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The Protective Function of Labour Law with regard to the Rights of Foreign Nationals

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Summary. The subject of this article is the analysis of the protective function of labour law with regard to the foreigners' rights and their position on the labour market. This article shows the essence of the protective function of the law in order to guarantee the fundamental human rights and freedoms, including first and foremost the protective role of labour law. The author has mainly used the legal-dogmatic method.

The research also used the research required for work, support in the work supporting Polish and EU law in the field of labor law regulations, and thus in assessing the effectiveness of the protective function of employment of foreigners. The publication also includes a deductive method – assessments and judgments developed by means of deduction in combination with the normative material subject to the regulation, indicating the flaws and imperfections of contemporary legal regulations. The main thesis of the research is: the protective function of labor law in relation to foreigners has an impact on the implementation of the principle of non-discrimination and is a guarantee of freedom of movement between countries for gainful purposes. The protective function is limited to the status of employed persons, and indifferent to jobseekers who do not have the status of an unemployed person.

Funkcja ochronna prawa pracy w prawie cudzoziemców

Słowa kluczowe: funkcja ochronna prawa, prawo pracy, funkcja ochronna prawa pracy, prawo cudzoziemców

Streszczenie. Przedmiotem niniejszego artykułu jest analiza funkcji ochronnej prawa pracy w odniesieniu do praw cudzoziemców i pozycji ich zatrudnienia na rynku pracy. Niewątpliwie funkcja ochronna prawa odgrywa fundamentalną rolę w zakresie praw pracowników, którzy posiadają słabszą pozycję w stosunku pracy. Jawi się ona tym bardziej jako niezmiernie istotna, jeśli weźmie się pod uwagę zatrudnienie cudzoziemców. Prawo pracy chroni bowiem nie tylko obywatele Rzeczypospolitej Polskiej przed wyzyskiem ze strony pracodawców. W artykule podjęto próbę systematyzacji przepisów prawa, które gwarantują cudzoziemcom równość w dostępie do instytucji rynku pracy na terytorium Polski. Wstęp do rozważań w powyższym przedmiocie poprzedzony został analizą funkcji ochronnej prawa pracy, z uwzględnieniem głosów literatury i orzecznictwa na temat jej kształtu i funkcjonowania w polskim systemie prawa.

Introductory Remarks

The considerations of the protective function of labour law should begin with a statement that it manifests itself in various aspects of people's work life. In essence, this function is meant to protect the employee against broadly defined exploitation¹. In the colloquial use of the term, it is common to define exploitation as "the abuse of another person being in a forced position in order to receive a benefit whose value at the time of signing a contract significantly exceeds the value of one's own work"². This function, as being protective against labour exploitation, is expressed in the occupational health and safety regulations (in particular, to the extent in which they refer to the protection of the life and health of employees)³, working hours (especially, the right to rest and leisure guaranteed by the Constitution)⁴, the protection of female workers or young workers⁵, or the protection of wages⁶. It is stressed in the literature, that the realization of the protective function of la-

¹ M. Gersdorf, *Pojęcie, przedmiot i właściwości prawa pracy*, [in:] *Prawo pracy w pytaniach i odpowiedziach*, red. M. Gersdorf, K. Rączka, Warszawa 2004, p. 60.

² Słownik Języka Polskiego PWN, *Wyzysk*, <https://sjp.pwn.pl/slowniki/wyzysk.html> [access as on: 20.08.2020].

³ When it comes to legal protection of the employee with respect to compliance with the occupational health and safety regulations, we may also refer to the provisions of the Penal Code, in particular, to Article 220, which says that whoever, being responsible for occupational safety and hygiene, does not fulfil his duties and by doing so exposes an employee to an immediate danger of loss of life or a serious detriment to his health, shall be subject to criminal liability. Also, the Labor Code provides for the punishment for anyone who does not observe the occupational health and safety regulations (see Article 283 of the Labor Code). More information about the liability arising from the breach of occupational health and safety can be found in: D. Habrat, *Prawnokarna ochrona praw pracownika związana z bezpieczeństwem i higieną pracy*, [in:] *Funkcja ochronna prawa pracy a wyzwania współczesności*, red. M. Bosak, Warszawa 2014, pp. 189-199.

⁴ The protective function of labor law with regard to employees' time off is an issue which could definitely be the subject of a separate analysis. A broad range of literature can be cited with reference to this issue. See in particular T. Nycz, *Ochronny charakter przepisów o czasie pracy – wybrane zagadnienia*, „Praca i Zabezpieczenie Społeczne” 1999, no. 3, p. 2; A. Drozd, *Wykładnia w zgodzie z Konstytucją w dziedzinie prawa pracy*, „Przegląd Sądowy” 2010, no. 2, pp. 5-32; Z. Góral, *O kodeksowym katalogu zasad indywidualnego prawa pracy*, „Praca i Zabezpieczenie Społeczne” 2011, no. 12, pp. 41-43; W. Dyląg, *Prawo do odpoczynku jako przejaw funkcji ochronnej prawa pracy*, [in:] *Funkcja ochronna prawa pracy...*, pp. 27-38; A. Zwolińska, *Prawo do odpoczynku a zatrudnienie cywilnoprawne*, „Praca i Zabezpieczenie Społeczne” 2019, no. 1, pp. 54-65; E. Tkaczyk, *Bezpieczne i higieniczne warunki pracy jako prawo każdego człowieka służące ochronie życia i zdrowia ludzkiego przed szkodliwym oddziaływaniem czynników pracy*, „Studia Prawnicze i Administracyjne 2019”, no. 2, pp. 39-48; A. Wiącek-Burmańczyk, *Konstytucyjne prawo do wypoczynku*, „Przegląd Sejmowy” 2017, no. 5, pp. 109-124.

⁵ See in particular I.A. Wieleba, *Szczególna ochrona zdrowia pracowników młodocianych – zagadnienia wybrane*, [in:] *Funkcja ochronna prawa pracy...*, pp. 71-84; R. Golat, *Zasady zatrudniania dzieci do lat 16*, „Słownik Pracowniczy” 2013, no. 3, pp. 1-4.

⁶ A. Kwecko-Podświadek, *Rys historyczny prawa pracownika do wynagrodzenia za pracę w godzinach nadliczbowych w prawie polskim*, [in:] *Prawo pracownika do wynagrodzenia za pracę w godzinach nadliczbowych*, Wolters Kluwer Polska, LEX/el. 2020.

bour law is also safeguarded by carrying out inspections of the National Labour Inspectorate, which are aimed at ensuring compliance with the rules for hiring employees. However, as practice shows, the legal standards in the Polish legal system do not give the inspectors full authority to perform certain acts that would ensure proper protection of employees⁷. Also, labour courts, as having the power to ensure legal protection, should be able to secure compliance with labour law, which, too, has the protective function⁸.

In order to gain an in-depth understanding of the concept of the protective function of labour law with regard to the foreigners' rights, we must refer to the very essence of this concept. This task may seem fairly problematic because the protective function, as being strictly related to labour law, is defined in a general and, at the same time, broad sense. Consequently, there might be some difficulties when it comes to the proper understanding of this function⁹. It is worth pointing out, though, that it is the basic, and also the most important function concerning the employment relationship¹⁰. Its importance can be confirmed by the mere fact that the protective function prevails in the labour law doctrine¹¹.

According to T. Zieliński, the protective function consists in general in “[...] the labour law standards acting as a mechanism to protect the interests of employees”¹². Since it is the employer who is in a more privileged position in the employment relationship, the provisions of labour law should allow creating such standards which would prevent inequality and improve the legal position of the weaker party to the employment relationship¹³.

Michał Skąpski has made the following distinction within the protective function between three of its elements into “subsidiary functions”:

- equalizing function,
- safeguarding function,
- promotional function¹⁴.

⁷ M. Jarota, *Funkcja ochronna prawa pracy na przykładach wybranych regulacji państw europejskich*, „Annales Universitatis Mariae Curie-Skłodowska”, Lublin 2015, Nr LXII, Sekcja G, p. 68.

⁸ W. Baran, *Procesowe prawo pracy. Wzory pism*, Warszawa 2013, pp. 37–38.

⁹ A. Sobczyk, *Różnicowanie praw (ochrony) zatrudnionych – wybrane kryteria i ich ocena*, [in:] *Funkcja ochronna prawa pracy a wyzwania współczesności*, M. Bosak, Warszawa 2014, p. 1.

¹⁰ T. Liszcz, *Ogólna charakterystyka prawa pracy*, [in:] *Zarys prawa pracy*, red. R. Borek-Buchajczuk, Lublin 2005, p. 22; W. Jaśkiewicz, C. Jackowiak, W. Piotrowski, *Prawo pracy w zarysie*, PWN, Warszawa 1980; Z. Salwa, *Prawo pracy i ubezpieczeń społecznych*, LexisNexis, Warszawa 2007.

¹¹ W. Osowski, *Ochronna funkcja prawa pracy wobec upadłościowej restrukturyzacji zatrudnienia*, *Studia Ekonomiczne / Uniwersytet Ekonomiczny w Katowicach*, 2014 nr 200, p. 96

¹² T. Zieliński, *Prawo pracy. Zarys systemu. Cz. I Ogólna*, PWN, Warszawa-Kraków 1986, p. 39.

¹³ M. Skąpski, *Ochronna funkcja prawa pracy w gospodarce rynkowej*, Zakamycze, Kraków 2006, p. 82; U. Jackowiak (red.), *Prawo pracy – podręcznik dla studentów prawa*, Kraków 2003, p. 39.

¹⁴ M. Skąpski, *Ochronna funkcja prawa pracy w gospodarce rynkowej*, Zakamycze, Kraków 2006, p. 104–105.

The objective of the first subsidiary function, as its name suggests, is to equalize the position of the employee against the more privileged position of the employer. The safeguarding function serves as an extension of the first subsidiary function, which is focused on the protection of people who require special employment conditions that are necessary because of their less favourable employment-related predispositions than in the case of standard employees (e.g. pregnant women, pre-retirement workers). When it comes to the promotional function, this subsidiary function concerns in most part individuals who are seeking employment (it relates, among other things, to those standards aimed at fighting unemployment, the rules for appointment for certain positions, the ways and forms of seeking employment)¹⁵.

What is more, the protective function can be understood as a dichotomy in a formal and material approach.

The formal aspect of this function imposes a ban on the entities performing acts concerning labour law to depart from the regulations that are to the detriment of the employee. It is about the guarantee of the minimum employee rights and, at the same time, it sets an upper limit for the employee obligations¹⁶. There is no doubt that such understanding of the protective function is in some way related to the principle of the employee favouritism described in Article 18 of the Labour Code, which says that any provisions of the contracts and acts on the basis of which an employment relationship is established may not disadvantage an employee more than the provisions of labour law¹⁷.

The material approach of the protective function refers to those law which restrict work duties, extend powers, enhance sustainable employment relationships and guarantee the observance of human rights and their personal data protection¹⁸.

The view of Jakub Stelina seems very accurate which is based on the idea that the privileged position of the employer “[...] takes various forms and exists because of various mechanisms. [...] not every labour standard is there to protect the interests of the employee. We can decode the protective function from certain regularities resulting from the key provisions of labour law, not from all regulations without exceptions. That is why among the key factors, which are the sign of the

¹⁵ W. Osowski, *op. cit.*, p. 98.

¹⁶ Cf. G. Goździewicz, *Funkcje prawa pracy w nowym ustroju pracy w Polsce*, [in:] *Prawo pracy, ubezpieczenia społeczne. Wybrane zagadnienia* red. B.M. Cwiertniak, Opole 1998. Cf. Z. Salwa, *Ochronna funkcja prawa pracy*, [in:] K.W. Baran (red.), *Zarys systemu prawa pracy*, Warszawa 2010, p. 179 et al.

¹⁷ The subsequent paragraph of Article 18 of the Labor Code provides that any acts that are less favorable to an employee than the provisions of labor law are invalid. The appropriate provisions of labor law will apply instead, and if there are no such provisions, then the appropriate provisions of a non-discriminatory character will apply instead.

¹⁸ M. Barzycka-Banaszczyk, *Prawo pracy*, Warszawa 2008, p. 30 et al.

protective nature of labour law, special mention should be made of the mechanism which limits the freedom to shape the content of the employment relationship (called the employee privilege principle) according to which employees and employers may not by way of legal procedures diminish the level of power of the employed individuals below the minimum set out in the regulations, restrict freedom to terminate employment relationships by employers (a general and specific protection of the sustainable employment relationships), pay guarantees, including the establishing of the minimum wage, a mandatory vacation, maternity protection, protection of young workers, or health and safety at work regulations”¹⁹.

From an axiological perspective, the protective function is determined by an absolute objective, i.e. the protection of employees. This recital justifies the acceptance of every legal institution, on condition, though, that it will allow to grant certain powers to employees²⁰. As a side note, it seems worthwhile to refer to the Declaration of Philadelphia which recognizes the fact that labour is not a commodity²¹. This provision remains an effective counterargument to any proposal for the reduction of the protective standards²². If we assume that labour is not a commodity, then it is not possible to use such terms as “the labour market”²³.

1. Definition of a Foreigner

In order to transpose the above considerations onto the area of the protective function with regard to the rights of foreigners, we must begin with the systematization of terminology. In particular, the term “foreigner” or “foreign person” needs clarification.

The legal definition of a foreign person can be found in the provisions of the Act on Employment Promotion and Labour Market Institutions²⁴. According to its Article 2 paragraph 1 subparagraph 7, a foreign person is a person having no Polish citizenship. This is a rather laconic provision because this term can mean

¹⁹ J. Stelina, *Prawo pracy*, Wyd. C.H. Beck, Warszawa 2016, p. 40.

²⁰ A. Sobczyk, *Prawo pracy w świetle Konstytucji RP. Tom I. Teoria publicznego i prywatnego indywidualnego prawa pracy*, Wyd. C.H. Beck, Warszawa 2013, p. 4 et al.

²¹ The Declaration of Philadelphia – Declaration concerning the aims and purposes of the International Labor Organization, The General Conference of the International Labor Organization, meeting in its Twenty-sixth Session in Philadelphia, hereby adopts, this tenth day of May in the year nineteen hundred and forty-four, the present Declaration of the aims and purposes of the International Labor Organization and of the principles which should inspire the policy of its Members, item I, the text is available at: http://www.mop.pl/html/miedzynarodowe_standardy/deklaracja_filadelfijska.html [access as of: 20.08.2020].

²² A. Sobczyk, *Prawo pracy...*, p. 4.

²³ W. Sanetra, *Czy istnieje rynek pracy?*, PiZS 2011, sentence 9, pp.8-9

²⁴ The Act of 20 April 2004 on Employment Promotion and Labor Market Institutions, Dz. U. of 2020; *item*, 1409

that stateless persons may also be considered foreigners²⁵. The protective function with regard to the rights of foreigners is expressed in particular by the principles of the legality of employment of persons having no Polish citizenship.

2. Employment of European Union citizens

In its Article 45, the Treaty on the Functioning of the European Union²⁶ secures freedom of movement for workers. According to this provision, freedom of movement for workers shall be secured within the Union. Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work. The freedom of movement within the EU/EEA applies to foreign persons who are the citizens of:

- The EU Member States (i.e. Austria, Belgium, Denmark, Finland, France, Greece, Spain, the Netherlands, Ireland, Luxemburg, Germany, Portugal, Sweden, the United Kingdom, Northern Ireland, Italy, Cyprus, the Czech Republic, Estonia, Lithuania, Latvia, Malta, Slovakia, Slovenia, Hungary, Romania, Bulgaria and Croatia);
- The European Economic Area;
- Switzerland²⁷.

It is noted in the literature that the “classical freedom of movement for workers (Article 45 of the TFEU) is based on the idea that migrant workers shall enjoy equality of treatment with nationals of the receiving State”²⁸.

The conditions for taking up employment by foreign persons in Poland are specified in Article 87, para 1 of the Act on Employment Promotion and Labour Market Institutions. Among the prerequisites to taking up employment by foreigners, the legislator listed, among other things, the requirement of having a refugee status, providing them with subsidiary protection within the Republic of Poland, having a permanent residence status or a permission to stay for humanitarian reasons. At the same time, as of 17 January 2007, foreigners were no longer required

²⁵ The Convention relating to the Status of Stateless Persons defines a stateless person as someone who is not recognized as a national by any state under the operation of its law. See the UN General Assembly, the Convention relating to the Status of Stateless Persons, 28 September 1954, UN Treaty Collection, vol. 360, p. 117, the text is available at: <https://www.refworld.org/docid/3ae6b3840.html> [access as of: 20.08.2020].

²⁶ The Treaty on the Functioning of the European Union, Rome 1957, Dz.U.2004.90.864/2.

²⁷ J. Cichoń, *Legalność zatrudnienia cudzoziemców. Informator dla pracodawców*, „Państwowa Inspekcja Pracy”, Warszawa 2019, p. 4.

²⁸ L. Mitrus, *Charakter prawny delegowania pracowników w ramach swobody świadczenia usług w Unii Europejskiej*, „Europejski Przegląd Sądowy”, 2018, no. 6, pp. 4-11.

to obtain a work permit who have these type of permission. In practice, the new powers conferred on foreign nationals to allow them to work without a permit were granted to the following states: Austria, Belgium, Denmark, France, the Netherlands, Lichtenstein, Luxemburg, Germany, Norway and Switzerland. In other cases, this entitlement was acquired earlier, on the basis of reciprocity rules²⁹.

The protective function with regard to the employment of foreign nationals also affects their families. First, it should be noted that Article 87 paragraph 1 subparagraph 10 of the Act on Employment Promotion and Labour Market Institutions provides for the possibility of employment of family members of the foreign persons. The definition of a family member is provided in the Act on Entering the Territory of the Republic of Poland³⁰. According to Article 2 paragraph 4 of this Act, a family member of a foreign person should be understood as:

- the spouse of an EU citizen,
- a direct descendant of an EU citizen or their spouse, to the age of 21 years or a dependent of an EU citizen or their spouse,
- a direct ascendant of an EU citizen or their spouse, a dependent of an EU citizen or their spouse.

As far as the family matters are concerned, the family, as the basic unit of society, is defined in the Charter of Fundamental Rights³¹. According to Article 9 of the Charter: “The right to marry and the right to found a family shall be guaranteed in accordance with the national laws governing the exercise of these rights”.

The provisions of the regulations on the employment of foreign nationals do not state that the Member States have an obligation to allow family members of the foreign persons to access its territory. However, it is emphasized that these countries have an obligation to facilitate residence of such persons in the State concerned³². It is no exaggeration to offer an argument that the actions taken by the Republic of Poland in order to facilitate entrance to the country by family members of foreign nationals and their employment will be an expression of the protective function of labour law. These people surely find themselves in a worse position than the Polish citizens, and this is why the EU legislator decided to give them special protection.

²⁹ A. Drabek, *Warunki wykonywania pracy przez cudzoziemca*, [in:] *The Act on Employment Promotion and Labor Market Institutions. Komentarz*, red. Z. Góral, Wyd. II, WK 2016.

³⁰ The Act of 14 July 2006 on Entering the Territory of the Republic of Poland, Residence and Departure from this Territory of Nationals of Member States of the European Union and their Family Members, Dz. U. of 2019, *item*, 293.

³¹ The EU Charter of Fundamental Rights, “Official Journal of the European Union” C.2007.303.1.

³² D.E. Harasimiuk, *Skuteczne korzystanie z prawa pobytu przez obywateli UE i członków ich rodzin*, „Ius Novum” 2016, no. 1, pp. 63-78.

According to Joanna Osiejewicz, “family must be afforded special protection by the EU’s secondary legislation on free movement and family reunification in the situation where a person who is the resident of a Member State wants their family members, who were left behind when they migrated, to join them”³³.

The protective function with regard to the rights of foreigners is also expressed in the provisions of the Act on State Assistance in Upbringing of Children³⁴. According to its Article 1 paragraph 2 subparagraph 2, foreign persons are entitled to childcare benefits. The entitlement is conditional only upon whether a foreign national is eligible to work in Poland. The eligibility to work may result, for instance, from the regulations that release foreign nationals from the obligation to obtain a work permit³⁵.

3. Non-discrimination clause

The principle of equal treatment as regards access to employment, which is directly related to the prohibition of discrimination, is a special form of protection of foreigners referred to in labour law.

This principle is presented in Article 11² of the Labour Code, which reads that employees have equal rights in respect of the same performance of the same duties; this applies in particular to the equal treatment of men and women in employment. This principle is supplemented with the content of Article 11³ of the Labour Code, which reads that any discrimination in employment, direct or indirect, in particular in respect of gender, age, disability, race, religion, nationality, political views, trade union membership, ethnic origin, creed, sexual orientation or in respect of the conditions of employment for a definite or an indefinite period of time or full or part time, are prohibited.

The principle of non-discrimination prohibits, therefore, unequal treatment of certain employees on the basis of some discriminatory factors (e.g. nationality). As a rule, this “unequal treatment” is characterized by putting an employee in a worse position than the position of others³⁶.

Following these principles is the cornerstone of human rights in employment. Because the legal standards have been formulated in this particular way, foreign

³³ J. Osiejewicz, *Członek rodziny w prawie Unii Europejskiej*, „Europejski Przegląd Sądowy”, 2015, no. 6, pp. 24-30.

³⁴ The Act of 11 February 2016 on State Assistance in Upbringing of Children, Dz. U. of 2019, *item*, 2407.

³⁵ The Voivodeship Administrative Court in Łódź Judgment of 20 April 2017, Court File No. II SA/Łd 23/17, LEX nr 2277501.

³⁶ M. Lewandowski, *Ochrona pracownika przed dyskryminacją w polskim prawie pracy*, „Palestra” 2014, no. 3-4, pp. 137-153.

nationals may assert their rights if they have been treated worse than other employees who are citizens. We should not overlook the fact that there are some legal consequences that will follow from a breach of the obligations of equal treatment in employment.

Having the above principles in mind, Lech Kaczyński presented the following argument: “the basic sanction with regard to crossing the border of freedom to shape the content of a contract used in labour law is still the sanction of nullity, which is related to the so-called legal automation. Besides this sanction, there may also be the sanction of absolute nullity concerning the entire employment contract or its part. It occurs when there is conflict between the law and the type of work, and also conflict between the contract (or its part) and the principle of social interaction. The sanction of nullity may also apply to a contract that is contrary to Article 112 or Article 113 of the Labour Code. And last but not least, if there is conflict between the contract and the features of the employment relationship, it is possible that the sanction of nullity is applicable to the entire legal transaction or a situation in which it creates legal effects, but under civil law, not labour law”³⁷.

The prohibition of discrimination concerns to a large degree the employer, as it is the employer who has a decisive voice when it comes to the position of the particular employees within the internal structure of their company³⁸.

In the event of the discrimination of employees, the protective function is also reflected in situations where there is a dispute in court and the employee, who has been discriminated against, is trying to assert their rights. In particular, it can be noted that the burden of proof that the employer has followed some objective reasoning lies with the employer, not with the employee who has been discriminated against. The latter must only present the facts in support of their claim that the act of discrimination has actually occurred³⁹.

The issue of discrimination in employment has been the subject of numerous considerations with regard to case law. As an example, in one of its rulings, the Supreme Court indicated that “a discrepancy in the amount of remuneration based on the criterion of citizenship is an act of direct discrimination, and keeping this criterion in force by the employer, who is maintaining higher remuneration for the employees who were hired earlier under such conditions, is an act of “partial” discrimination (Article 113 of the Labour Code). [...] The absence of action aimed at equalizing pay and, to the contrary, the maintenance of higher remuneration for

³⁷ L. Kaczyński, *Zasada swobody umów w prawie pracy po nowelizacji kodeksu pracy*, „Państwo i Prawo”, 1997, no. 3, pp. 8-21.

³⁸ L. Florek, *Zakaz dyskryminacji w stosunkach pracy*, „Praca i Zabezpieczenie Społeczne” 1997, no. 1, p. 2.

³⁹ K. Wójcik, *Sędziowie nie znajdują prawa*, „Rzeczpospolita” 2013, no. 1, p. 30.

the recognized employees, may be indicative of discrimination, especially if this status quo has persisted for many years”⁴⁰.

4. Penal regulations

To conclude, the considerations which refer to the protective function of the law point to the fact that it is directly correlated to other areas of law. A particularly interesting approach is presented in the substantive criminal law. Given the vastness of the subject, only some brief comments of theoretical nature will be made for the purpose of the clarity of this article. These comments are intended to only point to the rules for the protection of foreign nationals in this area of the law. It is important to begin with a statement that the protective function of criminal law is the result of the guarantee function which, in turn, generally boils down to the assertion of rights of an individual to be protected from unauthorized interference by a public authority with the matters relating to human rights and freedoms⁴¹. The protection referred to above, is expressed in the rights of foreign nationals, in particular, through the introduction of special rules to the Code in order to hold foreigners accountable under the Polish law. In particular, reference should be made to the regulation of Chapter XIII of the Penal Code, entitled “Liability for Offences Committed Abroad”.

According to Article 110 of the Penal Code, the Polish penal law shall be applied to aliens who have committed abroad an offence against the interests of the Republic of Poland, a Polish citizen, a Polish legal person or a Polish organisational unit not having the status of a legal person, and to aliens who have committed abroad a terrorist offence. The Polish penal law shall be applied to aliens in the case of the commission abroad of an offence other than listed in § 1, if, under the Polish penal law, such an offence is subject to a penalty exceeding 2 years of deprivation of liberty, and the perpetrator remains within the territory of the Republic of Poland, and where no decision on his extradition has been taken.

By analysing the content of this law, it can be assumed that foreign nationals are hold criminally liable as stipulated in the Polish law only in the presence of certain preconditions.

⁴⁰ The Supreme Court Judgment of 7 May 2019, Court File No. II PK 31/18, OSNP 2020/5/40.

⁴¹ A. Zoll (red.), *Kodeks karny: część ogólna. Komentarz do art. 1-116 k.k.*, vol. I, Kraków 2004, p. 43.

5. Closing Remarks

To summarise, the protective function of the law plays an important role for guarantees of fundamental human rights and freedoms, whereas, as a rule, labour law performs, to a large extent, the protective function. There is no doubt that the protective function of the law serves a key role at the level of the rights of employees who have a relatively weaker position in the employment relationship. It also plays a crucial role in the law regarding the employment of foreigners because labour law protects not only Polish citizens, but also foreign nationals.

Furthermore, when it comes to labour law, there is no denying that because of general directives pertaining to the realization of the protective function, all employees, including foreigners, have equal opportunities in employment and can freely move within the European Union Member States for the purpose of seeking employment, and they may not be discriminated against. This kind of protective function is undoubtedly a useful tool in combating unemployment and it provides support for improving the social situation of those who are not Polish citizens.

Nevertheless, it should be heeded that for some time now the postulates that the law does not keep up with the changing structure of employment in Poland have been heard more and more. More and more foreigners are migrating to Poland for work purposes, and they are mainly citizens of the former USSR countries (Ukraine and Belarus), but also from Asia (Vietnam). Employment of foreigners is difficult because it requires obtaining appropriate work permits, the obtaining of which is associated with a long wait, a large number of documents and costs for employers. Work is currently underway to amend the law on foreigners, which has been announced by the government for some time. At the current stage of legislative work and the proposed changes, there is no visible “revolution” that would facilitate the employment of foreigners and significantly shorten the waiting time for work permits or temporary residence and work.

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