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Constitutional Right to Collective Bargaining and its Consequencesin Terms of Conducting a Collective Dispute

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Słowa kluczowe: konstytucja, rokowania, związki zawodowe, spory zbiorowe, monopol związkowy

Abstract

A right to collective bargaining is a consequence of freedom of assembly and at the same time one of the most significant demonstrations of trade union liberty. The Constitution of the Republic of Poland does not define the concept of collective bargaining, but introduces guarantees of a right to bargain. A broad approach to collective bargaining represents the core of it and is consistent with the Polish legislator's intentions. Thus, a concept of collective bargaining should include any and all negotiations between an employer, a group, an organization or organizations of employers and a trade union or trade unions held in order to set forth the terms and conditions of employment or to manage relations between employers or between employers and their organizations and trade unions. Resolution of collective disputes as a power of trade unions addressed by the author in this study accounts for one of the demonstrations of a right to collective bargaining.

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Streszczenie

Konstytucyjne prawo do rokowań zbiorowych i jego konsekwencje w warunkach prowadzenia sporu zbiorowego

Prawo do rokowań zbiorowych jest konsekwencją wolności zrzeszania się i jednocześnie jednym z najistotniejszych przejawów wolności związkowej. Konstytucja RP nie definiuje pojęcia rokowań zbiorowych, wprowadza jednak gwarancje w zakresie prawa do rokowań. Wydaje się że szerokie ujęcie rokowań zbiorowych oddaje ich istotę i jest zbieżne z intencjami ustawodawcy polskiego. Zatem pojęciem rokowań zbiorowych należałoby objąć wszelkie negocjacje między pracodawcą, grupą, organizacją lub organizacjami pracodawców, a związkiem zawodowym lub związkami zawodowymi, prowadzone celem określenia warunków zatrudnienia lub regulacji stosunków między pracodawcami lub między pracodawcami i ich organizacjami, a związkami zawodowymi. Jednym z przejawów realizacji prawa do rokowań zbiorowych jest rozwiązywanie sporów zbiorowych, do której to kompetencji związków zawodowych odnosi się autorka w artykule.

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In the Law on resolution of collective disputes, the Polish legislator introduces regulations guaranteeing a monopoly of Polish trade unions in terms of both collective dispute initiation, commencement and its conduct by the employees' party[2]. Thus, the issue of a trade union monopoly should be analyzed in two aspects. Firstly, as granting a trade union the right to sole representation of the employees'party in a collective dispute, which means deprivation of the right to initiate a collective dispute and its conduct on the employees' part by non-trade union representations. Secondly, a guarantee for a trade union of the right to initiate a dispute by a trade union which, most likely, means deprivation of the other party of collective disputes i.e. the employer party of the right in this area.

The suitability of this restriction may evoke some controversy both in terms of constitutional standards on the right to collective bargaining as well as in

[2] Article 2(1) and Article 7(1) of the Law of May 23, 1991 on resolution of collective disputes (Dz.U. No. 55, item 236 as amended).

the context of a decrease of the rate of unionization over the last several years. Deterioration of protection of employees' rights and interests accounts for a consequence and at the same time a risk of a low unionization rate, if an-individual entity is not capable of guaranteeing itself such protection, taking advantage of its bargaining position as effectively as does a collective entity[3]. The Law on trade unions grants the latter powers in the area of protection of employees' rights and interests[4]. Due to a broad range of powers granted to them by the legislation, a tradition in this area, giving a feeling of stability and continuity and protection, that is meant to guarantee independence on an employer, trade unions are the most effective representative of employees. One should bear in mind, however, that the labour law is subject to transformation involving, but not limited to, implementation of standards allowing other employees' representations. Their powers are often coherent with the powers of trade unions, but they may take advantage of them only when there are no trade unions at a given employer. Moreover, the scope of these powers isconsiderably limited.

A right to collective bargaining is a consequence of freedom of assembly and at the same time one of the most significant demonstrations of trade union liberty. The Constitution of the Republic of Poland does not define the concept of collective bargaining, but introduces guarantees of a right to bargain in Article 59(2). Pursuant to this provision, a right to bargain is held by trade unions, employers and their organizations, and such bargaining aims at resolution of collective disputes and execution of collective labour and otheragreements.

Due to a broad range of subjects of bargaining, it seems obvious that the constitutional guarantee of a right to collective bargaining covers not only bargaining understood as a method of resolution of disputes or a mode of executing collective agreements, including collective labour agreements, but also as an instrument enabling management of collective labour relations featuring respect for the social dialogue concept and enabling the achievement of social order. The standards arising from convention C154 of ILO pertain-

[3] A. Kowalczyk, *Rola związków zawodowych w negocjacjach w sprawach pracowniczych,* [in:] *Prawo pracy czynnikiem skutecznego kierowania ludźmi,* ed. A. Nowak, Radom 2013, p. 222.

[4] Article 1 of the Law of May 23, 1991 on trade unions (consolidated text: Dz.U. 2001, No. 79 item 854 as amended).

ing to support for collective bargaining that expands the concept of collective bargaining to include any and all negotiations between an employer, a group, an organization or organizations of employers and a trade union or trade unions held in order to set forth the terms and conditions of employment or to manage relations between employers or between employers and their organizations and trade unions should be a reference point for interpretation of a concept of bargaining in the constitutional approach[5]. Such a broad approach to collective bargaining represents the core of it and seems to be consistent with the Polish legislator's intentions. Both the linguistic and purposive interpretation in the Article 59(2) of the Constitution do not provide any reason to limit the concept of collective bargaining solely to the method of resolution of collective disputes[6]. On one hand, the legislation uses the phrase: "in particular" indicating an open nature of a catalogue to determine the subject of bargaining, but on the other hand, the core of bargaining itself calls for a broader interpretation of this concept, thus, a reference to the provisions of ILO convention C154 seems to be justified in the context of deliberations on the constitutional standards pertaining to bargaining. It may be, therefore, concluded that an analysis of the issues of collective bargaining may not ignore the social dialogue issue. Hence, the Article 20 of the Constitution of the Republic of Poland considers a dialogue and cooperation of social partners to be a significant element providing a basis for the market economy. A social dialogue is not a uniform concept; therefore, it is difficult to define, but to put it in most general terms, the ways of communication and mutual relations of social partners pertaining to various aspects of collective labour law[7] may be called a dialogue.

This rule underlies all collective labour law institutions, and is most comprehensively implemented in collective bargaining aiming at execution of a collective agreement or any other agreement or at resolving a collective dis-

[5] Z. Hajn, *Autonomia rokowań zbiorowych w świetle Konstytucji*, [in:] *Konstytucyjne problemy prawa pracy i zabezpieczenia społecznego, Papers of the 15th Meeting of Labour Law and Social Security Faculties and Organizations, Wrocław 1–2 June 2005*, ed. H. Szurgacz, Acta Universitatis Wratislaviensis, No. 2753, Wrocław 2005, p. 60.

[6] L. Florek, *Zgodność przepisów prawa pracy z konstytucją*, "Praca i Zabezpieczenie Społeczne" 1997, No. 11, p. 4; W. Sanetra, *Konstytucyjne prawo do rokowań*, "Praca i Zabezpieczenie Społeczne" 1998, No. 12, p. 4.

[7] E. Wronikowska, P. Nowik, *Zbiorowe prawo pracy*, Warsaw 2008, p. 24.

pute by peaceful means[8]. In terms of theory, employees and employers may participate in a dialogue directly or indirectly[9]. Due to the fact, however, that a dialogue may be held at various levels including the supra-organizational, it is hard to imagine how employees could be involved directly. Thus, it is necessary to involve an employees' representation in a dialogue, if there is reference, *inter alia*, to collective bargaining. Therefore, a question appears about the form of this employees' representation. Article 59(2) provides that trade unions and employers and their organizations have a right to bargain. On the basis of the linguistic interpretation of this provision, one should put an argument of exclusivity of trade union representation for participation in collective bargaining in the constitutional approach. Due to the general nature of constitutional standards pertaining to human rights, it seems that reliance solely on linguistic interpretation, when construing them, may be misleading. There is no consensus in the subject matter academic works whether one may talk about a trade union monopoly in the case of collective bargaining in the constitutional approach, but the views tend to favor the thesis that there should be no such monopoly in bargaining except for collective labour agreement. It has been highlighted that when considering the issue of collective bargaining and potential trade union monopoly, one may not forget about a negative trade union liberty, that should be understood not only as the employees' right to remain outside of trade unions, but also that the rights of non-associated employees may not be less protected than those of associated employees.

The constitutional scope of liberty should be, therefore, treated as a minimum of what every legislator in a democratic state should consider to be the basis for legal order. It means that there is an option to expand human liberties and rights by means of ordinary law (statute), as it supports their reinforcement[10]. Some representatives of jurisprudence narrow the trade union monopoly to bargaining in a constitutional perspective, emphasizing that it does

[8] G. Goździewicz, *Podstawowe zasady zbiorowego prawa pracy,* [in:] *Zbiorowe prawo pracy w społecznej gospodarce rynkowej,* ed. G. Goździewicz, Toruń 2000, p. 47.

[9] M. Seweryński, *Dialog społeczny. Współzależność gospodarki i prawa pracy,* [in:] *VI Europejski Kongres Prawa Pracy i Zabezpieczenia Społecznego,* September 13–17, 1999, Warsaw 1999, p. 20.

[10] M. Seweryński, *Problemy statusu prawnego związków zawodowych,* [in:] *Zbiorowe prawo pracy w społecznej gospodarce rynkowej…*, p. 120; *idem, Problemy konstytucyjne kodyfikacji prawa pracy,* [in:] *Konstytucyjne problemy prawa pracy i zabezpieczenia społecznego…*, p. 21;

not mean that the term: "collective bargaining" may not include negotiations pertaining to the rights and interests of employees and employers held, *inter alia*, between other entities e.g. between an employer and non-trade-union employees' representation. They will not, however, be bargaining in the constitutional sense of the term[11]. This supports the view that the Constitution is not an obstacle for development of non-trade-union development of employees' representation. When taking account of modern standards and evolution that have affected the labour law, it should be assumed that the situation that employees will have adequate representation ensured[12] by our government is a precondition for ensuring proper security. It does not mean, however, that in each and every case, a legislator should implement pluralism of employees' representations without any limitations. Limitations in this area are necessary due to the object and the subject of bargaining.

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[11] Z. Hajn, op.cit., p. 63.

[12] W. Sanetra, *Konstytucyjne problemy stosowania prawa pracy*, [in:] *Konstytucyjne problemy prawa pracy i zabezpieczenia społecznego…*, p. 31.

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