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The Principle of Complementarity in Polish Migration Law. Is It a Facade?

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The article presents an analysis of the real role of the complementarity principle and the reasons why immigration law is still based on this principle. The basic assumptions of the state's attitude towards labour immigration were set out in a period when this kind of immigration to Poland was at a much smaller scale than currently. First and foremost, one of the basic premises is the complementarity of labour immigration (complementarity principle) with the labour market test as an element of the procedures, although with some exceptions. The mechanism of controlling the complementarity is obligatory and preventive. The current economic situation in Poland, including the conditions for the functioning of immigration law, is very different from the reality of that time. In view of growing shortages of Polish employees on the labour market one can doubt whether preventive enforcement of complementarity by law is needed. The complementarity of labour immigration to Poland is a socio-economic fact and legal guarantees to ensure this result seem obsolete. There are strong arguments to consider that opportunistic political motivations are the main reason against the rationalisation of legal regulations concerning immigration of workers. The complementarity principle has become a facade of restrictive immigration law, while allowing for its use in a way that ensures the access of immigrants to the labour market.

Keywords: labour immigration; labour market test; complementarity principle; Poland

Introduction

The subject of the following considerations is the validity of maintaining preventive mechanism for verifying the complementarity of labour immigration in Polish immigration law, mainly by means of labour market testing. This form of immigration to Poland has been increasing since 2014 at a pace unprecedented in Poland's social and economic history (see also Duszczyk and Matuszczyk 2018). In spite of the dynamism and the social importance of this rapid growth, legal regulations on access of immigrants to the labour market have not been adapted to a new reality. These regulations are still largely based on premises which were adopted when labour immigration to Poland was at a much smaller scale. Primarily, according to these premises, the availability of the labour market to immigrants is basically allowed on condition of being complementary in relation to the

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employment of national labour force, although with some important exceptions mainly regarding seasonal or short-time work (see further details). The premise that the law should guarantee only the complementary character of labour immigration and prevent its substitutability, which means replacement of nationals by immigrants in the case of domestic labour, will be defined as the ‘complementarity principle’ (see also Florczak 2019).

The thesis of the article is a claim that in the current reality, with the labour market having undergone structural and most likely permanent changes, the preventive care to ensure the complementarity of immigration workforce is a highly artificial solution, which presents mainly bureaucratic hurdles. The extent to which the principle is executed – basically in connection with how accessible the labour market is for long-term employment – raises similar doubts. The text also undertakes to identify why the prevention of complementarity still features in Polish law, and the presented hypothesis argues that it is a politically motivated choice to maintain a facade of strict immigration policy in various dimensions and a fear of the costs of political decisions, which could be interpreted as a step towards the liberalisation of immigration policy. The assessment of political motives which have created the current real policy towards labour immigration is only a hypothesis. However, in the author’s opinion, informal goals of immigration policy (or perhaps better: the ambiguity of goals) was lent credence to by the inactivity of the state in view of mass labour immigration.

The concept of complementarity or substitutability regarding labour immigration is mainly specific to economics and sociology. The law is treated by these sciences, typically, and understandably, as only a tool to reach an aim and is not a separate subject for consideration (e.g. Grabowska-Lusińska and Żylicz 2008). The issue of complementarity is also touched upon in the context of political or interdisciplinary studies on labour migration (e.g. Duszczuk and Matuszczyk 2018). The present article is based on a comprehensive approach to the immigration law’s environment (socio-economic, political, other flows connected with migration) but the author’s perspective is legal. The complementarity principle in law is the focus of his attention, while the complementarity of labour migration as a socio-economic issue to a lesser degree.

The analysis covers the development of legal regulations in 1989–2019, the literature on the complementarity issue and official government documents on immigration policy. The comments relating to current legislation pertain to the Act of 12 December 2013 on Foreigners¹ and the Act of 20 April 2004 on the Promotion of Employment and the Institutions of Labour Market.² Such an approach is close to public policy science.

The arrangement of the text covers, respectively, the evolution of legal provisions with regard to the access of foreigners to the labour market, including their current shape, with particular emphasis on the development of the complementarity principle, considerations regarding the paradigm of complementarity in law and the relevance of maintaining it, as well as a presentation of the hypothesis clarifying why it is still supported.

Evolution of the legal regulation of immigrants’ access to the Polish labour market

Polish immigration law did not begin to take shape until communism had fallen (1989), with the country essentially closed to immigration prior to that, in a manner typical of a socialist bloc. The basic assumptions of the state’s attitude towards labour immigration were set out in the law very early, i.e. in the Act of 29 December 1989 on Employment.³ That regulation was not well-developed and mainly amounted to introducing a common type of work permit and an early form of the labour market test. The term refers to a tool of selective immigration policy aimed at ensuring that a foreigner seeking to obtain the right to work and related stay will obtain employment only if it does not have a negative impact on the local labour market, i.e. no national of the host country has expressed interest in the vacancy (Duszczuk 2013). The link between this tool and the rule of complementarity is direct and clear. In line with art. 33 of the Act on Employment, employers could hire foreign nationals within the Polish People’s Republic if they were permitted to do so by the employment body

on the voivodeship level (the highest level of administrative division, body of state administration). The act stated laconically that the body should verify the situation on the labour market prior to issuing the permit. It was assumed this was the basis for evaluating whether or not there were native employees who could undertake the job before it was decided that a foreigner could. The introduction of protectionist solutions at that time is hardly surprising since it was a legal act passed in critical conditions for the economy, in the midst of a shock therapy leading from socialism to capitalism. Among the many symptoms of a crisis at the time, the unemployment rate was rising rapidly and was decisive in the process of introducing protectionist solutions, which were designed to safeguard the native workforce from being forced out of the labour market by immigrants. In the regulations to follow, the lawmaker searched for an appropriate formula to test the labour market.

The next act was more restrictive (Bielak-Jomaa 2015). Art 50(1) of the Act of 16 of October 1991 on Employment and Unemployment,⁴ places of employment or physical persons could employ foreigners on the territory of the Republic of Poland or entrust them with paid services, upon obtaining permission to do so from the local labour office. To resolve the case, the official body was to take into consideration the situation on the labour market and the decision had to be supported by the mandatory decision of an advisory body – the provincial council of employment – in each case. Yet another legal act – the Act of 14 December 1994 on Employment and Prevention of Unemployment – appealed to the situation on the local labour market and special criteria, unspecified by law, which could be indicated by the voivode (the highest body of regional state administration) and apply solely to a particular voivodeship. The criteria could not discriminate against candidates on the basis of sex, age, disability, race, nationality, convictions (especially political and religious ones) or union membership. The Act of 1994 was also the first among acts which normalised the matter to allow for a number of exceptions to obligatory labour market testing, which was motivated by a range of reasons, e.g. early symptoms of candidate shortages for some highly-skilled professions (such as doctors, dentists, pharmacists who were graduates of Polish schools).

The act which is currently in force, i.e. the Act of 20 April 2004 on the Promotion of Employment and the Institutions of Labour Market⁵ with only few changes replicated the previous regulation in its original wording. The changes pertained to broadening the competences of the voivode, who could, in cases justified by the situation on the labour market, limit the type of work to management activity and representative functions for the entity. The voivode could also take into consideration the usefulness of the entity for the labour market and economy. In 2009 the lawmaker decided to use a new formula of the labour market test⁶. The current article 87 paragraph 1 subparagraph 2 and paragraph 3 of the aforementioned act obliges the entity entrusting work to apply to the starosta (medium-level of administrative division, body of local authority) for information on the inability to satisfy the staffing needs of the employer based on registers of unemployed persons and job seekers, or for information on the negative outcome of the recruitment held for the employer, taking into account the priority of Polish nationals and foreigners exempt from the duty of having a work permit to access the labour market.

As the law stands now, it has become ever more difficult to describe the scope of the complementarity rule and explain the rationale of the lawmaker in this respect. The defragmentation of this regulation is manifested in particular in the establishment of several dozen exceptions from the obligation to obtain a work permit. The introduction of some of these exceptions was strictly necessary, as it resulted from the international obligations of the Republic of Poland (e.g. towards beneficiaries of the free movement of persons or beneficiaries of international protection). Other exceptions are to do with various preferences, e.g. related to the Polish nationality of a foreigner, or the immigrant's profession being particularly desired on the labour market (see Mitrus 2018). Migrants who are covered by these exceptions are obviously excluded from the complementarity principle.

Labour market tests do not apply if the profession that the foreigner is supposed to undertake or the type of job they are to be entrusted appears on the list of professions and types of jobs exempt from the responsibility. The list is maintained by the voivode and when making a new entry, they should be guided by the situation on the local labour market, particularly with regard to the number of registered unemployed persons as well as job seekers in specific professions in relation to the number of offers submitted to district job agencies (Podgórska-Rakiel and Szypniewski 2018). In addition, it is not necessary to apply for the information from the starosta if the voivode issues a prolongation of the work permit for the same foreigner in the same job, or when it results from other regulations.

Labour market testing is only applied in some proceedings resolving the issue of access to the labour market. Currently, there are various paths for obtaining this access, which can be systematised primarily depending on the subject they concern – the actual employment or the legalisation of the foreigner's stay (access to the labour market is a consequence of granting the residence permit).⁷ Four paths have economic significance due to its frequency of granting – 1) 'declarations'; 2) work permits; 3) seasonal work permits, and 4) temporary residence and work permits ('single permits'). Other types of permits exist as well, but they elicit little interest and as such will not be described in detail.

Declarations. In 2006, a simplified procedure granting an immigrant entry into the labour market was introduced, in which the basis for performing work is an entry of the intention to entrust work to a foreigner into the register performed by an administrative authority and made at the request of the entity that entrusts the work (the so-called 'declaration system' or 'simplified procedure'). This procedure is the most significant exception from the complementarity principle and does not require labour market testing. Its introduction resulted from shortages of labour supply and problems in finding Polish employees willing to take up employment, which appeared in the agricultural sector (especially in horticulture). Owing to this reason, the procedure is compared to similar initiatives, e.g. the Bracero programme in the USA (Górny, Kaczmarczyk, Szulecka, Bitner, Okólski, Siedlecka and Stefańczyk 2018; more on Bracero Program: Gratton and Merchant 2018). In 2007, the programme was extended to other sectors of the economy. The circle of its potential beneficiaries was also expanded – they are now citizens of Ukraine, the Russian Federation, Belarus, Georgia, Moldova and Armenia. In essence, it enables the citizens of these countries to provide short-term work (currently for six months within twelve consecutive months) on the basis of a declaration of intent to entrust work to a foreigner (and since 2018, on entrusting work to a foreigner) entered in the register, without the need to obtain a work permit (Mitrus 2018).

Work permits. At present, permits concerning only employment (without the permission to stay, which is a separate case), regulated in the Act on the Promotion of Employment and the Institutions of Labour Market, come in the form of a work permit. Work permits are issued by the voivode. The group of foreign entities obliged to obtain the permission is very specifically determined by law, as confirmed by a number of different exceptions established in relation to the general obligation to have the permit. Despite the fact that foreigners cannot invoke any of them, they need to obtain the permit if: they want to perform work on the basis of a contract (which includes order contracts, not just typical contracts under labour law) with an entity whose registered office, place of residence or branch, plant or other form of organised activities are found within the Republic of Poland; they want to perform work on the basis of self-employment or perform specific functions as a legal person (e.g. member of the board); they are a seconded employee (some exceptions apply). The labour market test is applied as described above.

Seasonal work permits. As of 1 January 2018, on the basis of the Act on the Promotion of Employment and the Institutions of Labour Market, short-term work may also be carried out by an immigrant who was granted a seasonal work permit (regulated in Directive 2014/36/EU⁸). Seasonal work permits are issued by the starosta.

The areas of the labour market requiring seasonal work permits are outlined in the common regulation (executive order to the act) of ministers responsible for issues of employment, agriculture and tourism. The ministers are to take into consideration a much higher demand for workforce at certain times during the year, as a result of recurring events or types of events determined by seasonal changes (Art. 90[9]). The labour market test is practically eliminated, because the regulation (implementing act to the act) indicates the citizens of countries excluded from this requirement. Currently, this preference applies to citizens of the same countries to whom the simplified procedure applies. Due to the nationalities of the beneficiaries of this type of permit, this is in fact almost total exemption.

Single permits. These are permits regulated under the Act on Foreigners, which implements Directive 2011/98/EU⁹ in this respect. This type of permit is issued to foreigners who wish to perform work on the territory of the Republic of Poland and, as a result, they need both legalisation of stay and access to the labour market. It is a comprehensive permit and therefore most beneficial to the foreigner. However, granting it is dependent on a number of strict economic conditions (i.e. stable and regular income, health insurance; see: Podgórska-Rakiel and Szypniewski 2018; Dąbrowski 2019). The permits are issued by the voivode. The labour market test is applied as described above.

Synthesising the observations so far leads to a conclusion that in the initial period of post-communist transformation, Polish immigration policy and law were based on the principle of complementarity of employment of immigrants to Polish citizens and this assumption has survived basically in relation to longer-term employment. The observation requires clarification, though. From among all the listed modes of access to work, which all have an economic impact due to the frequency of application, the labour market test is only ever relevant in the case of work permits and temporary residence and work permits (single permits). As a rule, the former are issued for a period of time not exceeding three years, or five years in some cases, with a possible extension in both cases. However, the law does not provide the lower limit of the period of validity of the work permit, which means that the permit can only be granted for a relatively short period of time, e.g. when the extended employment contract with the entity entrusting work will be for a few months only. Single permits are granted for a period necessary to achieve the purpose of the stay of the foreigner within the Republic of Poland, not exceeding three years. The Act on Foreigners provides that the circumstances which provide the basis for applying for the permit should justify the foreigner's stay within the territory of Poland for a period longer than three months. The rules seem to be rather fluid then, and it is impossible to draw a simple timeline that would separate declarations and seasonal work permits from the alternatives enabling a longer stay and employment.

In the context of introducing a simplified procedure allowing access to the labour market in 2006 and seasonal work permits in 2018, which are, respectively, fully exempt and almost fully exempt from the complementarity rule, one may wonder whether its validity is essential and whether its existence poses any problems. Indeed, there are several concerns arising from the status quo. First of all, it is the problem of the effectiveness and internal consistency of overly defragmented law. Currently, the same immigrant can easily access the labour market in the simplified procedure, as well as a result of obtaining a different type of permit. What is more, immigrants often use these procedures interchangeably, e.g. they first enter the labour market based on a declaration, then they work on the basis of a contract, followed by yet another available method ensuring their access to the labour market. Applying different rules as part of different procedures may lead to applying the law ineffectively. Secondly, there is also no evidence or even signs that longer-term work should be protected more than short-term (seasonal) work, because the risk of substitutability is higher. The need of Polish economy for labour supply is surely not limited to work or employment which comes only in certain seasons. Today's law seems to be closer to the concept of preferences for circular migration, i.e. the procedures which

are encompassed in the exemption from the labour market test (simplified procedure and seasonal work permit procedure) are based on the premise that the stay of beneficiaries is time-limited during a year.

It is worth emphasising that no attempt has ever been made in Poland to introduce solutions alternative to the labour market test, such as the ones that have been used in other countries, for instance point systems and immigration quotas (see further comments, however).

Is the complementarity paradigm needed in law?

Poland has been in a phase of dynamic growth of employee immigration since 2014, caused by the coincidence of two factors. The first is an obvious shortage of workforce on the Polish labour market, the second is increased emigration pressure in the Ukrainian society. Ukrainian migration, notably in the economically richer countries of the region — Czech Republic, Poland, Hungary and Slovakia — is a phenomenon similar to the migration of Mexicans into the United States (Barnickel and Beichelt 2013). The reasons for the shortage of employees include a stable and sustained economic growth in 1995–2018 and a rapid increase in exports, contributing to the creation of new jobs, a high level of emigration among people of working age from Poland prompted by Poland's accession to the EU, demographic processes related to the aging of the population and untapped human resources in the labour market (in particular a high percentage of inactive people over 50)¹⁰. In addition, it is likely that Poland has in fact developed the so-called '3D sector', i.e. the area of the labour market with jobs deemed as 'dirty', 'dangerous' and 'demanding' (see Connell 1993), which Poles do not want to do, forcing employers to desperately look for resources.

As for increased emigration pressure, it is worth paying attention to the natural causes of the emergence and consolidation of Ukrainian migration networks,¹¹ which are: the direct proximity of Poland and Ukraine, the cultural closeness of Ukrainian and Polish societies on many levels, including linguistic, as well as, since 2006, preferences for Ukrainian citizens on the Polish labour market (included in the simplified procedure). In 2014, Crimea was annexed by the Russian Federation, which led to a war in eastern Ukraine and caused a rapid deterioration of the Ukrainian economy. As a consequence, the financial situation of the population took a hit, provoking economic emigration. Strong migration networks already in place and the prospect of finding employment easily have made Poland one of the main choices of this wave of Ukrainian emigration (see also Brunarska, Kindler, Szulecka and Toruńczyk-Ruiz 2016). The dynamics of this change is illustrated by the data below. Between 31 December 2008 and 31 December 2012, the number of valid residence cards (main identity card issued to immigrants) increased from around 77 000 to approximately 112 000, which marks an annual average increase by approximately 8 to 9 thousand. On 31 December 2018, there were already 372 000 valid residence cards (average annual increase between 2013 and 2018 by approximately 40 thousand).¹² The number of declarations registered in the simplified procedure increased by leaps and bounds (2014 – 387 000, 2015 – 782 000, 2016 – 1 314 000, 2017 – 1 824 000, 2018 – 1 582 000 declarations).¹³ The number of work permits granted in 2013 was just over 39 000, while in 2018 it was already over 328 000, with 121 000 permits of a new type – for seasonal work.¹⁴ In each of these cases, the increase was primarily associated with the increase in immigration from Ukraine (see also Polakowski and Szelewa 2016).

For sure the Poland of today is dealing with three joint phenomena: a record low unemployment rate – 5.3 per cent at the end of June 2019 (see also Florczak 2019), labour immigration at an unprecedented social scale in Polish history, and an unmet and – as it seems – growing labour deficit, which is becoming a structural feature of the Polish labour market. As labour immigration is on the rise, unemployment is not increasing, and the human deficit on the labour market is growing, one could be excused for questioning the advisability and sensibility of continuing to protect the native labour force before it is forced out of the labour market by immigrants. What is more, according to many Polish economists, the country's development processes have led

to employers becoming overly reliant on the immigrant workforce, whose presence is a key factor in maintaining the economic growth (see among others Duszczuk and Matuszczyk 2018; Grabowska-Lusińska and Żylicz 2008). Of course, the answer to the question of whether only labour immigration is able to fill shortages on the labour market is controversial, but what may be decisive, however, is the lack of a clear proposal how to alternatively solve the problem of this shortage.

Likewise, it would be impossible to ignore the conclusions arising from an even cursory overview of the decisions issued. The percentage of negative decisions in the cases of work permits issued in 2018 stood at 0.6 per cent only,¹⁵ and not necessarily so due to the negative result of the labour market test. This indication demonstrates convincingly that as far as law enforcement goes, the labour market test does not realistically achieve the objectives for which it was introduced. Even if they wanted to, starostas are not able to show a threat to native workforce by employing an immigrant, because vacant jobs with even minimum requirements remain vacant. Besides, other countries' experiences have shown that effective labour market tests are notoriously difficult to implement (Ruhs 2005). To some extent, employers also protect themselves against refusal by including in the application to issue the information in question requirements specific for immigrants and unavailable to Polish citizens, e.g. fluency in a language (Ukrainian, Vietnamese), even in offers for simple jobs. Naturally, as far as recruitment standards go, this practice should not be condoned, being a clear example of discrimination on the basis of language. It has been formally recorded in the analytical papers of the Ministry of the Interior and Administration (*Spoleczność...* 2007) but has never been subject to research on migration. There is also no information available confirming that any anti-discrimination procedures have ever been initiated with regard to those practices. There are only single rulings of administrative courts in such cases, where the starosta had questioned the veracity of such a requirement.¹⁶ Still, a quick look at current job offers for vacancies in small Asian enterprises proves that the practice is still very much common. All these factors suggest that the entity entrusting work to a foreigner can relatively easily obtain information from the starosta about the failure to meet their staffing needs with the native workers.

These circumstances clearly support a rethinking of the assumptions on which Polish immigration policy and immigration law are based. The expectation to find a new model of policy towards labour immigration is also clear in the light of other EU countries' experiences connected with the shortage of national workers on their labour markets. For instance, it is worth analysing the Swedish reform of immigration law in 2008. Sweden moved then from a system that required employers to meet a labour market test, and provided for different entry streams tailored to specific occupations and sectors with different rights and privileges for different migrant statuses, to a single-stream, demand-driven system. It does not impose either skill requirements on migrants or labour market tests, and it is available across all occupations in the Swedish labour market. The reform was designed to create a flexible system that would facilitate the recruitment of workers from third countries in the absence of sufficient domestic labour reserves (Woolfson, Fudge and Thörnqvist 2014). The more general recommendation towards EU is formulated as the abandonment of the administrative labour market test policy in favour of labour market driven selection (i.e. of those obtaining a job offer in the country), possibly combined with general universally applied selection criteria (Kahanec, Zimmermann, Kureková and Biavaschi 2013). However, the ruling class refuse to take up this challenge, which begs the question about the agenda at play.

Irrespective of economic considerations as to whether immigrant workforce should even be regarded as leading to such a replacement of nationals (see, among others, Somerville and Sumption 2009) in view of a growing shortage of Polish employees on the labour market one can doubt whether the complementary character of labour immigration to Poland needs a preventive mechanism of controlling it nowadays. Of course, one should remember that the consequences of the increased presence of immigrants in a given labour market are likely to vary widely depending on the segment, and sometimes the influx of immigrants may result in

increased unemployment (Piore 1979). Still, even if the substitutability takes place in some segments of the labour market, a broad application of legal tools like the labour market test is not justified. This point of view means the lawmaker's attitude is obsolete. However, nothing indicates that ruling authorities consider amendments of law in this scope.

Do politicians prefer to maintain the labour market test (*status quo*)?

The hitherto discussed changes in the environment in which Polish immigration law operates coincided with a completely different process of a purely political nature. For most of the period since the fall of communism, immigration policy remained overshadowed by a number of other social issues in Poland. Unlike many other European countries, it was the domain of officials rather than politicians and had a technocratic and reactive dimension (see e.g. Duszczyk, Lesińska, Stefańska, Szczepański and Szulecka 2010). The situation changed quite rapidly during the last parliamentary election campaign (summer/autumn 2015), which took place at the time when the European Commission was grappling with the migrant crisis and eventually proposed the migrant relocation mechanism. The now ruling party (Law and Justice, PiS) decided to include in its programme radical criticism of those plans, combining it with an aggressive anti-refugee rhetoric. This element of the campaign turned out to be crucial, as it struck a chord with the society's deep fear of Muslim immigration. Having come to power, PiS opted to embark on an acrimonious political dispute in the EU arena regarding the relocation programme and manifesting a critical view of EU immigration policy. In one particular move, the reception of 7 thousand immigrants, which the previous government had approved, was blocked (see e.g. Szulecka, Pachocka and Sobczak-Szelc 2018).

In a paradoxical twist of fate, during the administration of the party which decided to play the anti-immigration card in the elections, there was an unprecedented increase in immigration rates to Poland. This must come with a considerable level of discomfort for those in power. One can say that there is a very fine line between an anti-refugee narrative and a general anti-immigrant narrative. The government has to bear in mind that a part of the electorate is completely opposed to immigration, being accustomed to the homogeneous nature of the society – an experience in common with all post-war generations of Poles. For those in power, this situation means finding themselves at the proverbial crossroads. In any case, the relaxation of immigration policy proposed by some business-related circles (e.g. Trzeciakowski and Wesołowska 2018)¹⁷ would jeopardise the support for the party and bring about a possible exodus of voters towards the far right. On the other hand, it makes economic sense to at least provide employers with a permanent access to immigrant workforce and, further down the line, liberalise policies and laws vis-a-vis labour immigration. At the same time, the government must take into account a very real threat to economic growth if it is guided by the anti-immigration *vox populi*, which may also come at a high political price.

It seems quite plausible to suggest that in these political circumstances the government follows an immigration policy whose core is to maintain the conditions facilitating a large influx of immigrants to the labour market, in line with the economic interest of the country, while manifesting distrust of immigration in some areas, e.g. with regard to refugees (see also Szulecka 2019) or avoiding a clear stance on other immigration areas, e.g. with regard to labour immigrants. Thus, immigration law is treated quite instrumentally – formally it must still be characterised by a certain degree of restrictiveness, but at the level of application it is not really to hinder the use of foreign labour. It is worth noticing that the 'silent approval' of labour immigration does not only concern the ruling party. The other political parties in the political mainstream have not made a stand on that issue either. It remains in the sphere of guesswork to determine what the reasons are and how serious the threat of introducing pro-immigration rhetoric is.

In such a political reality the principle of complementarity and its flagship instrument – the labour market test, has become an element of a political game aimed at maintaining a pretence that the government is pursuing a quasi-restrictive immigration policy. The legal status of the principle of complementarity remains in its unchanged form for purely political, not socio-economic, reasons.

The current situation may be described as perpetuation of formally restrictive and protectionist law, which has no chance of being efficient in its social-economic environment at the present time but simultaneously also as ‘silent’ acceptance to fill shortages of labour supply by immigrants. One could liken this part of migration law to a ‘tiger without teeth’. Such an attitude seems to be internally contradictory, but if we take account of opportunistic political motivations it will become clearer. The ruling politicians have to balance between two contradictions. The first of them is the desire to maintain the support of the electorate that takes exception to immigration and would resent the liberalisation of immigration law. At the same time, the government must strive to maintain a high influx of immigrant workers to Poland, otherwise it will risk an economic downturn, possibly at an even higher political cost. Under the weight of these two considerations capable of driving immigration policy in two entirely different directions, the government maintains the facade of restrictive immigration law, while allowing for its use in a way that ensures access of immigrants to the labour market.

The confirmation of ‘disguise of restrictiveness’ hypothesis is indirectly provided by governmental documents concerning immigration policy prepared in last years. First of them is document *Socio-Economic Priorities of Migration Policy* which was prepared in Ministry of Investment and Development and adopted by Council of Ministers in March 2018. Second document is a draft of *Poland’s Migration Policy* (dated 10 June 2019), prepared in the Ministry of the Interior and Administration. The works have not been finished due to some controversies and it is not clear whether they will be continued. Both documents show extreme caution of the authors of the document in their approach to any attempt at possible rationalisation of legal regulations in the scope of immigration of workers. Both documents feature only very tentative and general statements regarding the ‘analysis of the legal system affecting the employment and stay of foreigners and in the event of diagnosing obstacles in this respect, in particular excessive bureaucratic burdens, putting this system in order, with priority given to national security, protection of the national labour market and ensuring appropriate employment standards’ (respectively point 2(d) and the section ‘Actions to be taken’).

The facade of the ‘quota-system’?

The other legal practice that lends credence to the ‘disguise of restrictiveness’ hypothesis is the new legal possibility to determine maximum limits of permits enabling employment, which can be issued in a given calendar year and the number of declarations that can be entered in the register during the same period. The limits refer to:

- permits for temporary residence and work;
- permits for temporary residence for the purpose of highly qualified employment;
- permits for temporary residence for the purpose of performing work by a third-country national posted by a foreign employer to work on the territory of the Republic of Poland;
- permits for temporary residence for the purpose of economic activity;
- work permits;
- seasonal work permits;
- declarations of entrustment of employment.

The legal bases enabling the establishment of such limits were added by amendments to the Act on Foreigners¹⁸ and the Act on the Promotion of Employment and the Institutions of Labour Market¹⁹ adopted, respectively, in 2017 and 2018. In this way, the Polish lawmaker used the possibility of optional implementation of such restrictions, provided for in the relevant directives.

Seemingly, the rationing system ends up being even more restrictive because it acquires mixed features, by combining labour market testing and the quota system. Generally speaking, the quota system is about determining the number of migrants who can enter a particular country at a particular time to undertake work (Duszczyk 2013). Such a combination is very odd in European countries (Kahanec, Zimmermann, Kureková and Biavaschi 2013). Setting such limits would spell a significant change and deterioration in the situation of employers and immigrants compared to the current situation (see also Górny *et al.* 2018). However, the quota system does not seem to be actually applied. The statutory provisions constituting the basis for their establishment provide for the relevant minister to issue an appropriate regulation (in the system of sources of Polish law it is an executive order to the act), but they do not create an obligation to issue it. Ministers will therefore be in compliance with the law if they do not exercise this option. To date, no legislative work has been undertaken in this regard, and the desire to undertake it has not been signalled. Considering the economic forecasts indicating a further increase in the labour deficit, it is unlikely that the government will decide to take a step compromising the conditions to do business in Poland.

One can therefore get the impression that adding these regulations constitutes a kind of ‘alibi’ for the government, ready to be weaponised for political use in the event of an alleged lack of anti-immigration measures. As it is, this restrictive solution does not seem to have any real impact on the way the law is applied.

Conclusion

Under current conditions, the Polish labour market generally does not need the complementarity principle in its present shape. The labour market test does not have any regulatory function over the labour market, and its maintenance in its present form is only explained by political considerations, i.e. the desire to preserve the appearance of restrictiveness of law. The hypothesis of the deliberate guise of restrictiveness of law can be explained using the case of labour market testing inasmuch that its obsolescence is now becoming clearer than ever and yet those in power do not undertake to change it. Besides, the complementarity principle in this shape causes bureaucratic burdens.

The criticism of the current solutions leads inevitably to questions about the requested future model of the regulations. Due to the complexity of the matter, as well as its novelty (no real public discussion on the issue has taken place so far), the suggestions can only take a very general form. It seems that the time has come for a paradigm shift – instead of the current preventive mechanism focused on the complementarity of employment of immigrants, the administration should be equipped with powers allowing them to monitor the situation on local labour markets regarding the complementarity or substitutability of immigrant workforce on the one hand, and on the other hand, in the event of negative tendencies being detected, with authority to suppress adverse consequences of labour immigration. Formally, this step could be interpreted as liberalisation of existing rules, yet in the context of the actual effects the current law has brought about, i.e. the massive influx of immigrant workers, it would in fact be a step towards rationalisation of administrative and legal requirements, rather than actual liberalisation of immigration policy. Without digressing too much, it would be worth considering whether, while working on a new solution, the current defragmented network of paths granting access to the Polish labour market is really effective, as well as whether employers, relieved of present bureaucratic demands, should not be the target of new obligations preventing abuse of immigrant workforce. It is worth to remember about Swedish experiences in this matter.

From the point of view of political interest, the characterised model of operation could probably be considered relatively rational. Similarly, an economist would presumably argue that the end, i.e. ensuring access of immigrants to the Polish labour market, is the most important, and the legal means to achieving this goal and the wording of ‘law in books’ are of lesser importance. On the other hand, from a lawyer’s perspective, the situation when it is necessary to distinguish between the declared objectives of law and the objectives actually set before them and obtained through the application of said law undermine the authority of law and as a consequence cannot be seen as anything other than a pathological phenomenon.

Notes

¹ Consolidated text: Journal of Laws 2018, item 2094, with amendments.

² The Act of 20 April 2004 on the Promotion of Employment and the Institutions of Labour Market, consolidated text: Journal of Laws 2019, item 1482.

³ Journal of Laws 1989, vol. 75, item 446.

⁴ The Act of 16 October 1991 on Employment and Unemployment, consolidated text: Journal of Laws 1991, vol. 106, item 457.

⁵ The Act of 20 April 2004 on the Promotion of Employment and the Institutions of Labour Market.

⁶ The Act of 19 December 2008 amending the Act of 20 April 2004 on the Promotion of Employment and the Institutions of Labour Market, Journal of Laws 2009, vol. 9, item 33.

⁷ Inter alia: permits for temporary stay and work (so-called single permits, very common in Poland) specified in Directive 2011/98/EU; temporary residence permits for the purpose of highly qualified employment (Directive 2009/50/EC, the so-called Blue Card); temporary residence permits for the purpose of performing work in the framework of intra-corporate transfer (Directive 2014/66/EU) and temporary residence permits for the purpose of performing work by a third-country national posted by a foreign employer to work on the territory of the Republic of Poland.

⁸ Directive 2014/36/EU of the European Parliament and of the Council of 26 February 2014 on the conditions of entry and stay of third-country nationals for the purpose of employment as seasonal workers, OJ 2014 L 94, p. 375.

⁹ Directive 2011/98/EU of the European Parliament and of the Council of 13 December 2011 on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State, OJ 2011 L 343, p. 1.

¹⁰ According to the report of the European Commission (2017), *The Ageing Report, Underlying Assumptions & Projection Methodologies* (p. 204) the number of employees in Poland will fall at a rate of 0.5 per cent a year until 2030.

¹¹ The notion ‘migration networks’ is used in the meaning ‘sets of interpersonal relations that link migrants or returned migrants with relatives, friends or fellow countrymen at home’ that ‘convey information, provide financial assistance, facilitate employment and accommodation, and give support in various forms’ (Arango 2000: 291).

¹² The estimation on the basis of data prepared by Office for Foreigners, online: <https://udsc.gov.pl/en/statystyki/> (accessed: 21 September 201). This number includes also immigrants who obtained ‘single permits’. However, figures for this particular type of permit are not provided separately.

¹³ A separate issue, though not elaborated on here, is the particular vulnerability of this procedure to fraudulent behaviour observed in 2006–2017, which was then mainly related to visa fraud (the declaration was also the basis for a visa application; see e.g. Szulecka 2016, 2017). Although it is undisputed that the number

of immigrants in the simplified procedure is much higher than those who were actually employed (the scale of fraud is not easily detectable), this does not change the fact that volume-wise this is the most important channel for immigrants wishing to enter the Polish labour market (see also Duszczyk and Matuszczyk 2018).

¹⁴ The estimation on the basis of data prepared by the Ministry of Family, Labour and Social Policy, online: <https://psz.praca.gov.pl/rynek-pracy/statystyki-i-analizy/zatrudnianie-cudzoziemcow-w-polsce> (accessed: 21 September 2019).

¹⁵ The estimation on the basis of data prepared by the Ministry of Family, Labour and Social Policy, online: <https://psz.praca.gov.pl/rynek-pracy/statystyki-i-analizy/zatrudnianie-cudzoziemcow-w-polsce> (accessed: 21 September 2019). Data on the number of refusals to issue information by starostas is not available.

¹⁶ <http://orzeczenia.nsa.gov.pl/doc/374CA8006B>.

¹⁷ For instance: *Labour Migration Flexibility of Regulation for Employing non-EU nationals*, Lithuanian Free Market Institute 2018, online: <https://for.org.pl/pl/a/6100,analiza-7/2018-potrzebujmy-imigrantow-jak-zatrzymac-ukrainskich-pracownikow-w-polsce> (accessed: 18 December 2018).

¹⁸ The Act of 24 November 2017 amending the Act on Foreigners and Some Other Acts, Journal of Laws 2018, item 107. The basis to issue regulations are art. 114a and art. 127a, art. 139b and art. 142a of the Act of Foreigners.

¹⁹ The Act of 20 July 2017 amending the Act on the Promotion of Employment and the Institutions of Labour Market. Journal of Laws 2017, item 1543. The basis to issue regulations are art. 90b (1)–(3).

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