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SELECTED PROBLEMS OF SHAPING THE AMOUNT OF REMUNERATION FOR WORK

INTRODUCTORY REMARKS

Greater autonomy of the will of the parties in the market economy means numerous threats to the rights and interests of the working people. Consequently, the need for pursuing appropriate socio-economic policies and the introduction of specific legislation results not only from the protection of the rights and interests of the employee and employer but it is also justified by the public interest. The state should provide employees and members of their families with decent living and remuneration conditions. It is therefore necessary to make a real change of the economic growth paradigm for the concept of sustainable socio-economic development. An important goal from the point of view of the individual and the society is therefore the continuous increase of prosperity, understood as the improvement of all condi-

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tions in which life takes place[1]. The legal protection of the employee is primarily based on the creation of legal means that will effectively protect the rights and interests of the working people. At this point, the question arises as to whether the existing legal standards provide a sufficient basis to effectively increase the amount of employee remuneration in our country or whether further legal actions are required without which achieving the objective of equitable remuneration is not possible. *De lege lata* existing legal solutions should be indicated in this regard and it should be assessed if they are sufficient, as well as the demands *de lege ferenda* which will help to strengthen and extend this protection should be formulated. It is particularly important to have an effective claim system for the employee in this regard to protect his threatened or violated rights and interests on the labor market. It is expected that each Polish employer respects satisfactorily the basic provisions and principles of the labor law that guarantee benefits to employees at a sufficiently high level within the European standards and create safe and hygienic working conditions.

CONSTITUTIONAL BASES FOR LABOR PROTECTION

Employment protection should be implemented in many areas of social life. The Constitution of the Republic of Poland does not expressly define the principle of freedom of contract as the institution of constitutional status. However, it can be derived from some of its provisions[2]. On the other hand, the Constitution of the Republic of Poland provides for broader legal bases to limit the freedom of employment contracts than is the case of other private-law agreements, contained in article 24 and indirectly in article 20 of the Constitution related with labor protection and with the existence of autonomous legal acts from the social partners. The provision of article 24 of the Constitution of the Republic of Poland refers primarily to labor protection in the context of employment. There is no doubt that one of the most important areas are employment relationships. This provision also includes, in addition to the obligation of labor protection, the obligation of the state to protect working conditions, understood as the overall obligations and rights connected with work of the person employed. The importance of the Constitution for the labor law is in this case much higher than for the civil law, as workers and other people employed should be particularly protected from the dangers connected with employment. The employer is generally a stronger economic party and usually strives to achieve the greatest possible benefits from employment, often with the exploitation of employees.

[1] Compare Ł. Jabłoński, *Teorie rozwoju gospodarczego a konwergencja ekonomiczna*. „Nierówności Społeczne a Wzrost Gospodarczy" 2008, no 13, p. 151-166; R. Piasecki, *Ewolucja teorii rozwoju gospodarczego krajów biednych,* [in:] *Ekonomia rozwoju*, ed. R. Piasecki, Warsaw 2007, *passim*.

[2] More on his topic: Compare. L. Florek, *Ustawa i umowa w prawie pracy*, Warsaw 2010, p. 108 and next.

The obligation of labor protection means that people living with work can not be in a much worse social situation than people living from other incomes (capital, real estate, etc.), which is directly related to the principles of social justice and to the protection of the dignity of the individual[3]. This means both suitable shaping of the situation of employees compared with those who receive incomes from other sources, as well as appropriate shaping of the relationships between the particular groups of these individuals. Accordingly, the state's obligation to protect employment comes down to the creation of certain legal guarantees by the state concerning both the protection of those persons as well as their property and non-property interests. The Constitution does not prejudge, however, the specific protective measures that should be contained in ordinary legislation[4].

The general wording „labor protection" does not preclude the protection of work performed under other legal relationships, in particular the civil law relations. Accordingly, the thesis of the Supreme Court judgment of October 7, 2004, eloquently reads: „The establishment in court proceedings that the work was provided on the basis of the civil law agreement does not violate article 24 of the Constitution of the Republic of Poland, but the differentiation of the legal situation of the employee and the party to the civil law agreement does not constitute an infringement of article 32 of the Constitution of the Republic of Poland"[5].

AUTONOMY OF THE WILL OF THE PARTIES IN FREE MARKET CONDITIONS

The principle of autonomy of the will of the parties allows for the independent and free shaping of legal relationships by the parties to these relations through carrying out legal actions, including conclusion of contracts. This interpretation of the autonomy of will arises from the content of article 56 of the Polish Civil Code, under which a legal action causes legal effects[6] expressed in it. Further reinforcement of this principle is contained in article 353[1] of the Polish Civil Code introducing into the area of contract law the freedom of contract recognized as a separate principle of private law. Freedom of contract contained in that provision means that the parties concluding the contract may shape its content at their discretion, but the content or purpose of the contract may not be contrary to the nature of the legal relationship, the law or

[3] Compare H. Szewczyk, *Ochrona dóbr osobistych w zatrudnieniu,* Warsaw 2007, *passim*.

[4] See L. Florek, [in:] *Konstytucyjne podstawy indywidualnego prawa pracy. Konstytucyjne podstawy systemu prawa,* ed. M. Wyrzykowski, Warsaw 2001, p. 70-71; B. Zdziennicki, [in:] *Znaczenie orzecznictwa Trybunału Konstytucyjnego dla umocnienia pozycji władzy sądowniczej. Rola orzecznictwa w systemie prawa,* ed. T. Giaro, Warsaw 2016, p. 18 and next.

[5] See Sentence of the Supreme Court of 7 October 2004, II PK 29/04, Case Law of the Supreme Labor Court 2005, no 7, item 97.

[6] Compare M. Wilejczyk, *Zagadnienia etyczne części ogólnej prawa cywilnego,* Warsaw 2014, p. 96-97.

the principles of social interaction. Thus, this freedom is not unlimited. The limits of freedom of contracts in terms of their purpose and content are determined by the law, the character of the legal relationship created by the contract and the principles of social interaction.[7] The principle of freedom of contracts can not violate the provisions of *iuris cogentis*.[8] The content of this principle includes such elements as: freedom contract, freedom of contractor selection, freedom of shaping the content of the contract, freedom of its termination and the admissibility of any form of contract[9].

The normative relation between the labor law and the civil law is specifically shown in article 300 of the Polish Labor Code and other provisions referring to the civil code in matters not regulated by the labor law[10]. The provision of article 353[1] of the Polish Civil Code satisfies the conditions contained in article 300 of the Polish Labor Code, which is confirmed in the judicature and doctrine[11].

On the basis of the labor law, the principle of freedom of contract (contractual) or more broadly the principle of autonomy of the will of the parties is, in particular, the principle of the free establishment of labor relations as one of the fundamental principles of the labor law contained in article 11 of the Polish Labor Code, which is confirmed in the nature of obligation of the labor relation that is followed by the voluntariness of incurring obligations towards each other and deciding about their content[12]. A consistent statement of the will of the parties to the labor relation is a condition of establishing any labor relation, including non-contractual, where there are undoubtedly more limitations of this principle than in the contractual labor relation[13].

You can not forget about the role of article 10 and article 18 of the Polish Labour Code in this area as other fundamental principles of the labor law. In a broader sense, freedom of contract arises also from the content of article 18 § 1 of the Polish

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[7] Compare R. Trzaskowski, *Granice swobody kształtowania treści i celu umów obligacyjnych*. Art. 353[1] of the Polish Civil Code Kraków 2005, *passim*; the same, *Właściwość (natura) zobowiązaniowego stosunku prawnego jako ograniczenie zasady swobody kształtowania treści umów*, „Kwartalnik Prawa Prywatnego" 2000, no 2, p. 389 and next.

[8] See Sentence of the Supreme Court of 5 June 2002, II CKN 701/00 with glosa of Z. Radwański Case Law of the Labor Court 2003, no 10, item. 124.

[9] Compare Z. Radwański, [in:] *System prawa cywilnego.* V. 3. Section 1. *Prawo zobowiązań - część ogólna,* ed. Z. Radwański, Ossolineum 1981, p. 261.

[10] See T. Zieliński, *Prawo pracy. Zarys systemu*. Część I *ogólna,* Warsaw-Kraków 1986, p. 141 and next.

[11] Compare L. Florek, *Ustawa i umowa w prawie pracy*, Warsaw 2010, p. 104-105; B. Wagner, [in:] *O swobodzie umowy o pracę raz jeszcze. Prawo pracy a wyzwania XXI wieku. Księga Jubileuszowa Profesora Tadeusza Zielińskiego,* ed. M. Matey-Tyrowicz, L. Nawacki, B. Wagner Warsaw 2002, p. 366; A. Malinowski, *Redagowanie tekstu prawnego. Wybrane wskazania logiczno-językowe*, Warsaw 2006, p. 176 and next; S. Lewandowski, *Retoryczne i logiczne podstawy argumentacji prawniczej*, Warsaw 2015, p. 203 and next; Sentence of the Supreme Court of 18 May 2005, III PK 27/05, Case Law of the Supreme Labor Court 2006, no 9-10, item 141; Sentence of the Supreme Court of 4 June 2002 I PKN 71/01, Case Law of the Supreme Labor Court 2004, no 7, item 119.

[12] More on his topic, Z. Góral, [in:] *System prawa pracy,* t. 1: *Część ogólna prawa pracy* [ed.] K.W. Baran, Warsaw 2010, p. 580 and next; B. Wagner, *Zasada swobody nawiązywania stosunku pracy*, „Krakowskie Studia Prawnicze" 1982, v. XV, p.66.

[13] See J. Stelina, *Charakter prawny stosunku pracy z mianowania,* Gdańsk 2005, p. 172 and next.

Labor Code, according to which the provisions of employment contracts may not be less favorable to the employee than the provisions of the labor law. In the light of judicature, the protective standards of the labor law counteract exploitation of the employee in the labor relation, leading to the invalidity of employment contract provisions less favorable to the employee than the labor law provisions (article 18 of the Polish Labor Code)[14]. As a matter of principle, the parties may lay down the labor relation at their discretion in favor of the employee in comparison with the law provisions[15]. It finds its application in matters not regulated by the law, also in those which are demanded by the law to be specified in the contract, but leaves the parties their formation, among others on the basis of article 29 § 1 of the Polish Labor Code. It is noteworthy that only the law is the clearest restriction on the freedom of contract, and other restrictions on the basis of the labor law, such as the nature of the legal relationship, the principle of social interaction and the autonomous sources of the labor law, are less pronounced[16].

LEGAL CONCEPT OF EXPLOITATION AND THE AMOUNT OF REMUNERATION FOR WORK.

It is worth reflecting on the role and importance of the legal concept of exploitation in the context of the amount of remuneration for work. With its very nature it should serve to counteract the establishment of relatively low remuneration for work.

The mechanism of exploitation interferes with the freedom of the parties to develop the content of the legal relationship by contract and it is an expression of the principle of contractual justice[17]. The legal nature of the mechanism of exploitation is disputable in the doctrine of the civil law[18]. Exploitation is treated as the defect of the will statement or exploitation should be considered the defect of the content of the legal action. To this day there is no agreement in the doctrine of the civil law in this regard. The contract

[14] See Sentence of the Supreme Court of 24 November 2004, I PK 6/04, Case Law of the Supreme Labor Court 2005, no 14, item 208.

[15] Compare L. Florek, *Ustawa i umowa w prawie pracy*…, p. 105.

[16] As above; W. Sanetra, *O zasadach prawa pracy i zasadach współżycia społecznego*. State Labor Inspectorate 1966, no 11, p. 706.

[17] Compare M. Safjan, [in:] *System prawa prywatnego,* vol. 1, ed. M. Safjan, Warsaw 2012, p. 356-358; A. Fermus-Bobowiec, I. Szpringer, *Laesio enormis jako podstawa współczesnej instytucji wyzysku,* [in:] *Ex contractu, ex delicto. Z dziejów prawa zobowiązań*, ed. M. Mikuła, K. Stolarski, Kraków 2012, p. 191-209; M. Wilejczyk, *Umowy nacechowane wyzyskiem,* [in:] *Współczesne problemy prawa prywatnego. Księga pamiątkowa ku czci Profesora Edwarda Gniewka. Modern problems of Private Law. Essays in Honour of Proffesor Edward Gniewek,* ed. J. Gołaczyński, P. Machnikowski, Warsaw 2010, p. 663-670; A. Cisek, J. Kremis, *Z problematyki wyzysku w ujęciu kodeksu cywilnego* „Ruch Prawniczy, Ekonomiczny i Społeczny" 1979, no 3, p. 61-73.

[18] Compare J. Andrzejewski, *Czy art. 388 k. c. jest potrzebny? Wyzysk w kodeksie cywilnym oraz w tzw. perspektywie kodyfikacyjnej – spojrzenie krytyczne i wnioski de lege ferenda,* [in:] *Wokół rekodyfikacji prawa cywilnego. Prace jubileuszowe,* ed. P. Stec, M. Załucki, Kraków 2015, p. 185-199; D. Bierecki, *Regulacja prawna wyzysku. Uwagi de lege lata* i *de lege ferenda*, „Rejent" 2015, no 7, p. 21 and next.

concluded for the purpose of exploitation of the other party goes beyond the scope of freedom of contract stated in article 353[1] of the Polish Civil Code. It is about abusing freedom of contract and not about the action prohibited by law constituting a forbidden act, such as a fraud, contrary to the applicable legal order[19]. Exploitation is an element limiting the principle of freedom of contract, i.e. the contract concluded for the purpose of exploitation is contrary to the nature (characteristics) of the obligation relationship as well as to the law and the principles of social interaction.

The regulation of the mechanism of exploitation in the civil code aims to protect one of the parties of the civil law relationship, which is in a worse position, against being used by the other party. Exploitation refers primarily to mutual agreements[20], but the broad application of article 388 of the Polish Civil Code to all private law contracts should be recognized.

In the light of article 388 § 1 of the Polish Civil Code the contract is concluded for the purpose of exploitation if the following conditions are fulfilled:

1) an objective condition – one of the parties in return for their benefits accepts or reserves for themselves or for a third party benefits whose value at the time of conclusion of the contract exceeds the value of their own benefits to a considerable degree;

2) a subjective condition - the party, who accepts or reserves for themselves or for a third party benefits whose value at the time of conclusion of the contract exceeds the value of their own benefits to a considerable degree, in order to achieve that goal exploits: a) the state of necessity; b) disability, or c) inexperience of the other party.

In the light of judicature, the moment of conclusion of the contract decides about a gross disproportion between benefits and the subsequent changes that have taken place after its conclusion are irrelevant, unless they have been foreseeable for the other party and consciously used by them.[21] The state of necessity means such material, personal or family conditions of the party which force them to conclude the contract at any price, or do not allow for free agreement on individual contractual provisions[22].

In the case of concluding the contract for the purpose of exploitation, it is possible to modify the content of the contact in such a way as to restore the economic balance of the benefits of the parties, or the cancellation of the contract. The law allows the exploited party to apply to the court with the following claims:

1) reduction of their benefits;
2) increase of mutual benefits;

[19] See sentence of the Supreme Court of 24 March 2009, I PK 205/08, Case Law of the Supreme Labor Court 2010, no 23-24, item 282.

[20] See H. Witczak, A. Kawałko, *Zobowiązania.* Warszawa 2007, p. 72-73.

[21] See sentence of the Appeal Court in Katowice of 10 January 1995, I ACr 839/94, Case Law of the Appeal Court 1997, No 7-8, item 46.

[22] See sentence of the Supreme Court of 28 January 1974, I CR 819/73, Lex no 7391.

3) simultaneous reduction of their benefits and increase of mutual benefits;

4) cancellation of the contract (sanction of relative nullity); such a claim may be submitted if the implementation of the above-mentioned claims will prove excessively difficult.

Modification or cancellation of the contract concluded for the purpose of exploitation occurs due to a constitutive judgment of the court effective *ex tunc*. This implies an obligation to return mutual benefits or parts of benefits that have already been fulfilled in performance of the contract concluded for the purpose of exploitation. When assessing the value of benefits fulfilled in performing the contract affected by exploitation, you should not be guided by the recognition of the parties themselves, but – as equivalent (article 497 § 2 of the Polish Civil Code) - take into account the objective value of benefits[23]. In the case of exploitation, it comes to an objective lack of equivalence of the value of mutual benefits[24].

The contract concluded in the conditions of exploitation is therefore not affected by the sanction of absolute nullity, but it belongs to legal actions rebuttable by the constitutive judgment of the court. Such a normative solution is beneficial due to the fact that the parties do not have to return their mutual benefits. It can only be undermined in court proceedings, by means of action for the formation that can be connected with the claim for awarding benefits changed by the constitutive judgment. The sanction of rebuttal, both in respect of legal actions rebuttable by the constitutive judgment of the court as well as with respect to those rebuttable by the constitutive declaration of will, acts as a follow-up mechanism, resulting in the exclusion of the rules of legal action and, in the case of exploitation, it is even possible to modify these rules. As a consequence of the application of this mechanism, the sanction consists in the subsequent annulment of legal action or modification of its content, with the effects in principle analogous to the consequences of absolute nullity, in this case acting *ex tunc*, nullifying both the factual and the binding consequences of the rebutted action. Also in the case of exploitation, when it comes to responsibility on the basis of *culpa in contrahendo* and possibly the liability in tort on the basis of article 415 of the Polish Civil Code[25]. Therefore, until the judgment is issued by the court, the defective legal action causes all legal effects envisaged in it.

It is worth noting, however, that court judgments stating the invalidity of the civil law contract on the basis of article 388 of the Polish Civil Code are rare[26]. Conse-

[23] See sentence of the Appeal Court in Białystok of 27.10.2004, I ACa 530/04, Case Law of the Appeal Court 2005, No 9, item 37.

[24] See sentence of the Appeal Court in Łódź of 12.07.2013, I ACa 201/13, http://orzeczenia.lodz.sa.gov.pl/details/$N/152500000000503_I_ACa_000201_2013_Uz_2013-07-12_001.

[25] Compare M. Gutowski, *Bezskuteczność czynności prawnej*, Warsaw 2013, p. 428; the same, M. Gutowski, *Wzruszalność czynności prawnej*, Warsaw 2012, p. 335 and next.; A. Grebieniow, *Częściowa wzruszalność umowy opartej na wyzysku – na przykładzie prawa szwajcarskiego,* „Forum Prawnicze" 2012, no 5, p. 25-35.

[26] See among others sentence of the Appeal Court in Białystok of 27 January 2004, I ACa 530/04, Lex no 143483.

quently, it is recognized in the judicature that the contract violating the principle of equivalence of benefits (glaring disproportion of benefits) of the parties may also be assessed in the light of article 58 § 2 of the Polish Civil Code, especially when all the conditions of exploitation provided for in article 388 § 1 of the Polish Civil Code did not occur[27]. The effect of exceeding the limits of freedom of contract is, therefore, the recognition of the contract or its individual provisions as null and void by law, as provided for in article 58 § 1 and 3 of the Polish Civil Code. In this case, the provisions should be considered incompatible with the principles of social interaction due to the violation of the principle of equivalence and the construction of the contract on the glaring disproportion of rights and obligations of the parties. However, this condition should be applied with caution, bearing in mind the broad scope of freedom including also some consent to the factual inequality of the parties, without having to prove the existence of specific circumstances that would justify it.

In the civil law doctrine it has been shown in a convincing manner that the mechanism of exploitation under article 388 of the Polish Civil Code does not fulfill its primary function, failing to protect against exploitation. The injured party (usually inexperienced, disabled, or in the state of necessity) was made to bear an extremely difficult burden of proof to demonstrate all the conditions under article 388 of the Polish Civil Code. Thus, on the basis of private law the legislator puts before the exploited party a more difficult task than before the prosecutor accusing in the lawsuit on the basis of article 304 of the Polish Civil Code[28]. These claims should be submitted by the exploited party within two years from the date of conclusion of the contract (article 388 § 2 of the Polish Civil Code). This term has the nature of a strict time limit (limitation period), i.e. after its expiration the powers to modify or cancel the contract concluded for the purpose of exploitation expire. It is difficult, therefore, to expect the injured party bearing the procedural risk and high court costs to take effective protection of their rights in the limitation period. As a result, the mechanism of exploitation in practice protects the exploiters, because after two years an "immoral contract" will be non-actionable[29]. It is therefore at least necessary to amend article 388 of the Polish Civil Code towards relaxing the conditions of its application and article 58 of the Polish Civil Code towards making the sanctions more flexible in this latter provision. J. Andrzejewski even proposes the removal of article 388 of the Polish Civil Code from the Civil Code, as the relevant states of fact should fall under the general clause of the principles of social interaction (good

[27] See sentence of the Supreme Court of 14 January 2010, IV CSK 432/09, Case Law of the Labor Court 2011, no 3, item 30 with glosa of A. Girdwoyń, „Monitor Prawa Pracy" 2016, no 12, p. 660-663; sentence of the Appeal Court in Warszawa of 17 July 2015, I ACa 1958/14, Lex no 1805957.

[28] Compare J. Andrzejewski, *Czy art. 388 k.c. jest potrzebny?...,* p. 191 and next; R. Trzaskowski, *Skutki sprzeczności umów obligacyjnych z prawem. W poszukiwaniu sankcji skutecznych i proporcjonalnych,* Warsaw 2013, p. 650.

[29] Compare J. Andrzejewski, *Czy art. 388 k.c. jest potrzebny?...,* p. 192.

morals) which, in his view, will provide adequate protection and flexibility of interpretation[30]. It is therefore necessary to consider whether the mechanism of exploitation under article 388 of the Polish Civil Code can, by necessity ("forcefully"), be transferred directly (without modification) to the labor law. The fact is that the appropriate application of article 388 of the Polish Civil Code in labor relations, even if formally acceptable, does not fulfill its protective function in such a situation, and in practice the mechanism of exploitation will be poorly used in labor relations as before, especially in terms of the amount of remuneration for work.

EQUITABLE REMUNERATION FOR WORK

The legislator's aim for the realization of the principles of justice and social solidarity in labor relations must involve a greater limitation of the principle of freedom of contract. "The glaring nature of the disproportion of benefits" and "the state of necessity of the party" should be considered with regard to the protective function of labor law and the situation on the labor market. It is worth noting that freedom of contract can on the one hand serve the interests of both parties to the employment relationship, and especially the employee, providing him with additional powers or higher benefits, which is not always possible through statutory regulation. On the other hand, freedom of contracts carries certain risks in the form of exploitation of a generally weaker position of the employee. Hence the greater statutory and other limitation of the principle of freedom of contract in labor law, which, however, does not affect - according to the doctrine[31]– the formal equivalence of the parties to the employment relationship.

Exploitation in labor law should be considered primarily in the aspect of remuneration of employees. There is no doubt that it is in the interests of the employer to set in the current wording of article 78 of the Polish Labor Code the criteria for determining the amount of remuneration for work related to work (type, quantity and quality of performed work)[32] as well as necessary qualifications, which means for the employer the possibility of shaping remuneration excluding social elements such as the personal and family situation of the employee.[33] As far as remuneration is concerned, the interest of the employer depends therefore on a possibly close connection between the remuneration and work performed by the employee. *De lege lata* the limits of the protection of the employer's interest are thus determined

[30] Ibidem, p. 199.
[31] Compare B. Wagner, *Zasada swobody umów w prawie pracy*, „State Labor Inspectorate" 1987, no 6, p. 64 and next; L. Kaczyński, *Zasada swobody umów w prawie pracy po nowelizacji kodeksu pracy*, „State Labor Inspectorate" 1997, no 3, p. 8 and next; A. Sobczyk, *Prawo pracy w świetle konstytucji RP*, vol. I: *Teoria publicznego i prywatnego indywidualnego prawa pracy*, Warszawa 2013, p. 246.
[32] See T. Zieliński, *Prawo pracy. Zarys systemu. Cz. II. Prawo stosunku pracy*, Warsaw-Kraków 1986, p. 233 and next.
[33] Compare M. Latos-Miłkowska, *Ochrona interesu pracodawcy*, Warsaw 2013, p. 186-187.

by the social interest of the employee in the form of, first of all, the minimum remuneration for work, as well as various social and guarantee benefits such as the severance payment and the guarantee remuneration under article 92 of the Polish Labor Code[34]. Constitutionally guaranteed right to the minimum remuneration for work is a significant limitation on the part of employers, but in a country like Poland it is difficult at the present stage of socio-economic development of the country to find a better solution, which would force many employers to determine remuneration at the minimum social level. The democratic state of law can not lose sight of the development and consolidation of social justice[35]. The aim of the regulation of labor law can not be only the maximization of the employer's profit. Excessive freedom of contract in employment relationships can not thus lead to the social exclusion of employees, excessive stratification of wealth and to their exploitation[36].

The principle of justice can be used to protect the employee from exploitation as the weaker party of the employment relationship. This applies in particular to the employment relationship, one of whose characteristics is bearing the economic, personal and technical risk by the employer. Consequently, as a rule, the amount of remuneration due to the employees may not be affected by the poor financial condition of the loss-making company. Therefore, the remuneration associated with the economic situation of the company can only supplement the remuneration for the input of labor, but it should not replace it unless we are dealing with a managerial staff. The obligation to pay the appropriate amount of remuneration for work is in fact one of the main responsibilities of the employer. The employer is obliged to pay the remuneration even if the outcome of the work does not match his expectations or even if the objectives for which the employment relationship was concluded were not achieved[37].

One of the unfulfilled to this day 21 so called August demands of Solidarity of 1980 is to guarantee the automatic wage growth parallel to the rise in prices and inflation. According to the Council of Europe, the concept of „fair wage" should include not only the economic element (objective) related to the equivalence of benefits but also the social one (subjective). The employee's right to equitable remuneration for work resulting from the fundamental principle of the labor law contained in article 13 of the Polish Labor Code does not in fact break with the equivalence

[34] Compare M. Seweryński, *Minimalne wynagrodzenie za pracę – wybrane zagadnienia*, [in:] *Wynagrodzenie za pracę w warunkach społecznej gospodarki rynkowej i demokracji,* ed. W. Sanetra, Warsaw 2009, p. 53 and next; G. Goździewicz, *Refleksje na temat prawa do godziwego wynagrodzenia za pracę,* [in:] *Wynagrodzenie za pracę w warunkach społecznej gospodarki rynkowej i demokracji,* ed. W. Sanetra, Warsaw 2009, p. 63 and next.

[35] Compare M. Zieliński, *Wykładnia prawa. Zasady - reguły - wskazówki*, Warsaw 2017, p. 258 and next.

[36] Compare M. Latos-Miłkowska, *Ochrona interesu pracodawcy*…, p. 388, 400.

[37] Compare H. Szurgacz, *Zagadnienia kształtowania warunków wynagrodzenia przez pracodawcę*, [in:] *Kształtowanie warunków pracy przez pracodawcę. Możliwości i granice,* Warsaw 2011, p. 52; Ł. Pisarczyk, *Konstrukcje i zakres ryzyka pracodawcy*, PiZS 2003, no 12, *passim*; the same, *Ryzyko pracodawcy*, Warsaw 2008, p. 49, 152 and next.

of benefits[38], but this law must be interpreted primarily through the prism of the European Social Charter referring to the criterion of the needs of the employee and his family, constituting in connection with article 78 of the Polish Labor Code the indicator of fair remuneration according to the social doctrine of the church[39]. However, Poland has not ratified article 4 paragraph 1 of the European Social Charter which implies the right of the employee to such (fair) remuneration which will provide a decent standard of living for him and his family[40]. *A contrario* a question can be asked whether the remuneration of employees in Poland is inequitable and thereby does not allow to satisfy the necessary needs of the employee and his family, which is connected inseparably with the excessive pay differential and exploitation of workers. The problem also lies in the fact that hardly anyone believes that in Polish conditions European standards can be reached in this regard at the level specified in article 4 paragraph 1 of the European Social Charter[41] and the Covenants on Human Rights[42]. Thus, the prospect of the ratification of this Charter by Poland is quite remote. However, Poland is obliged, in virtue of the partial ratification of the European Social Charter, to extend the ratification to other provisions of the Charter[43]. Remuneration at the level defined by the Charter (equitable) is nothing uncommon in the old EU countries and constitutes accepted standards.

In the light of the jurisdiction of the Constitutional Tribunal the provision of article 65 of the Constitution of the Republic of Poland containing the right to work constitutes another argument for the recognition of the principle of equitable (fair) remuneration for performed work as a principle of a constitutional rank[44]. In turn, according to article 10 § 2 of the Polish Labor Code the state determines the minimum amount of remuneration for work. The amount of an equitable wage, however, goes beyond a certain minimum level. The provisions of article 13 and article 78 of the Polish Labor Code do not however constitute in practice in our country the independent basis of the employee's claims to determine remuneration for work at the appropriate (fair) level. Therefore, the employee can not claim a higher wage payment, but can only claim its compensation to the level of minimum remuneration[45].

[38] See M. Nowak, *Prawo do godziwego wynagrodzenia za pracę. Regulacja prawna i treść,* Łódź 2007, *passim*; J. Skoczyński, *Prawo do godziwego wynagrodzenia za pracę*, PiZS 1997, no 4, p. 14.

[39] Compare J. Wratny, *Niektóre dylematy polityki płac a ustawodawstwo pracy,* PiZS 2001, no 7, p. 6; G. Goździewicz, *Refleksje na temat prawa do godziwego…*, p. 63 and next.

[40] Compare A.M. Świątkowski, *Karta praw społecznych Rady Europy*, Warsaw 2006, p. 132-139.

[41] Journal of Laws of 1999 No 8, item 67 with.changes.

[42] Journal of Laws of 1977 No 38, item 167 and Journal of Laws of 1977, No 38, item 169.

[43] See T. Zieliński, *Konsekwencje ratyfikacji Europejskiej Karty Społecznej dla polskiego systemu prawnego*, [in:] *Obywatel – jego wolności i prawa*, ed. B. Oliwa-Radzikowska, Warsaw 1998, p. 209.

[44] See sentence of the Constitutional Court of 7 May 2001, K 19/00, Case Law of the Constitutional Court 2001, no 4, item 82.

[45] See sentence of the Supreme Court of 29 May 2006, I PKN 230/05, Case Law of the Supreme Labor Court 2007, no 11-12, item 155 with glosa of A. Musiała; sentence of the Supreme Court of 10 lutego 2011, II PK 194/10, http://www.orzeczenia.com.pl/orzeczenie/hklwg/sn,II-PK-194-10,wyrok_sn_izba_pracy_

One can risk the claim that Polish minimum remuneration for work as grossly low (understated) is „inequitable", although formally compliant with the law.

As it has already been noted, highly disputable is also the view according to which the appropriate application of article 388 of the Polish Civil Code about exploitation is acceptable in relation to article 300 of the Polish Labor Code, when the employee receives remuneration that violates the principle of equitable remuneration in a blatant manner under article 13 of the Polish Labor Code. The employee would then have to show that the value of the work he performs blatantly exceeds the remuneration received for it, and that the employer, setting remuneration that is too low, has used his state of necessity, disability, or inexperience. The employee could then demand an increase in pay or a reduction in the dimension of the work performed.

Despite the fact, however, that more than one representative of the science of labor law[46] in theory allows for the application of article 388 of the Polish Civil Code in employment relationships, in Polish courts there have been no cases against the payment of grossly low remuneration for work brought under this provision for many years. So the fact is that this provision is very difficult to apply adequately on the basis of article 300 of the Polish Labor Code and it does not protect effectively against real exploitation in employment relationships. The more so, that there is no lack of legal doubt as to its application in employment relationships in terms of remuneration for work. The regulation of the Labor Code concerning remuneration is in fact exhaustive and it is difficult to see a legal gap here[47]. But, it would be even more difficult, in the case of exploitation in employment, to use *the analogy of legis* or *the analogy of iuris*[48].

There are however lawsuits against grossly high remuneration (also wrongly called „inequitable")[49]. Meanwhile, one should share the view in the light of which grossly high remuneration for work can not be assessed in terms of its equitability, but only its compliance with the principles of social interaction[50]. According to

ubezpieczen_spolecznych_i_spraw_publicznych_ii/6/; E. Maniewska [in:] *Kodeks pracy. Komentarz,* t. I, ed. K. Jaśkowski, Warsaw 2014, p. 91; K. Walczak, *Problematyka wynagrodzenia w świetle Europejskiej Karty Społecznej oraz Zrewidowanej Europejskiej Kary Społecznej i jej odzwierciedlenie w polskich realiach,* PiZS 2017, no 1, p. 3-4; A. Sobczyk [in:] *Kodeks pracy Komentarz,* ed. A. Sobczyk, Warsaw 2015, p. 53.

[46] See B. Wagner [in:] *Kodeks pracy 2011. Komentarz,* ed. B. Wagner, Gdańsk 2011, p. 73; G. Goździewicz, T. Zieliński, [in:] *Kodeks pracy. Komentarz,* ed. L. Florek, Warsaw 2011, p. 98-99; K.W. Baran, [in:] *Kodeks pracy. Komentarz,* ed. K.W. Baran, Warsaw 2016, p. 1590; B. Bury, *Odpowiednie stosowanie w prawie pracy wybranych przepisów księgi III Kodeksu cywilnego,* „Monitor Prawa Pracy" 2007, no 5, p. 233; M. Raczkowski, *Odpowiednie stosowanie przepisów kodeksu cywilnego o wyzysku w stosunkach pracy*, PiZS 2006, no 7, p. 9 and next.

[47] Compare M. Nowak, *Wynagrodzenie za pracę*, Warsaw 2014, p. 51.

[48] Compare K. Roszewska, *Skutki sprzeczności przepisów kodeksu cywilnego z zasadami prawa pracy,* PiZS 2005, no 2, p. 22 the same, *Klauzula niesprzeczności przepisów kodeksu cywilnego z zasadami prawa pracy w odesłaniu z art. 300 k.p.,* PiZS 2004, no 6, p. 25.

[49] Compare G. Goździewicz, *Refleksje na temat prawa do godziwego wynagrodzenia za pracę…*, p. 70 and next with quoted case law and literature.

[50] See B. Wagner [in:] *Kodeks pracy 2011…*, p. 73. See among others sentence of the Supreme Court of 7 August 2001, I PKN 563/00, Case Law of the Supreme Labor Court 2002, no 4, item 90 with glosa of

the Supreme Court, granting over-standard or extraordinary employee privileges is subject to judicial review in terms of the socio-economic assessment of the parties' interests or the rights of the beneficiaries, and requires taking into consideration the principles of good faith, decency in negotiating, the obligation to maintain loyalty of the parties and respect for their legitimate interests, good morals, as well as other principles of social interaction (article 8 of the Polish Labor Code)[51]. In the light of the judicature, remuneration regulations, including those regulating the remuneration policy and the rules of the assessment of employees, should be interpreted, taking into account the circumstances of their issue, the principles of social interaction and the established customs. The intent and purpose of the issue of these regulations should also be examined, paying less attention to their literal wording. Lack of precise and clear rules causes that the positive assessment of the employee should in this case lead to the establishment of higher remuneration – in accordance with the adopted rules [52].

AMOUNT OF REMUNERATION FOR WORK AND WAGE DISCRIMINATION

By the way, in such cases, wage discrimination in employment is also a real problem. Practice has shown that in the same period in different workplaces (even public) the conditions of remuneration for work of the same type, the same quantity and quality, with the same qualifications may be more or less favorable. It is not uncommon that the level of the rights of employees varies significantly, although both employees perform the same or very similar work in different workplaces. Quite often, especially in the conditions of high unemployment on the labor market, many employers offer understated remuneration following the assumptions of shallow economism. In the doctrine remuneration is considered grossly understated when being reduced by ¼[53].

The interpretation of international and European law points to the need to occasionally leave „the area of one employer" in order to, among others, eliminate wage discrimination in the same sectors and industries. Using the phrase „discrimination in employment" in the Labor Code may also suggest the legislator's aim to extend the scope of the application of anti-discrimination standards as well as going beyond the specific,

Z. Hajna, PiZS 2002, no 6, p. 39 and next and with glosa of B. Cudowski i Z. Niedbała, Case Law of the Labor Court 2002, no 1, item 9; sentence of the Appeal Court of Kraków of 20 09.2012, III AUa 420/12, http://orzeczenia.krakow.sa.gov.pl/content/$N/152000000001521_III_AUa_000420_2012_Uz_2012-09-20_001; sentence of the Appeal Court in Katowice of 21.04.2016, V ACa 814/14, Lex no 2055098.

[51] See Sentence of the Supreme Court of 4 November 2010, II PK 106/10, Case Law of the Labor Court 2012, no 10, item 98 with glosa of J. Wratny.

[52] See Sentence of the Supreme Court of 16 February 2017, II PK 11/16, „Gazeta Prawna" of 27 February 2017.

[53] Ibidem.

individualized employment relationship, particularly in the process of shaping fair wage relations[54]. In recent years the Court of Justice of the EU has adopted a very broad understanding of the prohibition of discrimination in the field of remuneration. Discrimination in this respect can be established even if the compared employees perform work at different workplaces, if the working conditions of these employees derive from the same source, for example from the same law or the same supra-institutional collective labor agreement[55]. However, so that a person making a claim of discrimination could indicate as a reference object a worker employed with another employer there must be the entity (source) who has powers in respect of the employment conditions with one and the other employer and is able to restore the state of equal treatment and non-discrimination (*single source*)[56]. A good example of such discrimination may be here the comparison of remuneration conditions in two different Polish public academies (e.g. universities), where there are significant disproportions in the amount of remuneration at the same job positions (assistant professors, professors, etc.)[57]. The Supreme Court therefore rightly states that the equitable (non-discriminatory) relation of the academic professors' remuneration for dimensional hours (contained in the teaching quota) and overtime hours means that the remuneration rate for overtime hours should not be lower than the remuneration rate for didactic classes held within the teaching quota[58]. The anti-discrimination law constitutes admittedly the formally undeniable achievement as the synonym of human rights and civilization progress. The problem begins, however, only in the case of its factual application by employers, State Labor Inspectorate, labor courts. The issue of remuneration discrimination (indirect) in the field of remuneration is one of the most difficult to prove in court by a single employee who needs support from colleagues, lawyers and trade unions in this regard[59].

[54] Compare M. Nowak, *Wynagrodzenie za pracę*…, p. 76–77; M. Wandzel, *Równe wynagradzanie pracowników niezależnie od miejsca świadczenia pracy*, „Monitor Prawa Pracy" 2006, no 11, *passim*.

[55] Compare L. Mitrus, *Rozwój prawa wspólnotowego w dziedzinie równego traktowania mężczyzn i kobiet w zatrudnieniu,* PiZS 2007, no 1, p. 4–5 with quoted there case law of the European Court of Justice.

[56] See glosa of P. Czarnecki to sentence of the Supreme Court of 18 September 2014 to sentence III PK 136/13, Case Law of the Labor Court 2014, no 9, item 85.

[57] Compare H. Szewczyk, *Równość płci w zatrudnieniu.* Warsaw 2017, p. 77 and next.

[58] See Sentence of the Supreme Court of 26 November 2002, I PKN 632/01 Case Law of the Supreme Labor Court 2004, no 10, item 172.

[59] See M. Tomczak, *Wykazanie dyskryminacji płacowej to walka z wiatrakami,* „Gazeta Prawna" of 12 January 2017.

FINAL REMARKS

It is *in fine* worth pointing out that the right of the employee to the minimum remuneration for work has a constitutional dimension, which also prejudges the normative character of the basic principles of labor law contained in article 13 of the Polish Labor Code. In order to reduce the exploitation of the employee receiving the lowest remuneration for work, it is necessary to continue raising the minimum remuneration with regard to the financial capacity of the state, so that in effect raise it to such a level that it would increasingly take into account the needs of the worker and his family and in this way fulfill the requirements contained in article 4 of the European Social Charter[60]. Particularly that the level of national income in our country still does not translate into the amount of wages, which results in the fact that employees do not fully benefit from economic growth, and do not participate sufficiently in social development[61].

It is also worth considering the demand for admitting the claiming nature of article 78 of the Polish Labor Code (as well as changes in its content towards taking into account the social part of remuneration) and introducing changes in the anti-discrimination law towards making it easier to demonstrate remuneration discrimination (indirect)[62].

Under Polish conditions, such legal solutions would certainly be needed in order to, while strengthening the protection against exploitation, exclusion and social stratification, positively affect the improvement of the quality of life and work of employees and their families and promote social integration[63].

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[60] Compare M. Nowak, *Wynagrodzenie za pracę*…, p. 52-53.
[61] Compare Z. Jacukowicz, *Płaca minimalna w Polsce i w innych krajach o gospodarce rynkowej*. Warsaw 1992, p. 39; Z. Studniarek, *Wynagrodzenie godziwe w ujęciu Europejskiej Karty Społecznej i możliwość jej wdrożenia w realiach polskiej gospodarki*, PiZS 1995, no 6, p. 25.
[62] M. Raczkowski, *Odpowiednie stosowanie przepisów kodeksu cywilnego*…, p. 13.
[63] Compare B. Godlewska-Bujok, *Ryzyko wykluczenia i niepewność*, PiZS 2008, no 8, p. 5-7.

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Summary: The normative relationship between the labour law and the civil law is specifically shown in article 300 of the Polish Labour Code, the provisions of which are met by article 353(1) of the Polish Civil Code. The mechanism of exploitation interferes with the freedom of the parties to develop the content of their legal relationship as a contract and it is an expression of the principle of contractual justice. Exploitation limits the principle of freedom of contracts, i.e. a contract concluded for the purpose of exploitation is contrary to the nature (characteristics) of the obligation relationship as well as to the acts and the principles of social interaction. It is difficult to apply the provision of article 388 of the Polish Civil Code based on article 300 of the Polish Labour Code; it does not ensure effective protection against exploitation in employment contracts either.
The mechanism of exploitation in the labour law should be reviewed in terms of remuneration of employees. The employee's right to receive equitable remuneration for work resulting from the basic principle of the labour law provided for in article 13 of the Polish Labour Code does not depart from the equivalence of benefits, but it should take both the economic aspect associated with the equivalence of benefits and the social aspect into account. However, the provisions of article 13 and article 78 of the Polish Labour Code do not provide the sole basis for employee's claims for the determination of the remuneration for work at the "fair" level, and the employee can only demand that the remuneration be increased to the level of the minimum wage. Therefore, new mechanisms of protection against exploitation in the field of the labour law should be sought.

Keywords: freedom of contracts, exploitation, legal protection, employee, remuneration

WYBRANE PROBLEMY KSZTAŁTOWANIA WYSOKOŚCI WYNAGRODZENIA ZA PRACĘ

Streszczenie: Związek normatywny prawa pracy z prawem cywilnym uwidacznia się zwłaszcza w art. 300 k.p., którego warunki spełnia przepis art. 3531 k.c. Instytucja wyzysku z kolei ingeruje w swobodę stron w kształtowaniu w drodze umowy treści stosunku prawnego oraz jest ona wyrazem zasady sprawiedliwości kontraktowej. Wyzysk jest elementem ograniczającym zasadę swobody umów, tj. umowa zawarta w celu wyzysku jest sprzeczna z naturą (właściwością) stosunku zobowiązaniowego, a także z ustawą i zasadami współżycia społecznego. Przepis art. 388 k.c. jest trudny do odpowiedniego zastosowania na podstawie art. 300 k.p. i nie chroni również skutecznie przed wyzyskiem w stosunkach pracy.
Instytucję wyzysku w prawie pracy należy rozpatrywać przede wszystkim w aspekcie wynagradzania pracowników. Prawo pracownika do godziwego wynagrodzenia za pracę wynika-

jące z podstawowej zasady prawa pracy zawartej w art. 13 k.p. nie zrywa wprawdzie z ekwiwalentnością świadczenia, jednak powinno ono obejmować nie tylko element ekonomiczny wiążący się z ekwiwalentnością świadczenia, ale również socjalny. Przepisy art. 13 oraz art. 78 k.p. nie stanowią jednak samodzielnej podstawy roszczeń pracownika o ustalenie wynagrodzenia za pracę na „godziwym" poziomie, a pracownik może żądać tylko podniesienia wynagrodzenia do poziomu wynagrodzenia minimalnego.

Słowa kluczowe: swoboda umów, wyzysk, ochrona prawna, pracownik, wynagrodzenie