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Non-Discrimination Principle as the Fundamental Rule of Labour Law and Developing Factor – Polish Perspective

Introduction

The origins of an idea of equality must be looked for in ancient Greece, particularly in ramifications pursued by philosophers of those times. They observed that the notion of equality is inherently connected with the notion of justice. This is manifested in philosophy of Aristotle, who advanced his thoughts on equality in Chapter "On Justice" in one of his works called Great Ethics. Aristotle perceived two kinds of justice – one based on law, and the other, having its pinnacle in relations with another man. The first one is manifested by undertaking deeds that are desired by law, and justice would be done through such deeds and, as consequence of undertaking such deeds, man would become just and live in accordance with justice that, as recognised by Aristotle, would raise to the ranks of virtue. The philosopher himself, however, cautioned that under such perception man would become just by himself. Despite an assumption made by the philosopher that the lawgiver orders undertaking good deeds, and punishes for bad deeds, or even for failure to undertake noble deeds, however, since justice is removed from interpersonal relations there is no place for the notion of equality in it. In such case, of key importance is the second notion of justice that the essence of which is justice towards the other man. The philosopher calls such justice towards others equality. Aristotle perceives equality in equality of distribution – so that everyone would distribute a proper quantity of good and bad things to themselves. Moderation is an important component of equality, as it involves preserving balance between superfluity and scarcity. In the philosopher's theory, man who collects for themselves does harm to others. Aristotle calls an ability of finding oneself between these two extremes justice, while the golden mean in between them he defines as equality. It is worth noticing that the Greek word homo (Gr. man) originates from the term *homoioi*, translated as "equals". The philosopher discerns two basic types of equality – numerical equality that awarded the same rights to everyone and proportional that rested obtained good on a property selected criterion, mostly on merits. He is clearly in favour of proportional equality[1]. In Aristotle's view equality is seen in reflection of efforts employed by a person in their actions that generate achieved results. High payment received by a person who has undertaken significant efforts must proportionally correspond to payment for a person whose efforts have been smaller. Additionally, such persons' voluntary waiver of rendering equality towards them does not disturb its overall applicability, since such persons waives rights they are entitled to due to some reasons and suffered reduction is somewhat compensated. If man really acts in a voluntary fashion, then he does not harm himself by selecting inequality, since it is his choice. It must be noted that there is no opposition between numerical equality and proportional equality. If people demonstrate some

[1] cf. Aristotle, Politics, Warsaw 2003, p. 64: "it is thought that justice is equality, and so it is, though not for everybody but only for those who are equals; and it is thought that inequality is just, for so indeed it is, though not for everybody, but for those who are unequal" [translation by Harris Rackham], cf. also Aristotle, Nicomachean Ethics, Warsaw 1981, p. 168

feature to the same extent, then equalising their situation shall be fully compliant with both assumptions of numerical and proportional equality alike.

Summarising, justice is the basis for a principle of equality, as equality finds its origin in it. The role of justice in selecting relevant, just criteria that are of importance for the position of assessed entities. Primarily, it must be differentiated from full equivalence and identity that is just only of the types of equality that exists when various entities are characterised by an equal degree of a feature based on which they are assessed or when all differentiating criteria are unjust. Then, humanity may be recognised to be such feature as everyone is characterised by it to the same extent.

Concept of Equality of Opportunities

In modern philosophy, equality of opportunities (horizontal equality) is referred to as a separate type of equality next to proportional and numerical. It is an extremely complex issue since life prospects and each specific situation depend on very numerous factors. Some of them are at least partially independent from actions of a person they apply to. These, among others, include the place of birth, family membership, wealth, health, abilities, lucky coincidences, or simply sex. Nonetheless, some of those, such as education or perseverance and diligence may be extensively influenced by persons. Equality in such perception means identical conditions prior to commencement of actions. It means seeking to minimise importance of factors that are independent from acts of a specific man, and which for example include, background and everything that is related. Sex is one of the features that man has the least influence on, so it should affect certain situations only to the narrowest extent. A concept of equality of opportunities is just aimed at linking a position a person may attain as much as possible with decisions taken, actions, and efforts pursued and with other factors that are dependent on such person. Under the concept, it is acceptable to differentiate situations based on factors that are independent of a person that to large extent are fortuitous and arising later, already when persons have undertaken actions, such as luck. Under such perception of equality, persons having similar abilities should have a comparable situation at the beginning. The concept of equal opportunities is not, however, aimed at subsequently guaranteeing people an identical position. Equality as a principle that fulfils a function of justice must be assessed as the one that brings about full consequences in reality and also evaluated through the prism of such consequences. Guaranteeing equal opportunities enrolling to a given university to persons who come from poorer families may be a classic example of implementation of the concept of equality by means of providing them with financial support, however, without favouring them in case such persons display any lesser abilities compared with other candidates.

Characteristics of the Equality Principle in the Light of Law

The principle and notion of equality has been subject to numerous philosophical and theoretical ramifications. It is recognised as one of the most ambiguous, complex, and undefined rules. Considerations given to the notion of equality have been also pursued in its judicial decisions by Poland's Constitutional Tribunal. Noticing numerous criteria of perceiving justice it has been in favour to follow distributive justice as the most equitable one. The Tribunal has referred to an idea of proportional equality concluding that a principle of equality orders equal treatment of peer entities and unequal treatment of entities that are not peer, though differentiation itself must be justified by means of employing relevant

assessment criteria of classification that differentiates such entities[2]. Justice under such concept originates from selection of a similar properly selected differentiation criterion that is applied to all. Equality before the law is subject to division into two subcategories[3]. First - sensu stricto equality refers to application of law ordering equal use of norms in all cases that are hypothetically governed by them. The second dimension of equality is equality under the law, focusing on the content of the law and consisting in assessment of application of relevant criteria of differentiating entities and consequences of specific differentiation to maintain equality. It orders not to apply discriminatory regulations favouring certain groups in established norms. Following philosophers' views, the Tribunal treats equality as originating from justice. Therefore, it sees a necessity of justified assessment of solutions that shall allow concluding whether a specific solution pursues the postulate of equality. If there are any differences in distribution of goods that must be recognised as unjust on the basis of fundamental sense of justice, then in such case the principle of equality shall be undermined, and such differences shall manifest departure from the principle of justice that occasionally may be recognised as a form of discrimination or preference. Also equal treatment of entities that are substantially different in terms of major criteria will have to be recognised as an act of discrimination or preference and thus being contrary to the principle of equality before the law. It is, however, possible to depart from such principle, especially in cases referring to distribution of goods, when a given entity experiences a situation of a relative shortage. A feature that is used as a criterion of differentiation in the situation must be actual and substantial from a perspective of specific differentiation. Differentiation of situations of entities on the basis of a feature that is irrelevant to a specific situation may also make given differentiation defaulting on the principle of equality before the law, especially if the situation caused is found to be contrary to the sense of justice. If despite application of an insignificant criterion of differentiation, the existing decision is not compliance with the principle of justice, criticism shall only cover selection of a differentiating feature, and not the final solution of the situation. What is more, if there is a conflict between the principle of justice and the principle of equality, the first one shall prevail and differentiation shall be admitted as justified. Nonetheless, each departure from the principle of equality must be justified by the principles of justice and related to other recognised Constitutional values, principles, or norms that justify such differentiated treatment. By combining the notion of equality with proportional justice and by perceiving it through the prism of equality and similarity, the Constitutional Tribunal's understanding explicitly refers to Aristotle's views. Similar interpretation is applied by the Court of Justice of the European Union. The Constitutional Tribunal has given a very high rank to the principle of equality that allows even a change of rights that have already been acquired provided that the essence of such rights included in the Constitution is maintained. It should be considered in relation to rights that are compliant with the principle of social justice. Assessment of the equality of situations of specific entities, implementation of the principle of justice, and thus, also the effectiveness of regulations within a given extent shall necessitate comparison of situations of specific addressees and check if it is possible to indicate a major feature that they demonstrate to an equal or different extent and which sufficiently would justify equal or appropriately differentiated treatment.

The principle of equality before the law is fundamental, however, a relative one, and thus not every departure from it shall be perceived as an unacceptable act of discrimination or preference, since it shall require additional assessment of the criterion based on which such differentiation is made. In order to be recognised as acceptable, such differentiation must be however deeply rooted in the Constitutional principle of justice. If the criterion does not find

[2] Judgement of the Constitutional Tribunal of 9 March 1988 Ref. No. U 7/87 OTK 1988, No. 1, item 1

[3] Judgement of the Constitutional Tribunal of 24 October 1989 Ref. No. K 6/89, OTK 1989, No. 1, item 7

justification in any perception of the principle of social justice, it shall be recognised as a form of discrimination or preference.

Differentiation into Formal and Substantive Equality

There is formal and substantive equality distinguished out of a general legal concept of equality. It seems that part of the theory of law rightly so relates a formal dimension of equality with equality before the law, while a formal aspect is linked to equality before the law[4]. Formal equality's objective is equal treatment of entities in compliance with the law. It is identified with absolute equality, guaranteed under the law. It denotes a relation between entities whose features are non-differentiable. In case of formal equality, any differentiation, even based on premises that are recognised as objective shall be deemed to be inadmissible and harmful[5]. It rests mainly on negative activities, fitting into assumptions of a liberal model of state that does not award additional privileges and that seeks minimising formal constraints within access to goods, services, education, or professional career. Such interpretation seems to be insufficient, since thus many consequences are not considered that should be brought in under an assumption of equality among people. Its attainment may consist both in raising and lowering the level of protection. It requires comparing an assessment of similarities among entities and situations. A risk is mentioned that in such case there is a threat of having a stereotyped view that assumes a model dominating in the past as a point of reference. It is orientated on protection against discrimination of a specific person and not entire groups that is set to protect. A rigid nature, having little flexibility is also its another fundamental drawback. Basic limitations of this concept have resulted in a necessity of separating a concept of substantive equality that will fill in the established gaps. It should be recognised, however, that in many situations a formal perception of equality shall suffice.

Substantive equality's objective is to eliminate discrimination and ensure equality in practice, which is why it assumes undertaking positive actions, too, which are aimed at corrective measures and those that seek implementation of the idea of social justice. Substantive equality allows including only direct forms of discrimination, since it focuses on protection against application of the prohibited criterion of differentiation. It allows taking into consideration a specific position of various categories of persons under additional aspects, among others, biological, economic, cultural, social, and historic even. A substantive approach to equality provides for both equal treatment of groups and differentiation of their situation depending on similarities and differences between assessed groups. This concept is to implement actual equality to the broadest possible extent.

The equality of changes may also be distinguished between both concepts of equality. Unlike substantive equality the purpose of which is to ensure proper, just results, the equality of chances is to ensure an equal position only at the start. Like substantive equality, such concept may require undertaking positive actions.

Equality of Sexes in Employment under International Law

In today's world equality is one of the primary pillars used to perceive man. It has been reflected in numerous acts of law; it is inherently linked with the concept of human rights.

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[4] cf. T. Tridimas, The Application of the Principle of Equality of Community Measures [in:] The Principle of Equal Treatment in E.C. Law, A. Dashwood, S. O'Leary, London 1997, p. 214 [after:] J. Maliszewska-Nienartowicz, Dyskryminacja pośrednia w prawie Unii Europejskiej, Toruń 2012, p. 30

[5] M. Głogowska, Kryterium „pracy równej" i „pracy równej wartości" jako czynnik różnicujący [in:] Studia z zakresu prawa pracy i polityki społecznej ed. by A. Świątkowski, 2011, p. 51

The Universal Declaration of Human Rights of 10 December 1948 is the basic act of law that emphasises how important perception of equality of people is. Its Article 1 states that *"All human beings are born free and equal in dignity and rights"*. Article 26 of the International Covenant on Civil and Political Rights guarantees that all persons are equal before the law and are entitled to the equal protection of the law and commits the State Parties to statutory protection against any discrimination on any ground. It must be noted that equality and a discrimination ban are particularly often referred to in acts of labour law. In Article 7 the International Covenant on Economic, Social and Cultural Rights commits the State Parties to the Covenant to guarantee to all workers equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work. In addition, the State Parties must ensure equal opportunity for everyone to be promoted in his employment to an appropriate higher level, subject to no considerations other than those of seniority and competence. Furthermore, the two UN Covenants directly commit the State Parties to ensure for both women and men, to the same extent, a possibility of using the rights referred to in them. The European Social Charter recognises the right of men and women workers to equal pay for work of equal value. The Declaration of Philadelphia of the International Labour Organisation (ILO) that currently forms part of the ILO Constitution stated that all human beings, irrespective of sex of other listed factors, have the right to pursue, among others, their material well-being and their spiritual development in conditions of freedom and dignity, of economic security and equal opportunity and that the attainment of the conditions in which this shall be possible must constitute the central aim of national and international policy. In addition, a special role in counteracting against discrimination in legal and employee-related regulations is provided in Convention No. 111 of ILO derived from the Declaration of Philadelphia and which concerns discrimination in respect of employment and occupation. An issue of equality of men and women in respect of occupation has also been undertaken by the UN in the Convention on the Elimination of All Forms of Discrimination against Women committing the State Parties to it to undertake any measures to eliminate all forms of discrimination against women, especially in respect of the right to work as an inalienable right of all human beings, the right of employment, the criteria for selection in matters of employment, the right to [free] choice of profession, the right to retraining, the conditions of employment, the right to remuneration, holiday, the evaluation of the quality of work, the right to protection of health and to safety in working conditions, including the safeguarding the function of reproduction, and issues relating to social security. The State Parties are also committed to introduce protection for women during their pregnancy and maternity leave with pay or with comparable social benefits without loss of former employment, seniority or social allowances.

Equality of Men and Women in the Constitution of Poland

Regulations of labour law concerning equality of men and women in respect of employment are solely derived from the obligations of Poland under international treatises and conventions. Currently, the Constitution of the Republic of Poland is a special and primary source of law which already in the recitals establishes that the citizens are equal in their rights. According to Constitution experts this is confirmed by Art. 32 of the Constitution that adds that no one shall be discriminated against in political, social or economic life (so, under employment relations, too) for any reason whatsoever[6]. It already covers all natural persons,

[6] so W. Skrzydło, Konstytucja Rzeczypospolitej Polskiej. Komentarz. - LEX 2013, unlike W. Perdeus [in:] Kodeks pracy. Komentarz, ed. by K. W. Baran, 2012, p. 98, indicating that the principle of equal treatment in employment is not authorised under Art. 32.1

and even legal ones, which, from a perspective of equality of sexes is of no importance. The principle of equality may be treated not only as the one on which the political system rests, but also as subjective law (in such approach, it is referred to as the right to equal treatment)[7]. As regards sexes, this regulation is particularly emphasised and additionally, expanded in Art. 33. Men and women shall have equal rights, in particular, regarding education, employment and promotion, and shall have the right to social security, to hold offices. They shall have the right to equal compensation for work of similar value. It seems that both provisions shall apply not only vertically, but also horizontally[8], which allows their direct application in relations among entities.

Though tradition and practice indicate that elimination of any discriminatory behaviour is hard to attain[9], it must be recognised that manifestations of discrimination in employment in respect of sex are unacceptable already at the level of the Constitution that obliges state authorities to counteract them not at the legal level, but also in any measures that shall be reflected in actual life. It is worth noting that perception of the principle of equality by the Constitutional Tribunal has been referred to on numerous occasions and re-confirmed in judgements issued in subsequent periods. Also as established in the Constitution, equality is strictly related to the principle of social justice, departure from the principle of absolute equality is possible when it is just and is of the so-called corrective nature[10], or it serves equality under a substantive approach. Awarding bigger rights to women than men does not violate the Constitutional principle of equality of sexes[11].

Equality under Social Market Economy

Provision of work fulfils a number of functions and it to attain numerous goals, without satisfaction of which it is hard to talk about reasonable performance of obligations. Equality of sexes and equal treatment of men and women in employment must be perceived in the context of such postulates. Work allows increase of production of goods and services through which it contributes to social welfare growth. In such context, it must be noted that a service provided by a specific sex person may be of a different value in the assessment of customers than the one provided by an opposite sex person. Under such perspective, it shall be possible to justify a certain departure from the principle of equality to ensure maximum efficiency of work.

An earning function is another key function of work. It is derived from an observation that for the majority of people work is the primary, if not the only sources of earning for a living, so it plays a special role in their lives. Additionally, obtained remuneration that allows satisfying primary life needs is the only form of motivation for a significant number of those employed to provide work. The principle of equality must also be applied with regard to needs of the employee and his persons next of kin who are to be provided for indirectly through provision of his work for others. Both these functions are strictly related to mechanisms that operate within social market economy. Furthermore, equality and also justice shall be given different, specific content and meaning depending on political views and

[7] I. Pużycka, J. Wojnowska-Radzińska, Zasada równości i zakaz dyskryminacji w Konstytucji RP [in:] Prawo wobec dyskryminacji w życiu społecznym, gospodarczym i politycznym, Warsaw 2011, p. 271

[8] A. Sobczyk, Prawo pracy w świetle Konstytucji RP. Volume II. Wybrane problemy i instytucje prawa pracy a ochrona konstytucyjnych praw i wolności człowieka, Warsaw 2013, p. 104

[9] W. Skrzydło - Konstytucja Rzeczypospolitej Polskiej. Komentarz. - LEX 2013

[10] I. Pużycka, J. Wojnowska-Radzińska, Zasada równości i zakaz dyskryminacji w Konstytucji RP [in:] Prawo wobec dyskryminacji w życiu społecznym, gospodarczym i politycznym, Warsaw 2011, p. 269

[11] Judgement of the Constitutional Tribunal of 03 March 1987 Ref. No. P 2/87, OTK 1987, No. 1, item 2

the way the world is perceived. Under a liberal approach, a guarantee of equality before the law shall suffice and provision of the equality of opportunities to recognise that access to market, including the labour market is equal and just. Free market is just because of its openness and reliance on universal, equal rights for everyone, thus, all its participants, or employers and employees alike shall have equal opportunities to become successful[12]. On the other hand, however, free market has failed to guarantee just distribution of goods combined with security of such distribution. Since full competition makes it impossible for any of economic entities to permanently capture the market therefore competition mechanisms generate social injustice in the free market economy. Additionally, not all market players are characterised by equal personality features and capital resources. Scarcity of the latter ones usually stems from intergenerational inheritance of material goods, while personality features may be determined by genetically transmitted inclinations. This results in an impossibility of implementing entrepreneurial roles, inaccessibility of certain roles on the market, and thus entailing a sense of injustice and impression of inequality of opportunities. From a perspective of the labour market, ensuring the equality of opportunities for future generations in access to education, irrespective of sex, is an important tool that shall be used to mitigating disproportions with regard to issues concerning personality features in the future. A social-democratic approach to equality and justice, more characteristic for welfare state, shall seek to eliminate the above-referenced issues even at the expense of curtailing the market openness and universality of rights that its participants are entitled to. Nonetheless, there is, here, a need to ensure a far reaching just balance between increase of economic efficiency and provision of welfare to rank-and-file employees. It is, however, worth stressing that unlike civil law that emphasises the equality of parties, labour law is primarily focused on protection and provision of welfare for employees which should be indicative of an angle from which a justice-based character of the equality of sexes and direction of any actions leading to expansion of application of the principle of equal treatment of men and women in employment should be perceived.

Principle of Equality in Labour Law

The general principle of equality of sexes referred to by Aristotle or the Constitutional Tribunal has been transposed into Polish labour law in the form of a number of regulations that are to guarantee the equality of different sex persons. It is manifested in the provisions that establish an obligation of equal treatment and prohibition of discrimination under employment relations that are stipulated in Chapter II of the [Polish] Labour Code. The legislator has thus assigned them with a special role and rank of primary principles under labour law. The provision in Art. 11^2 the Labour Law grants equal rights to employees for the same performance of the same duties. The said provision is not derived from the Constitutional principle of the equality of everyone before the law that consists in granting equal rights to everyone in private law relations[13]. The Polish Labour Code does not prohibit differentiation of a legal situation of employees; it only requires applying and comparing objective criteria that are of actual importance, i.e. professional qualifications, the employee's abilities, commitment during performance of the same duties by different employees[14]. It is possible to differentiate a situation in terms of their personal traits and differences in work

[12] K. Leśniak-Moczuk, Równość i sprawiedliwość w społecznej gospodarce rynkowej [in:] Nierówności społeczne a wzrost gospodarczy, No. 4, p. 230

[13] A. Sobczyk, Prawo pracy w świetle Konstytucji RP. Volume II. Wybrane problemy i instytucje prawa pracy a ochrona konstytucyjnych praw i wolności człowieka, Warsaw 2013, p. 105

[14] A. M. Świątkowski, Kodeks pracy. Komentarz, Warsaw 2010, p. 57

performance[15]. The employee's sex may not be such a personal trait which is emphasised in the wording of the provision. Article 11^3 of Labour Code provides for no discrimination in employment. It points out to a number of premises on the grounds of which discrimination of the employee is inadmissible, and the employee's sex is just one of them. As a result of implementation of directive of the European Union in 2003, the said regulations have been expanded in provisions in a separate Chapter IIa titled "Equal Treatment in Employment". Premises of inadmissible differentiation of the employee's situation have been stipulated in Art. 183a.1 of the Labour Code. The provision also establishes elements under which the equality of employees must be ensured. Thus, it is necessary to ensure the equality of employees at the stage of the terms and conditions of employment, training, and termination of the employment relationship. There is also an obligation of equal treatment of employee candidates with respect of establishment of the employment relationship, which has been light-heartedly formulated by the legislator in the above-mentioned provision[16].

Types of Discrimination

A number of bans on discrimination provided for in the [Labour] Code are to set a route for ensuring equal treatment of men and women in employment. This is related to actual variety of issues that occur in employment and is to lead to and guarantee equal opportunities for men and women, which is particularly emphasised as the essence of seeking material equality, irrespective of sex. It is the aspect of the equality of opportunities of sexes that is particularly emphasised in legislation of the European Union[17] and, under an EU approach it is a primary objective of the regulation. It is worth indicating that the regulations protect not only men and women against discrimination which is referred to by intuition, but they also are to guarantee just and equal treatment of transsexual persons who have undergone a sex reassignment surgery[18]. They shall not be, however, separately reviewed in this paper.

Addressee of the Discrimination Prohibition Because of Sex

The principle of equality and the discrimination prohibition first and foremost refer to the legislator. This is primarily derived from Constitutional regulations, but also from international obligations of the Republic of Poland. All acts of law should avoid unequal treatment of employees. First, it is the concept of the formal equality of different sex employees that is implemented.

It must be noted, however, that the most essential element of the employment relationship is a relation that is established between the employer and the employee. Despite complexity and details of the statutory regulation, employers have the largest influence on the situation of their employees. Such principle may be in conflict with world-views or fads of the employer, his concept of developing relations with subordinates or a vision of managing the plant, which is particularly important because the employer takes the risk for his hired employees. Because of the intricacy of relations and the employer's stronger position, it should be expected that also law, in terms of its content, shall affect

[15] Judgement of the Supreme Court of 12 December 2001, I PKN 182/01, OSP 2002, No. 11, item 150

[16] Light-heartedness of the legislator consists in using the term "not employing the employee", since the employer may refuse employing only a person who seeks employment and who is not entitled to the employee status.

[17] It is manifested in the names of legal acts, e.g. Directive 2006/54/EC of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, and also the wording of the recitals

[18] J. Maliszewska-Nienartowicz, Dyskryminacja pośrednia w prawie Unii Europejskiej, Toruń 2012, p. 121

the conduct of employers to ensure actual equality of the employed men and women. Under such approach, the formal equality in many cases turns out to be insufficient and it shall be necessary to apply solutions that implement the substantive equality to ensure fuller, actual equality of men and women.

Direct Discrimination

The Labour Code distinguishes two types of discrimination. Direct discrimination occurs when the employer directly applies an inadmissible reason for differentiation to use it as the basis for unequal treatment of his employees. It is explicitly based on a prohibited sex-related criterion as the basis for differentiating situation of persons employed. The most characteristic example of such discrimination is a provision included in one of the company's work rules that governs a situation of female employees in the plant in one way, and male employees in another – more or less favourably, without a reasonable base for such differentiation. Such type of discrimination is strongly related to the notion of the formal equality since under such approach, only acts of direct discrimination may be considered. Such form, however, is very rare, as employers avoid informing that sex is the sole reason for unfavourable treatment.

Indirect Discrimination

Indirect discrimination is the second type of discrimination currently distinguished by law. It occurs in situations where the employer applies apparently a neutral regulation, criterion, or action that result in an unfavourable situation of a person or a group of persons, especially, due to the same reasons that have been referred to in Art. 183a.1 of the Labour Code. It focuses on a substantive aspect of a specific legal measure, and it must be primarily related to the concept of equality under the law[19]. Discriminatory acts pursued in this form do not directly relate to criteria indicated by the law. A discriminatory nature of each action undertaken by the employer must be assessed *in concreto,* separately with respect to each situation that raises doubts. An example of such discrimination reviewed by the Court of Justice of the European Union involved exclusion of persons working half-time from an additional pension plan[20]. Women accounted for a significant majority of those employed under such contracts, given which, ECJ assumed that it was a sufficient premise to recognise such act as discriminating employees on the grounds of sex. ECJ ruled that if such exclusion affected more women than men, it was a prohibited act of discrimination, unless the enterprise would demonstrate existence of objectively justified circumstances not related to discrimination on the grounds of sex and justifying the said differentiation of a situation of the employees hired on a full-time or half-time basis. For differentiation of the situation not to be indirectly discriminating, it is necessary to justify such diversification by a lawful objective, or, primarily, an objective other than differentiation on the grounds of sex or other prohibited reasons, while assessing actual consequences of such diversification from a point of view of the prohibited criteria. It must be emphasised that such justification has to be objective. Primarily, permitted are objectives related to work ("flexibility", "mobility" of employees, their professional training, seniority, physical abilities, the quality of work provided by them) and to the enterprise (attracting the best possible professionals)[21]. If, however, physical abilities are directly derived from the employee's sex, such justification shall be insufficient.

[19] J. Maliszewska-Nienartowicz, Dyskryminacja pośrednia w prawie Unii Europejskiej, Toruń 2012, p. 28

[20] Judgement of the ECJ of 13 May 1986 in Case 170/84, LEGALIS No. 108829

[21] M. Wandzel, Nowy kształt kontratypów dyskryminacji po nowelizacji Kodeksu pracy, MoPr 2009, No. 5, LEGALIS 2015

Indirect discrimination, especially when it covers a group of employees, or all employees of the same sex, may exist under provisions of the enterprise's rules and by-laws, and the collective labour agreement, even. If such provisions exist, they shall be recognised as ineffective due to the content of Art. 9.4 of the Labour Code. It must be stated that provisions of Polish legal regulations may constitute an example of indirect discrimination on the grounds of sex, if despite neutral wording has been used in laws, a much higher percentage of persons of the same sex shall be actually treated less favourable when compared with persons of the other sex. The principle of sex equality shall not be violated, however, if the above-mentioned different treatment is properly justified by other objective factors. The above considerations bring about a conclusion that a ban of discrimination on the grounds of sex is very broadly understood.

Special Forms of Discrimination

Although the catalogue of discriminatory actions is an open set, the [Labour] Code distinguishes a few special forms. Another conduct that is recognised among discriminatory actions is every act the purpose or consequence of which is violation of employee dignity or creation of an unpleasant atmosphere around them. Such conduct is called harassment. When such conduct is conditioned by sex of a specific employee or a group of employees, it shall satisfy the features of sexual harassment. Acts of harassment may consist in both physical and verbal or non-verbal behaviour. They include encouragement to unequal treatment and ordering an employee to so behave. These are forms that could be included within a subjective range of norms that prohibit discrimination under employment conditions; however, due to a special character of such actions aimed at dignity of a human being, the legislator has decided to separate such provisions in Art. 183a.5-6 of the Labour Code.

Subjective Range of the Principle of Equality in Employment

Provisions of the Polish Labour Code do not explicitly refer to a specific addressee that is burdened with a discrimination ban. Nonetheless, it is quite differently in case of obligations to respect dignity and other moral rights of the employee or an obligation to provide employees with safe and hygiene working conditions that pursuant to the literal meaning of the provision are the responsibility of the employer[22]. The nature of a legal employment relation allows presuming that it is mainly the employer's responsibility. On the other hand, however, the principle of equality protects the employee not only directly against illegal actions of the employer, but respecting it may be required from all entities within the enterprise. The principle is supplemented by the content of Art. 94.2b of the Labour Code. The principle of equality does not limit the employer's obligation to passive refraining from discriminatory actions. It is obliged to actively undertake measures aimed at counteracting against any form of discrimination that may occur in employment. It is also indicated that as much as the order of equal treatment solely refers to employees, the discrimination ban applies to both parties of the legal employment relation and it may not be excluded that a situation would occur consisting in discrimination of employers, their representatives, or other persons acting on their behalf, e.g. through sexual harassment pursued by an important employee of the enterprise or discriminatory treatment of one of the enterprise's owners. The subjective scope of the discrimination ban covers all employees, irrespective of the type of the employment contract concluded with them. However, there are no grounds to believe that it shall be applied to employment relations other than those of employees. It must be

[22] cf. Art. 11^1 and Art. 15 of the Labour Code

noted that the discrimination band is not at all related to sex of the person that perpetrates a discriminatory act. Thus, there are no obstacles to assign a discriminating nature of the act to both a male employer who favours women at work, and a female employer who treats them in a worse manner without explicit reason for so doing. Discrimination may consist also in petrifying the already existing stereotypes relating to sexes[23].

Obstacles in Implementing the Principle of Equality on the Basis of Labour Law

It is indicated that together with discrimination on the grounds of age and disability, discrimination on the grounds of sex is most common in practice and most dangerous[24]. A different situation of men and women in employment may stem from various reasons. Differentiation resulting from actions undertaken by employers may be related to historical experience and stereotypes concerning employment of men and women in specific industries or their employment in general. It may also be related to personal prejudices concerning specific sex persons or actual intentions of the employer towards a given employee. When such situation is persistent and has its origins in opinions deeply rooted in beliefs of specific social structures, it is referred to as structural or institutional discrimination. It is an expression of social exclusion in its broader or narrower sense. No equivalence of the situation caused by an employee may arise from difficulties for women to combine their professional lives and family duties that historically are more expanded than those men are charged with. Another reason for unequal treatment may relate to a legal status, especially when it is combined with any of other reasons. Matured women, and also those young ones with small children are particularly exposed to discrimination on the grounds of sex. The main reason is a higher likelihood of becoming pregnant and taking a maternity leave and a high chance of leaving work to look after the child. Economic experience shows that the "invisible hand of the market" is not particularly successful in mitigating the disproportion in an employment situation of men and women. Given that and having regard to the equality of all people under human rights, it is necessary to implement far-reaching regulations that shall take into consideration the employee's sex. Primarily, it is legal regulations that are to implement the principle of equality. Discriminatory acts may, however, stem not only from directly provided laws, but also from mindsets of employees and employers, given which a way to counteract such situations is made very much difficult. In the current economic situation, labour law is a very specific sphere of law that governs relations among entities among which there exist numerous and unequal economic dependencies. Law must also provide for implementation of the principle of sex equality in employment, also by external entities that employers are. An employee or an employee candidate usually shall be in a much weaker position than their prospective employer. Additionally, a conflict with the principle of freedom to develop legal relations by interested parties may arise as the employer, irrespective of its will, shall be obliged to modify contracts that have already been concluded not to become charged with discrimination allegations. Thus, the employer shall become an entity that implements assumptions of social justice. This principle may, however, be contrary to the basic mechanism of the free market, i.e. competition also among employees. Simultaneously, it negates functions that such process is to fulfil in the socio-economic system[25]. This is indicative of a deep relation of this issue also with political and sociological ones.

[23] Przeciw dyskryminacji. Poradnik Rzecznika Praw Obywatelskich, "Biuletyn RPO" 2013, No. 78, p. 12

[24] L. Florek, Zakaz dyskryminacji w stosunkach pracy [in:] PiZS No. 1/1997 p. 4

[25] B. Michalski, Równość a konkurencja w perspektywie ekonomicznej, [in:] Równość w Unii Europejskiej – teoria i praktyka, p. 188

Mechanisms of Protection Against Unequal Treatment

The basis route to protect employees against unequal treatment is their right to claim compensation for unjust development of their situation. As provided for in Art. 183d of the Labour Code, it may not be less than the established amount of minimum remuneration. There is no upper limit for sought claims, which allows seeking compensation in amounts that actually correspond to suffered violations. This is of significant importance in situations where illegal actions pursued by the employer are particularly harmful, such as sexual harassment or mobbing. Because of the public law nature of violation that discrimination is, it is necessary to have a possibility of assigning guilt to the employer. Private law violation of the equality of rights under Art. 11^2 of the Labour Code, as being independent of circumstances, does not require the employer's guilt. It is of importance in acts of sexual harassment perpetrated by the employee's superior about whom the employer did not know. If the employer has exercised best efforts to counteract them, it shall not be held liable for them.

Another guarantee the purpose of which is to provide protection for employees who claim their rights and persons providing them with assistance is a principle pursuant to which filing a suit against the employer may not be a reason justifying termination of the employment relationship or any other treatment less favourable than in case of other employees. This principle is to guarantee for employees that their actions shall not bring about adverse consequences for them. In many case, another regulation would lead to lack of actual liability of employers, since a hiring party would always have a retaliatory tool against an employee that in his opinion is disloyal. Extending protection to persons who provide assistance in seeking claims is a response to any difficulties in substantiating violations. Similar protection against any adverse consequences is provided to a person who has subjected themselves to or opposed acts of harassment and sexual harassment.

There is a fundamental difficulty in seeking claims for violation of the principle of equal treatment because of uncertainty of a criterion that the employer has been actually guided by, which is noticeable particularly in indirect discrimination. This is related to difficulties concerning evidence and actual uncertainty as to what the employer has been guided by while developing situation of its subordinates in such and in not another way. Another improvement is a change in the distribution of the burden of proof generally provided for in Art. 6 of the Civil Code to such that is the responsibility of the employer pursuant to Art. 183b.1 of the Labour Code. This obligation is not the responsibility of the employee who is to prove legal consequences. The employee is initially charged with the burden of proof in a discrimination case and must only substantiate that his rights have been violated[26]. As regards cases of indirect discrimination even a requirement of indicating facts from which a charge is derived may raise difficulties. However, transfer of the final burden of proof onto the employer shall be interpreted by the theory of law as confirmation that equal treatment is a public law obligation of the employer so that is why it is obliged to demonstrate the correctness of its actions[27]. It is not required to indicate a criterion that could have been the basis for discrimination. It is sufficient to indicate a consequence of violation, or failure to achieve an objective desired by a person who feels discriminated against others who have achieved such objective. Nonetheless, when a reason for discrimination is not obvious, as it is so in case of indirect discrimination, it is assumed that it is all right when a discriminated person indicates a probable prohibited reason for differentiating his own situation and that of

[26] A. M. Świątkowski, Kodeks pracy. Komentarz, Warsaw 2010, p. 62

[27] A. Sobczyk, Prawo pracy w świetle Konstytucji RP. Volume II. Wybrane problemy i instytucje prawa pracy a ochrona konstytucyjnych praw i wolności człowieka, Warsaw 2013, p. 116

another employee[28]. However, there is no such need. An obligation of the employee to provide evidence of discrimination would make the principle of equality fictitious. It is the employer who knows the reason for different treatment of his subordinates may defend himself against actual allegation of discrimination by demonstrating that he has been guided by just criteria[29]. Transfer of the burden of proof is a basic form of facilitating for employees seeking their rights in relation to discrimination and unequal treatment provided for in the Labour Code, and which is of importance particularly in cases of acts of indirect discrimination. It is also to guarantee that the employer shall differentiate the situation of employees only in situations when he could convincingly justify his decisions.

Equality of Sexes and Special Protection of Employees

There is an issue of balance between the principle of equality of sexes, and extending special protection onto employed women. In the light of general elements of the principle of equality, each departure from the model of numerical equality through provision of special protection to women employees or men employees shall have to be objectively justified in terms of broadly understood features of their sexes to be recognised as not violating the principle of equality of sexes in employment. Additional protection shall always refer to substantive equality or the equality of opportunities. Positive actions related to it sometimes are described as positive discrimination or reserved discrimination[30].

From the beginning conventions and recommendations of the International Labour Organisation have presented a conservative approach to work by women and extended special protection to them. This has resulted in impossibility for women to be employed in certain positions, and in some cases in entire industries[31]. It may be considered, whether such ban on employment is an entitlement or rather harm for men who may be employed. Such ban is to protect women from harmful working conditions resulting from performance of work in specific positions. It may be doubtful whether such ban does not violate the principle of equality. Such banks have provided solely for an impossibility of undertaking work in case of certain working positions only and such that pose a real hazard for woman's health[32].

Pursuant to the previously express concerns, protection of women in such extent has been questioned by the European Community just because of violation of the principle of equal treatment, irrespective of sex. Under an EU approach, the only reasons justifying privileged treatment and special protection of women in labour law is woman's pregnancy and maternity[33].

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[28] K. Gonera, Rozkład ciężaru dowodu w sprawach o dyskryminację w zatrudnieniu w świetle orzecznictwa Sądu Najwyższego, Warsaw 2011, p. 10

[29] A. M. Świątkowski, Kodeks pracy. Komentarz, Warsaw 2010, p. 58

[30] J. Mikołajewicz, Dyskryminacja jako naruszenie godności ludzkiej. Na marginesie orzecznictwa Trybunału Konstytucyjnego [in:] Prawo wobec dyskryminacji w życiu społecznym, gospodarczym i politycznym, Warsaw 2011, p. 186

[31] K. Walczak, Szczególna ochrona czy bezwzględna równość? – dylematy związane z dopuszczeniem kobiet do prac tradycyjnie uznanych za męskie, MoPr 2008, No. 4, LEGALIS 2015

[32] U. Jackowiak, Rola prawa pracy i prawa socjalnego w ochronie praw i interesów kobiet, [in:] Ład społeczny w Polsce i Niemczech na tle jednoczącej się Europy. Księga pamiątkowa poświęcona Cz. Jackowiakowi, Warsaw 1999, pp. 394-395.

[33] K. Walczak, Szczególna ochrona czy bezwzględna równość? – dylematy związane z dopuszczeniem kobiet do prac tradycyjnie uznanych za męskie, MoPr 2008, No. 4, LEGALIS 2015

Penalties for Non-Compliance with the Principle of Equal Treatment of Sexes in Employment

The basic weakness of Polish anti-discrimination law is poorly developed procedures to countermeasure discriminatory acts. A possibility for the employee to directly seek their rights under violated entitlements is missing. A weakness of regulations is lack of sanctions imposed on the employer in the event of discriminating practices pursued by it on the grounds of sex. The only threat for the employer-person is a necessity of paying damages for undertaking illegal actions. Focusing regulations on redressing harms inflicted against an employee who has been unlawfully treated is right and just. It may, however, raise doubts, if it also fulfils a preventive function that is to refrain employers from undertaking discriminatory practices in the future. It shall be particularly visible in discriminatory remuneration of employees of one sex where the employer primarily exposes itself to damages calculated on the basis of a difference between employees of one sex who are better paid and those of the opposite sex who are worse paid. Damages may consist solely in compensation based on an unpaid part of remuneration together with interest. Nonetheless, the employer has a chance that an employee would never raise a claim against it. It thus seems that some of the discriminatory acts do not bring about a threat for the employer of suffering high adverse economic consequences. There is no provision that would correspond to Art. 35.1.3 of the Trade Union Act that provides for a possibility of imposing a fine, and even a penalty of imprisonment on the employer who discriminates against the employee because of their membership in the trade union[34].

A properly formulated regulation would have the employer liable not only for the damage and injustice inflicted by its actions, but it would also take into account personal liability, not directly related to the legal relation binding it with the discriminated employee. There is also an opposite view postulating that implementation of severe sanctions for employers would not lead to solving a problem. Arguments supporting this view relate to the fact that non-compliance with regulations primarily is driven by a specific nature and difficulties in identifying discrimination occurrences even in case of employers who wish to prevent them[35].

Parities Forcing a Relevant Relation Between the Number of Employees of Each Sex

One of the issues concerning the equality of sexes in employment that is regularly raised by women involves clear disproportions in the number of employed women to the number of employed men. One of the ideas to counteract such disproportions is to statutorily introduce parities, referred to as sex quotas - or legal requirements concerning a percentage share of employees of each sex in a given case. A first such step is a proposal of a directive of the European Parliament and of the Council on improving the gender balance among non-executive directors of companies listed on stock exchanges. The proposal assumes obliging the Member States to implement a requirement into their legal systems that women should account for at least 40% of supervisory board membership in companies listed on stock exchanges and employing minimum 250 persons. Justification for introducing such regulation is the current under-representation of sexes among members of such supervisory boards. In Poland, women account for some 12% of members of management boards and supervisory

[34] Any person who in connection with their position of function held: […] 3) discriminates against the employee because of their membership in the trade union, non-membership in the trade union,
or holding a trade union function − shall be liable to a fine or imprisonment.

[35] G. Spytek-Bandurska, Równouprawnienie kobiet i mężczyzn na rynku pracy w praktyce pracodawców [in:] Równouprawnienie kobiet i mężczyzn na rynku pracy w praktyce, Warsaw 2010, p. 41

boards of large stock-exchange listed companies. It is worth mentioning that the percentage is not much lower than the average percentage of women-members of supervisory boards calculated for the entire European Union that currently stands at 14%. Additionally, the envisaged percentage of women sitting in supervisory boards is much higher that ratios currently shown even in EU Member States that commonly have the highest percentage of women in supervisory board (Latvia – 26%, Finland – 27%). This is not the ratio that is impossible to attain. Countries such as Norway or Iceland that are not Member States of the European Union may serve as an example here. As late as in 2004 some 9% of members of supervisory boards in Norway were women, which was a percentage similar to the ratio valid for the European Union Member States[36]. Presently, Norway has a percentage of women in supervisory boards in the largest stock-listed companies at 44%, while Iceland has managed to achieve a still higher percentage with 49% women sitting in companies' authorities[37].

It must be considered whether introduction of a legal instrument such as parity shall actually provide for broader than before implementation of a postulate of the equality of employees of different sexes in employment. Based on the above-quoted example, the first observation that comes to mind refers to such instrument's focus on protection of interests of women. It is also said that it shall be beneficial for managed companies since the balance of sexes limits companies' risks and contributes to their profitability, and, furthermore, statistically, women are better educated than men and account for 60% of university graduates in Poland[38]. The European Commission has pointed that women represent different leadership styles, have a positive impact on a group's collective intelligence and are more flexible and, statistically, attend a larger number of meetings of a given body[39].

The first charge against the postulate of sex quotas in supervisory boards is equal treatment of men and women is an observation that the said regulation does not assume introducing any similar regulation covering men that would guarantee male employees that it shall not result in supervisory boards being "women-dominated". As the 40-percent minimum refers solely to women-members in supervisory boards of companies, there is no legal guarantee that a percentage of women in supervisory boards does not exceed 60%, and a ratio of men shall not drop below a 40% threshold. Such solution may be recognised as undoubtedly more favourable from a point of view of women, as a form of compensation for years of an actually worse position in companies' bodies. It is, however, hard to contradict that it is a solution that leads to another inequality and discriminatory treatment of men. Equal treatment guaranteeing equality under a legal instrument which a parity is, would require implementing uniform employment thresholds for both sexes. It would be necessary to have a regulation predicting that, by way of example, a number of members of each sex sitting in companies' bodies may not be lower than a correctly envisaged percentage. It must also be noted that application of a sex parity with 50% of women and 50% of men, though guaranteeing equality would be extremely inflexible and non-functional. At the moment when a majority of the body's composition is known it would be necessary to search for members of a specific sex to comply with the regulations of law. Sex under parities becomes a purely

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[36] B. Jagura, Kwoty płci na stanowiskach kierowniczych – sprawozdanie z międzynarodowej konferencji naukowej w Sejmie RP, MoP 2013, No. 11, LEGALIS 2015

[37] M. Potocki, Bruksela wprowadza parytety do rad nadzorczych, http://forsal.pl/artykuly/747384,dyrektywaue-o-parytetach-w-radach-nadzorczych-spolek-gieldowych.html (accessed on 6 April 2015)

[38] B. Jagura, Kwoty płci na stanowiskach kierowniczych – sprawozdanie z międzynarodowej konferencji naukowej w Sejmie RP, MoP 2013, No. 11, LEGALIS 2015

[39] M. Romanowski, Czy prawo powinno wymuszać udział kobiet w radach i zarządach spółek?, MPh 2011, No. 2, LEGALIS 2015

formal requirement[40]. If the composition has a large number of employees of a given sex, the same sex would become an obstacle making it hard to employ people, irrespective of other employee features they may have and which are important for hiring them, such as education or experience they have. A candidate of a sex that is poorly represented among members of the body has a much larger chances to be accepted among members than a well-qualified candidate of the opposite sex. The lower the required percentage, the more flexible solution is from a perspective of selecting members of such body.

It is, however, worth considering whether the same instrument of parity is a real step towards implementing the principle of equality in employment. As it has been already mentioned, the proposed EU directive unquestionably does not implement a formal approach to the principle of equality. It is a consequence of complete lack of a guarantee in the proposed regulation to assure a comparable number of men sitting in companies' bodies. By its nature the parity instrument is focused on implementing the principle of substantive equality that is expressed in consequences seen in the labour market, it is aimed at mitigating actual disproportion in a number of employees of different sexes in given employment. Nonetheless, provision of an additional guarantee to ensure a proper number of men would make such regulation simultaneously implement both the principle of formal and substantive equality. By as much as the principle of equality perceived globally and manifested in statistical data has been actually expanded, the principle of equal treatment would be weakened in perception of specific employees. As already mentioned, a specific employee seeking employment in a workplace that is subject to the parity instrument would be differently treated depending on their sex. With solid representation of one sex among its staff, the employer would have to refuse another representative of such sex, irrespective of their qualifications and professional prospects. Their employment would result in an obligation of additionally expanding staff to include employees of the opposite sex who would have increased chances for employment only because of their belonging to a specific sex. It is a direct challenge against the equality of opportunities for men and women, since a factor such as sex that is independent of a person becomes a material condition for employing one person at the expense of the other. The concept of parity as such significantly distorts and is isolate from natural market mechanisms and may lead to employing staff only because to satisfy the requirements provided under the law. Equality of sexes in terms of selection of employees should be implemented by means of properly established, fair, and equal recruitment procedures applicable to both men and women and derived from just premises. They should bring about the largest possible equal treatment and employment of different sex employees in substantial independence from the industry, simultaneously without detriment to market mechanisms of selecting employees by employers. Research that the European Commission refers to does not prove any causal relation between presence of women in companies' bodies and positive performance of such companies, since the issue is more complex which is admitted by the European Commission, too[41].

Furthermore, shareholders are already focused on a company's good performance. An opinion expressed by Prof. Michał Romanowski should be shared who points out that there is no basis to believe that by limiting the role of women in stock-listed companies shareholders act economically irrationally, and that such intents are hardly to be assigned to them. Moreover, it should refer to the principle of alleged freedom applicable in private law;

[40] M. Romanowski, Czy prawo powinno wymuszać udział kobiet w radach i zarządach spółek?, MPh 2011, No. 2, LEGALIS 2015

[41] M. Romanowski, Czy prawo powinno wymuszać udział kobiet w radach i zarządach spółek?, MPh 2011, No. 2, LEGALIS 2015

efficiency of management of a company is and should be a superior criterion selected by investors, and not application of the sex criterion in running its affairs[42].

Summary

Given irreversible and continued increase in importance of women on the labour market the principle of equality of men and women in employment turns out to be one of the key principles that a state seeking implementation of the principle of social justice must follow. Labour done by women is increasingly common, representatives of the fairer sex have ceased to limit their jobs to those carried out at home. To an extent comparable with men they are a pillar for the economy, so because of that reason and in humanitarian terms and dignified treatment of men and women, every effort should be made to provide them with just treatment that is equal to that of men.

It is justice and proportionality of the regulation, and also its effectiveness on the labour market are approaches in the perspective of which the principle of equality of sexes should be perceived. As men and women significantly differ, equal treatment recognised as numerical equality does not suffice and it is thus necessary to look for differences that affect the situation of men and women and with the use of proper regulations stimulate proper and just treatment. Substantive equality should be sought that shall ensure just, equal opportunities, and to the broadest extent it shall provide for individual development of own situation on the labour market. All in all, it must be perceived functionally and implemented with natural, social differences in mind, or those that are forced by a broadly understood market.

The basic issue that law tackles in that sphere is how to check that the actual equality of sexes has been implemented in practice, especially by employers. Each act of preferring one sex whose situation is worse may bring about even worse perception of such sex employees, had such regulation not been put in place. It requires high caution in selecting instruments to level out natural inequalities so that an instrument that is too strong would not actually deteriorate the situation of employees and scare away employers on one hand, as it is them who shall be charged, while implementing its primary objective relating to equality, on the other. In short, proportionate, just structures should be selected, simultaneously weighing out benefits and threats. This is of particular importance especially in terms of privileges related to pregnancy of women and a social task of delivering children, since such condition is not only essential from a perspective of a woman-employee, but also the state's economy and its importance may not be otherwise replaced.

In the present situation, law seeks to maintain a just and functional balance between equal treatment of sexes during recruitment of employees. On one hand, a prospective employer may not freely develop its expectations about an employee's sex based on its own, unjustified expectations only. But on the other, law does not require from it to employ an employee who, on grounds of sex, whose actual suitability in a workplace shall be infinitesimal. It would be contrary to the primary role of the employment relationship and would make the principle of equality a rule that operates for itself, without a real function, thus creating a situation that is equally unjust, as if such principle had not operated. Similar just and equal treatment of men and women may be expected in termination of the employment relationship.

[42] B. Jagura, Kwoty płci na stanowiskach kierowniczych – sprawozdanie z międzynarodowej konferencji naukowej w Sejmie RP, MoP 2013, No. 11, LEGALIS 2015

The principle of just and dignified treatment shall also require equal treatment in terms of employment conditions. An employee has the right to expect that he shall not be treated worse only because of being a member of one sex only. A position of the employee shall make his rights equal. It is particularly problematic with respect to requirements set for the employee at work satisfaction of which may be more or less affected by their sex. Satisfaction of such requirements is thus strictly related to received remuneration that for a majority of employees is the most important reason for taking up a job. As regards that law, mainly because of judicial decisions by the Court of Justice of the European Union seems to be ailing, preventing differentiation of requirements in relation to sex, when it matters for the employee's efficiency. Since remuneration is to primarily cover the employee's needs that in case of both sexes are comparable, and also to reflect their efforts, such approach seems to be unjust. It is just from a point of view of the employer. The only advantage of such approach is the fact that while employing both men and women from a perspective of the employer is equally profitable, and thus the employer shall be less likely to show a tendency of seeking a specific sex employee.

Another approach to equality is the equality of remuneration of men and women outside a specific workplace. Although in case of discrimination by a specific employer, an employee may effectively seek claims under violated rights, it is also necessary to aim at overall mitigation of disproportions between remuneration received for the comparable work. First and foremost, stereotypes of women as persons on whose shoulders rests the task of maintaining the family and who are recognised as employees worse than men should be fought with.

Summarising, justice in treating men and women requires great caution and finding a just and functional golden mean. It seems that there are solutions that may still be implemented to even more effectively exercise the rights of employees. I do believe, however, that it must be recognised that currently the situation is good, and what is important, awareness of society with regard to knowledge of rights increases, with employers increasingly more positively perceiving women as employees, too. Times of unjust, unequal treatment of women in employment are sinking into oblivion.