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DEPENDENT SELF-EMPLOYMENT IN THE LIGHT OF THE CONSTITUTIONAL PRINCIPLE OF WORK PROTECTION

INTRODUCTION

In a report submitted before the European Commission in 1999, a group of researchers led by professor Alain Supiot addressed the emergence of a new group of employed people who are economically dependent on an ordering party. Such entrepreneurs constitute a category which is intermediate between employed workers who work under an employment relationship and those who are self-employed.[1] The legal status of the said group has come to be defined as "economically dependent self-employment" or "quasi-subordinate employment". The systematic increase in the number of the self-employed who operate in economic dependency in the OECD countries (Organization for Economic Co-operation and Development)[2] presents a challenge for the legislator since this issue is complex and unequivocal in its character.[3] Poland belongs to those European countries which display the highest rate of self-employed workers against the total number of the employed population. The figure is 21.8%, a much higher amount than the average of the European Union

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[1] *Tranformation of labour and future of labour law in Europe*: *Final Report* (Brussels: European Commission, 1999), accessed July 26, 2016, http://bookshop.europa.eu/en/transformation-of-labour-and-future-of-labour-law-in-europe-pbCE1998302/.

[2] *Employment Outlook* (OECD Publishing, 2014), 162.

[3] S. Sciarra, *The Evolution of Labour Law (1992–2003)*, European Commission, Directorate-General for Employment, Social Affairs and Equal Opportunities, manuscript completed in 2005.

[hereafter EU], which amounts to 16.5%. Simultaneously, as many as 80% of the self-employed do not employ any workers.[4] One of the principal issues pertaining to the category of dependent self-employed people is how to determine the scope of their legal protection. Unlike some other European states, Poland has not recognized dependent self-employment as a distinct legal category.[5] Therefore, under the Polish legal system, self-employed but dependent operators do not benefit from any special protection, which would be similar to the protection enjoyed by those bound by an employment relationship. This is connected with a greater risk of being downgraded to a group referred to as the precariat. This notion denotes a category encompassing people who are deprived of the seven forms employment protection, identified by G. Standing as: labour market security, employment security, employment security, job security, work security, skill reproduction security, income security and representation security.[6] Art. 24 of the Constitution of the Republic of Poland[7] provides protection of every kind of work. Therefore the question arises what – in the light of this constitutional principle – the model of such protection should be, and in particular, whether and to what extent the character of such work justifies the creation of a separate legal category encompassing dependent self-employment and whether to provide legal protection to this group, similar to the one already enjoyed by employees under employment relationship.

1. ECONOMICALLY DEPENDENT SELF-EMPLOYED WORK – BETWEEN SELF-EMPLOYMENT AND EMPLOYMENT RELATIONSHIP

The Polish legislator does not use the term "self-employment", this being a legal term. The absence of a definition of self-employment causes this phenomenon to be identified with economic activity conducted by a natural person in the Polish legal system. Self-employed work entails a situation in which a natural person, who has a status of entrepreneur, as part of his or her economic, single-person activity

[4] *Self-employment rate (indicator)*, OECD Publishing 2016, accessed January 7, 2016, doi:10.1787/fb58715e-en.

[5] For a description of the legal status of some EU member states in respect of economically dependent self-employment, see opinion of the European Economic and Social Committee dated February 26, 2009 on New trends in self-employed work: the specific case of economically dependent self-employed work, OJ C 18/44 2011, section 4.

[6] G. Standing, *The Precariat: The New Dangerous Class* (London: Bloomsbury, 2011), 18, 27.

[7] Constitution of the Republic of Poland, enacted on April 2, 1997, Journal of Laws, No. 78, item 483 as amended [hereafter the Constitution].

conducted at their own risk and for their own account,[8] based on a civil law contract (specific task contract, contract of mandate or other contract for services regulated by provisions concerning commission), provides services to the other party under that contract.[9] With respect to the above, self-employed work is a manifestation of individual and small-scale entrepreneurship, conducted as small or micro-enterprises.[10]

Self-employed work represents a complex phenomenon, hence it is difficult to determine its legal framework.[11] The literature has seen attempts at capturing various categories of self-employed work. One possible classification is a division into the independent self-employed and dependent self-employed, whose emergence on the labour market is associated with the adoption of employment strategies based on outsourcing and subcontracting done by enterprises.[12]

Economically dependent self-employment constitutes a legal category which bridges the gap between "classic" self-employment and an employment relationship. The category covers cases when an entrepreneur, who has little or no own capital, performs services exclusively or predominantly for the benefit of one entity in a manner resembling the way work is performed under an employment relationship. As it is, dependent self-employment constitutes a contract for work, having a similar structure to an employment contract but – being a civil law contract – does not establish an employment relationship. The emergence of economically dependent self-employed persons, whose status is similar to that existing under an employment relationship, has disturbed the boundary between an employment relationship and "classic" self-employed work.

The element that brings dependent self-employment closer to an employment relationship is this unique state of dependence of a self-employed person on his or her trading partner, which is described as economic dependence. Basically, economic dependence is a situation where a person's whole income or its major proportion is

[8] The definition of economic activity was provided by Act of 2 July 2004 on freedom of economic activity, art. 2, Journal of Laws of 2016, item 1829, which defines economic activity as a profit-making activity related to manufacturing, construction, trading, provision of services and prospecting, identifying and mining of minerals in deposits, as well as professional activity conducted in an organised and continuous fashion.

[9] Z. Kubot, *Szczególne formy zatrudnienia* (Wrocław: [no publisher name], 2000), 8.

[10] A. Szepelska, „Samozatrudnienie jako forma wspierania rozwoju przedsiębiorczości regionów," *Ekonomia i Prawo* 12, no. 1 (2013): 70, http://dx.doi.org/10.12775/EiP.2013.006.

[11] More on this in D. Bąk-Grabowska, "Entrepreneurship vs. self-employment – terminological dilemmas," in *Determinants of entrepreneurship – diversity and variability*, ed. K. Jaremczuk (Tarnobrzeg: State High Vocational School in Tarnobrzeg, 2008), 136–40.

[12] U. Muehlberger, S. Pasqua, *Workers on the Border Between Employment and Self-Employment*, accessed January 7, 2016, http://ssrn.com/abstract=932060.

derived from one source.[13] In the legal systems of some European states, a certain threshold (expressed as percentage) of income earned from one client is a determinant of economic dependence. For example, in Spain this amounts to 75%,[14] while in Germany it is over 50%.[15] In most cases, the dependence of a self-employed person on a single client is a long-term commitment, resulting from a lasting cooperation of parties. The criterion of "lasting cooperation" is used by the Italian legislator to describe a state of economic dependence of a self-employed person.[16] Similarly, the Spanish legislator qualifies self-employed work as being economically dependent using, among others, the notion of activity conducted on a regular basis.[17] A self-employed person provides service personally, unaided, which is associated with the limited scope of his or her activity and the lack of a developed organisational structure.[18] The requirement that work is performed personally appears also in German and Spanish legislation.[19] Nonetheless, a self-employed person, who is bound by economic dependence on one primary trading partner, similarly to an employee, involves business risk. As opposed to employees, whose salary is determined contractually, the income earned by a self-employed operator depends only on the market circumstances of his or her contracting partner. As indicated by A. Perulli, reliance on one primary business partner leads to a decreased sense of security in the self-employed entrepreneur and lack of autonomy, which are so characteristic for types of activity oriented towards business networking.[20]

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[13] Ibid., 2. In the same vein, see T. Duraj, "Prawna perspektywa pracy na własny rachunek," in *Praca na własny rachunek – determinanty i implikacje*, ed. E. Kryńska, 24–15 (Warsaw: Instytut Prawa Pracy i Spraw Społecznych, 2007); A. Perulli, "Economically dependent/quasi subordinate (parasubordinate) employment: legal, social and economic aspects," in *The employment relationship. A comparative overview*, ed. G. Casale (Geneva: International Labour Office, 2011).

[14] Art. 11 of Act of 11 July 2007 on the status of independent work. Ley 20/2007, de 11 de julio, del Estatuto del trabajo autónomo, BOE núm. 166, de 12/07/2007.

[15] Opinion of the European Economic and Social Committee dated April 29, 2010 on new trends in self-employed work: the specific case of economically dependent self-employed work, SOC/344-CESE 639/2010, 7–8.

[16] D. Morante, "The future of «dependent self-employed workers» in Italy," accessed January 26, 2017, www.linkedin.com/pulse/future-dependent-self-employed-workers-italy-morante-daniela.

[17] J.P. Landa Zapirain, "Regulation of Dependent Self-employed Workers in Spain: A Regulatory Framework for Informal Work?" in C*hallenging the Legal Boundaries of Work Regulation*, ed. J. Fudge, S. McKrystal, and K. Sankaran, (Oxford–Portland–Oregon: Hart Publishing, 2012), 160.

[18] The doctrine permits an occasional use of other people's help, see for example A. Musiała, "Prawna problematyka świadczenia pracy przez samozatrudnionego ekonomicznie zależnego," *Monitor Prawa Pracy* 2 (2014): 70.

[19] Landa Zapirain, "Regulation," 160.

[20] Perulli, "Economically," 105.

Economical dependency, leading to a lack of autonomy of a self-employed person, is not to be identified with the subordination of an employment relationship despite different concepts used in the literature and case law broadly addressing subordinate employment.[21] This is so because the notion of economical dependence cannot be constrained within the limits imposed by the notion of "employer's authority" as provided in art. 22 para. 1 of the Polish Labour Code,[22] which covers an employer's right to organise and manage work process and his or her right to issue instructions to their employees with respect to their work, especially the time, place and manner of its performance.[23] In practice, however, economical dependence can lead to a state of personal subordination to the ordering party,[24] which is similar to that holding under an employment relationship. The rise of such personal dependence is made easier in a situation when a self-employed person is integrated with the client's company and performs his or her work on the client's premises, using the latter's equipment and cooperating with the employers. It is debatable, however, to what extent a client can interfere with the process of work rendered by a self-employed entrepreneur. It appears that besides general coordination of his or her work, the client should not issue any detailed instructions in respect of the manner in which the commissioned work is to be done. Neither should the performance of the work be interfered with in respect of timing and venue, the aspects which lie within the discretion of a self-employed contractor.

2. THE PRINCIPLE OF WORK PROTECTION AS A FUNDAMENTAL PRINCIPLE OF THE SOCIAL AND ECONOMIC SYSTEM OF POLAND

Pursuant to art. 24 of the Constitution, "work shall be protected by the Republic of Poland. The State shall exercise supervision over the conditions of work." Owing to the inclusion of the invoked provision in Chapter I of the Constitution, entitled "The Republic", the principle of work protection was assigned the status of

[21] These concepts are presented in T. Duraj, „Zależność ekonomiczna jako kryterium identyfikacji stosunku pracy – analiza krytyczna," *Praca i Zabezpieczenie Społeczne* 6 (2013): 8–9.

[22] Act of 26 June 1974 (The Labour Code), Journal of Laws of 2016, item 1666 as amended [hereafter LC]. Duraj, "Zależność ekonomiczna," 9.

[23] H. Lewandowski, *Uprawnienia kierownicze w umownym stosunku pracy* (Warsaw: no publisher indicated, 1977), 21.

[24] U. Muehlberger, *Dependent Self-Employment* (New York: Palgrave Macmillan, 2007).

a fundamental principle of the social and economic system of the state.[25] The recognition of special significance of work is conditioned by two factors. Firstly, work seen as an asset constitutes the basis of economy and a source of social welfare.[26] Secondly, work is the source of human dignity.[27] Its goal is to satisfy not only the basic (material) but also cultural and spiritual needs of human beings.[28]

As used by the legislator, the generic term "work" implies that the principle of work protection is extended, in varying degrees, to persons who perform work as part of their employment relationship but also under both civil law contracts[29] which have a profit-making character and those which do not.

The principle of work protection applies to the totality of legal and institutional solutions intended to offset negative consequences facing employees that are associated with the performance of work. The realisation of this principle is twofold. On the one hand, it consists in a suitable management of the status of regularly employed workers as opposed to those who derive their income from other sources, too, especially from immovable property or capital, based on the assumption that individuals who make their living from regular work cannot be worse off than those who obtain their income from other sources. On the other hand, this principle is employed to determine mutual relations among particular groups of employees with respect to threats that performance of work entails.[30]

The duties of the State in respect of work protection have their origin in the adoption of the social market economy model[31] as the foundation of its economic system, that is an economy which takes into consideration the social aspects of its functioning (art. 20 of the Constitution). Within the social market economy model, the economic system is based, on the one hand, on free operation of market mechanisms, freedom of enterprise and private ownership, but on the other on solidarity, dialogue and cooperation between social partners – all constituting the pillars of

[25] H. Zięba-Załucka, „Prawo do pracy jako przedmiot regulacji konstytucyjnych," *Praca i Zabezpieczenie Społeczne* 2 (2006): 2.

[26] K. Polek-Duraj, „Humanizacja pracy w aspekcie jakości pracy i życia społeczeństwa," *Studia i Materiały. Miscellanea Oeconomicae*" 2 (2010): 237.

[27] A. Dral and B. Bury, „Zasada ochrony pracy w świetle Konstytucji RP," *Przegląd Prawa Konstytucyjnego*, 3 (2014): 236.

[28] Z. Wiatrowski, *Podstawy pedagogiki pracy* (Bydgoszcz: Wydawnictwo Uczelniane Wyższej Szkoły Pedagogicznej, 1994), 56.

[29] Judgement of the Supreme Court dated October 7, 2004, file ref. no. II PK 29/04, OSNP 2005, no. 7, item 97.

[30] H. Szewczyk, *Ochrona dóbr osobistych w zatrudnieniu* (Warsaw: Wolters Kluwer, 2007), 126.

[31] W. Skrzydło, *Konstytucja RP. Komenatrz* (Warsaw: Wolters Kluwer, 2013), Lex/el., commentary for art. 20.

an economy referred to as "social".[32] A social market economy is characterised by a tendency to maintain balance between work and capital. In a social market economy, the State does not act solely as the "watchman" but, at the same time, is a welfare state which interferes with the course of its economy in order to realize specific social needs, including those connected with work protection, the fulfilment of which would be impossible if based only on free market laws.[33] In this sense, a social market economy rests upon the principle of social justice, expressed in art. 2 of the Constitution, but it also makes reference to art. 1 of the Constitution, which reflects the essence of a state seen as the common good of all its citizens, and which envisages – in the case of a conflict – the common good taking precedence over the individual interest of a person or a particular group.[34]

What the principle of work protection amounts to is the State's obligation to supervise the conditions in which work is performed, as provided in art. 24 of the Constitution (the second sentence), and further constitutional duties of the State, enshrined in Chapter II, art. 65–67, associated with freedoms as well as economic and social entitlements. Simultaneously, these duties constitute basic social rights, reflected in international and European laws, and adopted by the International Labour Organisation (hereafter ILO), the Council of Europe and European Union. These rights include the right to choose and pursue a career, and the right to choose where to work, a ban on regular labour of under 16s, determination of a minimum wage, pursuit of a policy aimed at full and productive employment, the right to safe and hygienic conditions of work, the right to statutory days off work and annual paid holidays, and minimum norms of work time.[35] The Constitution does not predetermine specific protective measures to be used in connection with the above duties, letting them to be further specified by ordinary laws.[36]

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[32] T. Liszcz, „Praca i kapitał w Konstytucji Rzeczypospolitej Polskiej," *Studia Iuridica Lublinensia* 22 (2014): 259–60.

[33] D.R. Kijowski and P.J. Suwaj, „Kryzys prawa administracyjnego?" in *Wypieranie prawa administracyjnego przez prawo cywilne*, ed. A. Doliwa and S. Prutis (Warsaw: Woltwers Kluwer, 2012), Lex/el.

[34] Skrzydło, *Konstytucja*, commentary for Art. 20.

[35] Ibid.

[36] L. Florek, „Konstytucyjne podstawy indywidualnego prawa pracy," in *Konstytucyjne podstawy systemu prawa*, ed. M. Wyrzykowski (Warsaw: no publisher indicated, 2001), 70–71.

3. THE PRINCIPLE OF WORK PROTECTION WITH RESPECT TO EMPLOYEES AND THE SELF-EMPLOYED

Application of the work protection principle to all kinds of employment does not meant that this protection should be identical in every case. The substance of this principle makes it possible to vary the degree of protection due to the status of an employed individual. This applies in particular to work carried out under an employment relationship and work done under civil law contracts. The current legislation makes a clear distinction between the legal status of employees and parties to civil law contracts, granting them a broad scope of employment relationship protection, while denying such protection to those who provide services under civil law contracts.

Diversification of the legal nature of the two working arrangements does not constitute a violation of the principle of equality before the law, expressed in art. 32 para. 1 of the Constitution.[37] The said precept provides that "all persons shall be equal before the law. All persons shall have the right to equal treatment by public authorities." The constitutional principle of equality before the law must not be equated with the state of being identical. The principle is breached if persons who belong to the same group, created on the basis of a specific feature regarded as essential (relevant), are treated differently.[38] In this case, a feature that justifies differences in the level of protection among employees and between parties to civil law contracts is the unique nature of the said types of employment, which heavily determines the economic and social status of employed individuals. Consequently, the degree of protection should be greater if the status of an employed person is weaker in relation to his or her employer.[39] An element that distinguishes an employment relationship from a civil law relationship is the element of economic and organisational subordination of an employee working under an employment relationship, which does not occur in a civil law relationship where the contractual parties are on an equal footing. The subordination principle, a distinguishing feature of an employment relationship, affects the actual status of parties to it (equal status in the substantial aspect[40]).

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[37] Judgement of the Supreme Court dated October 7, 2004, file ref. no. II PK 29/04.

[38] A. Błaszczak, „Efektywność środków ochrony przed dyskryminacją w Polsce," *Przegląd Prawa Publicznego* 6 (2015): 37. Cf. the judgement of the Constitutional Tribunal dated December 2, 2008, file ref. no. P 48/07, OTK-A 2008, no. 10, item 173, in which the Tribunal considered the question of different rules for termination of employment contracts with a fixed term or of an indefinite duration.

[39] Liszcz, "Praca," 269.

[40] The prevalent view is that employment relationships, as well as a civil law relationship, are established in accordance with the principle of formal equivalence of subjects – see for example

The levelling out of inequalities which emerge between parties to an employment relationship underpins the protective function of labour law, which in the past was instrumental in the separation of labour law from civil law.[41] The protective function of labour law is justified by the weaker (economically and socially) position of an employee relative to his or her employer. Performance of work under an employment relationship, which is carried out under organisational subordination, may become a source of breach of employee rights.

For that reason, the constitutional principle of work protection has a much greater practical value for employment relationships than for those based on civil law.[42] The need to put parties to an employment relationship on an equal footing justifies the State's greater interference in relations holding between employers and their employees (in comparison with contractual relationships governed by civil law), whereby employees are granted rights which they would never have if they negotiated them individually as part of employment terms and conditions.[43] This idea is accompanied by the assumption that human work, as an "object of transaction" in an employment relationship, is not a commodity,[44] and thereby labour market, which is not a commodity market, cannot be founded upon the same principles.[45]

The protective function of law is realised by provisions which determine the minimum rights of employees as well as their maximum duties. This function is manifested by the fact that priority is given to employees, a principle expressed by art. 18 LC, which reflects the semi-mandatory nature of the norms of labour law (they are binding in a unilateral and mandatory manner). In the light of this principle, parties bound by an employment relationship can depart from the minimum

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A. Sobczyk, *Równość stron zobowiązaniowego stosunku pracy a rozwiązanie umowy o pracę bez wypowiedzenia* (Kraków: Wydawnictwo Uniwersytetu Jagiellońskiego, 1998), 60.

[41] For more on this, see U. Jacowiak, W. Uziak, and A. Wypych-Żywicka, *Prawo pracy, Podręcznik dla studentów prawa*, 4th ed. (Warsaw: Wolters Kluwer, 2012), 21–22.

[42] K.W. Baran, „Zasada ochrony pracy i państwowy nadzór nad warunkami pracy," in *Zarys systemu prawa pracy. Tom I. Część ogólna prawa pracy*, ed. K.W. Baran (Warsaw: Wolters Kluwer, 2010), Lex/el.

[43] O. Kahn-Freund, *Arbeit und Recht* (Köln–Frankfurt: Band Verlag, 1979); M. Skąpski, *Ochronna funkcja prawa pracy w społecznej gospodarce rynkowej* (Kraków: Wolters Kluwer, 2006), Lex/el. Likewise, the rulings of the Constitutional Tribunal demonstrate that the principle of work protection underlies the „duty of the State to provide a legal guarantee for employee protection, including protection against unlawful or unreasonable activities of employers (see ruling of October 18, 2005, file ref. no. SK 48/03, OTK-A 2005, no. 9, item. 101.

[44] It is a fundamental principle that underlies the activity of ILO, expressed in the Declaration of Philadelphia of April 10, 1944.

[45] M. Weiss, "Re-inventing Labour Law?" in *The idea of Labour Law*, ed. G. Davidov and B. Langille (Oxford: Oxford University Press, 2011), 44.

employment standards included in the provisions of labour law only to benefit employees. In contrast, the less beneficial provisions of employment contracts and documents upon which an employment relationship is based are under the sanction of absolute nullity, being superseded by applicable provisions of labour law.[46]

A wide range of aspects related to employment relationship are under protection, from the formation of such a relationship, through the definition of mutual rights and obligations of the parties, to its dissolution. Special importance is attached to the legal protection of work time, holidays, remuneration for work, health and safety at work, the continuity of employment relationship, trade union representation of employees' rights and interests, as well as social protection. Principally, this kind of protection does not cover persons who perform work on the basis of civil law contracts and who use only selected employee rights to a limited degree.[47]

The exception applies only to individuals who carry out home-based work and are subject to labour law in the scope determined by the Council of Ministers[48] (art. 303 §1 LC). This regulation exemplifies the expansion of labour law into the domain of non-employee employment. Being not a classic contract for a specific task, it is emphasised that a tolling agreement does have features which make it similar to an employment contract and thereby justify its more comprehensive protection of home workers' employment relative to other non-employee forms of employment.[49] Based on that, a worker who is bound by an outwork contract enjoys a number of employee rights, continuity of an outwork relationship, the right to a minimum consideration for outwork, continuity of remuneration for work along with a ban on deductions, the right to be remunerated for the first 33 days of incapacity for work caused by illness, limited material liability for non-performance or improper performance of an obligation and for damage to the entrusted or non-entrusted property, the right to holidays, the right to safe and hygienic work conditions, the right to death benefits for the family members,

[46] J. Wratny, *Kodeks pracy. Komentarz*, 5th ed. (Warsaw: C.H. Beck, 2013), 31–33; A.M. Świątkowski, *Polskie prawo pracy* (Warsaw: LexisNexis, 2012), 29–30, 47–48.

[47] These entitlements include but are not limited to the right to safe and hygienic work (art. 304 LC), the right to share entitlements related to child care, maternity leave, parental leave and the related right to maternity leave in the length equivalent to the duration of these leaves regardless of the entitlement to social security (art. 1791 §2 and 3 LC, art. 180 §4 and 5 LC), and the right to be a party to a collective agreement (art. 239 §2 LC).

[48] Regulation of the Council of Ministers of 31 December 1975 on employee rights of individuals who carry out work, Journal of Laws of 1976, No. 3, item 19.

[49] T. Wyka, *Sytuacja prawna osób wykonujących pracę nakładczą* (Łódź: Wydawnictwo Uniwersytetu Łódzkiego, 1986).

social security insurance, the right to establish and join trade unions, and finally being covered by the jurisdiction of a competent labour court in claims arising from contract-based provision of outwork.

So far, the legislator has not used an equivalent statutory entitlement with respect to individuals who perform outwork regularly but under other form than an employment relationship or outwork agreement, as stipulated in art. 303 §2 LC.

4. THE WORK PROTECTION MODEL IN DEPENDENT SELF-EMPLOYMENT

In a final report on the phenomenon of self-employment in the EU member countries, commissioned by the European Commission,[50] A. Perulli distinguished four potential scenarios for a legal qualification of economically dependent self-employment work. These are:

– maintenance of *the status quo*, in which economically dependent self-employment is subject to the same regulations of civil law as those of "classic" self-employment;

– isolation of economically dependent self-employment as a distinct legal category which bridges the gap between an employment relationship and "classic" self-employment, and provision of legal protection over the subordinate employment relationship. However, the way these protective norms are to apply to this group of employees raises doubts. It is uncertain whether this will happen as part of extension of labour law or by means of separate regulations which will be drawn upon selected norms of labour law;

– inclusion of dependent self-employment in the domain of employment relationship through extension of the idea of employee subordination by additional criteria, e.g. the criterion of economic dependence;

– creation of the list of fundamental social rights which apply to all relationships of employment regardless of their legal basis.[51]

The lack of a legal definition of self-employment under the Polish law significantly impedes considerations of the legal qualification of economically dependent self-employment. However, the idea to retain *status quo* in this respect must be

[50] Perulli, "Economically,"112–15.

[51] According to A. Perulli, this is the most realistic proposal (Perulli, "Economically," 116). Such a proposal can also be found in a report submitted before the European Commission by a group of researchers led by A. Supiot – see *Tranformation*.

rejected. If self-employment is to be understood as provision of services under a civil law relationship by a natural person who is an economic operator, there is no denying that this group includes a unique category of employees whose working conditions evidently depart from "classic" self-employment while coming close to an employment relationship. The feature that distinguishes this category of self-employed workers is dependence on the employing entity, referred to as economic dependence, not occurring to such an extent in the "classic" model of self-employment, if services are supplied to a larger number of clients. Due to this state of economic dependence on the main client, the provision of services by the self-employed person involves similar risks to those associated with provision of work under an employment relationship. This corroborates the claim that economically dependent self-employment cannot be qualified as "classic" self-employment, so the legal status of dependent self-employed workers cannot be the same as the status of those who perform work under the "classic" model of self-employment. The principle of work protection, derived from the model of social market economy, is not in favour of leaving dependent self-employment to the working of free market mechanisms within the limits imposed by the norms of civil law. The economic dependence of a service provider in relation to the employer is a criterion distinguishing economically dependent self-employment from "classic" self-employment and as such justifies increased protection of dependent self-employed workers in comparison to other non-employee forms of employment. The economic advantage of the employer gives rise to inequality of the contractual parties in material terms, which significantly reduces the bargaining power of the self-employed worker in relation to his or her client. This, in turn, puts the former in a situation similar to the one of an employee in relation to his or her employer. The worker's influence on his or her work conditions is slight, but given the relatively obligatory character of norms of civil law such persons are more susceptible to disadvantageous contractual terms and conditions in comparison to employees protected by the semi-mandatory norms of labour law.

Despite the similarity of economically dependent self-employment to an employment relationship, there are no convincing arguments to support the inclusion of dependent self-employed work in the personal scope of employment relationship by extending the condition of employee subordination, whose scope is broader than economic dependence. We should accept the views expressed in the doctrine of labour law that founding employment relationship on the criterion of subordination perceived in terms of economic dependence would lead to further weakening of the

already thin line between employment relationship and contracts under civil law.[52] Economic dependence may but need not lead to personal dependence of a self-employed person on his or her client. This dependence is not so strong as in the case of an employment relationship, where it hinges on the employer's authority which makes it possible for the employer to have an employee at the disposal of the company, to specify the place, time and manner of execution of work.[53]

Economic dependence, on the other hand, justifies the isolation of dependent self-employment as a distinct legal category and granting this group more comprehensive protection, which should be similar to the one provided under an employment relationship due to the degree of the dependence. The economic advantage of the employer, which makes it necessary to protect regular employers, legitimises the claim to provide economically dependent self-employed workers with legal protection. It seems that such legal protection requires labour law to be extended,[54] a method that the legislator has already used with regard to outwork. The use of specific norms of labour law with regard to dependent self-employed workers explains the similarity of these forms of employment. At the same time, this does not exclude the possibility of adapting certain protective measures to suit the needs of the self-employed since they provide their services under economical subordination.

In addition to protective measures that currently are used with respect to employed individuals regardless of the legal basis for provision of work, the following aspects of dependent self-employed work should be protected: remuneration for work, including especially the right to a minimum wage, continuity of employment relationship, work time, including the right to annual leave, the right to remuneration for the time of incapacity for work caused by illness, social security, and the right to establish and join trade unions.[55]

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[52] Duraj, "Zależność," 12.

[53] Ibid., 3.

[54] A. Musiała presents a different view, being in favour of developing separate legal regulations which would "fit" the specific nature of employment in this group. This, in her opinion, does not bar the models provided in the norms of labour law from being relied upon (Musiała, "Prawna problematyka").

[55] See the judgement of the Constitutional Tribunal dated June 2, 2015, file ref. no. K 1/13, Journal of Laws, item 791, in which the Tribunal considered as unconstitutional the norm of art. 2 para. 1 of the Act of 23 May 1993 on trade unions to the extent that the norm restricts the freedom of establishment and joining trade unions by people who do paid work but are not mentioned in this provision, i.e. those who perform work on a basis different than employment relationship. In the justification, the Tribunal presented a view that the notion "employee" should be interpreted as autonomous by the Constitution.

CONCLUSION

Our considerations support the claim that there exists a category of self-employed workers on the labour market, whose conditions for provision of work clearly deviate from "classic" self-employment and they do not constitute an employment relationship. This makes it necessary to isolate a legal category of economically dependent self-employment. The nature of work performed by a self-employed worker in conditions of economic dependence makes such employment similar to an employment relationship, where the legal status of the employed entity is subject to the limitations derived from the protective function of labour law, which is intended to level out existing inequalities between parties to an employment relationship as resulting from the economic and organisational advantage of the employer. Economic advantage, which also occurs in relation to economic self-employment and determines the bargaining power of the employed worker versus the principal client, proves that it is necessary to cover this category of workers with protection, which, due to the degree of dependence, should be similar to the protection that workers under an employment relationship benefit from. For this reason, the element of economic advantage justifies the greater – compared to other non-employee forms of contracting – interference of the State in employment relationship. The postulate to cover self-employed but economically dependent workers with legal protection is part of the general proposition to extend a legal cover to all over all types of employment, irrespective of their legal basis, where the degree of protection would reflect the negotiating position of a worker in relation to his or her client. The first valid step in this direction was the amendment of the Act on social insurance of 2014,[56] which radically changed the rules of social insurance with regard to workers who perform work on the basis of specific task agreements and agreements for services which are subject to provisions regulating contracts of mandate. The next step was made by the Ministry of Labour and Social Policy, which on January 15, 2016, submitted a draft act amending the minimum wage and the Act on the State Labour Inspectorate, which proposed the introduction of a minimum hourly rate as binding for contracts of mandate and agreements for services subject to provisions regulating contracts of mandate between, among others, a self-employed worker, i.e. a natural person who, as the draft act suggests, is an economic operator delivering services personally, and an entrepreneur or other organisational unit as part of their economic operation. The draft law has gained

[56] Act of 23 October 2014 on Amending the act on social security system and some other laws, Journal of Laws, item 1831 as amended.

the support of social partners participating in the Social Dialogue Council. It can be expected, then, that the draft law will be adopted in this shape.

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DEPENDENT SELF-EMPLOYMENT IN THE LIGHT OF THE CONSTITUTIONAL PRINCIPLE OF WORK PROTECTION

Summary

A major problem pertaining to the operation of dependent self-employed entrepreneurs on the labour market in Poland is determination of the scope of legal protection granted to them. Under the Polish law, dependent self-employed persons do not enjoy any special legal protection, unlike employees who are bound by an employment relationship. The question therefore arises what – in the light of constitutional principle of work protection – the model of such protection should be, and in particular, whether the character of such work relationship makes it necessary to create of a separate legal category encompassing dependent self-employment and to provide this group with legal protection similar to the protection already enjoyed by employees bound by employment relationship.

Key words: self-employment; dependent self-employment; labour law; principle of work protection; Constitution of the Republic of Poland.

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