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Autonomous Sources of Labour Law in the Light of Constitutional *Numerus Clausus*. Problems with Qualifying Autonomous Acts under Polish Law.*

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Abstract

One of the most distinguishing features of labour law is the existence of a category of legal acts considered autonomous sources of law. Although not adopted by public authorities, they establish general and abstract norms regulating various labour-related issues and are secured by a complex system of sanctions. The legal effects of autonomous acts must be confronted with the normative model of sources of law. The Constitution of the Republic of Poland has established *numerus clausus* of sources of law. None of the autonomous sources of labour law are mentioned as a part of the constitutional legal system. The article presents the Polish system of sources of law and clarifies constitutional grounds for creating the normativity of collective agreements and employer's regulations as autonomous acts.

Keywords: Autonomous; Sources; Labour; Law; Constitution; Collective bargaining; Employer; Worker.

1. Introduction.

One of the most distinguishing features of labour law is the existence of a category of legal acts considered autonomous sources of law.[1] Although not adopted by public authorities, they establish general and abstract norms regulating various labour-related issues and are secured by a complex system of sanctions, including state coercion which is unique

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[1] *See, e.g.* Gyulavári T., Menegatti E. (eds.), *The Sources of Labour Law*, Wolters Kluwer, Alphen aan den Rijn, 2019.

for labour law.[2] There is, however, a question whether they are sources of law or fall into another legal category. Of course, the concept of law and its sources is among the most complex and ambiguous. The understanding of law depends on the adopted perspective (ranging from various versions of *ius naturale* and legal positivism to realistic approaches)[3] as well as research methods (legal sciences, sociology, psychology, etc.). Moreover, due to ongoing changes, including the increase in cross-border relationships, unification tendencies and digitalization, the approach to the idea of law has been evolving towards pluralism and multicentrism.[4] The labour-related sphere is no exception: global and regional systems of fundamental rights[5] but also a variety of acts created by social partners (e.g. transnational framework agreements adopted at the European Union level, transnational collective agreements concluded between multinational companies and employees' representatives) and adopted by companies (e.g. codes of conducts). However, at the end, the legal effects of autonomous acts must be confronted with the normative models of sources of law adopted in various countries. These models vary from country to country. Some of them, although rooted in constitutions, are shaped to a large extent by the jurisprudence and scholars (France, Germany). In some other cases, constitutions create a comprehensive framework for the sources of law (Eastern European Countries), in particular specifying their exhaustive lists (as a response to historical experience).

An example of a complex constitutional legal framework can be found in Poland.[6] The Constitution of the Republic of Poland has established *numerus clausus* of generally binding sources of law.[7] The law specifies bodies authorised to create generally binding law and regulated legislative procedures. None of the autonomous sources of labour law are mentioned as a part of the constitutional legal system. At the same time, the definition of labour law adopted in the Labour Code covers not only provisions of generally binding sources of law but also provisions of autonomous acts: collective agreements, employer's acts and statutes – internal acts of various organizations as far as they regulate rights and duties of the parties to the employment relationship (Article 9 § 1 of the Labour Code). On

[2] Zöllner W. *et al.*, *Arbeitsrecht [Labour Law],* C.H. Beck, München, 2015, 69.
[3] *See, e.g.* Letwin S. R., *On the History of the Idea of the Law*, Cambridge University Press, Cambridge, 2005.
[4] *Cf.* Griffiths A., *Legal Pluralism,* in Banakar R., Travers M. (eds.), *An Introduction to Law and Social Theory*, Hart Publishing, Oxford, 2002; Tamanaha B. Z., *Understanding Legal Pluralism: Past to Present, Local to Global,* in *Sydney Law Review*, 30, 2008, 375.
[5] ILO, *Fundamental rights at work and international labour standards*, International Labour Office, Geneva, 2003; Swepston L., *International Labour Law,* in Blanpain R. (ed.), *Comparative Labour Law and Industrial Relations in Industrialized Market Economies*, Wolters Kluwer, Alphen aan den Rijn, 2014, 155-182.
[6] *See, e.g.* Bień-Kacala A., Młynarska-Sobaczewska A., *Poland,* in Alen A., Haljan D. (eds.), *IEL Constitutional Law*, Kluwer Law International, Alphen aan den Rijn, 2022, 37-56.
[7] A similar solution was adopted in the Constitution of Hungary. Generally binding rules of conduct may be laid down in the Fundamental Law or in legal regulations adopted by an organ having legislative competence and specified in the Fundamental Law that are promulgated in the official gazette. A cardinal Act may lay down different rules for the promulgation of local government decrees, and of legal regulations adopted during a special legal order (Article T.1). Legal regulations shall be the Acts, the government decrees, the prime ministerial decrees, the ministerial decrees, the decrees of the Governor of the National Bank of Hungary, the decrees of the heads of autonomous regulatory organs and local government decrees. In addition, decrees of the National Defence Council adopted during a state of national crisis and decrees of the President of the Republic adopted during a state of emergency shall also be legal regulations (Article T.2). Translation: https://www.constituteproject.org/constitution/Hungary_2016?lang=en (visited 26 December 2022).

the one hand, the incorporation of this provision into the Labour Code in 1996 was considered as a recognition of the normative character of collective agreements and internal acts.[8] On the other hand, the adopted regulation leads to the questions whether autonomous sources could be considered sources of law in the light of the constitutional *numerus clausus* and, if not, what the legal basis for their normativity is (the power to regulate the rights and duties of third parties). These questions are particularly relevant when human freedoms and rights are at stake.

To answer these questions the article clarifies the concept of autonomous sources of labour law and the idea of their normativity. The presentation of the constitutional system of sources of law based on the *numerus clausus* principle enables an answer to the question whether autonomous acts can be treated as sources of law in a strict constitutional sense. Next section clarifies constitutional grounds for creating the normativity of collective agreements and employer's regulations as autonomous acts. The analysis of collective agreements together with internal regulations issued by the employers is justified by exceptionally large role of the latter. This is caused by the crisis of collective bargaining and the phenomenon of replacing collective agreements by unilateral acts. The Polish case can be instructive as a contribution to the discussion on the legal nature of autonomous sources of labour law. Therefore, the analysis, although relativized to a specific constitutional system, is conducted from a broader perspective.

2. The concept of autonomous sources of labour law.

Two main types of autonomous sources of labour law which have developed in the course of time are: 1) collective agreements concluded by employers (bodies representing employers) and workers' representatives; 2) internal acts issued by employers. Collective agreements do not constitute a homogeneous category. They can be classified according to various criteria, including the type of bodies representing workers (trade unions and elected bodies, e.g. work councils) as well as subject matters: from working conditions (collective bargaining agreements) via organization of the work process (organizational agreements) to structural issues (co-determination agreements). The right of trade unions to negotiate and conclude collective agreements, as an emanation of freedom of association, is covered by international (ILO), European and constitutional guarantees. Originally, the domain of trade unions was setting up employment standards, while works councils exercise the right to co-determination. Nowadays, for various reasons, numerous exceptions to the traditional division are allowed. Unilateral employers' acts are usually issued to organise the process of work (schedules of working time, workwear). In some countries, the role of employer's acts has been taken over by company agreements concluded with work councils (e.g. German *Betriebsvereinbarungen*).

[8] Hajn Z., Mitrus L., *Poland,* in Blanpain R. (ed.), *International Encyclopaedia of Laws: Labour Law and Industrial Relations*, Kluwer Law International, Alphen aan den Rijn, 2016, 51.

Autonomous acts are created not by the state (public authorities),[9] but by autonomous actors: bodies representing workers on the one hand and employers (employers' organizations) on the other (autonomy). Even in public sector the state acts usually in its *dominium* not *imperium*. The law creates a framework for autonomous law-making mechanisms. The scope of legislative intervention varies depending on the type of autonomous act and the adopted model of collective relations reflecting a variety of approaches to social and economic issues (liberal market economies and coordinated market economies).[10] The foundation of voluntary systems is collective autonomy (e.g. British collective *laissez-faire*, German *Tarifautonomie*) and legislation plays an auxiliary role[11] while in regulatory systems (e.g. French law) the state's intervention is more intensive (the obligation to bargain collectively, *erga omnes* effect of collective agreements).[12] The state intervention is stronger in case of agreements negotiated with elected bodies and unilateral acts issued by employers. The law authorize specific bodies to regulate selected matters. Finally, the law-making process is, however, of autonomous nature.

Autonomous acts can be treated as sources of law as far as their provisions are used to create general and abstract norms binding upon not only the bodies involved in the law-making process but also third parties, e.g. employers covered by multi-company collective agreements and workers employed in companies where collective agreements apply[13] (normativity). The normativity of autonomous acts may be built up by themselves by extending their application scope and by adoption of a system of autonomous sanctions which does not require the state's intervention. The normativity of autonomous acts in various areas is, however, supported by the law. The law may provide an *erga omnes* effect of autonomous acts (extending their personal scope on non-unionized employers and/or workers), their binding effect (*effet impératif*)[14] accompanied by the prohibition of *in peius* modifications in individual employment contracts.[15] German law provides explicitly that provisions of collective bargaining agreements (*Tarifverträge*) and company agreements (*Betriebsvereinbarungen*) are treated as legal provisions: *Rechtsnormen*[16] while under French law *effet immédiat* (provisions of collective agreements apply directly like legal provisions) has been recognized.[17] On the other hand, in some systems the operation of autonomous acts, in particular collective agreements, is still based on contract law (Great Britain).

[9] The state may act as an employer in these relations.
[10] Hall P. A., Soskice D., *Introduction,* in Hall P. A., Soskice D. (eds.), *Varieties of Capitalism: The Institutional Foundations of Comparative Advantage*, Oxford University Press, Oxford, 2001, 8.
[11] Davies P., Freedland M. (eds.), *Kahn-Freund's Labour and the Law*, Stevens, London, 1983, 60.
[12] Liukkunen U., *The Role of Collective Bargaining in Labour Law Regimes: A Global Approach,* in Liukkunen U. (ed.), *Collective Bargaining in Labour Law Regimes. A Global Perspective*, Springer, Cham, 2019, 1 ff.
[13] *Cf.* Davies P., Freedland M. (eds.), nt. (11), 123, 153-154 (collective agreements).
[14] Pélissier J. *et al.*, *Droit du travail [Labour law],* Dalloz, Paris, 2006, 121.
[15] Auzerro G. *et al.*, *Droit du travail [Labour Law],* Dalloz, Paris, 2017, 84-87.
[16] § 1(1) of the German law on collective agreements. Provisions of collective agreements apply directly (*unmittelbar*) and are binding (*zwingend*).
[17] Auzerro G., nt. (15), 77.

In legal systems which recognise the *erga omnes* effect of collective agreements social partners 'compete' with the state in creating legal norms.[18] The extended application may be justified by constitutional provisions recognising (either directly or indirectly) the regulatory power of social partners also towards third parties.[19] For example, the Constitution of Italy recognises generally binding nature of industry-wide collective agreements concluded by representative trade unions.[20] The Preamble of the Constitution of France of 1946 (recognised by the Constitution of 1958) provides that all workers shall, through the intermediary of their representatives, participate in the collective determination of their conditions of work.[21] According to Article 37.1 of the Constitution of Spain the law shall guarantee the right to collective labour bargaining between worker and employer representatives, as well as the binding force of the agreements.[22]

The normative effect of collective bargaining agreements may be derived either from the will of individuals and entities (membership in organisations involved in the law-making process) or from the decision of the state which takes over and applies conditions of work and pay negotiated by social partners.[23] Organizational and/or co-determination workplace agreements can be treated as an emanation of workplace community and are based on democratic mandate.[24] It justifies their *erga omnes* application to all workers/employees employed in a given establishment or a company (as a part of a 'workplace constitution'). [25] As far as unilateral acts of employers are concerned, the law may require or authorise employers to issue internal acts on selected issues, usually aimed at organizing the process of work (e.g. French *règlement intérieur*). They are based on managerial employer's power.[26] The legal nature of the internal acts is ambiguous which reflects differences in the approach to the employer's managerial rights and employee's subordination. On the one hand, the employer's prerogative may be treated as an element of the power delegated by the law to employers.[27] On the other hand, the right to issue internal rules can be derived from the contract law.[28] In this theory the managerial power of the employer is accepted voluntarily by employees. Due to their legal nature and purpose internal employers' acts apply (may

[18] Brameshuber E., *The Importance of Sectoral Collective Bargaining in Austria,* in S. Laulom (ed.), *Collective Bargaining Developments in Times of Crisis – 99 Bulletin of Comparative Labour Relations*, Wolters Kluwer, Alphen aan den Rijn, 2018, 98-99.
[19] Cf. Neal A.C., *Historical Roots for Regulation of the World of Work,* in Gyulavári T. Menegatti E. (eds.), nt. (1), 29.
[20] Article 39.4 of the Constitution of Italy. However, the constitutional provision has not been implemented by the legislation: Treu T., *Labour Law in Italy*, Kluwer Law International, Alphen aan den Rijn, 2007, 185.
[21] Available at: https://www.conseil-constitutionnel.fr/sites/default/files/as/root/bank_mm/anglais/cst3.pdf, accessed 5 November 2023.
[22] Translation available at: https://www.boe.es/legislacion/documentos/ConstitucionINGLES.pdf, accessed 5 November 2023.
[23] Neal A.C., nt. (19), 29. In Germany the Minister for Labour could declare collective agreements concluded by representative organisations generally binding (*Allgemeinverbindlichkeit*) (§ 5 of the German law on collective agreements). Autonomous norms apply by decision of public authorities.
[24] Gamillscheg F., *Kollektives Arbeitsrecht. Band II. Betriebsverfassungsrecht [Collective Labour Law. Vol. II. Industrial constitution law]*, C.H. Beck, München, 2008, 22-35; Zöllner W., nt. (2), 601-603.
[25] *Cf.* Zöllner W., nt. (2), 756-772.
[26] Auzerro G., nt. (15), 4. Consequently employer's power is limited by the employment contract.
[27] De Stefano V., *Negotiating the algorithm: Automation, artificial intelligence and labour protection*, ILO Employment Working Paper No. 246, 2018, 14-15, available at: https://www.ilo.org/wcmsp5/groups/public/---ed_emp/---emp_policy/documents/publication/wcms_634157.pdf, accessed 5 November 2023.
[28] Treu T., nt. (20), 30.

apply) to all workers employed in a given company. Their subject may be, however, limited by the law[29] (to protect workers). Internal employers' acts can be either voluntary (the law recognises the managerial prerogatives of employers) or mandatory (the law expects employers to create common standards for groups of workers).[30]

3. Legal Framework of Autonomous Law-Making under Polish Law.

The Constitution recognises the right of trade unions on the one hand and employers and their organizations on the other to bargain and conclude collective bargaining agreements and other agreements (arrangements) (Article 59.2 of the Constitution). However, the Constitution neither clarifies the legal nature of collective bargaining agreements nor explicitly provides for their extended application. No other acts considered to be autonomous sources of labour law are *expressis verbis* mentioned by the Constitution. A broader definition of labour law has been provided in the Labour Code. For the purposes of the Labour Code, labour law should be understood as the provisions of laws (acts of parliament) as well as the provisions of collective bargaining agreements and other collective agreements provided for by the law, internal acts issued by the employer (regulations) and statutes[31] as far as they regulate the rights and duties of the parties to the employment relationship (Article 9 § 1 of the Labour Code).[32]

The law distinguishes between regular collective bargaining agreements which may regulate all the matters falling within the competences of social partners (Chapter 11 Labour Code)[33] and atypical collective agreements provided for in specific circumstances (collective redundancies, transfer of undertaking) or limited to specific matters (working time, remote work).[34] Both, typical and atypical collective agreements, have the same (normative) legal character[35] and, if concluded by trade unions and employers, can be treated as collective bargaining agreements in the constitutional meaning.

Atypical collective agreements, to be treated as sources of labour law in the meaning of Article 9 § 1 of the Labour Code, must be concluded on the basis of an express statutory authorisation. Social partners, within collective autonomy, may negotiate and conclude also other agreements (arrangements). However, they do not enjoy the normative status (binding *inter partes*). Characteristic of the Polish law is a broad category of internal acts issued by employers. Due to the weakness of collective bargaining (very low level of coverage),[36] Polish law provides for a number of unilateral acts issued by employers. Employers not covered by

[29] Article L1321-1 of the French Labour Code.
[30] Article L1311-2 of the French Labour Code.
[31] The acts that regulate internal structure of specific entities and bodies, e.g. universities or companies. They may regulate the rights and duties of the parties to the employment relationship.
[32] *See,* e.g. Baran K.W. (ed.), *Outline of Polish Labour Law System*, Wolters Kluwer, Warszawa, 2016, 84.
[33] Baran K.W., *Model of collective labour agreements in the Polish legal system,* in *Praca i Zabezpieczenie Społeczne*, 2, 2019.
[34] Hajn Z., *Collective agreements in Poland in the light of international standards,* in *Studia z Zakresu Prawa Pracy i Polityki Społecznej*, 29, 4, 2022, 378.
[35] Hajn Z. nt. (34), 379.
[36] Pisarczyk Ł, *The Crisis of the Collective Bargaining System in Poland,* in *International Journal of Comparative Labour Law and Industrial Relations*, 35, 1, 2019, 57-77.

collective agreements and employing at least 50 employees are obliged to issue work order regulations and pay regulations. Employers employing fewer than 50 employees are authorised to issue work order and pay regulations. Moreover, larger companies are obliged to provide employees with social benefits and consequently to adopt internal regulations also in this field. Organisational matters are regulated also by other general acts issued by employers as a part of their managerial power (Article 22 § 1 of the Labour Code in conjunction with Article 100 § 1 of the Labour Code).

Autonomous norms are as a rule of deontic nature.[37] They are all, including acts not provided for in the Article 9 of the Labour Code, adopted or issued to set up rules (orders or prohibitions). They set up minimum working conditions (collective agreements, pay regulations) that must be observed by parties to each employment relationship, provide for workers' rights (social benefits regulations) or regulate rights and duties of employers and employees connected with the organization of the process of work (work order regulations, employer's announcements, innominate employer's acts based on managerial prerogatives). Usually, they formulate general and abstract rules. Their application scope is not limited to parties involved in their conclusion (adoption) but applies also to third parties, e.g. employers covered by multi-company collective agreements and employees employed in companies covered by collective agreements, employer's acts or statutes. Collective agreements are binding on all the employees employed in a company covered by an agreement unless otherwise provided.[38] Internal acts issued by employers apply to all employees of a given company. In the case of mandatory regulations (pay, work order), a limitation of personal scope is not allowed since the law requires the adoption of general rules for the whole workforce (the law may, however, provides for exceptions).

Compliance with autonomous norms is enforced by various sanctions, including sanctions provided for by the law. Provisions of individual employment contracts cannot be less favourable for employees than the provisions of collective agreements based on statutory authorisation, employer's acts and statutes as far as they regulate the rights and duties of the parties to the employment relationship (Article 18 § 1 of the Labour Code). Less favourable provisions of individual employment contracts are null and void and replaced by collective standards (Article 18 § 2 of the Labour Code). As a result, parties to the employment relationship have to abide by norms arising from autonomous acts provided for by Article 9 § 1 of the Labour Code. Autonomous acts not included in the definition of labour law (Article 9 § 1 of the Labour Code) are not covered by non-deterioration mechanism. Non-compliance with all autonomous norms (also those not provided for by Article 9 § 1 of the Labour Code) may be the basis for various forms of liability of the employee and the employer. Employees bear disciplinary responsibility for breaching their duties in the field of work order (determined by workers' regulations and announcements as well as other employer's general acts based on its managerial prerogatives). Disciplinary penalties are imposed by employers as a part of their managerial power arising from the employment relationship. An employee who breaches their duties (resulting from e.g. autonomous acts)

[37] Pisarczyk Ł., *Autonomiczne źródła prawa pracy [Autonomous sources of labour law]*, Wolters Kluwer, Warszawa , 2022, 29-43.
[38] *See*, e.g. Baran K.W., nt. (33), 8.

and causes damage to the employer bears financial liability regulated in the Labour Code. The employer's responsibility for damage caused by non-compliance with autonomous norms is regulated, as a rule, by the Civil Code.[39] This means that some of the autonomous norms have been sanctioned by the state (secured by state coercion). Undoubtedly, they are part of the broadly understood normative system.

4. Constitutional model of sources of law in Poland.

Chapter 3 of the Constitution titled "Sources of Law" distinguishes between generally binding and internal sources of law.[40] The generally binding sources of law may regulate the situation of individuals and autonomous entities in all matters (although within the framework set up by international standards and the Constitution itself). Due to the experience of the communist period, when the state failed to respect fundamental rights and freedoms and used extraordinary legal instruments towards individuals, the Constitution provides a closed list of generally binding sources of law.[41] The sources of universally binding law of the Republic of Poland shall be: the Constitution, statutes (acts of Parliament), ratified international agreements, and regulations – ordinances issued by state authorities but only within the framework set up by the acts of Parliament (Article 87.1 of the Constitution) as well as local laws adopted by appropriate (government and municipal) bodies in the territory of the body issuing such acts (Article 87.2 of the Constitution). Sources of internal law (*interna*) are binding on entities dependant on the state and public authorities only. They cannot interfere with the rights and freedoms of individuals. Since there is no need to limit the regulatory power of the state towards dependant units, the list of the sources of internal law is open. The constitutional approach to law is positivist. Acts provided for in the Constitution, established by competent bodies and in the appropriate procedure, are law. Constitutional regulation of sources of law can be called a *sui generis* norm of recognition.[42]

The definition of labour law provided in Article 9 § 1 of the Labour Code, even if limited to labour-related matters only, is much broader than the concept of law arising from the Constitution. It leads to the question about the constitutionality of Article 9 § 1 of the Labour Code which recognizes collective agreements, specific employer's acts and statutes as a part of labour law. It is obvious that an ordinary legal act, such as the Labour Code, cannot extend

[39] Hajn Z., Mitrus L., nt. (8), 177.
[40] *See*, e.g. Rytel-Warzocha A., *Constitutional law of Poland*, Larcier, Bruxelles, 2022, 107-134; Bień-Kacała A., Młynarska-Sobaczewska A., nt. (6), 37-56.
[41] Komisja Konstytucyjna Zgromadzenia Narodowego [the Constitutional Committee of the National Assembly], *Biuletyn XI*, Wydawnictwo Sejmowe, Warszawa, 1995, 172; Garlicki L. (ed.), *Konstytucja Rzeczypospolitej Polskiej. Komentarz, t. 1 [The Constitution of the Republic of Poland. Commentary, Vol. 1],* Wydawnictwo Sejmowe, Warszawa, 1999, Article 87, 2-3; Wronkowska S., *System źródeł prawa w nowej Konstytucji [The system of sources of law in the Constitution],* in *Biuletyn RPO*, 38, 2000, 82; Mojak R., *System źródeł prawa w Konstytucji Rzeczypospolitej Polskiej z 2 kwietnia 1997 r. [System of sources of law in the Constitution of the Republic of Poland of 2 April 1997],* in *Studia Iuridica Lublinensia*, 12, 2009, 29 and 45.
[42] Hart H.L.A, *The concept of law*, Oxford University Press, Oxford, 2012, 100-109.

the constitutional list of sources of law.[43] However, the constitutional system of sources of law should not be treated as a separate legal construct. It is a part of a broader constitutional model (a social contract) aimed at the protection and implementation of specific values, in particular fundamental human rights and freedoms. The closed system of constitutional sources of law is limited to acts created or recognised by the state. It means that the state, which is a democratic state ruled by law (Article 2), interferes with the rights and freedoms of individuals only in forms provided for by the Constitution. The basic form of such interference are acts of Parliament, which is empowered by the nation, the only source of such power, in democratic elections. Acts of Parliament may empower public authorities to issue regulations (ordinances). However, the latter acts are only of an executive nature and are issued within the limits set by acts of Parliament (in particular, they may not impose new obligations or limit the rights of individuals). The Constitution does not regulate other normative systems created autonomously within society. Even if the constitutional approach could be treated as positivist, it is orientated towards the relationship between the state and individuals. At the same time, the Constitution recognises a broad sphere of autonomy of individuals and voluntary bodies (civic society). The state's intervention is based on the principle of subsidiarity and aimed at supporting individuals (Preamble). An element of autonomy is the right to issue self-regulations, which may result in various normative systems, e.g. customary law, international *lex mercatoria*, private standards (e.g. codes of good practices created in multinational corporations, autonomous regulations of various associations).[44] The normative order based on the Constitution is pluralistic.[45] It covers the law in a strict sense created by the state (within the constitutional framework) as well as autonomous normative systems.[46]

Autonomous norms are enforced with the help of instruments adequate to the nature of various groups and communities (e.g. exclusion from an organization). Moreover, to bring constitutional values to life, the law may (or even should) recognise the normative effect of some autonomous acts. The extent and consequences of the recognition (e.g. the type of sanctions imposed by the law in case of non-compliance with autonomous norms) will depend on the nature of the norms and the objectives pursued by the legislature (within the constitutional framework). In particular, the recognition of or the support for autonomous systems may result from international standards.

5. Autonomous sources of labour law and constitutional *numerus clausus*.

The next step is an attempt to answer the question whether autonomous sources of labour law can be treated as sources of law in the constitutional sense. In particular, they are

[43] Kaczyński L., *Wpływ art. 87 Konstytucji na swoiste źródła prawa pracy (Uwagi wstępne) [The Influence of Art. 87 Constitution on autonomous sources of labour law (First remarks)],* in *Państwo i Prawo*, 8, 1997, 65; Sobczyk A., *Prawo pracy w świetle Konstytucji RP, t. II [Labour law in the light of the Constitution of Poland, Vol. 2],* C.H. Beck, Warszawa, 2013, 129-130.
[44] Tamanaha B. Z., nt. (4), 387-388.
[45] *See*, e.g. Griffiths A., nt. (4), 302 ff.
[46] Cf. Tamanaha B. Z., nt. (4), 375.

confronted with the constitutional *numerus clausus*. The analysis is divided into two parts, covering collective agreements (provided for by the Constitution) and other autonomous sources of labour law.

First of all, however, it is necessary to answer a question about the nature of the employment relationship and the position of parties thereto. The question is important since some scholars consider the employment relationship as a relationship of public (administrative) law. The idea is based on the concept that labour, which is not a commodity, must be treated as a part of the common good. As a result, labour is public, not private (in particular, it does not belong to the employer). A company is a private entrepreneur in the economic sphere and a public employer in the field of employment. Consequently, the employer's acts are of administrative nature. It concerns, inter alia, internal regulations concerning work order.[47] It is true that Polish law considers labour law as a separate branch of law with separate codification. Due to significant public intervention (extensive labour legislation, enforcement with the use of public law instruments), labour law is not treated as a part of private law in a strict sense. However, the law considers the employment relationship as an obligation relationship (Article 22 § 1 of the Labour Code). The obligation construction, based on autonomy and freedom, protects to the largest extent the worker's dignity. The employee's dependency is not public but autonomous in nature (the employee accepts dependency when entering into the employment relationship). Formally, the employee must be treated as an equal party to the employment relationship. Public intervention aimed at restoring real equality and equilibrium between the parties is an important element of workers' protection. The relationships of public nature exist, however, between the employer and the state (public supervision over employment standards, administrative and penal responsibility of employers), not between the employer and the employee.

A potential legal basis for considering collective agreements as constitutional sources of law is Article 59.1 of the Constitution, which recognises the right of trade unions and employers (employers' organizations) to bargain collectively and to conclude collective bargaining agreements. There are various theories explaining the position of collective bargaining agreements as sources of law.

By some scholars, they are considered to be a category of universally binding sources of law. In this theory, Article 59.2 of the Constitution extends the *numerus clausus* of generally binding sources of law.[48] However, the discussed constitutional provision is located in Chapter 2 ("Freedom, Rights and Obligations of Persons and Citizens"), not in Chapter 3 ("Sources of Law"). The Constitution does not call collective bargaining agreements sources of law, either. The absence of a clear norm of competence in the Constitution argues against recognising collective bargaining agreements as universally binding sources of law. If derived from individual rights of individuals (the right to collective bargaining), collective bargaining agreements cannot interfere with rights and duties of third parties without clear

[47] Sobczyk A., *Zakład pracy jako zakład administracyjny [Work establishment as an administrative unit],* Wydawnictwo Uniwersytetu Jagiellońskiego, Kraków, 2021, 172 ff.

[48] *See*, e.g. Krzywoń A., *Konstytucyjna ochrona pracy i praw pracowniczych* [*Constitutional protection of work and workers' rights]*, Wolters Kluwer, Warszawa , 2017, 478 - 481.

authorisation. The lack of a constitutional legal framework concerning the conclusion, entry into force as well as application of collective agreements (e.g. hierarchy of norms) is likewise symptomatic. Finally, collective bargaining agreements cover only labour-related matters, employers and workers, while generally binding sources of law are characterized by a potentially unlimited regulatory power (within the constitutional framework). Theoretically, collective bargaining agreements could be treated as a separate category of constitutional sources of law (apart from the generally binding and the internal sources of law). However, this concepts does not solve the above-mentioned problems. Especially the question about the authorisation to regulate the position of third parties remains unanswered.[49]

All the more so, there are no grounds for qualifying other autonomous acts, including acts issued by employers (regulations) and statutes, as sources of generally applicable law or a third category of constitutional sources of law.[50] They are not provided for by the Constitution[51] and are adopted by a party to an employment relationship (company, employer). Another question concerns the possibility to qualify autonomous sources of labour law (or some of them) as sources of internal law. Considering the employment relationship as an obligation binding upon the parties, the employees (workforce) cannot be treated as a dependant entities in the meaning of Article 93 of the Constitution. The employer is not a public body entitled to regulate their situation by means of public law instruments. As a result, the construct of internal sources of law is inconsistent with the nature of the employment relationship.

To summarise, autonomous sources of labour law provided for in Article 9 § 1 of the Labour Code cannot be treated as sources of law in the strict constitutional sense: they are neither generally binding nor a third category of constitutional legal acts, nor sources of internal law.

6. Grounds of normativity of autonomous sources of labour law.

If autonomous acts are not sources of law in a strict constitutional meaning, how to explain their normative effects (influence on the legal situation of third parties) in specific areas?

A core of the constitutional system (similarly to international systems of human rights), a *sui generis Grundnorm*, is human dignity, which constitutes the source of all freedoms and rights (Article 30 of the Constitution). Crucial for human dignity is freedom, the natural state of individuals,[52] "proud autonomy"[53] enabling the independent shaping of one's personal situation (own life path). Freedom expresses itself in various ways (civic society, freedom of

[49] Cf. Hajn Z., Mitrus L., nt. (8), 51.
[50] Sobczyk A., nt. (42), 143.
[51] Chmielek-Łubińska E., *Szczególne właściwości źródeł prawa pracy (zagadnienia wybrane) [Special features of labour law (selected issues],* in *Studia z zakresu prawa pracy i polityki społecznej*, 1999/2000, 47.
[52] The only primary law in the Kant's approach: Kant I., *The Principles of Political Rights* in *Kant's Principles of Politics*, Clark, Edinburgh, 1891, 34-35. *See* also Alexy R., *A Theory of Constitutional Rights*, Oxford University Press, Oxford, 2010, 223 ff.
[53] Davies P. Freedland M. (eds.), nt. (11), 78.

contracts). However, real freedom may be threatened by the factual position of individuals. In some areas, real equality is threatened by the factual position of the parties involved. Formally free actors, e.g. workers, may become dependent and be dominated by the counterparty (e.g. employer or company).[54] It may lead to imbalance and unfair contractual conditions. Such a situation is dangerous for both: individuals and society as a whole, in particular in the field of work, which is fundamental for the development of individuals.[55] Fundamental rights should safeguard real freedom.[56] Real freedom needs a real equality of partners. Finally, the function of freedom and equality is justice – one of the main objectives of the constitutional system. The Republic of Poland shall implement the principles of social justice (Article 2 of the Constitution), work shall be protected by the Republic of Poland (Article 24 of the Constitution), while the foundation of the socio-economic system is a social market economy (Article 20 of the Constitution). The constitutional model entails interference in labour-related relationships, protection of the weaker party, restoring equilibrium and finally social justice which covers, *inter alia*, fair employment conditions and safeguarding of basic people's needs. Protecting the weaker and restoring social balance can be accomplished in various ways: either directly by the state and law (statutory minimum standards) or by means of autonomous instruments including collective bargaining.

The role of autonomous mechanisms in the constitutional system is crucial. The Preamble proclaims the principle of subsidiarity of the state and underlines the position of social dialogue, while the social market economy (the foundation of the socio-economic system) is based not only on the freedom of economic activity and private ownership but also on solidarity, dialogue and cooperation between social partners (Article 20 of the Constitution). It leads to a conclusion that autonomous mechanisms, including collective bargaining, should play a primary role in shaping the economic and social order.[57] The idea of collective bargaining, a synthesis of fundamental constitutional values: freedom, real equality and justice, fully corresponds with the vision adopted in the "social contract". The state may (or even should) create a legal framework for collective bargaining, in particular to support social partners and to promote collective bargaining. The nature and extent of the support and promotion should be adjusted to the real situation of social dialogue. A far going interference may be justified by a factual weakness of social partners. In particular, it could be treated as a promotion of voluntary collective bargaining.

Workers are beneficiaries of collective bargaining agreements. However, only a part of them (a relatively small part in Poland) is unionised (a direct link between trade unions and workers). As far as non-unionised workers are concerned, the legislature may assume their

[54] Prassl J., *Humans as a Service. The Promise and Perils of Work in the Gig Economy*, Oxford University Press, Oxford, 2018, 52 ff.
[55] Cf. Langille B., *Labour Law's Theory of Justice,* in Davidov G., Langille B. (eds.), *The Idea of Labour Law*, Oxford University Press, Oxford, 2011, 101 ff.
[56] Alexy R., nt. (51), 70. Real freedom means a possibility to act in various areas and to be a part of the society. The assumption of formal equality must be confronted with real conditions in various areas of economic and social life.
[57] *See*, e.g. Florek L., *Konstytucyjne gwarancje uprawnień pracowniczych [Constitutional guarantees of workers' rights],* in *Państwo i Prawo*, 11-12, 1997, 198; Sanetra W., *Konstytucyjne prawo do rokowań [Constitutional right to collective bargaining]*, in *Praca i Zabezpieczenie Społeczne*, 12, 1998, 4.

acceptance for collective bargaining agreements as far as the favourability principle is safeguarded. If constitutional collective bargaining agreements are to be treated as *erga omnes* agreements (binding on all the workers), the *favor laboratoris* principle must be considered their structural element.[58] As regards unilateral acts, the source of regulatory power of the employer is the employment relationship itself, in particular the employee's subordination to the employer. The employer needs legal instruments to coordinate the process of work[59] and to specify the subject of the employee's performance (tasks, place and time of work). When entering the employment relationship, the employee agrees to the direction of the employer. The right of the employer to issue instructions to workers is therefore based on the employee's consent, arises from the employment relationship and is of contractual (not public) nature.[60] The employer may exercise its prerogatives by issuing individual instructions or by adopting general acts addressed to all subordinate employees (groups of employees). In some cases, the employer is obliged by the law to regulate specific matters, e.g. work order, in a general way.

Internal pay regulations can be considered as a kind of self-binding on the employer,[61] as the employer's offer (information about the offer)[62] or even a *sui generis* standard contract. In this respect, autonomous acts are therefore not sources of law in the strict sense, either. They derive their legal force from the employment relationship and obligation mechanisms.[63] Finally, statutes can be treated as an emanation of the freedom of association: either a special type of contracts (corporations) or unilateral legal acts (foundations).[64]

To sum up, the normativity of autonomous sources of labour law is built up within the constitutional model based on fundamental rights and freedoms.[65] The legal support for collective bargaining (*inter alia* by providing the *erga omnes* effect of collective agreements) enables the real exercise of the right to collective bargaining and is aimed at ensuring fair (just) working conditions. The normativity of legal acts issued by employers and companies is rooted either in the employment relationship structure (e.g. internal employer's acts) or in the freedom of associations/other freedoms (statutes). In both cases, it is usually based on the consent of those who are covered by their application scope.

[58] Piekarczyk S., *Oddziaływanie zasady uprzywilejowania pracownika na relację postanowień układów zbiorowych pracy z przepisami państwowych aktów prawotwórczych a Konstytucja RP [The influence of the favor laboratoris principle on the relationship between collective agreements ant the law in the light of the Constitution of Poland],* in *Praca i Zabezpieczenie Społeczne*, 5, 2021, 5-8.

[59] Zieliński T., *Prawo pracy. Zarys systemu. Część I: Ogólna [Labour Law. System's Outline, Vol. I General],* Państwowe Wydawnictwo Naukowe, Warszawa - Kraków, 1986, 165; Blanpain R., *European Labour Law*, Wolters Kluwer, Alphen aan den Rijn, 2013, 35.

[60] Judgment of the Constitutional Court of 10 June 2003, SK 37/02, OTK-A 2003, No. 6, item 53. Internal acts based on the employer's managerial power are not sources of law.

[61] Judgment of the Constitutional Court of 10 June 2003, SK 37/02, OTK-A 2003, No. 6, item 53.

[62] Sobczyk A., nt. (42), 143 and 266 (pay regulations and work order regulations as far as they exceed the managerial competences of the employer).

[63] Judgment of the Constitutional Court of 10 June 2003, SK 37/02, OTK-A 2003, No. 6, item 53.

[64] Judgment of the Supreme Court of 12 April 2007, III CZP 26/07, OSNC 2008, No. 3, item 32.

[65] Judgment of the Supreme Court of 24 June 1998, III ZP 14/98, OSNAP 1998, No. 24, item 705 (Article 9 of the Labour Code is consistent with Articles 20 and 59 of the Constitution).

7. Conclusions.

The contradiction between the constitutional *numerus clausus* of the sources of law and the autonomous sources of labour law may be regarded as apparent. The law in a strict constitutional meaning is an instrument used by the state to influence the position of individuals (generally binding sources of law) and dependent units (*interna*). To safeguard individuals' rights and freedoms, the Constitution proclaims *numerus clausus* of generally binding sources of law. At the same time, the Constitution does not preclude the existence of an autonomous normative system. The constitutional legal order is pluralistic. Therefore, there is no need to include autonomous acts in the constitutional list of sources of law.

Autonomous acts derive their binding force from the rights and freedoms of individuals as well as from other constitutional principles. In particular, they are based on various forms of consent expressed by individuals and entities covered by those acts. The *erga omnes* effect of collective bargaining agreements is based on the assumption that workers accept more favourable working conditions (*favor laboratoris* as a constructive element of constitutional collective agreements). Subordination to the management of the employer is accepted when entering into an employment relationship while organizational rules of associations are accepted by joining them by their members. The normative effect is one of the instruments of bringing fundamental rights and freedoms to life, in particular if they cannot be realized by using other legal means. However, this is valid as far as the recognition is consistent with international standards and the Constitution.

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