Employment model and freedom of association - the case of Poland

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Summary

The aim of the paper within the "Human Rights and International Labour Standards" workshop is to demonstrate how transformation in employment market may influence the right to create and join trade unions by workers on the example of Poland, where labour law has gone a long way since the 1990s, when political and economic transformation has strongly influenced its shape. The change from state protected labour law model to one oriented to flexibility favoured by liberal economy model has not only changed individual employment relations but also the collective labour law.

Freedom of association without a doubt constitutes one of fundamental human and workers' rights enshrined in various international, European and national legal acts. However, this is also one of the areas where individual and collective labour rights are strongly intertwined. Even though the freedom of association is granted to workers independently from legal basis of their employment, in practice it is the national system of labour law that decides whether a person performing work for benefit of other entity is given legal means to execute their freedom.

In recent years in Poland the number of workers performing subordinated work on the basis of civil law contracts or as self-employed increased significantly. Also the number of fixed-time employees reached the highest number in Europe. During the same period trade union participation rate is dropping slowly. There are various reasons explaining this phenomenon. One of them is changing structure of employment model together with provisions of trade union law. The trade union law has provided for the right to create and join trade unions only to certain groups of workers such as employees as defined by the Labour Code, members of agricultural co-operative and persons working under agency contract. A large and still growing group of persons employed under civil law contracts as well as self-employed has been deprived of this right. Therefore it seems that a significant percentage of workforce does not benefit from the freedom of association and other fundamental rights that stem from it: the right to collective bargaining, collective disputes and the right to strike.

This state of act was subject to proceeding before the ILO Freedom of Association Committee as well as the Polish Constitutional Court. The ILO has urged Polish government to adapt their legislation to international standards and widen the personal scope of the freedom of association. Also the constitutional tribunal as a reaction to changing employment market contrary to the content of its earlier judgements has decided do search for a different "constitutional" definition of worker based on European and international law. The Court's findings have lead to conclusions that current definition of worker in the labour code cannot be applied in order to ensure workers their fundamental rights.
The example allows reflecting on relations between individual and collective labour rights as well as multi level character of guarantees of collective workers' rights.

1. Economic transformation, flexibility of employment law and dualisation of employment market.

The national labour law has gone a long way since the 1990s, when political and economic transformation has strongly influenced its shape. The change from state protected labour law model to one oriented to flexibility favoured by liberal economy model has changed individual and collective labour law alike.

Until 1990s state legislation in the sphere of labour law was comparatively rigid and favourable for workers. Economic transformation beginning in 1990s, brought deep changes in employment structure and a few waves of unemployment. For the start the economy was confronted with a significant overemployment reaching 20-30% of the workforce[1]. Privatisation and rationalisation of the economy triggered a huge wave of dismissals. In only one year the number of unemployed has grown more than 10-fold reaching 1,2 million people[2]. Therefore major amendments of the Labour Code undertaken in the 1990s and the beginning of 2000s were not only a part of EU accession process, but most of all were supposed to facilitate cheaper, faster and less formal employment procedures[3]. Liberalisation of labour law was accompanied by introducing measures to activate dismissed workers and the unemployed. One

[1] J. Męcina,*Wpływ dialogu społecznego na kształtowanie sie stosunków pracy w III Rzeczypospolitej*, Instytut Polityki Społecznej-Uniwersytet Warszawaski, Warszawa 2010, p. 193.
[2] J. Męcina,*Wpływ dialogu społecznego*... , p. 194.
[3] J. Wratny, *Granice liberalizacji prawa pracy*, Dialog, 1/ 2007, p. 30.

example is the act on employment of temporary workers of 2003, which contributed to expansion of this form of work, but also provided for a legal basis for this group of workers. Since then employment by temporary employment agencies is growing. The number of agency workers in Poland (full- time equivalent) in 2014 was over 56 000 - a double in comparison with 2009[4]. Yet, only 46% of temporary workers are employed on the basis of employment contract[5].

Currently, with a strong support of employers' organizations, labour law seems to promote employer flexibility and competition based on low employment costs, mainly through generous options for fixed term employment contracts and the substitution of employment by civil law contracts. Obviously changes in the employment market are strongly connected to various civilisation factors, such as globalization: e.g. Poland is becoming an important centre of business services[6]. Postfordism does not mean that the problems of worker's representation and protection of worker's rights disappear, but conditions of functioning of trade unions and other worker's representatives change[7].

2. Trade union erosion and decline trade union membership rate

Freedom of association without a doubt constitutes one of fundamental human and workers' rights enshrined in various international, European and national legal acts. However, this is also one of the areas where individual and collective labour rights are strongly intertwined. Even though as a human right the freedom of association is granted to workers independently from legal basis of their employment, in practice it is the national system of labour law that decides whether a person performing work for benefit of other entity is given legal means to execute their freedom.

In Poland the process of trade union erosion characterised by diminishing trade union membership and the number of companies covered by trade union activity has taken

[4] Polskie Forum HR, *Rynek agencji zatrudnienia w 2014 roku*, p. 16 http://admin.polskieforumhr.pl/dir_upload/site/70c12353731d477c8cda0204c7564695/raport/RAPORT_2015.pdf

[5] Polskie Forum HR, *Rynek agencji zatrudnienia w 2014 roku*... p. 17

[6] A. Patulski, *Praca niepewna jako produkt zmian na współczesnym rynku pracy* [in:] G. Uscińska (ed.) *Prawo pracy. Refleksje i poszukiwania. Księga jubileuszowa profesora Jerzego Wratnego*, IPiSS Warszawa 2013, p. 73

[7] J. Jarosiński, *Globalizacja a rynek pracy i stosunki pracy w Polsce* ..., p. 95

place since 1990s[8]. According to polls carried out on a regular basis by public opinion Research Centre (CBOS) in 1991 19% of population in production age declared trade union membership. This number lowered gradually reaching 12% in 1997, 7% in 2001 and 2007, and 6% in 2015[9]. In the group of employees trade union membership was higher: 20% in 1999, 18% in 2001 17,6% in 2007 and 16% in 2015[10]. Trade unions are strongest in traditional branches of industry such as shipyards and mines, in public institutions and state-owned enterprises, including privatised companies and these where the state holds majority of shares. The lowest level of trade union membership is found in private companies, although trade unions claim successes in retail (especially in large supermarkets) and private security companies[11]. It is worthwhile to mention here that the sectors where trade unions remain strong more often tan others rely on traditional forms of full time open – ended employment contracts.

There are many reasons for this negative tendency. One of them is trade union pluralism: a group of 10 workers may create and register trade union and in some companies the number of trade union organisation reaches several dozens[12]. The model of conflicting pluralism prevented these organisations form preparing to respond to the challenges of market economy and benefit from positive examples of trade union organisations in other EU countries[13]. This in turn has largely contributed to trade union erosion and marginalisation in the private sector. Before the transformation 100% of workers in traditional state enterprises were unionised. The number was much lower in privatises state enterprises (63,6%) and in new companies with foreign capital (30%), while the lowest rate was found in newly established

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[8] J. Wratny, *Związki zawodowe. Znaczenie w życiu politycznym i społeczno-gospodarczym* [w:] J. Wratny, M. Bednarski, *Związki zawodowe a niezwiązkowe przedstawicielstwa pracownicze w gospodarce posttransformacyjnej*, IPiSS, Warszawa 2010, p. 40.

[9] J. Wratny, *Związki zawodowe*... p. 41; CBOS, *Opinie o związkach zawodowych i protestach górników 2015* http://cbos.pl/SPISKOM.POL/2015/K_066_15.PDF

[10] Ibidem; Trade union membership is more frequent than average among older workers: having from 45 to 54 years of age (18%), and especially from 55 to 64 years of age (23%), living in cities up to 20 thousand. of the population (18%), employed in state-owned enterprises and public institutions (22%), representatives of associate professionals and technicians (24%), as well as executives and professionals with higher education (15%). CBOS, *Opinie o związkach zawodowych i protestach górników 2015* http://cbos.pl/SPISKOM.POL/2015/K_066_15.PDF

[11] J. Wratny, *Związki zawodowe*... p. 41

[12] J. Wratny quotes an example of PKP Cargo (a large railway company) with 263 trade union organisations J. Wratny, *Związki zawodowe*... p. 43.

[13] J. Gardawski, *Polskie związki zawodowe w procesie transformacji* [in:] K. Żukrowska (ed.) *Transformacja systemowa w Polsce*, Szkoła Główna Handlowa w Warszawie, Warszawa 2010, p. 183

companies with Polish capital(5,4%)[14]. In practice pluralisation also means that trade unions represent only particular group of interests and not majority of workers. On the other hand large trade union organisations representative on a country level (NSZZ Solidarność" OPZZ and FZZ) tend to fulfil a role similar to political parties and their activities do not always concentrate only on protection of workers' interests[15].

In the survey carried out by CBOS in 2004 most workers declared that they are not members of trade unions because of a lack of trade union organisation at their workplace, which is often a small enterprise (46,2%). 28,3% declared no need to be a trade union member, 16,5% were critical about trade union activity doubting if this type of organisation really protects workers or fearing negative reaction of the employer[16]. Workers who left trade unions most often indicated retirement (25,2%) or unemployment (17,6%) as a reason, but some had lost trust in them (5,6%), because they were not provided support they had been counting on. Also in later polls (2010) workers expressed only limited trust in trade union's efficiency in protecting worker's rights[17] Some declared loosing trust in NSZZ "Solidarność", which had once been a large social movement, but failed their members by becoming involved in politics and failure to protect worker's rights. Interestingly 2% of the surveyed declared that they left trade unions because they were once obliged to the membership and now they are free to choose[18].

The survey also explains absence of trade unions in companies. 36,5% of the respondents suggest that the enterprise is too small. 11,9% believe that privatisation is the reason and about the same number, that trade union is not needed. 10,3% claim

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[14] J. Gardawski, *Ewolucja polskich związków zawodowych* [in:] J. Gardawski (ed.) *Polacy pracujący a kryzys fordyzmu*, Wydawnictwo Naukowe Scholar, Warszawa 2009, p. 486

[15] M. Rycak, *Wpływ koncepcji flexicurity na przemiany stosunku pracy* [in:] L. Florek, Ł. Pisarczyk (eds.) *Współczesne problemy prawa pracy i ubezpieczeń społecznych*, LexisNexis, Warszawa 2011, p. 220; J. Jarosiński, *Globalizacja a rynek pracy i stosunki pracy w Polsce* [in:] M. Bsoul, F. Bylok, *Zwiazki zawodowe w procesie przemian społeczno-gospodarczych w Polsce i w wybranych krajach Unii Europejskiej*, Ślask, Katowice 2013, p. 97-99

[16] A. Mokrzyszewski, *Przyczyny niskiego uzwiązkowienia Polaków pracujących* [in:] J. Gardawski (ed.) *Polacy pracujący a kryzys fordyzmu*, Wydawnictwo Naukowe Scholar, Warszawa 2009, p. 572-574

[17] 14% of the respondents expressed positive opinion on trade union's efficiency, while 33% claimed they do not see any effects of their activity, 44% that their endeavours do not bring effects. P. Kikosicki, *Związki zawodowe w zakładach pracy w Polsce w świetle badań opinii społecznej* [in:],Z. Hajn (ed.) *Związkowe przedstawicielstwo pracowników zakładu pracy*, Lex Wolters Kluwer, Warszawa 2015 p. 6-61. See also J. Gardawski, *Związki zawodowe na rozdrożu*, ISP Warszawa 2001, p. 106-107

[18] *Ibidem*, p. 575-578.

that the worker themselves are not interested in creating trade union and do not take initiative. 7,9% state that trade union does not exist because of employer's hostility and workers fearing repercussions[19].

The opinion on negative attitude of managerial staff towards trade unions is not ungrounded, as J. Gardawski suggests. In the initial period of economic transformation NSZZ Solidarność had a strong influence in the process of eliminating representatives of a socialist regime from privatised and restructured enterprises. Those who lost their posts often established their own enterprises in the private sector and shared their resentment towards trade unions among other company owners and managers[20]. Similarly trade unionists often share negative perception of employer's organisations, which only deepens mutual distrust[21]. Especially in small enterprises environment hostile for trade unions prevents workers from creating and joining trade union organisations[22]

It is also important to note that Polish labour law consists mainly of statutory legislation. Workplace regulations and collective agreements cover all employees regardless of their trade union status, but they play no significant role in the system. Even when present, they rarely modify the statutory provisions in any significant manner. This does not encourage workers to joint trade unions in order to get access to better employment conditions[23].

Economic transformation also has changed the picture of workers participation. Apart from worker's participants in the supervisory boards in privatised enterprises, new participation bodies like works councils and EWCs appeared. Lowering trade union membership was one of the arguments for creating works councils independent from trade unions[24]. Still the largest influence on worker's situation in privatised and restructured companies is due to concluding by trade unions agreements with future

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[19] *Ibidem* , p. 579.
[20] J. Gardawski, *Ewolucja polskich związków zawodowych* [in:] J. Gardawski (ed.) *Polacy pracujący a kryzys fordyzmu*, Wydawnictwo Naukowe Scholar, Warszawa 2009, p. 481
[21] Ibidem p. 518
[22] J. Wratny, *Partycypacja pracownicza. Studium zagadnienia w warunkach transformacji gospodarcze*j, IPiSS, Warszawa 2002, p. 174 ,
[23] J. Gardawski, *Ewolucja polskich związków zawodowych* [in:] J. Gardawski (ed*.) Polacy pracujący a kryzys fordyzmu*, Wydawnictwo Naukowe Scholar, Warszawa 2009, p. 487. P. Czarnecki, *Bariery prawne w zakresie rokowań zbiorowych w sektorze prywatnym w Polsce* [in:] J. Czarzasty (ed.) *Rokowania zbiorowe w cieniu globalizacji. Rola i miejsce związków zawodowych w korporacjach ponadnarodowych*, Wydawnictwo Naukowe SCOLAR, Warszawa 2014, p. 124
[24] J. Wratny, Partycypacja pracownicza. ... p. 50

employer, which at least for a short period of time guaranteed better employment condition and limited dismissals[25].

3. Spreading of fixed-term employment contracts

Weakening of trade union position is also strongly connected with transformation of employment relations. Greater flexibility of employment, manifesting in atypical forms of Labour Code-based forms of employment such as especially fixed-term contracts, agency work as well as civil law contracts obviously is not a uniquely Polish phenomenon. Similar changes can be observed in all countries where the economy is transforming from industrial economy based on taylorist and fordist organisation of production to post-industrial economy. This change means limiting co-operated work performed by large number of workers in one establishment at the same time under employer's supervision and spreading of more individualistic patterns of work[26]. Flexibility of employment is both needed and possible because of such phenomena like de centralisation and de location of production process, individualisation of tasks given to employees, different attitude to working time and new technical possibilities of monitoring employees outside employer's establishment. Real results of work become more important that staying at the disposal of the employer, modern technologies both facilitate reconciliation of work and private life and at the same time contribute to dissolving boarders between the two spheres[27].

In recent years in Poland the number of fixed-time employees reached the highest number in Europe - about 28% in the 3rd quarter of 2015[28]. Also the number of workers performing subordinated work on the basis of civil law contracts or as self-

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[25] J. Wratny *Wpływ prywatyzacji na zbiorowe stosunku pracy. Podsumowanie* [in:] J. Wratny, M. Bednarski, *Wpływ prywatyzacji na zbiorowe stosunku pracy. Aspekty prawne i społeczno-ekonomiczne*, Warszawa 2005, p. 166-167. J. Wratny, *Partycypacja pracownicza. Studium zagadnienia* ...s. 44-45

[26] J. Męcina, *Zatrudnienie niepracownicze z perspektywy polityki społecznej i rynku pracy* [in:] K.W. Baran (ed.) *System prawa pracy. Tom VII Zatrudnienie niepracownicze*, Lex Wolters Kluwer, Warszawa 2015, p. 30; see also K. Walczak, *Wpływ globalizacji i ogólnoświatowego kryzysu na podstawy i warunki zatrudniania. Wyzwania dla polskiego prawa pracy* [in:] L. Florek, Ł. Pisarczyk (eds.) *Współczesne problemy prawa pracy i ubezpieczeń społecznych*, LexisNexis, Warszawa 2011, p. 81 and J. Wratny, *Zwiazki zawodowe*... p. 43.

[27] J. Męcina, *Zatrudnienie* ... p. 32

[28] GUS, *Kwartalna informacja o rynku pracy*, http://stat.gov.pl/obszary-tematyczne/rynek-pracy/pracujacy-bezrobotni-bierni-zawodowo-wg-bael/kwartalna-informacja-o-rynku-pracy-w-iii-kwartale-2015-r-,12,22.html

employed increased significantly. Employment on the basis of fixed-term employment contracts and - in a larger extent - civil law contracts seems to contribute the most to segmentation of employment market, deepening even more differences between insiders and outsiders[29].

Given the high proportion of those less protected employees, EU legislation such as the Directive on fixed term contracts has the potential to improve employment conditions. Non-compliance of the fixed-term contract provisions in Polish law with the *acquis communautaire* had been long calling for an action and in September 2012 the NSZZ „Solidarność" trade union filed a complaint to the European Commission concerning the failure to implement Directive 99/70/EC.[30] The Commission announced that a formal infringement procedure had been started.[31] In this proceedings the European Commission considered the following aspects of the complaint of „Solidarność trade union:

1. The difference between the length of the period of notice of contracts concluded for a specified period and the length of the period of notice of contracts for an indefinite period for contracts covering a similar period means less favourable treatment of workers on fixed-term without objective justification.

2. Polish legislation unfairly does not allow to treat in par with fixed term contracts within the meaning of article 25(1) §1 LC apprenticeships and contracts or specific measures of employment policy such as contracts concluded between the employment offices and employers under which workers receive on job training

3. The 30 days period, which must elapse between two fixed-term contracts to qualify as consecutive is too short.

4. The term "tasks executed cyclically", under which it is permitted to conclude successive fixed-term contracts without any limit, is not sufficiently defined by law, to be able to prevent an excessive number of concluding such agreements[32].

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[29] K. Walczak, *Wpływ globalizacji i ogólnoswiatowego kryzysu*... p. 87.

[30] http://www.solidarnosc.org.pl/stara/uploads/oryginal/1/4/2b5f6_Skarga_calosc.pdf (accessed 23.07 2014)

[31] Press release on Rzeczpospolita Daily Newspaper Website*: Po skardze "S" interwencja KE ws. umów na czas określony w Polsce* http://prawo.rp.pl/artykul/1074268.html

[32] Press release on NSZZ Solidarność website: *„Po skardze „S": Komisja Europejska interweniuje w sprawie umów na czas określony*" http://www.solidarnosc.org.pl/aktualnosci/wiadomosci/zagranica/item/7859-po-skardze-s-komisja-

Also the EU Council Country Specific Recommendation for the years 2014-2015 for Poland require correcting the segmentation of the labour market, among others, by improving the transition from temporary employment to permanent employment.

Another important step towards changing situation of workers on fixed-term contracts was the CJEU preliminary ruling in Case Nierodzik. In January 2013 a labour court in Białystok turned to the CJEU for preliminary ruling concerning the interpretation of clauses 1 and 4 of the Framework Agreement on fixed-term work in a proceeding initiated by a nursing assistant, whose fixed-term contract was terminated by her employer (Psychiatric Health Care Institution). In the sentence the CJEU reminded, that Clause 4(1) of the Framework Agreement lays down, in respect of employment conditions, a prohibition on treating fixed-term workers in a less favourable manner, than comparable permanent workers, solely because they have a fixed-term contract or relation unless different treatment is justified on objective grounds.[33] The CJEU also argued, that the mere temporary nature of an employment relationship is not sufficient to justify such a difference, otherwise the objectives of Directive 1999/70 and the Framework Agreement would be negated.[34]

It is interesting to note here, that the Court does not compare employment conditions (which include also the notice period for the termination of fixed-term employment contracts) of two workers, but one throughout her employment by the same employer.

The Court concludes in that case, that the notice period, prior to the termination of the employment contract of the applicant in the main proceedings, is fixed (2 weeks) without taking account of her length of service, whereas, if the worker had been employed under a contract of indefinite duration, that period, calculated in accordance with her length of service, would have been one month, that is to say, twice the length of the notice period she received. The only factor capable of distinguishing worker's situation from that of a permanent worker seems to be the temporary nature of the employment relationship. It follows from the foregoing that the application of notice

europejska-interweniuje-w-sprawie-umow-na-czas-okreslony?tmpl=component&print=1

[33] Judgment of the Court of 13 March 2014 in Case C−38/13 *Małgorzata Nierodzik v. Samodzielny Publiczny Psychiatryczny Zakład Opieki Zdrowotnej im. dr. Stanisława Deresza w Choroszczy*

[34] C−38/13, para 38.

periods of different length constitutes different treatment in respect of employment conditions.[35]

The result of this judgement was an important amendment in the Labour Code changing in the system of limitation of fixed-term employment. Employment on the basis of civil law contracts often replaces traditional form of employment. This shift towards independent, non co-ordinated forms of employment, also results in a growing number of employees who are not covered by any protective regulations (except from basic health and safety ones) stemming from labour code[36].

Workers employed on the basis of fixed- term contracts are less willing to join trade unions[37]. The same can be said on teleworkers and foreigners[38], even though there are no legal obstacles for atypical workers (as well as home workers) employed on the basis of labour contracts to join trade unions. Although agency workers are not exempted from these provisions in reality trade unions are not formed in the agencies. It is caused by the temporary character of employment, the fact, that their real interest are connected with user employer rather than the agency (e.g. remuneration)[39] and last but over 50% of them, as mentioned earlier are employed on the basis of civil contracts.[40]

It can be generally stated that atypical employment forms do not favour workers participation in representative bodies, be it trade unions or works councils[41]. Weak bond with the company discourages employees to participate in the management process but also influences relations between employees.[42] All this makes it difficult to organise atypical workers in trade unions which influences industrial relations

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[35] C−38/13, paras 34-35.
[36] J. Męcina, *Zatrudnienie niepracownicze z perspektywy polityki społecznej i rynku pracy* [in:] K.W. Baran (ed.) *System prawa pracy. Tom VII. Zatrudnienie niepracownicze*, LEX Wolters Kluwer, Warszawa 2015, p. 27
[37] J. Wratny. M. Bednarski, *Wpływ prywatyzacji na zbiorowe stosunki pracy. Aspekty prawne i społeczno – ekonomiczne*, Warszawa 2005, p. 175.
[38] There are however some individual exceptions of foreigners declaring their interest to join trade unions.
[39] J. Wratny, *Elastyczność z ludzka twarzą*, Dialog, 3/2007. p. 28
[40] *Report on activity of temporary work agencies in* 2006 *(Raport z działalności agencji zatrudnienia w 2006 r.* Ministerstwo Pracy i Polityki Społecznej- Departament Rynku Pracy) http://www.zapt.pl/pdf/RAPORT_AGENCJE_-_2006_-_MPIPS.pdf
[41] J. Wratny, Partycypacja pracownicza. Studium zagadnienia w warunkach transformacji gospodarczej, IPiSS, Warszawa 2002, p. 175
[42] M. Bednarski, *E- parca a zmiany w firmie*, Polityka społeczna, 2004/2

in the establishment.[43] Until the recent judgement of Constitutional Tribunal in case K 1/13 workers on civil law contracts were not allowed to join and form trade unions. The trade union law had provided for the right to create and join trade unions only to certain groups of workers such as employees as defined by the Labour Code, members of agricultural co-operative and persons working under agency contract. A large and still growing group of persons employed under civil law contracts as well as self-employed has been deprived of this right. Therefore it seems that a significant percentage of workforce had not benefited from the freedom of association and other fundamental rights that stem from it: the right to collective bargaining, collective disputes and the right to strike.

4. Replacement of employment contracts by civil-law contracts

Employers are much willing to apply civil law contracts instead of employment contract both for fiscal reasons (social security fees are lower) and greater flexibility regarding organisation of work as well as resolution of employment contract. The national statistics do not reflect precisely the number of independent employees but they may constitute from almost 7% to 13% of the workforce.[44] Unfortunately the practice does not apply to these tasks and workers who indeed act as independent ones but often leads to "hiding" employment relationship under bogus civil law contracts and self employment. Statistics of the Labour Inspection reveal that the scale of such unlawful practice is growing each year. While in 2007 only 4% of controlled enterprises the labour inspectors found irregularities in concluding employment contract in 2013 the number has grown to 18%.[45]

Civil law contracts are often signed for only one month, many of them are not fully covered by social security. This form of employment is also a disadvantage for workers as bank clients: banks tend to be critical towards civil-law workers while

[43] J. Wartny, M. Bednarski, *op.cit.* , p.176.
[44] J. Męcina, *Zatrudnienie* ... p. 40; Central Statistical Office, Pracujacy w nietypowych formach zatrudnienia, http://stat.gov.pl/obszary-tematyczne/rynek-pracy/pracujacy-zatrudnieni-wynagrodzenia-koszty-pracy/pracujacy-w-nietypowych-formach-zatrudnienia,11,1.html
[45] J. Męcina, *Zatrudnienie* ... p. 40.

assessing their credit rating. Because of all these circumstances workers tend to perceive this form of employment as precarious.[46]

Despite prohibition of such practice in the Labour Code employers and employees often conclude several civil law contracts before the establishment of a fixed-term employment contract. Only after a longer duration of such contracts employers decide to hire workers on an employment contract basis for a trial period and then on the basis of a chain of fixed-term contracts. Under civil law contracts workers are deprived of protection guaranteed by the labour code in terms of working time, minimum wage, holidays and privilages for working parents. In many cases, the nature of the work performed by the employee does not change throughout the period of employment: this applies in particular to the nature of duties, the way how they are performed and subordination of the worker. According to the view expressed by the Supreme Court and supported by labour law scholars, if the type of the contract may not be changed (from employment contract to civil law contract) without changing the nature of the work, its intensity and character, then it is an abuse of the law, which is not justified.[47] The means to protect workers against such forms of abuse are the definition of the employment contract in the Labour Code, and so called „soft" presumption of employment contract as well as a ban to conclude civil law contracts instead of an employment contract.[48] There is also a specific proceeding available to establish the existence of an employment contract. Still, the controls carried out by the Labour inspection has shown that the phenomenon of illegal replacement of employment contracts by civil law contracts is growing: in 2007 only 4% of controlled enterprises has broken a law, in 2013 the number has grown to 18%.[49]

Apart from negative effects in the sphere of individual labour law (access to promotion, training, remuneration) employment on the basis of civil law contracts has also negative effects on collective labour law. Although even in the present legal

[46] J. Męcina, *Zatrudnienie niepracownicze ...* p. 42.
[47] Article 58 of the Civil Code; Supreme Court judgement of 14.12.2009, I PK 108/09, MOPR 2010, No. 7, p 364) E. Suknarowska-Drzewiecka (2013) In: Walczak, K. (ed.): *Kodeks pracy. Komentarz,* Warszawa, C.H. Beck SIP Legalis (accessed on 23.07 2014); G. Goździewicz and T. Zieliński underline the autonomy of the parties to transform an employment contract into a civil law contract or a civil law contract into an employment contract, however, this change should be accompanied by a change of the character of the work performed. (G. Goździewicz, T. Zielinski (2011), In: Florek, L. (ed.): *Kodeks pracy.* Warszawa, WoltersKluwer, p.148; Tak też M. Gersdorf (2012) In: Gersdorf, M. – Rączka, K. –Jackowski, M.: *Kodeks pracy.* Komentarz, Warszawa LexisNexis, p.119.
[48] J. Unterschütz (2013), ibid. p. 131.
[49] J. Męcina, *Zatrudnienie niepracownicze z perspektywy polityki społecznej i rynku pracy* p. 40.

situation civil- contract workers since 1995 may be covered by collective agreements, they may not participate in negotiation process. In practice only few collective agreements unfortunately do deal with rights of workers employed on other basis than the employment contracts, which means that this tool is not sufficiently used. One of the cause of this may be the lack of trade union representation of dependant workers who are not employees in the meaning of the Labour Code.

4. Limited access to trade unions of independent workers. Proceeding before ILO Freedom of Association Committee

The problem of limited access to trade unions by workers employed on the basis of civil law contracts and self-employed was subject to proceeding before the ILO Freedom of Association Committee as well as the Polish Constitutional Court. Concerns presented by the academia[50] were confirmed by the recommendations the Committee on Freedom of Association of the Administrative Council of the International Labour Organisation (CFA), included in the report of 2012, as a response to the complaint made by the NSZZ "Solidarność".

Trade unions considered that by using a narrow definition of the term "employee" inspired by the Labour Code, the legislator denied freedom of association rights to persons employed on the basis of civil law contracts (contract for service), self-employed and other persons performing work but who are not employers. According to the complainant, the scope of the right to organize is therefore restricted only to selected categories of employees and the choice seems to be arbitral and does not reflect the reality of the Polish labour market where persons employed on the basis of civil law contracts and self-employed constitute a significant share of the workforce[51].

The problem is even more visible in the case of self-employed as according to the Polish law, such workers may not join employers‟ organizations as they do not employ anyone and are not "employers" in the sense of the definition provided for in section 3 of the Labour Code. Pursuant to sections 1 and 2 of the Law on Employers'

[50] Z. Hajn, *Prawo zrzeszania sie w zwiazkach zawodowych – prawo pracowników czy prawo ludzi pracy*? [w:] *Zbiorowe prawo pracy w XXI wieku*... s175-183.
[51] *363rd Report of the Committee on Freedom of Association 313th Session*, Geneva, 15–30 March 2012 , para 1070.

Organizations of 1991, only subjects defined by the Labour Code may associate in employers‟ organizations. Trade union act also grants the right to establish and join trade unions to some categories of workers such as employees, members of agricultural cooperatives, persons employed on agency contracts and in non-combatant military service, only the right to join trade unions (without the right to establish them) is granted to homeworkers, pensioners and unemployed. State officers of uniform service may associate with restrictions as defined by specific legislation.
This is in violation of Convention No. 87 as it makes a distinction between the rights of specific categories of workers[52]. The Act on Trade Unions is also in violation of Convention No. 135 under which the term "workers‟ representative" refers not only to trade union members but also to other persons in accordance with the national law. Trade union law grants the protection against dismissal and privilege to be released from work to carry out trade union duties is again given only to employees and not other categories of workers.[53]

In its conclusions the Committee requested the Government to take the necessary measures in order to ensure that all workers, without distinction whatsoever, including self-employed workers and those employed under civil law contracts, enjoy the right to establish and join organizations of their own choosing within the meaning of Convention No. 87, to amend the Act on Trade Unions so as to ensure that home-based workers can establish and join organizations of their own choosing and to ensure that all workers and their representatives enjoy adequate protection against acts of anti-union discrimination regardless of whether they fall under the definition of employee under the Labour Code or not[54].

5. Constitutional Tribunal on freedom of association and "constitutional" definition of worker

Also the Constitutional Tribunal as a reaction to changing employment market contrary to the content of its earlier judgements has decided do search for a different "constitutional" definition of worker based on European and international law. The

[52] *363rd Report of the Committee on Freedom of Association* ...para 1073.
[53] *363rd Report of the Committee on Freedom of Association* .., para 1074.
[54] *363rd Report of the Committee on Freedom of Association* ... para 1087.

Court's findings have lead to conclusions that current definition of worker in the labour code cannot be applied in order to ensure workers their fundamental rights.
In the judgement of the Polish Constitutional Court ruled on 2nd June 2015 in case K 1/13, where the Court stated that the provisions of the Law on Trade Unions in force in Poland are unconstitutional. The proceedings before the Constitutional Court were initiated by one of the largest unions - the OPZZ. The applicant challenged the provisions of the LTU that grant certain individuals the right to form and join trade unions. According to the OPZZ laws exclude the possibility to organize in trade unions by persons performing paid work on a basis other than an employment relationship within the meaning of the Labour Code. Meanwhile, many people provide work on the basis of civil law contracts or as self-employed. Such a restriction is contrary to the constitutional guarantees of freedom of association in trade unions and the Convention (No. 87) of the International Labour Organization, declaring freedom of association in trade unions of all workers regardless of the legal basis on which work is performed.

The Court held that the personal scope of the statutory guarantee to organize in trade unions is too narrow in relation to the constitutional norms and those arising from international agreements binding for Poland. Legislator used a criterion of legal basis of employment for determining the group of entities entitled to organize in trade unions. This criterion is not a decisive element for the exercise of freedom, referred to in Art. 59 paragraph 1 of the Polish Constitution. The application of this criterion led to preclude the possibility of exercising freedom of association in trade unions by a large group of workers. Instead the Tribunal applied wider definition of employee than the one enshrined in the Labour Code. Using the Freedom of Association is conditional, according to the Constitutional Tribunal, the fulfilment of three conditions: 1) gainful employment; 2) remain in a legal relationship with the entity for which the employee performs work, and 3) to have such professional interests connected with the work that could be collectively protected. This definition was based (inter alia) on the case law of the CJEU[55]. The criteria, which determine

[55] Trybunał przywołuje tu orzeczenia w sprawach: z 4.12.2014 r., C-413/13, FNV Kunsten Informatie en Media v. Staat der Nederlanden, pkt 34; z 10.4.2014 r., C-270/13, Iraklis Haralambidis v. Calogero Casilli, pkt 28, www.eur-lex.europa.eu; z 21.2.2013 r., C-46/12, L.N. v. Styrelsen for Videregående Uddannelser og Uddannelsesstøtte, pkt 40, www.eur-lex.europa.eu; z 14.10.2010 r., C-345/09, van Delft i inni v. College voor zorgverzekeringen, pkt 89, Zb. Orz 2011, s. I-00011; z 4.9.2009 r., C-22/08

existence of employment relatioship include: providing work for another person to perform work under the direction of an employer and the fees for the work and genuine and effective paid employment and economic risk of the employer[56]. The type of legal relationship (or a contract) between the employee with the employer bears no significance. Both "European" and "constitutional" definitions of employee thus have substantial and not formal character and is not solely based on the type of contract between the employee with a person using his work.

Therefore the Tribunal concluded that the legislator should enable to perform the freedom of association to all those who, from a constitutional perspective belong to the category of workers. To legislator should, however, choose the right legislative technique ensuring the implementation of the constitutional norm.

As a result the government presented a bill amending the Act on trade unions in a way that it covered all categories of workers. Currently (May 2016) the bill is under consultation with social partners.

The example allows reflecting on relations between individual and collective labour rights as well as multi level character of guarantees of collective workers' rights.

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i C-23/08, Athanasios Vatsouras i Josif Koupatantze v. Arbeitsgemeinschaft (ARGE) Nürnberg 900, pkt 26, Zb. Orz. 2009, s. I-04585. Pojecie pracownika kształtują także wyroki TSUE z 3.7.1986 r., 66/85, Deborah Lawrie-Blum v. Land Baden-Württemberg, Zb. Orz. 1986, s. 02121; z 12.5.1998 r., C−85/96, María Martínez Sala v. Freistaat Bayern, Zb. Orz 1998, s. I-02691; z 13.1.2004 r., C-256/01, Debra Allonby v. Accrington & Rossendale College, Education Lecturing Services, trading as Protocol Professional and Secretary of State for Education and Employment, Zb. Orz. 2004, s. I-00873.

[56] M. Tomaszewska, *Prawo integracji stosunku pracy. Między jednością a różnorodnością*, Gdańsk 20011, s. 290.