

INTRODUCTION TO DISCUSSION

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I. THE RIGHT TO WORK — IS IT A FEASIBLE OBJECTIVE?

This question should, in my opinion, be answered positively right from the start. At the same time, however, a reliable analysis of the various aspects of the right to work, as well as the contradictions which arise from its implementation is indispensable.

The right to work belongs to that category of social problems about which it is easy to formulate judgments on a theoretical level, but whose practical resolution has proven stubbornly elusive. Indeed, steps intended to make the right to work a reality often produce outcomes the opposite of those intended. One can assume the existence of a certain core of principles pertaining to the right to work, and to work itself, for which there exists general approval in different political systems. This set of core principles is accepted not only by the social doctrine of the Church (as insightfully analyzed by Prof. Schasching) but also by socialist, or even liberal doctrines. Roughly, these principles are the following:

1. Work constitutes a condition of man's self-fulfillment. This can only be uncoerced work, not work rendered under duress.
2. Unemployment or the lack of opportunity to choose one's place of work in accordance with one's aptitude and interests constitute major obstacles to fulfillment of personal objectives.
3. Providing work takes priority over the establishment of adequate remuneration.
4. By means of its economic and social policies, the state ought to aspire to provide full employment.

Few would deny the validity of these generally formulated principles. As a matter of fact, one could content himself with their mere enumeration and treat them as the appropriate policy of the state. However, a more detailed consideration shows how many contradictions and perplexities

would arise if one were to attempt their implementation. Experience demonstrates how excessive emphasis upon the right to work, and attempts to ensure the permanence of employment through legal guarantees produces the contrary. The problem of the right to work is a complex matter, and its reliable analysis must include both legal and social aspects.

Although in numerous countries the contract of employment is a civil contract, both the contract itself and circumstances concomitant to its establishment and dissolution have become subject to special attitudes and regulations that transcend the limits of the civil code. Irrespective of the ideological approach, in our part of Europe, it is impossible to arrive at a consensus which would not single out work from all other forms of legal civil relations.

From the point of view of its legal and constitutional classification, the right to work belongs to the group of economic and social rights. It is a part of the so-called second generation of human rights, as opposed to the first generation, to which such rights and freedoms as personal freedom, freedom of speech, freedom of the press, freedom of conscience and religious creed, etc. traditionally are incorporated. The first generation rights often are referred to as the traditional rights, and nearly universally are recognized to constitute the core of every state constitution, since for they define and limit the scope of the authority of the state over the individual. Economic and social rights constitute a different problem. Discussion of their normative character is much more complex, and opinions as to the need for their constitutional recognition greatly vary, extending from the liberal doctrine, which denies the need for constitutional inclusion of these rights, to the socialist doctrines, which favour their very detailed formulation.

The debate over these issues has become particularly pronounced in the post-communist countries, and it clearly demonstrates that these are not purely doctrinal controversies, but on the contrary, disputes about issues deeply rooted in the social and economic realities of the post-communist states (i.e., states currently undergoing a process of economic transformation). As is well known, work is affected by all the changes taking place in the field of economy. Work and its conditions are intrinsically related to the choice of a given economic system and to changes in the methods of its administration. And the changes that have been taking place in the post-communist states in recent years are not only a different set of tools through which the state manages its economy. They also represent a change in the role of the state and the relation between the citizen — hitherto the state's employee — and the state — the main

employer. In this respect, the countries currently undergoing transformation appear to be the point of convergence for the problems concerning work that haunt the contemporary world. Consequently, the post-communist states provide an opportunity for a "fresh" review of these problems, and to investigate the development of the ideas pertaining to the right to work, the barriers to success in the fight against unemployment, and to determine whether the right to work constitutes a feasible objective.

Considered from a legal perspective, the right to work, as well as the other so-called economic and social rights, have undergone a peculiar historical evolution in the 20th century. These rights did not constitute a relevant element of the constitutional development in democratic-liberal countries. On the other hand, they were vastly expanded in the constitutions of the countries representing "real" socialism, and such detailed constitutional inclusion used to be considered as an indicator of the progressive character of the communist system. These rights, and particularly the right to work interpreted as the principle of full employment, played the role of fundamental slogans in the communist system. These rights, however, as incorporated in an artificial economic system that the centrally-planned economy constituted, were considered to be of propagandistic or declarative rather than of normative importance. They constituted a peculiar kind of socio-economic principle of a particular sort of authoritarian state, rather than an individual right. That is why any profound, substantial discussion on the scope and importance of the right to work was impossible. Even today, though, discussion of the right to work under market economy conditions generates considerable excitement. We live in a world full of contradictions. Irreconcilable values — as confirmed by hitherto existing reality — stand in opposition to one another. On the one hand, there is the unquestionable value of full employment and, as a result, security for the individual. On the other hand, this value is constituted by the market system of economy built according to principles recognizing the freedom of the individual. And experience shows that implementation of the principle of full employment is only possible under conditions of a system of centrally-planned economy, a system which deprives the individual of the freedom of enterprise, private property, and which removes from him the responsibility for his own fortunes, i.e. in a situation in which man is considered to be a production instrument rather than a genuine entity endowed with his own entrepreneurial drive. Thus, implementation of a value such as full employment — at least under circumstances we have been familiar with — always took place in a situation of denial of the personalistic concept of the individual, i.e., in a

situation of a denial of one of the canons of the social teachings of the Church.¹

Thus, the only example of implementation of the principle of full employment are the communist states. And the implementation of the principle in such a “version” caused a series of negative consequences which virtually denied the very essence of work, and could be reduced only to formal employment. Fictitious employment — the reverse of latent unemployment — became a common phenomenon. Any relation between work or an understanding of the relationship between employment and wages was lost. In the human dimension, this situation led to the loss of the work ethos and to the demoralization of workers, whereas in the economic dimension, it led to low productivity and, consequently, to the bad state of the economy as a whole.

On the other hand, the market economy principle, based on the recognition of the freedom of the individual and his responsibility for his own fortunes, devoid of any social considerations, leads to mass unemployment and, consequently, violation of the dignity of the individual who is unable to support himself by his own work. Thus, the challenge the contemporary world poses is a search for the answer as to whether and how these two values can be reconciled. Our present discussion is meant to be a step in this direction.

This particular dichotomy, this peculiar clash of values between the necessity of the introduction of the market economy and unemployment, is particularly manifest in countries delivering themselves from the communist system. Hence, we find using the example of these countries expedient.

The beginning of the so-called transformation process, which, in the economic dimension, meant the introduction of the system of market economy in the post-communist countries, meant renouncing the principle of full employment, the principle being — as I have already mentioned — basically fictitious. This resulted in massive unemployment, with both the society and the state completely unprepared for this phenomenon. The society, accustomed to employment security and the idea that any concern about finding and securing work was the responsibility of the state, suddenly found itself frustrated and lost. In the face of such particularly excruciating events as large-scale factory closures, and the not infrequent cases where all the members of a family were made redundant, the positive effects of transformation receded into the background. Moreover, these positive changes took place in a completely immobile society, a society

¹ Cf., J. Schasching, report prepared for the present session.

whose members were accustomed to one place of employment, to one place of work, and one place of abode virtually throughout their entire lives. Such were the rules governing the communist societies, where man, owing to the existing economic infrastructure and housing system, was in a peculiar way ascribed to one place of work and abode.²

It therefore should come as no surprise that, after the initial months of expectation for positive effects of the new system, a major campaign was launched against closing the hitherto existing establishments, against restructuring, and in favour of the full employment system in — obviously — its only known version, that is, the “real” state socialism version, with the state being the sole employer. The aim of suppressing unemployment became the leading issue of the whole transformation process. Consequently, inclusion of the right to work in the constitution has come to be recognized as a means both to guarantee employment and to return to previous solutions. Hence the intense pressure to include the right to work in the constitution in recent years. In the initial period of system reform, at the time of particular fascination with a market economy, MPs representing liberal parties strongly opposed the constitutional inclusion of the right to work, finding it an attempt to re-impose the communist concept. In doing so, they sought to limit the role of the state as the major, direct employer.

The latest public opinion polls show that 59% of the respondents support the inclusion of social rights, and particularly the right to work, in the new constitution, whereas only 24% would like the new constitution to be predominantly a guaranty of political and human rights. It is thus obvious that the liberal democratic principle of primacy of political over social rights is quite strongly questioned in the society. This does not mean questioning the traditional rights themselves. Instead, it is a matter of supporting the supremacy of socio-economic rights over the traditional ones. Such an attitude is undoubtedly the legacy of the communist system as well as fears resulting from the current socio-economic transformations which constitute a danger to these social rights.

— Discussion of the concept of the constitutional inclusion of the right to work indicates that it is the one that is most prone to constitute an “empty” or fictitious right. It is paradoxical that the right to work is ensured by the constitution of Spain, a country where unemployment levels far exceed the average for Western Europe and the USA. At the same time,

² Such conditions, particularly social immobility within the range of a given country, are characteristic of overseas countries with high levels of unemployment. At the same time, however, countries of the so-called “South” are characterized by a high migration rate to the countries of the “North”. Cf. Prof. J. Zubrzycki’s interesting report for the present session.

current experience indicates that unemployment levels drop faster in the USA than in Western Europe, although declarations as to the formal guaranties of the right to work as well as constitutional inclusion of the state's right to intervention in favour of reducing the unemployment are far more articulate in Europe.³ Hence it is an obvious conclusion that the nexus between the constitutional inclusion of the right to work and reduction of unemployment levels is practically non-existent. It is undoubtedly the result of the particularly normative character of the right to work.

— As pointed out in the literature, the social rights do not have the same character as the “traditional” rights that guarantee the security of the citizen against the state. Consequently, unlike the traditional rights, the “social rights” do not constitute a set of claims that an individual has against the various organs of the state. It is unquestionable that excessive legal guarantees meant to ensure employment provoke abuse on the part of the workers and, as such, become subject to moral judgments. On the other hand, in a situation of tormenting unemployment and poverty, which results from economic underdevelopment and the collapse of declining industries, employers have an advantage over employees, and particularly prospective employees, which they may abuse. Furthermore, lack of the fundamental stability of the employment relationship cannot be accepted on moral grounds. This is yet another example of possible contradictions that are persistent aspects of this issue.

— The problem of work or the right to work is, thus, not only a question of mutual relation of work and capital, but a moral issue, and — as exemplified by the above examples — a very complex one.

— However, another aspect has to be stressed here. Namely, many considerations of the right to work underestimate or even completely disregard the question of the financial aspects and the financial condition of the state as one of the elements necessary to any implementation of the right to work. Thus, Dr. H. Tietmeyer's text concerning financial markets in relation to employment and unemployment submitted for today's session is very valuable. Any solution in the sphere of the right to work must not hinder economic growth, nor the stability of the currency since then it loses its social relevance. (Such hindrances can be the result of pressure aimed at maintaining obsolete and unprofitable socialist industrial giants, and the pay claims of these enterprises).

³ T. Syryjczyk: “Granice misji ekonomicznej i socjalnej w konstytucji”, in: *Konstytucja i gospodarka*, Societas, Warszawa, 1995, p. 63.

In this respect, the principle of employment protection, intervention into problems of employment safety, and limited steps aimed at stabilizing the employment relationship appear to be reasonable solutions. So is the question of organized assistance for persons whose employment is a result of genuine inability to take up employment or find other sources of subsistence (poverty).

The problem of forced labor has always been one of the more controversial issues. As a feasible objective, the right to work, most certainly must have nothing in common with forced labor. Many an international agreement has attempted to ban forced labor. Hence, one of the indubitable features of work which allows for man's self-fulfillment is freedom of its exercise. The communist states, having created broad and far-reaching guarantees for workers, such as protection against dissolution of the employment relationship, the stability of employment, and the assurance and limitation of working time, thereby brought about a situation in which the value of the performed work was in certain cases so low, that people were not willing to take it up of their own accord. That is where the problem of forced labor originated. It has to be added that the organization of forced labor is an intrinsic feature of totalitarian states.

The broad discussion that took place in Poland in the mid-1980's in connection with the government's plan to register so-called "parasites", or in other words, to introduce a certain level of labor duty, showed how much misunderstanding the problem generates. The proposed draft of this plan contradicted the Human Rights Agreement which Poland had ratified. Arguments stemming from Catholic social doctrine were relied upon, that pointed out that the treatment of work in terms of duty in a certain way undermines its absolute value. Through work, the personalistic element should exemplify itself, and the personal values should be accomplished. This is denied or at least fundamentally limited in the case of forced labor. The arguments of human right activists stressed the unique feature of work that is constituted by its freedom. This was also the attitude of the majority of the members of the public.

2. ALTERNATIVE WAYS AND MEANS OF SUPPLYING EMPLOYMENT

These remarks may have only limited reference to certain very broad hypotheses, for, as far as the general principle is concerned, it is obvious that employment, in the shape of a formal contract of employment, is the main objective of the majority of society members eligible for work. This comes as no surprise, since only employment entitles one to a number of

guarantees not appertaining to other forms of rendering work. It also provides, to a lesser or higher degree, a certain comfort in terms of stability and security of the employment relationship. Thus, employment can be complemented with different kinds of expedients only to a limited degree, and this happens for a number of reasons.

The most typical forms are: rendering commissioned work; the establishment of private enterprises as a result of the closure of large unproductive ones; entering into cooperation with major enterprises. Furthermore, a clear distinction has to be made between the categories of people who voluntarily choose different forms of rendering work from those who do it because they have found themselves in a situation of compulsion. In the first category, I would include people who, owing to their specific family situation, prefer not to conclude a formal contract of employment, but choose to carry out only commissioned work. The various and vastly developed kinds of commissioned work undoubtedly constitute a very vital element complementary to employment. At the same time, however, one has to refrain from formulating hasty conclusions with regard to the positive effects of such forms of rendering work upon reduction of the unemployment rate. This dependence is not unequivocal. Such commissioned work is often undertaken by people who have a formal contract of employment with a different employer. In such instances, commissioned work will not be a means of reducing the level of unemployment; on the contrary, it is likely to hinder the unemployed from finding employment.

3. MAIN BARRIERS TO REDUCING UNEMPLOYMENT (AND UNDEREMPLOYMENT)

Paradoxically, excessive legal regulations meant to ensure stability and security of the employment relationship may turn out to be the main barriers on the way to reducing unemployment. So may excessive protection by the state. Thus, the very features which we are prone to assess positively may and indeed, as exemplified by experience, do have a negative impact upon the process of unemployment reduction. I shall elaborate on the matter by means of examples.

As shown in previous argumentation, an attempt to include the right to work in the constitution does not provide a guaranty against unemployment. It is, however, also true that with all the reservations regarding the purposefulness, the scope of particularization of the constitutional regulation of the right to work and its normative character, the state intervenes more actively in employment relationships than any other categories of agreements, even in market economies. The free market principles are

subjected to numerous limitations. It is already plain, however, that certain guarantees are of doubtful value. They can also create traps which, in effect, will turn against the value which was meant to be protected by means of such guarantees. The most frequent aspiration of trade unions is to ensure stability of the employment relationship, in other words, to search for solutions that would render dissolution of employment relationship most difficult. Here we have a very clear example of such opposition of values. If employers find it difficult to terminate employees' contracts, then, even in times of prosperity, they will not employ new workers. Employers will not take advantage of the favourable circumstances since it is clear that when the period of prosperity is over, they will not be able to reduce employment, and eventually costs will exceed profits generated during a temporary growth of production. Another example: excessively high costs of labor which are the result of the social security and health insurance systems, holiday schemes, etc., incline employers to avoid formal contracts of employment. Thus, seeking the most profitable solutions from the point of view of the employees, approaches that supply them the greatest possible employment security may undermine their interests in the long-run. Instead of being a guaranty of formal contracts of employment, these devices can result in workers being able to obtain only casual labor opportunities. A third example: The legal limitation of the working time, in its substance meant to protect the worker, makes it impossible for already employed workers to gain an extra workload. As a result, production is not stimulated, nor do such limitations increase the employment of those workers who remain unemployed.⁴ Another sensitive issue in the countries under transformation is the question of shortening the working time. On the one hand, this might become a certain incentive (although, in my opinion, a very doubtful one) towards the reduction of unemployment. It might turn out that shortening the working time without lowering the wages could lead to such an increase in costs for employers, that they would be motivated to replace employees with machines. Again the result achieved would be contrary to the one intended. On the other hand, however, it is worth remembering that additional employment already has been a common phenomenon in our countries. Thus, such proposals might prove economically detrimental.

The problem of minimum wages also appeared to be a vital element of the right to work. Today it is, to say the least, a controversial matter — a guaranty of a minimum wage prohibits the creation of new jobs and the

⁴ *Ibid.*, p. 67.

employment of young people to learn a trade. And *similarly*, the minimum wage reduces employment opportunities in situations in which higher wages are economically impossible.

In order to work out a suitable concept of unemployment reduction, the precise discernment of the factors generating unemployment is of utmost importance. In the case of the countries undergoing transformation, these factors are different from those expected, and different from the ones which can be observed in stably working economies. The main sources of unemployment growth are: increase in the number of people eligible for work, suppression of latent unemployment, the poor financial standing of enterprises, the closing of large, state-run enterprises, change in the export situation, as well as rapid abridgment of traditional markets — which has occurred through the collapse of the Soviet Union.

The proponents of a right to work have suggested numerous programs to prevent unemployment. Very often, however, these turn out to be idealistic proposals which do not stand a chance of implementation, particularly in countries with high unemployment levels. Most frequently mentioned are: career guidance by the state, assuring people the opportunity to gain new professional qualifications, as well as community and public works projects. Undoubtedly, the role of the state, as defined through the principle of subsidiarity, must not be denied here. However, experience has shown that in countries which have rapidly changed or are rapidly changing their economic systems, implementation of these sorts of programs is extremely difficult, if not altogether impossible. The first two programs require time and the creation of new jobs. In the initial stages of transformation, there is no knowledge as to the optimal professional structure and, accordingly, the directions for changing job qualifications. On the other hand, it is a time when unemployment develops overnight due to closing of obsolete enterprises, and there are no means to stop this process. Countries with stable market systems can respond in a totally different way. The problem of the initiation of public works is even more complex. The problem of unemployment increase is one typical of poor countries with completely ruined economies. Such nations lack the financial resources needed to initiate public works on such a scale that substantially could reduce unemployment. It is also a time-consuming process.

One of the major barriers to unemployment reduction is thus the lack of financial resources. It is not the only factor, however. Sometimes a country lacks a certain vision as well as appropriate technical and organizational structures. Also, the psychological or mental factor is one of paramount importance. To elaborate on the issue, let me use the example of the unemployment benefit. Here we are confronted with yet another

contradiction between the state's duty to protect the unemployed, which flows from the subsidiary principle, and unemployment reduction.

In the opening phase of transformation, due to the closing of state enterprises and resulting group redundancies, a large-scale unemployment benefit programme was initiated. (During this period, the concept of seeking different forms and methods of unemployment was dominated by the idea of an unemployment benefit). A number of its recipients treated this benefit as a kind of extension of the wages they had been paid in the communist enterprise, since those wages were also unrelated to the scope of the work rendered. As a result, the recipients made no efforts to find employment. Thus we have arrived at yet another paradox. A new phenomenon of demoralization began to appear. It turned out that it was more profitable to seek financial assistance from the state than to make attempts to find means of support. Permanent employment was not sought since the unemployment benefit and occasional paid jobs provide a higher income. As a result, long-term unemployment partly consists of such optional unemployment. In this instance, it was the overprotective role of the state, combined with a lack of vision as to the consequences of such a solution, that turned out to be the barrier for unemployment reduction. Crossing this boundary has a moral, and in the long run, a social dimension, for instead of limiting, it expands the scope of unemployment and consolidates passive attitudes, thus leading to poverty. Further economic consequences, such as collapse of economic growth due to an overloading of the economy and additional deepening of unemployment come later. It must be pointed out, that this process — not without social resistance — gradually is being restrained. The range of the benefit and period of its availability is considerably shorter than it was in the opening stages. In the future, it should be prevented by the prospective change of the unemployment benefit system into an insurance system, thus relating the amount and timing of benefit reception to the amount and timing of insurance premiums.

In the course of progress of the transformation process and extension of privatization schemes, some of the unemployed workers will be absorbed by private enterprises. There exists, however, a vast discrepancy between the number of people made redundant and those who find employment in private enterprises. A number of reasons account for this, namely:

1. private enterprises assume the principle of rational employment, thus there are no cases of latent unemployment in them;

2. lack of suitable qualifications on the part of workers seeking employment in private enterprises, and difficulties with qualifying for new jobs;

3. inability to get adjusted to the working routine in a private enterprise (higher productivity, higher work discipline).

Thus it is not always the government that is responsible for the existence of these barriers; very often it is the question of the worker's mentality.

5. A GLOBAL EMPLOYMENT POLICY AND/OR LOCAL ACTION?

The problems of work, employment and unemployment are global problems, as is very clearly indicated in the reports which are presented here. The most frequent reason for the collapse of governments in democratic countries is social pressure in general, and the growth of unemployment in particular; this happens irrespective of whether it is the so-called "East" or the "West". The specialist literature as well as different international reports dealing with social problems stress the fact that contemporary development triggers such phenomena as: the globalization of production and employment, rapid technological change, increased mobility of labor, atomization of workplaces, growth of the informal sector and structural adjustment policies. All these points generate large-scale structural changes in labor markets followed by flexible employment practices and an increase of the atypical employment situations (for example, part time work, temporary work, home work, self-employment and changes in working time). While official rates of unemployment remain stubbornly high, an increase is recorded in a group of "latent" or "non-declared" unemployed, resulting in a blurring of the distinction between employment and unemployment.⁵

All this seems to suggest that adopting a global employment policy, or at least taking steps in this direction, should be possible. I have very serious reservations, however, about the possibility of such policies. Unquestionably, Prof. Juan J. Llach's text presented during this session is very conducive to the discussion of this issue.

Acceptance of a certain global employment policy is, at the present stage, impossible. Instead of that, in this opening stage one should concentrate upon seeking possibilities to implement certain regional employment policies, although this problem itself is very difficult. The European Union is, undoubtedly, a major step in this direction. However, even within this structure, one that assumes the far-reaching integration of the economic

⁵ K. Drzewicki, "The Right to Work and Rights in Work", in: A Eide, C. Krause, A Rosas (ed.): *Economic, Social and Cultural Rights*, Nijhoff, p. 185.

and financial activities, a joint employment policy has not been worked out. Although the unrestrained flow of the workforce has been granted, it has been effectuated only to a certain degree. Levels of unemployment among the particular members of the Union still vary greatly. However, no joint efforts of the Union or among certain of its members to solve the problem are known to me.

No steps towards working out a common employment policy have been taken up by the countries of Central and Eastern Europe. In my opinion, this is the result of the fact that each of these countries has been following its own, extremely difficult path of transformation, and none of these countries individually has worked out a clear employment policy. Under such circumstances, long-range activities are obviously very difficult to undertake.

I am convinced however, that a global employment policy is a matter of a more distant future, possibly the next century. The way towards this end leads through attempts to create adequate local policies.

One of the major impediments to such a joint policy is the fear of certain countries, particularly the most advanced ones, of an influx of strangers. Another reason, is the fear that as a result of accepting such a policy, the citizens of Central European countries would be entitled only to second-category jobs, due to the differences of economic development among the participating nations. This is an essential, not only a psychological, but also a national barrier. A global or even regional employment policy must not disregard such issues. For it is unthinkable that in trying to solve one problem (employment), new, e.g., nationalist problems will be evoked.