

COLLECTIVE LABOUR LAW CODIFICATION, POLISH EXPERIENCE*

CODIFICACIÓN DEL DERECHO COLECTIVO
DEL TRABAJO, LA EXPERIENCIA POLACA

LOI COLLECTIVE DU DROIT DU TRAVAIL
D'EXPÉRIENCE SUR LA CODIFICATION - POLONAIS

Michał SEWERYŃSKI**

I. THE NEED FOR THE POLISH LABOUR LAW REFORM

Following the systemic transformation, which started in Poland in 1989 —as a consequence of Solidarity Revolution, the Polish Labour Code of 1974 and other labour law acts were successively amended. However, that method did not granted its full and prompt adjustment to the rules of democracy and market economy, as well as to the European Union law. That's why the Polish authorities decided to reform the labour law by one legislative act, namely the new Labour Law Code. Although this form of labour law regulation does not prevail in democratic and free-market countries, it was taken into account that codification can be harmonized with democratic rules of the country and that social partners accept such a form of regulation.

II. INDIVIDUAL (EMPLOYMENT) AND COLLECTIVE LABOUR LAW

One of the key legislative question which arose as regards the reform of the Polish labour law was as follows: should individual labour law (employ-

* Ponencia presentada al II Congreso de la Sociedad Mexicana de Derecho del Trabajo y de la Seguridad Social y II Jornadas de la Academia Iberoamericana de Derecho del Trabajo y de la Seguridad Social, celebrado en la Escuela Libre de Derecho de Puebla los días 8, 9 y 10 de marzo de 2012.

** Profesor en la Universidad de Lodz y presidente de la ISLSSL, Polonia.



ment law) and collective labour law be covered by a single labour code or by two codes separately. When solving the above mentioned problem it shall be pointed out that individual and collective labour relations are genetically and functionally connected *i.e.* without individual relations there can be no collective relations. At the same time collective labour relations serve for individual labour relations. Thus, interdependence existing between individual and collective labour relations justify to cover them with one Labour Law Code.

On the other hand, however, one has to note that collective labour relations represent specific subject matter and are based on specific rules. That's why provisions regulating collective labour relations, adopted in Poland after 1989, were placed in separate statutes, outside of the existing Labour Code of 1974 (except provisions concerning collective labour agreements), becoming more and more clearly an act regulating only employment relations. At the same time a dispersion of collective labour law provisions in separate statutes does not allow for taking into account connections and dependencies occurring between them. It also causes loopholes and improper functioning of these provisions.

Taking all above factors into account, many of Polish labour law specialists argued that collective labour law provisions should be consolidated in a separate legislative act, preferably in the Collective Labour Law Code which should exist alongside to Labour Law Code, regulating employment relations. That idea was accepted by the Polish Government establishing in 2002 the Labour Law Codification Commission.

Undertaking its task in the field of collective labour law, the Polish Codification Commission had to resolve a number of important issues, concerning mainly trade unions freedom, collective bargaining and collective disputes. All of them have an universal character but they will be presented here with special regard to national specific factors.

III. TRADE UNIONS

The Polish Constitution of 1997 (article 59), as well as a set of 1991 acts on collective labour law, recognizes all basic trade union freedoms (freedom of coalition, right to collective bargaining, right to conclude collective agree-

ments and other collective accords, as well as the right to strike). However, the scope of trade union freedom raises some serious questions.

1. Establishment of Trade Union

The 1991 Trade Union Act states that a union can be established by at least 10 people having the right to associate themselves in trade unions (article 12.1). This low threshold had as a consequence an appearance of very small trade unions, limited to a single works establishment and having no greater significance. Moreover, the existence of high number of small trade unions generate competition and conflicts between them, weakening the whole trade union movement. Furthermore, an easy way to establish trade union is in Poland frequently abused by employees having in mind privileges granted to unions activists. For this reason it was proposed to raise the number of persons authorised to establish a trade union. But the Polish unions always consider it as a violation of the trade union freedom and rather prefer to leave the number of trade union's members to the discretion of interested persons.

Another issue which had to be considered by the Codification Commission in the light of the freedom of association is the trade union registration in court, which is provided for in the Polish Trade Union Act as of 1991 (article 14). The starting point for this consideration should be the article 2 of the 87 ILO Convention, defining the workers' right to establish a trade union without a previous authorisation. 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 lead to make the union establishment dependant on the will of a state authority. According to the 1991 Act, the registration consists in the court verifying whether the trade union established by its founders fulfils the statutory requirements concerning the terms and the mode of its foundation, the 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.

It is obvious that such a registration is not limited to a simple act of trade union enlistment, but is of a constitutive character since, without the regis-

tration, the employees' resolution establishing trade union loses its validity. That's why the compatibility of the Polish legislation with the para. 2 and 7 of the ILO Convention Number 87 raises some doubts, and an alternative procedure of notification has also its adherents in Poland. It has to be pointed out, however, that the ILO did not question the Polish legislation as regards trade union registration, and that Polish trade unions do not claim a procedure of notification.

2. Trade Union within an Enterprise

The Polish Trade Union Act as of 1991 allows each trade union to set up freely works establishment sections, called "works trade union organisations." The sections, which have to count at least 10 members, are granted by the 1991 Act and the Labour Code far reached rights, including a special protection against dismissal for the members of the section board. Trade union sections may use their rights autonomously, even without the approval of the trade union's board and their position is strengthened by the legal personality which is usually granted to sections by trade unions' bylaws.

That particular position granted to work establishment union sections raises serious doubts considered by Codification Commission. Without questioning trade union's right to establish its organisational units at the work establishment level, it seems that these units shall conduct its activity rather on behalf of the whole trade union and not autonomously. Furthermore, the trade union section should be a credible and responsible partner in relations with an employer, which is doubtful when a section may act without a full engagement of the whole trade union. In particular, it is very unlikely that an employer will get compensation for a damage caused by 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 all necessary skills to lead autonomous collective negotiation with an employer. Moreover, its autonomy is not conducive to industrial peace as it can organise a strike even without the consent of the whole trade union.

Considering the issue of trade union freedom, the Codification Commission had taken into account that the private sector of Polish economy is mostly composed of very small enterprises, employing no more than 4-5 workers. Therefore, in these enterprises there are no conditions to establish trade union section, even though all workers are members of a trade union. Thus, the issue is how to guarantee the proper union representation and protection to workers employed by such small employer. According to the 1991 Trade Union Act the solution consist in the establishment of multi-plant trade union units. This concept has many 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 union representatives necessary information and refuse to bear costs connected with the multi-plant trade union section functioning. Therefore, an alternative solution was considered by the Codification Commission, consisting in the designation of trade union delegate, representing trade union members within an enterprise in which their number is not sufficient to establish a regular trade union section. Trade union delegate, acting on behalf of the whole trade union, could have the same rights as trade union section.

3. Protection of Trade Union Representatives

The scope of trade unions' representatives protection in Poland is very large. Moreover, the protection became entirely real, secured by the judicial power of independent courts and tribunals (article 173 of the Polish Constitution). The main mechanism of protection consist in prohibition of termination of a trade union representative's contract of employment or worsening its terms without the consent of the board of works establishment trade union section and 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 regime in which trade unions played mostly a political role, closely directed by the ruling communist party. After 1989 all these regulations were maintained due to the strong position of trade unions in the process of democratic transformation in Poland. However, in a new systemic conditions the large scope of union

representatives protection had to be considered by the Codification Commission. Even though some amendments of the 1991 Trade Unions Act has it reduced, the number of protected union activists seems still excessive, as in a single work establishment there are often several trade union sections, particularly in the public sector. As a consequence, the employer's freedom to lead its own employment policy, adjusted to his goals and market conditions, is seriously limited.

For fear of such consequences employers try to impede the attempts to establish trade union sections, especially that very often they are established exactly to gain the protection against dismissal or worsening terms of contract. The Supreme Court recognized that in some cases such a practice constitute an abuse of the trade union freedom, but this decision does not solve entirely the above problem.

But 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 in work in such cases, as well as remuneration which is guaranteed for the time during which the dismissed activists were unemployed, do not refrain employers from discriminatory actions.

4. *Representative Trade Union*

If more than one trade union aspires to represent employees in a given case, the binding Polish provisions allow for creating a common trade union representation or for other forms of common action (article 30 §§ 3 and 4 of the 1991 Trade Union Act and article 241.25 § 1 of the Labour Code). However, ideological differences between Polish trade unions and competition between them due to particular interests frequently prevent trade unions from agreeing on common actions. Therefore, there's a need of provisions allowing for selecting the representative trade union, authorised to act before an employer or an employers' organisation.

However the binding criteria of trade union representativeness are considered as too liberal, as they allow for selecting several representative trade unions in the same work establishment which hamper the development of

collective bargaining. Furthermore, it has to be pointed out that, according to the Polish labour law, the principle of representativeness is not applied to collective disputes which enables even a marginal trade union organisation to enter a strike and this solution is not favourable to maintain social peace.

Thus, the Codification Commission tried to rationalize the criteria of trade union representativeness. However, its proposals were contested by trade unions. As a matter of fact, the position of large trade unions as well as trade union federations and confederations was not endangered no matter what criteria of representativeness are adopted. But small trade unions were afraid of losing their right to act, if a (high) number of members is adopted as a criterion of representativeness.

IV. COLLECTIVE BARGAINING

1. *Scope of Collective Bargaining*

In a democratic country and within a market economy collective labour agreements should be given a large regulatory space. Consequently the statutory regulation should be limited to the scope which is necessary to guarantee a common legal order, granting a protection to the public interest. However, determining a clear delimitation between a statutory regulation and a regulation by way of collective agreements was one of the most difficult challenges facing by the Codification Commission.

First of all it has to be noted that the current scope of the statutory labour law in Poland is quite broad and unions and workers see in it a strong guarantee of their rights. Thus, it is difficult to limit the scope of the statutory regulation dramatically. Furthermore, far reaching limitation of the statutory regulation, in favour of broader collective agreement regulations, is not encouraged by a lack of trade union partner in the small private enterprises.

Another legislative issue, as regards collective bargaining, is connected with a lack of a proper determination of relations between collective labour agreements and collective accords, both recognized by the Polish Labour Code as a source of labour law. At the same time, there are substantial doubts, including the Supreme Court judiciary, connected with the possibility to conclude col-

lective accords without a concrete statutory authorisation. The authorisation is required by the binding Labour Code (article 9 § 1), however in the light of the article 59.2 of the Polish Constitution it seems to be redundant.

2. *Freedom of Collective Bargaining*

One of the crucial issues of collective bargaining refers to the possibility of establishing collective agreements' standards going below the statutory level of employees' rights and employers' obligations. According to the old rule of the Polish labour law, a statute defines the minimum legal order in labour relations, and as a consequence a collective agreement cannot contain provisions which are less favourable to an employee than statutory provisions (article 9 § 2 Labour Code). However, in the contemporary European labour law doctrine one can find arguments that a strict application of the above principle does not help to save enterprises undergoing economic difficulties, which as a consequence may lead to loss of jobs. That's why an idea of deregulation is nowadays one of the central issue in the European labour law doctrine.

Approaching this issue, the Polish Codification Commission has finally rejected a possibility of deregulation below statutory protective standards, particularly as regards protection against dismissal, work safety and hygiene, protection of women and young persons, as well as from provisions granting employees an access to the court in a case of individual labour dispute.

V. COLLECTIVE LABOUR DISPUTES

1. *Strike*

The international standards clearly grant the right to strike, but they also allow the national legislator to regulate this right in order to protect the public interests. That's why the Polish Constitution (article 59.3) also provides for the possibility of establishing some statutory limitations of the right to strike. However, their present scope raises many doubts, connected with proper strike limitation in order to guarantee *essential services* and it was the next challenge to the Codification Commission. Particularly hot issue represent politi-

cal and sit-in strikes. As for the first one, there's a fear that strikes could be abused for political purposes, being far from economic and social employees' interests. Nevertheless, according to the ILO Freedom of Association Committee, the strike having at the same time a social and political character cannot be banned. As far as a sit-in strike is concerned, one has to take into consideration that it could make impossible to perform work by workers not participating in the strike as well as an employer to manage their work and his/her enterprise. However, the ILO Committee of Experts expressed the opinion that a peaceful occupation of the place of work is covered by the right to strike.

Another controversial issue is if in order to grant full protection of the employer's right to manage a plant during the strike there should be allowed to entrust workers who are not on strike with work at posts covered by strike. It could be necessary for security reasons, in order to limit losses or to guarantee essential services. On the other side, there are not doubts that there should be a ban to employ new workers in order to replace those who went on strike, unless to guarantee essential services. However it is controversial whether to allow in these situations not striking workers to work on posts covered by a sit-in strike.

In Poland also hunger strikes constitute a problem, as they occur quite often inducing a direct hazard for strikers' health and life. It seems that this hazard makes hunger strike incompatible with economic and social character of interests of striking workers. However, this negative opinion has rather a moral background and is particularly related to personal workers freedom. Thus, introduction of a legal ban of hunger strike was qualified by Codification Commission as controversial and ineffective.

2. *Lock-Out*

Clear recognition of the right to strike and other forms of employees' protests by the Polish legislation is in contrast with the legislator's silence over lock-out. Some Polish scholars indicate a legal ground for lock-out in the article 32 of the Constitution as it institutes the principle of equality before the law. But majority of Polish legal doctrine find that provision as to general and suggest to regulate clearly the issue.

The adherents of the right to lock-out consider it as a mean of necessary balance with the employees' right to strike, and argue that both rights stem from the provisions of the ILO Convention Number 87. They refer also to the article 6.4 of the European Social Charter, stipulating that in case of a conflict the right to conduct collective actions is granted to employees as well as to employers. Considering those arguments, the Codification Commission has proposed to recognize the right to a defensive lock-out, *i.e.* such which aims at giving an employer the possibility to defend him/herself against an unlawful strike. This type of lock-out does not impede the right to lawful strike. An employer should therefore have the right to announce a lockout 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 organisation's) or a labour inspector request.

At the same time the Commission stressed that 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 relationships with employees who are covered by a lock-out are suspended. It is obvious that during a lock-out employees shouldn't have the right to their salary, but they should have the right to maintain their jobs once the lockout is over, unless the agreement ending a collective dispute would provide for a limitation of jobs or a possibility to change their terms.

The above defined defensive lock-out would be more favourable for employees as compared to the present legislation in Poland. Indeed, due to the lack of any provisions on lock-out, an employer can judge the lawfulness of a strike autonomously and if he/she decides that it is unlawful he/she may dismiss striking workers without notice, as violating the obligation to perform work (article 52 § 1.1 of the Labour Code).

The Codification Commission aimed to increase the freedom of the parties to collective dispute in choosing the measures to settle it. 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 some specific circumstances, as well as judicial control of the strikes' and lock-outs' lawfulness.

VI. CONCLUSIONS

All above problems of the Polish collective labour law were regulated in the draft of Collective Labour Code issued by the Polish Codification Commission in 2006. The draft provisions aim to shape trade union freedom according to international standards and taking into specific national context, still determined to some extent by recent Polish history. At the same time the drafted Code contains many new regulations fully adjusting collective labour law to democratic system and to social-market economy.

Unfortunately, the draft of Collective Labour Code, as well as elaborated at the same time the draft of Labour Code —dealing with employment law— were not presented by the Polish Government to the Parliament. It was due to a strong opposition of both —unions and employers. The first were afraid of losing something from their freedom in the light of drafted provisions. The second found that the proposed Code does not take sufficiently into account the rules of market economy determining a run of their enterprises. In this situation the Government found that forcing codification political could be very risky from political point of view.

Thus, both draft of labour law codification have now only a scientific value. As such they could serve as a point of reference in a forgoing debate on the future shape of the Polish Labour Law. ¶