies, transfer of enterprises or occupational safety and hygiene can be mentioned by way of an example in that respect.

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[5] Certain determinative powers of trade union can fall within the broader notion of worker participation. The concept is an ambiguous one. In legal doctrine it is given various meanings, from the broad one, including all forms of employee involvement in decision-making within the company, to a narrowly perceived co-deciding. For a broader discussion see J. Wratny, M. Bednarski, *Wpływ prywatyzacji na zbiorowe stosunki pracy* [The Impact of Privatisation on Industrial Relations], Warszawa 2005, p. 48.

[6] I.e. the Directive 2002/14/EC of the European Parliament and of the Council of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community, O.J. L 80, 23.3.2002, Special edition in Polish: Chapter 05, Vol. 04, p. 219–223.

[7] The Act of 7 April, 2006 on Employee Information and Consultation (Journal of Laws No. 79, item 550, as amended), hereinafter referred to as the "Information Act".

The best developed (while most internally differentiated) is the group of law-making powers and powers related to the function (as the issue in question is not only that of law enactment but also one of the activities through which the influence on the law-making process is achieved). Certainly enough, it should be noted at that occasion that the notion of "law-making powers" is used in the broad meaning of the word, i.e. to denote powers to establish abstract and general rules whether formally meeting the conditions for being regarded as sources of law by the Constitution or not. Thanks to said, the discussed group of powers can be viewed as containing both the right to opine on drafted acts of Community and national law, a so-called quasi-legislative initiative (a request to amend the law), co-creation or opining on so-called autonomous sources of labour law, and conducting collective bargaining in other matters (e.g. those covered by collective disputes). As it is commonly known, the objective of such bargaining most often consists in conclusion of a collective agreement whereby occupational standards are established.

And, finally, the last group contains powers of highly differentiated nature, not falling into the two preceding groups. These include, for instance, negotiations or other forms of social dialogue which are not aimed at conclusion of an agreement (e.g. a protest action, pressure on the employer, rights resulting from tripartite dialogue etc.), designation of members to certain bodies, management of company welfare fund and the like.

Dividing the representation into individual and collective schemes does not merely help sort them out. It also has certain meaning as regards legal foundations of the representation and rules for its execution. As far as collective rights and duties of employees are concerned, all employees are represented by trade unions, regardless of the employees' trade union affiliation. In issues of individual employment relationships it is rights and duties of trade union members that are represented by the unions unions; at a request of a non-member, a trade union may undertake protection of his/her rights and interests towards the employer. As it can be easily noted, two separate legal foundations for a trade union to speak for and behalf of workers are provided for. In the event of an individual case the foundation is an agreement between a specific person and the organization, either indirect or direct. The former regards members of a specific organization who, by joining the organisation and becoming its members consent to specific actions being undertaken by the trade union for them; meanwhile the trade union, when admitting the persons into membership, agrees to protect them. Representing those not being members of the trade union must always be based on a mutual agreement between the persons in question and the said trade union. The rule stems both from negative trade union freedom and from trade union autonomy and independence. It should be also added that individual trade union protection can only be extended onto those not being members of any trade union (so-called "non-unionised employees").

As far as collective representation is concerned, the legal grounds for the representation are derived from the statutory law itself. It is by law that trade unions are entitled to represent the entire community of those working. The statement is rather obvious as regards people not being trade union members, lacking any kind of a formal tie with the trade union organization. Actually, it is also in the case of those associated in trade unions that statutory grounds exist for collective representation, as the representation is based on special principles that include, *inter alia*, a prohibition to discriminate and a duty to act in the interest of those employed regardless of their trade union membership. In collective matters trade unions represent and protect not just their members and persons not associated in trade unions, but even members of other organizations (e.g. not taking part in the collective dispute or in negotiating company regulations). In the said respect, any agreements or actions undertaken by trade unions that would divert from the above said rules are ruled out. Hence it should be assumed that the legal grounds for representing all the working people in collective matters, also trade union members, come for trade unions from the law and not from the act of admission into membership. Members do have indirect influence on directions of activities undertaken by trade unions, though, through the corporative rights executed by them (e.g. appointment of bodies, adoption of resolutions etc.).

4. The above discussed differentiation of the representative function of trade unions, the different mechanisms of representation of those employed in particular, are also of importance as regards determination of legal nature of Poland's trade union organizations. Extension of the collective protection onto all persons remaining in the sphere of influence of trade unions, regardless of their trade union affiliation, leads to the conclusion that it is a special type of a society that we are dealing with. The classical structure of a society assumes that its operation and pursuance of its goals takes place within the society's human substratum. Only in order to meet a reasonable public objective can the limits be extended. This is just the case of trade unions, which have been authorized by law to represent the entirety of those working.

5. The emergence of representations of collective rights and interests of the working class, alternative against trade unions, has resulted in far-reaching changes in the system of the representation. At present as many as three types of worker representation can be identified in Poland, these being: trade union, all-workforce (all-company) and general professional representations. All-company representation bodies are ones representing the staff of a specific work establishment (or a group of work establishments). These include mostly workers' councils, works councils, European works' councils (other representative bodies in entities of a Community-wide scope of operation) and so-called workforce delegates. Taking as the point of departure the body's relation to trade unions, two types of all-company representation can be distinguished: those a) subsidiary

(supplementary) to trade unions and those b)autonomous against trade unions (operating whether trade unions exist at the workplace or not). The first situation is encountered where the non-trade union representation plays a substitutive role in relation to trade unions, i.e. it is the trade union that takes preference, the non-trade union representation just substituting it. The situation becomes different when it comes to the autonomous representation of the staff, i.e. one that is established regardless of the existence (non-existence) of trade unions at a specific work establishment. In connection with the said, such representations enjoy their own, autonomous powers, sometimes overlapping those of trade unions. A typical example of an autonomous non-trade union representation is the works' councils operating under the Polish Act implementing Directive 2022/14.

As far as the general professional representation bodies are concerned, these are bodies of certain professional corporations (e.g. ones associating healthcare system employees or those operating within the administration of justice). The basic task of the bodies of professional corporations lies in taking care of due and diligent job performance by members of a specific corporation and supervision of the performance; to a certain extent they can, however, also represent employee interests in the strict meaning of the word.

The co-existence of various types of worker representation induces a question about the model of collective representation. Looking from the perspective of the level of the representation, two tiers of it can be discerned, operating at the company level and above the latter. At the supra-company level there exists, in fact, trade union monopoly, as it is mostly those organizations that have well-developed structures operating outside of work establishments (professional self-governing corporations being the only exclusion from the model). Hence trade union are partners to the social dialogue on the line of business or regional level, at the national level (independently or under tripartite dialogue schemes) or even transnationally (European bargaining, ETUC).

At the company level the situation is much more complex. As representatives of the legal doctrine put it, at that level as many as five collective representation models can be found worldwide: a single-channel model based on trade union monopoly, a single-channel model based on elected representation, a double-channel mode with trade union and non-trade union representations enjoying equal rights, a double-channel model with the predominance of the trade union representation and a double-channel model with the non-trade union representation playing a supplementary role[8]. There is no doubt that Polish legal solutions in that respect fall among the double-channel representations, the model based on equal rights of trade union/non-trade union representations seeming to be the nearest point of reference. Actually, the issue is more complex, as position of

[8] Cf. the keynote paper of A. Jeammaud from Universite de Lumiere "Workers' Representation and Social Dialogue at the Workplace Level" delivered at the *International Society for Labour and Social Security Law XIXth World Congress in Septembers 2009.*

the representations depends on the essence of the matter, type of representation, nature and even size of the work establishment. Hence in some cases domination and preference (monopoly) of trade unions can be observed (an example being representation of employees in collective disputes or negotiations on collective labour agreements), in other ones the non-trade union representation has a subsidiary (supplementary) nature and takes actions only where trade union organizations are non-existent (this being the case of, for instance, information and consultation procedures related to mass redundancies or negotiation of certain collective agreements, other than CLAs, on the company level).

6. To complete the above said, it is well-worth devoting some considerations to the future of trade unions as representatives of the working people. As trade unions have lost their monopolistic position for representation of the working class, questions regarding directions of further development of workers' representation (actually the entire industrial relations law) are ever more frequently asked. Frankly speaking, no clear course of events can be predicted yet. Hardly could one expect a revival of the trade union movement in the shape and size it had in the 20th century, it does not seem likely, though, that the form of organization of social life may disappear in a short perspective. Nor is it possible for non-trade union representations to fully replace trade union organizations in their role of an effective representative of the working class. After all, the representative function of trade unions is performed by them not only in relation to employers or their organizations, but also all other entities that have direct or indirect influence on legal situation of employees (like agencies of central or local government).

A major factor determining the position and efficiency of trade unions is the trade union density rate in a specific country, hence if trade unions are willing to further play the important role of a representative of the working people, they have not just to halt, but to actually reverse the falling trend of the trade union density ratio. A kind of "re-unionising" is thus needed, to change the current tendency in collective representation, unfavourable to trade unions. Not that the postulate is easy to specify by indicating concrete measure to be taken – this is more the area of factual activities, tactics and skills of trade unions themselves. Still, a few errors should be named, not avoided over the last twenty years or so (at least in Poland), which errors have contributed to undermining the prestige and resulted in a drop of trust in trade unions among employees. These were, for instance: lack of unity/dispersal of the trade union movement, excessive involvement in politics, frequently observed focus on protection of particular interests and corporative privileges, poor effectiveness of actions taken, populism deterring those better educated not only from specific organizations, but also from the trade union idea in general).

It was also a fault to legally provide that in collective matters all employees are represented by trade unions, whatever the employees' trade union affiliation

might be. Trade unions were thus statutorily authorized to represent the working class as a whole. The reflections induced by such a solution are rather critical. First of all, it seems to be not the only acceptable one, since in different countries various rules concerning collective representation of employees are implemented[9]. Looking back at the solution, it has done more harm than good to the trade union idea. The *ratio legis* of the provision in question probably lay in the desire to duly respect the rule of equality of employees and to prohibit discrimination on the grounds of trade union (non) affiliation. Hardly can it be denied, though, that the rule in question has abated employees' interest in joining trade unions since staying outside of them did not entail negative consequences (the employees enjoying benefits from the negotiated company- or supra-company level acts anyway)[10]. The trend to make collective agreements universally binding (effective *erga omnes*) acts was present in many other European countries as well, it is true[11], yet the actions were taken in entirely different realities, at the times when trade union movement kept gaining momentum, so extension of the binding force of collective agreements onto employees not being trade union members was, in fact, just an axiological issue[12].

Paradoxically enough, the falling trend of trade union density rate was brought to a halt, and was even slightly reversed owing to the current economic crisis, the painful results of which include, *inter alia*, poorer employment stability and fears of employees lest they should lose their jobs. The forecasts predicting that crisis situations may again enhance the interest of employees and other wage-earners in joining trade unions have thus proved to be true[13].

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[9] By means of an example it can be noted that in Germany provisions of CLAs are, as a rule, binding on the employer only as regards employees being members of trade unions that negotiated the collective agreement in question. It is through the fear of accusations of discrimination that employers tend to apply provisions of the said agreements onto all those employed (M. Kittner, *Arbeits- und Soziaordnung*, Bund-Verlag 2005, p. 1347 *et seq*.

[10] It seems in the context that adoption (actually confirmation) of an earlier rule that in matters of individual employment relationships trade unions represent rights and interests of their members was, in fact, insufficient. At the request of an employee not being a trade union member, the union may undertake protection of the employee's rights and interests against the employer.

[11] A. Jacobs, *Collective Labour Relations*, (in:) *The Ttransformation of Labour Law in Europe*, B. Hepple, B. Veneziani (eds.), Oxford and Portland, Oregon 2009, p. 219 *et seq*.

[12] It is likely that also in Poland the practice (at least as regards judicial decisions) would probably force application of acts concluded by social partners to all those employed (if only owing to employers' desire to avoid being accused of discrimination practices). Legal nature of protection of those associated and non-associated in trade unions would be different in that situation, though. The position of the former would be governed by the "favourability to the employee" principle (art. 18 of the Labour Code), i.e. a mechanism related to operation of legal norms, whereas onto the latter (non-associated-ones) operation of the CLAs and other acts would be extended using contractual mechanisms.

[13] J. Wratny, M. Bednarski, *Wpływ prywatyzacji*…, p. 172.

7. A characteristic feature of Poland's industrial relations is an asymmetry in trade union density at various work establishments. On the one hand the percentage of employers covered by trade union operation keeps decreasing, on the other hand at the work establishments where unions do operate there is, as a rule, an "oversupply" of them. The said means that the employees are represented by more than one trade union, the situation resulting from, *inter alia*, divisions existing in the trade union movement at the national level. Besides two major central trade union organizations that were formed before 1989, i.e. the "Solidarity" trade union and OPZZ (the Polish acronym for All-Poland Federation of Trade Unions) there exist numerous trade unions of national or regional scope of operation, emerged as a result of the many splits that took place within the said big organizations. The differentiation is often transferred onto the level of companies.

In such a situation two scenarios are, in fact, possible – of either cooperation or confrontation of various organizations. For more than a dozen of years of the transformation of the socio-political system it was the attitude of rivalry and hot disputes between hostile trade union movements that prevailed, resulting mostly from historical experience, but also from differences in the world outlook. From the point of view of the working class's interests the years should be viewed as ones of lost opportunities, for in building the foundations of a new socio-economic system it was unity of the trade union movement that was badly needed. Meanwhile, the disputes and ideological quarrels resulted in the waste of the ever more shrinking trade union potential and weakened the actions taken in defense of the new social model. And while the situation has markedly improved over the last few years, the initial stage of the transformation, judged from that perspective, seems to have been a time of lost opportunities.

Certainly enough, under conditions of trade union pluralism it is necessary to establish rules for cooperation between various trade union organizations. Regulations that differentiated the status of trade unions according to the number of members (the feature of representativeness) were introduced into Poland's labour law relatively early. Initially, the formula had a limited scope of application, its content being hardly clear (with representativeness granted to a majority of work establishment organizations). Further on, it was given a more specific shape in Part XI of the Labour Code concerning collective labour agreements (initially as regards multi-work-establishment collective agreements, later on also single-work establishment ones). The concept of representativeness, as referred to collective labour agreements, was further modified and its scope of reference was extended. Currently representativeness on the supra-company level is partly connected with the right to sit on the Tripartite Committee for Social and Economic Affairs, whereas the feature of company-level representativeness is widely used to determine the status and powers of company- (and inter-company) trade union organizations.

As far as conclusions *de lege ferenda* are concerned, the ill-conceived rule that trade unions are obligated to represent all those working should be replaced

by a trade union obligation to represent their membership. Secondly, enhancement of trade union protection of trade union members should be put to consideration, attractiveness of joining trade unions being improved by the same[14]. It should not be forgotten that trade union movement has a *raison d'être* only when a certain level of minimum representativeness is maintained. The level (threshold) is hard to estimate, yet trade unions of Poland seem to be nearing it rather dangerously. And, finally, the subjective scope of freedom to associate should be reviewed. Currently, almost all people employed under civil law contracts are excluded from the circle of those entitled to establish and join trade unions, although they form an ever greater group of people, bereft – *de lege lata* – of any mechanisms of collective protection. It is also necessary to propose the creation of legal mechanisms favouring consolidation of the dispersed trade union movement at work establishments (the trade union freedom being, of course, fully respected). A mechanism to serve that purpose could lie in introducing the concept of so-called joint representativeness, consisting in raising the representativeness threshold, yet with a possibility to refer it not only to single trade unions, but also to their joint representations.

And, finally, it is necessary to propose that the legal solutions now hindering the development of social dialogue (mostly at the company level) should be made more flexible. The regulation of collective labour agreements can serve as an example in that respect. Provisions of Part XI of the Labour Code are over-casuistic, the law-maker attempting to resolve, in detail, any problems arising in connection with their application. At the same time legal solutions concerning many of so-called collective accords enjoying the high status of labour law sources are much more flexible. In addition, a limited scope of matters is subject to CLA-related negotiations. While social partners are, formally, rather free in that respect, the size of statutory regulation and the level of employee rights resulting therefrom make up a barrier discouraging employers to make any further concessions.

8. Trade unions keep remaining one of key bodies of collective representation of those employed in Poland. Their position gradually keeps evolving, though. No more a hegemonic leader, they become one of many entities forced to compete with other worker representations and to defend their assets. Although there are many signs indicating the existence of a relative balance in that respect, it is not likely to be permanent. At the moment further ways of development of industrial relations within the area in question are hard to predict. The discussion of the issues, as carried out in this paper shows that the fate of trade unions lies, in fact, in their own hands, as the crucial issue is whether they can succeed in convincing people that they should be joined again. Should the efforts fail, trade unions near-

[14] Even now, willing to encourage employees to join them, trade unions are extending the offer of their services by dealing with organization of training or by providing legal assistance services.

ing the level of minimum representativeness as a result, other – non-trade union – representations will gradually take over their functions. Legal instruments are of a lesser importance in the said respect, although they can stimulate changes to a certain extent, it is true.

9. Considering the said, tasks of the legal doctrine may lie not just in formulating current conclusions concerning the law as it should be, but also in assessment of likely scenarios of further development of industrial relations in Poland. The attempts made in the earlier part of the discussion concerned only a few most urgent, while also relatively less controversial postulates *de lege ferenda*. Now it is time to devote some space to model solutions. After more than twenty years of transformation of Poland's socio-economic system, i.e. a transfer from the centrally planned economy to social market economy, it seems that time has come to review the legal structure of collective representation of the working class by trade unions. As it appears, the current model of the representation has been shaped not a result of the informed, well-thought decision of the law-maker, but more by a whole lot of circumstances, often rather casual in nature. The true array of legal solutions faced by us is not necessarily internally coherent. A question arises, though, if creation of a new model of collective representation, based on coherent axiological and structural assumptions is possible at the moment. Any attempts to pursue such an objective would require determining the direction of the proposed solutions. The questions that would have to be answered include a number of issues, like whether the channel of representation should be a single or double one, whether powers of non-trade union representations should be actually further extended or the current position of trade unions at work establishments maintained etc. The issues in question entail lots of problems which should be considered not only as regards their substance, but also from the political perspective. There are many signs indicating that at present there is no political will to resolve the matters. Such a state of affairs brings about consequences for legal scholars as well. They are faced with a hard task of development of possible scenarios of the course of actions supplied by a thorough theoretical analysis allowing to show the weak and strong points of specific solutions. A task that important makes it necessary to take up a number of sizeable studies and analyses, and a serious scientific discussion; it thus exceeds the limits of this paper.

At this point I should like to draw the reader's attention to but a single issue which may, however, provide a clue as to the direction of further changes. In the legal doctrine ever more settled becomes the view that non-trade union representation bodies (in particular works' councils) should be developed, to take over part of the responsibilities of trade unions which keep growing weaker. Although the idea is, at the moment, promoted by the doctrine, it may, nevertheless, win a broader social support, should the scenario of further limitation of trade union density ratio come true. Consolidation of the role of works' councils is likely to

take place as a result of the judgment of the Constitutional Tribunal of 1 July, 2008, whereby the so-called "unionised" procedure for appointment of members of works' councils was contested. While reinforcing the system of a double-channel workers' representation at the workplace level, the judgment brought about a change in the strategy of operation of the existing trade union organizations, which – in a natural way – attempted at taking control of the works' councils by introducing their activists there. It is thus likely that the process of works' councils turning "unionised" may contribute to a change in the formula of trade union representation at the workplace level.

ABSTRACT

The author presents an analysis of the position of trade unions as the most popular worker representation. Among all types of worker representations operating in the modern world, trade unions keep playing a special role. Three basic functions of trade unions are the protective, control and representative ones. However, the growing role of the non-trade union forms of collective protection of the working class certainly results in changes of the status of trade unions. We can observe a weakening of the position of trade unions. Three types of worker representation can be identified in Poland: trade union, all-workforce (all-company) and general professional representations (in particular works councils). At the supra-company level there exists, in fact, trade union monopoly. At the company level, Polish legal solutions fall among the double-channel representation, a model based on equal rights of trade union/non-trade union representation. Hence in some cases domination and preference (monopoly) of trade unions can be observed. The co-existence of various types of worker representation raises a question about the model of collective representation. Trade unions have lost their monopolistic position in the representation of the working class. At the moment, further ways of development of industrial relations within the area in question are hard to predict. The questions that would have to be answered include a number of issues, like whether the channel of representation should be a single or double one, whether powers of non-trade union representations should be actually further extended or the current position of trade unions at work establishments maintained.

FUNKCJA PRZEDSTAWICIELSKA ZWIĄZKÓW ZAWODOWYCH

Streszczenie

Autor analizuje pozycję związków zawodowych jako najbardziej powszechnej formy przedstawicielstwa pracowniczego. Wśród wszystkich typów przedstawicielstwa pracowniczego, występujących we współczesnym świecie, związki zawodowe odgrywają szczególną rolę. Trzy podstawowe funkcje związków zawodowych to funkcja ochronna, kontrolna i przedstawicielska. Niemniej jednak rosnąca rola pozazwiązkowych form zbiorowej ochrony interesów pracowniczych wyraźnie rzutuje na status związków zawodowych. Obserwuje się słabnącą pozycję związków zawodowych. W Polsce można wyróżnić trzy formy przedstawicielstwa pracowniczego: związki zawodowe, zebranie ogółu pracowników (tj. cały zakład pracy) oraz profesjonalne przedstawicielstwa (w szczególności rady pracowników). Na poziomie ponadzakładowym występuje właściwie monopol związków zawodowych. Na poziomie zakładowym polskie regulacje są najbliższe modelowi dwutorowego przedstawicielstwa zakładającego równe uprawnienia przedstawicielstw związkowych i pozazwiązkowych, chociaż w wielu przypadkach występuje monopol związkowy. Współistnienie różnych form przedstawicielstwa pracowniczego nasuwa pytanie o kształt reprezentacji pracowniczej. Związki zawodowe utraciły pozycję monopolisty w zakresie reprezentowania interesów pracowniczych. Dalszy kierunek rozwoju sytuacji w tym obszarze jest trudny do przewidzenia. Pytania, które wymagają odpowiedzi, dotyczą w szczególności tego, czy model tej reprezentacji powinien być jedno- czy dwutorowy, a także czy uprawnienia przedstawicielstw pozazwiązkowych powinny być w dalszym ciągu rozszerzane, czy też powinna zostać utrzymana aktualna pozycja związków zawodowych.

KEYWORDS

workers representation, trade union, works' council, non-trade union representation, representative function

SŁOWA KLUCZOWE

przedstawicielstwo pracowników, związek zawodowy, rada pracowników, przedstawicielstwo pozazwiązkowe, funkcja przedstawicielska

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POLISH REGULATIONS CONCERNING SETTLEMENT OF COLLECTIVE DISPUTES IN THE LIGHT OF EUROPEAN STANDARDS, EXEMPLIFIED BY THE RIGHT TO STRIKE

1. Experiences of NSZZ "Solidarność" (Solidarity Trade Union) dating back to the 1980's and the signing of post-strike agreements in Gdańsk, Szczecin and Jastrzębie which took place on 30 August 1980 (in the Polish history they are referred to as the "August Agreements") clearly show that collective actions are extremely important. This is in particular valid in the case of strikes, which help achieving and maintaining social peace in the context of collective labour relationships. The conference organised by the Chair of Labour Law of the University of Gdańsk in order to commemorate the 30th anniversary of creation of NSZZ "Solidarność" is a perfect occasion to make the former and current leadership of this largest and best-known Polish trade union, as well as the representatives of other trade union confederations, federations and trade union structures aware of the necessity to exert certain pressure on Polish authorities in order to encourage them to ratify the Revised European Social Charter adopted on 3.5.1996 (its Article 6 § 4 in particular). The Charter includes legal provisions establishing standards of collective labour law in relation to the right of initiating and carrying out strike activities by employees.

Scientific conferences are the best venues for presenting arguments in support of the urgent adjustment of the provisions of Chapter 4 of the Collective Disputes Resolution Act dated 23.5.1991[1] to the European standards of collective labour law. The international conference on legal acquis of the Council of Europe in the sphere of shaping and safeguarding social rights as falling within the scope of labour law[2], organised in 2005 at Cracow's Jagiellonian University,

[1] Journal of Laws No. 55, item 236, as amended.

[2] *W kierunku powszechnej ratyfikacji Zrewidowanej Europejskiej Karty Społecznej* [European Social Charter. Towards common application of the Revised Charter], A. M. Świątkowski (ed.), Warszawa 2005, *passim*.

resulted in a declaration made by the deputy prime president of the Council of the Ministers of the Republic of Poland that a decision had been made to sign the Revised European Social Charter. On 25.10.2005 the permanent representative of the Republic of Poland to the Council of Europe signed the Charter. However, despite declarations on the lack of essential contraindications to the ratification of Article 6 § 4 of the Revised European Social Charter and other provisions thereof, which introduce higher standards of legal protection of employee and social rights than those featured in the provisions of the European Social Charter of 18.10.1961 ratified by the Polish authorities on 25.6.1997, this declaration has failed to bring about expected results[3]. The Council of Europe has been actively working on establishment and application of legal standards relative to general protection of fundamental social rights[4] for over 60 years. The fact that the Council of Europe is the oldest international institution in Europe dealing with the protection of human rights and fundamental freedoms in the context of the provisions of labour and social security law makes it justified to request once again that the Revised European Social Charter be ratified[5]. Presenting such a request is particularly justified in the context of the conference organised to celebrate the 30th anniversary of establishment of NSZZ "Solidarność". The legal acquis of the Council of Europe's European Committee of Social Affairs on issues relevant to the protection of the employees' right to strike presented in the second part of this paper does not provide any material arguments that can be used by opponents to this ratification who claim that the effective provisions of collective labour law are not consistent with the European standards. A thorough analysis of case law of the European Committee of Social Rights[6] – an independent international institution which monitors conformity of national legal regulations with European standards

[3] Cf A. M. Świątkowski, *Zrewidowana Europejska Karta Społeczna – perspektywy ratyfikacji* [Revised European Social Charter – Prospects for Ratification], suplement to "Monitor Prawa Pracy" 2006, Vol. 2, p. 809.

[4] Cf A. M. Świątkowski, *Liberté, Egalité i Fraternité jako idee przewodnie wykorzystywane przez Radę Europy w procesach tworzenia i stosowania standardów międzynarodowych w zakresie praw społecznych*, (in:) *60 lat Rady Europy. Tworzenie i stosowanie standardów prawnych* [Liberté, Egalité and Fraternité as Key Ideas Used by the Council of Europe When Creating and Implementing International Standards Regarding Social Rights, (in:) 60 Years of the Council of Europe. Creation and Implementation of Legal Standards], H. Machińska (ed.), Warszawa 2009, p. 267 *et seq.*

[5] Such an appeal has been featured in a plenary speech made during the 27th Convention of the Labour and Social Insurance Law Chairs and Departments organised by the Chair of Labour Law and Social Policy of the Jagiellonian University in Cracow in May 2009; Cf A. M. Świątkowski, *Ochrona praw człowieka w świetle przepisów prawa pracy i zabezpieczenia społecznego*, (in:) *Każdy ma prawo do...* [Protection of Human Rights in the Light of Labour Law and Social Security Regulations, (in:) Everybody Has the Right to…], Warszawa 2009, p. 76 et *seq.*

[6] This paper is based on the analysis of case law of the European Committee of Social Rights published by A. M. Świątkowski in his monographic paper: *Karta praw społecznych Rady Europy* [European Social Charter of the Council of Europe], Warszawa 2006, p. 322 *et seq.*

under the Revised European Social Charter – speaks in favour of the opinion expressed by the advocates of its ratification that such a ratification is possible and necessary in the nearest future.

2. Article 6 § 4 of the Charter grants social partners the right to undertake collective action in the case of a collective labour dispute[7]. The said provision guarantees the right to initiate collective actions to both sides of the collective labour relationships (both employees and employers)[8]. However, specific types of collective actions that may be undertaken by parties of collective labour relationships have not been enumerated. In the case of employees it has only been stated that they shall be entitled to initiate any collective action, including a strike. This general, demonstrative regulation of the right to undertake collective labour actions in cases of conflicts of interests granted to the social partners has become a legal basis for the European Committee of Social Rights to develop standards of protection of social rights covered by the provisions of collective labour law in the case of collective labour disputes.

3. Apart from the right to strike, Article 6 § 4 of the Charter does not enumerate any specific collective actions that may be undertaken by employees in order to protect their interests. The Committee has neither listed or analysed collective actions that may be organised on the basis of Article 6 § 4 of the Charter, being only interested in learning about collective actions which may be legally undertaken pursuant to national provisions of collective labour law[9]. The Committee requested some member states to present explanations on why their binding provisions of collective labour law prohibit some categories of employees, such as civil servants, to organise collective actions, with the exception of strike[10].

As early as in the first supervisory cycle the Committee was of an opinion that Article 6 § 4 of the Charter guaranteed the right to undertake collective actions to social partners. The provision in question mentions *expressis verbis* the right to strike, which may be exercised by employees in the case of a conflict of interests[11]. The necessary condition which has to be met in order to undertake

[7] Cf J. M. Belorgey, *La gestion des conflits du travail en Europe: le choc des cultures*, "Droit Social", 2002, No. 12, p. 1125 *et seq*.; T. Novitz, *International and European Protection of the Right to Strike*, "Oxford Monographhs on Labour Law", Oxford 2003, p. 125 *et seq*., p. 211 *et seq*.

[8] A. Bleckmann, *Interprétation et application en droit interne de la Charte sociale européenne, notamment du droit de grève*, "Cahiers de droit européenne" 1967, No. 4, p. 388 *et seq*.; M. H. Bobke, *Die Europäische und das Streikrecht in der Bundesrepublik*, WSI Mitteilungen 4/87 40e Jahrgang, April, p. 246; H. F. Zacher, *Le droit syndical et le droit aux actions collectives a'après l'Article 5 et l'Article 6 paragraphe 4 de la Charte sociale européenne*, Assemblée parlementaire du Conseil de l'Europe, Strasbourg, décembre 1977.

[9] Conclusions XV-1, Vol. 1, p. 81 (Belgium), p. 121 (Cyprus).

[10] Conclusions XIV-1, Vol. 1, p. 21; Conclusions XV-1, Vol. 1, p. 202; Conclusions XV-1, Vol. 2, p. 477 (Portugal), p. 520 (Spain).

[11] O. Kahn-Freund, *The right of strike – Its scope and limitations*, Strasbourg 1974, p. 1 *et seq*.

collective actions within the framework of collective labour relations is the existence of divergent interests of various social partners. According to the principles generally binding in the context of collective labour relationships, the Committee has expressed an opinion that the right to organise collective labour actions has no *raison d'être* in the case of difference of opinions between social partners on the interpretation and practical application of generally binding provisions of labour law or of collective labour agreements. According to the Committee, the statement presented above remains rational even in a situation where social partners have unanimously introduced into a collective labour agreement some provisions on the basis of which divergence of opinion on practical application of certain provisions may justify organising and carrying out collective actions[12].

4. Article 6 § 4 of the Charter does not distinguish between legal and illegal strikes. It only covers the employees' right to undertake legal collective actions, including the right to strike. As a result it provides a basis for distinguishing certain forms of strike which are consistent with the law from those which violate the law. Under this provision legal strike shall mean all forms of strike covered by the said legal norm. Strike is a collective action organised by employees in order to exert pressure on the employer who makes decisions relative to the terms and conditions of work and remuneration. Therefore a strike may have, as its objective, only the shaping of terms and conditions of employment and remuneration in a more beneficial manner for the employees. Strikes may be organised in order to protect interests of employees of the employer that employs people intending to go on strike. Strikes and other collective actions may not be organised to protect interests of another employer's employees or the interests of clients or consumers[13]. A conflict between the interests of employees and those of employers is therefore a necessary condition for organising a legal strike[14]. The provisions of Article 6 § 4 and Article 5 of the Charter are closely interrelated. Collective actions (including strikes) may be organised for the same purposes as ones for which trade unions are formed, namely in order to protect the employees' economic and social interests. The Charter does not protect any other interests of employees. Therefore strikes organised for political purposes do not benefit from legal protection, as Article 6 of the Charter constitutes a provision which is supposed to grant social partners an effective right to carry out collective negotiations, while political issues do not fall within the scope of matters negotiated under collective labour agreement schemes[15]. Employees form trade unions, carry

[12] Conclusions I, p. 38.

[13] *Ibidem*.

[14] Conclusions XV-1, Vol. 2, p. 637–641 (Great Britain). G. Morris, *The Right to Strike and Lock-out in English Law*, (in:) *The Council of Europe and Its Social Challeges of the XXIst Century*, T. Blanpain (ed.), "Bulletin of Comparative Labour Relations", No. 39, Kluwer Law International 2001, p. 229 *et seq*.

[15] Conclusions II, p. 27.

out negotiations with employers, and undertake collective actions with the view of protecting their own economic and professional interests. Legal protection guaranteed by Article 6 § 4 of the Charter does not cover solidarity strikes organised in order to support interests of other employee groups. The Committee of Social Rights has not pronounced its opinion on the legality of strikes organised by some trade unions in order to support demands of other trade union organisations wishing to be considered as representative organisations by the authorities of member states and organisations of employers. Invoking the case law of the ILO's Committee on Freedom of Association, which does not grant protection to solidarity strikes organised in order to support another trade union demanding to be considered a representative trade union organisation, the Committee of Social Rights has ruled that strikes aimed at protecting trade union-related interests of the same trade union which has organised the strike shall benefit from legal protection guaranteed by Article 6 § 4 of the Charter[16].

Legal strikes may be organised by all employees, both trade union members and non-affiliated employees. A monopoly to organise collective actions and strikes granted to trade union organisations by national provisions of labour law is contrary to international standards established in this respect by the Committee of Social Rights. In member states which do not impose significant formalities and requirements relative to setting up trade unions, the right to organise and participate in a legal strike may depend on whether such an action is managed by a trade union[17].

5. The right to strike is not an absolute right that is not subject to any limitations. In Appendix 6 § 4 of the Charter authorities of member states have been authorised to introduce such regulations relevant to the exercise of this right as they deem justified, so that any further limitation of the said right could be justified exclusively by the occurrence of circumstances referred to in Article 31 § 1 of the European Social Charter or Article G § 1 of the Revised European Social Charter. The sources enabling to limit the right to strike include collective labour agreements, laws and regulations enacted by member states and court case law.

Interpretation of Article 6 § 4 of the Charter enables us to conclude that limitations of the right to strike introduced by social partners by way of collective agreements are in line with international standards. Parties negotiating collective labour agreements are entitled to insert so-called social peace clauses into them. The clauses mean provisions on the basis of which employee representatives who have signed the collective labour agreement voluntarily agree to abstain from undertaking collective actions (including strikes) during the period in which the collective agreement in question remains in force. Voluntary introduction of provisions excluding or limiting the right to strike into a collective labour agreement

[16] Conclusions XVII-1, Vol. 2, p. 290 (Malte).

[17] Conclusions XV-1, Vol. 1, p. 204 (Finland); Conclusions XV-1, Vol. 2, p. 566 (Sweden).

does not constitute violation of the provisions of Article 6 § 4 of the Charter[18]. The social peace clause is binding exclusively on those employees who are represented by the trade union that has signed the collective labour agreement in question[19]. Employees who are members of a trade union organisation covered with a social peace clause shall refrain from undertaking collective actions exclusively in relation to issues covered by the material scope of relevant collective labour agreements.

Member states introduce regulations relative to the rules of conducting collective labour agreements. They outline procedural requirements to be met by entities organising a strike so that it may be considered legal. Interference of member states' authorities into the exercise of the right to undertake collective actions (including strikes) by the entitled employees consists in: limiting the scope of entities entitled to organise strikes, introducing formal requirements to be met prior to announcing a legal strike, exhausting the possibilities relative to arbitrary proceedings prior to making a decision on proclaiming a strike, and the duty to ensure continuity of operation of some employing establishments. The right to introduce regulations relative to the principles of organising strikes may not be considered equivalent to the prohibition to undertake collective actions and to organise strikes[20].

6. No member state guarantees the right to organise strikes to all employees. Usually the necessary condition to be met in order to organise a strike in a legal way is to establish a trade union organisation first. Some member states limit the freedom to organise strikes by trade unions by granting such a right exclusively to those trade unions that are considered to be representative. According to the Committee such a limitation of freedom to organise strikes is contrary to the provisions of Article 6 § 4 of the Charter[21]. Employees are entitled to undertake collective actions, including strikes, irrespective of the fact whether they are members of representative trade unions or not[22].

7. The Committee has ruled that a requirement that a decision on organising a strike must have been approved by the management of a trade union organisation[23] or the majority of employees[24] is not consistent with international standards.

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[18] Conclusions I, p. 38; Conclusions VIII, p. 98 (Sweden); Conclusions XV-1, Vol. 2, p. 521 (Spain).

[19] Conclusions VII, p. 40 (Sweden); Conclusions XIV-1, Vol. 2, p. 619 (Norway).

[20] Conclusions XII-1, p. 128 (Iceland).

[21] The case of France: Conclusions 2002, pp. 35–36; Conclusions 2004, Vol. 1, p. 220.

[22] The case of Romania: Conclusions 2002, p. 135, 137; Conclusions 2004, Vol. 2, p. 461.

[23] Conclusions 200, Vol. 1, p. 97 (Cyprus).

[24] In the case of Romania it is 50% of employees. Conclusions 2002, p. 137; Conclusions 2004, Vol. 2, p. 461. As far as Lithuania is concerned, this ratio is equal to 75% of employees. Conclusions 2004, Vol. 2, p. 351.

The obligation to organise a vote on a planned strike among employees of the employer on which pressure is to be exerted has also been considered a violation of Article 6 § 4 of the Charter[25].

The Committee had no doubts whatsoever that the national provisions of collective labour law on a notification period for informing the employer about any planned collective action are in line with international standards. As a rule the Committee acknowledged that periods of notification relative to a planned action (and in particular to a strike) may serve as a factor enabling the parties to curb their emotions and stimulate reasonable decisions relative to going on strike. The legal doctrine relevant to collective labour law refers to those periods as the "*cooling off periods*". Such a term correctly reflects the rationale behind introducing such periods by member states. According to the Committee, introducing a duty to notify the employer of the planned collective action should not be interpreted as a limitation of the right to strike[26]. The extent of those periods may, however, constitute a limitation on the right to strike. Pursuant to the basic rule of refraining to provide model legal regulations, the Committee has not indicated what kind of notification periods were consistent with the international standards. The Committee limits itself to assessing regulations introduced by the provisions of labour law in particular member states. It may rule on the failure of a member state to respect the provisions of Article 6 § 4 of the Charter in those cases, where national provisions of collective labour law have introduced long notification periods (ranging to a couple of weeks), combined with a duty to subject the planned collective action to an assessment by a social arbitration body or by a court, upon request expressed either by the employer or a public administration entity[27].

8. In some cases member states introduce a duty to subject a collective dispute to a decision of a social arbitration body. The objective of introducing such a requirement is to postpone the starting date of a collective action or a strike. Compulsory arbitration proceedings introduced by legal provisions enacted by a member state are permissible only in the case where their objective consists in the protection of values referred to in Article 31 § 1 of the European Social Charter or Article G § 1 of the Revised European Social Charter. Limiting the right to strike introduced pursuant to the above-mentioned provisions of the Charter should not be excessive and duration of such restrictions should be limited – it may not, under any circumstances, exceed the period necessary to restore the situation to its normal state[28].

[25] Conclusions XV-1, Vol. 2, p. 641 (the United Kingdom).
[26] Conclusions I, p. 38.
[27] Conclusions XIV, Vol. 1, p. 157; Conclusions XV-1, Vol. 1, p. 123.
[28] Conclusions X-1, pp. 74–75.

9. Member states may limit the right to strike of employees employed in some private employing establishments in order to safeguard certain values referred to in Article 31 § 1 of the European Social Charter or Article G § 1 of the Revised European Social Charter. The Committee has therefore adopted a practice developed in the course of interpretation of Article 6 § 4 of the Charter in the context of public service employees. The scope of limitations of the right to strike of employees working for private employers depends on the significance of services provided by those employees to the local community. The Committee has expressed an opinion that limiting the right to strike may take place exclusively in a situation where suspension of activity by some employing establishments would constitute a threat to the existence of a specific community[29]. While analysing the limitations of the right to strike introduced by member states, the Committee examines if they refer to employees working for employing establishments that are essential for the functioning of a local community. It also analyses whether, instead of excluding the right to strike, it would be sufficient to oblige the employees on strike to ensure such services to the extent indispensable for the community. The Committee is against a situation where authorities of member states reserve the right to determine the minimum scope of services that should be provided during strike[30]. Aiming at ensuring continuity of activities of certain employing establishments the authorities of some member states replace the employees on strike with strikebreakers. The Committee has already dealt with cases of this kind on three occasions. In two cases two different rulings were given in the context of the situation in the Federal Republic of Germany. The Committee first decided that replacing employees who went on strike, employed on the basis of employment contracts in public administration offices, is consistent with international standards unless it goes beyond the principles outlined in Article 31 § 1 of the European Social Charter[31]. In the next supervisory cycle the Committee stated that on 2.3.1993 the German Constitutional Court declared unconstitutional provisions allowing for replacement of public officers on strike with other employees and as a result ruled that the national provisions constituted a violation of Article 6 § 4 of the Charter due to the fact of transgressing the authorisation granted by the provisions of Article 31 § 1 of the Charter[32]. The Committee has maintained its position on the subject in its recent ruling in a case relative to Slovenia[33].

[29] Conclusions I, p. 38.

[30] Conclusions XVII-1, Vol. 2, p. 420 (Portugal).

[31] Conclusions XII-2, p. 113–114.

[32] Conclusions XIII-2, p. 282.

[33] Conclusions 2004, Vol. 2, p. 517. The Committee deferred its ruling until relevant information on legal consequences of unlawful redundancies of employees in the course of a legal strike would be obtained.

10. The problem of collective disputes resolution under the Polish labour law is covered by the provisions of the Collective Disputes Resolution Act[34]. The provisions of the Act do not include a definition of a collective dispute, but only indicate the scope of this phenomenon. Article 1 states that a collective dispute may refer to conditions of work, remuneration or social benefits, as well as association rights and freedoms of employees or other groups entitled to associate in trade unions. The differentiating factor applicable to disputes covered by the said Act is their collective character, which means that such disputes must be linked to a group of people. As a result, under provisions of the Polish labour law, one of the parties of a collective agreement is always some sort of a collectivity[35]. It should be acknowledged that individual employee requests may be covered by a collective dispute only if they concern a group of employees and not just one single person[36].

The provisions of labour law traditionally include a distinction between disputes relative to rights and disputes relative to interests[37]. Disputes relative to rights touch on employee rights resulting from binding provisions of the law, while disputes relative to interests are organised in order to initiate or block changes of currently applicable terms and conditions of employment[38]. Disputes relative to rights may be also discussed in a wider sense, where their goal is to achieve or to maintain certain profits or benefits (for example in the sphere of association-related rights and freedoms). It is commonly acknowledged that all disputes relative to interests are covered by the notion of collective disputes, but the character of disputes relative to rights remains a controversial issue. A strong distinction between these two categories presented above results in inadmissibility to include disputes relative to rights into the scope of collective disputes[39].

As mentioned above, collective disputes (disputes relative to interests) are aimed at achieving a more beneficial situation or avoiding deterioration of the status quo. As a result we do not support any views according to which collective

[34] Collective Disputes Resolution Act of 23 May 1991 (Journal of Laws No. 55, item 236, as amended).

[35] The notion of the collectivity of employees has been discussed in a greater detail by A. M. Świątkowski, *Komentarz do ustawy o rozwiązywaniu sporów zbiorowych*, (in:) *Zbiorowe prawo pracy. Komentarz* [A Commentary to the Collective Disputes Resolution Act, (in:) Collective Labour Law. A Commentary], J. Wratny, K. Walczak (eds.), Warszawa 2009, pp. 268–275.

[36] B. Cudowski, *Pojęcie i przedmiot sporu zbiorowego* [The Notion and Subject Matter of a Collective Dispute], "Praca i Zabezpieczenie Społeczne" 1995, Vol. 11, p. 34. A different opinion has been expressed by K. W. Baran, *Zbiorowe prawo pracy. Komentarz* [Collective Labour Law. A Commentary], Warszawa 2007, pp. 363–367.

[37] Cf. K. W. Baran, *Zbiorowe prawo pracy…*, p. 363 *et seq.*

[38] B. Cudowski, *Pojęcie i przedmiot…*, p. 35.

[39] A different view has been expressed by W. Masewicz, *Ustawa o związkach zawodowych. Ustawa o rozwiązywaniu sporów zbiorowych* [Trade Union Act. Collective Disputes Resolution Act], Warszawa 1998, p. 136.

disputes may be initiated also for the purpose of defending associative rights and freedoms understood as subjective rights and not as interests[40].

11. In its Article 22 the provisions of the analysed Act clearly indicate the possibility to organise the so-called solidarity strikes. A solidarity strike is an action undertaken in order to safeguard the rights and interests of employees who are not entitled to go on strike, organised by a trade union operating in another employment establishment. As it can be clearly seen, the objective of a strike may include not only safeguarding one's own interests, but also someone interests of someone else. It also holds true that a solidarity strike may be organised exclusively for the same reasons as a standard strike[41]. Interpretation other than that would lead us to a conclusion that a solidarity strike might be organised also in circumstances where no collective dispute is taking place.

The legal doctrine has introduced a distinction between accessory solidarity strike and substitute solidarity strike[42]. Accessory solidarity strike consists in interruption of work in order to express solidarity with employees of a different establishment who are currently on strike. Substitute solidarity strike, on the other hand, is organised in order to express support for the rights and interests of those employee groups who are not entitled to go on strike. Under the provisions of the Collective Disputes Resolution Act, a solidarity strike may not be carried out in order to support the activities of collective groups of employees who may exercise their own right to strike. As a result the Polish law authorises exclusively the substitute solidarity strike[43].

The above-mentioned regulations relative to solidarity strike do not constitute a violation of Article 6 §4 of the Revised European Social Charter, since the Committee has not proclaimed solidarity strikes to be contrary to the provisions of the Charter, as it has already been explained above.

While analysing the objective of a collective dispute we may not ignore the possibility of so-called political strikes being organised[44]. In the case of such a strike revindications are addressed to the authorities in power. The objectives of such a strike are of a clearly political nature and include, for example, resignation of the government, change of law, etc. Quoting the words of H. Sinay, 3 distinct characteristics of a political strike may be distinguished:

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[40] For example K. W. Baran, *Zbiorowe prawo pracy…*, pp. 366–367.

[41] P. Korus, *Strajk nielegalny* [Illegal Strike], "Studia z zakresu prawa pracy polityki społecznej" 1997/1998, A. M. Świątkowski (ed.), pp. 158–159.

[42] K. W. Baran, *Zbiorowe prawo pracy…*, p. 315.

[43] I. Borut, Z. Góral, Z. Hajn, *Komentarz* do ustaw o związkach zawodowych, organizacjach pracodawców, *zbiorowych sporach pracy* [Commentaries to the Trade Union Act, Employers' Associations Act, Collective Disputes Resolution Act], Łódź 1992, p. 239.

[44] Cf A. M. Świątkowski, *Rozwiązywanie sporów zbiorowych pracy* [Settlement of Collective Disputes], "Studia z zakresu prawa pracy i polityki społecznej" 1994, A. M. Świątkowski (ed.), pp. 313–315.

– the strike is not organised against the employer and revindications of its participants may be met exclusively by the government;

– it is an action with negative distinguishing features (usually those of a protest against something);

– the strike participants act not as employees, but as citizens[45].

It does not seem necessary for a collective action to meet all the criteria described above in order to be considered a political strike. A political strike is considered illegal and may not be proclaimed consistent with the Collective Dispute Resolution Act. This reasoning is also justified on the grounds of Article 6 § 4 of the Charter. As already mentioned above, the Committee is of an opinion that political strikes are not permissible[46].

12. Pursuant to the Collective Dispute Resolution Act a strike (as well as any other activities falling within the scope of a collective dispute) may be initiated exclusively by a representative trade union[47]. As a result no other entity representing the employees (such as a works' council or the European works council) may initiate and coordinate a strike. Such a right is not available in particular to the *ad hoc* protest and strike committees appointed by members of the staff[48]. A regulation like that may generate certain doubts about its being consistent with Article 6 § 4 of the Charter. According to the Committee, granting a monopoly to organise collective actions to trade unions constitutes a violation of international standards[49]. However, we have to take into account the opinion of the Committee presented in detail in part II of this paper, according to which, if terms and conditions for establishing a trade union (covered by the provisions of Article 5 of the Charter) are not excessively strict, it is possible to link legal character of a collective action to its being organised and coordinated by a trade union[50]. While analysing the case of Poland, the European Committee of Social Rights has ruled that the requirements specified in Article 12 paragraph 1 of the Trade Union Act[51] (10 persons authorised to establish a trade union organisation) are not excessive[52]. Therefore it is fully justified to claim that a limitation of the scope of entities entitled to conduct collective agreements introduced by the Collective Disputes Resolution Act, resulting in granting a monopoly of undertaking such

[45] K. W. Wedderburn, *Industrial Action, The State and The Public Interest*, (in:) *Industrial Conflict. A Comparative Legal Survey*, B. Aaron, K. W. Wedderburn (eds.), London 1972, p. 337.

[46] Conclusions II, p. 27.

[47] Z. Salwa, *Uprawnienia związków zawodowych* [Trade Union Rights], Branta 1998, p. 141.

[48] K. W. Baran, *Zbiorowe prawo pracy*…, p. 368.

[49] Conclusions IV, p. 50.

[50] Conclusions XV, Vol. 1, p. 204.

[51] Trade Union Act of 23 May 1991 (consolidated text: Journal of Laws of 2014, item 167).

[52] Addendum to Conclusions XV-1, pp. 108–109.

actions to trade unions, does not constitute a violation of Article 6 § 4 of the Revised Charter of Social Rights.

13. The Collective Disputes Resolution Act has introduced a detailed procedure aimed at ensuring the legality of a strike. First of all, the strike has to be preceded by mediations and negotiations. It may also be optionally preceded by proceedings before the social arbitration court. In this context it is necessary to decide if the above-mentioned duties constitute a limitation of the right to strike provided for in Article 6 § 4 of the Charter. The proceedings before the social arbitration court will certainly not be declared a limitation of this kind, as they are purely voluntary and instigated at the initiative of the trade union involved in a dispute. More doubts, on the other hand, arise in the context of the duty to organise mediation proceedings. As indicated above, the Committee has ruled that obligatory mediation is not consistent with international standards[53]. It is, however, necessary to take into account the fact that within the Polish system of collective law mediation shall be pursued until the parties themselves decide to close the mediation procedure[54]. Therefore such a model of mediation duty may not be considered excessive, and we may (with a certain degree of caution) consider the Polish regulations consistent with the requirements of Article 6 § 4 of the European Charter of Social Rights.

A trade union willing to proclaim a strike must obtain the support of a majority of employees expressed in a referendum. The legislator has specified a minimum number of employees supposed to participate in a vote so that it may be considered valid. In the case of a single-company strike it is equal to at least 50% of employees of the employment establishment in question, while in the case of multi-company strike at least 50% of employees of each establishment covered with the strike action must take part in the referendum. The turnout is calculated on the basis of official employment figures in the establishment in question within the period in which the referendum is organised. Should the percentage of employees taking part in the vote be lower than required by the Act, a strike may not be organised. The expression "the majority of employees participating in the vote" used in the provisions of the Act shall mean a situation where over half of employees expressed their support for the initiative of announcing a strike.

Approval by the majority of employees participating in the vote enables the employee representatives to organise a strike. This right, however, may not be exercised unless the conditions outlined in Article 20 paragraph 3 of the Collective Disputes Resolution Act are met. According to this provision a trade union shall proclaim a strike at least 5 days prior to its commencement. The objective of this period consists in notifying both the employer and employees about the planned strike.

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[53] Conclusions 2002, p. 136.

[54] About the mediation period, cf. A. M. Świątkowski, *Komentarz do ustawy…*, pp. 338–339.

Referring to the opinion of the Committee of Social Rights on formal requirements relative to undertaking strike actions already presented in part II of this paper, we may conclude that Polish regulations remain consistent with the provisions of the Charter and with the standards developed on its basis by the Committee. It is in particular important to stress that in the light of the Committee's case law the duty to hold a strike referendum may not be considered to constitute a violation of the provisions of the Charter. At the same time the Committee's case law seems to confirm the need to guarantee freedom of expression of will by the participants of the vote. The 5-days notification period should also be considered consistent with international standards. The Committee has ruled that also very long notification periods (of several weeks) shall constitute a violation of international standards, which is clearly not the case of the notification period referred to in Article 20 paragraph 3 of the Collective Disputes Resolution Act.

14. The Collective Disputes Resolution Act introduces both subjective and objective limitations of the capacity to carry out a strike.

As far as the subjective limitations are concerned, the right to strike has not been granted to employees working for the public authorities, government and local government administration, courts and public prosecution authorities (Article 19 paragraph 3). It is also unacceptable to organise a strike at the Internal Security Agency, Foreign Intelligence Agency, Military Counterintelligence Service, Military Intelligence Service, Central Anticorruption Bureau, Polish Police and Armed Forces units, Prison Service, National Boarder Guards, Customs Service of the Republic of Poland, as well as fire brigade organisational units (Article 19 paragraph 2)[55]. The legal doctrine stresses the need to interpret this provision in a restrictive manner. Therefore we should support an approach according to which the right to strike under general conditions shall be granted to employees who are not employed within the framework of structures of militarised bodies referred to in Article 19 paragraph 2 of the Act, but who are employees of companies which perform subsidiary or service functions in relation to such bodies[56].

Imposing a ban on strike actions on employees of public authorities, government and local government administration, courts and public prosecution authorities seems to be an excessively broad approach. The wording of the provision imposes a ban on organising strikes on all employees of the said structures. Such a ban covers not only public servants, but also all persons employed in public administration offices[57]. A regulation like that is contrary to the objective of

[55] Just like B. Cudowski, in his *Spory zbiorowe w polskim prawie pracy* [*Collective Disputes in Polish Labour Law*], Białystok 1998, p. 132, we consider the limitations resulting from Article 19 paragraph 2 on the Collective Disputes Resolution Act to be subjective limitations; a different opinion has been expressed by K. W. Baran, *Zbiorowe prawo pracy*…, p. 298.

[56] W. Masewicz, *Ustawa o związkach zawodowych*…, p. 196.

[57] B. Cudowski, *Spory zbiorowe pracy*…, p. 492.

introduced limitations, which are aimed at ensuring efficient operation of public administration.

This view is supported by case law of the Committee of Social Rights, which, as it has already been shown, provides for a possibility to exclude the right to organise strikes in relation to certain categories of employees. In this respect the provisions of Article 19 of the Collective Disputes Resolution Act will be consistent with the Revised European Social Charter and its Article 6 § 4. However, international standards developed by the Committee have been breached by the provisions of the said Act, which excludes the right to organise strikes in relation to all employees of public services. It would be therefore desirable to introduce necessary changes in that respect by limiting the group of entities not authorised to organise strikes to people who carry out task which fall within the framework of public administration and public authorities and which are related to safeguarding rights and freedoms, public order, and public security[58].

The objective limitation has, on the other hand, been defined by Article 19 paragraph 1 of the Collective Disputes Resolution Act, which includes a prohibition of interrupting work as a result of strike actions to employees holding certain positions or working on machines and installations where any interruption of work constitutes a threat to human life and health or the country's security[59]. Every state has its institutions that are vital in the context of life and health protection and as a result they should not be entitled to interrupt their activities, even if their rights and interests already have or may be breached. Referring to the legal acquis of the Freedom of Association Committee of the International Labour Organisation, we may draw a conclusion that employing establishments which public authorities may consider vital in the context of protection of human life, health and security shall include: health care institutions, entities producing and distributing electric energy and water, telephone service providers, police, armed forces, fire brigades, prison service (both public and private), establishments providing food for schoolchildren and maintaining hygiene and order in school buildings, and air traffic controllers[60]. In practice it is up to the employer to decide which positions are particularly important for the reasons enumerated in the Collective Disputes Resolution Act, namely in the context of being responsible for human life and health as well as the country's security. It should be noticed that the Collective Disputes Resolution Act does not provide any mechanisms for review of decisions made by employers in the context of limiting the right to strike for the reasons referred to in Article 19 paragraph 1 of the Act in question.

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[58] These are values enumerated in Article 31 §1 of the European Social Charter.

[59] Cf. B. Paździor, *Strajk w orzecznictwie organów kontrolnych Międzynarodowej Organizacji Pracy* [Strike in theRulings of ILO Supervisory Bodies], "Państwo i Prawo" 2002, No. 1, p. 45.

[60] Freedom of Association. Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO, 5th (revised) edition, Geneva 2006, p. 120, paragraph 585.

The legislator has also prohibited the interruption of work as a result of a strike by employees in situations where such an interruption would result in a threat to the country's security. The notion of this "threat to the country's security" is not well defined and therefore it should be interpreted in a literal and objective manner in the context of a real threat. In this case, in order to cover a group of employees with such a prohibition it is not sufficient to declare that a strike may possibly result in a threat to the country's security. The interruption of work in question must actually result in such a threat[61].

We should acknowledge that the regulations featured in Article 19 overlap with standards introduced by the Committee for Social Rights and that as such the discussed Polish regulations are consistent with Article 6 § 4 of the Charter.

15. The analysis presented in this paper allows us to conclude that Polish legal provisions are consistent with the provisions of the Revised European Social Charter, in particular with its Article 6 § 4. The only area where some doubt may arise concerns the possibility to appeal against the employer's decision on inadmissibility of a strike on the grounds of having to preserve human life or health or the country's security. It should be noted, however, that it would be advisable to amend the provisions of the Polish law in this respect, irrespective of the decision on ratification of the Charter, and to introduce a possibility to make such an appeal.

We should also take into account the fact that currently social relations are becoming more and more global and that to a large extent they are no longer limited to just one legal system of a single state. This applies also to relationships in the sphere of labour and social policy. For that very reason it is necessary to raise the standards of social protection in order to ensure certain unification of protection of social rights[62]. Ratification of the Revised European Social Charter will undoubtedly be favourable to implementing this goal.

Therefore, in our opinion, ratification of the Revised European Social Charter, and in particular its Article 6 § 4, should take place as soon as possible.

ABSTRACT

The authors present a comparison between the European standards on the right to strike (Article 6 § 4 of the European Social Charter) and the Polish Collective Disputes Resolution Act of 23.5.1991 and arrive at a conclusion that there

[61] W. Masewicz, *Ustawa z dnia 23 maja 1997 r. o rozwiązywaniu sporów zbiorowych. Komentarz* [The Collective Disputes Resolution Act of 23 May, 1997], Warszawa 1992, p. 55.

[62] To learn more on this issue, see: *W kierunku powszechnej ratyfikacji…*

are no legal obstacles to the ratification of this basic European standard in the sphere of collective labour law by Poland. It is in particular important to note that the monopoly of trade unions in the context of organising strikes and other protest actions covered by the provisions of the Polish collective labour law introduced by the Polish Collective Disputes Resolution Act does not constitute an obstacle to this ratification. The case law of the European Committee of Social Rights of the Council of Europe tolerates domestic legal solutions which limit the right to organise strikes by groups of employees who are not members of trade unions, unless these provisions impose excessively drastic requirements on the establishment of a trade union entitled to organise a strike. The Polish Collective Disputes Resolution Act has been assessed by the European Committee of Social Rights and declared to be a legal act that enables employees who are interested in organising a protest action to establish a trade union in quite an easy manner. Other legal requirements resulting from the Polish provisions of collective labour law are also consistent with European standards. On the 30th anniversary of a strike organised in the former Lenin Shipyard in Gdańsk by employees who were not, at that time, members of any official trade unions, we have to say that NSZZ "Solidarność" ("Solidarity" Trade Union) has every right to plead with the authorities of the Republic of Poland to proceed with the ratification of Article 6 § 4 of the European Social Charter.

POLSKIE REGULACJE DOTYCZĄCE PROWADZENIA SPORÓW ZBIOROWYCH W ŚWIETLE STANDARDÓW EUROPEJSKICH NA PRZYKŁADZIE PRAWA DO STRAJKU

Streszczenie

Autorzy przedstawiają porównanie pomiędzy standardami europejskimi w zakresie prawa do strajku (art. 6 § 4 Europejskiej Karty Społecznej) i polską ustawą z dnia 23 maja 1991 r. o rozwiązywaniu sporów zbiorowych. Dochodzą do wniosku, że nie ma przeszkód prawnych dla ratyfikowania przez Polskę tych podstawowych standardów europejskich z zakresu zbiorowego prawa pracy. W szczególności należy podkreślić, że monopol związków zawodowych w zakresie organizowania strajków oraz innych form akcji protestacyjnych objętych regulacjami polskiego prawa pracy, wprowadzony przez polską ustawę o rozwiązywaniu sporów zbiorowych, nie jest utrudnieniem dla tej ratyfikacji. Dorobek orzeczniczy Europejskiego Komitetu Praw Społecznych, działającego przy Radzie Europy, dopuszcza krajowe rozwiązania prawne, które ograniczają prawo organizowania strajków przez grupy pracowników niebędących członkami związków zawodowych, o ile stosowne regulacje krajowe nie ustanawiają zbyt restrykcyjnych

wymagań dotyczących utworzenia związku zawodowego, uprawnionego do przeprowadzenia strajku. Polska ustawa o rozwiązywaniu sporów zbiorowych była analizowana przez Europejski Komitet Praw Społecznych i została uznana za akt prawny umożliwiający pracownikom, zainteresowanym w zorganizowaniu akcji protestacyjnej, utworzenie związku zawodowego w stosunkowo łatwy sposób. Pozostałe wymagania prawne wynikające z regulacji polskiego zbiorowego prawa pracy są również zgodne ze standardami europejskimi. W 30. rocznicę strajku zorganizowanego w dawnej stoczni im. Lenina w Gdańsku przez pracowników, którzy formalnie nie byli w tamtym czasie członkami związku zawodowego, trzeba powiedzieć, że NSSZ "Solidarność" ma pełne prawo domagania się od władz Rzeczpospolitej Polskiej dokonania ratyfikacji art. 6 § 4 Europejskiej Karty Społecznej.

KEYWORDS

European Social Charter, Collective Dispute Resolution Act, strike, European Committee of Social Rights, protest action, trade union

SŁOWA KLUCZOWE

Europejska Karta Społeczna, ustawa o rozwiązywaniu sporów zbiorowych, strajk, Europejski Komitet Praw Społecznych, akcja protestacyjna, związek zawodowy

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WORKERS' REPRESENTATION IN EUROPEAN LAW

1. Legal basis for representation of employee collective rights and interests, forms of worker participation or types of workers' representation evolved in the law of European Union in a similar way as social policy (and protection standards being a part and parcel of the policy and supposed to help improve working and living standards) did[1]. During the initial phase of the European integration, the reasons for *approximation of the laws of Member States*, as the Community legislator has put it (meaning assimilation of laws, ordinances and administrative regulations) lay in the intent to achieve economic objectives, the establishment and operation of the Common Market in particular[2]. Workers' representations, as a subject matter of legal regulation, were qualified by the doctrine as part of collective labour law[3]. The latter, in turn, was developed inasmuch as it could support[4] competitive-

[1] Ex Art. 136 of the Treaty establishing European Community (hereinafter referred to as TEC).

[2] Art. 2 TEC and Art. 3 items h, j TEC.

[3] R. Blanpain, M. Matey, *Europejskie prawo pracy w polskiej perspektywie* [European Labour Law in Polish Perspective], Warszawa 1993, p. 193 *et seq.*

[4] J. Wratny, *Partycypacja pracownicza w przedsiębiorstwie* [Worker's Participation at Workplace Level], Studia i Materiały IPiSS 1993, Vol. 7, p. 23; L. Florek, *Dostosowanie polskiego prawa pracy do prawa Wspólnot Europejskich*, (in:) *Biała Księga. Polska – Unia Europejska. Opracowania i analizy* [Alignment of Poland's Labour Law withe Law of European Communities, (in:) White Paper. Poland – European Union. Studies and Analyses], Vol. 2, Warszawa 1995; M. Matey, *Proces zbliżania polskiego prawa pracy do standardów europejskich*, (in:) *Polskie prawo pracy i zbiorowe stosunki pracy w okresie transformacji* [The Process of Approximation of Poland's Labour Law to European Standards, (in:) Polish Labour Law and Industrial Relations in the Period of Transformation], M. Seweryński (ed.), Warszawa 1995; M. Matey, *Praca i polityka socjalna w regulacjach europejskich*, (in:) *Nowy ład pracy w Polsce i Europie* [Labour and Social Policy in European Legal Regulations, (in:) New Labour Order in Poland and Europe], M. Matey (ed.), Warszawa 1997; S. Sobótka, *Rola porozumień zbiorowych w uregulowaniu stosunków pacy i kształtowaniu polityki społeczno-gospodarczej w Polsce na tle porównawczym*, (in:) *Zbiorowe stosunki pracy w Polsce w perspektywie integracji europejskiej*, [The Role of Collective Agreements in Regulating Employment Relations and Development of Poland's Socio-Economic Policy in a Comparative Perspective, (in:) Poland's Industrial Relations from the Perspective of European

ness or help protect it against disturbances[5]. The structure and scope of legislative powers in which the European Union was vested favoured adoption of legal acts being rather fragmentary and partial in nature. In addition, the approach presented at that time by the European legislation assumed that responsibilities of workers' representations should be a mere supplement to the decision-making, as exercised by the employers. Consequently, powers of the representations, if provided for at the transnational level at all, did not interfere in the employer's decision-making process, but were secondary against the earlier made decisions of the employer.

The first attempt to provide balance between economic and social objectives within the EU took place during the Paris summit of 1972, as a result of which summit the first social programme was adopted. Pursuant to the then Art. 117 of the Treaty establishing European Community (TEC) the European Commission presented, on 21 January, 1974[6] a programme suggesting a need to provide for a whole range of matters related to changes in company structures or subjective transformations on the employer's side. Given the nature of the competence norm of Art. 100 of TEC, the adopted directives had to stay in direct connection with the establishment or operation of the Common Market, both as regards their objectives and scope of regulation. Within that narrow legal framework collective relations between employees and the employer were only fragmentarily provided for, and concerned mostly the right of workers' representation to information or consultation (with the option for concluding an agreement) on matters of transfers of undertakings, businesses or parts of undertakings or businesses[7], and employee rights under the procedure of collective redundancies[8].

Integration], W Kozek (ed.), Warszawa 1997, p. 208 *et seq*.; M. Matey-Tyrowicz, *Traktat Amsterdamski a europejski model socjalny* [The Treaty of Amsterdam and the European Social Mode], "Przegląd Prawa Europejskiego" 1998, Vol. 1/4, p. 45; A. M. Świątkowski, *Europejskie prawo socjalne* [European Social Law], Vol. II, Warszawa 1999, pp. 445, 463 *et seq*.; B. Rutkowska, *Przedstawicielstwo pracowników w europejskim prawie pracy* [Workers' Representation in European Labour Law], PiZS 2005, Vol. 4, p. 13 *et seq*.; K. Walczak, G. Orłowski, *Załoga a rada pracowników*, (in:) *Informowanie i konsultowanie pracowników w polskim prawie pracy* [The Workforce and the Works' Council, (in:) Informing and Consulting Employees under Polish Labour Law], A. Sobczyk (ed.), Kraków 2008, p. 103 *et seq*.

[5] R. Birk, *Arbeitsrecht – Freizügigkeit der Arbeitnehmer und Harmonisierung des Arbeitsrechts*, (in:) *EG-Handbuch. Recht im Binnenmarkt*, C.O. Lenz (ed.), Herne–Berlin 1994, p. 369.

[6] Council Resolution of 21 January 1974 (2) concerning a Social Action Programme (OJ C 13, 12.2.1974, p. 1). Positive opinions about the adopted social programme and the changes made were voiced, *inter alia*, by J. Kenner, *EU Employment Law*, Oxford 2003, p. 24; B. Bercusson, *European Labour Law*, London, 1996, p. 49 *et seq*.

[7] Council Directive 77/187/EEC of 14 February 1977 on the approximation of the laws of the Member States relating to the safeguarding of employees rights in the event of transfers of undertakings, businesses or parts of businesses **(**O.J. 1977 EC L 061, p. 26) updated by Directive 98/50 of 29 June, (O.J. 1998, L 201, p. 98. The Directive was overruled by Council Directive 2001/23/EC of 12 March 2001 under the same title (O.J. 2001, L 82, p. 16) (O.J. Sp. Ed. Chapter 5 Volume 4 p. 98).

[8] Council Directive 75/129/EEC of 17 February 1975 on the approximation of the laws of the Member States relating to collective redundancies, O.J. L 048, p. 29. Overruled by Council

The new competence basis (Art. 118a TEC), included in the treaties by the Single European Act (SEA)[9], was used for development of framework Council *Directive 89/391*/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work[10]. The Directive provided for a relatively wide scope of participation by workers' representation, concerning both access to information on hazards to employee safety and protection at workplaces and employee involvement in measures required by the Directive and taken in order to reduce or eliminate the hazards[11]. The broad formula of *„working environment"* legitimized the legal measures introduced, as thanks to its wording the measures did not have to show a strict tie to the common market[12]. Directives adopted by the Council were recognised by the Tribunal as not violating the powers conferred on the Council if they fitted into the broadly termed *improvement of the working environment to protect health and safety of employees*[13]. Pursuant to Art. 137 TEC a directive was adopted to provide for certain aspects of the organisation of working time[14], in which directive a basis was created for the employer to introduce instruments of working time flexibility after opinions and consultations with the workers' representation were sought. In certain cases, within the transitory period set by the Community legislator for Member States to achieve maximum working time standards and minimum standards of the time of rest in particular, consultations with the representation were supposed to bring the parties to concluding a relevant agreement.

2. The few examples of the powers of workers' representations do not alter the general conclusion that until the changes made by the Treaty of Maastricht the right to information and consultation, an indispensable attribute of workers' representations, remained in the sole competences of Member States. It was only under pro-

Directive 98/59 of 20 July, 1998 under the same title, O.J. 1998, L 225, p. 16 (O.J. Sp. Ed. Chapter 5 Volume 3, p. 327).

[9] O.J. 1987, L 169, p. 1.

[10] Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work, O.J. L 183, 29/06/1989, p. 1.

[11] Par. 9 of Council Directive 89/391/EEC.

[12] Case C-84/94 United Kingdom of Great Britain and Northern Ireland v Council of the European Union, European Court reports 1996, Page I-05755 thesis 1; cf. A. M. Świątkowski, *Bezpieczeństwo i higiena w pracy* [Occupational Safety and Health], from the publishing series of "Prawo Socjalne Unii Europejskiej i Rady Europy", Kraków 2003, p. 9–22.

[13] Case C-84/94 United Kingdom of Great Britain and Northern Ireland v Council of the European Union, European Court Reports 1996, Page I-05755.

[14] Council Directive 93/104/EC of 23rd November 1993 concerning certain aspects of the organization of working time, O.J. L 307 of 13 December 1993, p. 18 (O.J. Spec. Ed. Chapter 5, Vol. 2, p. 197). Overruled by Directive 2003/88/EC of the European Parliament and Council of 4 November 2003 of the same title, O.J. L 299, p. 9 (O.J. Spec. Ed., Chapter 5, Vol. 4, p. 381).

tocol No. 14[15] and the Agreement on Social Policy[16] based on it that a c ompetence of the European Community was recognised in the field of both informing and consulting employees[17]. Also competencies regarding *representation and collective defence of the interests of workers* were granted to the European Community by the Agreement[18]. At this occasion reference should be made to the Community Charter of the Fundamental Social Rights of Workers[19] adopted on 9th December, 1989 , thanks to which document rights of workers and their representations to information and consultation (item 17) grew in importance, becoming one of the objectives to be pursued and achieved by the European Community and its Member States[20]. Although the Community Charter, owing to the objection by the United Kingdom, did not attain the status of a binding document, it actually became an action plan determining the direction of European integration in the field of social policy[21]. In addition, expressed in the charter are values and programmatic standards setting the potential extent of alignment of Member State systems of both individual and collective labour law.

Within the so changed legal environment, with a number of new elements included, like extension of the competence base under the Protocol and Agreement on Social Policy and new goals set both in the above indicated social documents and the not fully binding programmatic documents, a basis was created for adoption of comprehensive legal regulation concerning issues of workers' participation and forms of workers' representation. The perceptible change was connected with

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[15] The Treaty on European Union – The Maastricht Protocol on Social Policy, O.J. 1992, C 191, p. 90.

[16] O.J. 1992, C 191, p. 91.

[17] Art. 2 par. 2 of the Agreement on Social Policy.

[18] *Ibidem*.

[19] Hereinafter referred to as the Community Charter. Text of the Charter in Polish translation was included in the work of A. Świątkowski and H. Wierzbińska and published in *Dokumenty źródłowe instytucji Wspólnot Europejskich w zakresie prawa socjalnego* [Source Documents of European Community Institutions Concerning Social Law], Kraków 1999.

[20] R. Blanpain, M. Matey, *Europejskie prawo pracy…*, p. 193; J. Wratny, *Europejskie rady zakładowe oraz inne przedstawicielstwa pracownicze w organizacjach gospodarczych o zasięgu wspólnotowym*, (in:) *Związki zawodowe a niezwiązkowe przedstawicielstwa pracownicze* [European Works Councils and Other Workers' Representations in Community-Scale Business Organisations, (in:) Trade Unions and Non-Trade Union Workers' Representations], J. Wratny, M. Bednarski (eds.), Warszawa 2010, p. 87.

[21] Immediately after adoption of the *Community Charter* of the Fundamental *Social* Rights of Workers the Commission issued a *communiqué* on the action plan aimed at implementation of the Charter, cf. COM (1989) p. 568. Following that the Commission adopted a social programme of the action in which it indicated the need to enact 47 legal acts for protection of fundamental rights of the workers. Cf. Resolution concerning proposal of the most urgent legislative changes in the social sphere, O.J. 1990, C 68, p. 155; Resolution on the Commission's action programme to implement the *Community Charter* of the Fundamental *Social* Rights of Workers – priorities for the year 1991–1992, O.J. 1990, 260, p. 167; Resolution on implementation of the Social Action Programme, O.J. 1991, C. 158, p. 291.

departing from fragmentarily provided for powers of workers' representations (as concerning specific issues in the relations between the employer and employees, like transfer of the undertaking or mass lay-offs) in favour of comprehensive and exhausting legal solutions. An example of the latter is directives concerning the establishment of European works councils[22] and providing a basis for setting framework conditions of employee information and consultation[23]. The subject matter of the said legal acts strictly concerns the very foundation of functioning of workers' representations, These are, in the former case of those indicated above, representations of a transnational (trans-Community) nature, since they can be established in multi-plant and transnational undertakings. The latter case concerns workers' representations operating in undertakings at a national level.

Amendments made by the Treaty of Amsterdam consisted mainly in including the provisions of the Agreement on Social Policy directly into the treaty-level provisions[24], the *acquis communautaire* based on the Agreement becoming a part and parcel of the Community law. In addition, the Treaty of Amsterdam forced the United Kingdom to bind itself with the acts which had been excluded in relation to it, as an obvious deficiency of the earlier concluded Agreement on Social Policy was the limited territorial scope of the acts based on it. In such a way the extent of the binding force of the directive on European Works Councils[25] was extended without the need to change its normative part. The Treaty of Amsterdam included the Community Charter of the Fundamental Social Rights of Workers and the European Social Charter of the Council of Europe into the programmatic norm of Art. 136 TEC. As a result of that, the standards of protection of rights of employees and their representatives set forth in both documents had to be recognised as a legal objective both for the European Community and Member States.

A final confirmation of certain rights of workers' representations as fundamental rights under the European law came with the adoption of the Treaty of Lisbon, which amended the founding treaties by abolishing the division into pillars. Following this, the Treaty on European Union and Treaty on the Functioning

[22] Council Directive 94/45/EC of 22 September 1994 on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees, O.J. 1994, L 254, p. 64 (O.J. Spec. Ed., Chapter 5, Vol. 2, p. 232). Overruled by Directive 2009/38/EC of the European Parliament and Council of 6 May 200 of the same title, O.J. 2009, L 122, p. 28. Pursuant to Art. 17, Directive 94/45/EC as amended becomes ineffective as of 6 June, 2011.

[23] Directive 2002/14/EC of 11 March, 2002 of the European Parliament and of the Council establishing a general framework for informing and consulting employees in the European Community, O.J. 2002, L 80, p. 29 (O.J. Spec. Ed. Chapter 5, Vol. 4, p. 219).

[24] M. Matey-Tyrowicz, *Traktat Amsterdamski*…, p. 45.

[25] Council Directive 97/74/EC of 15 December 1997 extending, to the United Kingdom of Great Britain and Northern Ireland, Directive 94/45/EC on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees, O.J. 1998, L 10, p. 22.

of the European Union were concluded[26]. An appendix to both Treaties is the Charter of Fundamental Rights of the European Union, adopted as early as at the summit of Nice in 2000[27]. Since the conclusion of the Lisbon Treaty it has become a part and parcel of the EU law, its binding force being equal to the force of the Treaties themselves. In the Charter o Fundamental Rights, Chapter IV dealing with what has been referred to as a group of solidarity rights, the workers' right to information and consultation within the undertaking (Art. 27) or the right of collective bargaining and action (art. 28) to be guaranteed to workers and their representatives have been proclaimed, to name but the two examples. The binding force of the solidarity rights from the Charter of Fundamental Rights has, however, been reduced as regards Poland, given the separate position taken by our country on that matter, expressed in protocol No. 30[28]. The protocol in question, called the British protocol, does not rule out application of the Charter o Fundamental Rights to Poland (or the United Kingdom), it is true, but specifies certain aspects of application of the solidarity rights as provided or in the Charter[29], both by the European Court of Justice and Polish courts.

3. Determination of the concept of workers' representation in the law of the European Union has been delegated to the level of the national legislation. That mode of regulation is mostly followed as regards the areas where the European Union has competences shared or exercised paralel to Member States[30]. According to Art. 4 of the Treaty on the Functioning of the European Union, social policy in the aspects provided for in the Treaty falls within the category of such competences. Considering the said, the mode of execution of rights granted in the sphere is subject to the criterion of proportionality , which means that legal measures selected by the European Union have to be adequate for the objective intended. In addition, the sphere of relationships between the employer and employee is subject to the principle of subsidiarity, considering Protocol No. 2[31], adopted as early as in 1977. The rule in question authorizes the European Union to act only in and insofar as the objectives of the proposed action cannot be sufficiently achieved

[26] Treaty on European Union and the Treaty on the Functioning of the European Union (consolidated versions), O.J. 2010, C 83.

[27] Charter of Fundamental Rights of the European Union proclaimed in Nice on 7 December, 2000, O.J. 2010, C 83.

[28] Protocol (No. 30) on the Application of the Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom, O.J. 2008, C 115, p. 313.

[29] W. Sanetra, *Karta Praw podstawowych Unii Europejskiej a prawo pracy*, (in:) *Karta Praw Podstawowych w europejskim i krajowym porządku prawnym* [Charter of Fundamental Rights of the European Union and Labour Law, (in:) The Charter of Fundamental Rights in European and National Legal System], A. Wróbel (ed.), Warszawa 2009, p. 260 *et seq*.

[30] C. Mik, *Europejskie prawo wspólnotowe* [European Community Law], Warszawa 2000, p. 271 *et seq*.

[31] Protocol (No. 2) on the application of the principles of subsidiarity and proportionality, O.J. 2008, C 115, p. 207.

by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community (Art. 5 par. 2 TUE-L). The above mentioned general rules influence execution of the powers entrusted to the EU in such a way that the EU acts preserve diversity of forms of workers' representations having developed in Member States similarly as they take account of the diverse forms of workers' participation or contractual relations (including those of collective nature), which the Community legislator puts clearly in Art. 151 par. 2 of the Treaty on the Functioning of the European Union. Keeping the said in mind, the interference of Community bodies should support the role and dialogue between social partners (respecting their identity and autonomy as guaranteed by national law) rather than determine types or nature of workers' representations.

A review of the Community legislation in force seems to confirm the above made assumptions whether a specific directive provides for workers' representation at the national or transnational level. By way of an example provisions of the Council directive 2001/23/EC can be pointed out to. According to its Art.2, *representatives of employees and related expressions* mean representatives of the employees provided for by the laws or practices of the Member States. A similar wording has been used by the Community legislator in Council Directive 98/59/EC. Art. 1 contains definitions of legal terms used for the application of the said directive, including the institution of the procedure of collective redundancies. From Art. 1 item b of Directive 98/59/EC it follows that *workers' representatives* mean workers' representatives provided for by the laws or practices of the Member States. A similar mode of reference to national legislation and practices is featured by Art. 3c of Council Directive 89/391/EEC. Interesting are conclusions of the European Court of justice as contained in the judgment on *Commission of the European Communities vs. Portuguese Republic*[32]. In it, the ECJ confirmed the entirely national nature of the rights to appoint a workers' representative for matters of occupational safety and health and recognised the internal (national) mode of appointment of the representative. Meanwhile, in the same judgment the Court made it clear that if a choice of the election procedure has been made by a Member State, Directive 89/391 does not expressly require the national legislation to state all the detailed rules applying to that procedure. However, where a Member State provides that workers' representatives with such responsibility must be elected, it is for that Member State to ensure that workers can elect their representatives in accordance with national legislation and/or practices[33]. In other words, the Community law does not interfere with the mode of election of workers' representatives provided that the employees are guaranteed actual impact on the election under national procedures.

[32] Case C-425/01 *Commission of the European Communities vs. Portuguese Republic*, (Rec. 2003, p. I-6025).

[33] *Ibidem*, thesis 2.

Solutions adopted in Directive 2009/38/EC of the European Parliament and of the Council and Directive 2002/14 /EC of the European Parliament and of the Council differ from that model only very slightly. In the first of those the Community legislator has directly quoted the subsidiarity rule, leaving it to the Member States to determine who the employees' representatives are and to provide for a balanced representation of different categories of employees[34]. The competence of national legislation and practice in that respect is reinforced by Art. 2 of Directive 2009/38/EC, making a direct reference to them. The directive itself allows for establishment of alternative forms of creation of the employee information and consultation systems[35]. One of them takes on an institutionalized form consisting in the election of a workers' representation referred to in the directive as the European Works' Council (EWC). The other, less formalized, consists in the establishment, by the central management together with the special negotiating body of another transnational procedure for the purpose of informing and consulting employees instead of establishing a European Works Council[36]. From an analysis of the normative part of the directive it clearly follows that the directive definitely prefers the institutionalised form of the representation in order to pass information and hold consultations in matters of importance to the employees. A proof of that is the additional procedure for appointment of the EWC under standard rules specified in the appendix to the directive, to be applied should – within three years of notification of the initiative – the agreement mentioned in Art. 6 of directive 2009/38/EC be not be arrived at. The said agreement is concluded between the central management and the negotiating body, its subject matter being detailed ways of informing and consulting employees.

References to national legislation and practices are also made by Directive 2002/14/EC of the European Parliament and of the Council. From the catalogue of legal definitions clarifying important legal terms for the needs of application of this directive it follows (Art. 2 item e) that employees' representatives' mean the employees' representatives provided for by national laws and/or practices.

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[34] Preamble, item 20, to Directive 2009/38/EC of the European Parliament and of the Council.

[35] J. Stelina, *Zbiorowa reprezentacja pracowników w Polsce – stan obecny i perspektywy rozwoju*, (in:) *Problemy kodyfikacji prawa pracy. Wybrane zagadnienia zabezpieczenia społecznego. Referaty na XVI Zjazd Katedr oraz Zakładów Prawa Pracy i Ubezpieczeń Społecznych, Gdańsk 19–21 września 2007* [Collective Representation of Workers in Poland – Current State of Affairs and Prospects for Development, (in:) Problems of Labour Law Codification. Selected Issues of Social Security. Papers to the 16th Congress of Labour Law and Social Security Chairs and Sections, Gdańsk 19–21 September, 2007], Gdańsk 2007, p. 90; J. Wratny, *Europejska Rada Zakładowa (nowa instytucja wspólnotowego prawa pracy)* [European Works' Council (New Institution of Community Labour Law)], PiP 1996, Vol. 8–9, p. 106.

[36] Art. 6 par. 3 of Directive 2009/38 of the European Parliament and of the Council. Cf. J. Stelina, *Ustawa o Europejskich Radach Zakładowych z komentarzem* [The Act on European Works Councils with a Commentary], S. Pawłowski, J. Stelina, M. Zieleniecki (eds.), Gdańsk 2006, pp. 7–13.

The above presented mode of regulation does, nevertheless, deserve credit. It is related to that stage of development of the EU law which assumed minimum interference in industrial relations and minimum harmonisation of internal legal systems of Member States.

4. In the sphere of social policy diversified forms of workers' participation constitute an essential element of the conducted social dialogue and provide foundation for keeping balance between economic activities and social needs. Participation, recognised as an attribute of each workers' representation[37], makes up a vital part of the European law, hence in the transnational system all known types and forms of the representation can be encountered[38]. Besides ideological reasons for that diversification, those having objective nature should be identified as well. Legal solutions whereby scope and powers of workers' representation are provided for were adopted at various stages of development of the EU law, with intensity of transfer of competencies to the European Union level changing in time. Mutual relations between law of the European Union and national legislation would also change as a result. This is the main reason why in the recently adopted directives advanced participation forms (placed even in headquarters or groups of enterprises of international nature) appear ever more frequently[39].

Prior to indicating specific forms of workers' participation in the law of the European Union the very notion of participation should be explained. The term appears more in the lawyers' than in the legal language, to denote all forms of employee participation in matters concerning the work establishment (enterprise)[40]. Taking, as the criteria of classification, intensity of the influence and final impact on the fortunes of the staff, weaker forms of participation (consisting in informing or consulting) and stronger ones (like negotiations with the option of signing an agreement, co-determination or even co-management with the staff being given the casting vote) can be distinguished.[41]. Hardly is it the only criterion for classifi-

[37] *Reprezentacja praw i interesów pracowniczych* [Representation of Workers' Rights and Interests], G. Goździewicz (ed.), Toruń 2001 and papers included in the book: G. Goździewicz, *Reprezentacja praw i interesów pracowniczych (ogólna charakterystyka)* [Representation of Workers' Rights and Interests – General Characteristics], p. 11 and M. Seweryński, *Załoga zakładu pracy – uwagi de lege ferenda* [The Workforce of Work Establishment – Observations *de lege ferenda*], p. 48.

[38] M. Gładoch, *Uczestnictwo pracowników w zarządzaniu przedsiębiorstwem w Polsce. Problemy teorii i praktyki na tle prawa wspólnotowego* [Workers' Participation in Company Management. Problems of Theory and Practice against the Background of Community Law], Toruń 2005, p. 49 *et seq.* and J. Wratny: *Partycypacja pracownicza w prawie europejskim – rozwój wśród przeciwieństw* [Workers' Participation in European Law – Development Among Contradictions], Studia i Materiały IPiSS 1994, Vol. 1, p. 13–26.

[39] J. Wratny, *Europejskie rady zakładowe*…, p. 88.

[40] J. Stelina, *Zbiorowa reprezentacja pracowników*…, p. 91 *et seq.*

[41] *Ibidem*.

cation of powers of the workers' representation[42]. A functional approach allows to indicate areas of execution of powers of employee representatives, e.g. participation in collective agreements, the right to elect representatives or the earlier indicated right to obtain information or to be consulted. As regards the two latter functions of the representation, these are combined with the classification based on substance, concerning a specific area on which the information is to be provided or consultation sought (like employee issues, business matters etc.). All the above mentioned types and forms are encountered in the law of the EU, albeit with varied frequency.

It is well-worth reminding at this occasion the earlier mentioned Council Directive No. 2001/23/EC. In the event of a transfer of the undertaking, business or part of the undertaking or business onto a new employer owing to legal transactions performed (sales, leasing[43] lease[44] and termination of a contract with the lessee, the owner resuming management again[45]) or due to other reasons (e.g. amendments to the law in force) the directive requires that the new and the current employer should provide the employees with information as to the reasons for and implications of the transfer, as well as the consequences resulting to the employees from the change of the employer. The object of the information includes legal, economic and social consequences and other issues related to the transfer and contemplated take-over of the employees. The directive requires that the information should be passed duly in advance, prior to the transfer, although does not provide for any specific time-limit, save for the statement that the information should be provided in good time. Neither the transferor nor the transferee are released from the duty by lack of employee representation in the undertaking. The representation missing, they are supposed to make the employees directly informed about all potential and likely consequences of the transfer[46], and the process of consultations held in that case is reinforced by a clear indication of the option of concluding an agreement[47].

Similar mechanisms of enhanced participation have been provided for in the directive concerning collective redundancies. The law requires the employer contemplating mass lay-offs to pass the information about the contemplated redundancies and consult the intent with employee representatives in order to conclude an agreement. When starting the process of consultation, the employer is obligated to provide representatives of the employees with all relevant information about the contemplated redundancies concerning, *inter alia*, the number and categories of usually employed staff, number and categories of employees to be made redun-

[42] *Ibidem*.

[43] Joined cases C-144, C-145/87 Harry Berg and Johannes Theodorus Maria Busschers v. Ivo Martin Besselsen, Rec. 1988, p. 2559.

[44] Case C-324/86 Foreningen af Arbejdsledere i Danmark v. Daddy's Dance Hall A/S, Rec. 1988, p. 0739.

[45] Case C-287/86 Landsorganisationen i Danmark for Tjenerforbundet i Danmark v. Ny Molle Kro, Rec. 1987, p. 5465.

[46] Art. 7 of Council Directive 2001/23/EC.

[47] Art. 7 par. 2 of Council Directive 2001/23/EC.

dant, the period over which the projected redundancies are to be effected, criterion for the selection, methods of calculation of redundancy payments concerning the redundancies unless they arise out of the national legislation or practice. The subject matter of the consultation is not so much the intent of the redundancies itself as a possibility of avoiding /reducing them or buffering the impact of reduction of the number of employees. From the rulings of the Luxembourg's ECJ it follows that where the duty to conclude an agreement has been skipped in national legislation or inefficient/ineffective sanctions for the employer not undertaking consultations (despite the non-binding nature of the latter) are retained, this is recognized as a contravention of the directive's objective and wrong implementation of it as a consequence[48].

Participation powers of workers' representations can be particularly clearly seen in directives concerning occupational safety and health. That group includes the framework 89/391/EEC directive of the Council, which provides for a wide range of powers, like the right to information , consultations, taking a position and participation in discussions, the right to forward proposals and other forms of participation in all matters related to occupational safety and health at workplace. In addition, participation concerns many aspects of employers' activities, such as identification of the earlier mentioned occupational hazards, measures having impact on the level of occupational safety and hygiene, protective and preventive measures aimed at improvement of the occupational safety or introduction of new OSH rules at the workplace.

The most developed forms of participation have been provided for in the directive on the establishment of the European Works Councils and the directive on informing and consulting employees. In the former one a mechanism of negotiations between the central management (i.e. the enterprise being the decision-making centre for all businesses of a transnational undertaking or the lead (controlling) in case of a concern) and the special negotiating body was introduced. The directive also states that the conducted negotiations should be held in a *spirit of cooperation with a view to reaching an agreement on the detailed arrangements for implementing the information and consultation of employees*. Their main objective should consist in concluding a written agreement to determine the procedure for informing and consulting employees. As regards workers' representations specified in Directive 2002/14, they have been determined at the workplace level. The expected forms include mainly informing, exchange of views, consultations among employee representatives. Their object, unlike in the case of sectoral directives, has not been strictly determined, which means that the object of the cooperation is running matters related to the undertaking and employees. The objective scope of employee participation has been indicated by pointing out to the issues that are excluded from the information passed to the employee representation. As

[48] *Ibidem*.

item 26 of the preamble has it, it is allowed not to inform and consult employees where this could seriously damage the undertaking or the establishment. Departing from cooperation is also justified by the situation where the employer has to comply immediately with an order issued to him by a regulatory or supervisory body, yet these circumstances should be provided for, more specifically, by the national legislation.

5. The review of European legislation reveals a trend towards reinforcement of workplace participation taking the form of employee representations of the workforce of undertakings. A predominance of the forms of soft participation can be observed, consisting mostly in the right to information and consultation. This is sometimes reinforced by the option of concluding an agreement.

ABSTRACT

The author presents an analysis of the workers' representation in the European law. Firstly, the legal basis of workers' representation in the European law until the adoption of the Treaty of Maastricht and after adoption of that Treaty is described. Until the changes made by the Treaty of Maastricht, the employees' right to information and consultation remained in the sole competences of Member States. The competence of the European Community in that field was recognized in the Maastricht Protocol on Social Policy. In 1989 the Community Charter of the Fundamental Social Rights of Workers has been adopted, thanks to which the rights of workers and their representatives to information and consultation grew in importance, becoming one of the objectives of the European Community and its Member States. Next, there were adopted directives concerning the establishment of European works councils and providing a basis for the setting of framework conditions of employee information and consultation. At the summit of Nice in 2000, the Charter of Fundamental Rights of the European Union was adopted. Since the conclusion of the Lisbon Treaty it has become a part of the EU law, with binding force being equal to the force of the Treaties themselves. After the analysis of the legal basis, the author comments the notion of workers' representation in the law of the European Union. In that field, the European Union has in competences that are shared with or exercised parallel to Member States, exercised according to the criterion of proportionality and the principle of subsidiarity. The last issue considered by the author are the forms of workers' participation in the law of the European Union. The most developed forms of participation have been provided for in the directive on the establishment of the European Works Councils and the directive on informing and consulting employees.

REPREZENTACJA PRACOWNIKÓW W PRAWIE EUROPEJSKIM

Streszczenie

Autorka dokonuje analizy zagadnień związanych z reprezentacją pracowników w prawie europejskim. Na wstępie przedstawia podstawy prawne reprezentacji pracowników w prawie europejskim przed przyjęciem traktatu z Maastricht oraz po jego przyjęciu. Do czasu zmian dokonanych na mocy traktatu z Maastricht prawo pracowników do informacji i konsultacji pozostawało wyłączną kompetencją państw członkowskich. Kompetencja Unii Europejskiej w tym obszarze została uznana dopiero w Protokole z Maastricht odnoszącym się do polityki społecznej. W 1989 r. została przyjęta Karta Wspólnotowa dotycząca podstawowych praw socjalnych pracowników, dzięki której prawa pracowników i ich przedstawicielstw do informacji i konsultacji zyskały na znaczeniu, stając się jednymi z celów Unii Europejskiej i państw członkowskich. Następnie przyjęto dyrektywy dotyczące powoływania europejskich rad zakładowych oraz ustanawiające ogólne ramowe warunki informowania i przeprowadzania konsultacji z pracownikami. Na szczycie w Nicei w 2000 r. została przyjęta Karta Praw Podstawowych Unii Europejskiej. Od czasu przyjęcia traktatu z Lizbony stała się ona częścią prawa Unii Europejskiej z mocą wiążącą równą mocy wiążącej samych traktatów. Po przeprowadzeniu analizy podstaw prawnych autorka skupia się na pojęciu reprezentacji pracowników w prawie Unii Europejskiej. Unia Europejska ma w tej sferze kompetencje dzielone i wykonywane równolegle z państwami członkowskimi, zgodnie z wymogiem proporcjonalności oraz zasadą subsydiarności. Ostatnia kwestia rozważana przez autorkę to formy reprezentacji pracowniczej w prawie Unii Europejskiej. Najbardziej rozwinięte formy tej reprezentacji zostały przewidziane w dyrektywie dotyczącej tworzenia europejskich rad zakładowych oraz w dyrektywie ustanawiającej ogólne ramowe warunki dotyczące informowania i przeprowadzania konsultacji z pracownikami.

KEYWORDS

workers' representation, the European law, the Treaty of Maastricht, the European Community, Member States, the Charter of Fundamental Rights of the European Union, the Lisbon Treaty, the European Union, European Works Councils

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reprezentacja pracowników, prawo europejskie, traktat z Maastricht, Wspólnoty Europejskie, państwa członkowskie, Karta Praw Podstawowych Unii Europejskiej, traktat z Lizbony, Unia Europejska, europejskie rady zakładowe

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WORKER'S PARTICIPATION PROSPECTS. CURRENT STATE OF AFFAIRS AND DIRECTIONS OF CHANGES

1. Inaccuracy of the notion of „participation" makes it possible to discuss the subject in question in various ways. Putting it most generally, participation can be perceived as the opposite of the traditional system of labour in which the relationship between the employee and the employer comes down to a scheme of work done against remuneration. The employee, viewed merely as a factor of production, does not feel it necessary to show interest in the operation of his/her workplace; he/she would not, actually, be allowed to do so, considering his/her status of a "hireling". The idea of participation rests in contradiction with that traditional operation of the salaried classes; the working people are supposed to get transformed from the hired workforce into co-hosts of "their" workplaces. The authorization comes from a so-called laboristic title, the fact of being an employee alone. Not that participation based one employee ownership would be ruled out by the same.

2. Such an axiological justification, referring to human needs and dignity of the person involved in doing so-called subordinated work creates space for a great variety of specific solutions aspiring to the name of "participation". At one extreme of that space employee ownership of an enterprise (a self-governing enterprise) can be situated, taking the form of a social enterprise, cooperative society, employee-owned company. It is, however, even in the contents of an individual employment relationship that a certain element of participation exists, reflecting the scope of initiative left to the employee who makes decisions and picks up options concerning his/her own workstand. Within that broad spectrum various forms of participation established by law or created in a practical way are contained, highly differentiated in terms of categories of matters covered by participation, the mechanism of employee influence on decision-making processes, the degree of institutionalization of solutions, legal basis for the operation of those, models of co-existence of participation institutions and practice with the structures and operation of trade unions etc.

Considering the broad scope of the issues in question, certain selection of those is needed. The matters left beyond the limits of this paper will thus include forms of individual or collective participation at the shop-floor level (e.g. the issue of so-called group work organisation, no more provided for in Poland's Labour Code) or – putting it even more broadly – the way in which the supervisors exercise their powers leaving their subordinates a wide area of freedom in meeting their tasks while attracting them to consultations on work organisation questions (direct participation, participative style of management). Limits of the paper will not allow to include, either, matters of employee ownership of enterprises or financial participation (participation in profits earned by the company). The author's interest will thus be limited only to forms of institutional involvement of employees in matters of their workplace via the representation established by them (the representative participation).

3. The multitude of solutions in that respect is accompanied – let us make it clear at the very beginning – by lack of an integrating institution and a guiding idea that could help internally arrange the area of industrial relations, referred to as worker participation in company management. Under no conditions is it possible to talk about the existence of a coherent system of representative participation in Poland.

It is trade unions' operation that is common (at least in terms of the legal basis for the operation). Trade union powers – in particular at the company level – related to law-making, as well as co-deciding or consulting on employer decisions in company-related or employee matters undoubtedly have a participative dimension. Regarding, however, role of the organisations in protection and representation of employee interests, trade unions have been seeking extension (maintenance or protection) of workers' share in gains resulting from company operation. That mode of operation, under which trade unions conclude collective labour agreements and enter into collective disputes with the employer, does not fit in with the concept of participation, not at least in the European meaning of the term. In continental Europe participation means participation of the staff in company management, based on the scheme of cooperation in seeking company good[1], indirectly translating into a rise in profits to the employees. This is why a delimitation is usually made between trade union operation and participation institutions/practice within the strict meaning of the term, even though participation can sometimes be exercised though trade unions.

4. As the paradigm of trade union operation does not actually harmonies with the function of worker participation, recognized as entities of the participation

[1] It is highly telling that in relevant Community documents the phrase of *in spirit of cooperation* is used to denote the way in which the employee representation body and the employer should collaborate with each other.

within the strict meaning of the word should be, first of all, trade union representative bodies. Covered by the notion are, in the first place, representatives elected by the whole staff of the work establishment; the notion, however, also includes the representatives whose election/appointment depends on trade unions, if the representatives (bodies of representation) are not parts of trade union structures (determined by their articles) and their appointment and operation are provided for in specific pieces of legislation.

Looking at the contemporary scene of industrial relations from historical perspective, its relic institution should be mentioned first. i.e. the self-administration of state-owned enterprises including the administration's main element – the employee council. The system of employee co-management, referred to as the workforce self-administration was established (barring its antecedence of worker councils of 1956) on the wave of the peaceful revolution of "Solidarity" in 1981. It played a historical role in 1980's being one of the factors of political and economic changes that led to the breakthrough of 1989[2]. Since the very inception of the shock transformation of Balcerowicz started in 1990 the institution of self-administration was accused of paralysing decision-making processes within the enterprises (the famous metaphore of a "Bermuda triangle") and privatization blockade. The commercialisation, and then privatisation of the public sector under the laws of 1990[3] and 1996[4] resulted in the shrinking of the number of state-owned enterprise with the above described system of participation, including the employee council's right to appoint the manager. Currently there exist no more than a few tens of such enterprises the legal structure of which is based on the Act of Parliament of 1981[5]. The employee self-administration, as an emanation of the community formed by the enterprise's workforce, proved incompatible with the legal structure of a commercial law company as an entity based on community of shareholders.

5. In the above quoted pieces of legislation employees were offered forms of participation alternative to the employee councils which, after the state-owned

[2] Cf. the Act of 25th September, 1981 on Self-Administration of the Staff of the State-Owned Enterprise (Journal of Laws, No. 24 item 123, as amended). The issue has been discussed by me more broadly in the book *Związki zawodowe a niezwiązkowe przedstawicielstwa pracownicze w gospodarce posttransformacyjnej* [Trade Unions and Non-Trade Union Worker Representations in the Post-Transformation Economy], J. Wratny, M. Bednarski (eds.), IPiSS, Warszawa 2010, pp. 57–85.

[3] The Act of 13th July, 1990 on Privatisation of State-Owned Enterprises (Journal of Laws No. 51, item 298, as amended).

[4] The Act of 30th August, 1996 on Commercialisation and Privatisation of State-Owned Enterprises, the current wording of the title being the Act on Commercialisation and Privatisation (consolidated text: Journal of Laws of 2013, item 216, as amended), hereinafter referred to as the Act on Privatisation.

[5] As of the end of June 2009 there were 70 of those. Source: website of the Ministry of State Treasury, www.msp.gov.pl.

enterprise was struck-off the register, ceased to exist. Representatives of the staff were secured minority participation in bodies of the company emerged from transformation of a state-owned enterprise – the supervisory board[6] and the management board[7]. The arrangement counted among the many privatization-related bonuses, such as the right to acquire a certain number of shares of the privatized entity (originally on preferential prices, and later on free of charge), concluding of so-called social packages providing for long-term job stability to employees of the taken over enterprise or the right to establish employee-owned companies using parts of the enterprise's assets.

The institution of employee representatives on supervisory boards of companies is an interesting solution based on the German law, where the existence of a representation of that kind is referred to as "employee co-determination" (*Mitbestimmung*). The status of the representatives, in the shape provided for by Polish law, can be interpreted as a cluster of three types of legal relationships: the organisational (corporative) relation between the employee representative and the company, the employment relationship between the representative and the company (although the representative does not necessarily have to be an employee) and the relationship of representation between the representative and the staff[8]. The representatives are, first of all, persons of employee trust, and the organisational relationship of the supervisory board member is ancillary to the institution of "second level participation" (referred to so in the literature as opposed to direct employee representation at the workplace level).

Although employees of former state-owned enterprises sitting on company supervisory boards continue, historically, tradition of the employee council, the continuation is hardly equivalent to the original arrangement. Considering that they form a minority of the supervisory board, employee representatives are not able – save for exceptional cases – influence the decisions made by the board by means of voting. Within the supervisory board they act in a persuasive and consultation capacity They strong points is "grassroots" knowledge of company matters and staff attitudes which members appointed by the shareholders do not

[6] The share of employees in the supervisory boards fluctuates around 1/3 of the seats. Cf. Art. 11 and 12 of the Act on Privatisation.

[7] Under Art. 16 of the Act on Privatisation, in companies with the annual average employment exceeding 500 people, one seat on the management board is reserved for a representative of the employees. Remarks concerning the role and importance of employee representatives on the supervisory boards refer, *mutatis mutandis*, also to that scheme.

[8] The issue has been tackled by me more broadly in the paper *Problematyka prawna i funkcje reprezentacji pracowników w radach nadzorczych spółek*, (in:) *Stosunki zatrudnienia w dwudziestoleciu społecznej gospodarki rynkowej. Księga pamiątkowa z okazji jubileuszu 40-lecia pracy naukowej Profesor Barbary Wagner* [Legal Issues and Functions of Employee Representation on Supervisory Boards of Companies, (in:) Employment Relationships in the Twenty Years of Market Economy. A Commemorative Book to Honour the Jubilee of 40 Years of Academic Work of Professor Barbara Wagner], A. Sobczyk (ed.), Warszawa 2010.

have. The knowledge and the links they keep with the staff allow them to pass information and opinions from the employee community to the company bodies (the "upstream" communication). Such communication may be beneficial not only to the employees but also to company bodies allowing the latter to optimize the decision-making processes. The "downstream" communication is just as important. It consists in passing information about issues touched at the meetings of the supervisory board and decisions made there to the employees and is limited by the prohibition to disclose information bearing confidential nature. The two-sided exchange of information and opinions with the intermediation of employee representatives in the supervisory boards makes up the substance of the representation relationship, as developed in practice, the said participation of the second level. It should be noted in passing, that while the persons in question can be appointed and removed only by the staff, the institution remain, as the research done shows[9], under informal influence of trade unions; it was, in particular, in the initial period, that trade unions attempted at regarding the employee councilors as their arm.

It is hard to provide an evaluation of the Polish variant of *Mitbestimmung*, much less tell what its prospects for the future might be. Survey polls of, *inter alia*, employee members of supervisory boards, launched by the Institute of Labour and Social Affairs[10], induce skepticism. The attractiveness of delegating elected employees to sit on the board may be undermined by the institution of works' councils vested with the powers to negotiate agreements with the employer ("strong" consultations). On the one hand, those sitting on the board have an advantage over the works' council members in that they receive important pieces of information "at source" while to members of the employee council the information is provided only secondarily, by the employer. Suggestions to extend that form of participation beyond the sector of former state-owned enterprises, to include all companies, also those established from scratch, are not likely to win support. A certain promoting role in that respect may be played by the Community law, though.

6. The two forms of employee representation (works' councils, participation of employee representatives in supervisory boards) can be linked together, to be

[9] Cf. note 10.

[10] The object of two series of surveys launched by the Institute of Labour and Social Affairs in 2001 and 2003 was the mode of appointment of employee representatives to company supervisory/management boards, their operation, relationships with trade unions and the role played by them in the company. Results of the surveys were presented by me in the books: J. Wratny, *Partycypacja pracownicza. Studium zagadnienia w warunkach transformacji gospodarczej* [Worker Participation. A Study of the Issue Under Conditions of Economic Transformation], Warszawa 2002, p. 56–91, and J. Wratny, M. Bednarski, *Wpływ prywatyzacji na zbiorowe stosunki pracy. Aspekty prawne i społeczno-ekonomiczne* [The Impact of Privatisation on Industrial Relations. Legal and Socio-Economic Aspects], Warszawa 2005, p. 75–156.

seen as two stages of evolution leading from the concept of self-administration (or co-management, historically the most developed form of participation) to the idea of allowing elected representatives of employees to sit on the supervisory board. The evolution in question is a result of economic transformation from centrally planned economy to the capitalist system, with attempts made to implant certain elements of **social** market economy into the latter. The main role in the process was thus played by **internal** factors, despite an obvious loan from the German concept of co-determination.

7. Quite different were the origins of the representative bodies that were established, extorted by the Community law, i.e. due to an **external** factor. The impact of the Community law was, generally speaking, two-channeled. First, it resulted from the need to implement a number of directives concerning the issue of information and consultation in business organisations of Community scope of operation, i.e. structures operating in two or more Member States of the European Union. The directives, ancillary to the concept of the European Common Market, concern also undertakings and plants situated on the territory of Poland being parts of corporations with registered offices in one of the EU states. The counterparts of the directives concerning involvement of employees in the multi-national companies are, as regards Polish legislation, the acts implementing them, viz. the Act ot 5th April, 2002 on European Works Councils[11], the Act of 4th March on the European Economic Interest Grouping and European Company[12], the Act of 22nd July 2006 on the European Cooperative Society[13] and the Act of 25th April, 2008 on Participation of Employees in the Company Emerged as a Result of Transnational Merger of Companies[14]. The category of representatives elected under the above mentioned pieces of legislation embraces representatives of Polish work establishments being parts of multinational undertakings, concerns, companies and cooperative societies, elected to European works' councils or other representative bodies on the company level, representatives of Polish employees in supervisory boards of European companies and cooperative societies as well as persons participating in ancillary bodies, including so-called special negotiating bodies determining the modes of employee involvement. It should be noted that practical importance of the legislation in question is limited, considering the fact that business organisations operating on a Community scale usually do not have their registered offices in Poland[15], since our country, just like other countries of Central and Eastern Europe is the area of expansion of capital from coun-

[11] Consolidated text: Journal of Laws 2012, item 1146.

[12] Journal of Laws No. 42, item 551, as amended.

[13] Journal of Laws No. 149, item 1077, as amended.

[14] Journal of Laws No. 86, item 525.

[15] A few transnational concerns, with PKN Orlen S.A. at the top, have their registered offices in Poland, though. Not a single European Works Council has been, nevertheless, established in this country.

tries of the "old EU", and not vice versa. Provisions of Polish Acts of Parliament concerning rules for informing and consulting in such multinational companies, while necessary given EU requirements are thus, to a great extent, dead – at least for the time being.

8. Another direction of Community law impact in that respect is directives promoting participation solutions (information and consultation of employees) in national companies and undertakings. They are not related to the needs of the common market (like the participation that "follows" processes of capital transfers), but their role lies in promotion of social dialogue in countries of the EU as an autotelic value.

Evolution in the area led from the gradually built up partial solutions which concerned, in particular, mass lay-offs, transfer of the work establishment onto a new employer, occupational safety and health, to complex solutions. All the partial schemes providing for the right of employees to be informed and consulted on certain categories of issues were implemented into Polish law, viz. the Labour Code or other Acts of Parliament. The pattern followed in that respect consisted in trade unions – wherever the latter existed – being vested in rights to be informed and consulted. Where trade unions were missing, the function was performed by elected representatives of the staff.

9. Comprehensive solutions were brought about only by EU Directive 2002/14[16], the counterpart of which piece of legislation is Polish law of 7th April, 2006 on Informing and Consulting Employees[17]. This has established a new participation institution – the works councils. In addition to being entitled to receive information, the councils have the right to voice their position in the form of so-called "strong consultation", or one that is supposed – in principle – to end with an accord concluded with the employer, although legal nature of such an accord is not quite clear. It is well-worth stressing that powers of the councils do not concern issues that are being settled at the work establishment on a running basis, but pertain to decisions which the employer contemplates to made in the long run. Consequently, the gap in employee interest representation at work establishments with no trade unions does not get filled by works councils' powers, as provided for in the law.

10. As far as establishment of the works councils is concerned, originally it was representative trade union organisations that were solely authorized to appoint members of the councils (trade union works councils). The employees themselves

[16] Directive 2002/14/EC of the European Parliament and of the Council of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community, O.J. L 080, p. 29–34.

[17] Journal of Laws No. 79, item 550, as amended. Hereinafter referred to, in short, as the Employee Information and Consultation Act.

had some say in the issue if the representative trade union organisations were unable to reach an agreement as to appointment of the councilors (works councils of a mixed, trade union/employee nature). Finally, election of the representatives was entirely left in the hands of the employees at work establishments with no trade unions, or ones with very low union density (employee works councils).

In the original version of the Act, works councils were thus shaped as an emanation of trade unions (although, considering the criteria adopted by me, cf. point 4. above, they should be, after all, reckoned towards non-trade union representations). As everybody knows, owing to amendments to the Act on Informing and Consulting the Employees of 2009[18], being itself a result of the well-known judgment of the Constitutional Tribunal of 2008[19], trade unions were stripped of the formal influence on the composition of works councils. After the end of the term of office of councils appointed prior to entrance into force of the amending Act of Parliament, the bodies are to become, at all work establishments, elected bodies. It is definitely not easy to evaluate the change of the way in which the councils are to be established. On the one hand, domination of the councils by representative trade union organisations raised doubts as to the paradigm of trade union operation (see the remarks in point 3. above). On the other hand, however, it was pragmatism that spoke in favour of the original solution. It was, in fact, negotiated by organisations of social partners, as a precondition for trade unions' consent to the Act in its originally adopted shape, after a long series of tripartite bargaining involving the government, central trade union organisations and employer associations; further fruitless protracting of the negotiations bore a threat of sanctions likely to be imposed by the European Commission. Appointment of councilors by trade unions was, in addition, a solution which was both simple and cheap. There arises a threat that, lacking trade union support, the emergence of works councils may come to a standstill or even a slump may occur, compared to the present situation.

Results of implementation of the Act on Informing and Consulting the Employees, even in its present shape, with trade unions determining composition of the works councils in a majority of cases (a circumstance actually favouring establishment of the councils) are rather alarming. According to the data provided by the Ministry of Labour and Social Affairs, as of 1 March, 2007, the councils were established in 1,990 work establishments (compared to the about 17,000 work establishments meeting the criteria specified in the Act, i.e. in 8.9% of the latter). Currently (as at 1 June, 2010) there are 3,042 works councils operating. The growth in number does not result from a higher involvement of the workforce and employers in the process of establishment of works councils, but can be ascribed to the end of the transitional period, after which provisions of the

[18] Journal of Laws No. 97 of 2009, item 805. The Act came into force on 8 July, 2009.

[19] Judgment of the Constitutional Tribunal of 1 July, 2008; Journal of Laws No. 120 of 2008, item 778. A (partly) critical gloss to the judgment was published by me in PIZS, Vol. 10 of 2008.

Act became applicable to employers with at least 50 employees (as opposed to the 100 employees that had made up the threshold for application of the Act before).

The reasons for underdevelopment of works councils lie both on the side of employers (who, as a rule, meet the idea of employee representative bodies hesitantly) and on the side of trade unions, ready to accept the councils if they extend their own operating capacity; works councils elected by the staff are viewed by trade unions as competitors. It should be added, that the employees themselves do not usually identify themselves with purposes for establishment of works councils. Moreover, if willing to enjoy the rights provided for by the Act, they often have to confront the employer. It is, in particular, the initiative group applying for election to the council to be held that is exposed to possible harassment; as Art. 8 par. 1 of the Act provides, the group has to be composed of as many as 10% of the employees working for a specific employer.

And it is the state the bears the responsibility for the shape of the Act with all its oblique statements and imperfections. The state has, in fact, given up the law-making powers its wields, to follow whatever the organisations of social partners, taking an unfriendly approach to the idea, wished. Directive 2002/14 was, as a result, implemented in a bureaucratic way, the only purpose of the implementing scheme being the meeting of the obligations towards the EU. Characteristic of the Act is purely mechanical approach to the Community law, the actual meaning of it being neglected. A clear proof of the said is the forwarded thesis (expressed also in literature and welcomed by employers) that informing employees and consulting them is a right of the employees which they do not have to make use of and that establishment of works councils is purely optional. Such an assumption, with no motivating mechanisms present in the Act, serves as a good excuse for the devastating majority of employers who do accept the law. It also brings about a reflection, though, that the industrial relations in our country are not developed enough to meet the European standards and that the level of participation should be a result of a natural development and not a scheme forced by external factors. Finally, the Directive itself is hardly clear in certain aspects, the fact making it difficult to be transposed into the national law.

11. Yet another type of worker representation provided for in Poland's industrial relations legislation is employee representatives appointed *ad hoc*, mentioned at various rules of the Labour Code and other Acts of Parliament. They are appointed for a specific case, their mandate expiring after the matter has been settled. The principle adhered to by the legislator is that in work establishments with trade unions operating the representative function is played by the company trade union organisations. Where there are no trade unions, the representatives are elected by the staff "in the way adopted at the specific employer's" as the general formula provides. Powers of the representatives can be, generally speaking, classified as falling within the category of cooperation with the employer in mak-

ing collective decisions regarding employee matters. Some of the issues, considering their weight, belong to the category of company management, hence powers of the representatives to cooperate with the employer can also be recognized as a manifestation of participation in the strict meaning of the term. These include, in particular, concluding so-called crisis-related agreements (suspending fully, or partly, operation of company regulations or concerning temporary application of terms of employment which are less favourable to employees than stipulations of contracts of employment – the agreements, mentioned in the Act of 11 July, 2009 on Soothing the Impact of Economic Crisis on Employees and Entrepreneurs, pertain also to the issue of flexible working time management). A characteristic feature of cooperation of employee representatives with the employer in the said respect is wide presence of elected representatives, which results from the fact that in a majority of work establishments do not operate any trade unions. Let us stress at that occasion that powers of the representatives, also those non-unionised ones (though not in every case) include concluding agreements with the employers, which are either binding in nature (as the case is with crisis-related agreements) or are ones concluded under the "strong" consultation scheme.

While the thus elected representatives have been vested in strong powers concerning employee-related matters, their legal status is not compatible with the said, starting from a rather enigmatic term describing their appointment as taking place "in the way adopted at the specific employer's". It is, in particular, lack of specific protection of job stability of the *ad hoc* representatives that deserves criticism, as it makes the group markedly different from other groups of representatives who enjoy such protection, trade union officers in the first place. The task of providing for, if only to an elementary extent, legal status of the *ad hoc* representatives, appears to be an urgent case to settle (particularly if you compare the status of the representatives and that of the works councils operating parallel to them).

12. As regards directions of changes of worker participation in Poland, the following remarks and reflections arise, to be briefly presented in the order from the shortest up to farthest perspective to be taken into account.

First, referring to the issue of law application in the nearest future, it should be noted that starting roughly from the latter half of 2010, works councils – due to amendments to the Act on Informing and Consulting the Employees – will be established following the new rules, the formal influence of trade unions on their composition being eliminated. This is going to be a hard test for the councils, since – as the research done by the Institute of Labour and Social Affairs[20] reveals – strength of the councils, wherever they emerge, depends on the strength of the trade unions. **Second**, the need for a review of the Act in a number of aspects must

[20] The research was carried out on a sample consisting of 20 undertakings from May until September, 2008. A report from the research was presented by M. Bednarski, (in:) *Związki zawodowe a niezwiązkowe*…, p. 20.

be raised, which review – if carried out – would be a test of the political will to duly implement Community standards regarding information and consultation of employees into Polish law and practice. The following issues should be pointed out to in that respect: specification of the employee rights to receive information on operation of the employer and his business standing, delimitation of powers of the councils/trade unions/the *ad hoc* appointed representatives in various spheres, imposing on the council a duty to pass the information obtained from the employer "down" to the staff, specification of mutual obligations of the council and the employer as regards using expert opinions ordered by the council; abolishing the requirement that the elective meeting should be convened by a group composed of at least 10% of all the employees. **Third**, hardly does the process of application of participation solutions in transnational corporations whose operation extends onto the territory of Poland give rise to optimism. It would be desired to stir interest of Polish employees in participation in representative bodies established at management centres of Community-scale companies and concerns[21]. And creation of a certain number of European works councils in Poland wherever the legal requirements for establishment of those are fulfilled should be initiated. It is likely that also in our country European companies and cooperative societies will be established in future, participation schemes being attached to them. **Fourth**, the entire area of participation in which the bodies discussed in this paper operate, would require – if a reasonable approach to the legislative policy is taken – a major reform of the idea of operation of worker participation in this country in a shorter or longer perspective. The author's suggestion *de lege ferenda* (what the law ought to be) is that a scheme allowing to integrate the dispersed elements of the existing system should be developed. An institution like that (compatible, *inter alia*, with the drafted Collective Labour Code) could be a worker representation bearing, in non-unionised work establishment, the name of a **works council** in a new, wider meaning of the word[22]. It powers could embrace current responsibilities of Polish works councils in the field of information and consultation (participation) as well as at least certain traditional trade union powers regarding employee protection

[21] It should be noted, though, that activities of „Solidarity" trade union aimed at including Polish employees into European Works Councils have grown recently. The issue was put to research by the Secretariat of Metal Workers of "Solidarity", crowned by an international conference in Warsaw in 2006, titled „Nieodkryty potencjał europejskich rad zakładowych" [The non-Discovered Potential of European Works Council]. The output of the project and conference was discussed by J. Gardawski in his book *Korporacje transnarodowe a Europejskie Rady Zakładowe w Polsce* [Transnational Corporations and European Works Councils in Poland], Warszawa 2007.

[22] As the draft provides, in the work establishment with no trade unions operating and staff composed of at least 50 employees, a works council is elected. In the work establishment with at least 20 employees, but less than 50, a workforce delegate is appointed by the staff. Drafts of the Labour Code (concerning individual labour law) and the Code of Collective Labour Law developed by the Labour Law Codification Committee operating in the years 2002–2006, are published on the website of the Ministry of Labour and Social Policy, http://www.mpips.gov.pl.

(participation in development of company regulations, opining on redundancies etc.). Such a works council of extended powers would also absorb the institution of representatives/representation bodies of ad *ad hoc* type regarding, for instance, cooperation with the employer in matters of mass lay-offs[23].

Fifth, it should be noted that the present discussion concerning the future of worker participation has not gone beyond the horizon of the initial dozen or so of years of the 21st century. It would be risky to try to extend it. As certain extreme forecasts put it, the future century will bring an end to salaried employment, to be replaced by performance of tasks[24]. Less categorical interpretations prophesy the end of hired work; the latter is supposed to be done in other forms. Certainly enough, the work done under employment relationship is a form that has it historical determinants. Personally I do not believe, though, that the system of the dependent employment might disappear in the 21st century.

It is hard to imagine that systems of work may, in the future, be based on individual workshops and small family enterprises, scattered all over the world. The work done in future, while performed by people of higher qualifications and enjoying greater freedom in doing their tasks, will remain, in its basic forms, cooperated work. It will thus need in principle, just as the case is today, leadership and subordination.

As the case has always been, people in future will remain differentiated in terms of qualifications, enterprise or financial resources; these factors will keep determining their various roles played in the processes of work. Those occupying lower positions will feel a need to participate in decisions made by supervisors, or – putting it more modernly – leaders. I do not think that the desire may ever die – for various reasons, both those external and those inherent to human nature. Keeping the assumption in mind, it is reasonable to believe – without trying to make forecasts

[23] An instrument used in the of operation of the works council could be a company accord modeled after the German pattern of *Betriebsvereinbarung*, which also could serve as the unification tool. A proposal regarding the said was put forward by me, *inter alia*, in the paper *Porozumienie zakładowe: stan obecny w Polsce, doświadczenia niemieckie, wnioski de lege ferenda* [Company Accord; Present State of Affairs in Poland, German Experience, Conclusions Regarding the Law As It Ought to Be], Ekspertyzy IPiSS, Vol. 3, Warszawa 1999 and in the paper *W stronę koncepcji jednolitego porozumienia zakładowego* [Towards the Concept of a Unified Company Accord], PiZS 1999, Vol. 11. German legal solutions in that respect are presented by M. Gładoch in her paper *Porozumienia zakładowe (Betriebsvereinbarungen) w prawie niemieckim* [Company Accords (*Betriebsvereinbarungen*) in German Law], "Zeszyty Prawnicze UKSW. Faculty of Law and Administration" 2009, No. 9.1.

[24] A view like that has been expressed by A. Schaff, cf. the author's *Od pracy do zajęć. Strukturalne bezrobocie – przyczyny i skutki* [From Doing Work to Undertaking Tasks], "Przegląd Tygodniowy" of 12 February, 1997, p. 17. Those polemicizing with A. Schaff included participants of the conference organised by the Forecast Committee „Poland in the 21st Century" and Committee of Labour and Social Policy Matters of Polish Academy of Sciences titled *Nowe koncepcje pracy i rynku pracy w perspektywie XXI wieku a problem bezrobocia* [New Concepts of Labour and Labour Law in the Perspective of the 21st Century and the Issue of Unemployment], Warsaw 1997.

as to the currently existing forms of representation-type participation or employee ownership – that the importance of direct participation will grow (cf. point 2).

ABSTRACT

The paper concerns various forms of worker participation in company management. The first historical form of worker participation was the self-administration of state-owned enterprises, including the administration's main element – the employee council. However, it has turned out to be incompatible with the legal structure of a commercial law company. Representatives of the staff were secured minority participation in the bodies of the company that emerged from the transformation of a state-owned enterprise – the supervisory board and the management board. These two forms of employee representation (works' councils and participation of employee representatives in supervisory boards) can be linked, and seen as two stages of the evolution coming from the concept of self-administration. The new forms of worker participation have appeared as a result of the influence of the Community law (e.g. the European Works Councils, the European Economic Interest Grouping or the European Company). Another result of the influence of Community law in that respect are the directives promoting participation solutions (information and consultation of employees) in national companies and undertakings (i.e. works councils). Yet another type of worker representation provided for in Poland's industrial relations legislation are employee representatives appointed *ad hoc*, for specific cases. As to the directions of changes of worker participation in Poland, the author points out new rules of appointing of the works councils (without trade unions on their composition), the necessity to review of the Act on Informing and Consulting the Employees and to implement Community standards and, most importanly, the need to work out a scheme making it possible to integrate the dispersed elements of the existing system of worker participation.

PARTYCYPACJA PRACOWNICZA. STAN OBECNY I KIERUNKI ZMIAN

Streszczenie

Artykuł został poświęcony różnym formom partycypacji pracowniczej w zarządzaniu zakładem pracy. Historycznie pierwszą formą partycypacji pracowniczej była

koncepcja tzw. samozarządzania, tj. dopuszczenie pracowników do udziału w zarządzaniu przedsiębiorstwami państwowymi poprzez tzw. rady pracowników. Niemniej jednak system ten okazał się nieadekwatny w podmiotach wolnorynkowych. Przedstawiciele pracowników zachowali jednak mniejszościowy udział w organach podmiotów powstałych po przekształceniu przedsiębiorstw państwowych – radach nadzorczych i zarządach. Te dwie formy partycypacji pracowniczej (rady pracowników oraz udział przedstawicieli pracowników w radach nadzorczych) należy postrzegać łącznie jako dwa etapy rozwoju koncepcji „samozarządzania". Nowe formy partycypacji pracowniczej pojawiły się w związku z wpływami prawa europejskiego (np. europejskie rady pracowników, Europejskie Zgrupowanie Interesów Gospodarczych czy spółka europejska). Innym przejawem wpływu prawa europejskiego są dyrektywy promujące partycypację pracowniczą (informowanie i konsultowanie pracowników) w podmiotach krajowych (tj. rady pracowników). Jeszcze inną formą partycypacji pracowniczej wprowadzoną przez polskie regulacje prawne są tzw. przedstawiciele *ad hoc*, powoływani do reprezentowania pracowników w konkretnych sprawach. Jeżeli chodzi o kierunki rozwoju partycypacji pracowniczej w Polsce, to autor zwraca uwagę na nowe zasady powoływania rad pracowników (bez wpływu związków zawodowych na ich skład), konieczność nowelizacji ustawy o informowaniu pracowników i przeprowadzaniu z nimi konsultacji oraz wdrożenia standardów europejskich, a także – co szczególnie istotne – na potrzebę wypracowania jednolitego schematu pozwalającego na zintegrowanie poszczególnych elementów istniejącego systemu partycypacji pracowniczej.

KEYWORDS

worker participation, employee council, works council, trade union, company management, European Works Council, the European Economic Interest Grouping, European Company, information and consultation of employees, Act on Informing and Consulting the Employees, Community law

SŁOWA KLUCZOWE

partycypacja pracownicza, rada pracowników, związek zawodowy, zarządzanie zakładem pracy, europejska rada pracowników, Europejskie Zgrupowanie Interesów Ekonomicznych, spółka europejska, informowanie i konsultowanie pracowników, ustawa o informowaniu pracowników i przeprowadzaniu z nimi konsultacji, prawo europejskie

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REPRESENTATION OF WORKERS IN INDIVIDUAL CASES – CURRENT STATE OF AFFAIRS AND DIRECTIONS OF CHANGES

1. Analysis of the formula for cooperation between the employer and the company trade union organisation has been usually carried out in two planes: of individual and collective relationships. The former has been, for years, the area of research conducted on collective labour agreements (CLAs) or collective disputes. The latter, due to judgments of the Supreme Court, has recently become one of the most controversial spheres of the labour law. Legal regulation of matters falling within the scope of the sphere requires immediate intervention of the law-maker, as the current model of cooperation of the employer and trade union in individual employee matters is open to doubts.

A characteristic feature of cooperation between the employer and the work establishment trade union organisation is division of the cooperation into stages. After the Labour Code was enacted in 1975, discussion concerning the cooperation focused on length of consultations, nature of so-called second level consultations (i.e. ones held with the trade union organisation of a supra-company level) and the need, if any, to keep the legal scheme in the legislation in Things got much more complicated after 1980, when trade union pluralism became a reality[1]. It was at that time that doubts were raised as to trade union consultations on temination of a contract at a company with a multitude of trade union organisations operating in it and a few organisations expressing their will to represent the non-associated employee, admissibility of trade union consultation should no consent be given by the employee to represent him/her or trade union consultation in a situation of only one trade union organization operating in the company[2].

[1] The Trade Union Act of 6 October, 1982 (Journal of Laws No. 32, item 216; consolidated text: Journal of Laws of 1985, No. 54, item 277) in its Art. 31 provided that in individual cases each trade union organization represents only its members. An employee not associated in a credit union could name a trade union organisation to protect his/her rights only when the organization had agreed to it in advance.

[2] Resolution of the Supreme Court of 17 June, 1983, III PZP 24/83, OSNCP 1983, No. 12, item 195.

At the same time that there appeared a major problem of consultation not with the immediately superior trade union organisation, as the case was in late 1970's but with the national trade union organisation of which the company trade union organisation was a a part[3].

Problems of cooperation did not disappear after changes of the political and socio-economic system and restoration of trade union pluralism[4]. The interpretation of law concerning the cooperation, provided by the Supreme Court and legal doctrine, diverts from the contents of the statutory provisions, and thus brings in question the current model of the cooperation. The fact makes it reasonable to ask to what extent the postulate to completely change the model of cooperation is actually justified. Would not it be sufficient just to modify the current scheme of the cooperation?

2. Provisions of the Trade Union Act often make references to the notion of "representation". Whereas in the initial provisions of the Act the word has been linked by the law-maker with the imprecise term of the "working people" (to state that the trade union is expected to represent them), in later provisions "representing" has been referred to specific groups of people, like employees, old-age pensioners, home workers, the unemployed. Thanks to the wording the category of those represented can be determined. Contents of the statutory provisions make it also possible to specify the object of the representation, which includes rights as well as social and professional interests of the subjects represented by the trade union.

Rules for representation of those working in their individual cases have been included in the Act as well. As the law provides, in individual matters concerning employment relationship trade unions represent rights and interests of their members. At the request of an employee not associated in a trade union, the trade union can undertake to defend him/her. The solution in question has underlined the principle of a negative trade union freedom (manifested in the employee's possibility to stay outside of a trade union, and providing the employee with guarantees of freedom within the sphere of his/her individual rights). Putting it more practically, without the non-associated employee's consent no trade union is authorized to defend him/her. The consent of the trade union organisation for representing the non-associated employee against the employer has to be won in advance, not afterwards, and it is not obligatory for the trade union to give it. It may thus happen that despite a non-associated employee's request to represent him/her, a negative answer would be given by the trade union, there being no

[3] See, for instance, resolution of the Supreme Court of 4 August, 1993, I PZP 32/93, OSNC 1994, No. 4, item 72; judgment of Supreme Court of 4 April, 2000, I PKN 566/99, OSNP 2001, No. 17, item 531.

[4] The Act of 2 February, 1996, on Amendments to the Labour Code and Certain Other Acts of Parliament (Journal of Laws No. 24, item 110 – hereinafter referred to as the Act of 1996).

sanctions entailed by such a move. The law-maker has provided that the issue of the organisation's involvement and cooperation with the employer in individual matters of the employee not being a member of the trade union is left at the latter's will.

Problems with the interpretation of the rule in question started emerging after the Trade Union Act got amended 1996, a new provision having been introduced to it. As the latter states, in individual matters concerning employment relationship, in which the employer is obligated by law to cooperate with the company trade union organisation, the employer has to turn to the organisation, asking for information about employees enjoying the organisation's protection. Should the information be not provided within 5 days, the employer is free of the obligation to cooperate with the company trade union organisation in matters concerning the employees.

Rights of a company trade unions representing the employee have been granted to the organisation associating at least 10 members who are employees or home workers with the employer at whose establishment the organization operates. At the same time a duty was imposed on the organisation to submit, on a quarterly basis, the total number of trade union members, including the number of members being employees (as per the last day of the quarter, by the 10th day of the month following the quarter)[5].

A new regulation concerning cooperation of the employer with the company trade union organisation in individual matters concerning the employment relationship was also adopted by the Labour Code. Also in that piece of legislation the employer was burdened with the duty to cooperate, in individual matters of the employment relationship, with the company trade union organisation representing the employee – just as the rules of the Trade Union Act provide.

The current scheme of cooperation with the company trade union organisation in individual employee matters is based on three rules concerning: specification of the time when the cooperation with the organisation is to be launched (if the law provides so), indication of the trade union organisation to be cooperated with and the duty to cooperate imposed onto the employer. As a result, the employer is obligated to cooperate with the organisation in the situation when the law expressly provides so and the cooperation must not be conducted with any other trade union organisation, but the one that represents the employee.

Despite expectations, the introducing of the new regulations into the Trade Union Act did not result in a unification of the process of cooperation of the employer with the trade union organisation. Just the opposite, the process was divided, two stages being distinguished as a result; one provided for by the Labour Code, the other by the Trade Union Act. While separated, the stages remain interdependent to a certain extent, for taking up cooperation with the trade union in

[5] The rule is also applicable to the officials mentioned in Art. 2 par. 6 of the Trade Union Act.

a specific case must be preceded by determining whether the trade union organisation represents the employee or has consented to do so.

That remodeling of the cooperation scheme, coming down to the supplementary "determination" of the employee's trade union affiliation was a consequence of the introduced trade union pluralism.

The move was supposed to facilitate, viz. to specify the cooperation between trade unions and the employer in individual employee matters in the situation of a few trade union organisations operating in the same company. The result proved, however, to be different from that assumed.

The reason for the difficulties of cooperation between the company trade union organization and the employer should be sought in the inaccurate rule included in the Trade Union Act. In its reasons to the judgment of 11 January 2011, I PKN 186/00[6] the Supreme Court takes the position that it is, in particular, the final part of the rule, that seems to be unclear, leading to not so logical conclusions. The employer should turn for the information concerning representation of the employee to the company trade union organisation whose member the employee is. Once the employer is supposed to turn to the organisation, however, he should earlier know which one the organisation in question is, and if he is aware of that, why should he ask the organisation about the representation?

3. Doubts that emerged in connection with interpretation of the rule concerning cooperation with trade unions in individual employee matters can be summarised as four major issues.

The first of those concerns the place which the procedure aimed at obtaining information takes in the process of cooperation of the employer with the company trade union organisation. It does not follow from the Trade Union Act whether the information-related procedure is part of the cooperation process – thanks to which the procedure is perceived as composed of the initial information stage and the stage of actual cooperation – or whether the information stage and the stage of actual cooperation should be viewed as separate processes. A doubt was raised if obtaining information concerning extension of protection onto the employee can be conducted parallel to actual cooperation or if the information-related stage should be preceding the actual cooperation[7].

Problem two concerns sanctions for the information-related procedure not having been observed at the termination of employment relationship. As far as

[6] Judgment of the Supreme Court of 11 January, 2001, I PKN 186/00, OSNP 2002, No. 18, item 428.

[7] Judgement of the Supreme Court of 21 April, 1999, I PKN 36/99, OSNP 2000, No. 13, item 507. A different position was taken by the Supreme Court judgment of 11 January, 2001, I PKN 186/00, OSNP 2002, No. 18, item 428; Supreme Court judgment of 23 January, 2002, I PKN 809/00, OSNP 2004, No. 2, item 31.

this issue is concerned, the view was expressed declaring the employee's right to pursue a claim arising from unlawful termination of the employment relationship[8].

Problem three is focused on the form in which information is to be gained that the employee has been granted the right to be defended by a company trade union organisation. Doubts concern the issue whether the information can be provided about a group of those protected (in the form a list of the persons) or whether the information should be limited to a specific employee. The problem is a complex one, considering particularly the frequency of seeking the information and the need to update it. Determining which party is obliged to initiate the cooperation in individual issues is just as important. Should it be the employer to do so or is it the trade union organisation?

Similarly controversial is the problem concerning the duty of cooperation with a company trade union which did undertake to represent the employee, yet the employer was not advised about the fact formally[9], or in the situation where the employee passed the information about being protected by a trade union himself/herself[10] or application of the rule of optionality of trade union representation towards trade union members[11].

Should the above mentioned issues be arranged by frequency of their analysis, the problem of the list of protected persons and the subject that is supposed to make it available to the other side of the employment relationship would definitely be ranked number one. The position taken by the legal literature is that it is the employer who is burdened with the duty to obtain information about a company trade union organisation having undertaken to defend the employee. By the same it is the employer that is supposed to initiate obtaining the information about employees enjoying the protection of the company trade union organisation. The fact that the employer already has information concerning either the employee's membership of a trade union or the employee being covered by a trade union protection does not release him from the duty to initiate the information-seeking procedure. The latter is, in fact, obligatory – as "the employer shall turn to" phrase, used by the law-maker, confirms. The employer's duty to turn to the company trade union organization concerns a specific employee only, as it is in his/her case that cooperation with trade unions is needed. This is why enquiring about the employee has to be done each time to ascertain whether launching of the actual

[8] Judgement of the Supreme Court of 6 August, 1998, I PKN 269/98, OSNP 1999, No. 17, item 550.

[9] Judgement of the Supreme Court of November, 2006, II PK 51/06, OSNP 2001, No. 23–24, item 348. Cf. An earlier Supreme Court judgment of 24 November, 2004, I PK 91/04, OSNP 2005, No. 19, item 300.

[10] Judgement of the Supreme Court of 18 October, 2005, II PK 90/05, OSNP 2006, No. 19–20, item 291.

[11] Judgement of the Supreme Court of 7 May 2007, II PK 305/06, LEX 307465.

cooperation stage is justified[12]. A different view is also encountered, though, questioning the necessity to seek information on the employee's representation by the company trade union organisation each time[13].

Interpretative doubts as to the above named rule also arose as regards judicial decisions of the Supreme Court concerning termination of the contract of employment with and without notice to terminate. On the one hand the Supreme Court has accepted behaviour of the employer consisting in seeking, each time, personalized information from the trade union organization about the covered employee, whereas on the other hand a thesis was advanced that the company trade union was supposed to make a list of employees represented by trade unions available to the employer. The presented view was not fully coherent, though. In the Supreme Court's opinion the information-seeking stage came down to a single act directed to all company trade union organizations operating at the employer's. The information was supposed to include a personal list of employees enjoying trade union protection, and the argument in favour of such interpretation was the legal arrangement of the involved subjects' behaviour, from selection of the company trade union organisation by the employee to a consent expressed by the organization and placement of the information in the list passed to the employer being obligated to cooperate.

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[12] The problems were raised by: A. Sobczyk, *Współdziałanie pracodawcy ze związkami zawodowymi w indywidualnych sprawach ze stosunku pracy* [Cooperation with the Employer with Trade Unions in Individual Matters Concerning Employment Relationship], "Przegląd Sądowy" 1998, Vol. 9, p. 21 *et seq*.; D. Dörre-Nowak, *Prawo organizacji związkowych i pracodawcy do informacji o pracownikach a ochrona prywatności* [The Right of Trade Unions and the Employer to Information about Employees vs. Protection of Privacy], "Monitor Prawa Pracy" 2005, No. 12, p. 322; M. Latos-Miłkowska, *Kształt powszechnej ochrony przed wypowiedzeniem we współczesnym prawie pracy* [The Model of Common Protection against Termination of Employment Contract with Notice in Modern Labour Law], "Praca i Zabezpieczenie Społeczne" 2008, Vol. 10, p. 12–13.

[13] K. W. Baran, *Zbiorowe prawo pracy. Komentarz* [Industrial Relations Law. A Commentary], Warszawa 2007, p. 258; K. Rączka, *Współdziałanie pracodawcy ze związkami zawodowymi w indywidualnych sprawach pracowniczych po nowelizacji kodeksu pracy* [Cooperation of the Employer with Trade Unions in Individual Employee Matters after Amendments Made to Labour Code], "Praca i Zabezpieczenie Społeczne" 1996, Vol. 8–9, p. 35–36; K. Rączka, (in:) *Prawo pracy po zmianach* [Labour Law after Amendments], Warszawa 1997, p. 141 *et seq*.; K. Rączka, A gloss to the Supreme Court judgment of 21 April, 1999, I PKN 36/99, "Praca i Zabezpieczenie Społeczne" 1999, Vol. 11, p. 38–39; the stand point seems to be shared by A. Dubowik, *Wybrane problemy ochrony przed wypowiedzeniem stosunku pracy po nowelizacji kodeksu pracy* [Selected Issues of Protection against Termination of Employment Contract with Notice after Amendments ot the Labour Code], "Praca i Zabezpieczenie Społeczne" 1997, No. 2, p. 24; A. Rycak, *Związkowa reprezentacja uprawnień pracowniczych w rozwiązywaniu umów o pracę*, (in:) *Reprezentacja praw i interesów pracowniczych* [Trade Union Representation of Employee Rights as Regards Termination of Employment Contracts, (in:) Representation of Employee Rights and Interests], G. Goździewicz (ed.), Toruń 2001, p. 182; W. Sanetra, *Rozwiązanie umowy o pracę bez wypowiedzenia w znowelizowanym kodeksie pracy* [Termination of a Contarct of Employment without Notice in the Amended Labour Code], "Praca i Zabezpieczenie Społeczne" 1996, Vol. 6, p. 29).

As a result, it was the company trade union organisation that was supposed to transfer and update the information about the employee represented by trade unions[14].

Despite certain divergence of opinions, the above presented trends of interpretation concerning cooperation of the employer and trade unions are actually not competitive against each other. Whereas the former of those was related to the very origins of cooperation of the employer with the company trade union organization representing the employee, the latter of the views has won acceptance recently. As a result, two interpretations of the way in which the employer should cooperate with trade unions in individual employee matters are followed at the moment.

4. Analysis of the presented issues proves that there is, in fact, a need to take up again a discussion on the model of involvement of a company trade union organization in individual employee matters.

The current situation, in which two different interpretations of the rule of cooperation between the employer and trade unions function side by side is hardly beneficial to contacts between them, and social tension arising around the issue of job stability protection, so important for the employee, does not help resolve the problem. In fact, it poses a threat to law reliability.

The idea gaining support now is that the trade union is not expected to provide information about a single case of extending its protection on an employee to the employer, but rather inform the latter about a certain community of such employees by means of a list presented to him. It is thus the employer that has the duty to turn to the company trade union organization, the duty being interpreted as a non-recurring one. The list provided to the employer is to be then updated by the trade union organization, the employer being advised about each change. The lack of such update of the list or the duty to provide the list within 5 days of the request not having been met are reasons releasing the employer from the duty to carry out the consultation as provided for in the Labour Code.

The current formula for of cooperation between the employer with trade unions in individual employee matters, as interpreted by the Supreme Court[15], gives rise to objections, as it is actually not backed by the rule contained in the

[14] Judgment of the Supreme Court of 25 July, 2003, I PK 305/02, LEX No. 127947, judgment of the Supreme Court of 23 January, 2002, I PKN 809/00, OSNP 2004, No. 2, item 31. A similarly view was expressed in reasons to the Supreme Court judgment of 22 June, 2004, II PK 2/04, LEX No. 108534. As regards the list, and duty of trade unions to inform about persons protected by them cf. judgment of the Supreme Court of 18 October, 2005, II PK 90/05.

[15] The Supreme Court's contribution in dissemination of the interpretation is undeniable. Since 2001 judgments of the Supreme Court would systematically repeat the solutions adopted by the Court in its judgment of 21 April, 1999, I PKN 36/99, OSNP 2000, No. 13, item 512.

It is interesting to observe that individual panels of judges did not undertake to interpret the provision, but would rather quote earlier judgments, thus establishing a certain line of jurisdiction.

Trade Union Act. The model of cooperation between the employer and trade unions established by the law-maker may be opposed, the legal scheme may be accused of incoherence, practical meaning and usefulness of the solution may be questioned, but hardly is it acceptable to make a ***contra legem*** interpretation only because it may facilitate the process of seeking information about employees and bring a relief to the employer in that respect.

The view advocating the duty of the company trade union organisation to produce a list of protected employees has been put to criticism many a time[16]. Arguments against such interpretation include lack of an explicit reference in the Trade Union Act to a list of trade union members or persons protected by a trade union. Nor is it worker community mentioned there (which fact could justify collective information being passed to the employer). The legal provisions in question do not confirm the view that the duty of the employer to obtain information about all persons enjoying protection in individual employee cases is a non-recurring one. Given the rule of a "reasonable law-maker", hardly does the said confirm that the interpretation made follows a reasonable course. And, finally, an argument quoted against the list is violation of confidentiality of personal data[17] of the employees included in it.

Neither do provisions of law support the idea that once the employer is sure about the employee being covered by the trade union protection, the employer is relieved from the duty to institute the information-seeking procedure. As the law in force provides, the employer should initiate that stage of the cooperation in each case, as no one can be absolutely certain that the trade union protection was not granted to the employee at the very last moment[18].

The current model of cooperation between the employer and trade union representing the employee can certainly be referred to as one far from perfection.

There arises a question if a model involving representation of the workforce community in individual employee cases should actually be retained? Is it reasonable to maintain cooperation with trade unions or is it worth to propose a change of the model and possibly entrust other bodies with the task? And should we find the latter necessary, the shape of cooperation between the company trade union

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As a result, further judgments of the Supreme Court indicated the existence of such a well-established Line of jurisdiction concerning the rule of cooperation, as included in the Trade Union Act.

[16] A. Wypych-Żywicka, *Opinia dla związków zawodowych dot. interpretacji art. 30 ust 2[1] ustawy związkowej* [An Opinion], http//: www.solidarnosc.org.pl; A. Wypych-Żywicka, *W sprawie interpretacji art. 30 ust 2[1] ustawy związkowej – słów kilka*, (in:) *Z zagadnień współczesnego prawa pracy. Księga Jubileuszowa Profesora Henryka Lewandowskiego* [Interpretation of Art. 30 ust. 2[1] of the Law on Trade Unions, (in:) Commemorative Book in Honour of Professor Henryk Lewandowski], Z. Góral (ed.), Warszawa 2009, s. 249 *et seq.*

[17] The Act of 29th August, 1997 on Personal Data Protection (consolidated text: Journal of Laws of 2014, item 1182, as amended).

[18] Finally, it was confirmed by the Supreme Court. See e.g. the judgement of 21 November, 2012, III PZP 6/12.

organization, the employer and other worker representation bodies in individual employee matters comes as an essential question.

Resolution of a so outlined problem is extremely difficult, considering lack of experience in cooperation with entities other than trade unions in such matters.

The analysis of the issues makes it possible to consider two options. **The first** of those comes down to making trade unions leave work establishments and gradually shift their participation in employee matters to the phase of a dispute. Such a solution was proposed by me, for the first time, in 1996[19]. It was based on the assumption that the law-maker should gradually relieve the employer's legal transactions from the involvement of the trade unions and transfer the cooperation to the dispute stage. Trade union membership would thus not be a reason triggering protection of the employee. Participation of the trade union in the court proceedings, at the interested person's request, would be conditioned upon the organization's consent, and the position taken by the trade union would not be binding on the employer, but would consist in giving an opinion. Even now rules of procedure effectively provide for participation of a trade union in defense of the employee's interests (examples being institution of proceedings on behalf of the employee in an individual case concerning employment relationship or accession of a trade union to court proceedings in progress, instituted by the employee). The proposed solution does not eliminate trade unions as organisations whose natural task is to protect employees nor does it reduce protection of the latter, but transfers it to another stage – that taking place outside of the work establishment.

Solution two is much more complex. It assumes retaining trade unions at the workplace, other entities being also allowed to cooperate with the employer in individual employee matters. There arises a question, though, how can powers be distributed in a situation of trade union and works' councils operating at the company side by side[20]. Three options can be contemplated in that respect:

– maintenance of current division of powers between trade unions and other worker representations;

– allowing bodies of both types to cooperate with the employer in individual employee matters;

– entrusting the powers solely to the worker representation should trade unions be missing at the workplace.

Each of the proposed solutions has its drawbacks. Solution one could perhaps be supported if representation of employees associated and non-associated in trade unions (and likely to join the unions in future) were provided a clear legal framework.

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[19] The postulate was forwarded by me (in:) *Zasadność wypowiedzenia umowy o pracę* [Reasons to Termination of the Contract of Employment with Notice], Gdańsk 1996, p. 180 *et seq.*

[20] The Act of 7th April, 2007 on Information and Consultation of Employees (Journal of Laws No. 79, item 550, as amended).

Implementation of solutions two and three raises doubts considering the role of the workforce (more specifically – its representatives) in resolving individual employee problems. As the works' council is identified as a body taking part in the process of workplace "co-management", a conflict of interest is possible if should the council take over the powers of trade unions related to protection of employee interests.

Just like trade unions, works' councils are representatives of the worker community, taking part in decision-making processes at the employer's. By meeting the postulate to transfer trade union powers, related to employee protection in individual cases, onto other worker representations (in order – as the declarations go – to better secure employee interest), only a replacement of organizations would occur as a result. A solution like that would not actually introduce any structural change in the model of cooperation; it would just approve participation of bodies other than trade unions (involved in employment relationship issues) into the decision-making process.

Considering the above said, the author believes that contents of the rule of representation of the employee, as set forth in the Trade Union Act, should be properly arranged in the nearest future. In the long run the author advocates the opinion that trade unions should, in fact, leave the workplace, their powers to protect employees in individual cases being retained.

ABSTRACT

The paper is an analysis of the representation of workers in individual employee cases. The author shows the current model of cooperation of the employer and the trade union in individual employee matters and gives several suggestions as to how to change the current state of affairs. In the opinion of the author, it is reasonable to ask to what extent the postulate to completely change the model of cooperation is actually justified. In individual matters concerning employment relationship the trade unions represent the rights and interests of their members. Additionally, at the request of an employee who is not a member of the trade union, the trade union can undertake his or her defence. The employer's decision to cooperate with the trade union in a specific case must be preceded by a determination of whether the trade union represents the employee. At this stage a few questions arise. The first one is whether the information-related procedure is part of the cooperation process or should be viewed as separate processes. The second is the question about sanctions for the information-related procedure not having been observed. However, the most important is the question about the form in which information is to be obtained – in the form of a list of employees or limited

to a specific employee? After short presentation of the current state of affairs, the author considers two options as to the future model of representation of workers in individual employee matters. The first one is that the trade unions should leave the workplace, retaining their powers to protect employees in individual cases. And the second option assumes retaining trade unions at the workplace, with other entities also allowed to cooperate with the employer in individual employee matters.

REPREZENTACJA PRACOWNIKÓW W SPRAWACH INDYWIDUALNYCH – STAN OBECNY I KIERUNKI ZMIAN

Streszczenie

Artykuł stanowi analizę zagadnienia reprezentacji pracowników w indywidualnych sprawach z zakresu prawa pracy. Autorka prezentuje aktualny model współdziałania pracodawcy i związków zawodowych w indywidualnych sprawach pracowniczych oraz bierze pod rozwagę kilka pomysłów dotyczących tego, w jaki sposób zmienić aktualny stan rzeczy. Zdaniem autorki, uzasadnione jest postawienie pytania, w jakim zakresie postulat całkowitej zmiany obecnego modelu tego współdziałania jest uzasadniony w dzisiejszej sytuacji. W indywidualnych sprawach z zakresu stosunku pracy związki zawodowe reprezentują prawa i interesy swoich członków. Dodatkowo, na wniosek pracownika nienależącego do związku zawodowego, związek zawodowy może podjąć się jego obrony. Podjęcie przez pracodawcę współdziałania ze związkiem zawodowym w konkretnej sprawie powinno być poprzedzone ustaleniem, czy pracownik jest objęty obroną związku zawodowego. Na tym etapie pojawia się kilka pytań. Pierwsze dotyczy tego, czy zwrócenia się do związku zawodowego o informację o objęciu pracownika obroną jest elementem współdziałania ze związkiem, czy też należy je postrzegać jako odrębny proces. Drugie pytanie dotyczy sankcji za niedopełnienie obowiązku zwrócenia się do związku zawodowego o informację o objęciu pracownika obroną. Niemniej jednak najważniejsze pytanie dotyczy formy, w jakiej te informacje powinny być udzielane pracodawcy – w formie listy pracowników czy w formie informacji ograniczonej do konkretnego pracownika? Po dokonaniu krótkiej analizy aktualnego stanu rzeczy, autorka proponuje dwie koncepcje dotyczące przyszłego modelu reprezentacji pracowników w indywidualnych sprawach z zakresu prawa pracy. Pierwsza zakłada wyprowadzenie związków zawodowych na zewnątrz zakładu pracy z zachowaniem uprawnień w zakresie reprezentowania pracowników w indywidualnych sprawach pracowniczych. Druga natomiast przewiduje pozostawienie związków zawodowych w zakładzie pracy z jednoczesnym dopuszczeniem innych podmiotów do podejmowania współpracy z pracodawcą w indywidualnych sprawach pracowniczych.

KEYWORDS

representation of workers, individual employee matters, trade union, cooperation process, information-related procedure

SŁOWA KLUCZOWE

reprezentacja pracowników, indywidualne sprawy pracownicze, związek zawodowy, proces współdziałania, procedura informacyjna