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The "social organisation" of the workplace as a fundamental concept of labour law theory

„Organizacja społeczna" zakładu pracy jako podstawowe pojęcie teorii prawa pracy

Abstract
The workplace must be recognised as a key institution in the theory of labour law and this is beyond any doubt. The social consequences of failing to recognise the workplace can be dramatic. Moreover, in a situation where other human communities are scarce, the importance of the community of the workplace (especially if we remember about its relative stability) turns out to be fundamental. Thus, the importance of the community of the workplace is crucial not only for the individual, but also for the society. Since public tasks and public functions exist in labour law, and the workplace exists as a subject and the manager of the workplace exists as a governing body, this forces us to reflect upon the legal qualification of the workplace and its manager. As mentioned above, the need to build on this reflection turns out to be urgent in today's scholarship if we take into account the social dimension of the workplace as a community. Thus, there is an absolute necessity to determine the legal relations between the employee and the workplace, but also (or perhaps especially) between the workplace and the state. This is especially important today, when the workplace turns out to be almost the only significant instrument in the administration of the state with regard to entities which exist outside of strictly defined public administration. The construction of the workplace vests the state with enormous possibilities for organising and shaping the society.

Keywords
workplace, social organisation, labour law

Streszczenie
Autorka wskazuje, że uznanie podmiotu zakładu pracy jako kluczowej instytucji w teorii prawa pracy, to teza, która pod żadnym pozorem nie może budzić wątpliwości. Konsekwencje społeczne niedostrzegania tego podmiotu są bowiem drastyczne. Co więcej, w sytuacji nikłości innych wspólnot ludzkich znacznie wspólnoty zakładu pracy okazuje się fundamentalne. Ważkość wspólnoty zakładu pracy wybija się nie tylko w perspektywie pojedynczego człowieka, ale i całego społeczeństwa. Poprzez fakt istnienia na płaszczyźnie prawa pracy zadań publicznych i funkcji publicznych instrument zakładu pracy jako pewnej „podmiotowości" i osoby kierownika tego zakładu jako swoistego „organu" wymusza refleksję w zakresie prawnej kwalifikacji zakładu pracy i osoby nim kierującej. Zdaniem autorki potrzeba rozważań wokół tej refleksji jest w dzisiejszych badaniach naukowych „paląca", jeśli wziąć pod uwagę społeczny wymiar wspólnoty zakładu pracy. Istnieje konieczność ustalenia prawnych relacji zachodzących między pracownikiem i zakładem pracy, ale także, a może przede wszystkim, między zakładem pracy i państwem, zwłaszcza teraz, gdy zakład pracy okazuje się być prawie jedynym znaczącym instrumentem w administrowaniu państwem, jeśli chodzi o podmioty spoza administracji publicznej *sensu stricto*. Konstrukcja zakładu pracy daje bowiem państwu ogromne możliwości organizowania i formowania społeczeństwa.

Słowa kluczowe
zakład pracy, organizacja społeczna, prawo pracy

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Introduction

The similarity between labour law and administrative law in terms of the axiology of labour law as well as the legal construction of regulations has led me towards a reflection, perhaps the most important one in the context of the mutual relations between these two branches of law that I have recently pondered over. Namely, the workplace, i.e. a certain kind of organisation (which consists of people and, therefore, is social in nature), is crucial for perceiving labour law from the perspective of public administration (this is the third article of studies on the relationship between labour law and administrative law, cf. Musiała, 2020; 2021). Put simply, if we want to view the fulfilment of tasks or public functions within the realm of labour law, we always need to bear in mind that although we might be referring to "the employer", the discussion in fact refers to the workplace, with the employer being a certain "organ" or emanation of the workplace. This reflection fills me with particular joy as a researcher because it necessitates the appreciation of the human community at the workplace despite the considerable reluctance of the Polish labour law doctrine to accept the workplace as a human community and an administrative-legal construct of social organisation.[1]

First of all, it should be stated that the notion of "workplace" as an employing entity was removed from the Polish Labour Code in 1996 through the so-called major amendment.[2] The concept of "workplace" was replaced with the concept of "employer". Henceforth, it was the employer rather than the workplace that employed people. This led to immeasurable consequences. The amendment created a bilateral legal relationship between the employee and the employer, understood in terms of mutual obligations, where labour was performed but it was necessarily understood as a commodity. Other employees would, in a sense, "disappear" and, one might say, they did not exist from the perspective of this bilateral relationship between the employee and the employer. The consequences of these legislative "achievements" on the grounds of interpreting legal regulations turned out to be immense. The workplace, as a community of people, could not become a point of reference when subsequent legal norms related to labour were created because it "did not exist." And yet it absolutely should exist. After all, employees were still performing work in a group of people and the employees' situation in labour law was not only a legal situation between them and the employer (the head of the workplace), but also between the other employees.

For a few years now, the workplace as a subject of employment relations seems to have been revived in the literature on labour law. This is thanks to the remarkable contributions of A. Sobczyk in this respect, an author who has rendered considerable services to the doctrine in this respect.[3] Thanks to the scholarly effort of this particular author, the concept of a workplace has returned to its rightful position, at least in the related literature, as a key institution in the theoretical approach to labour law. There is no doubt that this is the right direction for scholarly inquiry as it constitutes a guarantee for the humanistic and democratic development of labour law.

However, a question arises as to the legal nature of the workplace. Therefore, knowing that the workplace is a fundamental concept in the sociologically viewed labour law, one should consider whether the workplace is reflected in the context of administrative law nomenclature in the context of close relations between labour law and administrative law with regard to the employment relationship. I believe that it this is absolutely the case. I claim that since the employer can be vested with a public task or since the employer is the addressee of commissioned functions, the workplace must necessarily become a social organisation in the light of administrative law, as mentioned in Article 5 para. 2 of the Polish Code of Administrative Procedure.[4] However, the importance of the workplace as a public administration entity becomes even more crucial when we consider the transformations occurring in administration as such. In other words, in order to see the fundamental role of the workplace as a social organisation in the context of public administration, one has to be aware of the changes occurring in public administration, and the latter seem to be increasingly expanding its subjective scope and becoming increasingly a "providing administration". Moreover, I believe that the workplace as a social organisation occupies a fundamental place in this broader subjective view of public administration. Therefore, I will discuss the issues one by one, although "backwards" in a sense, as I will first discuss the changing shape of public administration and the growing importance of the workplace as a subject of public administration.

Workplace as a public administration

The shortest way to describe public administration would be to say that it is the activity of the state, performed by specific public entities (Niewiadomski, 2015, p. 14). According to J. Boć (2007, p. 8), public administration consists in "the satisfaction of collective and individual needs of citizens, arising from the coexistence of people in communities, taken over by the state and carried out by its dependent bodies, as well as by the local government bodies." This object-and--subject-oriented approach to public administration is typically found in the works of many other authors, and not only in Polish literature (Lang, 2006, pp. 17 et seq.). However, the drawback of this definition is that it primarily focuses on the static dimension of public administration. Meanwhile, nowadays public administration is crucially a dynamic phenomenon. Hence, the definition of public administration formulated by

I. Lipowicz (2020) seems particularly valuable: "administration is a system composed of people organised in order to ensure permanent, systematic, future-oriented implementation of the common good as a public mission, consisting mainly (though not exclusively) in the day-to-day execution of laws, equipped with state authority as well as material and technical means for this purpose." Summing up, one might say that public administration is an indispensable institution in any country, and that it can be best defined as the fulfilment of public tasks oriented towards the common good. Thus, dynamic nature turns out to be its key feature since the structure of public tasks is dynamic (changeable). However, the dynamism manifests itself not only at the level of tasks assumed by administration, but also by the entities carrying those tasks out. As pointed out by J. Zimmermann (2013, pp. 108–109: "(...) in the increasingly complex social and legal realities, the current legislation introduces many formulas of cooperation between public administration bodies or administering entities, in various configurations." In any case, in an attempt to delineate a certain contemporary developmental trend in public administration in a democratic state under the rule of law, we should say that it is largely becoming a "providing administration", whereas the rationing (and ordering) function, previously referred to as "administrative police", is being shifted to the background. Incidentally, it is worth noting that the developmental dynamism of public administration is also fraught with significant faults when it comes to the expanded subjective scope of public administration. When writing about the expansion of new categories of administrating entities, J. Zimmermann (2013, pp. 108–109) directly expresses a concern about the difficulties arising from the formulation of determinations concerning the subjectivity of various bodies under administrative law. Nevertheless, this is exactly where we will be dealing with the problem of locating the workplace as a potential subject of public administration. This problem will become particularly important when we confront the claim that the workplace can, or should, be understood as an administrative establishment (Sobczyk, 2021). For the time being, I claim that the workplace is certainly a social organisation in administrative terms and, moreover, it is crucial when we are talking about entities that perform public tasks and public functions but are positioned outside of public administration in the strict sense.[5] Before we discuss these, it is necessary to mention two other issues if we want to understand the workplace in terms of an administering entity since it still does not seem to be a subject of public law *de lege lata*. One should be aware that a workplace which fulfils a "public mission" may enter the space of public law either when performing a public task or a commissioned function.

When talking about entities that are not public administration bodies in the strict sense but which perform public tasks or public functions, we need to know that such non-administrative entities will be vested with a public task or a public function when such entities are treated either as a social organisation or a private entity, i.e. an entity that is neither a public administration body in the strict sense nor a social organisation within the meaning of Article 5 para. 2 point 5 of the Code of Administrative Procedure. The matter gets more complicated since no legal and universal definition of a "social organisation" has been formulated. Nonetheless, as J. Zimmermann writes, although the legal concept of a social organisation is extremely broad, since it includes all self-governing and professional organisations, as well as foundations and companies, one can identify certain features of social organisations, such as 1) being separated from state structures, 2) organisational independence, 3) permanence of goals and structures, or 4) voluntary participation. Alternatively, one may use the open typology of these organisations, which, according to Zimmerman, undoubtedly include political parties, associations, unions, local governments, trade unions and cooperatives. Zimmermann draws attention to an issue which seems important for our further deliberations about the nature of the workplace, namely: "Thus, in essence, any human association which has not been directly established to exercise public administration (local government) may be an addressee of a statutory norm which equips such an association with the right to perform some administrative function, or it may perform some administrative task." Further, he adds: "However, the state delegates administrative functions (or accepts the performance of administrative tasks) to organisations which are not indifferent to the state, i.e. those which are not concerned only with the interests of a narrow group of people (the Polish Philatelic Union), but which deal with broad social objectives (the Polish Red Cross)" (Zimmermann, 2020, p. 194).

As regards a private entity (which does not fall within the definition of a social organisation) that would perform public administration functions or carry out public tasks, we are dealing with a non-restricted understanding of "private entity". As J. Zimmermann writes (2020, p. 195), the understanding of the term "private entity" should be broad and it should include not only natural persons, but also human associations and organisations (churches, NGOs).

It follows clearly from the above that it is not entirely simple to classify a private entity as a social organisation within the meaning of Article 5 para. 2 point 5 of the Code of Administrative Procedure (on the grounds of administrative law, I would call it a certain "qualified" private entity). Nevertheless, when we are trying to classify the workplace among public administration entities, the workplace seems to be very much a social organisation. Why?

This is because the workplace undoubtedly has the following characteristics: 1) being separated from state structures, 2) organisational independence, 3) permanence

of goals and structures, or 4) voluntary participation. In short, there should be no doubt that the workplace fulfils the qualifying prerequisites of a social organisation in administrative law. However, none of the administrative law textbooks or other manuals contains this perspective. And although the position of the workplace should be unquestionable in administrative law literature, I am not surprised that administrative law experts are silent about it. I believe the labour law doctrine is to blame as it spreads the commodified concept of work, thus successfully "crushing" the idea and institution of the workplace, and quite successfully.[6] The workplace, as the most socially beautiful, and theoretically and legally important institution of labour law, cannot be found in administrative law literature. This has paramount consequences for the labour law. For instance, it is not clear how to classify certain employer's duties which are not directly connected with the work performance by an employee but are related to the public tasks commissioned to the employer as well as public functions entrusted to it.

The aforementioned problem of the absence of theoretical instruments for naming the tasks and functions imposed on the employer has been widely presented by A. Sobczyk, who prepared a monograph entitled *Państwo zakładów pracy* [The state of workplaces] (2017, passim). Indeed, the *Act on the company social benefits fund*,[7] which was thoroughly analysed by that author, provides examples of such employer's duties which cannot be closely linked with the performance of work by employees, since those duties are nothing more than an entrusted public task or a commissioned public function. For example, the employer is obliged to satisfy the everyday needs as well as social and cultural needs of both the employees and their families. It seems that this task has been delegated to the employer. By virtue of constitutional provisions, the obligation to support families is vested with the state and it is also the public task of the state.[8] Obviously, the delegation of this task does not eliminate the public nature of the task or the responsibility of the state for performing this task. However, in this case we should speak of the employer performing a public task, and the legal relationship which arises here should be viewed as an administrative-law relationship, unless the employer is denied authority. In fact, the latter would not be unreasonable given the existing practice of applying the aforementioned provisions of law.

The same author also points out relevant examples where employers have been commissioned with public functions; there is no other way to account for the automatic effect of certain parental leaves granted by the employer, which result in employees receiving maternity benefits from the Social Insurance Institution (ZUS). Incidentally, A. Sobczyk (2015, p. 108) is right when he further writes that: "By the same token, the employer's decision to grant a leave is binding on the Social Insurance Institution and, for this reason alone, there should be a possibility to verify the accuracy of this decision before administrative courts."

On the basis of the foregoing, one can undoubtedly see that if the employment relationship is understood as a bilateral relationship between the employee and the employer, this limits the description of this legal relationship and, in fact, leads to a significant distortion of this description, making it impossible to notice the rules that govern this multifaceted relationship of subordinated labour. Therefore, in order to provide a legal presentation of the phenomenon of human work performed under subordination, and all the related consequences, we must begin by saying that while the employee indeed remains in the employment relationship which arises through the employer, but the legal situation of the employee is certainly defined by the workplace, i.e. an organisation, which also becomes a social organisation in the meaning of administrative law. Earlier in this paper, I wrote that the employment relationship arises through the employer since I believe that the employee enters into an employment relationship with the workplace whereas the employer acts "only" on behalf of that workplace. In other words, the employee remains in an employment relationship not with the employer, but with the workplace (establishment), and the employee performs work for the benefit of the workplace. This already indicates that the employer will assume the shape or the role of the "organ" (governing body) of the workplace. If we adopt this perspective, it is much easier to explain many obligations imposed on the employer that remain fairly unrelated to the employees' performance of work. In particular, I am referring to the duties which turn out to be either public tasks or public functions. The fulfilment of those duties will always be connected with the workplace as a social organisation headed by the employer (as the employer manages the workplace). The organisation is where, in fact, the public task is fulfilled (for example supporting employees' family in raising children), or where the public function is performed (when the employer issues a decision granting parental leave). In the former case, the public task from the example is imposed on the workplace "to a greater extent" whereas the employer, as an "organ" of the workplace, ensures the fulfilment of the task. In the latter case, the public function is fulfilled directly by the employer, but again it acts as an "organ" of the workplace rather than purely a subject of private law (in this aspect, a private entity becomes an administrating entity).

In conclusion, I absolutely believe that in order to examine the legal relationship with the employee, we must depart from the notion of the workplace as a social organisation governed by the employer. The employee "enters" the organisation, which happens through the employer, in a sense. This employer fulfils various public functions, which necessarily transforms it into an administering entity. The employer is also responsible for performing public tasks, even if imposed on the

workplace. In any case, the workplace turns out to be an extremely important subject of social relations, not only in terms of sociology but also the law. The workplace is a point of reference in the fulfilment of public tasks and the "organ" of the workplace performs public functions. Therefore, through the institution of the workplace, labour law seems to reveal yet another strong resemblance to administrative law (in my previous paper, I demonstrated the similarity of axiology, and the importance of absolutely binding regulations, which is analogous for both branches of that law).

Workplace as a community

Furthermore, from the perspective of public (state-based) administration of state affairs, the institution of the workplace appears to be greatly underestimated in the current discourse, especially nowadays, when the community-based understanding of the state is undergoing a serious crisis. I believe that in today's Poland, given the scarcity of long-lasting civic initiatives to build smaller communities, the workplace turns out to be essentially the only fairly stable community, except for family communities. Thus, I feel that we can hardly see the actual realisation of the constitutional rule which provides that the Polish state is based on the idea of community (i.e. these small communities), and is guided by the principle of subsidiarity.[9] As a result, I claim that in a situation where civil society is almost disappearing, workplaces which have been "enforced" by law turn out to be the only permanent structure for the state to carry out its public tasks. This is best seen when we look at the family policy as a task of the state, as this task has been delegated to workplaces to an important extent. One might even venture to say that the state, in a way, "harnesses" the workplace, including it into the system of entities that are expected to implement social policy. In this case, the employer cannot be treated purely in terms of private law since it enters the regime of public tasks and functions, and the workplace must be absolutely perceived as a social organisation operating under administrative law.

Being deeply aware of the complexities of the role of employers and, above all, of the fundamental importance of the workplace, especially nowadays, in the crisis of the subsidiarity principle (in Poland and beyond), I would like to view my reflections in this paper as a starting point for the discussion of the legal nature of the workplace and the role of the employer as an entity governing the workplace. I believe that the above should be done not only because of purely theoretical considerations but because of the urgent need to provide accurate terminology to describe the role of the workplace and the significance of the employer (as the manager of the workplace) on the legal plane. This would make it easier for the legislator and for the entities applying the law to find the right legal trains of thought in the context of the workplace. I think that this need is indeed urgent. It turns out that the workplace is often the only place where people have the opportunity to gain the social status they need so much, which allows them to bridge cultural differences, find a platform for common living with different people regardless of race and religion, and to protect themselves from succumbing to populism. In this understanding, human work performed in a community entails a whole set of social bonds which give meaning and structure to life. As has been aptly observed: "When an »acquired« identity slips out of hand, we generally revert to an »ascribed« identity, making our ethnicity, religion and nationality central to our worldview" (Mounk, 2019, p. 283). All this (especially the differences) is compounded further in the world of social media. A. Supiot also wrote about the need to conform to certain predetermined agreed-upon rules, i.e. the necessity of heteronomy, and this is provided by the workplace as a community of working people. The same author also warned about the danger of breaking up communities and potential consequences that are faced when differences related to background, ethnicity, etc. come to the surface (Supiot, 2019, p. 529). Therefore, it is very dangerous to disregard the much needed institution of the workplace in sociological studies and legal research, especially since this is one of the few remaining sensible communities which guarantee social and economic order. When we look at the consequences of disappearing human identity, it seems to be effectively provided by work, performed in its communal form, and this form is expressed as the workplace in law.

Conclusion

To conclude, I believe that the workplace must be recognised as a key institution in the theory of labour law and this is beyond any doubt. The social consequences of failing to recognise the workplace can be dramatic. Moreover, in a situation where other human communities are scarce, the importance of the community of the workplace (especially if we remember about its relative stability) turns out to be fundamental. Thus, the importance of the community of the workplace is crucial not only for the individual, but also for the society. Since public tasks and public functions exist in labour law, and the workplace exists as a subject and the manager of the workplace exists as a governing body, this forces us to reflect upon the legal qualification of the workplace and its manager. As mentioned above, the need to build on this reflection turns out to be urgent in today's scholarship if we take into account the social dimension of the workplace as a community. Thus, there is an absolute necessity to determine the legal relations between the employee and the workplace, but also (or perhaps especially) between the workplace and the state. This is especially important today, when the workplace turns out to be almost the only significant instrument in the

administration of the state with regard to entities which exist outside of strictly defined public administration. The construction of the workplace vests the state with enormous possibilities for organising and shaping the society.

De lege lata, I believe therefore that the workplace is, at the very least, a social organisation in the meaning of administrative law. However, I am aware of the recent thesis formulated in literature whereby the workplace is an administrative establishment (Sobczyk, 2021).

Notes/Przypisy

[1] Even the professors — members of Labour Law Codification Commission in 2016–2018 denied the legitimacy of talking about the community of the workplace, voting against using the community of the workplace instead of the employer.

[2] Act of 2 February 1996 amending the Labour Code and amending certain acts of law, Dz.U. — Journal of Laws of 1996, No. 24, item 110.

[3] I refer in particular to his two-volume monograph: Sobczyk, 2013a, 2013b, but above all two further books: Sobczyk, 2015; 2017.

[4] Pursuant to Article 5 para. 2 point 5 of the Code of Administrative Procedure: "Whenever the provisions of the Code of Administrative Procedure refer to social organisations, this shall be understood as professional, self-government, cooperative and other social organisations." Act of 14 June 1960 — Code of Administrative Procedure, consolidated text: Dz.U. — Journal of Laws of 2020, item 256, as amended.

[5] Public administration entities in the strict sense are state bodies and public law entities such as administrative establishments.

[6] For more detail, cf. Czerniak-Swędzioł, 2017, pp. 628–629; Mitrus, 2017, pp. 356–357. It is worth noting that these statements are contained in the system of law, i.e., by definition, a fundamental work for any branch of law.

[7] Act of 4 March 1994 on the company social benefits fund, Dz.U. — Journal of Laws No. 43, item 163.

[8] Cf. Article 71 para. 1 of the 1997 Constitution of Poland: "In its social and economic policy, the state takes into account the interests of the family. Families in a difficult material and social situation, especially those with many children and incomplete families, are entitled to special assistance from public authorities."

[9] An excerpt from the preamble of the 1997 Constitution of Poland: "(...) we establish the Constitution of the Republic of Poland as the fundamental rights for the state based on respect for freedom and justice, cooperation between authorities, social dialogue and on the principle of subsidiarity, enhancing the powers of citizens and their communities."

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