Chapter 1. Sources of Polish Collective Employment Law

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1. The concept and hierarchy of sources of labour law

In the legal science, the concept of sources of labour law has two different meanings. On the one hand, it may be understood as the sources of creation of law (*fontes iuris oriundi*) and on the other hand – as sources of cognition (knowledge) of law (*fontes iuris cognoscendi*). Since a dominant model in the Polish normative system is the model of statutory law, it is reasonable to present the sources of labour law in accordance with the *fontes iuris oriundi* formula. With regard to the scope of application, the sources of labour law may be divided into general sources and specific sources of law[1]. The latter are characteristic mainly of the collective employment legislation system since they are not present in other branches of law.

A model hierarchy of sources of labour law may be presented in the form of a pyramid. At the top of the pyramid there are constitutional norms[2] and EU laws[3]. Those which are sufficiently precise are considered self-executing and are directly applicable. Apart from the constitutional norms, also international agreements and acts have their place in the hierarchy of sources of labour law. The binding force of both categories of the legal acts is uniform. However, if an act cannot be reconciled with an international agreement ratified by the

[1] See: *K.W. Baran*, *D. Książek*, [in:] *K.W. Baran* (ed.), System prawa pracy. Część ogólna. Tom I *[The System of Labour Law. General Part, Volume I]*, Warszawa 2017, p. 646 ff. and the literature referenced there.

[2] See: *J. Oniszczuk*, [in:] *K.W. Baran* (ed.), System prawa pracy. Część ogólna... [*The System of Labour Law. General Part...]*, p. 668 ff. and the literature referenced there; *A. Sobczyk*, Prawo pracy w świetle Konstytucji RP, tom I i II *[Labour Law in the Light of the Constitution of the Republic of Poland*, *Volume I and II]*, Warszawa 2013, *passim*.

[3] See. *K. Walczak*, [in:] *K.W. Baran* (ed.), System prawa pracy. Część ogólna… *[The System of Labour Law. General Part…]*, p. 800 and the literature referenced there.

President upon prior consent of the Parliament, then according to the conflict of laws principle expressed in Article 91(2) of the Constitution of the Republic of Poland, the international agreement shall have precedence over the act. Due to the fact that provisions of international law are not uniform in nature, under Article 93(3) of the Polish Constitution and in connection with Article 9 within this category of sources of law priority should be given to the law of the European Union. Such interpretation correlates with an idea of supremacy of EU provisions, both in the international and domestic order, deeply rooted in the *acquis communautaire*.

The sources of labour law include also legal acts of limited personal and territorial application in the employment relations (such as collective agreements, arrangements, internal rules). Since they are not generally applicable, they are called in the doctrine the specific sources of law. For this reason, they should be placed below the hierarchy of legal acts defined in Article 87 of the Constitution of the Republic of Poland. Often their relation to statutory provisions in a broad sense is characterised by the autonomic scope of regulation.

Article 9 of the Labour Code clarifies the mechanisms of priority of application of particular acts of labour law. Article 9 § 2 defines a relation between the general and the specific sources of labour law in accordance with favourability principle. According to this Article, the provisions of collective agreements and arrangements, internal rules and statutes cannot be less favourable to workers than the provisions of the Labour Code and of other laws and implementing acts.

On the other hand, Article 9 § 3 of the Labour Code governs the intra-normative relations within the specific sources of labour law. In this sense, the principle of favourability is also dominant[4], which means that the provisions of internal rules and statutes cannot be less favourable to workers than the provisions of collective agreements and collective arrangements. However, the said provisions do not establish this principle in normative relations between the collective agreements and other collective arrangements. Therefore, the general principles of conflict of laws and rules of interpretation should be applied.

In the Polish legal system the case law is not considered a source of labour law. Both labour courts and other bodies adjudicating on employment relationships are not competent to establish generally applicable provisions. It is because the essence of the jurisprudence is imperative resolution of individual rights and obligations, in accordance with the principle *ius facit inter partes*. Also, the sources of obligations, including a contract of employment, cannot be considered the sources of labour law.

[4] See a judgment of the Supreme Court of 19 March 2008, I PK 235/07, MoPr. 2008, No. 9, p. 472.

Also custom and internal customary practices at the establishments cannot be included among the sources of labour law[5]. On the other hand, according to still valid Justinian line of argumentation – *consuetudo est optima legum interpres* – custom is the best interpreter of law. In labour relations, the customary norms often directly or indirectly affect the functioning of normative mechanisms, for example when they penetrate into the provisions of collective agreements or internal rules.

2. General sources of labour law

2.1. Constitution of the Republic of Poland

The Constitution of the Republic of Poland is the fundamental legal act defining the state's system, also in labour relations[6]. A principle of fundamental importance is that the Republic of Poland is a democratic state ruled by law and implementing the principles of social justice. The instrument for implementation of this formula is the idea of social market economy based on the freedom of economic activity, private ownership and solidarity, dialogue and cooperation between social partners (Article 20). The essence of this model is a social homeostasis which implies establishment of the regulators of social and economic processes in order to guarantee the dignity of human work.

The Polish Constitution governs also certain matters relating to collective labour law relationships. In Article 12 it guarantees[7] a freedom of establishment and operation of trade unions and other voluntary associations (for example employers' associations). This general provision is clarified in Article 59 which defines the fundamental freedoms in the collective sense in the industrial relations. More specifically, it ensures the freedom to associate in trade unions, social and professional farmers' organisations and employers' organisations. Paragraphs 2 and 3 of this Article establish the right to bargain collectively and the right to strike and protest. On the other hand, paragraph 4 of this Article defines the scope of restrictions of the freedom of association in the Polish legislation.

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[5] See: *A. Patulski*, [in:] *K.W. Baran* (ed.), System prawa pracy. Część ogólna… *[The System of Labour Law. General Part...]*, p. 1277 ff. and the literature referenced there.

[6] See: *J. Oniszczuk*, [in:] *K.W. Baran* (ed.), System prawa pracy. Część ogólna… *[The System of Labour Law. General Part...]*, p. 668 ff. and the literature referenced there.

[7] See: *W. Sanetra*, Prawa (wolności) pracownicze w Konstytucji *[Workers' Rights (Freedoms) in the Constitution]*, PiZS 1997, No. 11, p. 2 ff.; *L. Florek*, Konstytucyjne gwarancje uprawnień pracowniczych *[Constitutional Guarantees of Workers' Rights]*, PiP 1997, Nos 11–12, p. 195.

Trade union freedoms are enshrined in the Constitution of the Republic of Poland among political rights and freedoms[8], unlike any other workers' rights and freedoms which are included in a group of economic, social and cultural freedoms and rights. Against this background, a question arises about the accuracy of this type of classification. The starting point for further deliberations on this subject will be the conclusion that the freedom of association in trade unions and employers' organisations has been treated by the legislature – despite its social core – as one of the dimensions of the general freedom of assembly.

In the constitutional terms, the "political factor"[9] of the trade union freedoms, in particular the freedom of association should be viewed as the possibility of employees or employers to collectively influence the form and functioning of social and economic relations in a broad sense through their empowerment in relations with public authorities and public administration. It is worth emphasising that in a democratic state in no event such "political factor" of the freedom of association can be a pretext for the trade unions or employers' organisations to take over the roles and tasks of political parties[10].

As compared with the legal regulations applicable in the past[11] in the system of Polish law and relating to trade union freedoms, the mechanisms adopted in the Constitution appear to be comprehensive and broadly take into account international standards in this field. The essence of constitutional regulation is that the freedom of formation and operation of trade unions is recognised in Article 12 of the Constitution of the Republic of Poland as one of the fundamental characteristics of the political system of the Republic of Poland. Unfortunately, said provision does not mention employers' organisations and this – in my opinion – heavily undermines the directive of equality of the parties in labour relations. This means a continuance of a disgraceful tradition of discrimination of employers' organisations[12] in the Polish legislative system. Obviously, on the basis of a functional interpretation of Article 12 of the Constitution, it may be assumed that the freedom of formation and operation refers also to employers' organisations as they can be classified in the group of entities called "other voluntary associations."

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[8] See: *W. Zakrzewski*, [in:] *W. Skrzydło* (ed.), Polskie prawo konstytucyjne *[Polish Constitutional Law]*, Lublin 2000, pp. 182–183.

[9] See: *Z. Witkowski* (ed.), Prawo konstytucyjne *[Constitutional Law]*, Toruń 1998, p. 96.

[10] See in particular: *W. Sanetra*, Prawa (wolności)... *[Workers' Rights...]*, p. 7.

[11] See more in: *K.W. Baran*, Wolności związkowe i ich gwarancje w systemie ustawodawstwa polskiego *[Trade Union Freedoms and Their Guarantees in the System of Polish Legislation]*, Bydgoszcz-Kraków 2001, pp. 33–34.

[12] Normative manifestations of discrimination against employers' organisations as regards the coalition rights are mentioned by *Z. Hajn*, Status prawny organizacji pracodawców *[Legal Status of the Workers' Organisations]*, p. 5 and 6.

While analysing the provisions of Article 12 of the Constitution, I conclude that it not only establishes the freedom to form trade unions and employers' organisations, but also their freedom to act. Thus, two other union freedoms were decreed implicitly in the Constitution, namely the self-governance and independence. If these two freedoms were not respected in the industrial relations, it would be difficult to imagine the free operation of organisations associating employees or employers.

The deliberations on the freedom of association cannot be detached from the general assumptions and principles laid down in the Constitution. In particular, attention should be given to Article 20 of the Constitution according to which a social market economy, based on the freedom of economic activity, private ownership and solidarity, dialogue and cooperation between social partners, shall be the basis of the economic system of the Republic of Poland. I have no doubt that the market nature of the economic system has significantly determined the form of the freedom of association. A broad scope of the freedom of association in trade unions and employers' organisations provided for in Article 59 of the Constitution of the Republic of Poland and reinforcement of this freedom with the right to bargain collectively, to strike and to protest, undoubtedly means departure in the collective labour relations from the state interventionism characteristic of the previous era towards dialogue and partnership.

The Constitution of the Republic of Poland includes certain normative mechanisms to serve the "reality and applicability"[13] of the freedoms and rights laid down in it. Article 8 of the Constitution seems to be of key importance in this regard. Paragraph 2 of the Article stipulates that the provisions of the Constitution shall apply directly, unless it provides otherwise[14]. In the light of the provisions cited above, I have no doubt that Article 12 and 59 of the Constitution which set a very specific range of union freedoms are suitable for direct application. Of course, these freedoms are not absolute. Article 59(4) of the Constitution *expressis verbis* permits their statutory restrictions, but only to the extent permitted by international treaties binding the Republic of Poland[15].

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[13] *W. Sanetra*, Prawa (wolności)... *[Workers' Rights…]*, p. 6.

[14] See in particular: *W. Skrzydło*, Konstytucja Rzeczypospolitej Polskiej. Komentarz *[Constitution of the Republic of Poland. Commentary]*, Kraków 2000, p. 20.

[15] See more in: *K.W. Baran*, Wolności... *[Trade Union Freedoms...]*, p. 21 ff.

[32] See: *L. Florek*, Zakres ograniczenia wolności związkowych (art. 59 ust. 4 Konstytucji) *[The Scope of Limitation of Trade Union Freedoms (Article 59(4) of the Constitution]*, PiP 2000, No. 12, p. 4 ff.

[33] See more in: *L. Florek*, Rola umów międzynarodowych w zbiorowym prawie pracy *[The Role of International Agreements in the Collective Labour Law]*, [in:] *G. Goździewicz* (ed.), Zbiorowe prawo pracy w społecznej gospodarce rynkowej *[Collective Labour Law in the Social Market Economy]*, Toruń 2000, pp. 99–108.

According to Article 31(3) of the Constitution of the Republic of Poland, any limitation upon the exercise of constitutional freedoms and rights may be imposed only when necessary in a democratic state for the protection of its security and public order, or to protect the natural environment, health or public morals, or the freedoms and rights of other persons. This provision – also in relation to union freedoms – correlates with the provisions of Article 2 of the European Convention on Human Rights. At this point, it should also be emphasised that in the light of Article 31(5) of the Constitution, it is unacceptable to introduce restrictions on the freedom of association for reasons other than those mentioned in this provision. That provision is *numerus clausus*. As a result, according to the *exceptiones non sunt extendendae* directive, none of the premises contained in the catalogue can be interpreted broadly.

2.2. Acts/laws (*Ustawy*)

The acts/laws (*ustawy*) constitute the base of the Polish labour law[16]. According to a generally accepted opinion, an act/law (*ustawa*) is a normative act which establishes general and abstract norms and is adopted by the parliament. It is a primary form of legal regulation in democratic states. With regard to the material scope, the Polish legal system is governed by the principle of exclusivity of acts which means that the Constitution does not impose any limits on the scope of the legislation[17]. However, it must be noted that the unlimited material scope does not mean that the legislature has full discretion in deciding on the substantial contents of acts. According to Article 31(3) of the Constitution of the Republic of Poland, any limitation upon the exercise of constitutional freedoms and rights may be imposed only when necessary in a democratic state for the protection of its security and public order, or to protect the natural environment, health or public morals, or the freedoms and rights of other persons.

The Polish statutory collective employment law is pluralised, in the sense that it is included in various laws and legal acts. Until now, despite various legislative attempts, it has not been possible to pass a uniform code of collective employment law.

Among the statutory sources of collective employment law, particularly important are the following:

- Act on Trade Unions (*Ustawa o związkach zawodowych*);
- Act on Employers' Organisations (*Ustawa o organizacjach pracodawców*);

[16] See a judgment of the Supreme Court of 2 December 2010, II PK 126/10, argument 1.

[17] See: *K.W. Baran* (ed.), [in:] *K.W. Baran* (ed.), System prawa pracy. Część ogólna… *[The System of Labour Law. General Part...]*, and the literature referenced there.

- Act on the Resolution of Collective Labour Disputes (*Ustawa o rozwiązywaniu sporów zbiorowych*);
- Act on the Council of Social Dialogue (*Ustawa o Radzie Dialogu Społecznego*);
- Act on Information and Consultation of Employees (*Ustawa o informowaniu pracowników i prowadzeniu z nimi konsultacji*);
- Act on Special Rules for Terminating Employment Relationships for Reasons not Attributable to Employees, so-called the Act on Collective Redundancies (*Ustawa o szczególnych zasadach rozwiązywania z pracownikami stosunków pracy z przyczyn niedotyczących pracowników* so-called *Ustawa o zwolnieniach grupowych*).

In the system of Polish law, the source of collective employment law is also the Labour Code. It regulates the legal framework for collective labour agreements and certain other collective arrangements. It will also be discussed in this study.

2.3. Regulations (*Rozporządzenia*)

One of the types of legal acts in the hierarchy of provisions of labour law are regulations (*rozporządzenia*)[18]. They implement laws/acts (*ustawy*) and govern matters necessary for the implementation of the former. Enactment of a regulation requires separate and explicit statutory authorisation. Such authorisation should specify the matters to be regulated and the shape of the regulation. Regulations may not deal with the matters reserved for acts/laws (*ustawy*).

Regulations in the labour relations may be adopted by: the President, the Council of Ministers, the Prime Minister and the ministers in charge of government administration departments. In the relevant material scope, it means primarily a minister competent in labour matters.

From a normative point of view, the regulations in force in the Polish labour law legislation have different nature. On one hand, they regulate comprehensively the labour law mechanisms, and on the other hand, they only supplement or clarify the statutory regulations. An example of the first category is a Regulation of the Council of Ministers of 16 August 1991 on the Rules of Procedure before the Social Arbitration Panels (*rozporządzenie Rady Ministrów z dnia 16 sierpnia 1991 w sprawie trybu postępowania przed kolegiami arbitrażu społecznego*) (Journal of Laws [*Dz.U.*] No. 73, item 324). An example of the second category is a Regulation of the Minister of Economy and Labour of

[18] See: *K.W. Baran*, [in:] *K.W. Baran* (ed.), System prawa pracy. Część ogólna… *[The System of Labour Law. General Part...]*, p. 838 ff. and the literature referenced there.

8 December 2004 on the Conditions of Remuneration of Mediators Entered on a List of a Competent Minister of Labour (*rozporządzenie Ministra Gospodarki i Pracy z dnia 8 grudnia 2004 w sprawie warunków wynagradzania mediatorów z listy ustalonej przez ministra właściwego do spraw pracy*) (Journal of Laws [*Dz.U.*] No. 269, item 2673).

3. Specific sources of collective employment law

3.1. Introduction

In the system of Polish employment law, the specific sources of law are supra-individual collective agreements concluded by entities representing employees and employers, if they have a statutory basis. These include collective agreements[19] and other collective arrangements[20]. I will present them in this chapter. The starting point will be a statement that Article 59(2) of the Constitution of the Republic of Poland[21] does not restrict the conclusion of other collective arrangements. In a market economy, they therefore have a diverse nature. The criteria for differentiation are set out Article 9 § 1 of the Labour Code. According to this provision, the granting of the status of the source of law is dependent on the cumulative fulfilment of two premises: the statutory basis[22] and regulation of the rights and obligations of the parties to an employment relationship. In this case, the universal principle *conventio est lex* applies in the industrial relations, which means that the agreement has the power of law.

De lege lata, the following categories of agreements have the statutory basis in the system of collective employment law[23]:

– collective agreements;

[19] Issues concerning collective agreements will be presented in the commentary on chapter XI. See in particular: *M. Włodarczyk*, [in:] *K.W. Baran* (ed.), Zarys systemu prawa pracy, t. I, Część ogólna prawa pracy *[The Outline of the System of Labour Law*, *Volume I*, *The General Part of Labour Law]*, Warszawa 2010, p. 398 ff.

[20] See: *Z. Niedbała*, O niektórych kontrowersjach wokół porozumień zbiorowych jako źródeł prawa pracy *[Some Controversies About Collective Agreements as Sources of Labour Law]*, [in:] *J. Stelina*, *A. Wypych-Żywicka* (eds.), Księga jubileuszowa poświęcona Profesor Urszuli Jackowiak *[An Anniversary Book Dedicated to Professor Urszula Jackowiak]*, Gdańsk 2007, p. 167 ff.

[21] See the judgment of the Supreme Court of 7 December 2012, II PK 128/12 in which the Court held that this provision cannot constitute a statutory basis for collective agreements containing provisions of labour law.

[22] Judgment of the Supreme Court of 13 June 2012, II PK 288/11.

[23] See: *M. Włodarczyk*, [in:] *K.W. Baran* (ed.), System prawa pracy. Zbiorowe prawo pracy. Tom V *[The System of Labour Law*. *Collective Labour Law. Volume 5]*, Warszawa 2014, p. 424 ff. and the literature referenced there.

- agreement on the application of a collective agreement (Article 241[10] of the Labour Code);
- agreement to suspend the application of a collective agreement (Article 241[27] § 1 of the Labour Code);
- agreement related to transfer of an undertaking to a new employer (Article 26[1](3) of the Act on Trade Unions);
- agreement to suspend the provisions of labour law (Article 9[1] of the Labour Code);
- agreement on the application of less favourable employment conditions (Article 23[1a] of the Labour Code);
- agreement on the conditions of telework (Article 67[6] of the Labour Code);
- conciliation agreement concluded in a collective dispute (Article 9 of the Act on Resolution of Collective Disputes);
- mediation agreement concluded in a collective dispute (Article 14 of the Act on Resolution of Collective Disputes);
- arbitration agreement concluded in a collective dispute (Article 16 of the Act on Resolution of Collective Disputes in connection with § 9 of the Regulation on the Procedure Before the Social Arbitration Panels);
- strike or post-strike agreements concluded in a collective dispute (Article 9 or 14 in connection with Article 17 of the Act on Resolution of Collective Disputes)[24];
- agreement on collective redundancies (Article 3(1) of the Act on Collective Redundancies);
- anti-crisis agreement[25];
- participatory agreements.

The above list is not exhaustive. The employer can create "bases" of the statutory level for further types of agreements. They can be both based on Labour Code and non-Labour Code. This part of the study will present those of the "other[26] collective arrangements"[27] which are not based on the Labour Code.

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[24] See the judgments of the Supreme Court of Poland of 8 July 2014, I PK 312/13, argument 3; of 12 August 2014, I PK 14/14.

[25] See: *J. Szmit*, Porozumienia zawierane w trybie ustawy z dnia 1 lipca 2009 r. o łagodzeniu skutków kryzysu ekonomicznego dla pracowników i przedsiębiorstw *[Agreements Concluded under the Act of 1 July 2009 on Mitigating the Effects of the Economic Crisis on Employees and Enterprises]*, [in:] *A. Świątkowski* (ed.), Studia z zakresu prawa pracy i polityki społecznej, Kraków 2010, p. 107 ff.

[26] Article 18 of the Labour Code applies to all collective agreements. See: *L. Florek*, Porozumienia zbiorowe a umowa o pracę *[Collective Agreements and a Contract of Employment]*, [in:] *Z. Niedbała* (ed.), Księga pamiątkowa w piątą rocznicę śmierci Profesora Andrzeja Kijowskiego *[Memorial Book on the Fifth Anniversary of Death of Professor Andrzej Kijowski]*, Warszawa 2010, p. 44.

[27] See: *M. Włodarczyk*, „Swoiste" źródła prawa pracy – kilka refleksji na temat ich genezy i funkcji *["Specific" Sources of Labour Law – A Few Reflections on Their Origins and Functions]*, [in:] *Z. Góral* (ed.),

The status of sources of employment law within the meaning of Article 9 § 1 of the Labour Code is granted also to agreements/arrangements concluded during a collective labour dispute between trade unions and employers or employers' organisations. Under the applicable laws, there is no doubt that conciliation and mediation agreements have direct statutory basis required by the commented provision[28].

On the other hand, more serious doubts arise with regard to the statutory basis of the agreement (the so-called arbitration agreement) concluded in the course of the arbitration procedure. Although § 9 of a Regulation of the Council of Ministers of 16 August 1991 on the Rules of Procedure Before the Social Arbitration Panels (*rozporządzenie Rady Ministrów z dnia 16 sierpnia 1991 w sprawie trybu postępowania przed kolegiami arbitrażu społecznego*[29]) allows explicitly the conclusion of an agreement by the parties to a collective dispute, but only under a lower-ranking legal act. In my opinion, the arbitration agreement has statutory basis required by the Code. This interpretation is supported by systemic arguments. It should be kept in mind that in light of the provisions of Article 92(1) of the Constitution of the Republic of Poland, the issuance of a lower-ranking normative act (regulation) is always aimed at ensuring the implementation of a higher-ranking act by specifying the provisions of the latter. It is worth noting that the regulation is obligatory, in the sense that Article 16(7) of the Act on the Resolution of Collective Disputes does not leave the Council of Ministers the freedom to enact it. Therefore, it seems legitimate to argue that the arbitration agreement has the statutory basis required by Article 9 § 1 of the Labour Code, although it is indirect. Such interpretation is justified by teleological considerations and the need to guarantee legal certainty in industrial relations.

Interpretation problems arise also in the case of so-called strike or post-strike agreements. They are concluded either during the strike or they end the strike or other industrial action. The Act does not provide for a separate legal basis for them in the provisions governing the strike. However, it is not necessary to recognise them as sources of labour law. One should bear in mind that such agreements are always concluded within the statutory arbitration procedures, either in direct negotiations or before a mediator. The irenic methods are used in parallel during the strike or protest. They are universal in

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Z zagadnień współczesnego prawa pracy. Księga jubileuszowa Profesora Henryka Lewandowskiego *[The Issues of Contemporary Labour Law. The Anniversary Book of Professor Henryk Lewandowski]*, Warszawa 2009, p. 110 ff.

[28] See: *Ł. Pisarczyk*, [in:] *K.W. Baran* (ed.), System prawa pracy. Zbiorowe prawo pracy… *[The System of Labour Law. Collective Labour Law…]*, p. 640 ff. and the literature referenced there.

[29] Journal of Laws *[Dz.U.]* No. 73, item 324.

the sense that they can be applied at all stages of a collective dispute. According to the circumstances in a particular dispute, it will be a conciliation agreement or a mediation agreement. Therefore, it is justified to argue that strike or post-strike agreements have the statutory basis required under Article 9 § 1 of the Labour Code. This view has also been approved in the case law of the Supreme Court[30], which gives such agreements the quality of sources of labour law within the meaning of Article 9 of the Labour Code.

There are no normative obstacles for them to regulate the factors determining the terms and conditions of an employment relationship. However, in the practice of Polish industrial relations, they mainly concern broadly understood wages and other monetary benefits, because the etiology of the majority of collective disputes in the free market conditions has an economic and social basis. They are therefore sources of labour law within the meaning of Article 9 § 1 of the Labour Code, because their provisions directly concern the individualised rights and obligations of the parties to an employment relationship.

At this point, it is worth emphasising that in the practice of collective disputes there are also such collective arrangements which in part relate to the rights and duties of employees, and in part to the parties in the collective dispute (e.g. trade unions). Because of the dualistic legal nature of such agreements, it should be assumed that their individual provisions must be classified in accordance with their substantive content. Therefore, for the employee some of their provisions may be claimable, while others not. The discussed collective agreements, in particular those ending the strike or other industrial action, very often include a clause of no criminal record of trade unionists organising or leading the course of this dispute. Depending on its wording, it may even be claimable. However, in no circumstances can it constitute immunity for persons who violate basic employee duties during a collective dispute.

The sources of collective employment law are also other collective arrangements[31] concluded by the employer with a non-union representation of employees, if they cumulatively meet both criteria laid down in Article 9 § 1 of the Labour Code. This kind of interpretation is justified by the *lege non*

[30] See the judgments of the Supreme Court of Poland of: 8 July 2014, I PK 312/13, argument 3; 12 August 2014, I PK 14/14.

[31] See: *B. Wagner*, Porozumienia zawierane na gruncie ustawy o informowaniu pracowników i prowadzeniu z nimi konsultacji *[Agreements Concluded under the Act on Information and Consultation of Employees]*, [in:] *A. Sobczyk* (ed.), Informowanie i konsultacja pracowników w polskim prawie pracy *[Information and Consultation of Employees in the Polish Labour Law]*, Kraków 2008, p. 114 ff.; *L. Florek*, Porozumienia zbiorowe dotyczące informacji i konsultacji pracowniczej *[Collective Agreements Concerning Information and Consultation of Employees]*, [in:] *Z. Góral* (ed.), Z zagadnień współczesnego… *[The Issues…]*, p. 70 ff.

distinguente argument, because the commented provision does not differentiate the entities on the employees' side. So there are no legal obstacles to it being a works council or other representation of the staff. An example of the type of the agreement discussed here can be a collective agreement concluded under Article 14(2)(5) of the Act of 7 April 2006 on Information and Consultation of Employees[32], of course to the extent to which it defines the rights and obligations of the parties to the employment relationship. Its provisions are usually claimable and may be enforced in court proceedings.

Following the general reflections on other collective arrangements based on the Act, it should be stated that within the freedom to conclude collective agreements, they can govern the following:

1) only the rights and obligations of the parties to the agreement, i.e. trade unions and employer(s);
2) both the rights and obligations of the parties to the agreement, as well as the rights and obligations of the parties to the employment relationship, i.e. the employee and employer;
3) only the provisions regarding the rights and obligations of the parties to the employment relationship.

The category of agreements indicated in paragraph 1 does not directly affect the terms and conditions of employment of employees, therefore in light of Article 9 § 1 of the Labour Code such agreements cannot be considered provisions of labour law[33]. The two remaining categories can be considered to have such an attribute in the parts in which they determine the status of the parties to the employment relationship. In practice, this means that they are claimable, which opens the way to their effective enforcement, both by the employee and the employer.

In practice, many difficulties arise on interpretation of collective agreements. Against the background of Article 300 of the Labour Code, certain doubts arise as to whether the application of provisions of the Civil Code is admissible in this matter. Based on *a completudine* argumentation, I support this interpretation option. The judicature is also going in this direction. An example is a judgment of the Supreme Court of Poland of 21 March 2014 (II PK 119/13) in which the Court allowed for the auxiliary application of Article 65 of the Civil Code to the interpretation of normative acts such as collective labour law agreements.

The status of sources of labour law within the meaning of Article 9 § 1 of the Labour Code is not granted to collective agreements concluded without

[32] Journal of Laws *[Dz.U.]* No. 79, item 550, as amended.

[33] Where the rights and obligations of the parties have been sufficiently precisely defined, the provisions of such an agreement may be claimable.

statutory basis[34]. This applies also to social agreements[35] to which public authorities and employees' and/or employers' organisations are parties[36], if they do not directly affect the terms and conditions of employment of specific employees. As a result, they are not claimable, so they cannot be effectively pursued before a labour court.

All other collective agreements discussed here briefly will be presented later in this book.

3.2. Collective agreements

3.2.1. Legal nature of collective agreements

The origins of the collective agreements can be found in the nineteenth century tariff and price contracts (*umowy taryfowo-cennikowe*) concluded between the factory owners and newly established trade unions. Under the liberal economy of the countries entering the industrial era, they were an instrument for mitigation of sharp contrasts between labour and capital. In theory, the legal nature of collective agreements is disputable[37]. In the labour law doctrine[38], there are two different theories on the issue in question. According to a contract theory (*teoria umowy*), collective agreements are classified as obligation acts. Supporters of this theory point out the contractual nature of the collective agreements where the trade unions representing employees and the employers create, under bilateral declaration of will, their mutual rights and obligations. On the other hand, according to the law theory (*teoria ustawy*), the collective agreements are classified as normative acts governing the rights and obligations of employees and employers. Supporters of the latter theory

[34] See: *W. Uziak*, Specyficzne źródła prawa pracy. Uwagi do dyskusji *[Specific Sources of Labour Law. Remarks for Discussion]*, GSP 2000, vol. VI, pp. 32–33; *K.W. Baran*, Zbiorowe prawo pracy *[Collective Labour Law]*, Kraków 2002, pp. 101–103. See also a controversial view expressed in the judgment of the Supreme Court of 6 February 2006, III PK 114/05, OSNP 2007, No. 1–2, item 2.

[35] See a ruling of the Supreme Court of 21 October 2008, III KAS 2/08, OSNP 2009, Nos 7–8, item 111.

[36] *M. Seweryński*, Porozumienia generalne *[General Agreements]*, [in:] *Z. Góral* (ed.), Z zagadnień… *[The Issues…]*, p. 81 ff.

[37] See: *G. Goździewicz*, Refleksje na temat charakteru prawnego układu zbiorowego *[Reflections on the Legal Nature of a Collective Agreement]*, [in:] *M. Seweryński*, *J. Stelina* (eds.), Księga pamiątkowa poświęcona Prezydentowi Rzeczypospolitej Polskiej Profesorowi Lechowi Kaczyńskiemu *[A Memorial Book Dedicated to the President of the Republic of Poland*, *Professor Lech Kaczyński]*, Gdańsk 2012, p. 115 ff.

[38] See: *L. Florek*, Umowny charakter układu zbiorowego pracy *[Contractual Nature of a Collective Agreement]*, PiP 1997, No. 7, p. 15 ff.; *J. Stelina*, Normatywny charakter układów zbiorowych pracy *[Normative Nature of Collective Agreements]*, GSP, vol. VII, pp. 510–512.

emphasise that the binding force of collective agreements is derived from the law which sanctions the norms established under the agreement of the social partners. More specifically, their normative character is based primarily on the personal scope and the influence on the individual employment relationships. The mechanism of application of statutory provisions and provisions of a collective agreement in relation to contracts of employment is identical.

According to a compromise approach, collective agreements are considered heterogeneous acts of partially normative and partially obligating character. Therefore, they are defined as normative agreements concluded by trade unions with employers or employers' organisations and concerning the wage and working conditions in a broad sense.

3.2.2. Personal scope of collective agreements

According to Article 239 of the Labour Code, a collective agreement[39] is concluded for all employees employed by the employers covered by the provisions of such agreement, unless the parties agree otherwise[40]. Therefore, it may not include a differentiation clause according to which the provisions of the collective agreement shall apply only to members of a trade union which is a party to the agreement and only the latter shall be its beneficiaries, meaning persons employed under more favourable conditions than other employees. *De lege lata*, it does not, however, mean the prohibition to restrict the personal scope of the provisions of a collective agreement, since there are no normative obstacles to exclusion, in whole or in part, of provisions of the collective agreement based on a type of work or the function performed.

Article 239 of the Labour Code refers to all categories of employees, regardless of the nature of the act establishing the employment relationship. Therefore, the provisions of a collective agreement may apply not only to persons employed under a contract of employment but also those performing work under nomination, appointment or even election. The above general directive based on the provisions of Article 239 § 3 of the Labour Code does not apply to certain categories of persons employed in the public administration in a broad sense. Within the limits specified by Article 239 § 2 of the Labour Code, a collective agreement may apply also to persons performing work on

[39] See: *M. Seweryński*, Układy zbiorowe pracy w okresie demokratycznej przebudowy państwa i gospodarki *[Collective Agreements in the Period of Democratic Reconstruction of the State and the Economy*], PiP 1992, No. 12, p. 18 ff.; *J. Wratny*, Problem funkcji promocyjnej układów zbiorowych w świetle zmian prawa pracy, *[Promotional Function of Collective Agreements in the Light of Changes in Labour Law]*, PiZS 1998, No. 2, p. 25 ff.

[40] See: *I. Sierocka*, Zakres podmiotowy i treść układu zbiorowego pracy *[The Personal Scope and the Contents of a Collective Agreement]*, Białystok 2000, *passim*.

a basis different than an employment relationship. These may include persons who perform work under civil law contracts or pensioners.

Parties to a collective agreement may also extend the personal scope of the agreement to cover members of an employee's family. It is associated with a certain tradition functioning in the Polish industrial relations according to which the immediate family of an employee injured in an accident at work may receive additional social benefits or benefit from preferences in employment. It must be emphasised that conclusion of a collective agreement solely for persons who are not employees is not permitted since such agreement may cover such persons only additionally.

In the Polish labour legislation, it is also prohibited to conclude a collective agreement for the officers of uniformed services since the terms and conditions of performance of work by this group of employees are set out unilaterally by the employer.

While discussing the personal scope of collective agreements, it is worth paying attention to the so-called generalisation clause[41]. According to the provisions of Article 241^{18} § 1 of the Labour Code, at the joint request of the employers' organisations and multi-establishment trade union organisations that have entered into a multi-establishment agreement, the minister competent for labour issues may, when the important public interest so requires, extend under a regulation the application of this collective agreement, in whole or in part, to cover employees employed by the employer who is not covered by any multi-establishment agreement, conducting business activity identical or similar to the activity of employers covered by this agreement, determined on the basis of separate provisions on the classification of activities, after consulting the employer or the employer's organisation and the trade union organisation – if such organisation operates at the employer's premises.

The basic premise for the generalisation of a multi-establishment collective agreement is an important public interest. Because of the vagueness of this term, it is impossible to precisely indicate the circumstances justifying the issuance of the regulation. It seems that in the practice of industrial relations it follows from the need to protect the interests of employees who perform work in conditions significantly worse than employees of other enterprises covered by a multi-establishment agreement. The purpose of the generalisation clause is usually to standardise the conditions of employment of employees within one industry and to reduce the social dumping.

[41] See: *L. Kaczyński*, Generalizacja układu zbiorowego pracy *[Generalisation of a Collective Agreement]*, PiP 1998, No. 5, *passim*.