

SOCIAL DIALOGUE PRINCIPLE AS SAFEGUARD OF SECURITY FOR WORKERS*

El principio del diálogo social como salvaguardia de la seguridad de los trabajadores

JOANNA UNTERSCHÜTZ

Wyższa Szkoła Administracji i Biznesu im. E. Kwiatkowskiego w Gdyni

University of Business and Administration

joanna.unterschuetz@wp.eu

Resumen

El diálogo social es la piedra angular del Derecho colectivo del trabajo. Tanto en el contexto internacional y europeo como en el nacional de las instituciones de diálogo social, el derecho a la negociación colectiva que lleva a acuerdos vinculantes tiene la fuerza suficiente para permitir conceptualizar el diálogo social como un principio dentro de la teoría de los principios legales. Los convenios colectivos son poderosos instrumentos jurídicos, pero los ejemplos tomados del diálogo social autónomo europeo, así como los acuerdos de empresa en el mismo nivel, ponen de manifiesto tanto la fuerza como la ineficiencia de los agentes sociales. Los convenios colectivos pueden servir, por lo tanto, como instrumentos útiles para aliviar las consecuencias de la crisis, pero únicamente si los agentes sociales, en especial los sindicatos, son fuertes y autónomos, y ambas partes se esfuerzan por conseguir la paz social.

Palabras clave: Principios legales, Derechos fundamentales, Derecho colectivo del trabajo, Diálogo social, convenios colectivos, tiempo de trabajo.

Abstract

Social dialogue is the corner stone of collective labour law. International, European and the national legal context of social dialogue institutions, the right to bargain collectively and to conclude binding agreement is strong enough to formulate the principle of social dialogue sustainable under the theory of legal principles. Collective agreements are powerful legal instruments, but as the examples taken from the autonomous European social dialogue as well as company agreements they visibly reflect social partners strength or inefficiency. Collective agreements may therefore serve

*The paper was written within the framework of Project co-funded by the European Commission (DG Employment, social affairs and inclusion) – VP/2012/001/0067 „Which securities for workers in time of crisis?“.

Recibido: 24/04/2014. Aceptado: 02/05/2014.

as useful instruments to alleviate consequences of long-lasting crises for workers and employers only if social partners, and especially trade unions are strong, autonomous and if both parties to the social dialogue strive to maintain social peace.

Key words: Legal principles, Fundamental rights, Collective labour law, Social dialogue, Collective agreements, Working time.

SUMMARY

1. Introductory remarks.- 2. The legal framework for the social dialogue.- 3. The inheritance pacts: general rules on addition of patrimony, accumulation of donations, inefficiency and revocation.- 5. The contract of lifetime.- 6. Other contractual institutions with inheritance and tax consequences.- 7. Bibliography.

1. INTRODUCTORY REMARKS

The aim of this paper is firstly to present social dialogue principle from the perspective of theoretical approach traditionally taken by the Polish legal theorists and Robert Alexy's theory of fundamental rights. Secondly it is to present examples application of social dialogue institutions to alleviate the effects of crisis for the benefit of workers and employers in the area of working time.

2. THE LEGAL FRAMEWORK FOR THE SOCIAL DIALOGUE

Social dialogue is a universal dimension of labour relations¹. It is carried out at all levels, from international, through a national, regional, sectoral, and, last but not least, at the factory level. Its subject are, generally speaking, employment conditions and the relationship between trade unions and employers' organizations. Two pillars of social dialogue are negotiations and their effects: agreements. In the wider international context social dialogue is an important part of the employment policy and decent work because of its impact on the labour law.

The principle of social dialogue in labour relations has a strong basis in international law. Already Philadelphia Declaration of 10 June 1944 formulated a solemn duty to promote negotiations among the nations of the world. The concretization of the universal dimension follows in ILO instruments. ILO Convention No. 154 concerning the promotion of collective bargaining is the most important one. According to the article 1 the Convention applies to all branches of economic activity. The exception are public officials, especially the armed forces and the police where limitations prescribed by the law or national policy are allowed. At the personal level ILO Convention No. 154 encompasses all categories of persons having the status of an employee, their associations, trade unions, employers' organizations

¹K.W. BARAN, *Zasada dialogu społecznego w stosunkach pracy* [in:] K. W. BARAN (ed.) *Zarys systemu prawa pracy. Tom I. Część ogólna prawa pracy*, Lex, Warszawa 2010, p. 691.

and their associations. The scope of social dialogue is very wide: it covers all negotiations which take place between an employer, a group of employers or one or more employers' organisations, on the one hand, and one or more workers' organisations, on the other, for determining working conditions and terms of employment; and/or regulating relations between employers and workers; and/or regulating relations between employers or their organisations and a workers' organisation or workers' organisations. Negotiations and accession to collective agreements should be voluntary. Mandatory negotiations, required by normative regulations (eg, laws) are contrary to this concept. Similarly there should be no obstacles to the social partners to initiate and carry on negotiations.

Among the regional instruments of international law principle of social dialogue is strongly emphasized by the art. 6 of the European Social Charter. It obliges the authorities of the Member States to promote joint consultation between workers and employers. Particular emphasis was placed on the active support of the negotiation arrangement (Article 6. 2). Any restrictions on the freedom of the social partners in this regard are inconsistent with the spirit and letter of the European Social Charter.

Social dialogue, is also deeply rooted in EU legislation. Article 118B of the Treaty of Rome obliges the Commission to support negotiations Communities between the social partners at the Community level. That provision is the foundation for Europe's collective bargaining agreements. European social dialogue is said to be initiated during the meeting of European social partners with the President of the Commission in Val Duchesse in 1985². Social dialogue is however present in the European context from the Treaty of Rome to the current Lisbon Treaty (Articles 154-155 TFEU). Since the entry into force of the Treaty of Maastricht the Commission is obliged to consult with the social partners prior to the adoption of binding legislation and the social partners are also allowed to conclude universally binding agreements. In addition, the European social partners apply tools, which can be qualified as soft law, such as recommendations, declarations, instruments and joint declarations. In European law the social dialogue is strengthened and there is a noticeable trend towards the use of non-binding instruments.

According to the European Commission, 'since the Amsterdam Treaty, European social dialogue has had the capacity to be an autonomous source of European social policy legislation. European social partners may adopt agreements that can be implemented through a Council Directive, which makes them legally binding for all employers and workers in Europe once they are transposed into national legislation or collective agreements ("*erga omnes*" effect); they may also adopt autonomous agreements to be implemented through customary national procedures. In the latter case, the

²J. MĘCINA, *Wpływ dialogu społecznego na kształtowanie stosunków pracy w III Rzeczpospolitej*, Warszawa 2010, p. 69.

agreements are binding only for the signatories and their affiliates ("relative" effect)³

A reference to social dialogue principle can also be found in national legislation of all levels. Polish Constitution is an example: Article 20 of the Constitution recognizes the social dialogue as one of the pillars of the economic system of the Republic of Poland. It is a basic instrument for implementing the idea of a social market economy. Social dialogue is also mentioned in the Constitution Preamble. This general normative directive is specified in the art. 59 § 2 of the Constitution, which guarantees the trade unions the right to bargain collectively and conclude agreements. The social partners can negotiate on all matters relating to employment conditions that they consider important.

3. THEORETICAL APPROACH TO LEGAL PRINCIPLES

In the theory of legal principles different approach can be taken while considering the role of principle of social dialogue. One is based on criteria, which allow to classify certain norm as a fundamental one and regard it as a legal principle. In the Polish literature J. Wróblewski presented a concept according to which principles of the legal system are norms of a given system based on the legal text. These may include both legal norms reconstructed from the legal text by means of linguistic or more complex methods of legal interpretation or directives derived from these standards on the basis of rules of inference.⁴ There are four factors, which are to be considered while deciding if a given norm is a legal principle: 1) the criterion of hierarchical supremacy of the norm. Principles can usually be found in legal acts considered as most important in the given branch of the law or placed in high position in hierarchical order of legal sources. These may include constitutional norms, many of which have the nature of principles. 2) The criterion of superiority of substance in relation to the other norms. A norm that gives rise to the entire group of norms may be considered fundamental. Consequent norms can be derived from the fundamental principles⁵. 3) The criterion of the special role played by a norm in the design of legal institutions. Principles encompass important standards especially useful in the construction of legal institutions understood as "a set of legal rules creating one functional unit due to the fact that to sufficiently exhaustively regulates an important fragment of human relations",⁶ 4) The

³Commission staff working document on the functioning and potential of European sectoral social dialogue, SEC(2010) 964 final, 22 July 2010, Brussels

⁴S. WRONKOWSKA, M. ZIELINSKI, Z. ZIEMBINSKI, *Zasady prawa. Zagadnienia podstawowe*, Wydawnictwa Prawnicze, Warszawa 1974, p. 54.

⁵K. OPAŁEK, J. WRÓBLEWSKI, *Zagadnienia teorii prawa*, PWN, Warszawa 1969, p. 92

⁶M. KORDELA, *Zasady prawa. Studium teoretycznoprawne*, Wydawnictwo Naukowe UAM, Poznań 2012, p. 15.

last criterion can be described as a functional one⁷. This refers to extra-legal justification of the norm, common acceptance of a given social rule i.e. its axiological justification. All these criteria do not need to be fulfilled at the same time. In some cases it is sufficient that the norm meets only one of them.

It seems that all conditions proposed by J. Wróblewski are fulfilled. Not only are social dialogue institutions regulated in the legal acts prominent in the international and European labour law, but they can also be considered fundamental for the design of further legal institutions. Social dialogue as a means to achieve consensus among workers and employers (and the governments) is approved by all parties of the process.

Legal theorists from Poznań University - S. Wronkowska, M. Zielinski and Z. Ziemiński - presented the first Polish monograph of the principles of law in 1960s, which consolidates the achievements of both the theory and the detailed dogmatic teachings.⁸ Concepts presented in this book were favourably received by the academia and the proposed division of principles as enunciations of normative or descriptive character are widely used by authors dealing with principles of labour law. The principle of law in the descriptive sense may be applied to describe the nature of a given legal institution (a set of norms bound by their function) or a paradigm (descriptive of projected) thereof.⁹ The term "descriptive principle of law" can be also used in the sense of recording, when we refer not so much to a shape of an institution or a set of institutions, but rather to some actual or expected regularity in the behaviour of the parties caused by the established institutions.¹⁰ A separate class of principles is constituted by principles in normative sense, i.e. non-descriptive statements, principles constituting norms regulating behaviour of their subjects. Here the Poznan authors following J. Wroblewski distinguish between principles of the law in the strict sense and policies. The former is applicable legal standards in the system is based on the text of the legislation¹¹.

In practice, this amounts to the recognition of these standards as imperative in relations to other norms of the system. This has far-reaching consequences, since no rule of lower order can be logically or praxeologically inconsistent the norm-principle.¹² In addition, these norms as superior ones constitute a formal basis in the law-making process, as standard providing the competence to create norms, which the other parties have an obligation to obey as well as axiological justification for the established norms¹³.

⁷K. OPAŁEK, J. WRÓBLEWSKI, *Zagadnienia teorii prawa...* p. 92.

⁸S. WRONKOWSKA, M. ZIELINSKI, Z. ZIEMBINSKI, *Zasady prawa...* passim

⁹S. WRONKOWSKA, M. ZIELINSKI, Z. ZIEMBINSKI, *Zasady prawa...* p. 25, 43.

¹⁰S. WRONKOWSKA, M. ZIELINSKI, Z. ZIEMBINSKI, *Zasady prawa...* p. 32.

¹¹S. WRONKOWSKA, M. ZIELINSKI, Z. ZIEMBINSKI, *Zasady prawa ...* p. 53-54

¹²Z. ZIEMIŃSKI, *Teoria prawa*, PWN Warszawa 1972, p. 65, 87.

¹³S. WRONKOWSKA, M. ZIELINSKI, Z. ZIEMBINSKI, *Zasady prawa ...* p. 65

According to this classification social dialogue principle can be regarded as a normative one. However we must bear in mind that, even though the concept of social dialogue is the basis of the structure, policies and program activities of the ILO, the institution does not use the official definition of social dialogue, also because of the time limit in each country can take on a slightly different meaning. A working definition is commonly applied, according to which the social dialogue should be read as "any kind of negotiation, consultation and transfer of information between representatives of the government and the social partners or between the social partners in the field lying in fields of mutual interest relating to economic and social policy". This very broad definition of social dialogue and tripartite dialogue involves two-way or even conduct collective bargaining. It also includes negotiations leading to the conclusion of collective bargaining agreements, social pacts, and even the process of information and consultation, which need not be completed as a result of the specific contract.¹⁴

Another approach to legal principles was developed by Robert Alexy. It is considered to be a continuation and development of thought R. Dworkin, although the German theorist of law by building theory of fundamental rights also significantly modified arguments of Dworkin. Theory of Fundamental Rights was created on the canvas reflection on individual rights contained in the German Constitution, its universal character, however, can be considered as a theory of principles of a much wider application.

R. Alexy bases his concept on three pillars: the optimization thesis, collisions of norms and outweighing¹⁵. Following R. Dworkin, R. Alexy rejects the traditional criteria for the delimitation of principles and rules. He does not agree that both principles and rules are norms, which differ from each other only the degree of generality (generality criterion) while they share the similarity of sorts. He rejects the argument that rules and principles are two classes of norms, among which there is only a difference of the degree. According to Alexy there is a qualitative difference between rules and principles.¹⁶

Legal principles are optimization commands, commanding that the desired state of act should be realized to the highest degree possible. They can be fulfilled in different degrees. The degree of fulfillment depends on actual facts and legal possibilities. The legal possibilities are determined by other relevant (colliding) principles and by rules. The latter is determined by

¹⁴Y. GHELLAB, *Social Dialogue: an ILO perspective*, wystąpienie na konferencji *Social Dialogue and civil dialogue: Means of Achieving the Democratic Transition and a Guarantee for Success of the Partnership with the EU and the Pre-accession and the Accession to the EU Regional Conference of ECSs and similar Institutions of South Eastern Europe and Black Sea Region*, Sofia, 25-26.06.07

¹⁵G. MAROŃ, *Zasady prawa. Pojmowanie i typologie a rola w wykładni prawa i orzecznictwie konstytucyjnym*, Ars boni et aequi, Poznań 2011, p. 42, M. KORDELA, *Zasady prawa ...* s. 63.

¹⁶R. ALEXY, *Teoria praw podstawowych*, Wydawnictwo sejmowe, Warszawa 2010, s. 75-76

the conflicting rules and regulations. At the same time the fact that one of the principles gives way before the other does not mean that this rule does not apply¹⁷. Principles do not always provide definitive orders, but *prima facie* orders.¹⁸ In contrast to legal principles, legal rules are definitive commands: they are applicable or not. If a rule is valid, it requires that one does exactly what it demands.¹⁹ The form of law application characteristic of rules is subsumption: applying a legal rule to the facts.

According to R. Alexy the difference between rules and principles is a difference in quality and not only one of degree. Weighing and balancing is the basic argumentation pattern in the justification of solutions of conflicts between principles²⁰. When two principles compete, then one of them must be outweighed. This means neither that the outweighed principle is invalid nor that it has to have an exception built into it. In the specific case one principle takes precedence over another, but this order may be reversed in different circumstances.

In order to conceptualize a rational way of this balancing of colliding principles Alexy introduces the law of balancing: the greater the degree of non-satisfaction of, or detriment to, one right or principle, the greater must be the importance of satisfying the other. Every norm is either a rule or a principle and in the light of this concept norms establishing social dialogue should be regarded as principles.

4. COLLECTIVE AGREEMENTS AS THE RESULT OF SOCIAL DIALOGUE

Finalization of social dialogue in labour relations are collective agreements concluded by the social partners. Negotiation model of regulation of labour relations is the foundation of social peace in the free market economy. Comprehensive dialogue between the social partners is an inherent feature of the labour system in the industrial civilization. Conclusion of collective agreements at all levels may also be perceived as a reflection of wider trend in development of the law. For at least two decades of legal theorists note the evolution of the concept of law as a command and technology, law, based on unilateral and authoritarian decisions, the concept of law as a conversation, this is the right model based on negotiations and agreements²¹. This communication vision of the law suggests that the basis for decision-making and rule under which resolves conflicts should rather be based on dialogue and complying with the principles of fair communication and consensus than imperious unilateral decisions.²² Terms such as

¹⁷R. ALEXY, *Teoria praw podstawowych* ... s. 78 i 80

¹⁸R. ALEXY, *Teoria praw podstawowych* ... s. 87

¹⁹R. ALEXY, *Teoria praw podstawowych* ... s. 78 i 87.

²⁰G. MAROŃ, *Zasady prawa* ... s. 42, M. KORDELA, *Zasady prawa* ... s. 63.

²¹L. MORAWSKI, *Główne problemy współczesnej filozofii prawa. Prawo w toku przemian* Warszawa 1999, p. 123

²²*Ibidem*, p. 110.

"negotiating forms of law-making" and "participatory democracy" or even "consensual democracy", whose aim is to enable citizens to actively participate in the development decisions made by public authorities or even the control over implementation these decisions.²³ Development of law-making model that complements the traditional model of law created by a public authority, is possible also due to the changes taking place in modern societies, the emergence of an increasing number of different forms of organization of citizens, from organizations of employers and workers, through association, and other types of formations representing the interests of its members²⁴. The legislator, who not so long ago was seen as an almost absolute decision maker in the social sphere must take into consideration a growing number of organizations and international and regional institutions, corporations and associations of citizens who wish to participate on equal terms in decision-making in public affairs. In addition, legislative solutions created within the traditional institutions of parliamentary democracy may be disapproved by direct addressees of norms created in this way, which in practice may hinder their implementation. It would seem, therefore, that the institution of social dialogue, so elementary in the area of collective labour law is likely to lead to the formation of not only modern, but also a useful legal solutions , in particular in the field of labour law.

These developments are also reflected in the EU documents. In its Communication Partnership for change in an enlarged Europe - Enhancing the contribution of European social dialogue (2004) the Commission proposed new terminology for the different texts which were classified in four broad categories: (1) agreements (whether or not implemented through European directives) which are binding and must be followed up and monitored, since they are based on Article 155 of the Lisbon Treaty; (2) process-oriented texts (frameworks of action, guidelines, codes of conduct, policy orientations), which, albeit not legally binding, must be followed up, and progress in implementing them regularly assessed; (3) joint opinions and tools, intended to influence European policies and to help share knowledge; and finally (4) procedural texts, like rules of procedures for the ESSDCs but also encompassing for instance the social partners' Agreement on Social Policy of 31 October 1991.²⁵ It is pointed out, however, that the transition towards soft law is the result not so much choice as the lack of pressure from the Commission on the implementation of an ambitious social agenda and a lack of interest on the part of employers. There is a tendency

²³B. GONCIARZ, W. PANKOW, *Dialog społeczny po polsku - fikcja czy szansa*, Warszawa 2001, s. 13.

²⁴T. CHAUVIN, *Umowy prawotwórcze jako umowy prawa publicznego*, Kwartlanik Prawa Publicznego, z 2003 r No 2. p. 8.

²⁵Communication from the Commission. Partnership for change in an enlarged Europe - Enhancing the contribution of European social dialogue, COM(2004) 557 final, 12 August 2004, Brussels, p. 15-19.

to move from a tripartite dialogue for bilateral dialogue in the EU. An important trend in the EU collective bargaining is decentralisation. Moving the negotiations to lower levels is associated with the need to develop new technologies and practices, including the organization of work, specific to individual companies, rather than entire industries. First of all, employers are interested in devolution negotiations, while the main social partners in the EU remain sceptical.²⁶

5. SOCIAL DIALOGUE DURING THE CRISIS: AGREEMENTS REGULATING WORKING TIME

One of the examples, which can illustrate how the social dialogue, and in particular its outcome are applied to reconcile interests of workers and employers not only in times of crisis is working time aspect of internal flexibility of companies. Widespread and - in many cases - effective practice of social dialogue on company, branch and even national level, which refers to working time flexibility as one of the useful tools in counteracting the effects of crisis was not reflected in the recent negotiations of European social partners on amendments to the Working Time Directive.

5.1. Working time directive

Discussion on the regulation of working time goes on for a few years at the EU level. After many attempts to amend the Directive 99/70/EC by the Parliament and the Council in previous years, in November 2011, the European social dialogue partners decided to start work on the Directive on the basis of Art. 155 TFEU. The first negotiation meeting was held on 8 December 2011. As mentioned above, under the Treaty, the social partners have full autonomy in terms of content and organization of the talks. If they reach an agreement, they may under Art. 155 TFEU request the Commission to convert it into a directive. The Commission shall forward the agreement to the Council that the council can either accept in full or reject a qualified majority vote, but can not change it. Parliament is not involved in the legislative process.

From the perspective of employers to the most important areas of the negotiations included the change in the definition of working time and supplementing it with the definition of on-call time, divided into the active part (when the employee performs the work) and inactive (when the employee is only ready to work) with the establishment of the principles of counting both on-call work time and calculating entitlement for no pay, to establish specific rules for the use of annual leave at the end of the calendar year in which the employee was entitled to and has not been used and the

²⁶J. CZARZASTY, *Decentralizacja negocjacji zbiorowych w Europie przyczyny, następstwa, wnioski* [in:] R. TOWALSKI (ed.) *Dialog społeczny. Najnowsze dyskusje i koncepcje*, Centrum Partnerstwa Społecznego Dialog, Warszawa 2007, p. 75.

calculation of leave in proportion to the time spent in a calendar year, in the absence of illness or other justifiable circumstances , extend the reference period to 12 months. For workers' representatives important areas included negotiating the change of the preamble of the Directive in such a way that the new text would envisage such instruments of European law such as the various provisions of the Charter of Fundamental Rights, the provisions of the TFEU as regards social progress and proper working conditions and the provisions of the European Social Charter, etc. Another important topic was more precise definition of the managing executives or other persons with autonomous decision-making , which, under Art. Paragraph 17. 1 lit. It does not apply to some of its provisions. The trade unions also wished to explore the subject of the detailed regulation of the use of the opt-out and help workers to reconcile work and family life .

The European social partners (employers' side BUSINESSEUROPE , CEEP, UEAPME and the ETUC employee side) had nine months to conclude an agreement, the period was extended to 31 December 2012 , but the agreement could not be reached . The Commission will present itself so , as promised , a legislative proposal on the basis of consultation and impact assessment legislation.

This example shows that the question of future role of social dialogue in European policy-making, with many delegates expressing their concern about the weakened influence of such social dialogue at EU level is indeed a challenge.²⁷ For T. G. Grosse the main deficiency of the EU social dialogue is the weakness of implementing the agreements undertaken. It stems from a number of reasons. It is associated with the voluntary nature of many arrangements and freedom of social partners in implementing them. The efficiency of this implementation in Member States depends largely on the position of the national confederation of trade unions and employers. But these are hard to get to the instruments of the EU, in a situation where it is not related to the implementation of EU law.²⁸ It is also suggested that the European social dialogue could be improved by institutionalisation of social dialogue through a European-level 'social dialogue directive', ensuring more powerful instruments focusing more on concrete results and which are thus more binding and precise.²⁹

5.2. Company agreements regulating working time

²⁷S. CLAUWAERT , *European framework agreements: 'nomina nuda tenemus' or what's in a name? Experiences of the European social dialogue* [in:] I. SCHÖMANN, R. JAGODZINSKI, G. BONI, S. CLAUWAERT, V. GLASSNER, and T. JASPERS, *Transnational collective bargaining at company level. A new component of European industrial relations?*, ETUI, Brussels 2012, p. 142.

²⁸T. G. GROSSE, *Dialog społeczny i obywatelski w Unii Europejskiej* [in:] R. TOWALSKI (ed.) *Dialog społeczny. Najnowsze dyskusje i koncepcje*, Centrum Partnerstwa Społecznego Dialog, Warszawa 2007, p. 62.

²⁹S. CLAUWAERT, *European framework agreements...* p. 142.

Social dialogue has often been a response to economic crisis and recession in the past. At national level, particularly in the past two decades, such dialogue at times resulted in formal 'social pacts' involving government, trade unions and employers, often covering a broad multi-issue agenda allowing trade-offs between the different interests of the participants.³⁰

In times of economic crisis, the overriding challenge is to link autonomous social dialogue and decentralization with norm-setting by the legislator on the national level, creating new links between different levels of regulation and different issues. Without this, social dialogue in hard times is likely to prove increasingly ineffectual³¹.

On the lower levels, especially at the company and branch level negotiations on working time were common also before the outbreak of financial crisis. In the research made in the period 2004-2005 main areas of negotiations on working time were described. First area is negotiations on unusual working hours. This was found to have taken place in particular in companies in the real estate and transport sectors, but they are comparatively rare in establishments operating in the construction, financial intermediation and electricity sectors. Probably because unusual hours is a rather new development, compared with those sectors where a longstanding tradition exists of working such hours³². Overtime is another important area for both employers and employees. Employers may resort to using overtime as a flexibility tool, but they may be cautious in their use of it due to the extra pay involved. Quite the opposite is true for employees. Many, in particular those with lower incomes, may be interested in the extra pay involved, whereas the loss of free time and regular work patterns may be regarded as disadvantageous by many others³³. In some other cases employee's representatives discuss with management the possibilities to avoid or reduce overtime hours.³⁴

In the recent years in a survey of responses to the crisis in ten European countries (evenly divided between east and west), Glassner and Galgóczi find widespread agreements in western countries on 'partial unemployment' or short-time working.³⁵

Recent studies have documented various successful experiences of national social dialogue in the context of the economic downturn. Even

³⁰R. HYMAN, *Social dialogue and industrial relations during the economic crisis: Innovative practices or business as usual?*, ILO, Geneva 2010, p. 11

³¹R. HYMAN, *Social dialogue and industrial relations ...* p.19.

³²A. KÜMMERLING, S. LEHNDORFF, L. COPPIN, M. RAMIOUL, *Social dialogue, working time arrangements and work-life balance in European companies. Establishment Survey on Working Time and Work-Life Balance 2004-2005* Eurofound, Dublin 2009, p. 49 .

³³A. KÜMMERLING, S. LEHNDORFF, L. COPPIN, M. RAMIOUL, *Social dialogue, working time arrangements and work-life balance, ...p.*, 53.

³⁴A. KÜMMERLING, S. LEHNDORFF, L. COPPIN, M. RAMIOUL, *Social dialogue, working time arrangements and work-life balance, ... p.* 59.

³⁵R. HYMAN, *Social dialogue and industrial relations ...* p. 16.

though social dialogue faced challenges even in countries with a long-standing tradition of social partnership, such as Ireland and Spain, effective cooperation was possible at national and enterprise levels and created the conditions for the smooth management of national economies until recovery returns.³⁶ The company-level agreements concluded in the times of crisis in various European countries dealt with the following issues: the promotion of employment and safeguarding of jobs via flexible reduction of working time; increasing the employability of workers through programmes of vocational training and re-skilling; facilitation of changes in work organization and support to company programmes of restructuring; In some sectoral and/or intersectoral collective agreements or labour law temporary deviations from collectively negotiated pay rates were allowed³⁷.

One example of agreement, aiming at the flexibilization of working time and the preservation of jobs and human capital can be found in the Dutch transport sector. Confronted with a substantial decline in demand for labour, the social partners stated from the starting point that they wanted as much as possible to avoid forced dismissals and the outflow of workers from the sector. Three measures were agreed upon, the specifics of which have to be agreed at company level by the company and a union representative. One solution is the possibility to enter the pre-pension scheme for workers born between 1947 and 1950 that are threatened by unemployment. Another are measures allowing for a more flexible scheduling of working hours. Finally the employer gets the right to determine unilaterally when the working time reduction days agreed in the sector collective agreement have to be taken up. Later a temporary mobility centre was established by the social partners with the aim of finding employment within the transport sector for unemployed or redundant truck drivers and crane operators to safeguard their expertise and knowledge for the sector.³⁸

Another example can be found in Hungary, where in April 2009 GM Opel made an agreement with the unions to introduce a four-day working week for permanent staff. The aims of the agreement are to reduce production following declining demand and at the same time save jobs. Workers receive 50 per cent of their salary for hours not worked. The contracts of temporary workers were not renewed, however.³⁹ At the same time in order to deal with declining demand and the protection of employment various types of arrangements to shorten working hours were negotiated and included in

³⁶Y. GHELLAB K. PAPADAKIS, *The politics of economic adjustment in Europe : State unilateralism or social dialogue?* [in:] *The global crisis Causes, responses and challenges* ILO, Geneva 2011, p. 83

³⁷V. GLASSNER, M. KEUNE *Negotiating the crisis? Collective bargaining in Europe during the economic downturn*, International Labour Office , Geneva March 2010, p. 22

³⁸V. GLASSNER, M. KEUNE, *Negotiating the crisis?* ... p. 17.

³⁹V. GLASSNER, M. KEUNE, *Negotiating the crisis?* ... p. 22.

agreements, even though it was often difficult to reconcile employers and worker's interests.⁴⁰

Social dialogue, including collective bargaining at all levels, is vital especially in times of heightened social tension. It may also help to design of policies to fit national priorities. Furthermore, it is a strong basis for building the commitment of employers and workers to the joint action with governments needed to overcome the crisis and for a sustainable recovery.⁴¹

More rapid response to the crisis was possible in those countries where the legal basis for partial unemployment compensation already existed, where the collective bargaining system was sufficiently sophisticated to include flexible working time arrangements, and where collective bargaining coverage extends to the majority of workers. Recent developments thus seem to confirm the hypothesis that "bargaining coordination facilitates faster and more flexible responses to shocks."⁴²

It is interesting to note that in countries with high levels of employment protection and strong unions and/or works councils, companies are likely at least initially to prefer internal to external flexibility. By contrast, in the liberal economies like the UK and Ireland but also many Eastern and central European countries dismissals are less costly and unions are fragmented. Therefore companies rely mainly on dismissals.⁴³

Social dialogue can also help to promote alternative policy choices which are fairer for all and more sustainable, thus effectively reversing one-size-fits-all policy decisions, which are often presented as "inevitable" by the financial markets. However, to attain this goal strong social partners are needed.⁴⁴

There has also been a split among social partners as to the necessity of the austerity measures. In general, trade unions have rejected austerity policies put in place by the governments in the countries examined, on the grounds that they are counterproductive and unfair. One aspect of negotiations on the national level during the current crisis is that social partnerships have been characterized by conflict within trade unions.⁴⁵ Also, they have strongly criticized government haste, the lack of social dialogue on the policy choices and the permanent nature of these measures. However, their mobilization has produced no visible results so far, for example in Greece, Portugal and Romania. Broadly speaking, employers' organizations

⁴⁰V. GLASSNER, M. KEUNE, *Negotiating the crisis?* ... p. 23.

⁴¹R. HYMAN, *Social dialogue and industrial relations* ... p. 17.

⁴²L. RYCHLY, *Social dialogue in times of crisis: Finding better solutions*, ILO, Geneva 2009, p. 25-26 .

⁴³R. HYMAN, *Social dialogue and industrial relations* ... p. 16.

⁴⁴Y. GHELLAB K. PAPADAKIS, *The politics of economic adjustment in Europe: State unilateralism or social dialogue?* p. 90 .

⁴⁵R. HYMAN, *Social dialogue and industrial relations*... p. 14

have approved government moves towards the implementation of an austerity policy, but in many cases they have expressed reservations about specific measures.⁴⁶

6. CONCLUDING REMARKS

From an overview of various negotiating practice during the crisis in Europe V. Glassner and M. Keune draw the following conclusions: One is that indeed in many European countries, tripartite processes have been playing a role in the making of public policy on short-time working schemes, active labour market policies, labour legislation, unemployment benefits, enterprise financing, etc.⁴⁷ The adaptation or introduction of such short-time work arrangements has been largely welcomed and supported by unions and employers. This high acceptance derives from the fact that these measures pursue the combined goals of employment protection, avoiding social costs of rising unemployment, maintaining human capital and increasing companies' internal flexibility in order to respond not only to the requirements of the sudden economic downturn but also to prepare for economic recovery. A further particularity of these measures is that they often rely on company or sector collective agreements for their implementation. In this way they truly are examples of coordinated collective responses by social partners and governments. They also have been of great importance to stimulating bipartite negotiated responses through collective agreements at intersectoral, sectoral or company level.⁴⁸

According to L. Beccaro and S. Herb freedom of association is necessary and jointly sufficient (when a number of other factors are present) for a social dialogue response to the crisis to emerge. Consequently, the absence of freedom of association is sufficient to produce the absence of social dialogue although social dialogue may be absent or fail when trade union rights are guaranteed. It has also been shown that social dialogue frequently does not emerge either when the crisis hits hard and the unions do not have the organizational resources to impose their presence to governments, or when the crisis is less than a full emergency and the unions are so strong that governments fear having to pay too high a price to them in negotiations. The analysis suggests that social dialogue cannot exist without freedom of association. This leads to the following conclusion: if national and international policy-makers believe that social dialogue is an efficient and equitable response to economic emergency, they should endeavour to

⁴⁶Y. GHELLAB K. PAPADAKIS, *The politics of economic adjustment in Europe ...*p. 88.

⁴⁷V. GLASSNER, M, KEUNE, *Negotiating the crisis?* ... p. 12 .

⁴⁸ V. GLASSNER, M, KEUNE, *Negotiating the crisis?* ... p. 14.

strengthen freedom of association in contexts in which it is not currently guaranteed.⁴⁹

In this context, the role of international institutions such as the ILO, which draws its legitimacy from its tripartite structure and its constant connection with the real economy, may be key, not least in assisting in the promotion of policy coherence at the national and international levels. It is important that the ILO initiate a dialogue with the IFIs and the EU institutions with regard to desirable models of social dialogue and industrial relations, including in light of the 2007–2008 European Court of Justice rulings (Laval, Viking, Ruffert and Commission v. Luxembourg) which brought about significant changes in the European social model(s) (see for example Höpner, 2008).⁵⁰

This shows that social dialogue may (and does) play a significant role in safeguarding workers' rights in times of crisis. However, this process is efficient only in some conditions are fulfilled: first of all social dialogue is perceived as a normative principle (or, using different terminology, a fundamental right) in the legal order of a given state. Another important prerequisite of efficient social dialogue is strength of social partners who are able to negotiate with each other and, which is less obvious, to overcome particular and temporary interests in order to be able to take common position during negotiations with a government.

7. BIBLIOGRAPHY

- R. ALEXY, *Teoria praw podstawowych*, Wydawnictwo sejmowe, Warszawa 2010
- L. BACCARO, S. HEEB *Social dialogue during the financial and economic crisis. Results from the ILO/World Bank Inventory using a Boolean analysis on 44 countries*, Employment Working Paper No. 102 ILO, Geneva 2011
- K.W. BARAN, *Zasada dialogu społecznego w stosunkach pracy* [in:] K. W. BARAN (ed.) *Zarys systemu prawa pracy. Tom I. Część ogólna prawa pracy*, Lex, Warszawa 2010
- S. CLAUWAERT, *European framework agreements: 'nomina nuda tenemus' or what's in a name? Experiences of the European social dialogue* [in:] I. SCHÖMANN, R. JAGODZINSKI, G. BONI, S. CLAUWAERT, V. GLASSNER,

⁴⁹L. BACCARO, S. HEEB *Social dialogue during the financial and economic crisis. Results from the ILO/World Bank Inventory using a Boolean analysis on 44 countries*, Employment Working Paper No. 102 ILO, Geneva 2011 p. 24.

⁵⁰Y. GHELLAB K. PAPADAKIS, *The politics of economic adjustment in Europe ...* p.91.

- and T. JASPERS, *Transnational collective bargaining at company level. A new component of European industrial relations?*, ETUI, Brussels 2012
- Communication from the Commission. Partnership for change in an enlarged Europe - Enhancing the contribution of European social dialogue, COM(2004) 557 final, 12 August 2004, Brussels
- Commission staff working document on the functioning and potential of European sectoral social dialogue, SEC(2010) 964 final, 22 July 2010, Brussels
- J. CZARZASTY, *Decentralizacja negocjacji zbiorowych w Europie przyczyny, następstwa, wnioski* [in:] R. TOWALSKI (ed.) *Dialog społeczny. Najnowsze dyskusje i koncepcje*, Centrum Partnerstwa Społecznego Dialog, Warszawa 2007
- Y. GHELLAB, *Social Dialogue: an ILO perspective*, wystąpienie na konferencji *Social Dialogue and civil dialogue: Means of Achieving the Democratic Transition and a Guarantee for Success of the Partnership with the EU and the Pre- accession and the Accession to the EU Regional Conference of ECSs and similar Institutions of South Eastern Europe and Black Sea Region*, Sofia, 25-26.06.07
- Y. GHELLAB K. PAPADAKIS, *The politics of economic adjustment in Europe : State unilateralism or social dialogue?* [in:] *The global crisis Causes, responses and challenges* ILO, Geneva 2011
- V. GLASSNER, M. KEUNE *Negotiating the crisis? Collective bargaining in Europe during the economic downturn*, International Labour Office , Geneva March 2010
- B. GONCIARZ, W. PANKOW, *Dialog społeczny po polsku – fikcja czy szansa*, Warszawa 2001
- T. G. GROSSE, *Dialog społeczny i obywatelski w Unii Europejskiej* [in:] R. TOWALSKI (ed.) *Dialog społeczny. Najnowsze dyskusje i koncepcje*, Centrum Partnerstwa Społecznego Dialog, Warszawa 2007
- R. HYMAN, *Social dialogue and industrial relations during the economic crisis: Innovative practices or business as usual?*, ILO, Geneva 2010
1. M. KORDELA, *Zasady prawa. Studium teoretycznoprawne*, Wydawnictwo Naukowe UAM, Poznań 2012
- KÜMMERLING , S. LEHNDORFF, L. COPPIN , M. RAMIOUL, *Social dialogue, working time arrangements and work-life balance in European companies. Establishment Survey on Working Time and Work-Life Balance 2004-2005* Eurofound, Dublin 2009
- G. MAROŃ, *Zasady prawa. Pojmowanie i typologie a rola w wykładni prawa i orzecznictwie konstytucyjnym*, Ars boni et aequi, Poznań 2011
- J. MĘCINA, *Wpływ dialogu społecznego na kształtowanie stosunków pracy w III Rzeczpospolitej*, Warszawa 2010
- L. MORAWSKI, *Główne problemy współczesnej filozofii prawa. Prawo w toku przemian* Warszawa 1999

- K. OPAŁEK, J. WRÓBLEWSKI, *Zagadnienia teorii prawa*, PWN, Warszawa 1969
- L. RYCHLY, *Social dialogue in times of crisis: Finding better solutions*, ILO, Geneva 2009
- S. WRONKOWSKA, M. ZIELINSKI, Z. ZIEMBINSKI, *Zasady prawa. Zagadnienia podstawowe*, Wydawnictwa Prawnicze, Warszawa 1974