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'THE RIGHT TO (DECENT) WORK. THE RIGHT TO EVERYONE OR "CHOSEN" ONES?' THE SITUATION IN POLAND

Work bears a particular mark of man and of humanity. This mark decides its interior characteristics; in a sense it constitutes its very nature.

Pope John Paul II, *Laborem Exercens*

I. INTRODUCTION

The history of human labour is a history of slavery, exploitation, inhumanity, poverty, disasters, risk of death, inequalities and injustices.[1] Workers' rights and needs were often subordinated to economic rationales. The value of work was determined by its economic value, shaped by free market fluctuations, especially the rules of supply and demand.[2] However, the approach to work that treats it as an economic good sidesteps two observations that serve as a reference point for some considerations on the issue of decent work.

Firstly, there is the presumption is that work involves human beings and therefore has a personal dimension which cannot be separated from workers. Therefore, the worker, his or her feelings, needs and nature cannot be completely kept out of view.[3] The approach to human labour as not a market product, but as a human being, is contained in the statement that 'labour is not a commodity'. This was firstly expressed in the ILOs' 1944 Declaration of

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[1] For more about the history of labour, see Lucassen (2013).

[2] This is the centre of the Theory of Value. For more on this issue, see Foley (2000): 1–39.

[3] See John Kells Ingram's speech at Trade Union Confederation Congress in Dublin 1880.

RPEiS 83(1), 2021: 143–156.

Philadelphia,[4] and most recently reaffirmed on the occasion of the 100th anniversary of ILO activities.

Secondly, this is a recognition of the particular economic, social and psychological relevance of paid work to the worker.[5] The significant value of work to humanity is expressed clearly in the Social Doctrine of the Catholic Church and is deeply rooted in the values and teachings of other religious traditions. In the encyclical *Laborem exercens*, John Paul II states that:

> Work is a good thing for man […]. It is not only good in the sense that it is useful or something to enjoy; it is also good as being something worthy, that is to say, something that corresponds to man's dignity, that expresses this dignity and increases it […]. Work is a good thing for man – a good thing for his humanity – because through work, man *not only transforms nature,* adapting it to his own needs, but he also *achieves fulfilment* as a human being and indeed, in a sense, becomes 'more a human being'. [6]

The reference to the well-known assumption that 'work is not a commodity' in the ILO Centenary Declaration for the Future of Work[7] is clear evidence that the treatment of human labour as merely a market product is still valid and even more challenging with the expansion of globalization, technological innovations, demographic shifts, environmental and climate change, all of which have profoundly reshaped the reality of work. Difficulties with access to decent work are more often experienced by workers in different (new) working arrangements that do not fit into the 'traditional' model of employment, and thus are often unprotected by labour law regulations.

The concerns relating to the inadequate protection of workers at a time of transformative change in the world of work shows that the history of labour has come full circle, and that the idea of decent work for workers has returned to being the centre of labour law regulations. With this in mind, it is then worth considering more deeply whether a decent job is an 'exclusive' and 'luxurious' ideal, which excludes numerous workers who are in need of protection because of their unique situation. The position of Poland in this state of affairs will be analysed.

II. DECENT WORK – WHAT DOES IT MEAN?

The idea of decent work gets its foundation from the Kantian concept of universal and inherent human dignity, considered as an 'intrinsic worth' that makes a human being valuable 'above all price', that should be treated as 'ends in them-

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[4] ILO Declaration of Philadelphia concerning the aims and purposes of the International Labour Organization, https://www.ilo.org/dyn/normlex/en/f?p=1000:62:0::NO:62:P62_LIST_ENTRIE_ID:2453907:NO#declaration [accessed 23 October 2019].

[5] Davidov (2018): 43.

[6] Catholic Church. Pope (1978–2005: John Paul II). *On Human Work: Encyclical Laborem Exercens.* Washington, D.C. (1312 Massachusetts Ave., N.W., Washington 20005): Office of Publishing Services, United States Catholic Conference, 1981.

[7] ILO Centenary Declaration for the Future of Work, 20 June 2019, adopted on the occasion of the Centenary of the International Labour Organization.

selves', not as a 'means only'[8]. Since 'dignity' is granted to every person, by virtue of the mere fact of his or her humanity, then in all aspects of life, including working life, a human being should be treated with dignity. This view is supported by the Charter of Fundamental Rights of the European Union, which provides for the right for every worker to 'working conditions which respect his or her health, safety and dignity'. Work that respects human dignity is not guaranteed if 'free market' rules are followed. Ultimately, the 'decent' attributes of work may depart from those which could be justified by merely economic calculations.

If we perceive 'dignity' as the value that enables an individual to 'make a living' in all aspects of his life,[9] then decent work emerges as work respecting the autonomy of the worker to pursue his working life without any constraints on such an ability.[10] In this sense, decent work means work that provides an individual with basic needs related to his self-esteem and self-respect, his or her health, economic, social and psychological security, protection against discrimination, poverty and social exclusion. The set of attributes of decent work is not fixed. The concept of decent work is shaped by changes in the working environment, which are very sensitive to social and economic developments. In light of recent key challenges in the labour market, the concept of decent work must be extended to the ability of workers to have their private relations, including with members of their family, not infringed by work duties (freedom from work-life conflict) and the ability to maintain their employability and adaptability to a rapidly changing situation in a highly competitive labour market (security of employment). In the Preamble to the Declaration of Philadelphia, the ILO proposed the following basic labour requirements which are still valid and more specifically identify decent work. These include:

> […] regulation of the hours of work including the establishment of a maximum working day and week, the regulation of the labour supply, the prevention of unemployment, the provision of an adequate living wage, the protection of the worker against sickness, disease and injury arising out of his employment, the protection of children, young persons and women, provision for old age and injury, protection of the interests of workers when employed in countries other than their own, recognition of the principle of equal remuneration for work of equal value, recognition of the principle of freedom of association, the organization of vocational and technical education and other measures.

III. DECENT EMPLOYMENT VS. FULL AND PRODUCTIVE EMPLOYMENT?

The Polish Constitution does not provide for a right to work as a guarantee of employment for all those seeking work, but only expresses the principle of freedom of labour, which covers the opportunity to choose the type of work.[11]

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[8] I. Kant, *Groundwork for the metaphysics of morals,* 2008. Trans. by A.W. Wood <http://www.inp.uw.edu.pl/mdsie/Political_Thought/Kant%20%20groundwork%20for%20the%20metaphysics%20of%20morals%20with%20essays.pdf> [accessed 29 October 2019].

[9] Davidov (2018): 83.

[10] Freedland, Kountouris (2011): 374–375; Sobczyk (2013): 113.

[11] Kumor-Jezierska (2018): 11–15.

As part of the measures designed to exercise this right, the public authorities implemented a policy aimed at full and productive employment (Article 65(5)). This is implemented by the Act on employment promotion and labour market institutions,[12] which also refers to the aim of 'full and productive employment' (Article 1(1)(1)). This corresponds to the ILO 122 Employment Policy Convention[13] (Article 1(1)) and European Social Charter.[14]

Since productive employment means 'employment yielding sufficient returns to labour to permit the worker and her/his dependents a level of consumption above a poverty line',[15] it is clear that the creation of productive jobs for all is an ideal that is almost impossible to reach in the conditions of a market economy. Full employment would not be productive for all employed, conversely employment that is productive would not cover all those seeking work.[16] The key for the labour market policy should be the creation of productive employment, even if this means maintaining or increasing the level of unemployment. This respects the balance between labour (the principle of social justice) and capital (freedom to conduct business) that characterizes the model of the social market economy in Poland (Article 20 Polish Constitution).[17]

There is an explicit link between the concept of productive employment and decent work, since both focus on the quality of work. The definition of productive employment emphasizes solely the economic dimension of work, leaving aside its social and psychological aspect, which is covered by the concept of decent work. This has been recently acknowledged in the UN Agenda for Sustainable Development (Agenda 2030),[18] which put the goal of 'decent work' alongside the goal of 'full and productive employment'.

Under decent work, ideal unemployment is not perceived as a negative phenomenon, unless its alternative would be decent work for the unemployed person. Concentrated around the constitutional aim of full and productive employment, the Polish labour market policy is based on an 'any job' approach, rather than on employment with 'decent' working conditions. This is firstly followed by the concept of 'suitable job', on which the right to unemployment benefit is conditional (Article 2(1)(16) u.p.z.), which may involve not only employment but also any other paid work, for example on the basis of civil-law contracts:[19] may ignore both the educational level of the unemployed and the

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[12] Act of 20 April 2004, Journal of Laws of the Republic of Poland [JL] 2013, item 674 (hereinafter referred to as u.p.z.).

[13] <https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C122> [accessed 3 November 2019].

[14] JL 1999, No. 8, item 67.

[15] Understanding deficits of productive employment and setting targets: a methodological guide, International Labour Office, Employment Sector, Geneva: ILO 2012: 3.

[16] Bartoszewicz (2014).

[17] Liszcz (2014): 259–260.

[18] <https://www.un.org/sustainabledevelopment/development-agenda/ [accessed 2 November 2019].

[19] In this regard see the judgement of the Supreme Administrative Court in Poland (NSA) of 7 March 1996, II SA 3163/95, unpublished and the judgement of the Privince Administrative Court in Wrocław (WSA) of 30 July 2008, IV SA/Wr 457/07.

qualification required for his previous job (qualification criterion);[20] may not provide remuneration at the level received before the job loss, but the lowest level must meet the national minimum wage (income criterion). Secondly, this is due to the low replacement rate of unemployment benefit, which does not relate to the past remuneration of the unemployed person and is calculated on an amount that is much below the national minimum rate. Following a broad and flexible concept of 'suitable work' and the low rate of unemployment benefit, the labour market policy in Poland cannot be considered as secure, since the system is putting pressure on the unemployed person a to take up any – even a low-quality – job, instead of searching for the one that provides them with decent working conditions, corresponds with their qualifications, and ensures their income stability.

IV. PERMANENT VS. TEMPORARY EMPLOYMENT RELATIONSHIP

Fixed-term employment contracts remain a permanent feature of the Polish labour market. Performing a job for a limited duration is the way to make the work relationship more flexible, leading to the rising popularity of non-standard forms of work, which consigns to the past the archetype of employment as a subordinate, continuous, bilateral relationship, provided on a full-time and non-temporary basis, usually with one employer throughout the whole workers' life cycle.[21] The benefits resulting from fixed-term employment have been acknowledged in the Fixed-Term Work Directive,[22] where it is expressly stated that 'fixed-term employment contracts respond, in certain circumstances, to the needs of both employers and workers'. This view has also been developed by the Polish Supreme Court, which highlighted that 'the fixed-term employment contract is effective and fulfills its functions in those cases where it is justified by the nature of the employment or the interest of the parties'.[23]

A considerable number of fixed-term contracts, which are excessively used in Poland, are used beyond this primary aim. A fixed-term employment contract is often perceived as an alternative to a permanent employment contract, and used not only in cases where there is a temporary demand for work, but also to cover demand that is permanent in nature. In Poland, fixed-term employment is the form used with a disproportionately high percentage of

[20] On re-employment quality see Grün, Hauser, Rhein (2010): 285–306.

[21] Rosioru (2013): 152.

[22] Council Directive 99/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by Business Europe (UNICE), European Centre of Enterprises with Public Participation (CEEP) and European Trade Union Confederation (ETUC), OJ L 175, 10/07/1999 (hereafter referred to as directive 99/70/EC).

[23] Case III ZP 52/97 of 16 April 1998 *Bogusława W-S v. Palais of Yough – […] Centre for Education in S*, OSNAPiUS 1998, no. 19, item 558.

young people (15–29), especially labour market entrants and low skilled ones, for whom fixed-term employment is not a voluntary choice and does not reflect its socioeconomic purpose.[24] In 2018 this was combined with the lowest transition rates from temporary to permanent contracts in the EU.[25] To a large extent, this situation can be attributed to existing differences in the employment protection between fixed-term and permanent employment. The lack of protection against unfair dismissal is the most problematic aspect of the coexistence of the fixed-term employment contract and employment contract for an indefinite term, which in fact has triggered a legal approach to fixed-term employment at the national and EU levels. This is also why ILO Convention no. 158,[26] when providing flexibility for the termination of the fixed-term employment contract, stipulates that adequate safeguards will be adopted against recourse to fixed-term employment contracts with the aim of avoiding the protection resulting from its provisions (Article 2(3)).

This situation does not change the last amendment to the regulation on fixed-term employment contract in the Polish Labour Code, which entered into force on 21 February 2015,[27] followed by a decision of the Court of Justice of the European Union (CJEU) in the *Nierodzik* case.[28] During the parliamentary debate, the Minister for Labour and Social Policy described it as a 'draft of good amendments for Polish workers aimed at reducing the unjustified use of fixed-term employment by employers beyond the principle of indefinite-term employment'.[29] Without a doubt, the amendment had a positive impact on reducing unjustified, long-term fixed-term employment contracts, since it sealed the mechanism of limiting the use of fixed-term employment contracts beyond the aim of temporary demand for work (Article 25^1 § 1, § 4 LC). Following the CJEU in the *Nierodzik* case, unified notice periods were introduced in the case of ordinary termination of fixed-term and indefinite-term employment contracts, which now in both cases depend on the length of service of employee.

The amendment did not tackle the heart of the issue of differences in employment protection between fixed-term and permanent employment contracts; that is, the lack of an adequate level of security for fixed-term workers against arbitrary dismissal. The general justification of unjust dismissal laws

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[24] Eurostat, 'Labour Force Survey' (European Communities, Luxembourg, 2014); Eurostat, 'Temporary employment in the EU" (15 May 2016), available at <http://ec.europa.eu/eurostat/web/products-eurostat-news/-/DDN-20170502-1>.

[25] European Commission, Commission Staff Working Document: Country Report Poland 2018 (Brussels, 7.3.2018, SWD(2019) 219 final): 2, 5, 24.

[26] ILO Termination of Employment Convention No. 158 on 22 June 1982, <http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C158> [accessed 16 December 2019].

[27] Act of 31 August 2015 amending the Labour Law Act and amending certain acts, JL 2015, item 1220.

[28] Case 38/13 of 13 March 2014 *Małgorzata Nierodzik v. Samodzielny Publiczny Psychiatryczny Zakład Opieki Zdrowotnej im. Dr. Stanislawa Deresza w Choroszczy* (ECLI:EU:C:2014:152).

[29] See the transcript of the 91st sitting of the Polish Parliament from 22 April 2015, 116 (20 December 2019), available at <http://orka2.sejm.gov.pl/StenoInter7.nsf/0/87F6E1A7BCA87D0CC1257E30000E9AF9/%24File/91_a_Ksiazka_bis.pdf> [accessed 20 February 2020].

that refer to the importance of work to the employee, in the case of fixed-term employment, has a more specific rationale than is implied in the temporary nature of a fixed-term employment relationship that is expected to maintain a fixed-term work relation within an agreed period of time. Under existing regulations, fixed-term workers are not recognized as having the right to full protection against unfair dismissal, since an ordinary termination of fixed-term employment contract by employer may take place without justified reasons (Article 30 § 3 LC *a contrartio*), and the right to adequate compensation in case of unjustified ordinary termination of a fixed-term employment contract that would compensate for the full damage would be effective, and dissuasive for an employer (Article 50 LC).

The decision of CJEU in the *Nierodzik* case opened a wider door for the possibility of challenging such differences in the employment protection between fixed-term and indefinite-term employment contracts on the grounds of discrimination. The CJEU has emphasized that the temporary nature of the fixed-term employment contract does not constitute an objective reason within the meaning of clause 4(1) of the Fixed-Term Work Directive. This decision from the CJEU neglects the approach of the Polish Constitutional Tribunal, which had previously ruled that the type of employment contract based on the duration of employment, justifying different treatment of fixed-term and indefinite-term employees with regard to the ordinary termination of the employment relationship. In this ruling, the Polish Constitutional Tribunal has referred to the social function and economic content of fixed-term and indefinite-term employment contracts, and the need for the implementation of a policy aimed at full and productive employment through legislation designed to create jobs and reduce unemployment. According to the Constitutional Tribunal, unifying the rules for the ordinary termination of these employment contracts would be contrary to the objective underlying the difference between them, resulting in overly rigid labour regulations, which would therefore produce the opposite results from those intended.[30] Following the amendment to Article 11^3 § 1 LC, which entered into force on 7 July 2019,[31] the principle of non-discrimination in the sphere of employment now has a broader potential in terms of the protection of fixed-term workers. This provision prohibits 'any discrimination based on any grounds'. The forms of discrimination listed in this provision now clearly include those not only related to the personal characteristics of the individual but also to the work performed by them, such as the temporary nature of employment.

V. NON-EMPLOYEE 'SUBORDINATE' EMPLOYMENT RELATIONS

In Poland, the application of labour law is built around a binary division between an 'employment relationship' and all other, different forms of 'paid

[30] Case P 48/07 of 2 December 2008, OTK-A 2008, no. 10, item. 173.

[31] Act of 16 May 2019 amending the Labour Law Act and amending certain acts, JL 2019, item 1043.

employment'.[32] An employment relationship is considered as an employee-employer relation pertaining to the performance of continuous, paid and personal work by the employee subordinate to and dependent on the employer, who assumes the risk of this relationship itself.[33] The relationship of subordination and dependence that is inherent to an employment relationship creates an inequality of bargaining power between the parties.[34] This puts the employee in a vulnerable position with regard to deciding on the conditions of employment.[35] The employer, as the more powerful party, is in a position to impose the terms of the contract that are more favourable to them.[36] This endangers human dignity, here possibly to a greater extent than in other work relationships.[37] Hence, respect for workers' dignity serves as a justification for a deeper intervention, by means of labour law regulations in the relationship between the employee and employer, since the operation of the employment relationship cannot be left entirely to the rules of private law, mainly because of the principle of (formal) equality between the parties to the contract and the principle of freedom of contract.[38]

Under Polish legislation, there are forms of personal paid employment where the relationship between parties falls within the structural elements of the contract of employment, mainly characterized by continuity, subordination and dependence, that are, however, classified by law as formally non-employee work relations. This includes: employment for training purposes under an apprenticeship contract for higher education graduates[39] and an internship agreement for unemployed persons,[40] work as a householder of a member of an agricultural cooperative under a contract of service,[41] and employment under a contract harvest agreement.[42] These work relations can be characterized as rather insecure for workers who do not have any – or have access only to a limited range of – the labour (individual and collective) rights that are allocated in the employment relationship.

This has relevance to income insecurity, manifested by a lack of adequate income stability. This is due to the following: the option to decide that work will be unpaid (apprenticeship contract); lack of protection of remuneration that is not subject to the obligation to ensure the minimum remuneration for work for employees, and parties to certain civil law contracts (farm work), or is directly subject to the profits made (working as

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[32] Baran (2015): 22.

[33] Liszcz (2017): 100–101; Florek (2017): 48–49. Case III AKa 791/18 of 6 December 2018 *E.K. and B.K. v. The National Healthcare Fund*; Case III AUa 246/18 of 4 December 2018 *R.C and W.C. v. The National Healthcare Fund*.

[34] Weiss (2011): 44.

[35] Davidov (2018): 39.

[36] Davidov (2018): 21.

[37] Weiss (2011): 44.

[38] Florek (2015): 266.

[39] Article 5 Graduates Practices Act of 17 July 2009, JL 2018, item 1244.

[40] Article 53 u.p.z.

[41] Article 156 Cooperative Act of 16 September 1982, JL 2018, item 1285.

[42] Article 91a Act of 20 December 1990 on social insurance for farmers, JL 2019, item 299.

a householder in an agricultural cooperative); no coverage by social security benefits (apprenticeship agreement) or a low level of social security of benefits when calculated based on worker's remuneration (internship, working as householder in an agricultural cooperative); employment security, since none of the workers in these work relationships benefit from adequate protection against arbitrary dismissals; work security insofar as there is a lack of protection requiring safe and hygienic work conditions (workers under harvest help agreement), lack of any protection regarding working time, including any limits on daily and weekly working time, lack of the right to daily and weekly rest periods and days off from work (workers under harvest help agreement, working as a householder in an agricultural cooperative) and the lack of the right to holiday leave (worker under harvest help agreement), or when the right to holiday leave, in terms of the amount and its conditions, is subject to the employer's internal regulations (working as a householder in an agricultural cooperative); and, finally, representation insecurity that is manifested in the lack of the right to form and/or join trade unions, which may be conditioned on the trade unions' internal regulations (unpaid apprentices, intern).

The reasons for protecting workers that refer to the inequality of bargaining power between the parties were subordinated in these working relationships to functional reasons, mainly labour market policy related to the increase of employability (apprenticeship contract[43] and internship agreement[44]) and the reduction of undeclared work and work that is not covered by a social security scheme (harvest helper[45]) and economic reasons, namely the reduction of labour costs and administrative burdens (employment of householder of a member of an agricultural cooperative) (harvest helper[46]). This left the reality of the work relationship (the personal character of work, continuity, and subordination) and the vulnerability of the worker's position vis-á-vis the employer in a worse position than that of an employee in an employment relationship. Considering these work relationships as those pertaining to a non-employee, thus falling outside the framework of the employment relationship, leads to the marginalization of those work relationships that are perceived as cheap and precarious, and thus socially and economically invaluable. This, in particular, concerns young people, especially labour market entrants, women, migrants and low-skilled workers, who are more likely to find themselves being trapped in this form of work relationship, which are often used beyond their primary aim, and thus rarely act as a 'stepping stone' to more secure, better jobs. Furthermore, the negative consequences for personal autonomy and general well-being of the young person, and difficulties in access to high-quality employment, can also have severe social and economic implications. The lack of access to high-quality employment that guarantees

[43] Sobczyk (2011): 424.
[44] Staszewska (2016).
[45] Surdykowska (2018): 4.
[46] Gersdorf (2013): 151.

an adequate income and decent working conditions is the main factor that generates income inequalities, which consequently increases the risk of poverty and social exclusion.

VI. DEPENDENT VS. INDEPENDENT: WORK BETWEEN THE BORDERS

Considering that the elements of 'subordination' and 'dependence' (economic, social and psychological[47]) remain central to the employee status and determine the vulnerable position of the employee, thus framing the goals of labour law – mainly the regulation of employee-employer work relationships.[48] 'Subordination' as the main indicia of an employment relationship is undergoing constant evolution. The traditional perception of 'subordination' as strict and hierarchical regarding the time, place, and the way tasks are carried out by the employee, is now giving way to a more flexible one.[49] This is an element of a global trend involving profound changes in the world of work, caused by the transition from industrial to postindustrial society, based on knowledge, followed by the development of the service sector, with the growing market in shared services (sharing economy) and services provided over an internet platform (digital economy), due to the rapid development of information and communication technologies.

The move toward to a more 'exclusive' approach to the element of 'subordination' is clearly visible in the case law. The case *Magdalena S. v. The National Healthcare Fund*[50] serves as an example of a change in the approach to subordination, considered as an 'evolving' element of an employment relationship, to greater autonomy and independence on the part of the employee. In this case, the Polish Supreme Court has confirmed that not all indicia traditionally associated with employment status, such as the bureaucratic control of employee subject to organizational rules and discipline,[51] direct day-to-day control, the inability to choose when and where to work, and the obligation to be available, necessarily have to exist at the same time. Earlier, in the case of *Andrzej S. v. Polish Television*,[52] the Polish Supreme Court developed the idea of 'autonomous subordination', meaning that an employer does not interfere with the way the tasks entrusted are carried out by the employee, who thus has autonomy in this regard and is not directly and constantly supervised by the employer. This reasoning, upheld in later case law,[53] opened the door wider

[47] Davidov (2018): 136.

[48] Liszcz (2011): 28.

[49] Tomaszewska (2018).

[50] Case I UK 68/05 of 25 November 2005, Wokanda 2006/4/26.

[51] Case I PZP 18/76 of 11 May 1976, OSNC 1976/11/241; case II URN 19/79 of 27 February 1979, NP. 1981/6/82; Case I PKN 441/99 of 14 December 1999, OSNP 2001/10/337.

[52] Case I PKN 277/99 of 7 September 1999, OSNAPiUS 2001/1/18.

[53] Case I PK 659/03 of 9 September 2004, OSNIPUSiSP 2005/10/139; case III AUa 730/17 of 26 April 2018, Lex 2527296.

to include different forms of work that had previously been excluded from employment status and considered as autonomous, due to the more creative character of their work, thus the lower degree of subordination associated with independent work relationships, such as legal advisers, journalists, doctors, architects, or managers[54]. In the case of legal advisers and physicians, the autonomy in the way tasks delegated by the employer are undertaken has been explicitly provided for by law. As an example, the Law on Legal Advisers[55] stipulates that a legal adviser is not bound by the orders or instructions (of his employer) regarding the contents of the legal advice (Article 15) and the Code of Medical Ethics[56] (Article 6) leaving physicians discretion as to the choice of form and methods of medical procedure.

The 'autonomous' and 'task-oriented' subordination makes the border between subordinate workers and independent contractors more unclear. Since then, these are often the parties, in reality the employer, that ultimately determine the legal form of the work relationship that may be provided within employee or non-employee relationships. The affirmation of the intention of the parties to the contract, which has the characteristics of both an employment and a civil relationship, constitutes the decision of the Polish Supreme Court in the case *Feliks M. v. Agencja Ochrony "W" S.A.*[57]

The blurring of the concept of an employment relationship leads to a question about the erosion of the paradigm of subordinate employment. This is followed by a proliferation of the categories of workers that are in a relationship of dependence entirely or mostly to a specific client. The economic, psychlogical and social dependence of such workers on their clients makes their position comparable to the position of employee in an employment relationship, who therefore share the same vulnerabilities. It is thus indicated that such workers need protection from labour law to help them oppose their vulnerability to non-decent work arising from the sense of dependency.[58] This is not the case for genuine independent contractors, who are not in a relationship of dependence with one client for economic, social and psychological purposes, thus maintaining the ability to spread risk in the market and not having to take it themselves.[59] The lack of a subordination relationship as a distinctive brand for the status of those workers who are not considered employees, is true for subordination in its 'traditional' meaning. Assuming some level of subordination in the case of work under civil-law contracts,[60] we notice that the progressive weakening of the indicia for subordinated work made the distinction between this category of workers and 'employees' even more difficult to grasp. This category of workers has already been set in between employees

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[54] Gersdorf (2011): 181; Duraj (2011): 157–158; Bury (2006): 63.

[55] Act of 6 July 1982, JL 2018, item 2115.

[56] Act of 2 January 2004 of Extraordinary Meeting of Physicians.

[57] Case I PKN 191/98 of 18 June 1998, OSNIAPiUS 1999/14/449.

[58] Risak, Dullinger (2018): 47–48; Duraj (2011): 158.

[59] Davidov (2018): 45.

[60] Case *Ewa K. and Halina L. v. Regional Court* of 11 September 2013, II PK 372/12, OSNP 2014/6/80.

and independent contractors. This model of regulation has been adopted in a growing number of countries that have a third, intermediate, category in their legislation called 'employee-like' workers, 'parasubordinated' or 'dependent contractors'. Polish law does not recognize the existence of this category, which is only perceived in academic discourse.[61] Consequently, such workers are considered to be independent contractors, and thus operate on the free market subject to the same rules of private law.

VII. CONCLUSIONS

This article has revealed a number of limitations in terms of the realization of the right to decent work in Poland. The implementation of the right to decent work needs changes.

1. The re-balance of the aim of labour market policy, which should be designed so as to facilitate not only immediate professional activation of the unemployed person, in line with the statutory objective of 'full employment', but also to move recipients into good (decent) employment. This would require both the redefinition of the concept of 'suitable job' and a change in the existing model of unemployment benefit.

2. The redefinition of the concept of employment relationship (and the concept of 'employee'), as a determinant for the application of labour law to personal work relationships. Due to the progressive relaxation of the strict and rigid parameters that were traditionally used to distinguish subordinate employment, a progressive erosion of the paradigm of subordinate employment can be expected.[62] The more 'flexible' approach to 'subordination' that exists in an increasing number of employee-employer relationships does not determine the vulnerable position of employee in that employment relationship. Therefore, 'subordination' should no longer be considered a exclusive condition for access to labour-related rights, which should be conditional on a position of dependency that determines the existing inequality of bargaining power in the working relationship. This requires the redefinition of the concept of 'employee' to one that sets forth the personal scope for the application of labour law. This concept should cover all people who are not genuine independent contractors but share the vulnerabilities of employees, such as those who lack real bargaining power resulting from the relationship of dependency with regard to the employer (client).

3. The change of the model of fixed-term employment. The existing regulation does not entirely reflect the temporary nature of a fixed-term employment contract, which, however, is related to the employer's need for the flexible use of a fixed-term employment contract. At the same time, under the existing regulation, a fixed-term employee is still left without any employment sta-

[61] Walczak (2015): 307.

[62] Liszcz (2011): 11; Countouris (2019): 6–7.

bility, which is the most problematic aspect. By allowing unlimited ordinary termination of a fixed-term employment contract, it has increased the risk of abuse in the use of fixed-term employment contracts, which will still be considered by employers to be an 'attractive' and 'cheap' alternative to the strictly indefinite-term employment contract. It cannot therefore be reasonably concluded that the new regulation in fact reflects a positive path on the way toward counteracting the labour market dualism between fixed-term and indefinite-term employment. It is, unfortunately, more appropriate to indicate the maintenance of a 'two-tier' (segmented) labour market into highly protected indefinite-term employees (insiders) and fixed-term employees (outsiders), deprived of the employment protection that applies to the indefinite-term employed. The use of fixed-term employment contracts tackles more broadly the degree of flexibilization of employment through the use of non-standard forms of work.

4. A rethink of the coverage of labour law regulation of a particular category of workers, who are now – fully or partially – excluded from the system of labour regulation for economic, fiscal, and budgetary reasons, but are in need of protection based on the relationships of subordination to and dependence on their employer.

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'THE RIGHT TO (DECENT) WORK. THE RIGHT TO EVERYONE OR "CHOSEN" ONES?' THE SITUATION IN POLAND

Summary

Work represents a particular economical, social and psychological relevance to the worker. Because of a personal dimension of work, that involves human beings, it cannot be separated from workers. The approach to human labour as not a market product, but as a human being, is contained in the statement that 'labour is not a commodity', firstly expressed in the International Labour Organization's 1944 Declaration of Philadelphia. The reference to this assumption more recently on the occasion of the 100th anniversary of ILO activities clearly evidence that the history of labour has come full circle and the idea of decent work for workers has returned to being the centre of labour law regulations. The concerns relating to the inadequate protection of workers coincided in time with the transformative change in the world of work. With this in mind, it is then worth considering more deeply whether a decent job is an 'exclusive' and 'luxurious' ideal, and leave outside its scope a number of workers who are in need of protection because of their unique situation. The position of Poland in this picture will be analysed.

Keywords: decent work; employment relationship; non-employee work relations; temporary employment