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INITIAL REMARKS ON ARTIFICIAL INTELLIGENCE AND AXIOLOGICAL FOUNDATIONS OF LABOUR LAW

Abstract

Progressive technological development forces a new look at the basic constructs of labour law. The science of labour law has so far paid little attention to the legal analysis of the risks associated with the ever-increasing interaction between people and technological tools, both in the form of advanced machinery as well as software used to manage enterprises and production processes. At the same time, questions about the future of labour law have long been posed in the science of labour law, primarily raising the need to realize the principle of social justice when work is not performed within the framework of the traditionally understood employment relationship (under employee subordination). The present study is a voice in this discussion, focusing on the issue of artificial intelligence in relation to the axiological foundations of labour law. The article analyzes the humanisation of work and human interaction in the world of new technologies primarily from the perspective of the central value of labour law, which is the inherent and inalienable dignity of the employee as a human being. There is also a consideration of the concept of autonomisation of the employee in the work process using artificial intelligence.

Słowa kluczowe: sztuczna inteligencja, prawo pracy, aksjologia, podporządkowanie, godność pracownika, autonomizacja pracownika, humanizacja pracy, technologia, wolność

Keywords: artificial intelligence, labour law, axiology, subordination, worker dignity, worker autonomy, humanisation of work, technology, freedom

ASJC: 3308, **JEL**: K31

Introductory remarks

Currently, there is an irreversible process of change in socio-economic conditions, progressive technological development and large-scale use of innovative technical solutions, which undoubtedly also affects labour law (Duraj 2014, p. 102). Indeed, the competing interests of the employee and the employer may be given a different meaning, for example, given the extent to which interference in the employee's private life is made possible by new and increasingly sophisticated technologies (ECtHR decision

of 5 October 2010, Köpke v. Germany, application no. 420/07, ECHR 1725). This is particularly evident during the crisis caused by the SARS-CoV-2 virus pandemic and the associated need to make indirect (via electronic communication) human contact more common in many work environments. To a large extent, this process of change is also due to the still rapidly developing Artificial Intelligence (AI).[1]

The general discussion of AI from an employment law perspective primarily emerges in studies of jobs that may be lost due to the automation and streamlining of work processes using AI (De Stefano 2019, p. 2). Much less attention has been paid to the legal analysis of the risks associated with the ever-increasing interaction between humans and technological tools, both in the form of advanced machines as well as software used to manage businesses and production processes (De Stefano 2019, p. 3). Meanwhile, AI is often beginning to become a reality in work. The scope of application of AI in the work environment is constantly increasing (Barański, Jankowska 2018, p. 200; Mélypataki 2019, pp. 69–80).

At the same time, questions about the future of labour law have long been raised in the science of labour law, primarily because of "the problem of how to realize the constitutional obligation of the state to protect all work and to realize the principles of social justice in the field of employment when work is not performed within the framework of a traditionally understood employment relationship" (Liszcz 2017, p. 206). Any scholarly discussion on this topic should be, and generally is, conducted primarily considering the axiology of labour law and the following irreversible transformations in the world affecting the work environment. This study provides a voice in this discussion by focusing on the issue of AI in relation to the aforementioned axiological foundations of labour law.

Humanisation of work and human interaction in a world of new technologies

Central among the values on which labour law is based is the inherent personal dignity of the employee as a human being (Liszcz 2018, p. 258).[2] Considering the still developing AI, the issue of dignity should be the fundamental part of any further considerations

[1] This study addresses the issue of so-called weak artificial intelligence (AI), which is meant as a computer treated as a device that can simulate brain activity. In this way, the computer is also understood as a convenient tool for testing hypotheses about the brain and mental processes. The content of this paper does not address the issue of strong AI—a computer with its consciousness (equivalent to the human brain and human mental activity) at all. This is because currently, no device or system could be considered a strong AI.

[2] Sometimes in the literature, it is pointed out that human dignity, e.g. in the Constitution of the Republic of Poland (Art. 30), is conceptually a different category than the dignity of the employee (Sanetra 2014, p. 24). The indicated Author argues that the employer should respect the employee's dignity, i.e. honour, self-esteem, personal dignity.

related to the influence of AI on labour law. T. Liszcz emphasizes that "with human dignity are connected—more or less directly—all the other values that labour law should materialize" (Liszcz 2017, p. 202).

The idea of humanisation of work, closely related to the above value, finds more and more support among theoreticians and practitioners of labour law (Wujczyk 2012, p. 18). The employee should not be treated without object, only in terms of the objectives set by the employer. As rightly observed by M. Wujczyk, "the humanisation of contemporary labour relations manifests itself in recognition of the rights and interests of the employee as one of the basic objectives of labour law" (Wujczyk 2012, p. 18).

Although AI can often make the performance of work safer, for example, and preservation of life is, after all, a necessary condition for the human realisation of other values and rights (Liszcz 2017, p. 258), AI is also associated with numerous risks, already signalled at the beginning of this paper. The performance of work involves the absolute subjectivity of the employee, which may result in the employer's interference in areas often remaining outside the framework defined by the employment relationship (Wujczyk 2012, p. 18). It is, therefore, necessary to establish appropriate legal measures to protect the employee against such unauthorized interference. A. Ludera-Ruszel even emphasizes that "the elimination of factors negatively affecting a person in the process of providing work is an element of the idea of humanisation of work" (Ludera-Ruszel 2016, p. 51).

The indicated risks can mainly result from the direct application of AI in the workplace. Already, AI enhances, for example, the ability to monitor and analyze employees' daily actions, e.g. when communicating via electronic means (Baranski 2021, p. 224). However, certain dangers may only emerge as the technology continues to develop, and even seemingly unrelated to an employer's use of AI in the workplace, such work may be affected. Here we should mention the dangers of the chaotically developing transhumanism, an intellectual current whose essence is an unwavering belief in human beings and the progress of science (Całus 2018, p. 252). Although most of the assumptions of transhumanism will probably never be realizable, it is worth mentioning, also for the further consideration made later in this paper, that one of the sources of transhumanism is the cybernetics movement. As part of this movement, in the 1970s, CYBERSYN was designed in Chile, a controversial system that, at least in theory, allowed factories to continuously monitor production data in terms of demand for specific products and to help forecast economic indicators while ensuring full employee autonomy and participation in factory management (Medina 2006, pp. 574–577; Całus 2018, pp. 251–252).[3]

It should also be noted that in the jurisprudence of the European Court of Human Rights, through the prism of the issue of the right to privacy in employment, the view has been expressed that "in the course of their working lives that the majority of people have a significant, if not the greatest, opportunity of developing relationships with the outside world" (ECtHR judgment of 16 December 1992, Niemietz v. Germany, application

[3] In the end, the guarantees of respect for employees' autonomy in the CYBERSYN project were minimal, and the project itself ended very quickly with the coup d'état by Augusto Pinochet.

no. 13710/88). Over time, as part of an employee's right to privacy in employment, the ECtHR has allowed an employee's right to develop a "social identity." "Since there are occasions when people knowingly or intentionally involve themselves in activities which are or may be recorded or reported in a public manner, a person's reasonable expectations as to privacy may be a significant, although not necessarily conclusive, factor in this assessment" (ECtHR judgment of 17 October 2019, López Ribalda and others v. Spain, application nos. 1874/13 and 8567/13). The concept of private life is not limited to the "inner circle" in which an individual can lead his or her own personal life without outside interference, but also includes the right to lead a "private social life," i.e., the ability to establish and develop relationships with other people and the outside world, e.g., in the professional sphere (ECtHR judgment of 17 October 2019, López Ribalda and others v. Spain, application nos. 1874/13 and 8567/13; ECtHR judgment of 12 January 2016, Bărbulescu v. Romania, application no. 61496/08). The right to privacy in the workplace provides a strong basis for constructing a right to human interaction consistent with the idea of humanizing work, especially in a world of new technologies using AI (Hendrickx 2019, p. 4).

The concept of employee autonomisation

Labour law fulfils two essential functions characteristic of this branch of law: a protective function and an organizational function. The protective function of labour law arises from the need to establish at the level of universally binding law certain guarantees and benefits for employees because the employee, as the weaker party of the employment relationship, is not able to independently secure his or her professional and social interests (Liszcz 2018, p. 257). On the other hand, the organizational function of labour law is to "ensure efficient organisation of teamwork processes by defining the powers of management and the duties of employees, legal measures to prevent their violation, as well as the role of representative bodies of the crew and the forms of their interaction with the management of workplaces [now, the employer—note M.B.]" (Szubert 1971, p. 567). Following Ł. Pisarczyk, it should be pointed out that through the executive powers "the employer can influence the object of the employee's performance, updating or specifying employee's duties, thus adjusting them to the changing conditions of the performance of the obligation and the needs of the enterprise, so that the work can be performed in the periods of existing demand and maintain its usefulness" (Pisarczyk 2008, p. 61).

In the current legal status, employee subordination is a structural element of the employment relationship, mainly because it is possible to distinguish an employee's employment (within the employment relationship) from various types of non-employment work, particularly the civil law type. However, it should be noted that at the turn of the 20th and 21st century, the concept of the so-called "autonomous subordination" was developed in jurisprudence (Polish Supreme Court judgment of 7 September 1999, I PKN 277/99, LEX No 44853). According to the Supreme Court, "the concept

of employee's subordination to the employer evolves with the development of social relations … in place of the former system of strict hierarchical subordination of the employee and the obligation to comply with the employer's instructions even in the technical scope of activity, there appears a new autonomous subordination consisting in the assignment of tasks by the employer to the employee without interfering in the way these tasks are performed." According to the Supreme Court, this new system of autonomous subordination is evident in the performance of creative professions because in these cases, the employer leaves a significant margin of freedom as to the manner of performance of the task entrusted to the employee under the employment relationship.

In the science of labour law, it is quite commonly accepted that the Polish Supreme Court in the above-cited judgment, and then in subsequent judgments reproducing or expanding the theses on "autonomous subordination," went beyond its competence, committing law-making activity and upsetting the balance between the employer's executive powers and the guarantee of employees' independence and autonomy (Musiała 2009, p. 133; Drozd 2011, p. 78; Liszcz 2011, p. 121; Duraj 2014, p. 108; differently, e.g. Mitrus 2011, p. 130). According to T. Duraj, the concept of "autonomous subordination" *de lege lata* is not acceptable because "it does not take into account the employer's right to specify—by way of binding orders—employee's duties, which is the *sine qua non* condition for the existence of employee subordination in any employment relationship" (Duraj 2014, p. 108).

Meanwhile, the previously mentioned right to develop one's "social identity" in the work environment also implies the right to make autonomous decisions and a certain additional degree of freedom (Hendrickx 2019, p. 4). This autonomisation of the employee seems to be all the more justified when the employee is "dependent" on the AI in the work process. As highlighted by F. Hendrickx, "in a context of new ways of working (for example, more autonomous work, more place and time sovereignty for workers), the right to be self-responsible and 'to be left alone' may become more relevant, in order to advance a human approach towards technologically dependent work" (Hendrickx 2019, p. 4). Making the work process "dependent" on AI within the framework of dependent work (which presupposes employee subordination) may even result in undue interference with the dignity and freedom of the employee as a human being (in the case of freedom on the same plane of values determining human dignity)[4].

Summary

The dependence of the work process on AI certainly increases the requirements for the human dimension of work, which should raise questions about the legitimacy of maintaining, in this regard, previous rigid constructions of labour law that demonstrate

[4] As a fundamental inherent human right, freedom means "above all, the freedom to decide of one's conduct in all spheres of personal and social life" (Liszcz 2017, p. 216).

the distinctiveness of this branch of law. Foreign literature emphasizes that the work of the future, dependent on modern technologies, including from the field of AI, may go far beyond the classic framework of subordinated work (Hendrickx 2019, p. 4). This may result in the need for a paradigm shift—the previous justification for separating labour law due to the existence of subordinated work will give way primarily to the need to regulate employee autonomy in the world of new technologies (Hendrickx 2019, p. 4). In this perspective, following A. Sobczyk, it could be pointed out that "detaching" the axiology of labour law from subordinated work and linking this axiology to the needs of man and the role of work in his life at the same time would mean that there are no reasons why the rights so far available to employees should not be exercised by persons performing paid work on another basis (Sobczyk 2014, p. 59). However, a complete legal abandonment of subordinated work when the work process is dependent on AI is not a good solution. After all, unlike human dignity, the right to freedom may be subject to limitations (*inter alia*, according to the rule of proportionality).[5] Besides, as A. Musiała notes, "beyond the strict concept of work are direct and primary interpersonal relations. Consequently, as essentially equal entities, persons at work cannot be subordinated to one another. This does not in any way cancel the communal character of a human being and human work and the resulting subordination. However, this subordination takes place on a different plane of the values of the person which determine human dignity—on the plane of secondary, indirect relations, resulting from common acts of creation and the common 'material' of these acts" (Musiała 2020, p. 83). Dignity of an employee as a human being does not exclude employee subordination. L. Mitrus argues that "the perception of human dignity as an axiological basis for the regulation of gainful employment should be considered through the prism of the labour market of the XXI century," primarily taking into account the development of new technologies (Mitrus 2014, p. 141). According to this Author, human dignity may inspire the determination of the status of persons providing paid work and justify expanding the subjective scope of labour law protections. At the same time, "this does not mean a postulate to equate the legal status of employees with contractors of civil law contracts" (Mitrus 2014, pp. 141–142). Indeed, "the convergence of different forms of providing work is not yet a phenomenon advanced enough to assume that it is possible to create a single formula of employment that would cover both today's employment relations and cases of providing services or so-called self-employment" (Pisarczyk 2014, p. 151).

Some fundamental legislative changes in labour law, however, in the case of an employee's performance of AI-dependent work, are necessary, and this necessity will grow with further technological development. It seems to be a good solution to use the

[5] Pursuant to Art. 31 Section 3 of the Constitution of the Republic of Poland, "limitations on the exercise of constitutional freedoms and rights may be established only by statute and only when they are necessary in ademocratic state for its security or public order, or for the protection of the environment, health and public morals, or of the freedoms and rights of others. Such limitations may not impair the essence of the freedoms and rights".

concept of "autonomous subordination" in this case, as already indicated, currently being pushed in the jurisprudence of the Polish Supreme Court. Ł. Pisarczyk, from the perspective of the Constitution of the Republic of Poland, notes that "by emphasising the dignity of the human person and the idea of the common good, the legislator also emphasises the importance of freedom and human and civil rights, which are the foundation of the social order" (Pisarczyk 2014, p. 159). Therefore, an essential determinant of how the situation of an individual is shaped is, in particular, "the working conditions in which work is performed, including in particular the degree of independence of the 'employee'," which in turn justifies "differentiating legal solutions … depending on whether work has the attribute of dependent work" (Pisarczyk 2014, p. 159). The proposed autonomisation of the employee would undoubtedly go beyond the classic framework of subordinated work. However, such an employee would, first of all, have more freedom to determine how to perform the tasks assigned to him or her, which would to a large extent "compensate" him or her not only for the still existing employee subordination (here weakened) but also for his or her "dependence" in the work process on the AI. This would be accompanied by a reduction of the employer's control, who expects concrete results without excessively penetrating how they were obtained (Wujczyk 2012, p. 17). Above all, however, this kind of weakening of employee subordination would guarantee the employee's dignity and freedom as a human being and be in line with the idea of humanizing work and the human interaction in the world of new technologies. This kind of piecemeal modification of subordinated work would also not stand in the way of creating a coherent model of non-employment work, particularly the civil law type (Pisarczyk 2017, p. 119).

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