

## Summary

# Subjective rights in labour law – and towards ‘whom’?

## The dispute over the nature of labour law

“There is nothing more practical than good theory” – this was the thought that accompanied me while writing my previous book, entitled: *Whose Labour Law? It’s a public affair! On the employment relationship from a theoretical and legal point of view*. At the time, however, I had not yet become fully aware of the power of this motto. I could still see a shadow of sense in the burgeoning studies of my fellow academics, describing the legal situation in labour law, and doing it without theoretical conceptual apparatus. Today I am absolutely convinced that these works are of negligible or no academic or social value whatsoever. They will fade as quickly as legislation in the field of labour law changes, and this, as we know, is changing at lightning speed. Yet nothing will prevent such works from flooding the academic labour law publishing market and creating a shoddy science of labour law. If it were not the case, we would be dealing with a more humanistic world of human labour in Poland and levying taxes on civil law forms of employment would not be treated as a Polish “civilizational” achievement but rather as an admission of failure. In short, the study of labour law in Poland is basically non-existent, and this “balance of power”, individuals can change little, if anything. And this is all because those with academic titles in social sciences who write papers in labour law do not pose questions about the theory of labour law, questions which are quite basic. But why is this so important?

A properly developed scientific discipline, in the natural and pure sciences as well as in the social sciences, is one in which basic research is carried out in addition to applied research. This research is carried out to understand the foundations of a given science, without aiming to solve a practical problem, e.g. in technology or industry. However, in the case being dealt with here, that is, in labour law, it is motivated by curiosity about the world and the desire to understand it more deeply, on which to establish a basis for further research. Such research is carried out especially in core countries. An inverse ratio between basic and applied research is found in periphery countries, where more importance is attached to developing applied research, which aims to solve immediate problems. Moreover, basic research, unlike applied research, does not generate direct benefits and is therefore of no interest to the private sector. In a situation where public research institutions do not ‘bet’ on its development, this research simply does not exist.

This is what has been happening for at least three decades with Polish labour law. It is difficult to discern any basic research within it, and therefore the *de facto* formulation of absolutely fundamental issues or posing of totally “basic” questions. As a consequence, new “scientific” works are being written but still on the basis of the archaic understanding of an

employer as the “contractor” of an employee or by imprecisely naming an employment relation an obligation. Such an approach not only gives no chance for a comprehensive study of modern labour law, but also only seemingly solves practical problems from a systemic point of view. What is worse, with this kind of promotion of labour law in Polish science, combining theory with practice, there can be no chance for the sound development of basic research; such research is a laborious cognitive process, consuming so much time that it is impossible to take up additional employment. Above all, it does not translate into direct economic benefits, and what is more, in order to defend one’s ideas, one is often forced to battle with labour law researchers who are attached at all costs to theories “from half a century ago”, and are so attached probably out of convenience. Moreover, treading such a research path is not viewed favourably by Polish university chairs or labour law departments, which are sometimes simulacrums of research teams, which their heads, under the banner of scientific freedom granted to subordinate academics as an effect of a “modern style of management” ineptly fulfil their managerial functions, ultimately destroying even the slightest chance for the development of a true science of labour law, which simply cannot grow out of it without basic research conducted in a team. The effects are visible from afar: the science of labour law in Poland is to all intents and purposes non-existent, and in the monumental collective study “System prawa pracy” (“The system of labour law”), which is a conglomeration of various, sometimes contradictory, statements, it is stated that labour is a commodity, admittedly a special one, but a commodity nonetheless. Only by analogy with the words of the outstanding Polish writer Sławomir Mrożek does the idea spring to mind that the Polish science of labour law really does not know where it is; it is simply suspended “somewhere between east and west”.

It is only, or as much as, the academic duty to strive for the truth and also the scientific responsibility towards the state and the university that employs me that do not allow me to give up and stop my academic work, which I now know is completely “Sisyphean” in nature. For this is what I have to say about my work in the Polish academic milieu of labour law, characterised by a rather low level of working culture.

This work is a continuation of my theoretical explorations. In the introduction to my previous monograph, as I had presumed, I only made initial inquiries in the field of the foundations of labour law theory. But thanks to this, I now know that the employment relationship does not exist “in abeyance”, as the doctrine maintains, or “somewhere on the border between civil law and administrative law”; one can only look for it as being embedded in civil (private) or administrative (public) law. Unfortunately, the framework of the previous study, but above all my still insufficient background in jurisprudence at that time, did not allow me to reach definitive conclusions as to the theoretical foundations of labour law in a single study. I concentrated on trying to find a place for the employment relationship in civil law, and am now in no doubt that this is not a mutual obligation relationship. But I have acquired knowledge that due to its saturation with the norms of universally binding law, as well as the subordination of labour relations to the principle of equality, one may rightly perceive it in terms of an administrative-legal relationship. The final answer as to whether it could be treated as an administrative law relationship was then avoided, as soon as I noticed that there was a possibility for it to be explained in theoretical terms by means of private law constructions. Simply put, I had not yet discerned the issue which A. Sobczyk recently indicated in the legal doctrine of the potential of public

tasks being incumbent upon an employer. Consequently, I did not ask myself the most important question of whether its potential embedding in administrative law would not create a more effective tool for dragging the primitive social relations of labour in Poland up to a higher level of civilisation.

What I consider to be crucial in this work is the indication that in order to be able to talk about the meaningfulness of labour law, and its real application, such law needs to be “told” from the perspective of subjective law. Therefore, only today I understand why, on many occasions, there has been a certain sterility in academic discussions on labour law and, in principle, little attractiveness of labour law in the general debate, not to mention in academic discussion. Analysing labour law from the subjective point of view will rather produce the effect of presenting a certain set of regulations, because that is what labour law is - a set of regulations - but without emphasising the functional connections.

Regarding labour law as subjective rights opens up unprecedented possibilities for discussion, but above all, it shows the reality of this right, in the sense that it is indeed real. Seeing labour law in terms of subjective rights also renders this law dynamic. This right is alive. It is real. After all, it is still necessary to determine the what is “due” to the employee and to look for addressees of employee’s subjective rights. Taking into account that the rights of an employee “emerge” from human rights themselves, for they were the subject of many acts of international law, they are also anchored in the constitutional provisions, and further, in statutory provisions - an extremely large number of sources of labour law appear. All of these have to be taken into account in the process of determining the amount due to the employee, as these constitute law in force. Next, it is necessary to find addressees of obligations that stem from these rights. From the acts of international law itself it already can be seen that it will not solely be the state. From the perspective of statutory labour law in particular, there is the employer, but also co-workers. At this very juncture, one can already see how the rigid division between public and private subjective rights related to labour law is breaking down. It should also be borne in mind that employees’ subjective rights are, to a significant extent, employees’ entitlements to benefits, for which funding must be found. This funding is closely linked to the wealth of the country, to the prosperity of the state.

Therefore, from the point of view of research on labour law, the subjective rights of employees should be a fundamental issue, the reason being that, due to their structure, they make it possible to grasp the whole socio-economic-political picture related to human labour issues.

Why?

Because it is precisely this need to determine the status that due to the employee, taking into account its changeability in terms of its connections with the economic situation, will trigger the problem of social policy on the macro level, and then, in particular instances, the individual will, with recourse to the legal possibilities, seek to obtain the appropriate benefits. The key issue, apart from determining the status due to the employee, will be to determine the addressees of obligations resulting from the employee’s subjective rights. It transpires that despite the fact that employee subjective rights are primarily directed at the state as the addressee, this does not mean that they do not also have a horizontal dimension. After all, it is possible to point to a co-worker as the holder of subjective employee rights, and obligated, for instance, with regard to annual leave: in connection

with this subjective right, an employee who also plays the role of a parent enjoys priority in asserting his right to annual leave, hence a childless co-worker should respect the right of this employee-parent to take their annual leave during the school holidays. In other words, the co-worker may also be among those who are obliged by virtue of the employment right in question.

The biggest issue with regard to asserting employees' subjective rights proves to be the question of the employer and the workplace as the entities obligated by virtue of these rights. It is already known that due employees' subjective rights being asserted in the workplace, it is the workplace, and not the employer, that will be the subject obliged towards the employee asserting his/her subjective rights. The employer, solely due to the fact that the workplace is managed by the employer, will formally realise the employee's subjective rights. In this very place it transpires that it is not the employment relationship but the institution of the workplace that concentrates the whole issue of employee subjective rights, and consequently, all issues related to labour law. At the same time, a source of great happiness to me, from the scientific point of view, is that on this issue which is absolutely crucial to research on labour law, I agree with Prof. A. Sobczyk research findings regarding the absolutely fundamental meaning of the subject of the workplace in labour law. At the same time, these findings refute the thesis of the central character of the employment relationship understood as a relation between the employee and the employer in labour law.

There remains the question of how to understand the nature of the workplace. In my opinion, where obligations are imposed on it which are to lead to the realisation of employees' subjective rights, and which at the same time create public tasks, one should speak of a workplace as an entity of public administration in the functional sense, namely an administering entity. *De lege lata*, it is not possible to speak of the workplace as a subject of public law, because it requires an *expressis verbis* adjudication of the nature of the workplace. This results, as it were, from the necessity to strictly ration the dispersion of the state's *imperium*.

On the other hand, where the workplace will be fulfilling its obligations derived from the subjective rights of employees, which stem from, and at the same time, do not constitute a public task, we are talking about the private legal character of the workplace, but included in the axiology of labour law, and very close to the axiology of administrative law. Why?

The reason is that in humanist labour law, the workplace becomes the central concept, that is a community of people who do work "together", where the bonds between them are based on the principle of solidarity, and the work process is directed by the employer. The individual who performs work is not "in opposition" to the employer, and absolutely does not remain in a relationship of mutual obligation, but together with others, under the direction of the employer, performs socially useful work. As a constituent part of the company community, this individual obtains much greater possibilities for self-realisation on many levels of human activity. Thus, *de facto*, the community is in a sense "subordinated" to it, thus it is the human being who constitutes the highest value.

Are we not coming to a similar system of "forces" as in administrative law? After all, this law bases the "mechanism" of its operation on the fact that it assumes the existence of a state community composed of individuals, but that this community is to serve these individuals; in other words, it is not the community in this "system" that is most impor-

tant, but the individual. Hence, to recall the words of J. Zimmermann, by regulating the relations between the state and the individual, administrative law serves the human good. The same can be said of labour law: its regulations are supposed to make it possible to realise the good of humans in the process of coordinated work (work in the community of a workplace).

I am not ruling out the idea of recognising the workplace as an entity in its full administrative capacity. I only claim that it would have to be done in a prejudicial way in the legislation. I think that it is in this sense, and therefore in attempting to indicate a more separate structure for the workplace as a subject of public administration, that new directions for further research should be sought. For merely pigeonholing the workplace as a social organisation in the space of administrative law impoverishes theoretical analyses conducted on such a fundamental institution of labour law as the workplace.

*Translated by Rob Pagett*