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Inclusion of the Protective Function into Non-Employee Relationship

Inkluzja funkcji ochronnej do relacji niepracowniczej

ABSTRACT

The author analyzes the inclusion of the protective function of labor law in the sphere of non-employment relationship. The main problem analyzed in the article concerns the issue of the universal nature of the protective function of labor law. According to the author, the subject of the protective function are all entities providing gainful employment, which is an added value in terms of the essence of this protection. This value will apply to all forms of performing work, and thus the rights resulting from the performance of work will be universal. The content of the protective function of labor law may be fulfilled by regulations unjustified in the traditional positioning of an employee within the meaning of the provisions of the Labor Code.

Keywords: labor law; non-employment relationship; protective function of labor law; gainful employment; Labor Code

INTRODUCTION

When proposing the article's topic, I was not aware of the difficulties that may arise when analyzing the problems contained in it. In the first place, the paper was supposed to focus only on the provisions governing worker protection institutions in the Labor Code and conventions of the International Labor Organization (ILO). However, the analysis of the concept of the development of the protection of work-

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ers in the last decade turned out to be a much more difficult task consisting not only in assessing the interpretation of regulations and the legitimacy of their further functioning but also in the analysis of a possible redefinition of the concept of protection of employees and non-employees. However, the literature has noticed that not only does there exist, but the group of employees, which is excluded from protection by the use of "substitutes" or an employment contract, is growing. Consequently, such activities cause legal and social differentiation of such people. As a result, there was a thesis that robust solutions were needed, including non-employees in the scope of protection by reformulating an employment relationship's definition. It is therefore necessary to look at the understanding of the axiology of labor law in the doctrine. For this reason, I refer to two theories of science from values, i.e. those presented by T. Zieliński and M. Borski. According to Zieliński, workers' natural human rights are the right to work, freedom of work, and freedom of association for people in a community; these values are a law established by states. Also, there is a second normative order called the superior one, to which Zieliński included the principle of freedom of work, the right to work, the right of association and collective bargaining, the right to rest, and the principle of a full 8-hour day and 46-hour working week.[1] In my opinion, this value will apply to all forms of work performance, and thus the rights resulting from work performance will be universal.

The word *employee* does not appear in the title of this article. However, such a perspective would be wrong as it could lead to the erroneous conclusion that the axiology of the protective function of labor law refers only to employee employment. Moreover, such a claim would also suggest that only an employee within the meaning of Article 2 of the Labor Code[2] is subject to superior protection resulting from the protective function of labor law. As a result, this article's analysis would be narrowed down to a selected group of people who perform "subordinate" or "in-person" work at the place and time designated by the employer. Other gainful work that does not fall within the definition of an employment relationship in Article 2 of the Labor Code would be beyond the scope of labor protection interest. Therefore, several questions mark also raise the future of labor law's protective function in the labor law literature dimension. As a result, the analysis carried out in this study boils down to the search for the unique value of labor law's protective function in the universal dimension and the ways of its impact on "subordinate" work.[3]

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[1] T. Zieliński, *Podstawy rozwoju prawa pracy*, Warszawa–Kraków 1988, pp. 75–76.

[2] Act of 26 June 1974 – Labor Code (Journal of Laws 1974, no. 24, item 141).

[3] L. Kaczyński, *Zasada uprzywilejowania pracownika w świetle kodeksu pracy*, "Państwo i Prawo" 1984, no. 8, pp. 60–61; A. Sobczyk, *Różnicowanie praw (ochrony) zatrudnionych – wybrane kryteria i ich ocena*, [in:] *Funkcja ochronna prawa pracy a wyzwania współczesności*, ed. M. Bosak, Warszawa 2014, p. 1; W. Dyląg, *Prawo do odpoczynku jako przejaw funkcji ochronnej prawa pracy*, [in:] *Funkcja ochronna prawa pracy…*, pp. 27–38; T. Liszcz, *Prawo pracy*, Lublin 2008, p. 27; A.M. Świątkowski, *Polskie prawo pracy*, Warszawa 2010, p. 32.

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In this respect, not only the specific features of the employment relationship, which fundamentally distinguish it from non-employee work, will be helpful, but most of all, the current directions of legislative changes. The question arises whether we are currently dealing with the phenomenon of lowering protection standards or, on the contrary, raising and transferring these regulations to non-employee employment. These are the questions that would justify the thesis that the transformation of work performance for the employer by an employee (and precisely for work that does not always have to be subordinated) is a process that has begun in earnest. However, this thesis is insufficient, as there remains the problem of the "non-employee" position concerning the employing entity, i.e. whether it is stronger than the employee's position. Labor law is therefore subject to the constant pressure of inevitable economic changes, which primarily relate to the time and place where these changes occur. The "employed" are also subject to the same pressure of change.[4] The concerns of workers and non-workers will depend on pressing issues of time in the local economic, political and social context. In the current context, economic development policy, including economic policy, is of crucial importance not only to the interests of many workers and non-workers in both industrialized and developing countries.[5]

The economic policy also influences the flexibility of the employment relationship and the choice of legal grounds for employment, and the distribution of financial risk, which the employer bore. The precise identification of all the problems accompanying this issue is insufficient and requires further studies that the author intends to undertake. This article is an open polemic regarding the coherent definition of the protective function of labor law concerning entities other than employees.

THE PROTECTIVE FUNCTION OF LABOR LAW IN THE FACE OF ADVANCED DEVELOPMENT OF EMPLOYMENT LAW

I would not like to analyze the protective function of labor law in detail, as it has been thoroughly discussed in the doctrine and jurisprudence of labor courts. At this point, I would like to point to the source of the traditional European "concept" of labor law, which will allow for understanding the mechanisms of the protective function. According to the famous statement of labor theorist O. Kahn-Freund, labor law is nothing more than a contractual relationship, the primary function of which is

[4] I intentionally use the word *employed*, the scope of which is broader than *employee*.

[5] J. Howe, *The Board Idea of Labour Law: Industrial Policy, Labour Market Regulation and Decent Work*, Centre for Employment and Labour Relations Law, University of Melbourne Working Paper 2009, no. 49, p. 9.

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to regulate and correct imbalances in bargaining power between the employer and the employee in order to provide the employee with a more equitable distribution in the process of performing work.[6] Although remaining in this convention, it should be said that it is about the sale of a commodity, which is work. S. Deakin rightly emphasizes that labor law has become fragmented as a branch of law, not only because the state no longer supports collective bargaining as the main or preferred mechanism for regulating employment to the same extent as it did a few decades ago, but also because that new problems and needs of "subordinate" employees appeared, which translates into changes in the directions of labor law legislation. The author points out that the extension of anti-discrimination legislation and the related orientation of labor law to human rights discourses constitute a single, coherent whole; others include attempts to use the law as a mechanism to ensure economic "competitiveness", raise employment levels and create a "more flexible labor market", or the abandonment of the domination of the long-term employment model for an indefinite period.[7]

Labor law, as a kind of regulator, must take into account a more comprehensive range of goals and functions, and at the same time it should be borne in mind that it is perceived as an instrument of social and economic policy.[8] I see the above reasoning as correct. At this point, it will be justified to find that the doctrine of labor law hardly or at all does not perceive the interdisciplinary of labor law. At present, labor markets and traditional labor relations have begun to collapse all over the world and the problem of precarisation of work or its flexibility[9] has emerged, causing anxiety in the future functions and purposes of labor law.

According to M. Finkin, in a sense, we are now dealing with a return to the beginnings of the labor law, which was established in a similar spirit of interdisciplinary openness. The implicit assumption is that there has been an opening of the legal discourse and analysis to external influences in the first decades of the 20th century. It was then that it had its axiological justification – the transformation of legal concepts in the light of the then goals of social policy.[10]

Because of the ongoing socio-economic transformations and those mentioned above, the crisis of the aims of the labor law function raises severe doubts about labor law's role in the face of these challenges. First of all, the question arises

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[6] O. Kahn-Freund, *Labour and the Law*, London 1972, p. 8.

[7] S. Deakin, *The Many Futures of the Contract of Employment*, [in:] *Labour Law in an Era of Globalization*, eds. J. Conaghan, R.M. Fischl, K. Klare, Oxford 2002, pp. 177–196.

[8] Idem, *The Legal Framework of Employment Relations*, Centre for Business Research, University of Cambridge Working Paper 2007, no. 349, p. 3.

[9] For more, see Ł. Rąb, *Prekariat i prekaryzacja pracy w epoce globalizacji*, "Zeszyty Naukowe Politechniki Śląskiej. Organizacja i Zarządzanie" 2016, no. 92.

[10] M. Finkin, *Comparative Labour Law*, [in:] *Comparative Law*, eds. M. Reimann, R. Zimmermann, New York 2006, pp. 1131–1161.

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whether and what is the purpose of the new regulations, which, as a rule, should improve the situation not only of employees themselves but also of the mass of non-employees. The problem is that there is now a tendency to minimize labor costs and minimize labor standards. However, the above statement may be contradictory for those who perceive the flexibility of work as a response to changes in labor law standards, which are discussed in this article's next subsection. B. Langille rightly notices that now the very idea of labor law is heavily burdened. In his opinion, the crisis in labor law has three dimensions: empirical (has the real world changed so much that traditional labor law ceases to play a crucial role); conceptual (are there still basic concepts such as "employee", "employer", "employment contract"); normative (are we still able to defend the idea of labor law in the traditional sense of the word). Therefore, the labor law prohibits competing with the price of labor below the set minimum (minimum wage) and it prohibits competition with working time above an absolute maximum. According to Langille, we are not dealing with a normative crisis and therefore there is no need for a normative reassessment. One of the challenges of modern labor law is to develop new techniques (measures) and adapt them to the old values of labor law. Contemporary problems of labor law require innovation in the redefinition of labor law institutions, ways of thinking or doing business, which is to help achieve the goals of labor law.[11]

Labor law does not compete with employment law in any way, but rather its aim should be to supplement protection gaps and indicate the minimum protection standards in the broadly understood employment law. On the other hand, a question should be asked whether departing from the model of a traditional employment relationship towards the development of non-employee forms of protection of non-workers would be contrary to employees' interests. The problem of redefinition (standards) of the protective function of labor law was noticed in Polish literature a decade ago by Ł. Pisarczyk,[12] which prompts a new reflection in the face of contemporary labor law challenges and the directions of its evolution. The author asked whether the regulations protecting employees did not contribute to the deterioration of employers' situation, resulting in effects opposite to those intended by the legislator, in particular by becoming a source of layoffs. He noted that there were demands for a fundamental reduction in protection standards, or even for their deregulation, which are understood as a resignation from solutions

[11] B. Langille, *Labour Law's Theory of Justice*, 2011, https://www.iea-nantes.fr/rtefiles/File/brian-langille.pdf (access: 28.4.2024).

[12] Ł. Pisarczyk, *Przeobrażenia prawa pracy a jego funkcja ochronna*, [in:] *Studia prawnicze. „Proaktywna" funkcja prawa pracy?*, eds. B. Wagner, E. Hofmańska, Kraków 2010, p. 25; A. Patulski, *Koncepcja flexicurity a nietypowe formy zatrudnienia, czyli jak ograniczać segmentację polskiego rynku pracy*, [in:] *Stosunki zatrudnienia w dwudziestoleciu społecznej gospodarki rynkowej. Księga pamiątkowa z okazji jubileuszu 40-lecia pracy naukowej Profesor Barbary Wagner*, ed. A. Sobczyk, Warszawa 2010, p. 359 ff.

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aimed at ensuring balance for the parties to the employment relationship, which on the one hand leads to deterioration of the situation of employees. However, on the other hand, the consequences of such conduct are improving the economic situation and saving jobs.[13]

A cursory analysis of Pisarczyk's statements may lead to an unjustified conclusion that there is in fact a uniform approach in the literature that examines the protective function of labor law and its impact on the situation of only employees within the meaning of the Labor Code. This would not contradict the statement that work is not a commodity. One should probably pay attention to the fact that human labor is a commodity, after all. This was pointed out by A.M. Świątkowski: "As a commodity, work is on the labor market. It is such an important and special commodity that a separate market has been created. (…) Although the terms define the parties in individual employment relationships: employee, employer, in fact they mean sellers and buyers of a special kind of goods, which is human labor. (…) human labor is sold under an employment contract".[14]

Thus, the thesis is justified here that since work is a commodity, this thesis not only excludes but even completes the protective function of labor law. More precisely, after M. Gersdorf, the axiology of "protection of the weaker" impacts the redefinition of labor law's protective function, i.e. protecting people who work without typing employment and related contracts. Since we assume that work is nothing more than a commodity, it should be assumed that the protective function of labor law complements and is a tool correcting dysfunction between labor market laws and the expectations of protection of a decent life and work. The protective function of labor law in such an approach should find expression in the content of the provisions not only of the Labor Code, as there is no doubt that it is now becoming a function of employees and an attribute of the right of persons performing work based on various grounds of employment. The question is whether the protective function can be an attribute of the employed.[15]

The example of self-employed workers shows that such persons are not officially employed and often are not covered by collective agreements that are negotiated and have a significant impact on the employee rights of people working under an employment contract. Therefore, a step towards regulating dependent self-employment is to recognize the existence of this obligated relationship as an "employment relationship". C.C. Williams and F. Lapeyre point here to the postal

[13] Ł. Pisarczyk, *op. cit.*, p. 15 ff.

[14] A.M. Świątkowski, *Praca towarem?*, "Polityka Społeczna" 1992, no. 4, p. 18 ff.; idem, *W kierunku ustawowej dyferencjacji praw i obowiązków pracowniczych zatrudnionych*, "Palestra" 2015, no. 1–2, p. 79.

[15] For instance, see C.C. Williams, F. Lapeyre, *Dependent Self-Employment: Trends, Challenges and Policy Responses in the EU*, 2017, https://www.ilo.org/wcmsp5/groups/public/---ed_emp/documents/publication/wcms_614176.pdf (access: 28.4.2024).

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and courier service sectors where the self-employed earned less than the national minimum wage (Netherlands).[16] In the face of the ongoing economic and social changes, the question arises: What significance will the function of labor law have? The answer to this question seems to depend on whether we are still dealing with workers' or working people's rights. Unfortunately, there is one doubt here as well; essentially, employee rights are rights that relate specifically to an employee's role. Some of these rights are exercised individually, and some are exercised jointly, e.g. the right to a voluntarily chosen job, employers, the right to privacy, non-discrimination and mobbing, the right to protection against arbitrary and unjustified dismissal, the right to belong and be represented by a trade union or the right to strike.[17] These rights, known as workers' rights, are due to the employee because he/she is an employee, and in my opinion they should be due for the very fact of performing work. It is these rights that characterize the most traditional labor law. One should not forget about the so-called social rights, i.e. holidays, severance pay, or statutory restrictions when terminating employees' employment contracts. Undoubtedly, all these rights result from the protective function of labor law and therefore one gets the wrong impression that they are characteristic only of an employee. This state of affairs should be modified and it should be noted that these rights are owed to those who work because they are based on common grounds such as freedom and dignity.

According to M. Włodarczyk, the process of making labor law more flexible has been going on for at least 30 years and is not caused by economic crises. In his opinion, the primary criterion for making changes in the labor law is the competitiveness of the economy – and changes in the labor law are dictated by the needs of entrepreneurs striving to improve their companies' market position on an international scale.[18] It seems that this thesis is not fully up-to-date because making the labor law more flexible or liberalizing does not depend entirely on entrepreneurs, but on changing the concept of work – in line with the position of Langille.[19] In this context, Włodarczyk aptly presented reducing labor costs, which undoubtedly forced the process of making protective provisions in labor law more flexible. According to him, human labor costs concerning such costs occurring in other countries reduce

[16] *Ibidem*.

[17] V. Mantouvalou, *Are Labour Rights Human Rights?*, "European Labour Law Journal" 2012, vol. 3(2), p. 2 and the literature referred to therein. For more, see W. Sanetra, *Konstytucyjne prawo do rokowań*, "Praca i Zabezpieczenie Społeczne" 1998, no. 12, p. 4 ff.

[18] M. Włodarczyk, *Wartości i interesy a prawo pracy – tytułem wstępu*, 2014, http://dspace.uni.lodz.pl:8080/xmlui/bitstream/handle/11089/27944/7-12%20Miroslaw%20Wlodarczyk_Wartosci%20i%20interesy%20a%20prawo%20pracy.pdf?sequence=1&isAllowed=y (access: 28.4.2024). See also R. Blanpain, *Flexicurity in a Global Economy*, [in:] *Labour Market of 21st Century: Looking for Flexibility and Security*, eds. T. Davulis, D. Petrylaite, Vilnius 2011, p. 27 ff.

[19] See B. Langille, *op. cit*.

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these burdens, limiting employee rights as the only way to achieve this goal. The answer to such a process is the permissibility of using the so-called flexible forms of employment, cheaper and competitive than a classic employment contract. Employers prefer to use fixed-term employment contracts and civil law contracts (mandate contract, contract for specific work, self-employment). Consequently, we get an undesirable effect, i.e. limitations and then deprivation of people employed in these permanent employment forms. In the case of the use of civil law or self-employed contracts – deprivation of a significant part of social security rights.[20]

The thesis proved here is that staying in a typical employment relationship, and therefore performing work, cannot be any justification for differentiating the legal situation of people who also perform gainful work but have an employment contract. However, I am not saying that employers do not make changes to obtain flexibility in the cross-use of workers. Employers change the nature of their employment by contracting with their "permanent" employees and more and more often also use "precarious" workers such as temporary workers and independent contractors. These employment trends represent a significant change and a signal for the legislator.[21] As indicated above, employers in the last century began to move away from long-term employment contracts, which in turn resulted in lower protection standards and a return to casuistic legislation to protect employees. One of the stages in making work more flexible is developing non-standard forms of employment, based on flexibility, in which it is not easy to find the essential elements of a typical employment contract.[22]

It is impossible not to notice a collision of interests and needs of employed persons and employees remaining in a typical employment relationship. The question is, then, how far can we go in creating protective laws that generate new powers

[20] M. Włodarczyk, *op. cit*.

[21] With regard to the Polish doctrine, see M. Moszyński, H. Ritter, *Niezależni współpracownicy firmy jako wyzwanie dla zarządzania zasobami ludzkimi*, "Praca i Zabezpieczenie Społeczne" 2003, no. 12, p. 10; M. Sewastianowicz, *Przewidywane kierunki zmian nietypowych form zatrudnienia w Polsce*, [in:] *Elastyczny rynek pracy i bezpieczeństwo socjalne. Flexicurity po polsku?*, ed. M. Rymsza, Warszawa 2005, p. 110; L. Florek, *Granice liberalizacji prawa pracy*, [in:] *Granice liberalizacji prawa pracy. Problemy zabezpieczenia społecznego*, eds. E. Bielak, H. Lewandowski, Łódź 2003, p. 22; Z. Kubot, *Szczególne formy zatrudnienia i samozatrudnienia*, [in:] *Szczególne formy zatrudnienia*, ed. Z. Kubot, Wrocław 2000, p. 6 ff.; J. Wratny, *Przemiany stosunku pracy w III RP*, [in:] *Współczesne problemy prawa pracy i ubezpieczeń społecznych*, eds. L. Florek, Ł. Pisarczyk, Warszawa 2011, p. 39. With regard to the foreign doctrine, see K.V. Stone, *Revisiting the At-Will Employment Doctrine: Imposed Terms, Implied Terms, and the Normative World of the Workplace*, "Industrial Law Journal" 2007, no. 3, p. 15.

[22] An example is the Act on the employment of temporary employees, as well as the provisions on teleworking in the Labor Code. See E. Kryńska, *Równowaga między elastycznością i bezpieczeństwem na polskim rynku pracy. Jak osiągnąć flexicurity?*, "Monitor Prawa Pracy" 2007, no. 7, pp. 340–346; Z. Hajn, *Elastyczność popytu na pracę w Polsce. Aspekty prawne*, [in:] *Elastyczne formy zatrudnienia i organizacji pracy a popyt na pracę w Polsce*, ed. E. Kryńska, Warszawa 2003, p. 56.

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for non-workers. As a result of deliberate action by the legislator, regulations compensating for injustice in the rights of employees and non-employees, partially duplicate their content. The inevitable liberalization of labor law can explain the above. Regardless of the answers in this regard, in the end we must refer to the protective function of labor law indicated at the beginning of this article and its inclusion in non-employee employment.[23]

R. Mitchell and J. Fetter indicate two primary ways in which employers can strive to increase profitability. The first approach assumes in the short term through cost reduction methods: wage cuts, more significant work intensification, reduction of the workforce, increased casual and temporary employment, and a hierarchical organization characterized by substantial management control. The second approach focuses on performance, showing a long-term strategy, highly skilled workforce, collaborative work systems, and a high level of investment in training. This approach guarantees job security because it is based on the so-called traditional employment model. The authors indicate that the first approach is consistent with labor law liberalization and the approach to reducing labor costs.[24] The first approach limits the relationship between the broadly understood employment law because it has much fewer solidarity obligations under the social security system. Alternatively, a hypothesis that will not be analyzed in this article is that changes in economic, social, and, above all, labor market conditions over the last 30 years have in themselves produced far-reaching transformations in the perception of the traditional employment model.

There are close and complicated ties and interdependencies between the employment relationship in its normative dimension. Dynamic changes in actual labor relations, economic or cultural relations in which work is performed, impact the legislator, which often leads to a modification of this relationship. From this point of view, it can also be said that the legislator's changes regarding the nature of the protection of employees, i.e. the conditions of work, and thus changes in the normative dimension may lead to changes in the perception of employees and non-employees. Dynamic changes in the sphere of employment relations and modifications introduced in the labor law provisions also entail changes in the way of looking not so much at the employment relationship as at work itself and its functions in the study of labor law.[25] As it has already been mentioned, the changes taking place also

[23] See M. Seweryński, R. Blanpain, A. Supiot, P.L. Davies, [in:] *Referaty na VI Europejski Kongres Prawa Pracy i Zabezpieczenia Społecznego*, Warszawa 1999; M. Latos-Miłkowska, *Ochrona interesu pracodawcy*, Warszawa 2013.

[24] See R. Mitchell, J. Fetter, *Human Resource Management and Individualization in Australian Labour Law*, https://law.unimelb.edu.au/__data/assets/pdf_file/0007/1743919/19-HUMANRESOURCEMANAGEMENTANDINDIVIDUALISATIONINAUSTRAL.pdf (access: 28.4.2024).

[25] Z. Salwa, *Przemiany prawa pracy początku stulecia a jego funkcja ochronna*, [in:] *Prawo pracy a wyzwania XXI wieku. Księga jubileuszowa Profesora Tadeusza Zielińskiego*, eds. M. Matey-Tyrowicz, L. Nawacki, B. Wagner, Warszawa 2002, pp. 298–300.

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concern the way of defining the employment relationship and its functions. There is still a noticeable differentiation between labor law and civil law provisions regulating the so-called civil law employment and unregulated self-employment. The need to reconstruct the existing model of protection of people who work is noticed not only by the doctrine of international labor law but also by representatives of the Polish doctrine of labor law, who point to the need to adapt the existing solutions to the changing reality, in particular the conditions of running a business.

CASUISTIC INCLUSION OF A PROTECTIVE FUNCTION IN POLISH LABOR LAW

When starting the inclusion of labor law provisions into broadly understood employment, it is necessary to point out several aspects that caused and which cause a gradual inclusion of labor law provisions, i.e. the so-called protective regulations – securing the position of the employee. The main questions that should be asked in this article concern whether the process of inclusion is temporary or utterly unavoidable in the normative sphere and whether inclusion concerns regulations. Polish labor law contains several provisions that seem to apply to all employees, including anti-discrimination provisions, which also cover atypical employment forms. The sources of the inclusion of labor law provisions can be seen[26] in the protective function of labor law, i.e., as A. Sobczyk points out, protection of the "weaker" against the "stronger", which is to "justify the statutory shaping of the content of the employment relationship, in the name of equalizing the actual position".[27] He points out that there is currently no convincing evidence that the "non-employee" position vis-à-vis the employing entity is more robust than that of the employee vis-à-vis the employer.[28]

As the statistics show, civil law employment still seems to be attractive for employers, although it should be noted that other problems related to it appear in practice, e.g. replacing a contract for a trial period with a civil law contract or employee outsourcing.[29] There is no doubt that everyone has the right to perform

[26] T. Wyka, *Miejsce prawa pracy w systemie prawa polskiego*, [in:] *Zarys Systemu Prawa Pracy*, vol. 1: *Część ogólna prawa pracy*, ed. K.W. Baran, Warszawa 2010, pp. 141–146; J. Jończyk, *Prawo pracy*, Warszawa 1995.

[27] A. Sobczyk, *Prawo i człowiek pracujący – między ochroną godności a równości*, [in:] *Aksjologiczne podstawy prawa pracy i ubezpieczeń społecznych*, eds. M. Skąpski, K. Ślebzak, Poznań 2016, p. 59.

[28] See *ibidem*; M. Wieczorek, *Some Aspects of Labour Law's Protective Function at the Time of COVID-19*, "Studia Iuridica Lublinensia" 2021, vol. 30(1).

[29] According to the National Labor Inspectorate's report of 2018, the phenomenon of concluding civil law contracts under conditions characteristic of an employment relationship is still noticeable. See https://www.pip.gov.pl/pl/f/v/211637/Sprawozdanie%202018%20r (access: 28.1.2021).

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work under the conditions chosen by them and it is consistent with the principle of freedom of work – the constitutional principle and the fundamental principle of labor law.[30]

However, it is not apparent whether the inclusion concerns the provisions of labor law in civil law employment or whether it is an inclusion of the axiology of the protective function, i.e. those who work or people ready to provide various services. The answer to this question seems ambiguous. It should be emphasized that the similarity and sometimes the identity of the obligations of, e.g., the contractor and the obligations of an employee within the meaning of the provisions of the Labor Code, always requires identification of features that make it possible to distinguish these two obligation relationships. The following conclusion is essential – as long as the market is dominated by low or medium-paid employment or non-employee employment, as long as a low or medium-paid employee/employed, it is practically impossible to take care of himself/herself to such an extent that a balance is achieved between him/her and the employing entity. This situation will justify the legislator's interference with freedom of contract.

Currently, one can notice a natural process of withdrawing from distinguishing an employee as a person working in subordinate conditions, not only in employee employment. Additionally, a pertinent comment relates to the increased activity of the legislator. The perception of the employment contract itself changed. Still, in the traditional sense of the word, the employees themselves as a new type of worker, or rather employed, have emerged who is not an "employee" in any conventional sense. Atypical workers include temporary workers, hired workers, part-time workers, trainees, or "dependent" or "independent'" contractors – these are groups that the legislator must bear in mind. Atypical employees are employees without employers or in a situation where we cannot precisely indicate such an employee's employer. The so-called temporary workers move from company to company or are very often sent to perform a short-term task by a temporary employment agency in the event of a so-called "needs" without knowing the workplace or working hours. Non-employees do not have any employee rights, although they are often similar in every respect. At this point, it will be justified to note that the Polish legislator has in recent years taken protective measures in a very dynamic manner, or one could even say – it has been taking them to a very wide extent. A clear proof of this is the regulation of the minimum wage for employees working under civil contracts,[31] or a controversial ruling, although awaited by trade unions, i.e. the judgment of the Constitutional Tribunal of 2 June 2015, in which the Tribunal found Article 2 (1) of

[30] See A. Sobczyk, *Prawo pracy w świetle Konstytucji RP*, Warszawa 2013, p. 52 ff.

[31] The Act on the minimum remuneration for work in the wording of 22 July 2016, the amendment of which entered into force on 1 January 2017. The Act introduces a minimum hourly rate for people working under a mandate contract.

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the Trade Unions Act and indicated that the right to freedom of association in trade unions should apply to persons who do not have the status of employees. In the Tribunal's opinion, the assessment of being an employee in the context of freedom of association should be assessed by reference to the criterion of performing paid work.[32] The Tribunal's ruling obliged the legislator to amend the Trade Unions Act and grant the right to freedom of association for all those who perform paid work, regardless of whether they perform work under an employment relationship or a civil law contract.[33] Legislative interventions in those mentioned above from the perspective of employee human rights relate to the protection of contractors and the self-employed, not to their possible employee rights, which cannot be granted to them from the normative point of view.

Noteworthy is Article 24 of the Polish Constitution,[34] which states that the work is under the Republic of Poland's protection. The state supervises the conditions of work performance. The subjective scope of this provision is very narrow. From a literal point of view, it seems that all work is under the protection of the Polish Constitution, even the one performed under the conditions of non-employee employment, without differentiation in legal relations of branches of law, i.e. labor law or civil law.[35]

Firstly, the Labor Code does not fully regulate all obligation relationships based on which work may be performed. It is assumed that the Civil Code does not regulate all property relations to the same extent.[36] Secondly, one should notice several typically "employee" obligations that have been imposed on an employee in the Labor Code, which, however, are difficult not to attribute to a civil law relationship – it should be emphasized that I mean not only the obligations of parties to a civil law contract, e.g. a mandate contract, but also self-employed towards the person giving the order.

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[32] In the judgment of 2 June 2015 (K 1/13, OTK-A 2015, no. 6, item 80) Constitutional Tribunal stated that Article 2 (1) of the Act of 23 May 1991 on trade unions to the extent to which it restricts the freedom to form and join trade unions to persons performing paid work not mentioned in this provision, is inconsistent with Article 59 (1) in conjunction with Article 12 of the Polish Constitution. It was mainly about the right to form trade unions by persons in civil law employment. See ILO CFA Case no. 2888, Complaint of 28 July 2012 submitted by the National Commission of the NSZZ "Solidarność" against the Government of Poland, Report No. 363, March 2012, https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:50002 (access: 10.5.2024).

[33] See Ł. Kobroń-Gąsiorowska, *Status partnerów społecznych w prawie pracy*, Kraków 2019.

[34] Constitution of the Republic of Poland of 2 April 1997 (Journal of Laws 1997, no. 78, item 483, as amended). English translation of the Constitution is available at https://www.sejm.gov.pl/prawo/konst/angielski/kon1.htm (access: 10.5.2024).

[35] See A.M. Świątkowski, *Wzorce pracy w prawie*, Kraków 2019, p. 216. Świątkowski concludes that Article 24 of the Polish Constitution is imprecise because "this provision does not indicate which work, each or performed exclusively within the framework of legal relations regulated by the provisions of various branches of law (labor, civil, private economic)".

[36] *Ibidem*.

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Without going into detailed considerations at this point, as it would go beyond the purpose of this study, we can confine ourselves to the statement that increasingly, in the status of people employed under a civil law contract, common elements for a civil law relationship and an employment relationship have started to be noticed.[37] Therefore, if one speaks of a breakthrough in this area of axiology, the protection of non-workers, then in the sense that the Polish Constitution unambiguously defines the basis on which the contractual relationship is to be protected (Article 24 of the Polish Constitution). However, due to the considerable extent to which labor relations are separate from civil law relations, the legislator included in the Labor Code a legal regulation that directly applies only to employees in the traditional sense of the word.[38]

THE POSITION OF EMPLOYEES AND NON-EMPLOYEES IN POLISH EMPLOYMENT

The legal status of employees within the meaning of the Labor Code is defined in Article 22, although it is characterized by far-reaching differentiation. Undoubtedly, this status still includes elements close only to labor law, which means that employment relationships go beyond the purely obligatory sphere in the understanding of civil law, and they are the relationship between the employing entity and the person providing work under an employment contract as an employee and in principle, characteristic of labor law. In Article 22 of the Labor Code, the characteristics of the employment relationship have been indicated, i.e. the obligation to perform work in person, management and compliance, as well as payment. The current wording of the provision, which boils down to specifying that the employment relationship in the performance of work of a specific type for the employer and under his direction and at the place and time designated by him, is to affect the assessment of whether the work is performed under the employment contract or the contract of mandate. The question is: Is it really so? In the judgment of 23 January 2002, the Supreme Court stated that if the "features of the employment contract defined in Article 22 § 1 of the Labor Code, we are dealing with such an agreement, so it is impossible to assess that we are dealing with a mixed agreement. Conversely, if the features of the employment contract are not predominant, then we are not dealing with an employment relationship".[39]

[37] For more, see A. Musiała, *Zatrudnienie niepracownicze*, Warszawa 2011, p. 201 ff.; M. Gersdorf, *Umowa o pracę, umowa o dzieło, umowa zlecenia*, Warszawa 1993, p. 9 ff.

[38] For more, see A.M. Świątkowski, *Kontynuacja i zmiana instytucji indywidualnego prawa pracy w Polsce*, "Studia z Zakresu Prawa Pracy i Polityki Społecznej" 1999–2000, pp. 59–147.

[39] Judgment of the Supreme Court of 23 January 2002, I PKN 786/00, OSNP 2004, no. 2, item 30.

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In conclusion, the groundbreaking thesis of the above-mentioned amendment concerning the minimum hourly wage for mandate contracts or the amendment to the Trade Unions Act confirm that we are not dealing with the inclusion of labor law provisions in civil law employment – this thesis seems a sealed. The Labor Code did not cut through the discussion on this subject and caused the discussions on the protective axiology of labor law to enter a new phase. With Article 22 of the Labor Code, it is not clear that the work must be performed only under an employment contract. However, this provision does not contain any indications of the nature of the employment contract itself and why a civil law contract cannot replace the employment contract as an act creating the employment relationship.[40]

The ILO Recommendation No. 198 may be helpful. It lists the characteristic criteria for determining employment status and divides them into those relating to (a) an employee and (b) a self-employed person. An employee is a person if: is under the control of another person who instructs him/her when and where the work is to be performed; receives a fixed monthly salary; cannot subcontract work; does not provide materials for work; does not provide equipment or other tools to perform the work; is not exposed to personal financial risk in carrying out the work; accepts no responsibility for investments and management in the company; cannot benefit from the proper management of task planning; receives payments to cover living and/or travel costs; is entitled to extra pay or overtime leave. Self-employed/contractor: has his/her own business/cooperation agreement/mandate contract; is exposed to financial risk as it must bear the costs of defective or non-standard work performed under the contract; takes responsibility for investments and management in the company; can benefit from the sound management of planning and execution of tasks and tasks; has control over what is done, when and where it is done and whether it does it in person or is free to hire other people, under its terms, to perform the work that has been agreed; can provide the same services to more than one person or company at the same time; in many cases, he/she provides the equipment and machinery necessary for the job.[41] Unfortunately, the ILO Recommendation has significant shortcomings and is burdened with a drawback because the perception of the legal relationship between the employer and employee is not so simple. The very premise of qualifying a person performing work as an employee is not a "yes" or "no" relationship. While remaining in this convention on the employer-employee line, there is no equality in the same way as in the "employer" and "non-employee" relationship. A different perception of labor law would even be affected by a significant error because it would assume different work values

[40] A.M. Świątkowski, *Wzorce pracy…*, p. 241.

[41] See International Labour Office, *Regulating the Employment Relationship in Europe: A Guide to Recommendation No. 198*, 2013, https://www.ilo.org/wcmsp5/groups/public/---ed_dialogue/---dialogue/documents/publication/wcms_209280.pdf (access: 2.4.2024).

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towards eliminating inequalities before the law in the relationship between the employer and persons performing work for gainful purposes.

The relationship between an employee and a non-employee is unclear – although they both work for gainful purposes. The requirement of a unanimous declaration of will by the employer and the employee as a condition for establishing an employment relationship and a contractual-civil relationship leads to the conclusion that it is, in fact, pointless to divide it into employees and, e.g., contractors, self-employed, etc., because the ultimate goal is earnings. It should be assumed that the acts creating the employment relationship and another obligation relationship mean that work performance may be performed based on any obligation relationship. On the other hand, this raises another question about each of the obligations mentioned above relationships' durability.[42] The above shortcomings of the employee-non-employee relationship conclude that the justification for some of the legislator's actions should be sought in the broadly understood protective concept of labor law.

Therefore, in the name of protecting many market participants, the differences between civil law contracts and the employment relationship and the durability of the civil law relationship are essential for discussing a normative nature. According to the wording of Article 129 § 1 of the Labor Code, within the Labor Code's meaning, an 8-hour daily standard of working time applies. Such an employee will always receive a salary, even if he/she did not work 8 hours through his/her fault. Against the background of this regulation, several doubts arise, which affects the perception of the position of employees and non-employees. The second remark relates to the durability of a civil law relationship, which is generally not permanent, and there is no trade union or legal control of the grounds for terminating such a relationship. Therefore, we cannot talk about the inclusion of protective provisions, but one can consider the inclusion of the protective function of labor law in non-employee employment. However, it is justified to indicate that the currently initiated process can be called the inclusion of the protective function of labor law as a universal function and it relates to the economic aspect of people performing work, i.e. people who are not employees. This "economic criterion" does not matter how many contracts are carried out by the contractor or the self-employed person. In the traditional sense, an employee may have several employment contracts and a self-employed person may have several regular contractors.

The above is closely related to the answer to whether the employment relationship within the meaning of Article 22 of the Labor Code more precisely, the criteria for determining whether or not someone is an employee is relevant to other branches of law, i.e. civil law. In conclusion, the use of such a general definition of

[42] For more, see M. Gersdorf, *Kodeks zatrudnienia wyzwaniem przyszłości*, [in:] *Zatrudnieni i zatrudniający na aktualnym rynku pracy*, ed. M. Gersdorf, Warszawa 2012, p. 21.

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an employment relationship as in the case of Article 22 § 1 of the Labor Code led to a situation where both the jurisprudence and the doctrine are forced to divide the obligatory work relationship under an employment contract from work under a civil law contract/self-employment.[43]

Notwithstanding, returning to ILO Recommendation No. 198, it should be pointed out that determining whether the work provided is an employment relationship, order, or self-employment can be made endlessly, multiplying the criteria more and more. I deny the thesis about the existence of features that determine the presence of an employment relationship. The requirements of the so-called "differentiating" the employment relationship from the civil law relationship indicated in the Recommendation, such as subordination, subordination, or the lack of the employer's obligation to provide materials for the order's performance, are of little importance. The Supreme Court confirmed this in the judgment of 24 November 2011, where it was indicated that "the dependency relationship does not itself give the concluded contract the character of an employment contract, since this relationship is appropriate not only to such a contract but also to an agency contract, because only such dependence characterizes an employment contract, unlike the dependence provided for in the agency contract, which is characterized by the employee's strict subordination to the employer for the duration of the work and the obligation to follow his/her instructions even in the technical scope of operation".[44] The case law in this area is evolving and I am indicating to it.

CONCLUSIONS

Although the article discusses many threads, I will limit myself to a few critical comments. Therefore, I am convinced that securing an employment relationship within the meaning of the Labor Code has ceased to be Article 22 of the Labor Code. The legislator's interference not only with traditional labor law but also with the freedom to conclude contracts, which in terms of earning money, e.g. based on a mandate contract, has been limited by the introduction of a minimum hourly rate for the perception of work performed by non-employees, will be significance. It is not the criteria for determining the employment relationship that will determine the development of protective legislation for non-workers, but the so-called inclusion of

[43] See A.M. Świątkowski, *Cywilnoprawne zatrudnienie niepracownicze*, [in:] *System Prawa Pracy*, vol. 7: *Zatrudnienie niepracownicze*, ed. K.W. Baran, Warszawa 2015, p. 75; A. Chobot, A. Kijowski, *Podstawowe problemy rozwoju prawa pracy*, [in:] *IX Zjazd Katedr Prawa Pracy*, Toruń 1990, p. 23. See also a list of the older literature on this subject: A. Musiała, *op. cit.*, p. 276; W. Perdeus, *Zasada uprzywilejowania pracownika – kilka uwag na tle zarysu sposobów ujmowania zasad prawa pracy*, "Studia Iuridica Lublinensia" 2016, vol. 25(1), p. 101 ff.

[44] Judgment of the Supreme Court of 24 November 2011, I PK 62/11, LEX no. 1109362.

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the axiology of the protective function against non-employee employment through the creation of case files. After all, the provisions of the Labor Code cannot be changed into semi-provisions, labor law, and civil law. It would also be unacceptable to change the legal nature of civil law contracts and, conversely, employment contracts. The above circumstances conclude that the legislator is facing a severe challenge of the legal protection of non-employees, based on the protective function existing in labor law, including universal values for the world of work. In my opinion, this value will apply to all forms of performing work, and thus the rights resulting from the performance of work will be universal. The content of the protective function of labor law may be filled by regulations that are not justified in the traditional positioning of an employee within the meaning of the provisions of the Labor Code.

Another critical remark appears concerning the fundamental challenges of the protective function of labor law in the face of inevitable economic, economic, and social changes. Will the defensive structures created by the legislator meet the main goal – the protection of non-employees?

Consequently, the protective function of labor law comes down entirely to the definition of minimum standards of work performed by persons who are not employees, e.g. self-employed persons economically dependent on one or two contractors. The legislator assumes that both an employee and a person who is not an employee cannot negotiate minimum protection conditions for themselves, similar to those provided for in the Labor Code. At this point, I represent the view that the analysis of the perception of the protective function of labor law through the prism of the essence of human rights is one of the problems faced not only by Polish labor law.

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Case law

Judgment of the Constitutional Tribunal of 2 June 2015, K 1/13, OTK-A 2015, no. 6, item 80.
Judgment of the Supreme Court of 23 January 2002, I PKN 786/00, OSNP 2004, no. 2, item 30.
Judgment of the Supreme Court of 24 November 2011, I PK 62/11, LEX no. 1109362.

ABSTRAKT

Autorka analizuje włączenie ochronnej funkcji prawa pracy do relacji niepracowniczej. W artykule główny analizowany problem dotyczy zagadnienia powszechności ochronnej funkcji prawa pracy. Zdaniem autorki przedmiotem funkcji ochronnej są wszystkie podmioty wykonujące pracę zarobkową, co stanowi wartość dodaną z punktu widzenia istoty tej ochrony. Wartość ta będzie dotyczyła wszystkich form wykonywania pracy, a tym samym prawa wynikające z wykonywania pracy będą uniwersalne. Treść ochronnej funkcji prawa pracy mogą wypełniać regulacje nieuzasadnione w tradycyjnym pozycjonowaniu pracownika w rozumieniu przepisów Kodeksu pracy.

Słowa kluczowe: prawo pracy; relacja niepracownicza; ochronna funkcja prawa pracy; praca zarobkowa; Kodeks pracy