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Employment Relationship, Emergency Situations, Formal Models of 'Emergency' Labour Law - Outline of Main Issues[1]

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The study presented in the paper is concerned with a formal (theoretical and legal) model of regulations dedicated to the normalisation of employment relationships in emergency situations (states). By an 'emergency situation' the authoress means 'overall exceptional circumstances caused by special, rare events, unforeseen in an accepted time perspective, in which someone or something was (is) at a certain time'. Until the outbreak of Covid-19, the subject matter of legal regulation of employment relationships in connection with the occurrence of emergency situations has not been given much thought (in our legal circle). This is also relevant to emergencies other than epidemics (warfare, natural disasters, force majeure, etc.). Insofar as research has been conducted to date, it rather focused on substantive and legal aspects of the regulations implemented in connection with the occurrence of such events, while any broader reflection on their formal and legal model has not been conducted. For this reason, in this paper, the authoress has firstly advanced a thesis that a distinction needs to be made between substantive and formal and legal models for the regulation of employment relationships in emergency situations, and secondly an attempt has been made to answer the question of which formal models can be distinguished in this context, what criteria should be used in this endeavour and how, on this basis, the distinguished models should be assessed. The authoress puts forward a thesis that formal models of 'emergency' labour law are closely linked to the concern to uphold the elementary democratic standards which should be respected by the law regardless of whether it relates to 'ordinary' or extraordinary situations. The research is primarily based on an analytical and linguistic, analytical and logical, dogmatic and legal, and descriptive method. It is conducted mainly on the example of the regulations of the Polish law and the decision of the Polish legislator taken in connection with the Covid-19 outbreak in relation to the method for the regulation of employment relationships during the period covered by it. However, the context of international (convention) regulations is also referred to. The authoress proposes to distinguish three basic formal models for the regulation of employment relationships in emergency situations: the permanent model, the mixed model and the ad hoc model. She concludes that, taking into account both the need for a relative flexibility in legal regulation and the need to maintain the elementary standards of a democratic state of law (primarily a guarantee that the applied legal solutions can be subjected to social discussion and dialogue between social partners), the mixed model should be considered as the most optimal.

Keywords: *Formal model of 'emergency' law; Emergency state; Emergency situation; 'Emergency' labour law; Employer's risk*

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Introduction

Undoubtedly, the COVID-19 epidemic has contributed to a revision and led to the need for a new perspective of factual conditions of employment and legal conditions related to it, which have an impact on the (legal) situation of the parties to an employment relationship. However, at the same time, the development has highlighted, or even gave rise to the need to address this issue in a much broader context, that is the context which encompasses all kinds of other emergency situations, including warfare, natural disasters, force majeure, etc. This need has been reinforced by the current emergence of an armed conflict in Europe (war in Ukraine), which could still develop into a wider one.

This has raised a number of important research issues that have not been addressed so far, or have been addressed only to a narrow extent. Among them, the following can for example be mentioned: indicating axiological grounds for the modification of the regulations regarding employment relationships in connection with the occurrence of emergency situations; answering the questions whether, and within what limits, deviations from the principles that shape these relationships in normal conditions are permissible in such situations and what factors should be taken into account in determining the final shape of individual legal institutions (their legal and extra-legal determinants).[2] Nevertheless, the choice of the method of regulation that would best suit this type of matter is an essential issue (the administrative-law or private-law method). It seems that it is indispensable to carry out a broader reflection, which will focus on an assessment as whether the regulations and models that have been developed for situations relating to an economic crisis, in which case we have more experience, are adequate to the situations referred to above.

However, the matter of the theoretical and legal model of regulations dedicated to the normalisation of employment relations in such conditions is also relevant. In particular, the question is whether, in this case, the legislator should rely on *ad hoc* measures or whether it should have at least some framework of adequate regulations prepared and adopted in stable times, i.e. the times in which all democratic mechanisms should be in place and in which a relative space for a full realisation of the idea of social dialogue exists. This article is concerned with this very issue precisely.[3]

Research Context

The concept of an emergency situation is relational it its nature, as its content is shaped in opposition to the content of the concept of ordinary (usual) situation. Such interdependence can be found in the colloquial language, but also translates into legal language and the language of the law.

In colloquial terms, an 'ordinary situation' is usually understood to mean 'overall ordinary, normal circumstances which are usual and unremarkable', whereas an

[2]See also Fitzpatrick (1994) at 1-2.
[3]See also Ackerman (2004); Bredekamp, Thorson Hause & Bond (1999).

'emergency situation' is usually understood to mean 'overall exceptional circumstances caused by special, rare events, unforeseen in an accepted time perspective, in which someone or something was (is) at a certain time'.[4]

Having this in mind, it is also worth initially mention the relevant principles of labour law which will be taken into account as a research background for the reflection on the theoretical and legal model of provisions dedicated to the regulation of employment relationships in emergency situations and the sets of circumstances which we will treat as emergency situations.

In defining this point in more detail, it seems that no special justification is needed for the making an assumption that, in this case, an adequate research context should focus on those features, or principles of labour law, which refer to situations deviating from the 'normal', undisturbed course of 'performance' of the employment relationship, in which the main performances of the parties (equivalent in kind) are: on the part of the employee – the performance of work of a certain type for the benefit of the employer (under the conditions of subordination) and on the part of the employer – the employment of an employee (allowing him or her to perform work) and the payment of remuneration corresponding to the work performed. At the same time, the performances referred to above can be seen as the primary objectives for which the employment relationship was concluded, understood as those which satisfy the main interests of the parties and justify the establishment of an employment relationship.

As a branch of law concerned with social relations of a permanent nature (as a rule), labour law also refers to issues related to the occurrence of certain events that are undesirable from the point of view of attainment of the objectives referred to above, or, more simply, it also refers to situations that hinder or prevent their attainment. The article points out that the following can be the reasons impeding the attainment of the objective of the employment relationship:

1. A personal situation of the employee or the employer;
2. Malfunction of technical equipment enabling the performance of work;
3. Circumstances external to the enterprise, including force majeure;
4. The manner in which the employee performs work; or
5. Changes in the market and the economic situation.

As a rule, the party to the employment relationship who is encumbered with the consequences of occurrence of these (adverse) circumstances is the employer and not the employee. This is always the case when, in general, the employee cannot be blamed for the occurrence of a given circumstance, but, more importantly, also the case when the employer itself had no influence on the occurrence of that circumstance either. The collective name for the legal institutions that address such situations is the 'principle of employer's risk'. In this sense as well the principle of employer's risk, to which the legal character of a descriptive (rather than normative)

[4]https://dictionary.cambridge.org/pl/dictionary/english/extraordinary
https://dictionary.cambridge.org/pl/dictionary/english/situation
https://dictionary.cambridge.org/pl/dictionary/english/state

principle of labour law must be attributed, reflects one of the essential features of the employment relationship.[5]

The above largely reflects the classic division of the employer's risk into economic, technical/organisational, social and personnel risks.

Highlighting this fact has a key impact on the formulation of the essential aspects of yet another division of the employer's risk, as it is presented not so much through the prism of material criteria (facts), but through the prism of formal criteria (conventions). Namely, it is about distinguishing between the forms of risk such as: factual risk and legal and normative risk.

The distinction essentially highlights the difference between the occurrence of a circumstance that is undesirable from the point of view of attainment of the objectives of the employment relationship (factual risk) and the conventional consequences of its occurrence: the possibility that a specific legal obligation may arise in relation to such occurrence on the part of some legal entity or the loss of a right by that entity (legal risk) and the attribution by the law, to a specific entity, of an obligation connected with the occurrence of that circumstance or loss of a right (normative risk). For example:

1. The occurrence of a factual circumstance that is undesirable from the point of view of attainment of the objectives of the employment relationship, such as an employee's illness (factual risk);
2. Leads to the possibility that legal provision may designate the entities (entity) which are to bear the negative consequences of occurrence of this circumstance through imposing on them a certain obligation or depriving them of a certain right (legal risk) – potentially, it may be the employee, the employer, or the public entity;
3. Legal provisions designate the entities (entity), which are to bear these consequences and indicate a specific legal obligation which is assigned to them or the scope of the lost right (normative risk).

For example, pursuant to the regulations of the Polish Labour Code and the social insurance system in Poland, during the period of an employee's incapacity to work due to illness (actual risk) not exceeding 33 days in a calendar year, the employer is obliged to pay the employee the so-called sick leave pay amounting to 80% of his or her normal earnings (as a rule); as a result, the employee 'shares' the normative risk of illness with the employer during that period by losing 20% of his or her income from the employment relationship; the public institution (the Social Insurance Institution) takes over the obligation to provide funds to the sick leave employee (normative risk) only after the expiry of the period provided for the payment of the sick leave pay by the employer, i.e., as a rule, only from the 34th day in a given calendar year. In this case, the legal risk is that each of the three entities mentioned here could potentially (and therefore not necessarily) be encumbered with the associated 'costs' as imposed by law.

It is this type of risk that will be crucial for further considerations.

[5]See more broadly Nassauer (1978).

Assuming that the reasons listed so far and impeding the attainment of the objectives of the employment relationship (personal situation of the employee or employer; technical failures; circumstances external to the company, including foreseeable force majeure; changes in the market and economic situation) fall within the spectrum of ordinary situations, the question is whether and which emergency situations allow for a different distribution of contractual risk in the employment relationship and in which formal framework they are to be specified and possible deviations from the rules applicable to "ordinary" situations are to be defined in connection with their occurrence.

For the purposes of further considerations, this will be referred to collectively as the formal model of 'emergency' employment law.

Formal Models of 'Emergency' Law

Trying to clarify (specify in more detail), on the basis of the above analysis, the meaning of the notion of emergency situation in the language which is to be used to describe the law (i.e. in legal language) or the notion of a state of emergency, which is identical in meaning in everyday language, it is obvious that the legal language cannot abstract from the relevant normative environment. This means that the dictionary-based understanding of an emergency situation (state of emergency) referred to above must first of all be compared with the concept of emergency situation as it functions in the legal language. In doing so, it should be borne in mind that it can and is used in legal texts of different rank and scope, and that it is sometimes used interchangeably with other terms such as state of emergency, force majeure, state of necessity, etc.

For example, in the Polish Constitution, which introduced the concept of a state of emergency (which includes: the martial law, the state of emergency and the state of natural disaster), it covers situations such as: external threats to the state; armed aggression against the state; joint defence of the state (with other states) against aggression under international agreements; threats to the constitutional system of the state; threats to the security of citizens; threats to public order; natural disasters and technical failures having the features of a natural disaster (Article 232 of the Constitution of the Republic of Poland).

Further (subject to meeting subsequent requirements set out in Constitution), the occurrence of these circumstances translates into the legislative authority's power to an ordinary application of a legal regime in which certain constitutional principles, rights and freedoms are excluded, and thus it translates into a right to introduce a regime of 'emergency' legislation that may contain deviations from ordinary legal rules even so far-reaching as to exclude normally applicable (broadly understood) constitutional guarantees.

In the Polish legal system, these are the Acts of 2002: the Martial Law, the State of Emergency Law and the State of Natural Disaster Law. At the same time, Article 233(1) and (2) of the Polish Constitution states that a statute defining the scope of restrictions on human and civil liberties and rights during martial law and the state of emergency may contain any modification of the normal legal regime, as

long as it does not restrict the freedoms and rights set out in Article 30 (human dignity), Article 34 and Article 36 (citizenship), Article 38 (protection of life), Article 39, Article 40 and Article 41(4) (humane treatment), Article 42 (criminal liability), Article 45 (access to the courts), Article 47 (personal rights), Article 53 (conscience and religion), Article 63 (petitions) and Articles 48 and 72 (family and child) and provided that the human and civil liberties and rights have not been restricted solely on the basis of race, sex, language, religion or lack thereof, social origin, birth and property.

In contrast, a different mechanism has been applied to emergencies covered by states of natural disaster. In such a case, as opposed to martial law and the state of emergency, the Polish Constitution explicitly specifies those areas in which the ordinary constitutional order may be interfered with. The provision (Article 233(3)) clearly stipulates that, in a state of natural disaster, the freedoms and rights set out in Article 22 (freedom of economic activity), Article 41(1, 3 and 5) (personal freedom), Article 50 (inviolability of home), Article 52(1) (freedom of movement and residence on the territory of the Republic of Poland), Article 59(3) (right to strike), Article 64 (right to property), Article 65(1) (freedom to work), Article 66(1) (right to safe and healthy working conditions), and Article 66(2) (right to rest) may be limited.[6]

On the other hand, for example, ILO Convention No. 29 on forced or compulsory labour[7] treats the following cases as emergency situations (force majeure incidents) giving right to a departure from the principle of freedom of work: war, disasters or threats of disasters such as fires, floods, famines, earthquakes, violent epidemics and cattle diseases, invasions by animals, insects or harmful plant parasites, and in general any circumstance posing a danger or risk of danger to the life or normal existence of the general population or a certain section of the population.

In contrast, in accordance with Article 16 of the European Convention on Human Rights[8], measures can be taken to repeal the application of obligations under the Convention to war or other public danger threatening the life of the nation.[9]

These examples alone show that the attribution to a given situation of 'extraordinariness' that allows such a situation 'to be treated' differently in legal terms is not straightforward. However, the present research does not seek to identify the substantive (essential) feature of 'extraordinariness' in the context of labour law, but only to demonstrate that this issue can also be debatable.

The examples referred to above also show that the legislator makes decisions and may make decisions also as to which specific solutions modifying the 'ordinary' legal regime will be introduced in these situations.

All this gives rise to the thesis of a possible differentiation of formal models of 'emergency' labour law.

[6]See also Golia, Hering, Moser & Sparks (2020).
[7]International Labour Organisation Convention No. 29 concerning Forced or Compulsory Labour adopted at Geneva on 28 June 1930.
[8]Convention on Human Rights, done at Rome on 4 November 1950.
[9]See also Sottiaux (2018) at 1063; Svensson-McCarthy (1998); Oraa (1992).

Types of Formal Models of 'Emergency' Law

First, it should be emphasised once again that, by referring to the formal model of 'emergency' law, we abstract from its substantive 'content', i.e. from what we used to call the content of the law, in this case understood as a set of specific legal solutions adopted in connection with the occurrence of a given extraordinary situation.[10]

Moreover, it should be noted that the observation of the 'behaviour' of the Polish legislator in connection with the occurrence of the Covid-19 pandemic provided a certain stimulus for the reflection on a possible typology of these formal models of 'emergency' law and, most importantly, the criteria according to which this could be done. This does not mean, however, that its conclusions cannot apply to emergencies other than a pandemic (epidemic) affecting the possibility of attainment of the objectives of the employment relationship or, more precisely, making such attainment difficult or even impossible.

The purpose is to highlight and demonstrate the differences between such model formal solutions, which I refer to as: the permanent model; the mixed model and the *ad hoc* model.

In the permanent model, firstly, a catalogue of emergency situations is predefined and, moreover, the manner in which the occurrence of these situations will modify the content of the legal relationship as defined in 'ordinary' law is predetermined.

In the mixed model, only the boundary conditions of both the assessment of 'extraordinariness' of a situation and the permissible framework of modifications of the content of legal relationships as defined in 'ordinary' law are pre-defined.

Then, in the *ad hoc* model, the legislator determines all these elements only in connection with the occurrence of a specific situation and only on the basis of current observation it assess its 'extraordinariness' and, at the same time, selects (creates, introduces) such legal solutions, which it views as desirable at a given moment (which obviously is also dependent on the 'dynamics' of the existing situation).[11]

The observation of the moves made by the Polish legislator in connection with the crisis of the Covid-19 pandemic and the lively social and political debate that arose following these moves allowed to draw preliminary conclusions relating to the assessment of the models defined in this way, taking into account their functionality, effectiveness and the degree in which they respect universal values which at the same time cannot be excluded in any situation and which the law should enshrine.

Consequently, given that any law should only provide for solutions that comply with the principle of proportionality in a broad sense, this should be considered extremely difficult, if not impossible, in the permanent model. In the event of occurrence of emergency situations that inherently represent a certain degree of unpredictability (both in terms of scale and in terms of the actual course of events), the principle of proportionality in the broad sense imposes the adoption of such

[10]See also Fatovic & Kleinerman (2013); Feldman (2010) at 163-164.
[11]See also Dyzenhaus (2005) at 2012-2015.

solutions (models) which feature a certain element of flexibility. This enables (as far as possible) to modify the 'corset' of legal provisions in such a way that, in the event of occurrence of situations significantly changing the circumstances in which the addressees of the law function, they still have the feeling that the law provides for fair solutions (in accordance with the principles of social justice on at least an elementary level).

From the axiological perspective, the *ad hoc* model should be treated with far-reaching caution. It is because we risk in this case the exclusion of the democratic mechanism associated with social dialogue (social and political discussion). In a democratic state, they should take place before, and not after, the legal amendments modifying the 'ordinary state of affairs', especially if these changes are significant. Democracy requires that all issues that are important to the situation of the subjects of the law (citizens, social partners and other stakeholders) be submitted to discussion, as far as possible; and this has no place in what is referred to as the *ad hoc* model. Indeed, the extent of flexibility of this mode leads to a situation where the law is changed on an ad hoc basis almost overnight, and such an approach further increases the risk of mistakes being made and provides a potentially large scope for abuse. Solutions which, at a given moment of time, seem good, functional and effective may ultimately prove to be flawed or even harmful in the long term. The public discussion, which is required by the democratic standard, should also take place in the time and under the conditions of relative calm, and not in an extraordinary atmosphere and under extraordinary circumstances.

From the point of view of the need to implement these values, a mixed model seems to be the most optimal. On the one hand, it meets the obvious need for flexibility in the way in which the legislator reacts to the occurrence of emergency situations and, at the same time, it allows only such a 'correction' of the law which (as a rule) has gained relative acceptance of its addressees, while, on the other hand, it brings a greater or lesser degree of flexibility indispensable for the introduction of extraordinary solutions, taking into account the need for their functionality and effectiveness.

The latter, i.e. functionality and effectiveness, should be assessed from the point of view of the primary reason for which 'extraordinary' solutions are allowed and introduced. It is the restoration of the 'normal' state of affairs – and thus the possibility of returning to 'ordinary law' ('everyday law').

Formal Model of 'Emergency' Labour Law adopted in Poland in connection with the Covid-19 Outbreak

The concept of the formal model of 'emergency' law outlined above and the proposed typology of such models and their framework assessment can be illustrated by a comparison with the actual normative context of 'emergency' labour law set by the legal solutions adopted in Poland in connection with the emergency situation that was the Covid-19 epidemic.

This context will be presented in the research area specified earlier. It is about the distribution of risk in the employment relationship, where the inability to

perform work is directly caused by epidemic restrictions imposed by the legislator, such as an order for a healthy employee to stay in home isolation or quarantine, a ban on certain types of economic activity, or a ban on leaving the place of residence, etc.[12]

Furthermore, this context (to better illustrate the findings made) will be limited only to the formal model of 'emergency' labour law adopted by the Polish legislator with regard to the distribution of wage risk.

Consequently, it should be pointed out that, although the mixed model could be used within the Polish legal system, the legislator decided to use *an ad hoc* model. Indeed, it introduced an incidental temporary regulation, which in principle does not use any elements of the permanent model. These are the statutes that are commonly referred to as anti-covid shields, which for the duration of the epidemic, introduced solutions that reduce (mitigate) the effects (costs incurred by employers) resulting from the distribution of wage risks existing in 'ordinary' labour law, but do not change the distribution of these risks in principle.

In fact, the legislator did not decide to solve this issue within the framework of a mixed model, which could have been used after a political decision was taken to declare a state of natural disaster within the meaning of Articles 232 and 233(3) of the Polish Constitution, and thus giving constitutional legitimacy to the change of the legal regime and the application of the solutions provided for in the statutes of 2002 and compatible with the Constitution: in the Act on the State of Natural Disaster and in the Act on the Compensation of Property Losses Resulting from the Restriction of Human and Civil Liberties and Rights during the State of Emergency.

With the adoption of the mixed model of 'emergency' labour law as referred to above, anyone who suffered a property loss as a consequence of the restriction of human and civil liberties and rights during such a state, and therefore also the employer who was obliged to pay downtime wages to the employee, would be entitled to a claim against the State Treasury for compensation of the property loss so caused. In such a system, the wage risk associated with downtime that does not result from the fault of either party to the employment relationship would be assumed by a public institution (the State).

Instead of adopting the mixed model, i.e. the 'permanent' regulation contained in the 1997 Constitution of the Republic of Poland supplemented by the "permanent' laws of ordinary legislation implementing it, which could be further supplemented by additional incidental (temporary) regulations within the framework provided for therein, a regulation was applied which consisted in:

1. granting financial assistance in an *ad hoc* fixed amount;
2. only to certain employers, also selected on an *ad hoc* basis;
3. when they fulfil certain (also *ad hoc*) conditions.

In parallel to these solutions, the possibility of mitigating the adverse effects of the situation on employers has been provided, including by allowing collective

[12]See Bosek (2022) at 2.

agreements limiting or modifying certain labour rights, which in practice have most often been imposed or forced on social partners by employers.

This was accompanied by certain reactions voiced in occasional and current public discourse: uncertainty as to whether, and if so what, solutions will be introduced by the legislator to deal with the situation; the feeling (caused by the short time perspective) that the solutions introduced have not been thought through; the feeling of inadequacy of some of them and the difficulties arising in their application in practice, revealing the non-functionality and sometimes even the ineffectiveness of the implemented measures. There were also many other minor comments.

Summary

In the summary, it is nevertheless worth highlighting another general yet extremely significant conclusion.

The point is that the research carried out so far inevitably seems to bring out the need for a scientific reflection on the labour law, also in the area of the function of that law, which should be directed at reducing uncertainty.

By this uncertainty I mean the lack of predictability of legal solutions that may be applied in connection with a possible occurrence of emergency situations that require the application of extraordinary solutions in relation to such a sensitive sphere as the acquisition of income through or by means of human work (which affects both the employer and the employee). The scale of this uncertainty increases as the likelihood of emergency situations increases, and these (as studies shows) are beginning to affect humanity with increasing frequency.

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