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## On Fairness and Moral Force of the Employment Contract in the Post-Industrial Era

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**Abstract:**

**Purpose:** The purpose of the article is to present selected concepts of extra-legal justification of the obligation to comply with contracts, including moral binding, which seem to be most fully developed in the Anglo-Saxon legal writings. Then, referring these arrangements to the employment contract by attempting to find extra-legal justification for its compliance.

**Design/Methodology/Approach:** The conducted research is based on the philosophical and legal methodology, taking into account the achievements of Anglo-Saxon thought.

**Findings:** From the extra-legal perspective, it seems that the binding force of this contract, based on differentiated values, lies in the fact it is a manifestation of freedom of a man as a rational and autonomous being, constituting a materialized fruit of parties' mutual trust, creating a platform for building social collaboration and long-term interpersonal relations based on the community ideal and leading to an exchange of promises bringing a mutual benefit by ensuring the parties' share in the distribution of socially significant goods, with all resulting social-economic-ethical-psychological effects and extending the sphere of human freedom, in particular freedom from social exclusion.

**Practical Implications:** The conducted research allows for the transfer of Anglo-Saxon philosophical and legal doctrines to the continental labor law systems, significantly enriching the axiological justification underlying the employment contract and the need to comply with its terms. This, in turn, may have a positive impact on the practice of applying the law by courts, particularly in cases where the non-legal aspect comes to the fore.

**Originality/value:** The article attempts to determine the employment contract's moral authority and the resulting obligation to comply with its provisions. It also contained threads regarding the issue of fairness of an employment contract and an axiological evaluation template.

**Keywords:** Promises, the theory of contract, employment contract, fairness theory, employment relationship.

**JEL:** J28.

**Paper Type:** Research study.

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## **1. Introduction**

The contemporary views of legal scholars and commentators of the civil law in most countries avoid the notion of 'the moral force of a contract' (its moral validity, parties' moral binding). In contrast, the binding force of acts in law are derived solely from the fact of the existence of a legal system (in the author's home country - Poland - there is talk of the existence of a competence norm in the legal system giving the parties the right to create, shape and terminate the legal relationships binding them – see: Machnikowski, 2005, p. 88-90; Stelmachowski, 1988, p. 88-90; Radwański, 1999, p. 263-264). The question of why contracts should be complied with is answered by these scholars, along with representatives of legal realism, in the following way: because it is compliant with given law and otherwise you are punished by the state apparatus which guards the observance of it. Therefore, the basic tool of enforcing contracts, in this case, involves the argument of force: the legal sanction and fear of its application, based in principle on an egocentric vision of the world.

Such an approach requires the state to create a complex bureaucratic apparatus to exercise 'external' control over legal entities. However, just like punishing a child for not complying with parental rules is often directed at immediate achievement of desire, though short-term effects (subjecting one to parental authority here and now), not at eliminating reasons for disobedience and developing an 'internal guardian' of applicable rules (Kohn, 2005; Juul, 2001), the discussed approach of legal scholars and commentators leads to ostensible and short-term effects which in the long run are detrimental to social relations and mutual trust. Moreover, although findings from social experiments based on the game theory allow a conclusion that factors that integrate the society do involve not only reciprocity and trust but also a consistently exercised mistrust and dependence (Putnam, 1993), the degree of effectiveness and institutional capability of these two strategies differ significantly (the latter leads i.a., to higher social costs, e.g., the multiplicity of safeguards and reluctance to working together – Fukuyama, 1996).

The legislative views of legal scholars and commentators glorified by continental systems may seem coherent only from the positivist outlook on legal relations and a certain legal orthodoxy. The said orthodoxy is most often manifested in an assumption adopted by its supporters that the regulatory universalism of law and its quantitative increment is key to resolving problems with its efficiency (Pałeczki, 2003; Malawski *et al.*, 2004). Though popular, such an approach does not seem to be right and disregards non-legal mechanisms of human impact, including norms of the moral law. In so far as most people would not deem an official who does not accept bribes for fear of a sanction as a person acting morally (a coward at most), a forceful and external impact of participants to economic trading has little to do with morality, and in a longer perspective relieves people from the sense of responsibility for others and a moral reflection on their own behavior (Veitch, 1999). Under such circumstances, people begin to assess reality solely through the lens of rights and obligations established by the state apparatus (MacCormick, 1978), even in spheres of life in which it seems thoroughly inadvisable (like Maria Soledad Vela, an Ecuadorian MP,

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who in the course of works on the constitution demanded that the right to orgasm for women be introduced to it).

As early as the 1980s, this phenomenon was called by the outstanding philosopher of law - J. Habermas - colonization of society by law (Habermas, 1981), and today it seems to be cancer boring through modern legal systems (Safjan, 2007). Not only does it omit the universally present among us, as people, an intuition which gives moral significance to any obligation freely undertaken by us, but it also leads to over-regulating social life, deterioration of willingness to learn legal norms, and in consequence, resignation from applying them. This translates to the impoverishment of scholarly discourse and neglecting contractual terms in economic trading, especially by the weaker party of the contract, which in turn leads to a high rate of cases brought before courts. The argument of force works only when a party to a contract or a participant of economic trading has a reasonable basis to fear this force, which to a small extent constitutes what the function of the severity of the punishment, and for the most part, its inevitability is (Beccaria, 1973). Therefore, where the likelihood of a sanction declines, there is massive exploitation of a man by man, or even violation of fundamental rights of an individual, which with the current incompetence of national systems of legal protection becomes a typical occurrence in certain spheres of social and economic life.

The above problem is expressly demonstrated by research conducted in the area of the labor market, even in the context of employing immigrants (Fine and Lyon, 2017; Ronconi, 2010), who due to not knowing their rights and for fear of deportation, receive such terms of employment from employers which are significantly below those offered to native employees (often contrary to applicable legal order) and on top of that are often treated in a way which violates human dignity, not even trying to defend themselves against it.

It seems that the phenomena referred to above intensify where the corset of moral norms is greatly loosened, and the state is not capable, for various reasons, of ensuring a high level of enforceability of given laws and executed contracts. A return to justifying the obligation to observe the contract from the moral order perspective seems to be a remedy for these problems. Moreover, although even the most unrelenting supporters of positivist and legalistic doctrines do not deny that there might be certain moral reasons to respect the *pacta sunt servanda* rules, it is not those rules in which they see a fundamental binding force of acts in law (naturally leaving aside the general clauses occurring in the majority of legal systems that refer to morality and customs as a criterion of the legality of acts in law, in line with the Roman principle of *summum ius summa iniuria*). In consequence, the legalists and radical positivists bring down acts in law only to the instrumental dimension (Morawski, 1995), wrongly assuming that the sanction guaranteed by the legal system (most often of a pecuniary nature) is a final solution to all or majority of existing problems, and a sufficient tool of compensating for losses due to non-observance of provisions of the contract for the wronged party and sufficient punishment for the party violating contractual provisions.

The above assumption results from the deterioration of interpersonal relations and pretending that the morality of complying with contracts does not matter in modern societies since contracts are merely a means of exchanging goods and services, not a tool for building relationships. Therefore, since goods and services are valued in terms of money and exchangeable values are to be the main objective of executing contracts by the parties in post-industrial societies, not achieving this objective may also be compensated for in the form of money, and allegedly it is perfectly sufficient (Holmes Jr, 2009). Such thinking has gained significance since Adam Smith's times, though as early as at the beginning of the 16th century, one could observe a gradual shift of liability for contractual obligations from the debtor to his assets.

The above way of thinking about the role of contracts in economic trading, though undoubtedly partially right, seems still to be insufficient. In order to illustrate it, let us base on the following example.

Let us assume that a car dealership put up a car for sale for USD 10,000 and, after a few days, found a buyer willing to pay this money. The sale contract was signed, and the price was paid, and the next day after a final check-up of all technical issues, the car was supposed to be delivered to the buyer. However, on the day of the handover, the car dealership informed the customer that instead of the car, he would receive a refund along with an appropriate (relevant) cash compensation (let us assume it is USD 500, which does not only compensate the losses incurred by the buyer, who hoped to drive away in a newly purchased vehicle but also increases his assets. The car dealership informed at the same time that the reason for this was the fact that in the meantime (that is, after the buyer had paid the price and had hoped to collect his car the following day), another man turned up who offered a higher price for this car (e.g., USD 12,000). From the positivist concept of law and the legal system established by the state apparatus, nothing major happened in the discussed situation.

Even though the contract was unlawfully not complied with by the car dealership, the buyer was paid for monetary compensation. At the same time, in light of a utilitarian vision of the world on which the global economic system is based to a great extent, it seems that each party should be satisfied. While it is true that the buyer does not have the car originally chosen, he got richer by USD 500 in one day (precisely by the difference between potential damage incurred and compensation paid) and still can buy a car, perhaps even the same model, in an identical standard (perhaps even better thanks to the compensation received from the car dealership). The buyer that offered a higher price than his predecessor should also be content since he purchased his desired car paying as much as he offered for it (USD 12,000). Even though the car dealership had to bear the financial consequences of breaking the contract with the previous buyer, eventually, it sold the car for a much higher price than the original, making a USD 1,500 profit on it in summary.

From the perspective of legal realism, the economic analysis of the law, and a solely positivist outlook on social relations, everything seems fine. What is more, some will claim that the car dealership does have the right and moral obligation to break the

first sale contract since this leads to obtaining maximum usefulness (the efficient breach of contract rule). Moreover, reading the car dealership's behavior described above shows that many people will find a certain discomfort and doubts within themselves. Perhaps they result from the fact that we would consider the trader's behavior in this case as frivolous and unprofessional. Even if our thinking did not go deeper into the essence of these doubts, a key question arises here. Would we want to enter into legal (business) relations with such an operator in the future, even with the view that if the situation were to be repeated, we would get an appropriate financial compensation from it? If we hesitate for even just a moment, it means that the obligation to comply with contracts lies not only in the legal system, which guarantees their enforceability, but also in an extra-legal system that should not be underestimated by legal scholars commentators, and the legislator. This results, i.a., from the fact that contracts are a basis for building relations and mutual trust, the loss of which between the parties cannot be compensated by any money.

For many lawyers, especially those who profess the previously mentioned positivist views, referring to contracts' morality may seem at least naive. However, undervaluing this sphere of reality leads to the above-mentioned undesirable social effects. For this reason, this paper adopts as its purpose a presentation of selected concepts of extra-legal justification of the obligation to comply with contracts, including being morally bound by them, which seem to be most fully developed in the legal writings of English-speaking countries.

Moreover, their presentation will be performed against an employment contract since this relationship between an employee and employer seems to be suffering the most due to a solely positivist perception of these institutions (contracts) in post-industrial societies. In the further part of the study, an attempt will be made to establish where the employment contract's moral authority lies and the resulting obligation to comply with its provisions. It will not omit the subject matter concerning the fairness of contracts, though they will be marginal due to editorial restrictions.

## **2. Is an Employment Contract an Exchange of Promises?**

As a rule, the notion of a 'contract' does not seem to be identical with the notion of a 'promise,' the employment contract, undoubtedly focused on creating and strengthening interpersonal relations, maybe in its essence perceived as an exchange of promises. However, such a belief requires a broader justification as it leads to grave consequences involving i.a., the possibility of defending its moral authority not only from a libertarian and utilitarian perspective but also from other ones existing in the teachings of Anglo-Saxon theories of contracts. Before they are briefly presented, one needs to look closer at the interrelation between the 'contract' and the 'promise,' in particular in so far as some theories of contracts (such as Law and Economics or Critical Legal Studies) depreciate the usefulness of such reflections in general (Craswell, 1989; Kraus, 2009).

The concept of a contract as a promise was first substantiated to a greater extent at the beginning of the 1980s by C. Fried, who believed the principle of a promise to be a moral basis of the entire contract law and a criterion for its separateness (Fried, 1981), and respect for an individual's separate autonomy and mutual trust to constitute social legitimization of possibilities of institutional enforcement of all contractual obligations (Fried, 1981). In its primary version, this theory did not point to a criterion for concluding which promises are fit for legal enforcement since, in its essence, it assumed that all of them without exception are subject to enforcement (Fried, 1981).

However, this leads to the so-called paradox of autonomy, which underlay the criticism of the views of C. Fried, and in consequence to softening his stand in this regard in later scholarly works (Fried, 2007). Regardless of this revision, the Anglo-Saxon literature has, nevertheless, attempted, with more or less success, to deal with this dilemma, examples of which are presented in the works of Raz (1997), Kraus (2009), and Scanlon (2001). The views of the first author will be discussed in a further part of this paper. It is only worth emphasizing here that all the above-mentioned scholars agree as regards the fact that the principle of a promise, to a lesser or greater extent, may provide an appropriate basis for legitimizing contracts, and it is a view still strongly present in the current Anglo-Saxon literature.

The concept of a contract as a promise was subject to a thorough critique by formalists to whom M. Gilbert, among others, belongs. The author claims that agreements (here: contracts) are not a mutual exchange of promises since the latter does not meet all requirements inseparable from the essence of a contract (Gilbert, 1993). These requirements include the so-called performance criterion (as a result of executing a contract, an obligation emerges on both sides involving action or omission), the simultaneity criterion (the obligation emerges at the same time), and the interdependence criterion (emergence and duration of one obligation are dependent on the emergence and duration of another) (Gilbert, 1993).

Gilbert, based on the example of the exchange of promises between the parties presented by her, proves that such an exchange does not lead to meeting the interdependence criterion and sometimes also the simultaneity criterion. And although one can, of course, argue that the assessment criteria adopted by the author are rightly selected, this does not change the fact that the formal critique performed by her proves that 'contracts' and 'promises' are not fundamentally the same thing. A similar position is taken i.a., by Penner (1996), who considers contracts to be agreements, not promises, and Barnett (1986), who treats contracts as a type of consent to compliance with the legal system and its rules.

The above formal critique of a contract's concept as a promise indicates that contracts are not as a rule constituted by promises or their exchange. This conclusion, as rightly pointed out by Pratt (2007), does not automatically mean that contractual liability cannot be based on the concept of a promise where obligations arising from the contract (legal obligations) are justified by claims identical to those resulting from promises (obligations of a moral nature). To negate the latter, a critique at a

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substantive, not formal, level must be performed, which is a much more difficult task given that promises and contracts are very similar in nature, and in particular, both concerns undertook obligations.

One of the first people to point to the above common feature of notions discussed here was MacCormick, who classified both contracts and promises in a common category of voluntary obligations (MacCormick, 1972). In principle, however, he believed they were different phenomena. He writes that the binding force of promises results from the underlying moral principle that 'we must not so act as to disappoint the reliance of others when we have intentionally or knowingly induced them to rely upon us' (MacCormick, 1972). Simultaneously, the binding force of contracts results according to him from the existence in the legal system of enforceable power-conferring rules, which in the case of promises are neither necessary nor sufficient for the establishment of an obligation to observe them (MacCormick, 1972). In a certain simplification, one may say that according to this author, the parties' mutual trust underlays the binding force, whereas, in the case of contracts, it is the compulsion coming from the state.

The above substantiation of the different nature of 'a contract' and 'a promise' may be called a substantive critique of the contract theory as a promise. This critique was developed and improved in subsequent years, reflected in the theoretical and legal analysis done by D. Kimel. The author believes that contracts and promises have the same instrumental value (thanks to them, people can exercise their individual autonomy and lead a better life), whereas their intrinsic value is different (Kimel, 2003). Promises serve voluntary reinforcement of interpersonal relations (making them more valuable), whereas it is quite the contrary for contracts - they exercise a value consisting of 'personal detachment' (Kimel, 2003). Therefore, contracts are somehow a substitute for promises, allowing us to collaborate with entities with which we do not have any interpersonal relations (Kimel, 2003). In turn, the fact that many of our aspirations can be achieved without entering into closer relations with others results in us nurturing the ones we already have more autonomously and transparently.

Kimel's theory, though not devoid of virtues, has many flaws aptly enumerated by i.a., Sheinman (2004) based on his theory Kimel himself allows the fact of the existence of promises which are not directed at reinforcing interpersonal relations, as well as of contracts which do not pursue the values of 'personal detachment.' The former include the so-called relational contracts, which usually involve a longer-term relationship, a substantial degree of commitment from both parties, and a high degree of communication and collaboration. Executing them is based on the parties' mutual trust, whereas the economic goal pursued by them is inseparably connected with maintaining or even deepening this trust.

Adopting the above reflections onto the ground of continental realities of law, it seems that the employment contract should be classified in the category of relational contracts. This results from the fact that the features (attributes) of an employment

relationship include the personal performance of the work by the employee (absence of a possibility to substitute one's rights and obligations onto a third party or making use of this third party when doing one's work), permanence (at least in principle) of the legal bond linking the parties, on-going and rigorous collaboration of parties under the employee abiding by the employer (superior), a community dimension of a work place directed at building long-lasting bonds not only between the employer and the employee but also between individual employees as a team, etc.

One can say that an employment contract is a quintessence of relational contracts, and when the fact that remuneration for work is most often the employee's and his family's main livelihood is thrown into it, one cannot be surprised by a claim that a contract of such a type is based to a great extent on the parties' mutual trust. It is also proved by the fact that in numerous continental systems, an employer's direct loss of trust in an employee, both because of undue performance of certain obligations and resulting from the total circumstances and history of collaboration, may constitute justification for terminating the employment contract.

Therefore, since an employment contract serves the building and reinforcing of interpersonal relations based on parties' mutual trust, and according to subject-matter critics (such as, e.g., MacCormick, 1972; Kimel, 2003), this is where the characteristic feature of obligations based on a promise lies, a contract of such a type, apart from a legal perspective (formal critique), may be perceived as an exchange of promises even in the light of theories (substantive critique) which fundamentally oppose such claims on the ground of contract law (extensive arguments of proponents of the contract as promise theory which would, of course, strengthen such a claim were intentionally omitted here).

### **3. In Search for the Moral Authority of an Employment Contract**

As already mentioned, an employment contract may be perceived not only strictly as a contract under the law but also as an exchange of promises between the parties. Consequently, extra-legal binding of parties by its provisions may be justified both based on theories not referring to the concept of a promise, but also those for which the assumption of the exchange of promises is of fundamental nature. Their number does not allow, in the light of editorial restrictions, and even summary presentation of all of them. For this reason, only those concepts which in the opinion of the person writing these words most aptly reflect the essence of extra-legal binding of parties by an employment contract will be described in a further part of this paper (thus the transfer theory or the canonical theory among others will be omitted).

Therefore, in the further part of the paper, the following will be presented: the efficiency theory, promissory and will theories, the reliance theory, promoting distributive justice, positive autonomy, and collaboration theory. Due to editorial restrictions, their presentation must be done in summary, only reflecting their essence.

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### 3.1 Efficiency Theory

This theory refers to maximizing usefulness (of happiness, wealth) and is based on a solely economic perception of social relations. Utilitarianism (Bentham, 2000) is its philosophical foundation. Its representatives claim that since the parties voluntarily executed a contract of a given content, it needs to be concluded that it served to maximize both of them (Kaplow and Shavell, 2003). Wanting to preserve this legal institution's high usefulness, one would need to comply with its provisions, as this leads to parties, as a rule, doing better than if the provisions of the contract were not complied with. Therefore, the contract's moral authority lies here in the benefit obtained by the parties by executing it.

Supporters of this concept believe that its main virtues include primarily the fact that apart from valuing, it gives an objective model of assessing the situation and at the same time supports the idea of voluntariness of exchange of goods and services, which generates greater social efficiency than unfounded promises (Chen-Wishart, 2018). However, a problem based on this theory arises when one of the parties has a significant benefit in breaking the contract, even considering the need to pay compensation for not complying with the contract (as in the example of the car dealership provided above). In such a case, proponents of the efficiency theory actually claim that there is a moral obligation to break the contract and pay compensation, and then to execute a new contract with another person on more beneficial terms, since, in this way, the total amount of happiness among participants in transactions should increase (the already mentioned efficient breach of contract doctrine).

The above approach conflicts with most people's universal moral intuition and does not fully explain the moral authority standing behind the employment contract. Despite this, there is no doubt that one of the extra-legal reasons for executing an employment contract is the parties' desire to achieve specific benefits. This contract allows an employer i.a., to gain time to improve non-business life and enhance the efficiency and effectiveness of the business they operate. In turn, it ensures remuneration for work (livelihood) to the employee and various social protection and, in several cases, satisfaction of psychological needs such as the need for affiliation (Maslow, 1954). What is more, in many cases, the said benefits are the main motivation for the parties to maintain collaboration, all the more so since they are mutual in this case. The representatives of the efficiency theory thus are right to a great extent. However, stopping only at such an explanation, we would address merely the surface of this extremely weighty subject-matter, while it is much more complex than assumed by proponents of the doctrine presented here.

### 3.2 Promissory and Will Theories

The economic doctrine discussed above is most often juxtaposed with the position emphasizing the individual's personal autonomy, for which the libertarian thread is its philosophical reasoning. The most well-known representative of promissory and

will theories in the world is the above-mentioned C. Fried, who claims that the binding force of contracts lies in the human ability to voluntarily impose obligations on themselves, which is an expression of man's individual autonomy and a manifestation of his having a free will and possibility of informed shaping of his own fate. The above properties of human nature impose on us a moral obligation to keep promises we make (a contract is indeed seen here as an exchange of promises). Failure to keep a promise is regarded based on this theory as equal to denying a previously taken autonomous decision, and as a consequence, negating the ability of a given man to make free and informed choices (negating one's autonomous status). This concept answers why terms of contracts need to be complied with as follows because you have thereby made a voluntary promise.

Apart from its many virtues, this theory has its flaws, which are synthetically presented by M. Chen-Wishart (e.g., they cannot explain why, in general, a party must give something in exchange for the promise to be entitled to enforce it) (Chen-Wishart, 2018). However, there is no doubt that a person's individual autonomy is a value to the achievement of which we should strive and is certainly an essential argument for complying with obligations, taken upon ourselves earlier voluntarily, arising from an employment contract.

### **3.3 Reliance Theory**

The reliance theory claims that the basis of the moral authority of a contract, and as a consequence of the need to comply with its provisions, lies in the moral principle that we cannot act in a way that results in undermining others' reliance when we potentially or consciously encouraged them to rely on us (Atiyah, 1979; 1990; Scanlon, 2001; Fuller and Perdue, 1937). Thus, contracts need to be complied with due to the reliance placed on us by the other party when executing a contract with us, in particular, because by executing it, we self-imposed this reliance on us. By breaking the contract, we act immorally since not only do we fail the trust of another person, but we may also thwart their plans, which cannot be redressed by any compensation (e.g., a promise given to one's mother that the good will be delivered on time).

The reliance theory seems to come down to a position referring to human autonomy (promissory and will theories) since the source of this reliance lies, in particular, in the binding force of a promise resulting from the fact of making it by an individual equipped with free will. As has already been pointed out, an employment contract inseparably entails creating relations and strengthening them, and due to its subject-matter (human work), seems to lead to the application of the moral rule (typical to promises and mentioned before) referring to reliance.

### **3.4 Promoting Distributive Justice**

Work is not a good (which has recently been extensively proven by Sobczyk, 2018), though it is most often valued, just like in the case of a good. It is a good for which

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the demand is greater than its supply, thus a good limited on the market (it depends on the market sector and its current phase, but the phenomenon of unemployment universally existing in almost every country may be considered a confirmation of this thesis). An employment contract allows an employee to participate in the 'consumption' of this limited good, which further allows satisfaction of human needs by purchasing other goods and services for the money received in return for work. Whereas an employer, using an employment contract, gains access to one of the most important production factors, freeing his time, increasing the quality of services, and accelerating his business, which in consequence leads to increasing his wealth, both material wealth and wealth understood more broadly - as well-being. For this reason, one of the extra-legal grounds for complying with the terms of the employment contract may involve Kronman's (1980) argument.

### **3.5 Positive Autonomy**

The positive autonomy theory claims that the state's role is to create conditions that will support people in making not only free but also valuable (good) choices. Contracts serve this objective too by facilitating people in entering into a collaboration with other individuals. Therefore, the moral authority of a contract here lies in the state organizing adequate conditions for taking voluntary obligations instead of only enforcing their implementation, i.e., creating conditions for avoiding unfair domination of one party over the other, ensuring substantive fairness of exchange, supporting collaboration (Raz, 1986). In such a case, the contract constitutes a reason for one of the parties to treat the other party's interests in terms of the contract's subject-matter as superior to all remaining stakeholders (Raz, 1982).

The above theoretical assumptions seem to be implemented by the legislator, especially on labor law. Norms of this field of law (at least in the EU area) are directed at restricting domination of the employer over the employee, which is manifested i.a., in removing negotiation disproportions (lying in the employer's informational, economic and substantive advantage), thus creating conditions for executing a fair contract which allows long-term collaboration (regulations on minimum pay, maximum standard working time and minimum daily and weekly rest, or the order of equal treatment and non-discrimination may serve as an example here).

### **3.6 Collaboration Theory**

The last theory to be discussed will be the one proposed by Markovits (2004), according to which the philosophical basis for binding parties by provisions of a contract rests in the underlying so-called collaborative ideal. According to this author, contracts create a respectful community between the parties, based on collaboration, in which counterparties treat one another as an end in themselves and not merely as a means (Markovits, 2004).

Therefore, there is an evident reference to I. Kant's categorical imperative here, and as a consequence, also to the entire ideology of human rights. Meanwhile, many legal

and employee-related legislative solutions are axiologically anchored in this very ideology, serving to protect basic rights of the individual such as the right to rest, the right to protection of family life, the right to safe and hygienic conditions of work, etc. From a solely individualistic perspective, it would be difficult to explain why an employer, executing a contract with an employee and agreeing to pay remuneration in return for performed work, is at the same time obliged to incur several burdens of a social nature (e.g., paying remuneration to the employee for the time of holiday leave or the period of inability to work due to an illness).

Many obligations related to the employment contract may be explained only by a reference to such values as a common good, the human dignity of social collaboration, which lies at the foundations of the individual's inalienable and inherent rights. They are also a strong moral argument for complying with an employment contract whose theoretical the indicated collaboration theory may constitute basis (at least partially). By using a certain feature immanently associated with a person, e.g., ability to perform work, in order to achieve something that lies beyond this person and irrespective of them, but for the sake of this something beyond them - not so much the given activity or property is being objectified, but the very person with whom this activity or property is inseparably associated. Therefore, adopting an assumption universal in continental legal systems that people are entitled to personal dignity from which results in i.a. prohibition of treating them like an object, it needs to be assumed that theories emphasizing a solely individualistic approach to contracts' morality are contrary to this assumption. D. Markovits' theory seems much more coherent against this background.

Nevertheless, not negating the validity of the above assertions, one needs to note a certain paradox. Well, human labor, which irrespective of the adopted philosophical concept (Kotarbiński, 1982; Marks and Engels, 1968; Legięć, 2012) is an essential value for a man, thanks to which he realizes his being, identity, and dignity, is as a rule valued based on economic criteria (not, e.g., social or livelihood-related). Meanwhile, work cannot be separated from the man who performs, and he cannot be made to engage only a fraction of himself during its performance (e.g., only the physical sphere, not the emotional one). It is because work in this angle is inseparably connected with the man who engages his entire self in it. Besides, this fact constituted one of the main arguments for the labor law separating itself from civil law and a departure from regulating human work by regulations on trade in goods.

Valuing goods immanently connected with a man (e.g., human work) by solely economic means of valuing them leads inevitably to the disavowal of not only these goods but the man himself too. Economic ways of valuing, typical to trade in goods, do not belong with this type of goods as good is used and a man is respected (treated indeed as an end in himself, not a means to an end). It is one of the strongest philosophical arguments for adopting regulations on minimum pay, which are different from the solely market valuation of human work. Therefore, does not the fact that such regulations are in force in most EU states prove the legitimacy of the axiology presented in this point, which stands behind the employment contract?

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#### **4. Source of the Moral Authority of the Employment Contract**

None of the theories described above explain the moral binding of parties by an employment contract fully and without reservations. Nevertheless, each of them undoubtedly brings a significant contribution to its understanding. From the extra-legal perspective, it seems that the binding force of this contract, based on differentiated values, lies in the fact it is a manifestation of freedom of a man as a rational and autonomous being, constituting a materialized fruit of parties' mutual trust, creating a platform for building social collaboration and long-term interpersonal relations based on the community ideal and leading to an exchange of promises bringing a mutual benefit by ensuring the parties' share in the distribution of socially significant goods, with all resulting social-economic-ethical-psychological effects and extending the sphere of human freedom, in particular freedom from social exclusion. Due to the above premises, the state legislator applies legal compulsion to enforce contractual terms agreed between the parties, ensure the protection of interests of the party wronged by failure to comply with them, and punish the person who does not observe the mutual contractual agreements. The sense of social justice and the protection of the employment contract's moral authority underlying the above values call for it.

#### **5. Moral Authority of the Employment Contract and the Question of Justice**

Against the radically libertarian position, it needs to be stated that actual contracts are never self-reliant moral tools. If I negotiate terms of a contract with someone who has, e.g., greater knowledge on the exchanged goods, the contract does not have to be bilaterally beneficial, and in an extreme case, I might be robbed or deceived. In real life, people take various social positions and, as a consequence, may always differ in terms of influence and the level of knowledge. As long as this state of affairs stands, the mere fact of executing a contract does not guarantee that it will be fair.

In order for justice to be done, something else is required. One needs to refer to the moral ideal underlying a contract. Moreover, even though the moral force discussed before (and the resulting obligation to comply with the provisions of the contract) should not be identified with the notion of fairness, these phenomena remain in a close relationship with each other. We assess the degree of fairness of a contract (in terms of its nature as a social and legal institution, but primarily in terms of its content and objective) somehow intuitively, by the lens of moral ideals underlying it, such as the ideal of freedom, trust, reciprocity, bilateral benefit, etc. Therefore, it seems legitimate to set forth at least the following thesis: the more the employment contract realizes the moral ideals underlying it, the fairer it is (where 'fairness' is understood in this approach as a crown of all virtues, embodiment of moral perfection).

To be possible to realize these ideals, and in consequence to execute a fair contract, the state must create adequate conditions of which at least two are of fundamental nature. The first one concerns the need for the contract parties to be duly informed

about all significant questions in a given case. One may call this requirement, ensuring substantive fairness to exchanged performances. The second requirement involves, in turn, guaranteeing that parties enjoy real freedom from internal and external compulsion in the course of negotiating and executing the contract. In particular, neither of the parties should find themselves in a situation of excessive dependence on the other or act under excessive pressure, e.g., coming from market realities.

The above requirements are difficult to realize fully in the labor market. It is because the employer has, as a rule, broader information about the good-work offered by him than the job candidate (e.g., the real shape of work obligations and the related responsibility), and also about factors allowing its assessment (he knows his financial standing and he knows how much he pays other employees in similar posts). Therefore, as a rule, the employer has an economic and informational advantage over the employee and a negotiation advantage. In turn, the employee, who most often cares about the job (even because remuneration for performing it is most often the main source of income for him and his family) and who oftentimes must compete for it on the labor market with other people, acts under severe pressure. Moreover, even though the labor law is trying to balance this situation in various ways, it cannot fully level out the employer's advantage in practice and the pressure the employee is subject to.

In an extreme case, even if the negotiated provisions are formally fair, there is still the factual dimension of implementing the contract, which may gravely diverge from what the parties included in the employment contract. Moreover, even though this situation may theoretically concern every contract, in the case of the employment contract, the employee almost always stands before a strongly stressful dilemma: to pursue his rights and lose the job in a shorter or longer perspective, or to maintain employment for the price of consenting to improper treatment.

Due to the above, the following thesis must be considered legitimate - it is the employer as a party with a definite advantage that carries greater moral responsibility for drafting the contract fairly. Therefore, any court rulings which in the event of declaring a contract unfair or unlawful try to draw legal consequences for the employee and the employer, arguing as a rule that it is as a reference to the freedom of contract and formal equality of parties (and more strictly than the employee expressed his consent to defective provisions) must be as a rule deemed as misgiven<sup>1</sup>.

## **6. Conclusion**

The analysis of selected theories of contract carried out in this paper, present primarily in the Anglo-Saxon legal writings, showed that extra-legal justification of respecting provisions of an employment contract is very extensive in terms of content and form the axiological angle it may and should strongly affect entities entering into legal relations on the labor market. Unfortunately, as already mentioned at the outset, such an approach to the binding force of contracts is gravely neglected in continental

systems as opposed to the omnipresent and sometimes developed to the bounds of absurdity positivist doctrines. Consequences of such a policy of the law lead to its inflation and further to the collapse of its authority and a decline inefficiency, which was already pointed out by a Polish theorist, philosopher, and sociologist of law – L. Petrażycki<sup>2</sup>. It seems that if an employment contract were seen by its parties more as a moral duty rather than a strictly legal obligation, there would not be so many abuses from the stronger entity, that is, the employer.

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<sup>1</sup>*Nevertheless, in this way: the Polish Supreme Court in its judgement of 26 September 2018, II PK 151/17, Legalis no. 1830853.*

<sup>2</sup>*Interest in Petrażycki's views and theories is constantly growing as seen in the number of publications devoted to this lawyer, or those which present his reflections in a broader way (in years 1932-1951 119 such publications came out, in years 1952-1971 there were 183 of them, in years 1972-1991 as many as 255, and in years 1992-2009 – 282 - cf. Kojder, Timošina, 2010; Sorokin, 1992; Mereżko, 2009; Rejsner, 1908; Gurvič, 1931/1932; Timasheff, 1923; Laserson, 1951; , whereas in Poland i.a. Podgórecki, Peretiatkovicz, Licki, Lande, Piętka and Kojder. Petrażycki's views and theories are also referred to by contemporary scholars – see e.g., Fittipaldi, 2016; Banakar, 2013, and among slightly older publications Poli, 1999. On L. Petrażycki's contribution to the European labour law: Rylski, 2019.*