SUMMARY

Labour Law: whose? Res publica!

The Employment Relation from the Legal Theory Point of View

The state of affairs with respect to the construction of the theory of the legal phenomenon that is labour law (since, according to the definition, a legal phenomenon involves the formation of particular norms of behaviour in a given social system, i.e., a certain cultural product which can be finally registered in the form of statements of a directive nature) seems to be unsatisfactory, because as a result of the detailed research conducted in the study of labour law – research in the field of the „scientific elaboration of this law" – completely different, even extreme results were obtained. One should note, for example, the standpoint according to which the employment relationship is a relationship of legal obligation, as well as the view concerning its public law character. Moreover, in this process of the „scientific elaboration of labour law", there are many misunderstandings as to the meaning of the legal terminology, even to such an extent that „professional" researchers who practise labour law do not understand each other. However, the worst thing about this lack of reliable theoretical reflections to accompany the „scientific elaboration of labour law" and lead to the construction of a theory of the legal phenomenon of labour law in the sense of a set of legal norms is that it constitutes a low level of culture in this work.

As a result, it is necessary to get back to the basics, which in fact means presenting a study with certain absolute baseline findings, as theoretical reflections, which, as we already know, should accompany the scientific elaboration of every branch of law, including labour law. In the field of research on theoretical reflections in labour law or, to put it another way, on constructing the theory of labour law as a legal phenomenon, it must be stated that it is impossible to note any monographs devoted to this subject. Smaller academic studies in this area, e.g. in the form of articles, are also lacking.

Is labour law really a public „thing"? Yes, labour law is *res publica*. Such an answer is founded on the conclusions of an analysis of legal norms creating employment relationship law and labour law as a section of administrative law. In no way is this hindered by the private law nature of the employment relationship, because this private legal nature of the employment relationship proves to be „made public". This can be analysed point by point.

An employment relationship is a private law relationship between an employee and a workplace, run by an employer. The employee performs work for the benefit of this

workplace, which comprises the community of its employees. Due to the fact that legal acts on behalf of the company are performed by the employer, it is the employer who will conclude an employment contract with the employee.

An absolutely fundamental issue in considering the employment relationship is to indicate its distinctiveness among private law relationships. In other words, the place of the employment relationship among private legal relationships is independent of them, which means that the employment relationship exists alongside the contractual obligation. The employment relationship is not a contractual obligation. So what is?

The answers is a private (civil) relationship. This is the most frequently referred-to contract, but as is known, it can also be established by a court decision. However, this has no significance for the content of the employment relationship, as it is basically shaped by the law. This should be made clear, for although an employment relationship as a private law relationship is governed by the basic principle of this law, resulting from the provision of Article 56 of the Civil Code, which could suggest the contract is significant as an element shaping the content of the employment relationship, labour law is constructed using strictly binding norms. As a rule, their all-pervasive existence fills the content of the employment relationship.

Notabene, it must be made clear at this juncture that considerations on the doctrine of labour law with regard to implementing the principle of contractual freedom in labour law are a mistake. Moreover, the mere fact that an employment relationship is not a contractual obligation makes it impossible to apply this principle, since it „governs" contractual obligations.

I am aware of the importance of my thesis concerning the civil law, non-obligatory nature of the employment relationship in a situation where the view ascribing an obligatory nature to the employment relationship is both predominant, can be found in virtually every textbook study, and is accepted in this school of thought. However, this thesis of the employment relationship being a contractual obligation relationship has no scientific basis. Contractual obligations are relationships founded on the principles of Article 353 of the Civil Code and their subject matter is a service, which in the civil law literature is understood as goods or services. This is consistent with the fact that the main function of contract law as a separate section of civil law comes down to its regulating trade in money, goods and services. Meanwhile, the subject of an employment relationship is the behaviour of the individual expressed through their work. Work is an integral part of being human, the essence of the human being. It belongs to the individual. It is their personal right. Therefore, it can only be the object of a private law relationship regulating a wider category – behaviours – but these are not behaviours in the sense of an exchange of goods and services. In other words, the arrangement of the employer-employee relationship based on the rules referred to in Article 353 of the Civil Code precludes the principle of treating human work as a value and not a commodity. In today's context of the universal adoption of human rights, no „serious" person dares to question this principle. If one wishes to establish an employment relationship on the basis of Art. 353 of the Civil Code, one has to acknowledge that work is a commodity, and then the conditions of its performance are subject to „negotiation", which results in a relationship of mutual obligation, i.e. „money for goods". This concept cannot be accepted not only on the basis of the civil law in force (because human work is not treated as an employee benefit, after all, the Labour Code uses the term: per-

formance of work), but also because it is precluded by the provisions of the Labour Code, *expressis verbis*, the concept of an employment relationship as a mutual obligation and the related consequences. Not only was this effected through the aforementioned „omnipotence" of mandatory provisions, but also through the adoption of the principle of equality.

Returning to the main argument concerning the private law character of the employment relationship, which is a separate relationship, first and foremost independent of contractual obligation under Article 353 of the Civil Code, it must be said that the role of the contract in shaping the content of this relationship is minimal, not only because of the „omnipotence" of the strictly binding regulations, but also, and perhaps primarily, as a result of the principle that is fundamental to labour law – the principle of equality. Therefore, a private employment relationship can be regarded as „public", but only in a „descriptive" sense. In any case, the theory of law does not utilise a public relationship, but at most suggests administrative and legal relations alongside civil law relations.

Why is it not possible to speak of an employment relationship as an administrative-legal one? First of all, it is because this relationship is built by entities that are not subjects of public law, i.e. those that perform public administration, and cannot be classified as entities practising public administration in the functional sense. An employment relationship is composed by private law entities: the employee and the employer acting as the manager of the workplace – entities that are free and autonomous, formally equivalent, and remain as such throughout the entire duration of the employment relationship. If it were otherwise, one of these entities would be „struck" by its personal dignity, because the idea of a free and autonomous human, equal to other people, arises from it. Freedom and autonomy does not deprive an employee of the right to have their employment situation unilaterally shaped by their employer, through the use of the latter's norms of competence that create formative powers, which are part of the employer's subjective rights.

Thus, an employment relationship is a private law relationship established by entities enjoying freedom and using their autonomy of will (it is impossible to speak of any legal compulsion to work). The „omnipotence" of the mandatory provisions and the principle of equality, which is fundamental to this legal relationship, excluding the principle of freedom of contract, renders this employment relationship public. Why is this the case? It is because giving it such a normative shape, which is the result of the two factors noted above („omnipotence" of the provisions that are absolutely binding, and the principle of equality, which is fundamental to this legal relationship,) is crucial from the point of view of the social and economic order and the organization of the state. The employment relationship opens up space for human rights to be implemented. Subsequently employed people, who constitute the workplace, form a „society of workplaces".

What, then, is the role of the state in labour law? If we wish to regard the state as a legislator, it might be said that this author has already indicated this role, for the state creates law, especially mandatory law, as the state is, in a sense, the „author" of public order. Therefore, the role of the state in labour law is significant. In principle, the state creates labour law in its entirety. But in the study of law, the state is referred to primarily in terms of public administration. Therefore, the above question would have to be reformulated as follows: What is the role of public administration in labour law? The answer is that plays a huge role, because in the field of human labour, the state performs one of its public tasks, which is absolutely fundamental, and even constitutionally defined, namely it monitors

the conditions in which work is performed. Thus, the provisions on the performance of public administration related to the performance of a public task in the form of supervising the conditions for performing work should be classified as substantive administrative law. Who performs this public task?

This public task is carried out by the state primarily through a system of state labour inspection, and therefore through regulatory public administration. But this is also performed through non-regulatory administration, the social labour inspectorate. The social labour inspectorate is an administrative entity performing a public task in a non-regulatory manner, just as the health and safety service does. An administrative entity can also be found in the health and safety committee, which performs a control function, although here it would probably be necessary to speak about regulatory administration. Trade unions are also such an administrative entity, in terms of their supervision of working conditions, because they are involved in monitoring these conditions. It would be very reasonable to consider whether the very low labour standards in Poland make it appropriate to expand the number of administrative entities for the supervision of working conditions; of course, what I have in mind are non-regulatory forms of public administration. In my opinion, this is an excellent form of raising social awareness of conditions fit for workers, *notabene*, those that are a good match for the changing objectives of public administration forms of activity.

My firm conviction, which is founded on lengthy studies in the field of law, is that labour law, in the field of employment relationship law, is a private law, but that it is heavily „publicized", and as it were „equality-based", while in turn, regarding the protection (in the form of supervision) of working conditions, this law is a section of substantive administrative law, and thus public law. This should be said in connection with the analysis of the normative structure of labour law, given the constitutional axiology attributed to it.

I believe that the fundamental conclusion for all further research in the field of labour law is that the law of employment relationships is private but „made public" in order to give the employer, who also takes cares of the economic dimension of how the workplace functions, the possibility of providing this care (and only in the private sphere can the economic dimension be cared for rationally), but also to facilitate the comprehensive development of individuals. Therefore, labour law should not be referred to as „for the employee" or „for the employer". Why is it a right neither „for the employee" nor „for the employer"? This is because it is fundamentally not created in order for the protection of this employee, not to mention the economic well-being of the employer (more precisely, the company), nor is it constructed only to extract the economic interest of this employer. In their work the employee is expected to achieve the highest level of his or her development as a person, and at the same time this work should serve others, while the employer is to make this possible while taking care of the economic well-being of the company. From the point of view of how society functions, the above-mentioned arrangement is absolutely fundamental, because the above constitutes the essence of the constitutionally defined social and economic order, which, in a sense, society „agreed upon", seeing it as a source of prosperity. Therefore, „good" labour law in is all our interests. Labour law is a common matter, but is „particularly" common for the employee and the employer. This is *RES PUBLICA*.

Translated by Rob Pagett