

Dialogue and communication in the workplace as a guarantee of protection of social human rights – legal and psychological analysis. Impact of Therapeutic Jurisprudence on protection of employee’s dignity

ABSTRACT

The subject I am talking about is very important socially. The Therapeutic Jurisprudence approach is necessary to promote employees’ dignity through legal regulations and psychology. I devote a lot of space for discussing work as a human right, therefore I am focused on the subject of dignity, especially employee’s dignity and I analyze what dialogue is. Moreover, in extensive way I discuss alternative methods of dispute resolution, in particular mediation. I am interested how the law, e.g. the labor code, can affect the emotional life. Due to the legal and social nature of the phenomenon concerned, the implementation of correct standards of counteracting mobbing in the Polish legal system will be a long process. It is important to sensitize Polish legal science to psychological aspects. Polish legal science has not dealt with the Therapeutic Jurisprudence approach so far, despite the fact that this approach has been successfully implemented and is present both in literature and in practice not only in the United States, but also in many other countries worldwide.

KEYWORDS: *Therapeutic Jurisprudence, labor law, legal needs, human needs, human rights, psychological aspects of law*

Introduction

The right to work is one of the basic human social rights, according to Universal Declaration of Human Rights. Its implementation is extremely important in everyday life - more and more often work is not only a source of money, but also help in self-realization and maintaining mental well-being. So, the employee dignity and his need for self-fulfillment play the key role, although unfortunately often there is no respect for human dignity in workplace. There are many reasons for this. These obstacles, include violation of employee's dignity which manifests itself through mobbing, discrimination or lack of help in situation of burnout.

I will conduct analyzes from the perspective of Therapeutic Jurisprudence by interpreting the provisions of labor law. The starting point for research is dialogue and discourse in individual and collective labor law. Distinguishing between these two concepts is necessary, because it carries other meaning behind it. The dialogue is understood as a way of communication, the purpose of which is to maintain relationship with another person. Discourse is understood in more technical way, which is going to change beliefs, arguments and not maintaining relationships.

What Therapeutic Jurisprudence is?

Therapeutic Jurisprudence is an interdisciplinary approach to law, incorporating the *acquis* of various sciences, including psychology. This approach was initiated in the United States by professor David B. Wexler, who started work on it in the 1980s (Backhouse, 2016, p. 2). At first, Therapeutic Jurisprudence was being developed in criminal law (Birgden, Ward, 2003, p. 334) to soon spread across other branches of law, including my focus, i.e. labor law (Yamada, 2010, p. 257). The authors perceive law as a science that has not only legal effects, but has an impact on the general condition of people, primarily mental health, psychological well-being, social change, behavioural change and emotional life (Winnick, Wexler, 1992, p. 212).

Therefore, this approach can be combined with mental health protection, and it is present also in this sense anyway. As it is explained by Therapeutic

Jurisprudence' pioneers Therapeutic Jurisprudence recognizes substantive legal rules, legal procedures and the roles of legal actors, e.g. lawyers. (Wexler, 2011, p. 33). It is a perspective that views the law itself as a therapeutic agent (Wexler, 1999, p. 1). This approach looks not only at possible law reforms, but also how existing law may be applied in a manner more conducive to the psychological well-being of those it affects. Therapeutic Jurisprudence complements the concept of looking at the law, does not say that the law is to perform only the "therapeutic" function (Wexler, 1990, p. 480). This translation leaves much to be desired, because the idea of the trend implies that the law is focused on human emotions and well-being, which may be influenced by law, but does not assume that the law is to cure or be a source of help in the situation of mental problems. The term "therapeutic" should not be understood in this way (Wexler, 2013, p. 14).

In Therapeutic Jurisprudence the key concepts are psycholegal soft spots, special sensitive places between psychology and law (Wexler, 2011, p. 34). It is defined as a psychological bag and baggage that often accompanies legal moves and measures (Wexler, 2011, p.34). They are particularly visible in labor law, e.g. in mobbing cases. These new scientific achievement is not present yet in Poland, but can contribute to the development of Polish science. The professors that originated the Therapeutic Jurisprudence approach, especially professor David Wexler want it to be known worldwide.

For Therapeutic Jurisprudence, it is important to find sensitive legal and psychological points in which it finds application. One of such areas in which both the norms of substantive law are present, here specifically the provisions of labor law and the psychological factor is dialogue and conflict in the workplace. Therapeutic Jurisprudence promotes the nurturing of productive and mentally healthy workplaces. For Therapeutic Jurisprudence respect for employee's dignity is very important.

Therapeutic Jurisprudence in labor law

Work is a place where we spend most of our lives and in which stressful and conflicting situations often affect the mental life of the recipients of

the law. The protection of emotional life is certainly favored by regulations protecting employee dignity, regulations protecting against mobbing, aimed at avoiding conflicts, anti-discrimination regulations or introducing mediation into labor law as a real chance to resolve conflicts occurring in the work environment. The dispute between the parties to the employment relationship is a natural phenomenon - this is emphasized by case law and doctrine.

Labor law is one of the areas in which both substantive law standards, in this case labor law regulations, and a psychological factor are present. Labor law is a field of law that seriously needs to incorporate ideas that promote mental health for employees. Labor law, to a large extent having a binding character, is a branch of law, in which the foundation is building a relationship between the employee or trade unions and the employer. Therefore, the basis of many labor law institutions is communication, so that they can be properly used. So, we can talk about dialogue between parties in labor law.

The currently dominating axiology of labor law is based primarily on the concept of the so-called protective function. This, in turn, exposes two flagship slogans. The first one, taken from the founding documents of the International Labor Organization, states that "work is not a commodity". The second is the observation that labor law protects the "weaker" from the "stronger". Consequently, labor law primarily fulfills a protective function, protecting the rights of employees. And regardless of the fact that other functions of labor law are also subject to analysis, the protective function of an employee is in any case the dominant function.

Although mobbing and other pathological behaviour at work, such as discrimination or lack of respect for the employee's dignity are common, Polish legal regulations are not good enough to counteract pathologies, and they first and foremost often do not take into account the mental health of those they govern. Currently, employees have limited remedies to protect themselves against mobbing and hostile behaviour at work. In many cases even internal regulations do not bring expected results. According to Labour Code an employer shall prevent workplace harassment (Polish Labor Code, art. 94³ §1). It has not been determined how to do it, moreover employees are

not obliged to counteract mobbing. If, despite counteracting mobbing, illegal acts are committed, the employer must only show that he has prevented, even if it was ineffective. According to § 3 of this article an employee whose health has deteriorated as a result of harassment at work may claim a sum of money from the employer as financial compensation for the damage suffered. According to Polish Labor Code workplace harassment is any act or behaviour relating to an employee or targeted against an employee that involves persistent and long-term bullying or intimidation, resulting in lower self-evaluation by the employee of his professional abilities, with the purpose or effect of humiliating or ridiculing, isolating or eliminating that employee from the team. (Polish Labor Code, art. 94³ §2). Mobbing is above all a violation of employee dignity and violates psychological needs, including the need for security, recognition and self-fulfillment, according to the Maslow classification (Yamada, 2004, p. 475). Unfortunately, employees have limited tools to deal with mobbing. An employee who has terminated his contract of employment as a result of harassment at work may claim damages from the employer at least equal to the amount of the minimum statutory wage, as defined in separate regulations. Mobbing is associated with a trauma for people who experience it, the more that an employee who wants to get compensation must show an upset of health. Therefore, Therapeutic Jurisprudence approach finds application in mobbing cases (Yamada, 2008, p. 49).

Therapeutic Jurisprudence can affect future Polish legislation in the area of the protection of mental health and counteracting mobbing at work (Yamada, 2018, p. 4). There is a need for psychoeducation of employers and employees who often focus on legal needs ignoring human needs that cannot be separated from the labor law context. There is also a special need to educate lawyers in Therapeutic Jurisprudence approach, to sensitize them that matters in the field of labor law also have a psychological background (Patry, Wexler, 1998, p. 3).

Therapeutic Jurisprudence can be relating to broadly understood work, not only in terms of law, but also protection against mental health problems, such as occupational burnout, depression, work-related anxiety or health

disorder. Personalistic management in companies, based on human dignity, is extensively promoted. There is a need in Polish workplaces to develop tools to help companies and employers to manage in a way that respects the emotional lives of their employees. Therapeutic Jurisprudence focuses in particular on problems in the workplace, such as mobbing. Although the Polish Labor Code includes specific legal provisions, many employees are helpless against violence at work.

First of all, it is very important to direct legislation to promote dialogue at the workplace, which can be achieved through the promotion of mediation in the workplace. Internal regulations are also often ineffective in helping people who suffer from violence and lack of respect for their dignity at work. Under the current regulations, the employee has to either demonstrate a health disorder or terminate their contract for employment to be able seek redress or compensation in court. The percentage of cases won by employees is still very small, because it is difficult for them to demonstrate harmful behaviour they experience. Therapeutic Jurisprudence promotes fostering productive workplaces, having regard to the mental health of employees.

Mediation as a method of resolving disputes at work

Mediation is an alternative method of conflict resolution (ADR). Mediation is an alternative to court proceedings. Mediation can be conducted in almost any case, it depends on the company's policy. Often employers believe that implementing mediation in an organization is a good idea that promotes productivity in the workplace and is related to maintaining relationships.

In the United States, mediation is very efficient as well. Mediation is the best way to resolve conflicts promptly and with due respect for human emotions. It is widely known that mediation originated in the United States. As early as at the beginning of the 20th century, a "reconciliation agents" council was established to resolve conflicts between trade unions and employers. The council evolved into the Federal Mediation and Conciliation Service.

In the United States, alternative methods of dispute resolution, where Therapeutic Jurisprudence was created, are commonly used. There are many

solutions there not used in Poland, in lens of Therapeutic Jurisprudence (Paquin, Harvey, 2002, p. 2). This means to resolve conflicts at work is also promoted through Therapeutic Jurisprudence mediation clauses in employment contracts, which are not used in Poland. Unfortunately, mediation in Poland is not included in employment contracts and is very rarely used. Mediation can be used at various stages of the dispute, both at the judicial stage and earlier. If the internal organization regulations provide for conducting mediation, the mediator may be an internal manager e.g. dealing with HR matters. This is acceptable, because he knows the organization and employees and could be first person who should mediate in the organization. Very important is the ability to see the conflict at a hidden level, to conduct individual strategies by the parties to the conflict. However, he undertakes to maintain impartiality and confidentiality (Gmurzyńska, Morek, 2018, p. 166).

It is also worth taking advantage of the internal mediator, if he is employed in the company. Such a person thanks to the company's knowledge can deal with conflicts at the level of relations, parallel positions, e.g. the annual employee assessment, individual conflicts at the level of relations, coalition, group, collective disputes, structural conflicts between employee - supervisor, employer – employee (Gmurzyńska, Morek, 2018, p. 382). This mediation is best done in a pendulum manner. Then the other party talks to the mediator to talk together in the third meeting. Each meeting is preceded by a mediator's monologue to guarantee the parties full security and the possibility of withdrawing from mediation or mediator or mediators – mediation is often conducted by two mediators. Employee mediation can be of a different nature - typically relational, where two people due to mutual prejudices, e.g. organizational changes in the company do not want to cooperate with each other, just do not like each other. Employee mediation in most cases is structural mediation (Gmurzyńska, Morek, 2018, p. 385).

Conclusions

Therapeutic jurisprudence is a trend that can significantly help in counteracting pathological phenomena in the workplace, such as mobbing,

discrimination, burnout. The assumptions of this trend emphasize that the law should also take into account the emotional life of its recipients and psychological aspects, then it will be fully effective. Therapeutic Jurisprudence focuses on communication and dialogue at work, emphasizing the dignity of employees. It is therefore important to promote this trend in Poland, to help change the provisions of law that would help employees in the mobbing situation. The role of psychoeducation of employers, employees, but also of lawyers who conduct labor law cases is significant. One of the important solutions is the dissemination of mediation in workplaces that will foster the emergence of dialogue.

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