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Pursuit of equality as the essence of labour law[1]

Dążenie do równości jako istota prawa pracy

Abstract
The author puts forward that the pursuit of equality, which is a general determinant of the contemporary shaping of social relations, has always constituted one of the main, and perhaps the most significant reason for the existence and development of labour law as a separate branch of law, and for its expansion. She points out that in the early days of labour law, the legal institutions forming the core of this field on the basis of civil law, in addition to ensuring safe and healthy working conditions, were aimed at removing the discrepancy (dissonance) between equality in the formal sense (equivalence) and inequality in the material sense of the subjects of legal relations in connection with the performance of subordinate work. Their sense boils down to the restriction of the principle of freedom of contract, so that "negotiation" of employment conditions can only take place above (not below) the standard set by the labour law. The author also stresses that in the last decades of the twentieth century, however, the equality aspect of labour law moved into a second phase. A feature of this phase is the accentuation of the need not only to level the privilege of the employer over the employee as the stronger party of the employment relationship, but also to remove inequalities between the employees themselves in matters related to the employment relationship resulting from different treatment by the employer of the individual persons employed by him or her. The "levelling" restriction of the principle of freedom of contract nowadays no longer involves only the prohibition of employers to employ workers below the standards set by semi-imperative norms of labour law, but also entails the prohibition to apply different standards of employment to some workers than to others without a legitimate reason.
According to the author, the equality aspect is also the flywheel of the formation of a new field of law, which we call employment law, whose subject matter is generally understood to be the regulation of social relations involving the provision of non-subordinate work. However, the essence of employment law, at least in its current, initial (germinating) form, is largely based on the uniformization (equalization) of certain elements of the protection of persons providing work on bases other than employment relationships with the protection standards inherent to labour law.

Keywords
labour law, equality

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Streszczenie
Autorka stawia tezę, że dążenie do równości, będące ogólnym wyznacznikiem współczesnego kształtowania stosunków społecznych, stanowiło i stanowi nadal jedną z głównych, a być może najistotniejszą, rację bytu i rozwoju prawa pracy jako odrębnej gałęzi prawa i jego ekspansji. Wskazuje, że w początkach prawa pracy instytucje prawne tworzące na pniu prawa cywilnego zrąb tej dziedziny, obok zapewnienia bezpiecznych i higienicznych warunków pracy, miały za zadanie usunięcie rozbieżności (dysonansu) pomiędzy równością w sensie formalnym (równorzędnością) a nierównością w sensie materialnym podmiotów stosunków prawnych związanych z wykonywaniem pracy podporządkowanej. Ich sens sprowadza się do ograniczenia zasady swobody umów do możliwości „negocjacji" warunków zatrudnienia tylko powyżej (nie niżej) niż wyznaczony prawem pracy standard. Autorka podkreśla również, że w ostatnich dekadach XX w. równościowy aspekt prawa pracy przeszedł jednak w drugą fazę. Cechą tej fazy jest akcentowanie potrzeby niwelacji nie tylko uprzywilejowania pracodawcy względem pracownika jako silniejszej strony stosunku pracy, ale także usunięcie nierówności pomiędzy samymi pracownikami w sprawach związanych ze stosunkiem pracy wynikających z odmiennego traktowania przez pracodawcę poszczególnych osób przez niego zatrudnianych. „Wyrównawcze" ograniczenie zasady swobody umów obecnie nie sprowadza się już jedynie do zakazu zatrudniania pracowników przez pracodawców poniżej standardów wyznaczonych semiimperatywnymi normami prawa pracy, lecz także do zakazu stosowania innego standardu zatrudnienia wobec jednych pracowników względem drugich bez uzasadnionej przyczyny. Według autorki aspekt równościowy stanowi także koło zamachowe kształtowania się nowej dziedziny prawa, którą określamy mianem prawa zatrudnienia, przez którego przedmiot na ogół rozumie się regulacje stosunków społecznych związanych ze świadczeniem pracy niepodporządkowanej. Istota prawa zatrudnienia, przynajmniej w obecnym, początkowym (kiełkującym) kształcie, w dużej mierze zasadza się jednak na uniformizacji (wyrównaniu) niektórych elementów ochrony osób zatrudnionych w ramach innych niż pracownicze stosunków świadczenia pracy ze standardami ochronnymi właściwymi prawu pracy.

Słowa kluczowe
prawo pracy, równość

The concept of labour law

What labour law is and what constitutes the basis for its autonomy as a branch of law has been the subject of numerous analyses in the doctrine.

This issue is closely related to a more general problem of dividing the entire legal matter into smaller components called branches of law, and more specifically, with the problem of determining an adequate criterion for such a division. Two chief bases for this division are still employed. One is the method of regulating social relationships (e.g. the non-authoritarian method, based on equality of the subjects of social relationships, vs. the authoritarian method, where one side authoritatively decides on the rights and obligations of the other party to a social relationship). The other one is the criterion of the object of legal regulation, that is the criterion of the scope of reference (the object of legal influence).

The criterion of the method of regulating social relationships is traditionally the basis for the division of all law into private and public (in other approaches: into civil and administrative). The criterion of the object of regulation, on the other hand, is used to distinguish such branches of law as criminal law (where the object of regulation are social relationships connected with the fact that some individuals commit socially dangerous acts); family law (social relationships within the family), and labour law (social relationships connected with the voluntary performance of subordinate work for another entity). Very often both these criteria are applied in parallel, with one adopted as the leading one and the other as auxiliary.

This issue is further complicated by the fact that some sets of legal norms with a shared scope of influence (that is: a shared object of regulation) simultaneously apply civil and administrative methods, or a combination of the two (Zieliński, 1986, pp. 7–13, Jończyk, 1984, pp. 12–14; Wyka, 2010, pp. 141–159; Piątkowski, 2009, pp. 81–82; Jarosz-Żukowska, 2015, pp. 137–143). This is how labour law is viewed nowadays, although its autonomy and independence of other branches in the legal system are strongly emphasized (Wyka, 2010, p. 145).

The foregoing introductory remarks should be complemented with the commonly accepted definition of labour law, which states that labour law is a set of norms regulating the subordinate labour relations and other social relations legally connected to them.

The essence of labour law

Essence (Latin: "*essentia*") is a concept central not only to philosophy, and chiefly to ontology and epistemology, but also to other sciences. In the broadest possible terms, the purpose of all sciences, both theoretical and empirical, is — directly or indirectly — "to enquire into the essence of this or that" (Kotarbiński, 1986, p. 379). What is meant by "essence," "the essence of a thing," "essential characteristic," etc. has been pondered since the dawn of classical philosophy, that is, since the Socratic times.

How the concept of "essence" functioned before and continues to function today is perhaps most accurately characterized by John Locke, who understood by "essence" "*that which causes an entity to be what it is, or to be at all*" (Locke, 1689, book III; Jones, 2020).

A defence of the thesis articulated in the title of this paper with the application of this definition requires a demonstration that the fact that labour law exists as a separate branch of law and that it is characterized by certain properties distinct from other branches of law is due to the fact that one of the main, and perhaps the most essential, element of its impact is the "pursuit of equality."

Yet to prove the truthfulness of this thesis, some preliminary establishments must be made first.

At the outset, it should be emphasized that not all legal relations concerning the provision of subordinate work regulated by labour law are of equal importance and significance. The fundamental institution of labour law is the employment relationship, and the basic subject of its regulation are the rights and obligations of the parties to this relationship (employment relationship law).

All other relations of labour law (administrative relations of labour law; collective labour relations or procedural labour relations) are derivative to it (Święcicki, 1957, p. 17; Zieliński, 1986, pp. 14–19; Wyka, 2010, pp. 144–145) and, according to some authors, even subsidiary (Kolasiński, 1997, pp. 19–20). Their existence is conditioned by the existence of the employment relationship. In this sense, legal regulations which refer to them only supplement the law of the employment relationship.

These "supplementary" labour law regulations include collective labour law (regulations relating to the relationship between the employer or employers' organization and the employees' representation; cf. more on this: Hajn, 2013, p. 24), labour administration law (e.g. labour inspection regulations) and procedural labour law (regulations relating to the settlement of labour law disputes).

Hence, in seeking the "essence" of labour law, it is necessary to focus primarily on the set of those norms of labour law that concern the employment relationship.

The object of the employment relationship has already been mentioned. The subjects of this relationship are the employing entity (employer) and the employed person (employee), while its content is the entirety of rights and duties of these entities. The fundamental element of this relationship, from the point of view of the evaluation of what labour law is and what it is aimed at, is the content of the labour relationship, and more specifically: the method (mechanism) applied to determine this content.

It is precisely within this context that we must remember that in the early days of labour law, the legal institutions forming the core of this field on the basis of civil law, in addition to ensuring safe and healthy working conditions, were aimed mainly at removing the

discrepancy (dissonance) between equality in the formal sense (equivalence) and inequality in the material sense of the subjects of legal relationships related to the performance of subordinate work (Jończyk, 1984, p. 14; cf. also: Sobczyk, 2013, pp. 237–254; Giaro, 2020, p. 3). The idea was to level the real inequality existing in the relations between the employee and the employer. It was real in the sense that is resulted from extra-legal factors, mainly economic and social, and it gave rise to grossly unjust "negotiation inequality" in determining the content of the (subordinated) employment relationship, which in turn generated social unrest. Before labour law (or strictly speaking, the law of employment relationships) began to emerge, this levelling was done using a purely civil law method, i.e., based on the principle of freedom of contract, which, significantly, was understood in very broad terms.

This aspect is visible in the specific nature of most of the norms of labour law (or specifically, the law of employment relationships, which is discussed in more detail below). They are referred to as semi-imperative norms, i.e. norms that are unilaterally mandatory. The point of such norms is to restrict the principle of freedom of contract so that "negotiation" of employment conditions can only take place above (not below) the standard set by the labour law (cf. Article 18(1) and 18(2) of the Labour Code). When it comes to this aspect of labour law, the need for protection of the employee as the weaker party of the employment relationship, including compensatory protection, is often mentioned (Stelina, 2010, pp. 242–248; Goździewicz, 1988).

The semi-imperativity of the provisions of labour law is nothing else but this method of regulating social relations, important from the point of view of treating a particular set of norms as a separate branch of law. In other words, paraphrasing J. Locke, the fact that "*labour law exists and that it is the way it is*" is determined by the method of regulation of these relationships based on the particular formal specificity of the norms of this law, apart from the object of regulation, which are the social relations related to the provision of subordinate work, and mainly the employment relationship. In the material dimension in respect of the minimum level of employee protection set by legislation, it is aimed at removing the negotiation inequality of the parties to this relationship in establishing the content of the employment relationship.

Development and expansion of labour law

In the last decades of the twentieth century and in the early twenty-first century, the equality aspect of labour law has moved into a second phase.

The fundamental feature of this phase of labour law development, besides detailing and increasing the minimum standard below which a person cannot be employed even at her or his consent, as well as unifying this standard across Europe, is stressing the need to not only level the privileged position of the employer vis-a-vis the employee, but also remove the inequality between employees themselves in matters concerning employment relationships and stemming from the different treatment of employees by the employer. Currently, the employer's duty to treat employees equally and the prohibition of their discrimination, stemming on the statutory level from Article 11^2, Article 11^3 and Article 18^{3a} et seq. of the Labour Code, are the fundamental principles of labour law also in light of the Constitution of the Republic of Poland, of the international treaties ratified by Poland, and of European Union law, especially on the treaty level.[2]

Pursuant to Article 18^{3a}(1) of the Labour Code, "employees shall be treated equally as concerns the establishment and termination of employment relationships, the conditions of employment, promotion and access to training in order to raise professional qualifications, particularly regardless of sex, age, disability, race, religion, nationality, political views, trade union membership, ethnic background, religious beliefs and sexual orientation and regardless of the fact of being employed for a definite or an indefinite period or on full-time or part-time basis." The employer's duties include the obligation to counter discrimination in employment (Article 94(2b) of the Labour Code).

The Code further provides: "Provisions of employment contracts and other instruments on the basis of which an employment relationship is established and which run contrary to the principle of equal treatment in employment shall be ineffective. Instead of such provisions, relevant regulations of labour law shall apply, and where no such regulations exist, the provisions shall be replaced with relevant provisions of non-discriminatory character" (Article 18(3)).

"A person in relation to whom an employer has breached the principle of equal treatment in employment shall have the right to compensation at an amount not lower than the minimum remuneration for work specified under separate provisions" (Article 18^{3d}). An employee in respect of whom the employer violates this principle, if certain conditions are met, may also terminate the employment contract without notice and with a right to compensation equal to the remuneration for the termination period (Article 55(1^1) of the Labour Code read in conjunction with Article 94(2b) of the Labour Code, read in conjunction with Article 18^{3a} et seq. of the Labour Code).

Hence, currently, the approach to the problem of inequality in labour law is broader. The "levelling" restriction of the principle of freedom of contract no longer involves only employers being prohibited from employing workers below the standards set by semi-imperative norms of labour law, but also entails the prohibition to apply different standards of employment to some workers than to others without a legitimate reason. This applies not only to employment conditions fixed in the employment contract, but also to the method

and forms of performing the employment relationship (Sobczyk, 2013, pp. 256–259).

The equality aspect is also the flywheel of the development of a new branch of law that is referred to as employment law, and which focuses generally on the regulation of social relations in connection with the personal performance of non-subordinate work (Gersdorf, 2013, pp. 15–19; 2018, pp. 49–58; Goździewicz, 2018, pp. 17–34; Męcina, 2020). Perhaps it will end up replacing traditional labour law, or will function alongside it.

Yet the essence of employment law, at least in its current, initial shape, is largely based on the uniformization (equalization) of certain elements of the protection of persons employed on the basis of civil law agreements with protection standards provided by labour law (cf. more on this: Maniewska, 2019, pp. 28–29).

For example, the Act on minimum remuneration for work[3] has stipulated since 1 January 2017 the application of a "minimum hourly rate" (the equivalent of minimum remuneration for the work of employees) to some contracts of mandate or contracts for the provision of services. This Act applies not only to contracts signed from its date forward, but also to contracts that were entered into before and continued to exist on the date on which it became effective. It fixes the protection of minimum hourly rate at a level similar to the protection of employees' remuneration. This also applies to the satisfaction of claims in the event of employer's insolvency, as workers hired on the basis of civil law contracts (enumerated in detail) are employers within the meaning of Article 10 of the Act on the protection of employee claims.[4]

Currently, pursuant to Article 304 and 304[1] of the Labour Code, the performance of work on any basis other than an employment relationship is governed by the provisions of the Labour Code on duties of the employer (Article 207(2)) and of the employee (Artticle 211) concerning work safety and hygiene. In this respect, the basic difference between civil contracts and the employment relationship has disappeared, as also persons performing work under a civil law contract are obliged to carry out the instructions of the employer or another work-organizing entity (Article 211(2) in connection with Article 3041 of the Labour Code).

Also the Act on trade restrictions[5], in effect since 1 March 2018, which prohibits trade and activities connected with trade on Sundays and holidays and stipulates sanctions for the violation of this prohibition, levelled the legal situation of employees and persons performing work on the basis of civil law contracts.[6]

A significant extension of the application of labour law provisions to persons performing work on a basis other than the employment relationship also results from the amendment to the Act on trade unions,[7] effective from 1 January 2019. It introduced a new concept of persons engaged in gainful activity, which encompasses both employees and persons providing work for remuneration on a basis other than an employment relationship. The effect of this amendment is that persons who provide work for remuneration on a basis other than employment relationship have gained the right to associate in unions, and that they are now covered by the provisions of the Labour Code on equal treatment, as well by Section Eleven of the Labour Code on collective bargaining, and by the Act on solving collective labour disputes.

The Act on employee capital plans, in force since 1 January 2019,[8] also applies to persons who are not employees.

Those employed based on civil law contracts are covered by anti-discrimination protection under the Act implementing some EU regulations concerning equal treatment,[9] although the protection under this Act is much more limited than that of employees.

Uniformization of selected aspects of the protection of persons employed under civil law contracts with the protection standards inherent to labour law is motivated by the need to safeguard the fiscal interests of the state. Employment law is meant to counter the practice of replacing employment contracts with civil law contracts with the intention of avoiding public levies related to employment contracts, in order to thus gain more financial benefits in the short perspective (Gersdorf, 2019, p. 30). The goal is also to prevent, in situations described above, persons providing work from agreeing, more or less consciously, to the lowering of protection standards against standard social risks.

Another reason for the introduction into the legal order of institutions that make up employment law is also, or perhaps chiefly, the need to satisfy constitutional standards, and specifically the principles of social justice (Article 2 of the Constitution), protection of work (Article 24), protection of the dignity of persons (Article 30) and, importantly, the principle of equality before the law (Article 32(1)), which is correlated with them (Maniewska, 2019, pp. 29–30; cf. also: Gersdorf, 2013, pp. 17–18).

In the broadest terms, the objective is for those rights that determine dignified conditions of existence of human beings to be granted to all individuals who support themselves and their families by means of work performed personally for another entity, whereas this work is the main source of their income. It has been acknowledged that, given the importance of this common feature, the current differentiation of protection of employees and of persons providing work on a civil law basis and, in fact, the lack of protection of the latter, is inadequate to the contemporary economic and social conditions and universally recognized values (see also Sobczyk, 2012, pp. 3 and 5; Gersdorf, 2013, p. 172).

In considering for example the provisions on minimum remuneration for work in the performance of certain contracts of mandate and contracts for the provision of services, it is worth emphasizing that they are strongly supported by Article 65(4) of the Polish Constitution. Pursuant to this provision, the minimum level of

remuneration for work, or the manner of setting its levels, is specified by the relevant statutory act. The state supervises the conditions of work performance. The Constitutional Tribunal recognises that the concept of 'work' used in the Constitution, and consequently in this provision, has an autonomous character, i.e. that like other constitutional concepts, it is not defined by ordinary acts of law, including the Labour Code. In its judgement of 23 February 2010,[10] the Tribunal found that the constitutional concept of 'work' encompasses all gainful activity for the benefit of another entity, regardless of the formal qualification of the relationship between these entities, and not just work performed under an employment relationship.[11]

Owing to the character of the mechanism applied, the expansion of the institutions of labour law onto social relationships concerning the performance of non-subordinate work is, in essence, taking place with the use of the very same method that gave rise to "labour law" itself. Here, too, the ultimate goal is to restrict the freedom of arrangements that parties can make with each other, and thus in fact, what can be referred to as "negotiation protection." Only the scope of this protection is different, as it is narrower. The legal character of the employment law norms (their fundamental core) is hence the same as of the labour law norms.

The pursuit of equality, which is nowadays the principal determinant of shaping social relations (cf. also Garton Ash, 2020, p. 29) has therefore been from the very beginning one of the chief, perhaps most significant, reasons for the emergence and development of labour law as a separate branch of law. Today it is even more than that: it is the flywheel of its further expansion.

Notes/Przypisy

[1] Tłumaczenie na język angielski M. Jaros i W. Szemińska.

[2] Cf. Article 32 and 33 of the Constitution of the Republic of Poland; ILO Convention no. 111 concerning discrimination in respect of employment and occupation adopted at Geneva on 25 June 1958, Journal of Laws of 1961, no 42, item 218; ILO Convention no 100 concerning equal remuneration for men and women workers for work of equal value, adopted at Geneva on 29 June 1951, Journal of Laws of 1955, no 38, item 238, Article 14 of the Conventionfor the protection of human rights and fundamental freedoms of 4 November 1950, Journal of Laws of 2010, no 90, item 587; Articles 20–23 of Charter of Fundamental Rights of the European Union, Article 8, 10 and 157 of TFEU; Article 7 of the Regulation (EU) no 492/2011 of 5 April 2011 on freedom of movement for workers within the Union, OJ. L 141, p. 1, as amended, and EU "equality" directives, especially Directive no 2000/43, Directive no 2000/78 and Directive no 2006/54. Cf. also introduction and Articles. 1–4 of the European Social Charter made at Turin on 18 October 1961, Journal of Laws of 1999, no 8, item 67 as amended.

[3] Act of 10 October 2002, Journal of Laws of 2018, item 2177 as amended.

[4] Act of 13 July 2006 on the protection of employee claims in the event of employers' insolvency (Journal of Laws of 2020, item 7).

[5] Act of 10 January 2018 on trade restrictions on Sundays, holidays and certain other days (Journal of Laws of 2019, item 466).

[6] Cf. Article 3(1) and (7), Article 5(2), Article 8(1)(2) and Article 10 of this Act.

[7] Journal of Laws of 2018, item 1608.

[8] Journal of Laws of 2020, item 1342.

[9] Act of 3 December 2010, Journal of Laws of 2016, item 1219 as amended.

[10] Judgement of the Constitutional Tribunal of 23.02.2010, P 20/09, OTK-A 2010/2, item 13.

[11] The Constitutional Tribunal has resolved the same in respect of the concept of 'work' within the meaning of Article 24 of the Constitution in sec. 1.2.4 of the grounds for its judgement dated 22.05.2013, P 46/11, OTK-A 2013/4, item 42.

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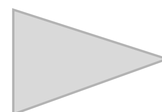
- ✔ informacje o nowościach, promocjach, konkursach.

Po więcej informacji zapraszamy na stronę PWE:  www.pwe.com.pl