TOWARD A NEW CODIFICATION OF POLISH LABOR LAW

Michał Seweryński†

I. GENERAL ISSUES

A. The Need for Fundamental Reform of Polish Labor Law

The political, economic, and social transformation in Poland, which started in 1989 ("Solidarity Revolution"), needs a fundamental reform of the Polish labor law, which was inherited from the communist system in the form of the Labour Code adopted in 1974. However, that task was so complex and difficult that Polish democratic authorities decided to change the labor law gradually, by successive amendments of the Labour Code and accompanying laws.

However, the method of successive labor law amendments, determined by the current political and economic needs, did not lead to its full adjustment to the rules of democracy and market economy, as defined by the new Polish Constitution of 1997. Furthermore, due to that method, the Polish labor law became heterogeneous and disintegrated, containing new and old provisions at the same time, which remained from the communist system. That situation is the origin of difficulties in interpretation and due application of the labor law provisions. Thus, it is obvious that fundamental reform of the Polish labor law is necessary, granting its full adjustment to the rules of ongoing systemic transformation, which means not only the national Constitution but also the European legislation, since Poland became a member of the European Union (EU) in 2004. Furthermore, the reform should give Polish labor law its internal coherence and integrity, covering all subject matters of employment and industrial relations.

† Professor and former President of Lodz University, Poland. This article will appear in an alternate form in the forthcoming book SELECTED PROBLEMS OF THE POLISH LABOUR LAW REFORM.

B. To Codify or Not to Codify the New Polish Labor Law?

The first question that appeared in the process of the Polish labor law reform was that of its codification. The binding Polish Labour Code of 1974 was the last codification of the labor law in the communist countries. Typical features of a codification, granting integration and stabilization of a legal order, were used at that time with the intention to the Polish labor relations uniform and have them supervised by the state, as this was required by the political and economic rules of the communist system. The codification of labor law played the same role in other countries with an authoritarian rule. Thus, those who are against codification of labor law argued that this regulation was not proper for democratic and free-market countries, where social partners shall have a wide autonomy with regard to regulation of labor relations. Moreover, the codification does not grant flexibility to the labor law, which is necessary nowadays, taking into account a dynamic character of the market economy, the development of service sector and new forms of employment. It is also said that the codification of the national labor law is not conducive to its adjustment to the changing EU legislation. The above arguments are mainly presented by Western labor law experts, but some specialists from post-communist countries also support them.[1] Their opinion is also based on the fact that the majority of western European countries, as well as many non-European countries, do not have a codified labor law.

On the other hand, it has to be pointed out that some European democratic and free-market countries (France, Portugal, Turkey) and some outside Europe (e.g., Latin-American countries, the French-speaking countries of Africa, Cambodia, the Philippines, and Vietnam) the labor law is codified, even if many of those codes cover only labor law principles therefore they need to be supplemented with detailed statutes. Besides, in the majority of post-communist

1. The codification of labor law is an old issue. It was broadly discussed during the international labor law congress in Munich in 1978. *See* W. Szubert, *The Codification of Labour Law*, *in* INT'L SOC. LAB. L. & SOC. SECURITY, 9TH CONG.: REPORTS AND PROCEEDINGS (1979). At the end of the 20th century, this issue was brought up again in the framework of undergoing labor law reforms in the post-communist countries. The international conference on a reform of the Hungarian labor law (Budapest, December 2003), gave an opportunity to formulate once again opinions in that matter. As far as Polish debate on labor law codification is concerned, see T. Zieliński, *Problem rekodyfikacji prawa pracy* [*The Issue of Labor Law Re-codification*], 7 PAŃSTWO I PRAWO 6–7 (1999); Z. Salwa, *Jaka rekodyfikacja*? [*What Kind of Re-codification?*], 10 PRACA I ZABEZPIECZENIE SPOŁECZNE 2 (1999); M. Seweryński, *Problemy rekodyfikacji prawa pracy* [*The Issues of Labour Law Codification*], *in* PRAWO PRACY A WYZWANIA XXI WIEKU [LABOR LAW AND CHALLENGES OF THE XXI CENTURY] 319–38 (M. Matey-Tyrowicz, L. Nawacki & B. Wagner eds., 2002).

countries, which are building democracy and free-market economy, labor codes were preserved in a thoroughly amended form or they were adopted in a new version (e.g., in Russia, Lithuania, Croatia). Furthermore, in some of those countries, the work on new codes is well advanced (e.g., in Ukraine and Poland). Moreover, the experience of those countries that have a codified labor law shows that a labor code can protect employees' rights as well as market economy and public interests. On the other hand, the labor law codification does not constitute an obstacle to the development of collective agreements, negotiated by social partners. Besides, the example of Poland shows the strong impact of social partners on the codified labor law and it is difficult to imagine the adoption of a new labor code despite their opposition to its specific regulations. The need to adjust the national laws to the EU legislation does not only apply to the labor law but also to other branches of law, mostly being codified in EU countries (e.g., civil, criminal, or commercial law), nevertheless nobody claims to abandon this form of their regulation. What is more, recently a revival of interest in the codification has been observed, which is proven, for example, by the work on the draft of a codified European law of contracts.[2]

Thus, it is justifiable to conclude that there are many different ways to regulate labor law: (a) separate statutes together with collective agreements, (b) labor code together with collective agreements, (c) labor code together with separate statutes and collective agreements, and (d) a labor law rules code together with collective agreements. Each of these methods has its advantages and disadvantages. However, codification of labor law is favored by the fact that it guarantees integrity of legal order in labor relations as well as uniformity of its rules, which is conducive to its coherent interpretation and application. That is why the Polish government chose the concept of a new codification of labor law, also taking into account its approval by social partners and legal doctrine.

C. Individual and Collective Labor Law: Together or Separately?

The Polish labor law doctrine clearly distinguishes individual labor relations—covering individual rights and duties of employees and employers—and collective labor relations that deal with collective rights and interests of employees and employers. These two types of

2. *See* J. BOUINEAU & J. ROUX, 200 ANS DE CODE CIVIL (Ministère des affaires étrangères 2004).

labor relations give grounds for calling respective legal provisions that regulate them "individual labor law" (employment law) and "collective labor law" (industrial relations).[3] Taking this division into account, a key legislative problem arises as regards the reform of the labor law: Should individual and collective labor law be covered by a single labor code or should each one of them be regulated separately?

When solving the above-mentioned problem it shall be pointed out that individual and collective labor relations are genetically and functionally connected, i.e., without individual relations there can be no collective relations. At the same time, collective labor relations serve for individual labor relations. Thus, interdependence existing between individual and collective labor relations justify considering both groups of provisions that regulate them as one branch of labor law as well as covering them with one Labour Law Code.

On the other hand, however, the specific subject matter and rules of collective labor relations shall be taken into consideration. Due to both those factors, the provisions regulating collective labor relations adopted in Poland after 1989 were placed in separate statutes, except provisions concerning collective labor agreements, which remained included in Chapter XI of the Labour Code. However, when the following amendments of this Chapter's provisions were drafted in 1994 and 2000 the Polish doctrine opted for excluding them from the Labour Code and regulating them in a separate statute. Yet, the existing dispersion of collective labor law provisions in separate statutes does not allow for taking into consideration connections and dependencies occurring between its institutions. Furthermore, it causes loopholes and improper functioning of these provisions. That is why many Polish labor law specialists argue that collective labor law provisions should be consolidated in one legislative act, preferably in the Collective Labour Law Code. It shall contain the general part, regulating the scope and rules of the collective labor law, as well as defining key collective labor law notions. Moreover, the suggested Code shall contain a comprehensive regulation of all institutions of the collective labor law, by removing loopholes and shortcomings occurring in currently binding provisions. As a result of such an integral regulation, the collective labor law would not only be consolidated but would also acquire a proper rank, adequate to its important political, economic, and social role.

3. *See* T. Zieliński, *Pojęcie i przedmiot zbiorowego prawa pracy* [*The Notion and Subject of the Collective Labor Law*], *in* ZBIOROWE PRAWO PRACY W SPOŁECZNEJ GOSPODARCE RYNKOWEJ [THE LABOR LAW IN THE SOCIAL-MARKET ECONOMY] 15–32 (G. Goździewicz ed., 2000); K.W. BARAN, ZBIOROWE PRAWO PRACY [COLLECTIVE LABOUR LAW] 13 (2002).

While presenting arguments in favor of separate codification of individual and collective labor law, despite connections that occur between them, it shall be mentioned that in the system of the Polish law such a solution would not constitute a precedent. Indeed, there are some branches of the law closely covering connected relations which are, however, regulated by separate legislative acts, and even by separate codes. The Civil Code as well as the recently adopted Commercial Companies Code can be an example. The authors of the latter code emphasize that provisions on companies certainly constitute a part of the civil law in its broad meaning, however it does not exclude a particular character of legal relations concerning commercial companies, which justify a separateness of the Commercial Companies Code.[4] The same authors also point out that the Rules of Legislative Technique, binding in Poland, allow them to call any legal act a "code" if it regulates a wide enough area of issues (section 15.2.2 of LTR). This means that the name of a "code" is not reserved for the whole branch of law, but may be also given to a specific group of provisions, belonging to the same branch of law, particularly if that group has its own subject matter and rules of regulation, which is the case of the collective labor law.

II. INDIVIDUAL LABOR LAW

A. Contract of Employment

In the Polish labor law doctrine there are no doubts that the contract of employment shall constitute the main ground for the employment relationship. The necessity to base employment on a contract of employment stems from the freedom of work and the freedom of economic activity that are both recognized by the Polish Constitution (arts. 65 and 20, respectively). However, some doubts arise regarding the variety of contracts of employment that should be recognized by the Labour Code. There is also a question if the Labour Code should cover employment based on contracts other than a contract of employment (contract labor) and employment not based on a contract at all.

As far as types of contracts of employment are concerned, a current common opinion in Poland is in favor of maintaining those for an indefinite and a definite period. However the establishment of new types of contracts of employment, including the contract of

4. *See* 1–2 STUDIA PRAWNICZE 143 (1999).

employment for managers, is being debated. Polish lawyers agree that, as a rule, the employment of managers should be based on the civil law, as it is the case in Western countries. It seems, however, that managers in the public economy sector could have the status of an employee in order to grant proper protection of the public interest against excessive benefits that managers frequently aim to gain using the full freedom of negotiation on the ground of civil law. Such an attitude of managers is currently noted in Poland, particularly in the state-owned undertakings, playing the key role within the public sector of economy.

As for employment based on grounds other than a contract of employment, the current Polish Labour Code distinguishes: nomination, election, and appointment. However, Polish doctrine is for abolishment of the two latter as the separate acts of employment because they limit the role of the contract of employment and sometimes weaken the employee's protection. This postulate refers in particular to the appointment that was adopted under the communist regime in order to facilitate state bodies to fill key economic posts and some of them in other public fields (e.g., in the banking sector, newspapers, television, or radio).

As far as nomination is concerned, there is a common agreement that it has to be maintained as an employment basis for civil servants. However, the Polish doctrine postulates to expand the Labour Code provisions regulating the nomination in order to avoid its present excessive differentiation by separate acts, regulating a specific branch of public administration, and to keep the integrity of the labor law. For the same reason it is pointed out that the future Labour Code shall regulate the core elements of the cooperative employment contract referring to a separate law on cooperatives only if secondary issues are concerned.

B. Contract Labor

One of the issues of Polish labor reform is the place for the regulation of employment based on civil law contracts, as well as of self-employment and employment by temporary work agencies. These forms of employment have developed in Poland as a result of employers' tendency to avoid legal restrictions and high costs connected with employment on the basis of an employment contract. As it is proven by the experience of Western countries, the above-mentioned forms of employment do not constitute a transitory phenomenon, as they are determined by the needs of the market

economy and at the same time they can help, to some extent, to reduce unemployment. However, it cannot be ignored that persons who, due to a high unemployment rate, are forced to accept such forms of employment, lose the particular protection guaranteed by the labor law, and this has negative social effects. Therefore, respecting all differences separating the above-mentioned forms of employment from that based on the contract of employment, at least an extension of some Labour Code provisions on them has to be taken into consideration, in particular those provisions that protect employees' health and security.[5] As far as the temporary employment is concerned, the Polish legislature has recently defined it as a specific type of the contract of employment between a temporary work agency and a worker,[6] and that choice is not contested by the Polish doctrine.

As far as the scope of the future Labour Code is concerned, it shall be also considered whether it should include the provisions regulating relations preceding the conclusion of the contract of employment. These are in particular the relations existing between employment administration and persons looking for a job or having some specific rights (e.g., graduates and the unemployed). In the debate on labor law reform the close connection between such pre-employment relations and employment relationships is stressed, as well as a positive role of the first in counteracting unemployment. Therefore, the postulate to include general provisions regulating the pre-employment relations, guaranteeing due legal protection for persons covered by them, into the new Labour Code seems justified. However, in Europe, the arguments are developed in favor of the opinion that provisions regulating relations preceding the conclusion of the contract of employment belong to a separate branch of labor law, strictly related to the policy of employment.[7]

In order to obtain the integrity effect in the new Labour Code statutes belonging to the labor law, but which currently remain outside of the Code, shall be included therein. This certainly refers to the Collective Redundancies Act[8] as well as to the Employees' Claims Protection in Case of Employer's Insolvency Act.[9] However doubts

5. *See* M. Seweryński, *Prospects for the Development of Labour Law and Social Security Law in Central and Eastern Europe in the Twenty-First Century*, *in* 5TH EUR. REG. CONG. LAB. L. & SOC. SEC., GENERAL REPORTS 11–12 (Leiden 1996).

6. Act of July 9, 2003, on Employment of Temporary Workers, J. Laws 2003, No. 166, Item 1608 (Pol.).

7. *See also* Miguel C. Rodriguez-Piñero Royo, *Temporary Work and Employment Agencies in Spain,* 23 COMP. LAB. L. & POL'Y J. 129, 170–71 (2001).

8. Act of Dec. 28, 1989, J. Laws 1990, No. 4, Item 19 (with following amendments).

9. Act of Dec. 29, 1993, J. Laws 1994, No. 1, Item 1 (with following amendments).

arise as regards the State Labour Inspectorate Act[10] to be included in the Labour Code. The provisions of that Act are closely connected with labor relations, but on the other hand it must be remembered that the State Labour Inspectorate is a state administration organ and this speaks in favor of regulating its legal status in a separate statute. Also it is doubtful whether it is justified to include in the Labour Code the Accidents at Work Act[11] or the Employment of the Disabled Persons Act,[12] as the provisions of those statutes are also closely connected with the social security system and the welfare benefits system.

C. Basic Rules of Labor Law

The need for basic rules of labor law, defining its axiological grounds, as well as the directives for its interpretation, is widely recognized in the Polish doctrine. Yet, the question arises: should the new Labour Code contain a normative catalogue of labor law rules, as is the case of the binding Code (Section I, Chapter II, articles 10–18.3). Doubts in this respect result from the view according to which labor law rules can play their role without being the subject of a normative catalogue, but rather the result of caselaw and legal doctrine. The opponents also argue that some provisions of the Constitution play the role of the labor law rules, hence there is no need to repeat them in the Labour Code.

On the other hand, the positive role played by the rules defined by the Labour Code, in particular as guidelines for interpretation and as criteria for auxiliary application of the civil law to labor relations (art. 300 of the Labour Code), speaks in favor of keeping the catalogue of the labor law rules in the new Polish Labour Code. The fact that some labor law rules are expressed in the Constitution does not exclude the possibility nor the need to develop them in the Labour Code. Furthermore, the Polish Constitution does not contain a full list of labor law rules stemming from basic human rights or from international laws. Thus, the new Labour Code would constitute an opportunity to establish the complete catalogue of the labor law rules and to define it in a way so as to allow for their direct application in

10. Act of Mar. 6, 1981, J. Laws 1985, No. 54, Item 276 (unified text).

11. Act of June 12, 1975, on Benefits Related to Accidents at Work and Occupational Diseases, J. Laws 1983, No. 30, Item 144 (unified text, with following amendments).

12. Act of Aug. 27, 1997, on Vocational Rehabilitation and Employment of Disabled Persons, J. Laws 1997, No. 123, Item 1082.

case of loopholes or when the labor law provisions are not precise enough.

D. Labor Law and Small Employers

One of the principles of the democratic system, expressed in Article 32.1 of the Polish Constitution, is the principle of equality before the law. This principle brings up a question with regard to the degree and scope of acceptable differentiation of labor law provisions. The differentiation aiming at protecting women's or young persons' employment raises no doubts. However, a differentiation of labor law provisions with regard to other criteria, e.g., public service, number of employees, a particular character of the work establishment, or its activity constitutes a problem. Small employers constitute a special case because, in Poland, they prevail in the private sector, usually employing just a few persons and their enterprises are the most vulnerable periods of economic transformation. That is why Polish small employers and their organizations request the labor law to be reformed with respect to their specific interests and this claim was already partially satisfied by consecutive Labour Code amendments.

The full regulation of the small employers issue needs, first of all, a statutory definition of this category, as well as an exhaustive list of labor law provisions that should be more liberal for them. The liberalization of some provisions, regulating, e.g., freedom to conclude contracts of employment for a definite period, working hours, adoption of works' bylaws, or establishment of work safety and hygiene services, as well as severance pays and paid leaves, raise no doubts.[13] Yet, trade unions as well as a part of labor law doctrine express reservations with regard to the postulates to give small employers more freedom as regards termination of a contract of employment, as well as to lower the minimum wage and salary for overtime work. The opponents argue that provisions protecting an employee against termination of employment are counted as the hard core of the labor law. Should they be weakened, this will mean that the commonly recognized paradigm of that law was undermined. However, it does not mean that the general concept of employee protection against the loss of employment, as adopted in the binding Polish labor law, including the scope of the employer's freedom to

13. *See* L. Florek, *Kierunki i ograniczenia nowelizacji kodeksu pracy* [*Directives and Boundaries of the Labor Code Amendment*], *in* WIĘCEJ PRYWATNYCH— MNIEJ BEZROBOTNYCH [MORE PRIVATE—LESS UNEMPLOYED], PROCEEDINGS OF THE CONFERENCE ORGANIZED BY THE POLISH CONFEDERATION OF THE PRIVATE EMPLOYERS 17–19 (Warsaw, Apr. 4–5, 2001).

terminate a contract of employment, requires no changes. This issue will be separately discussed in the following section of this essay.

As far as the differentiation of minimum wage is concerned, employers postulate its lower level not only in small enterprises but also in regions with high unemployment. However, such a differentiation does not seem to be reconcilable with the provisions of the Polish Constitution, referring to the principle of social justice (art. 2), equality before the law (art. 32.1), and a minimum level of remuneration for work (art. 65. 4). In light of those provisions, a minimum wage shall be treated as a minimum work revenue, the amount of which is defined by a statute, according to social criteria. The principle of equality before the law and that of social justice require the amount of the minimum revenue to be identical for all citizens. It would be particularly difficult to reconcile with those provisions the differentiation of minimum wages and salaries according to the territorial unemployment rate, i.e., according to the formula: where the unemployment rate is high, minimum wages and salaries could be lower. This would mean that people who have few chances to be employed, who are therefore in a worse situation, could receive a lower minimum salary and thus their social marginalization would be even greater.

E. Protection of Employment

Protection of employment is one of the basic functions of the labor law, developed exactly for the conditions of market economy that the post-communist countries are currently building. Thus, the protection of employment must remain one of basic assumptions for the new codification of the Polish labor law. Employment protection is already assured in the binding Labour Code, however its general conception was developed on the ground, of political and economic rules of the communist system. Yet, in the new Labour Code that conception, and particularly the scope and the forms of employment protection, shall be revised and adapted to the principles of a democratic and free-market system. The Polish legislature must also take into account the tendency to a more flexible employment policy that is recently stressed in the EU's regulations.[14]

14. However the recent research shows that national labor law systems in the EU countries maintain their typical protective function toward employees' interests. *See also* Silvana Sciarra, *The Evolution of Labour Law (1992–2003), General Report*, presented in Leiden (Sept. 30–Oct. 10, 2004), containing conclusions of research on recent evolution of labor law in fifteen ("old") EU countries.

In general, the Polish labor law doctrine agrees that it is necessary to grant an effective protection of employees against unjustified dismissals. But at the same time it is pointed out that an employer should be allowed to dismiss employees when it is justified by his or her interest. In particular, the protection of employees against dismissals shall be still based in Poland, as well as in other European countries, on the principle of causality. It means that termination of a contract of employment by the employer may not be arbitrary but must be always justified by real and serious reasons. The reasons justifying an employee's dismissal without notice should be enumerated by a statute, but the employer shall have the freedom to indicate the reasons for termination of a contract with notice. However, it is postulated to add a clear statutory requirement that these reasons must be real and serious, pursuant to the jurisprudence of Polish courts. The postulate presented in the European doctrine shall be also taken into account,[15] according to which the employee's dismissal is acceptable only when an employer has no possibility to continue employing an employee, even on new terms.

Looking at the protection against dismissals through the employer's interest and the free market requirements, it is proposed to review the list of prohibitions to terminate a contract by an employer. The current list, adopted under the communist system, is considered excessive by all except trade unions. That is why in the new political and economic conditions some of the prohibitions shall not be maintained. It concerns, first of all, prohibitions of termination of a contract of employment without notice, due to a fault of the employee, as it is clear that consequences of such a behavior shall be suffered by him or her and not by the employer.

One of the key issues for the employees' protection against dismissal consists in keeping its mandatory consultation by an employer with a trade union (art. 38 of the Labour Code). Polish trade unions consider the consultation a necessary measure of employee protection against dismissal and as one of the key elements of their power. However, this control stems from the communist model of trade unions, closely cooperating with a state employer. What is more, it puts them *de facto* in the position of dismissing an employee together with the employer, which is particularly clear when a trade union presents no reservations with regard to the intended

15. *See* G. Couturier, *Quel avenir pour le droit du licenciement? Perspectives d'une régulation européenne*, *in* 5TH EUR. REGIONAL CONG. LAB. L. & SOC. SECURITY, GENERAL REPORTS 6–8 (Leiden 1996).

dismissal. This concept is in flagrant conflict with the trade union's duty to defend the rights and interests of employees.

Moreover, a lack of trade union reservations put it in a difficult position when an employee asks the trade union to represent him or her before the court considering his or her appeal against the dismissal. Furthermore, it is stressed that the mandatory consultation of an employee dismissal with a trade union applies only to work establishments where a trade union section exists and only when the dismissed employee is a member of that section. Thus, employees who are not trade union members are not protected by the procedure of the trade union consultation, which justifies the objection of unequal treatment of employees by the legislature.

Trade union supervision over employees' dismissals made some sense in the communist system where there was no judicial control of the termination of the employment relationship by the employer. However, once the Labour Code was amended in 1996, the employee now has the right to appeal to the court against each dismissal. Moreover, the employer is obliged to specify directly to the employee the reasons justifying the termination of the contract and to inform him or her about his or her right to appeal (art. 30, section 4 Labour Code).

All the above arguments justify a serious modification of the trade union supervision over dismissals of employees. Thus, it seems that the present mandatory employer's consultation with a trade union of the intention to dismiss an employee, both with notice and without notice, could be replaced with an obligation to inform the trade union about the already performed dismissal and about reasons for it. That *post factum* notification would, nevertheless, enable a trade union to intervene in the employee's favor and eventually to force the employer to withdraw the dismissal, with serious consequences. The notification would also give trade unions the time to prepare to represent an employee in the court if he or she appeals against the dismissal.

The outcome of the proposed regulation concerning the trade union role in the case of an employee dismissal would be not less favorable for him than the present regulation, taking into account that eventually the employer decides autonomously on dismissal, even if the trade union presents peremptory reserves against it. Yet, it would be more harmonized with the nature and functions of trade unions toward an employer and employees.

There are no doubts, however, that the trade union consultation over collective redundancy, in the form shaped by Council Directive

98/59EC, shall be maintained. In such a case the collective employee interests prevail over individual interests, as collective redundancies usually cause serious social consequences. That is why in this case a single employee shall not be a party to negotiation or a dispute with an employer, but only a trade union as a collective partner, having at its disposal a collective action.

The Polish Labour Code has adopted a rule according to which an employee who was unjustly dismissed by an employer can seek in court reinstatement in work or a compensation. The Polish labor law doctrine has no doubts that this rule shall be maintained. However, with regard to small employers it is proposed, in cases of unlawful dismissal, to exclude mandatory reinstatement in work and grant employee only compensation. To explain that proposal it should be taken into consideration that small enterprises are under a strong impact of changing market conditions, therefore a reinstatement, especially after a long break caused by the lawsuit, may not be possible. It is also considered to give other employers the possibility to avoid reinstatement decided by the court, but only in return for a high compensation, defined by the statute. The proposed regulation is inspired by the need to further adjust the Polish labor law to the requirements of the market economy. However, nobody supports such a flexible regulation in cases of unlawful dismissal of an employee covered by a special protection, e.g., pregnant women or union activists.

F. Settlement of Individual Labor Disputes

One of the principles of a democratic state, recognized by the Polish Constitution (art. 45), is that its citizens can pursue their rights in courts. As far as labor relations are concerned, it means the necessity to recognize employees' and employers' rights to bring to a court any dispute stemming from an employment relationship. This possibility was fully guaranteed in 1996, after the amendment of the Labour Code and of the Code of Civil Procedure. At the same time an extra-judicial way was maintained, consisting in settling individual labor disputes before a conciliation commission, established jointly by the employer and the trade union at the workplace. However, conciliation commissions are not numerous and their activity is insignificant. One of the reasons for this situation is the employees' reluctance to dispute their claims when they are subordinated to the employer. That is why they prefer to claim their rights when they are already dismissed and then they may sue an employer. Nevertheless,

there are still some arguments speaking in favor of preserving a kind of conciliatory procedure to settle individual disputes, but rather outside of the workplace. It is also clear, in light of the Constitution, the new labor law shall also provide all civil servants with a possibility to settle claims in court, including a judicial supervision over disciplinary proceedings.[16]

In relation to disputes stemming from labor relations it is still proposed to restore a proper role of compensations granted to an employee for damage caused by the employer. In the communist system, with regard to the state-owned enterprises' interests, the employer's liability for damages toward employees was significantly limited. It is unjustified to keep those limitations in the state ruled by law, as it declares Polish Constitution (art. 2). In particular, it concerns an unlawful termination of a contract of employment by an employer. In that case an employee shall be granted the right to seek full compensation for the actual damage. But even when maintaining limited compensation in some cases, it should be high enough to grant employees a sufficient remuneration for the loss of employment and to play a preventive role toward employers' unlawful actions.

As far as an employee's liability toward the employer is concerned, it is proposed to keep its present limited scope in case of damage caused by an unintentional fault. It is justified, above all, by the necessity to protect an employee's salary, usually being for him or her (and his or her family) the only source of revenue. One should also not forget that taking into account the use of very expensive technologies in contemporary enterprises, employees are exposed to causing unintentional damage that would be so high that it is unreal for them to cover it with their salary. However, it seems justified to set different limits of compensation due from an employee for damage, depending on the degree of his or her fault, including full compensation in the case of an intentional fault.

It shall be thought over that maybe a more severe regime of liability for damages should be established for persons occupying managing positions to whom an employer entrusts a significant freedom of decision over his property and pays a higher salary than to rank-and-file employees. This problem refers in particular to the liability for damages of a manager toward an employer, as well as to the members of managerial board.

16. *See* W. Sanetra, *Ochrona praw pracowniczych* [*Protection of Employees' Rights*], *in* POLSKIE PRAWO PRACY W OKRESIE TRANSFORMACJI W OŚWIETLENIU PRAWA WSPÓLNOTOWEGO [POLISH LABOR LAW IN THE PERIOD OF TRANSFORMATION IN THE LIGHT OF COMMUNITY LAW] 129–31 (H. Lewandowski ed., 1997).

There is no doubt that the rule of law in labor relations should be guaranteed by the state's supervision over the respect of labor law provisions. The increasing significance of that supervision is closely related to a greater freedom of the parties in shaping the employment relationship, by way of a contract and collective labor agreements. That is why it is proposed to reinforce the role of state supervision organs in labor relations, especially that of the State Labour Inspectorate. In particular, it is proposed to extend the State Labour Inspectorate's competencies in order to make its activity more effective than it is today. Polish specialists of labor law also stress that the State Labour Inspectorate should remain subordinated directly to Parliament, since there were attempts to make it subordinated to the Minister of Labour. The latter solution does not seem adequate as the Minister of Labour is the member of the government who is implicated in the interests of state-owned enterprises, still numerous in Poland, and thus cannot assure the full autonomy of the Labour Inspectorate.

III. COLLECTIVE LABOR LAW

A. Preliminary Remarks

The current collective labor law provisions in Poland originate from the period after 1989. The only exception is the Act of 1981 concerning the Self-Government of the Staff of a State-Owned Enterprise.[17] The provisions concerning collective labor agreements, although included in the Labour Code, were several times amended after 1989, particularly by the 1994 and 2000 Acts. These Acts clearly recognized collective agreements as the source of the labor law and eliminated remnant provisions limiting social partners' freedom to bargain. The hard core of the Polish collective labor law is also made by three Acts as of 1991: on trade unions,[18] on employers' organizations,[19] and on the settlement of collective disputes.[20] These statutes thoroughly changed the shape of collective labor law in Poland, adapting it in general to the universally-recognized principle of trade union freedom. Further amendments of these statutes went in the same direction. Also the 1994 Act on the Enterprise Welfare

17. Act of Sept. 25, 1981, J. Laws 1981, No. 24, Item 123 (with following amendments).
18. J. Laws 1991, No. 55, Item 234 (with following amendments).
19. J. Laws 1991, No. 55, Item 235 (with following amendments).
20. J. Laws 1991, No. 55, Item 236 (with following amendments).

Benefits Fund is a part of the collective labor law.[21] This statute specifies employers' duties with regard to satisfaction of employees' welfare needs and covers both: public and private employers. Finally, the collective labor law provisions were recently completed by the Act on Tripartite Commission for Social and Economic Matters as of 2001.[22]

When characterizing the actual shape of the Polish collective labor law, it must be emphasized that its provisions are largely confirmed by the Polish Constitution of 1997. Thus, this fundamental Act recognized basic trade union freedoms: freedom of coalition, right to collective bargaining, right to conclude collective agreements, and other collective accords as well as the right to strike (art. 59). Moreover, the Constitution formulates the principle of social partners' dialogue and cooperation (art. 20). Constitutional prohibition for the statutes to limit the freedom of association in a way that would be contrary to binding international agreements (art. 59.4), as well as the general principle that constitutional provisions shall apply directly each time when it is not required to specify them in a statute, are also of particular importance (art. 8.2).

Even though after 1989 all key statutes concerning collective labor law were adopted and amended several times, this branch of the Polish legal system is not yet fully adapted to the political, economic, and social principles of a democratic state.[23] Consecutive amendments were only partial and often conducted under the pressure of the political and economic needs of the moment. It is therefore necessary to carry out a thorough and comprehensive reform of the collective labor law that would fully correspond to the democratic system and would consolidate its dispersed statutes as well as guarantee the stable legal order in industrial relations, regardless of the changing political situation. Collective labor law in Poland must also be revised with the aim to become fully harmonized with international standards and particularly with respective EU regulations.

B. Collective Labor Law Rules

Consolidation of the collective labor law would be encouraged by classification of its rules, following the example of individual labor law

21. Act of Mar. 4, 1994, on Works Social Benefits Fund, J. Laws 1996, No. 335 (unified text with following amendments).

22. J. Laws 2001, No. 100, Item 1080.

23. *See* T. Zieliński, *Reforma prawa pracy – szanse i zagro enia* [*Reform of the Labour Law: Chances and Risks*], 2 PAŃSTWO I PRAWO 18–27 (2001).

rules, as enumerated in the currently binding Labour Code. Similarly to the individual labor law, collective labor law rules would play the role of axiological grounds for collective labor relations, as well as to the role of legislative and interpretative guidelines. Taking into consideration that it would be the first time that an intended separation of the collective labor law takes place in Poland, the significance of the enumerated roles played by its principles would be particularly important.

Some of the collective labor law principles have been already defined by a statute together with the individual labor law rules (art. 18.1–18.3 Labour Code). Lacking principles can be reconstructed on the basis of international labor law acts and of the provisions of the Polish Constitution. Such reconstruction attempts have already been made in the Polish labor law doctrine.[24]

Employees' and employers' freedom of association was fully recognized in the Polish law, first in the Trade Unions Act and in the Employers' Organizations Act—both as of 1991, and later in the Polish Constitution of 1997, which enumerates this freedom among other citizens' freedoms (art. 12 and 59.1). Clear recognition of the freedom of association means that the Polish legislation is generally adjusted to the ILO standards as well as to other international standards in which this freedom was formulated as one of the basic human rights. However, some questions remain open.

The main issue with regard to employees' freedom of association may be reduced to the following question: Who may associate in a trade union? ILO Convention No. 87 says that the freedom of association in trade unions refers to employees, but other ILO conventions have given this expression a broader meaning. In this respect, the Polish 1991 Trade Unions Act may be considered liberal because it allows the unemployed, who have never been employed, to join trade unions. It also allows the retired as well as the disabled pensioners to maintain union membership although both have their own non-union associations. On the other hand, however, the 1991 Act deprives home workers of the right to create their own trade unions and does not cover with the trade union freedom persons employed on the basis of civil law contracts as well as persons

24. *See* M. SEWERYŃSKI, POLISH LABOUR LAW: FROM COMMUNISM TO DEMOCRACY 230 *et seq.* (1999); G. Goździewicz, *Zasady zbiorowego prawa pracy* [*Principles of the Collective Labour Law*], *in* ZBIOROWE PRAWO PRACY W SPOŁECZNEJ GOSPODARCE RYNKOWEJ [COLLECTIVE LABOUR LAW IN THE SOCIAL-MARKET ECONOMY] 35–85 (G. Goździewicz ed., 2000).

performing their autonomous activity, such as taxi drivers or craftsmen.

According to a prevailing opinion in Poland, the gainful character of employment, shaping the economic and social status of working persons, should be the decisive criterion in resolving the question concerning the scope of persons having the right to associate. Therefore it is proposed to recognize that the freedom to associate in trade unions is to serve all "working people," according to the expression used in the definition of a trade union from the 1991 Act (art. 1). But at the same time this general expression should be accompanied by a negative catalogue, defining specific groups of persons who, according to ILO Convention No. 87, are excluded from this freedom. The positive catalogue, as used in the 1991 Trade Unions Act, does not seem to be a good method of regulation, as it does not disperse all doubts about the right to associate in trade unions. Furthermore, that method of regulations suggests that it is the legislature who grants the right to associate in trade unions, which is not consistent with its basic human right character, thus independent from the legislature's will.

1. Establishment of Trade Unions

The 1991 Act states that a trade union can be established by at least ten people having the right to associate themselves in trade unions (art. 12.1). This low threshold has as a consequence, in Poland, the appearance of very small trade unions, having no greater significance, even within a single works establishment. Moreover, the existence of many small trade unions increases competition and conflicts between them, weakening the power of the whole trade union movement. For this reason it is sometimes suggested in the debate on future labor law in Poland to raise the number of persons authorized to establish a trade union. However, the majority of specialists opposed to that idea arguing that it could be seen as a violation of the trade union freedom. Thus, it seems justified rather not to adopt such a numerical criterion at all and leave the number of the trade union's members to the discretion of interested persons. Of course, it is true that the easiness to establish a trade union in Poland is frequently abused by workers, nevertheless the remedy should not be to tighten formal requirements related to it, but rather to review the union activists' rights. This issue will be considered later in this paper.

Another issue that has to be considered in light of the freedom of association is the trade union registration in court, which is provided for in the Polish 1991 Trade Union Act (art. 14). The starting point for this consideration should be article 2 of the 87 ILO Convention, defining the workers' right to establish a trade union without a prior authorization. According to the ILO bodies, this provision does not exclude the possibility for the national legislation to provide for some formalities connected with the establishment of a trade union, including the obligation to register it or to obtain a legal personality, but they cannot attempt to make the union establishment dependant on the will of a state authority.[25] According to the 1991 Trade Union Act, the registration consists in the court verifying whether the trade union established by its founders fulfills the statutory requirements concerning: terms and mode of its foundation and aims stemming from the definition of a trade union and its bylaws. If at least one of these requirements is not fulfilled then the court refuses to register such a trade union and, as a consequence, it cannot lead a lawful activity.

To a great extent, the Polish legal doctrine considers that the trade union registration, as required by the 1991 Trade Union Act, does not violate the trade union freedom, as it is conducted by an independent court that does not decide at its discretion, but according to the statute and its decision can be verified by the court of appeal.[26] Moreover, it has to be pointed out that registration is not contested by the Polish trade unions themselves, as it gives them legal personality and thus reinforces their legal position. It is also stressed that the Polish Constitution allows for a statute to define the types of associations being the subject of registration (art. 58.3).[27] However, in light of the 1991 Trade Unions Act provisions, it is obvious that registration of a trade union in Poland is not limited to a simple act of trade union enlistment,[28] but is of a constitutive character, since without the registration, the employees' resolution establishing a trade union loses its validity.[29] Furthermore, the court may refuse the

25. *See* N. VALTICOS, DROIT INTERNATIONAL DU TRAVAIL 248 (1983).

26. *See* G. BIENIEK, J. BROL & Z. SALWA, PRAWO ZWIĄZKOWE Z KOMENTARZEM [TRADE UNIONS LAW WITH COMMENTARY] 105 (1992); T. Liszcz, *Związki zawodowe po nowemu* [*New Status of Trade Unions*], 1 PRACA I ZABEZPIECZENIE SPOŁECZNE 31 (1992).

27. *See* Z. HAJN, STATUS PRAWNY ORGANIZACJI PRACODAWCÓW [LEGAL STATUS OF EMPLOYERS' ORGANIZATIONS] 38–39 (1999).

28. *See* L. Florek, *Konstytucyjne gwarancje uprawnień pracowniczych* [*Constitutional Guarantees of Employees' Rights*], 11–12 PAŃSTWO I PRAWO 202 (No. 11–12, 1997).

29. *See* Z. SALWA, PRAWO PRACY [LABOUR LAW] 17, 22 (1998); HAJN, *supra* note 27.

registration, considering the founding resolution or union by-laws unlawful.

Therefore, it is justified to conclude that trade unions in Poland are established as of the founders' will, but under the condition of later approval by the court which, as a matter of fact, is a kind of authorization being forbidden by the 87 ILO Convention. Therefore, the compatibility of the Polish legislation with paragraphs 2 and 7 of ILO Convention No. 87 raises some doubts, and that is why an alternative procedure of notification also has its adherents in Poland. It has to be pointed out, however, that the ILO does not question the Polish legislation, as regards trade union registration, nor the Polish trade unions claim notification. Nevertheless, there are no doubts that the establishment of a trade union via notification is fully compatible with the rule of trade union freedom, as it only requires the trade union's founders to notify competent authorities about the establishment of such a trade union. On the ground of this procedure, it is not the compatibility with the statute of the trade union's foundation resolution, nor its bylaws that are verified, but the lawfulness of the trade union's activity.

Registration of a trade union by a court would raise no doubts, if it were a pure act of entering into a register, without the possibility to refuse to register, which in fact expresses a lack of consent for the trade union's existence. If a court decides that the motion does not fulfill the statutory requirements it shall be simply returned to the requesting party, without making any decisions. Furthermore, registration could be accepted as a condition for the union to acquire legal personality, if it were allowed to exist and also act without such a personality. Only such a registration seems fully compatible with the articles 2 and 7 of the 87 ILO Convention.[30]

2. Trade Union Section

The Polish 1991 Trade Union Act allows each trade union to freely set up its works establishment sections, called by the Act "works trade union organizations." The section, which has to be composed of at least ten members, is granted by the 1991 Act and by the Polish Labour Code far reaching rights, and its position is

30. Article 7 of the 87 ILO Convention states, "The acquisition of legal personality by workers' and employers' organisations, federations and confederations shall not be made subject to conditions of such a character as to restrict the application of the provisions of Articles 2, 3, and 4 hereof." ILO Convention No. 87, Freedom of Association and Protection of the Right to Organize, art. 7 (July 9, 1948).

strengthened by the legal personality that may be conferred, and it usually is the case, by the national trade unions' bylaws. All trade union section rights may be used autonomously, i.e., without prior approval of the national trade union's board. Furthermore, the members of a trade union section board are protected in particular against dismissal.

The particular position granted to a work establishment trade union section raises serious doubts of the contemporary legal doctrine. Thus, it is pointed out that this concept, including the name itself "works trade union organization," remains from the communist system, when sections were charged with participating in the performance of works economic tasks and ideological functions, together with works communist party sections. However, under the democratic system, trade unions may not be charged with this type of task. Furthermore, trade union freedom should be understood as a capacity of the whole trade union to act in the name of and on behalf of employees. This interpretation is justified by the articles 59.2 and 59.3 of the Polish Constitution which grants right to bargain, to conclude collective agreements, to conduct collective disputes, and to organize strikes, directly to the trade union as a whole, and not to its internal units. As a consequence, without questioning the trade unions' right to establish organizational units at the work establishment level, it seems that these units shall conduct an activity on behalf of the trade union as a whole (national trade union) and not autonomously.

The autonomous legal capacity of a work establishment trade union section is difficult to be maintained not only in light of properly understood trade union freedom, but also because of the necessity to grant proper protection of the employer's interests in relations with a works trade union section. The section should be a credible and responsible partner in relations with the employer, which is doubtful when it may act without a full engagement of the whole trade union. In particular, it is very unlikely that an employer will get compensation for damage caused by an autonomously acting works trade union section, because the property of a trade union section is usually very modest. At the same time, the trade union as a whole can avoid responsibility for the damage, arguing that its section is an autonomous entity, having its own legal personality and statutory rights. It also has to be stressed that frequently a work establishment trade union section has no necessary skills to lead autonomous collective negotiations with an employer. Moreover, its autonomy is

not conducive to industrial peace as it can organize a strike even without the consent of a national trade union.

In the Polish private sector of the economy, very small businesses prevail, employing no more than four or five workers. Therefore, these businesses have no conditions to establish a trade union section, even though all workers are members of a trade union. Thus, the question appears how to guarantee the proper union representation and protection to workers employed by such a small employer. According to the 1991 Trade Union Act the solution consists in the establishment of multi-plant trade union units. This concept has some advantages but its implementation faces serious difficulties, as employers prevent trade union representatives who are not their own employees from accessing their enterprises. They are also reluctant to give necessary information and refuse to bear costs connected with the multi-plant trade union section functioning. Therefore, an alternative solution should be considered, consisting in the designation of a trade union delegate, representing trade union members within an enterprise in which their number is not sufficient to establish a regular trade union section. Such a trade union delegate could have the same rights as the trade union section. Such a solution would guarantee trade union protection to all interested workers, regardless of the size of the plant or the number of its workers being members of a trade union. Furthermore, having a fully competent trade union delegate, one can imagine raising the number of union members to establish works union section, which would make the trade union activity less bureaucratic and would lower its costs.

3. Protection of Trade Union Representatives

The 135 ILO Convention requires granting to trade unions' activists "an effective protection against any act prejudicial to them, including dismissal, based on their status or activities as a worker's representatives or on union membership or participation in union activities, in so far as they act in conformity with existing laws or collective agreements or other jointly agreed arrangements" (art. 1). This general standard is further developed in the 143 ILO Recommendation.[31]

31. The Recommendation enumerates among the means of protection of trade unions' activists the following:

- detailed and precise definition of the reasons justifying termination of employment,
- requirement of consultation with, an advisory opinion from, or agreement of an independent body,
- special recourse procedure,

The Polish law contains all standards, defined by the above mentioned ILO acts, covering all kinds of trade unions' representatives, including the founders of a trade union. Moreover, protection guarantees are now entirely real, secured by the judicial power of independent courts and tribunals (art. 173 of the Polish Constitution). The most important of these is the union representatives' protection against dismissal, as termination of their contract of employment may take place only after the prior consent of the works establishment trade union section's board. In practice the consent is never issued.

It shall be pointed out that basic regulations, granting union representatives large protection, were adopted under the communist system in which the role of trade unions and the legal status of their activists, as well as the whole employment policy, were strongly determined by political factors.[32] After 1989 all these regulations were maintained due to the strong position of trade unions in the process of democratic transformation in Poland. But nowadays the large scope of union representatives' protection is disputed. Even though the last amendment of the 1991 Trade Unions Act has reduced the number of protected members of the workplace trade union section it can be still very high, as in a single work establishment, particularly in the public sector, there are often several trade union sections, having their own quota of protected representatives. As a consequence, the employer's freedom to lead its own employment policy, adjusted to his or her goals and market conditions, is seriously limited. For fear of such consequences private employers try to impede the attempts to create trade union sections, they are very often established with the aim to gain the protection against dismissal or worsening terms of contract. The Supreme Court recognized that in some cases such a practice constituted an abuse of the trade union freedom,[33] but this decision does not entirely solve the above problem.

Taking into account the above regulatory environment and its consequences, some Polish labor law scholars propose to grant special protection against dismissal and worsening of employment terms only to those trade union representatives who are the most exposed to the risk of the employer's discriminatory acts. It means that within a work establishment the prohibition of dismissal should cover only chairmen

- reinstatement in the job, with payment of unpaid wages and with maintenance of acquired rights,
- priority to the retention in employment in case of reduction of the workforce.

32. *See* SEWERYŃSKI, *supra* note 24, at 74–75.

33. Case No. I PKN 17/97, published in: OSNAPiUS 1997, No. 1, Item 9.

of representative trade union sections. All other union activists and ordinary union members would be protected by the general ban of discrimination related to union activity or membership. It is also proposed to abolish the special protection of trade union representatives against termination of the employment relationship due to their fault. In this respect they should be treated equally with other workers. Also special protection of employment relationship of trade union representatives should be excluded in the case of the employer's bankruptcy or liquidation of enterprise.

At the same time there is a need to reinforce the protection of trade union representatives and members from dismissals in retaliation for their union activity, in particular for establishment of a trade union section at the workplace. Court decisions concerning reinstatement to work in such cases, as well as remuneration, guaranteed for the time during which the dismissed activists were unemployed, do not refrain employers from discriminatory actions. For this reason it seems necessary to grant high compensation to trade union representatives and members dismissed by the employer in retaliation for their union activity, if they do not ask for reinstatement in work or if reinstatement is not possible.

4. Representative Trade Union

When employees of a given work establishment are represented by more than one trade union section, the binding Polish provisions allow for creating common trade union representation or for other forms of common action (art. 30, sections 3 and 4 of the 1991 Trade Union Act and art. 241.25, section 1 of the Labour Code). However, ideological differences between Polish trade unions and competition between them due to other reasons, frequently prevent trade unions from acting commonly. Therefore, there is a need of provisions allowing for selecting the representative trade union, authorized to act before an employer or an employers' organization. The selection of a representative trade union was recognized by the International Labour Organisation, which leaves to national legislators the freedom to define the criteria of representativeness. The ILO requires, however, for these criteria to be defined in advance and be objective in order to exclude arbitrary decisions of the state authority and to

give all trade unions the chance to fulfill those criteria and thus to gain the status of a representative organization.[34]

In the Polish labor law, the principle of representativeness is applied first of all as regards collective labor agreements (art. 245.16, section 3, and 245.25, section 3 of the Labour Code). However, the criteria that were defined for selecting a representative trade union, despite some significant changes made by the statute amending the Labour Code in 2000, still cannot be considered as suitable. Generally speaking, they are too liberal, as they allow for selecting several representative trade unions in the same work establishment. As a result, since provisions require signatures of all representative trade unions participating in bargaining in order to conclude a collective labor agreement (art. 241.16, section 5, and 241.25, section 5 of the Labour Code), if they do not agree with each other, such an agreement cannot be concluded. When bargaining a multi-work establishment collective agreement, such a deadlock is even more likely, since each trade union federation is recognized as representative by virtue of law, regardless of the number of associated employees, if the federation is a member of a confederation whose representativeness was recognized (art. 241.17, section 3 of the Labour Code). Furthermore, it has to be pointed out that, according to the Polish labor law, the principle of representativeness does not apply to collective disputes and strikes, which enables even marginal trade union organizations to enter a dispute or a strike, which is not favorable to maintain social peace.

There is a common opinion that the criteria to select the representative trade union, as well as the representative employers' organization, have to be regulated in a clear and comprehensive way. However, it is not certain if such a regulation would be supported by all trade unions and employers' organizations. The position of large trade unions as well as trade union federations and confederations is not endangered, no matter what criteria of representativeness are adopted. But small trade unions are afraid of losing their authority to act if a high number of members is adopted as a criterion of representativeness. Besides, the adoption of a quantitative criterion of representativeness would require a precise register of the trade union's members, and this is not an easy task nor willingly accepted by trade unions, as sometimes they tend to overstate the number of

34. *See* M. Pliszkiewicz & M. Seweryński, *Les problèmes de la representativitéé des syndicats en Pologne*, *in* DROIT SYNDICAL ET DROITS DE L'HOMME À L'AUBE DU XXIE SIÈCLE, 113 *et seq.* (Dalloz 2001).

members in order to raise their importance. In particular, it happens quite often that members, who for a long time have not paid membership fees, are not crossed out from the register. Thus, the trade union register or declarations concerning its number of members cannot always be considered as a credible source of information. On the other hand, it is difficult to find other evidence, ensuring objective findings of the court in this respect.

One also has to take into consideration that, as a consequence of a general decrease of trade union membership in Poland, trade union sections are often small. In this situation the criterion of the highest number of members does not guarantee a real representativeness of a trade union section within a work establishment. Thus, it seems more reasonable to select the representative trade union section by way of a referendum, particularly in the case of a small rate union membership in a given work establishment. This method is successfully applied, e.g., in the United States and in Canada and its advantage is that it guarantees to select as a representative trade union one that has the real support of the majority of employees in a given work establishment, including those who are not union members.

C. Collective Bargaining

1. Scope of Collective Bargaining

One of the rules of the political system in Poland is "strengthening the powers of citizens and their communities" (Preamble to the Polish Constitution). As a consequence of this principle, the public authority is decentralized, which shows in giving the right to make law to self-governing territorial communities of inhabitants (art. 16, 87.l and 94 of the Polish Constitution). This means that, in Poland, the lawmaking process is decentralized, as regulations are established by the state as well as by citizens themselves. This rule coincides with the autonomy of employees and employers to regulate labor relations, stemming from their freedom to associate. An integral part of this freedom is the right of trade unions as well as of employers and their organizations to conclude collective labor agreements and collective accords regulating labor relations (art. 59.1 and 2 of the Polish Constitution).

The freedom of employees and employers to conclude collective agreements and collective accords is strengthened by the constitutional rule of social partners dialogue and cooperation, being one of the principles of the social-market economy that constitutes the grounds for the economic system in Poland (Preamble and art. 20 of

the Polish Constitution). Social-market character of the economy within which these relations are established and the conflict of employees' and employers' interests occurring therein speak in favor of regulatory autonomy of social partners. If labor relations regulations are established by social partners and are based on a compromise between them, then it will be easier to adapt them to changing interests and market conditions. Furthermore, such negotiated provisions also quite often guarantee a more stable legal order in the field of labor relations, as compared to that imposed by the statutory law.

Taking into account the above arguments, the Polish legal doctrine is of the opinion that collective labor agreements and accords should not only be considered as a source of labor law but moreover that agreements and accords should be given as large a regulatory space as possible. Consequently, legislative interference of the state in labor relations should be limited to the scope that is necessary to guarantee a common legal order, which is in the public interest.[35] However, determining a clear delimitation between a statutory regulation and a regulation by way of collective agreements and accords is one of the most difficult challenges faced by the legislature. Nevertheless, taking into account the origin of the labor law as well as its fundamental functions, a general proposal could be made for statutory labor law to guarantee due protection of employees' rights, freedom of managing an enterprise by an employer and public order. All issues that go beyond the minimum of statutory legal order in labor relations, defined this way, should be regulated by employees and employers themselves in collective labor agreements and collective accords.[36]

The above opinion, even if justified in principle, is, however, not precise enough to become a direct regulatory guideline as regards different sections of labor law. Moreover, it shall be pointed out that the present scope of statutory labor law in Poland is quite broad and trade unions see in this large statutory regulation a strong guarantee of union and employees' rights. Thus, it would be difficult to limit the

35. *See* M. Seweryński, *The Government's Role in Industrial Relations During the Period of Transformation in Poland*, *in* LABOUR LAW AT THE CROSSROADS: CHANGING EMPLOYMENT RELATIONSHIPS, STUDIES IN HONOUR OF BENJAMIN AARON 183–200 (1977); Florek, *supra* note 28, at 203.

36. *See* G. Goździewicz, *Rola związków zawodowych w tworzeniu prawa pracy* [*The Role of Trade Unions in the Lawmaking Process*], *in* ŹRÓDŁA PRAWA PRACY [SOURCES OF THE LABOUR LAW] 23 *et seq.* (L. Florek ed., 2000); Z. Hajn, *Rola organizacji pracodawców w tworzeniu prawa pracy* [*The Role of Employers' Organizations in the Lawmaking Process*], *in* ŹRÓDŁA PRAWA PRACY [SOURCES OF THE LABOUR LAW] 39 *et seq.* (L. Florek ed., 2000).

scope of statutory regulation radically. Furthermore, far reaching limitation of the statutory regulation, in favor of broader collective agreement regulations, is not encouraged by the lack of the trade union partner in the majority of private enterprises. As a consequence, in these enterprises, collective agreements cannot be concluded as trade unions in Poland keep the monopoly for collective bargaining. On the other side, underdevelopment of employers' organizations limits the bargaining of multi-work establishment collective agreements and their role as a tool regulating labor relations.

Another difficulty, as regards collective bargaining, is connected with a lack of proper determination of the relationship between collective labor agreements and collective accords, both recognized by the Polish Labour Code as a source of labor law (art. 9). Particular doubts also concern the possibility of concluding a collective accord without a concrete statutory authorization. The authorization is required by the binding Labour Code (art. 9, section 1), however in light of article 59.2 of the Polish Constitution, it seems to be redundant.

While discussing the regulation of labor relations by way of collective bargaining, one should also mention work establishment regulations that are considered by the Polish Labour Code as one of the sources of the labor law. Indeed, three types of those regulations play an important role: the work regulations (art. 104, section 1 of the Labour Code), the wage regulations (art. 77.2, section 1 of the Labour Code), and the welfare benefits regulations (art. 8.2 of the Plant Welfare Benefits Fund Act[37]). According to the above provisions, workplace regulations should be established by the employer in an agreement with a trade union section operating at the work establishment. If no agreement is reached or if there is no trade union partner at a given work establishment, an employer may adopt regulations unilaterally. However, in light of the new Polish Constitution it is highly doubtful for not negotiated but unilaterally adopted work establishment regulations to be considered as a source of labor law. Thus, having the lack of a trade union partner in many private enterprises in mind, the legislature has to consider an alternative employees' representation to negotiate workplace regulations with the employer.

37. Act of Mar. 4, 1994, J. Laws 1996, No. 70, Item 335 (unified text, with the following amendments).

2. Freedom of Collective Bargaining

One of the crucial issues of collective bargaining refers to the possibility of establishing collective agreements' provisions going below the statutory level of employees' rights and employers' obligations. According to the binding Polish law, a statute defines the minimum legal order in labor relations, and as a consequence a collective agreement cannot contain provisions that are less favorable to an employee than statutory provisions (art. 9, section 2 of the Labour Code). However, the contemporary European labor law doctrine remarks that a strict application of the above rule does not help to save enterprises undergoing economic difficulties, which as a consequence may lead to the loss of jobs. A particular example of that tendency is the so called "Danish model of labour law," which is characterized by limited statutory regulations, leaving space for collective bargaining. Another example is the Portuguese Labour Code of 2003, as according to its article 4: The legal rules stipulated in this Code may be waived in collective labor agreements, except when their effects are the opposite. The legal rules contained in this Code cannot be waived in regulations relating to minimum conditions.[38] A limited tendency to the deregulation is noted in also France and Germany.[39]

The above-mentioned tendencies should not be neglected in Poland. Furthermore, some cases were already noted when, in order to save jobs, employees had agreed to a temporary departure from the most advantageous statutory regulations. One shall then consider whether it would not be better to allow, in strictly defined situations and only for a definite period of time, for departures in collective agreements below the statutory regulation, if it could prevent enterprise liquidation or mass dismissal. However, it seems that such a permission would have to exclude departures from statutory requirements concerning some basic protective standards, e.g., work safety and hygiene, employment of women and young persons, or settlement of employment relationship disputes by the court.

38. Labour Code, Law No. 99/2003, Aug. 27, 2003, Publ. Ministry of Econ. Activities and Lab. (Lisbon 2004).

39. *See* Sciarra, *supra* note 14.

D. Collective Labor Disputes

1. Procedures for Settling Collective Disputes

The principle of the freedom of coalition requires the recognition of employees' and employers' rights to conduct collective disputes and to grant the parties a far reached freedom to settle them. Another argument is that an agreement based on the freely expressed will of the parties to a dispute, respecting their mutual interests, is the best way to settle a collective dispute. On the other hand, having in mind public interest and in particular the value of social peace, it is justified to impose on the parties a collective dispute some statutory requirements, concerning, in particular, procedures to settle it, as well as the right to strike and lock-out. The reconciliation of those two principles: freedom of the parties to settle a dispute and the protection of public interest, constitutes one of the most difficult tasks of every contemporary legislature shaping the collective labor law.

In light of these two premises, the Polish Act on Settlement of Collective Disputes as of 1991[40] raises some reservations, as it defines collective bargaining as a compulsory procedure for settling collective disputes. Such a regulation seems to be incompatible with the 154 ILO Convention which promotes the freedom of collective bargaining (art. 8).[41] That is why the Polish doctrine proposes to consider collective bargaining as a voluntary and universal form of dialogue between employees and employers, which may be applied at any stage of a collective dispute,[42] and also in all other situations when the parties are trying to reach an agreement.

There is no doubt that mediation and arbitration should both be maintained in the future Polish labor law as procedures for settling collective disputes. Mediation shall be a compulsory procedure, preventing too easy access to strike in a collective dispute. In order to allow for reaching agreements, the new regulation should give the parties the possibility to submit a collective dispute to repeated mediation that currently is not the case. Also, there should be no legal obstacles for the parties to seek arbitration directly by omitting mediation, as such a freedom would allow them to settle disputes to settle more quickly. The conciliation procedure, applied in certain

40. J. Laws 1991, No. 55, Item 236.

41. *See* HAJN, *supra* note 27, at 88.

42. *See* B. CUDOWSKI, SPORY ZBIOROWE W POLSKIM PRAWIE PRACY [COLLECTIVE DISPUTES IN THE POLISH LABOUR LAW] 99 (1999).

countries, could be omitted, as it is rather a particular form of mediation.

As far as arbitration is concerned, it shall be optional and therefore used only if both parties in a collective dispute agree. Compulsory arbitration is a controversial issue.[43] It seems, however, that an arbitration should be compulsory with regard to collective disputes that have not been settled by way of mediation and, at the same time, they cannot be continued by going on strike, since the statute forbids it. It seems that a collective dispute shall also be covered by a compulsory arbitration in cases when a strike or lock-out does not lead to its settlement within three months and a further dispute would threaten the security of the State or another important public interest. Such a request for compulsory arbitration could be submitted by a labor inspector. Furthermore, an arbitration should be considered as a procedure leading to the settlement of a dispute by imposing a binding decision on the parties. Such a solution would not be incompatible with the ILO standards, particularly if arbitration decisions could undergo a verification by a court, with regard to their compatibility with law.[44] The present experience in Poland with the so called "social arbitration," where a collective dispute is ended only when its parties agree to accept the arbitration decision, proves that this procedure is ineffective.

The judicial procedure is not yet recognized as a procedure to settle collective disputes in Poland. However it seems that it could be applied with regard to the application of statutory provisions, concerning employees' and employers' collective rights and freedoms, as well as collective agreements.

2. Strike

In the Polish debate on the shape of the future labor law, a number of issues is related to the limitation of the right to strike. International standards, granting the right to strike, allow at the same time the national legislature to regulate this right in order to protect the public interests.[45] Taking advantage of these standards, as well as of the Constitution (art. 59.3), the Polish legislature has established

43. *See* ILO, CONCILIATION AND ARBITRATION PROCEDURES IN LABOUR DISPUTES: A COMPARATIVE STUDY 159 *et seq.* (Geneva 1984).

44. B. Cudowski, *Model rozwiązywania sporów zbiorowych* [*Model of Collective Disputes Settlement*], *in* ZBIOROWE PRAWO PRACY W SPOŁECZNEJ GOSPODARCE RYNKOWEJ [COLLECTIVE LABOUR LAW IN SOCIAL-MARKET ECONOMY] 247 (G. Goździewcz ed., 2000).

45. *See also* R. BEN-ISRAEL, INTERNATIONAL LABOUR STANDARDS: THE CASE OF FREEDOM TO STRIKE 103 *et seq.* (1988).

some statutory limitations of the right to strike. However, according to some Polish specialists their present scope is too broad, as the statute introduced a general ban to organize strikes in cases of hazard to human life or health or the State's security, covering all categories of employees and all fields of employment, instead of specifying selected categories of employees.[46] Other doubts are connected to the method that should be adopted for proper strike limitation in order to guarantee essential services.[47]

Political and sit-in strikes are a particularly hot issue. As for the former, there is a fear that during systemic transformation in Poland, strikes could be abused for political purposes, being far from economic and social employees' interests. That is why in the debate on the future Polish labor law, one can find a proposal to establish the clear prohibition of political strikes. However, the proposal is not easy to apply, since there is a lack of a commonly accepted definition of "political strike." Furthermore, according to the ILO Freedom of Association Committee, the strike of both a social and political character cannot be banned.[48]

As far as sit-in strikes are concerned, they are currently very common in Poland and their opponents argue that they prevent workers who do not participate in the strike to work as well as the employer to manage their work and his or her enterprise. On the other side, the ILO Committee of Experts expressed the opinion that a peaceful occupation of the place of work is covered by the right to strike.[49]

Another controversial issue is when, in order to grant full protection of the employer's right to manage an undertaking during a strike, it should be allowed to entrust non-striking workers with work at posts covered by the strike. It could be necessary for security

46. *See* Florek, *supra* note 28, at 205–06.

47. The ILO's Freedom of Association Committee and the Committee of Experts define the notion of "essential services" as "services whose interruption would endanger the life, personal safety or health of the whole or part of the population." They go on to state that "a non-essential service may become essential if a strike lasts beyond a certain time or extends beyond a certain scope, thus endangering the life, personal safety or health of the whole or part of the population." *See* ILO, *Freedom of Association and Collective Bargaining*, Gen'l Survey by the Committee of Experts on the Application of Conventions and Recommendations, Rep. III, pt. 4b, ¶ 214 (Geneva 1983) [hereinafter ILO, *General Survey*]; ILO, FREEDOM OF ASS'N COMM., FREEDOM OF ASSOCIATION: DIGEST OF DECISIONS AND PRINCIPLES OF THE FREEDOM OF ASSOCIATION COMMITTEE OF THE GOVERNING BODY OF THE ILO ¶ 541 (4th ed. Geneva 1996) [hereinafter ILO, DIGEST].

48. *See* ILO, DIGEST, *supra* note 47, ¶¶ 492, 494, and 495.

49. According to the ILO Committee of Experts: "restrictions on strike, pickets and workplace occupations should be limited to cases where the action ceases to be peaceful." ILO, *General Survey*, *supra* note 47, ¶¶ 173–74.

reasons, in order to limit losses or to guarantee essential services. However it is particularly controversial whether or not to allow, in these situations, workers who are not on strike to work on posts covered by a sit-in strike. On the other hand, there is no doubt that there should be a ban on employing new workers in order to replace those who went on strike, unless to guarantee essential services.

Hunger strikes also constitute one of the major problems in Poland, as they occur quite often, inducing a direct hazard for strikers' health and life. It seems that this hazard makes hunger strike incompatible with the economic and social character of interests defended by striking workers in a collective dispute. However, this negative opinion has a rather moral background and at the same time concerns the personal freedom of workers. Thus, the introduction of a legal ban on hunger strikes is considered as highly controversial in Poland and would certainly be ineffective.[50]

With regard to the experience of some other countries, the suspension of the right to strike is the subject of debate in Poland. It seems that such a suspension, if decided by competent public authorities, should be allowed when an announced or ongoing strike constitutes a serious threat to the public interest. However, the suspension could last only during the period clearly defined by the statute, giving the parties to the dispute a possibility to settle it peacefully. At the same time, lawfulness of the decision suspending the strike shall be subject to judicial control.

3. Lock-out

A clear recognition of the right to strike and of other forms of employees' protests is in contrast with the Polish legislature's silence over lock-out. Even though during legislative work on the Act on the Settlement of Collective Labour Disputes the Polish Senate proposed to regulate the right to lock-out, the Polish Diet (*Sejm*) rejected this proposal.[51] That negative stand was due to the opposition of deputies that originate from trade unions who were afraid that the right to lock-out would impede the right to strike.

50. *See* CUDOWSKI, *supra* note 42, at 127.

51. *See* T. Zieliński, *Conflits collectifs de travail dans le droit polonais - période communiste et postcommuniste*, *in* CHANGEMENTS POLITIQUES ET DROIT DU TRAVAIL: PERSPECTIVE POLONO-ESPAGNOLE 145 (M. Seweryński & A. Marzal eds., 1992); W. MASEWICZ, ZATARG ZBIOROWY PRACY [COLLECTIVE LABOUR CONFLICT] 211 (1994).

The Polish adherents of the right to lock-out[52] consider it as a means of necessary balance with the employees' right to strike, and argue that both rights stem from the provisions of ILO Convention No. 87. They also refer to article 6.4 of the European Social Charter, stipulating that in cases of a conflict, the right to conduct collective actions is granted to employees as well as to employers. While looking for legal grounds for lock-out in the Polish legislation, article 32 of the Constitution is sometimes also indicated, as it institutes the principle of equality before the law.[53]

But the Polish doctrine proposes to recognize only the right to a defensive lock-out, i.e., something that aims to give an employer the possibility to defend him or herself against an unlawful strike. This type of lock-out does not impede the right to strike.[54] An employer should therefore have the right to announce a lock-out if, despite the court declaring the strike's unlawfulness, the trade union did not stop it. Thus, judicial control over strikes' lawfulness should be clearly allowed for—on an employer's (employer's organization's) or a labor inspector request. Today this control is incidental, when judging the criminal liability of the organizer of an unlawful strike (art. 26.2 of the Act on Collective Disputes). Thus, an employer cannot limit him or herself to ask the court to declare the strike unlawful but must engage a regular criminal procedure against the strike's organizer that makes the conflict with employees even more serious.

The employers' right to a defensive lock-out shall be accompanied by a provision saying that once a lock-out is announced, then, by virtue of the law, the employment relationship with employees who are covered by a lock-out are suspended. It is obvious that during a lock-out employees should not have the right to their salary, but they should have the right to maintain their jobs once the lock-out is over, unless the agreement ending a collective dispute would provide for a limitation of jobs or a possibility to change their terms.

The right to a lock-out shall be subject to limitations similar to those that concern the strike. Therefore a lock-out could not cover workplaces and installations the stopping of which could constitute a

52. *See* A. Świątkowski, *Strikes and Lock-outs in Polish Society Heading Toward Industrialized Market Economy*, 4 Y.B. POLISH LAB. L. & SOC. POL'Y 161, 170 (1993); BARAN, *supra* note 3, at 338.

53. *See* T. Zieliński, *Ustrój pracy w Konstytucji Rzeczypospolitej Polskiej* [*Regulation of Labor in the Constitution of the Polish Republic*], *in* PRAWO PRACY, UBEZPIECZENIA SPOŁECZNE, POLITYKA SPOŁECZNA: WYBRANE ZAGADNIENIA [LABOR LAW, SOCIAL SECURITY, SOCIAL POLICY: SELECTED ISSUES] 25 (B.M. Ćwiertniak ed., 1998).

54. *See* SEWERYŃSKI, *supra* note 24, at 241–42; Świątkowski, *supra* note 52, at 161.

hazard for life and health or a threat to the security of the State. A lock-out shall also be subject to suspension for the same reasons as the strike. Finally, similarly to the strike, an employer would have to respect the proportion between losses he or she wants to avoid thanks to a lock-out and the losses that it may cause to employees and to the public interest. The respect of these rules would be subject to judicial control on the request of an interested trade union or a labor inspector.

A lock-out could take place only during a collective dispute. Thus, it must be distinguished from a temporary closing of an enterprise or of its part for technical reasons. The employer's right to proceed to such a closing is known in the legislation of some Western countries (*shut down, chômage technique*[55]) and shall also be allowed by Polish provisions on similar terms. Closing of a work establishment should also be exceptionally permitted in cases of a *force majeure* or a state of a natural calamity, announced by the public authority, if these events can cause substantial damage to the employer. However, closing down of a work establishment for these reasons during a strike shall be subject to judicial control, at the request of a trade union organizing the strike or at the request of a labor inspector.

In conclusion, it has to be pointed out that the above defined defensive lock-out would be more favorable for employees as compared to the present legislation in Poland. Due to the lack of any provisions on lock-out, an employer can judge the lawfulness of a strike autonomously and if he or she decides that it is unlawful, he or she may dismiss striking workers without notice arguing that they violate the obligation to perform work (art. 52, section 1.1 of the Labour Code).

All above regulations concerning collective disputes are considered in the framework of current legislative debate in Poland with the aim of increasing the freedom of parties in choosing the measures to settle a dispute. Simultaneously, they shall give more reliable guarantees for maintaining social peace. In particular, this role could be played by a binding character of arbitration decisions, compulsory arbitration and suspension of a right to a strike in certain circumstances, as well as judicial control of the strikes' and lock-outs' lawfulness. This effect could also be enhanced with the proposed provisions granting labor inspectors the competence to request the

55. *See* G. LYON-CAEN, J. PELISSIER & A. SUPIOT, DROIT DU TRAVAIL 1120 (19th ed. 1998).

court to verify the lawfulness of actions initiated by the parties to a collective dispute.

E. Employee Involvement

1. General Remarks

"Employee involvement" is, as matter of fact, a new name, recently adopted in the European Union,[56] to define the idea named previously as workers' participation in the enterprise management and in the European communist countries—as workers' self-management. Under communism, that idea was treated in Poland as an ideological instrument, aiming to integrate workers with state-owned enterprise objectives. Instead of that, the Polish democratic opposition of the 1980s, considered it a way to enforce the employees' position in their struggle for social and political rights, as trade union freedom did not exist.[57] Under the pressure of that democratic opposition, the Act as of 1981 on Staff Self-Management in the State-owned Enterprise was adopted, giving new dimension to the idea of worker participation.[58] The Act is still binding, but the number of undertakings covered by it diminishes as a consequence of their privatization and commercialization.

The employee involvement remains a current issue in Poland, and the subject of hot debate among social partners, political parties and, of course, the legal doctrine. The opponents believe that the employee involvement, as issued from the idea of industrial democracy, has only a political meaning, so that transposing it onto labor relations is not justified. Some of them also pretend that this concept is incompatible with the rules of the free market economy. On the other hand, those who are in favor of employee involvement see in it a device of labor relations democratization, enterprise socialization, and the way to implement the constitutional idea of social justice. At the same time, they believe employee involvement to be one of the guarantees of the enterprise's autonomy toward the State, as well as a way of focusing the interest of the staff on the effectiveness and profitability of the enterprise. Furthermore, the idea of employee involvement is linked to the idea of social partnership, i.e., the dialogue between employers and employees,

56. *See also* EUROPEAN HANDBOOK OF EMPLOYEE INVOLVEMENT (M. Weiss & M. Seweryński eds., 2004).

57. *See* M. Seweryński, *Les particularites du syndicalisme des pays de l'Est et les tendances recentes dans ce domaine*, 1 REVUE INTERNATIONALE DE DROIT COMPARÉ 115 *et seq.* (1990).

58. Act of Sept. 25, 1981, J. Laws 1981, No. 24, Item 123 (with following amendments).

which facilitates the restructuring process of state-owned enterprises and helps to maintain industrial peace.[59]

Yet, the key factor for the issue of employee involvement in Poland became our membership in the European Union, imposing implementation of the specific Community regulations, establishing employees' rights for information and consultation. The most important include: the Directive 94/45 on European Works Councils, Directive No. 2002/14 establishing a general framework for informing and consulting employees in the European Community, and the Directive No. 2001/86 supplementing the Statute for European Company with regard to the involvement of employees. The above-mentioned European directives leave no doubt that the Polish labor law must recognize the employees' right to participation in the enterprise management. Nevertheless, the EU does not impose on Member States strict regulations, leaving some issues to be regulated by national legislatures. The main issue that could be decided by them is a form of employee representation executing prerogatives entering in the framework of involvement. Thus, the national legislator should enable employees to make a choice between their representation by works council or by a trade union. The parallel existence of both forms of employee representation should also be allowed, as positive and negative trade union freedom argue in favor of this solution. The freedom of the work establishment staff to select their own representation stems also from article 3 of ILO Convention No. 135, concerning protection and facilities to be afforded to workers' representatives in the undertaking. This provision says that the notion of "employees' representatives" means persons who are considered to be such representatives by the legislation or by the national practice. The same provisions later on add that these may not only be representatives of trade unions but representatives chosen in free elections by the enterprise staff as well.

2. Scope of Employee Involvement

The scope of issues covered by the employee involvement is one of the most difficult questions, as it is in employees' interest for this scope to be broad whereas employers are afraid of their too broad interference in the enterprise management. The second issue is the separation of rights of a works council and of a trade union, if those

59. *See also* EUROPEAN HANDBOOK OF EMPLOYEE INVOLVEMENT, *supra* note 56.

two forms of employees' representation concurrently exist within a work establishment.

In the first issue, the guidelines for the national legislature stem from the above-mentioned EU directives, which provide employee representation with the right of information, consultation, and negotiation in economic matters and employment policy of an employer.

In the second issue article 5 of the 135 ILO Convention and article 3.2 of the 154 ILO Convention shall be taken into consideration. Pursuant to these provisions, if two types of employees' representation exist in an enterprise, the presence of representatives chosen by the staff shall not undermine the position of interested trade unions. Moreover, article 3.b of the 135 ILO Convention clearly indicates that in order to achieve the above goal, the rights of both representations shall be distinguished so that rights of representatives chosen by the staff were not violating "the activity recognized in a given country as an exclusive right of trade unions."

Thus, in light of the above-mentioned ILO Conventions, it is of high importance to define trade unions' prerogatives. The quoted provision of the 135 ILO Convention leaves detailed decisions in this respect to the national legislature. Nevertheless, the separation of a trade union's prerogatives and those of a works council on the basis of the above criteria remains an uneasy task. Furthermore, it would have as a consequence that, if no trade union exists within a given work establishment, matters that fall within union competence could not be regulated by an employer in agreement with a works council. Therefore, many important decisions would be made unilaterally by the employer. Furthermore, employees would be deprived of the possibility to conduct collective disputes or to go on strike if these collective actions are defined as unions' prerogatives. That is why some Polish scholars stress that, in some countries (e.g., in France and in Italy), the right to a strike is guaranteed by the Constitution as a right of employees and not that of trade unions.[60] Also article 6.4 of the European Social Charter is interpreted by experts as legal grounds for the right to strike and indirectly—to conclude collective agreements for employees as well as for their organizations. The similar interpretation of the right to strike was given by the ILO Committee of Experts.[61] Thus, it has to be considered whether it is

60. *See* R. Del Punta, *Collective Agreements and Individual Contracts of Employment in Labour Law: Italian Report*, *in* COLLECTIVE AGREEMENTS AND INDIVIDUAL CONTRACTS OF EMPLOYMENT 147 (M. Seweryński ed., 2003).

61. *See* L. BETTEN, INTERNATIONAL LABOUR LAW 113–14 (1993).

possible to grant works councils the right to perform some prerogatives of trade unions in case of a lack of a union representation in a given work establishment, as this is the only way to guarantee a due protection of employees' rights and interests.

3. Cooperation of the Staff Representatives with Trade Unions

If there is a double employees' representation at a work establishment, i.e., a works council and a trade union section, the legislature shall keep in mind not only the need to clearly separate their powers, but also to assure cooperation between them. Such a directive is formulated by the 135 ILO Convention in its article 5, which binds national legislatures "to encourage co-operation on all relevant matters between the elected representatives and the trade unions concerned and their representatives." Taking into account this provision, as well as the experience of some Western countries, it is proposed in Poland for the above-mentioned cooperation to consist in formulating opinions by a trade union on all matters falling within the competence of a works council. Besides, a plant trade union section could be authorized to propose candidates for elections to a works council.

F. Social Partners' Dialogue

The idea of the Social Partners' Dialogue was developed in the European Union as one of the methods of employers' and employees' integration into the process of social policy making. The Polish Constitution recognized the Dialogue as one of the rules of the economic system (art. 20 of the Polish Constitution).

Poland has already had some experience with regard to legal regulation of the social partners dialogue. This experience is in particular connected with the Tripartite Commission for Social and Economic Matters composed of representatives of trade unions, employers' organizations, and those of the Government. The 2001 Act regulating the legal status of the Commission[62] defines it as a forum for a social dialogue, led in order to reconcile employees' and employers' interests, as well public interest. Pursuant to the Act, the dialogue objective is to aim for and maintain social peace. The dialogue may cover all issues related to salaries and social benefits, as well as state budget and other matters of the Government's economic

62. J. Laws 2001, No. 100, Item 1080.

and social policy. Social partners represented in the Commission may present their own or common standpoints for each of the deliberated issues. Moreover, they may conclude branch collective agreements, as well as other collective accords defining their mutual commitments. The 2001 Act has also established the ground for a decentralization of the social partners dialogue, entitling the *voivods* (governors) to establish Voivodship Social Dialogue Commissions. The Commissions are of a quadripartite character, as they are composed of: trade unions and employers' organizations representatives, the voivode—representing the Government and the voivodship marshal—as the local self-government party.

However, the legal position of the Tripartite Commission has raised some reservations in Poland, issued by the legal doctrine and some political factions,[63] similar to those raised in other post-communist countries.[64] The opponents generally stress that the Tripartite Commission is hardly reconcilable with the system of the parliamentary democracy, as its competencies related to budget and economic policy are incompatible with those of the Government stemming from the Constitution. It was also remarked that the Commission does not have a democratic character as only employees and employers are represented therein and other important social groups are omitted, even though the Commission activity has an impact on the situation of the whole society. Moreover, the lawfulness of arrangements negotiated by the parties within the Commission is not verified by a court nor by the Constitutional Tribunal. Finally, the legal nature of collective agreements that, according to the 2001 Act, may be concluded by trade unions and employers' organizations within the Tripartite Commission, is very unclear.

Some Polish labor law scholars also object to the definition of the Tripartite Commission expressed by the 2001 Act as a forum for social partners dialogue, while the Government represented in the Commission may not be considered a social partner.[65] It is also

63. *See* K.M. UJAZDOWSKI & R. MATYJA, RÓWNI—RÓWNIEJSI. RZECZ O ZWIĄZKACH ZAWODOWYCH W POLSCE [EQUAL AND MORE EQUAL: ESSAY ON TRADE UNIONS IN POLAND] 5, 35–37 (1993); W. Osiatyński, *Mętne stanowisko* [*Unclear Standpoint*], 52 GAZETA WYBORCZA (Mar. 3, 1997).

64. *See* M. Seweryński, *Trade Unions in the Post-communist Countries: Regulations, Problems and Prospects*, 16 COMP. LAB. L.J. 177, 177–230 (1995); M. Lado, *Trójstronność wciąż niepewna* [*Tripartism Still Uncertain*], *in* TRÓJSTRONNOŚĆ I ZBIOROWE STOSUNKI PRACY W KRAJACH EUROPY ŚRODKOWEJ I WSCHODNIEJ [TRIPARTISM AND COLLECTIVE LABOUR RELATIONS IN THE COUNTRIES OF CENTRAL AND EASTERN EUROPE] 53 (1994).

65. *See* W. Sanetra, *Prawo pracy a polityka* [*The Labor Law and Politics*], *in* PRAWO PRACY U PROGU XXI WIEKU: STARE PROBLEMY I WYZWANIA WSPÓŁCZESNOŚCI [THE LABOR

pointed out that the Government's participation in the Commission hampers the social partners dialogue, due to its dominating position. On the other hand, the tripartite dialogue could be used by the Government to avoid responsibility for decisions that should be made by it autonomously.

The above critiques addressed to the Tripartite Commission mean that its present legal status in Poland should to be reconsidered, in addition to other provisions concerning social partners dialogue. Furthermore, taking into account the constitutional rank of the Social Partners' Dialogue, as well as its positive influence on the social peace, it shall be supported by the state. This support should consist in establishing legal provisions facilitating the dialogue, in particular by defining its forum and procedures. Furthermore, it would be desirable to establish an independent public institution, having as its task to give assistance to employees and employers with regard to negotiation of collective agreements and settlement of collective disputes. The experience of some Western countries allows for assuming that such an institution could help employees and employers regulate their relations, mitigate conflicts, and even reduce their number. Considering the establishment of the above-mentioned institution, one has to take into account that an important obstacle encountered by the Polish social partners is the ignorance of the law and a lack of social dialogue experience. It seems that a competent assistance of an impartial institution, trusted by employees and employers, could be a remedy welcomed by them.

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The present essay covers only some selected issues faced by the Polish legislature, aiming at a fundamental reform of the Polish labor law. The full list of issues is much longer, which makes the whole legislative task more complex than was presented in the paper. Nevertheless, the legislative work is in progress, led by the governmental Labour Law Codification Commission, established in 2002. Its task consists of elaborating two drafts of codes, covering separately: individual labor law and collective labor law. However, the final result of that legislative project is uncertain, depending on the ongoing evolution on the political stage, as well as of the social partners' position.

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