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EUROPEANIZATION OF THE LABOUR LAW AFTER 1989

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K e y w o r d s: labour law, harmonisation of the law, implementation, labour code, economies.

A b s t r a c t

The paper discusses the process of Polish labour law adjustment to the European Union requirements. The process of labour law regulations evolution prior to the accession of Poland to the European Union can be divided into three stages: the first one started with the systemic transformation and continued until the coming into effect of the Europe Agreement made between Poland and the European Communities and their Member States, the second one started in February 1994 and continued until commencement of negotiations concerning membership of Poland in the European Union while the third one was the period of negotiations with the European Commission that ended in the accession.

During the early years of operation of the new system the focus was on two important issues – first, elimination of the regulations referring directly to the planned economy system that did not fit the market economy realities and second, protection of the interests of employees losing jobs as a consequence of restructuring of their employers.

During the period of association with the European Union, Article 68 of the Europe Agreement contained, expressed *expressis verbis,* the requirement for the approximation of Poland's existing and future legislation to that of the Community. The provision also stated that Poland shall use its best endeavours to ensure that future legislation is compatible with Community legislation. The Europe Agreement did not, however, impose the general duty of Poland's accession to the European Union. The process of Polish labour law harmonisation gained the highest dynamics during the years of negotiations with the European Union. That period was characterised by the largest number of changes in regulations while major novellas to the regulations occurred in 2001, 2002 and 2003.

This paper aims at presenting the process of Europeanization of the Polish labour law that took place after 1989. The paper presents the stages in the evolution of regulations and major directions of changes in the labour law. It also presents the issues of the novellas becoming effective, interpretation of regulations and critical comments to the process of Polish labour law adjustment to the European Union directives.

EUROPEIZACJA PRAWA PRACY PO ROKU 1989

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S ł o w a k l u c z o w e: prawo pracy, harmonizacja prawa, implementacja, kodeks pracy, ekonomia.

A b s t r a k t

W artykule omówiono proces dostosowania polskiego prawa pracy do wymogów Unii Europejskiej. Proces ewolucji przepisów prawa pracy do wejścia Polski do Unii Europejskiej można podzielić na trzy etapy: pierwszy zaczął się wraz z transformacją ustrojową i trwał do wejścia w życie układu europejskiego zawartego między Polską a Wspólnotą Europejską i jej krajami członkowskimi, drugi rozpoczął się w lutym 1994 r. i trwał do rozpoczęcia negocjacji o członkostwo Polski w Unii Europejskiej, etap trzeci to okres negocjacji z Komisją Europejską, który zakończył się akcesją.

W pierwszych latach funkcjonowania nowego ustroju skupiono się na dwóch istotnych problemach, po pierwsze na usunięciu przepisów nawiązujących bezpośrednio do systemu gospodarki planowanej, które nie pasowały do realiów gospodarki rynkowej, po drugie na ochronie interesów pracowników, który tracili zatrudnienie w związku z restrukturyzacją zakładów pracy.

W okresie stowarzyszenia z Unią Europejską o obowiązku zbliżenia ustawodawstwa Polski z prawem wspólnotowym *expressis verbis* stanowił artykuł 68 układu europejskiego. Przepis mówił o podejmowaniu adekwatnych starań, aby zapewnić zgodność przyszłego ustawodawstwa w Polsce z ustawodawstwem wspólnotowym. Układ europejski nie nakładał jednak obowiązku wstąpienia Polski do Unii Europejskiej. Proces harmonizacji polskiego prawa pracy największego dynamizmu nabrał w latach negocjacji z Unią Europejską. Okres ten charakteryzował się największą liczą zmian przepisów, a do poważnych nowelizacji przepisów dochodziło w latach 2001, 2002 i 2003.

Celem pracy jest ukazanie procesu europeizacji polskiego prawa pracy, który dokonał się po 1989 r. Artykuł wskazuje etapy ewolucji przepisów oraz zasadnicze kierunki zmian w prawie pracy. Ukazano także problematykę wejścia w życie nowelizacji, wykładni przepisów oraz krytyczne uwagi do procesu dostosowania polskiego prawa pracy dyrektyw unijnych.

Introduction

Labour law is one of the areas of the law that is subject to dynamic evolution. This takes place as a consequence of changing economic and social conditions, including rapid technological development, development of certain industries and sectors of the economy coupled with the recession in the other ones, demographic changes, development of new forms of work and thanks to the more extensive access of employees to knowledge and means of communication. The industrial revolution that took place during the 19th c. represents a historical example that reflects the influence of technological development on the development of work relations' formats. The shape of the labour law regulations is also influenced by the social partners, i.e. the trade unions and organisations of employers.

The dynamism of changes in the law was subject to in depth discussion in the European science of the labour law. In the doctrine of the law, particularly the German one, the discussion was conducted on whether the matter so variable as the labour law regulations should be subject to codification at all. Prior to 1989, the Polish doctrine of the labour law presented an entirely different position. There was the unanimous opinion concerning the need for existence of codified form of the labour law (ZIELIŃSKI 2006, p. 3). During the late 1980s and early 1990s theoreticians of the labour law supported the concept of labour law recodification that is a fundamental novella to the Labour Code of the 26th of June 1974. The Commission for the Reform of the Labour Law was established already in 1990 (ZIELIŃSKI 2006, p. 4).

The evolution of the Polish labour law during the past two decades was determined by two fundamental factors: the economic transformation, and exactly the transition from the centrally controlled economy to market economy, and adjustment of the Polish law to the European Union standards. The process of the Polish labour law adjustment to the European Union regulations was conducted in three stages:

1. stage one started with the systemic transformation and continued until the beginning of 1994, that is the effective date of the Europe Agreement made between Poland and the European Communities and their Member States,
2. stage two continued from February 1994 through the end of March 1998. That period is linked to the commencement of negotiations for membership of Poland in the European Union,
3. stage three started with the end of March 1998 and ended at the moment of Poland's accession to the European Union, i.e. the 1st of May 2004 (*Europeizacja*... 2004, p. 16).

Changes in the Polish labour law after 1989 (Period from 1989 until the 1st of February 1994)

The events of 1989, political and economic transformations initiated during that time, caused the necessity of transformations in the labour law. The first novella of the Labour Code was implemented by the Act of the 7th of April 1989. During the initial months of the new system operation the focus was on two important issues – first, elimination of the regulations referring directly to the planned economy system that did not fit the market economy realities and second, protection of the interests of employees losing jobs as a consequence of restructuring of their employers (MITRUS 2006, p. 122).

Polish labour law started evolving towards the European standards already in 1989, although at that time Poland was not under the obligation of

considering the achievements of the Community law, the so-called acquis communautaire yet. As indicated by Leszek Mitrus, the Community solutions were treated as the model for the Polish legislator. Among the legal acts inspired by the European law the following can be listed: the Act of the 28th of December 1989 on special principles for terminating the employment relations with employees for reasons concerning the employer and amendment to some other acts (DzU, nr 20, poz. 107) (Directive 75/129) and the Act of the 29th of December 1993 on protection of employee claims in case of employer's insolvency[1] (Directive 80/987).

It should be noticed that the labour law already at that time was a strongly "internationalised" branch of the law (MITRUS 2006, p. 105). The shape of the domestic provisions was influences by the conventions of the International Labour Organisation (ILO). Currently, under Article 87 section 1 of the Constitution of the Republic of Poland the ratified ILO conventions are the source of the Polish labour law without the need for causing their entry into force by specially issued regulations (ŚWIĄTKOWSKI 2010, p. 81). It is worth adding that the ratified ILO convention may introduce regulations to the benefit of employees but it may not lead to decreasing their rights or increasing their burdens (LISZCZ 2009, p. 67). As Teresa Liszcz remarks, Poland is the country with one of the largest numbers of ratified conventions although we have not ratified a number of conventions important from the perspective of the rights of the employees, such as, among others, Minimum Wage Fixing Convention No 131 of 1970 (LISZCZ 2009, p. 68).

The effective date of the Europe Agreement (the 2nd of February 1994 – March 1998)

Entry into force of the association agreement with the European Communities and their Member States that took place on the 1st of February 1994 is considered the date initiating the process of systematic Europeanization of the Polish labour law (MITRUS 2006, p. 105). Article 68 of the Europe Agreement contained, expressed *expressis verbis,* the requirement for the approximation of Poland's existing and future legislation to that of the Community. The provision also stated that Poland shall use its best endeavours to ensure that future legislation is compatible with Community legislation. The Europe Agreement did not, however, impose the general duty of Poland's accession to the European Union. In such a case, as highlighted by the doctrine, the duty of undertaking actions aimed at assuring consistency of our legislation with the

[1] Uniform text, DzU of 2002, No 9, item 85 as amended.

European Communities acquis communautaire was of conditional nature (*Europeizacja*... 2004, p. 17).

In 1996, a major novella of the Labour Code of 1974 took place. The catalogue of fundamental principles was complemented by, among others, the principle of equal rights of employees in performance of the same duties and prohibition of discrimination in employment relations (Art. 11^1, 11^2, 11^3), the principle of employees participation in management of enterprises (18^2), the duty to observe the dignity and other personal goods of the employee (11^1, 11^2, 11^3) and the principle of freedom of association of employees and employers in organisations aiming at representation of their rights and common interests (18^1) (ZIELIŃSKI 2006, p. 26).

Changes to the Labour Code made in 1996 imposed a number of new duties on the employer including, among others, the duty of notifying the employees about the change of employer and resulting consequences for employees taken over (art. 231 § 3), the duty of specifying the place of work in the employment contract (art. 29 § 1 point 1) and the duty of confirming the contract conditions within 7 days as of the date of commencement of work by the employee (art. 281 pkt. 2). The new regulations also increased the duration of holidays of employees with employment history of up to 6 years (art. 154 § 1) and specified clearly the right of the employee to refrain from work when its conditions do not comply with the OHS regulations (art. 208). The novella strengthened the legal position of the employee bringing the Polish labour law closer to the European Union Standards (FLOREK 2011).

The legislator, nevertheless, retained art. 300 of the Labour Code stipulating that all issues not regulated by the provisions of the labour law will be governed by provisions of the civil law unless they are contrary to the principles of the labour law. At the same time art. 12 of the Labour Code concerning the requirement of observing work discipline that was a socialistic relic in the Polish labour law was repealed (ZIELIŃSKI 2006, pp. 26, 27).

Given lack of duty to create legal norms corresponding with the Community standards, during the first and second period of creating the labour law the Community standards were not considered in full. At that time no such need was seen. The novella of the labour code enacted on the 2nd of February 1996 or the reform of collective work contracts implemented by the Act of the 29th of September 1994 on amendment to the Act – The Labour Code and amendment to some other acts are examples of such legislation (DzU nr 113, poz. 547). This does not mean that designing changes to the regulations contained in the labour code the Community legislation was not considered either. Just the opposite, it was known to the working legislators that earlier consideration of European achievements in the labour law in that field would contribute to making a smaller number of amendments in the future years

related to implementation of the acquis communautaire in our system of legislation. However, during the pre-negotiations period adjustment of the labour law regulation to the economic and political reality of market economy still played the priority role (*Europeizacja*... 2004).

Negotiations with the European Union

Commencement of negotiations with the European Union was a clear signal that the process of harmonisation of the Polish law with the acquis communautaire was entering the decisive stage. That period was characterised by the largest number of changes in the regulations. Major novellas of the legislation took place during three consecutive years 2001, 2002 and 2003 completing the process of harmonisation 2003 (FLOREK 2011). Those changes were made in the Labour Code as well as in the other Acts.

The first novella took place in August 2001. Article 261 of the Act on trade unions introduced the duty of notifying the trade unions about the change of the employer. The novella introduced the contract conditions for employees delegated to work abroad in the European Union countries and additional contractual provisions concerning those employed in the countries that were not Members of the European Union. Regulations concerning equal rights of men and women in employment relations were subject to further evolution that was supported by new standards concerning the liability for damages (FLOREK 2011).

Another novella was enacted in July 2002. The new regulations allowed more extensive overtime work than so far and also offered the possibility of shortening the work time in case of persons eligible to child care leave. Those changes allowed more flexible work time and its adjustment to the personal needs of the employee and the employer. Harmonisation with the Community regulations covered the regulations concerning insolvency of the employer (novella of the Act of the 29th of December 1993 on protection of employee claims in case of employer's insolvency).

The last novella of 2003 generally ended the process of adjustment of the domestic legislation to the acquis communautaire. The main stream of changes concerned the anti-discrimination regulations. The new regulations implemented the standards of the Directives 2000/43 and 2000/78 into the Polish law expanding the prohibition of discrimination of employees by further criteria such as the racial origin, religion, disability, age and sexual orientation (FLOREK 2011). Provisions of art. 9 § 4, art. 11^3, art 18^{3a} and art. 18^{3e} can be included in the group of regulations concerning the issues of even treatment of men and women. This resulted in the change of the title of

Chapter IIa, which started indicating that equal treatment in employment is its basic subject.

Definition of the frameworks of indirect discrimination, i.e. such, where as a consequence of seemingly neutral decision, criterion or action differences occur in the employment conditions that have negative influence on the situation of all or a significant number of employees of the identified group unless those differences can be justified by objective reasons (art. 183a § 4 of the Labour Code) was an important novelty. The definitions of molestation and sexual molestation were also provided (art. 183a § 5 of the Labour Code). The definition of mobbing was also introduced. The Act also determined the liability for damages to persons that suffered from discrimination (art. 183d of the Labour Code).

The novella also introduced new regulations concerning flexible forms of employment, i.e. work in less than full time and for specified time expressing the principle of proportionality (pro rata temoporis). The new regulations stipulated that in the situation where different treatment is not justified by objective considerations employees employed on the above-indicated principles might not be treated for that reason in a less favourable way than the employees employed for unspecified time or full time.

Important changes also applied to work time and holidays. The novella implemented the standards of the directive 93/104. The Act stipulated that the work time per week may not exceed the average of 48 hours during the assumed accounting period and that during each week the employee is eligible to uninterrupted rest of at least 35 hours.

Prof. dr hab. Andrzej Patulski and legal counsel Grzegorz Orłowski presented relatively critical opinions concerning the reforms of the Polish labour law on the verge of accession to the European Union in the „Monitor Prawa Pracy" (1/2004). Those lawyers, in the article „Ewolucja polskiego prawa a model polski" (Evolution of the Polish law and the Polish model) presented three fundamental theses. First, the novellas made prior to the accession did not implement systemic changes. *The system of work, which is in the statu nascendi, seems to be now a hybrid of the market (encompassing also the "grey zone", statism and quasi welfare state. The weakness of the state apparatus* (*corrupt to a significant extent*) *and absence of effective mechanisms of State intervention in the economic processes as well as high costs of work facilitate "work in the grey zone"* (*according to the statistical studies every fifth Pole in the productive age admits working in the "grey zone"*) (PATULSKI, ORŁOWSKI 2011).

Second, the legislator was unable to catch up with the changes taking place in our labour market. An example here is, among others, the legal regulation of temporary employment agencies. As indicated by the authors, such agencies had operated in Poland since mid-1990s but only in 2001 the

notion of temporary employment agency was introduced in the Labour Code while the comprehensive regulation of legal relations under that system was introduces only by the Act of the 9th of July 2003 on employment of temporary employees.

Finally, and third, the liberalisation of the Polish labour law was taking place by means of the judiciary liberalisation (PATULSKI, ORŁOWSKI 2011). According to the lawyers, the judiciary responded to the needs of the changing labour market earlier than the legislator. The resolution by the Supreme Court of the 9th of October 1997 allowing inclusion of unpaid and not included in the work time breaks in the collective employment contract, other agreement based on the Act, work rules and regulations, charter or employment contract is presented as an example of that trend[2]. The novella of the 26th of July 2002 in art. 129^{10} § 2 of the Labour Code offered the possibility of implementing by the employer of one break that is not included in the work time, which does not exceed 60 minutes and is meant for consumption of a meal or arrangement of private matters. The judgment of the Supreme Court of the 7th of December 1999 declared the then effective art. 240 § 3 of the Labour Code unconstitutional, which was later confirmed by the legislator that in the novella of the 9th of November 2000 amended the text of that provision[3].

The issue of the adjustment regulation coming into force and of the interpretation of the law

Determination of the date of entry into force for the regulations adjusting the Polish law was an important issue during the period of implementation of the regulations. Some of the regulations entered into force with accession of Poland to the European Union, some, however, on an earlier date. The legislator opted for still another procedure in case of art. 25^1 of the Labour Code. That regulation was included in the Polish labour code for performance of the Directive No 99/70 of the 28th of June 1999 concerning the framework agreement on fixed-term work. The consecutive novella of the labour code suspended application of that regulation by stipulating that the regulation shall not be effective as of the 28th of November 2002 until the date of accession of Poland to the EU, i.e. the 1st of May 2004. That legislative operation, however, was not a common component in the process of Polish legislation adjustment to the acquis communautaire (*Europeizacja*... 2004,

[2] III ZP 21/979
[3] I PKN 438/9911

p. 19). The issue was additionally complicated by the next novella of the labour code that took place during "suspension" of art. 25^1 application. The novella of the labour code of the 14th of November 2003 added two new paragraphs, which caused that after termination of the "suspension" the regulation entered into force with changed text.

The institutions of the labour law are subject to rapid transformations and changes. The labour law must catch up with the changes taking place as concerns the conditions of employment, wages, protection of work, occupational health and safety, etc. Professor Sanetra expresses the opinion that haste in implementation of directives before the dates set in them is not recommended. He motivates it by the fact that the directives already drafted may be changed. The role of the Court of Justice of the European Union, which may clarify possible doubts developed during implementation, is also important here. Observation and taking example from other countries may also facilitate the process of implementation of directives. It is also worth noticing that the economy of the law for which representatives of many fields of the law and legislators themselves opt requires avoiding mistakes and making multiple changes.

The fact that the directives impose mainly new duties on entrepreneurs – employers represents another argument presented by the doctrine of the labour law that speaks for moderation in rapid implementation of the solutions from the directives in our labour law. Increased burdens resulting from strengthening protection of the employee may lead to weakening the competitive advantage, and as a consequence the economic position, in case of countries representing a weaker level of economic development. That situation in turn will not contribute to the process of equalising the living standards in the EU countries assumed by the European Union.

It is also indicated in the doctrine that implementation of the directive in one operation and not "part by part" is necessary (*Europeizacja*.. 2004, p. 21). This allows more effective verification of errors and introduction of appropriate amendments at a later time. Obviously implementation of the complete directive before expiration of the deadline specified for its implementation is necessary.

A problem may also emerge in the situation when a specific directive is not enacted yet but discussions and works on enacting it are in progress or the draft text is already known. Such a draft may become inspiration for enactment of the legal solutions specified in the draft but on condition that the directive is enacted in the format presented in the draft. Polish labour legislation knows such an example and such a situation occurred in case of the Act on employment temporary of employees enacted on the 9th of July 2003 (DzU nr 166, poz. 108). This is the conclusion stemming from the fact that

regulations included in the draft European Union directive of the 20th of March 2002 concerning temporary employment were included in it. At this point it should also be added that a part of the doctrine criticises the fact that the provisions concerning temporary employees have not been included in the labour code (*Europeizacja*... 2004, p. 22).

It can be concluded that undertaking the legislative effort in the field of the labour law or in the other fields of the law under the inspirations stemming from the draft directives or in general the legal acts of the European Union is not a mistake and such actions could be qualified as positive and needed, however, it should be remembered that legislative activities based on drafts of the European Union legal acts may lead to the need for amending the Polish legislation in case, e.g. the directive does not enter into force or enters into force in a format different than initially assumed in the draft. Also the action of the Polish legislator in the form of implementation of the European Union provisions concerning the individual employment relation by placing such regulation in separate Acts should be criticised as this leads to segmentation of the labour law.

Interpretation of the European labour law represents an important issue. In case of the regulations implemented from directive the purpose based interpretation that is the purpose expressed by the regulations of the directives and the intents of their creators as well as the interpretational achievements of the Court of Justice of the European Union is of primary importance. The language, logical, systemic, functional and historical interpretations in the context of our labour law must give priority to the purpose based interpretation of the European labour law. racy. The question whether the interpretation of the labour law that implemented the acquis communautaire should be considered binding before Poland obtaining membership in the European Union, i.e. before the 1st of May 2004 is the issue worth mentioning. In the opinion of the doctrine the answer to this question must be positive under a certain condition, that is, such interpretation will be binding, but only when specific regulations of acquis communautaire have been implemented for the purpose of satisfying the requirements of the European labour law and not on the base of general inspiration with that law (*Europeizacja*... 2004, p. 29). Under such circumstances it should be considered that in case of Poland that situation occurred as of the time when the authorities of the State started negotiations on accession of our country to the European Union.

Conclusion

Polish labour law was subject to major metamorphosis during the years 1989-2004. The factors that determined its development that is the economic transformation and the process of adjustment of the Polish law to the European Union standards influenced the major directions of labour law evolution.

During the pre-negotiations period (1989-1998) the process of adjustment of the Polish labour law to the requirements of the market economy was the priority. "Modernisation" of the labour law was inspired by the European solutions in frequent cases. That trend was visible in particular during the period of association with the European Union. As of that moment we can talk about systematic Europeanization of the Polish law. The novellas strengthened the position of the employee bringing the Polish labour law closer to the European Union standards.

Commencement of the negotiations with the European Union gave the clear signal that the process of Polish law harmonisation with the European Union law is entering the decisive stage. That period was characterised by the largest number of changes in the adjustment regulations. The major area of changes covered antidiscrimination provisions in both the direct and indirect dimension. The issues of mobbing found a wide regulation. The changes also allowed more flexibility in the regulations concerning the work time.

The accession of Poland to the European Union has not completed Europeanization of the labour law as this is a continuous process because as a Member State we are implementing new directives of which some tens were enacted after 2004.

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Ustawa z dnia 29 września 1994 roku o zmianie ustawy – kodeks pracy oraz o zmianie niektórych innych ustaw. DzU nr 113, poz. 547.

Ustawa z 29 grudnia 1993 roku o ochronie roszczeń pracowniczych w razie niewypłacalności pracodawcy. DzU nr 9, poz. 85 z późn. zm.

Ustawa z 9 lipca 2003 roku o zatrudnieniu pracowników tymczasowych. DzU nr 166, poz. 1608.

Supreme Court Decrees:

1. I PKN 438/9911
2. III ZP 21/979