

## DILEMMAS AT THE ARCHITECT’S TABLE IN LABOUR LAW – LABOUR RIGHTS AS PRISONERS IN THE LIGHT OF THE EXTENSIVE CORE OF LEGAL PROTECTION OF EMPLOYEES

Péter Sipka,\* Márton Leó Zaccaria\*\*1

**Abstract:** *This paper examines some fundamental questions and new anomalies of the concept of employment relationship and the “worker” legal status. Furthermore, the study focuses on the legal protection of the sub-ordinated party in the employment relationship (worker, employee) because some anomalies and contradictions arise based on the strict division of legal relationships aiming at personal work in exchange of payment. The research is primarily based on the Hungarian legal environment, although the theoretical framework and the methodology is relevant to all levels of labour law regulations and principles including the International Labour Organization and the European Union as well. The main idea revolves around the hypothetical concept of the “labour force” contract that could cover almost all types of dependant work of various levels of sub-ordination in which the “worker” is clearly obliged to carry out the duties according to the “employer’s” instructions and is paid in exchange. The paper concludes that both from the side of labour law regulations and the jurisprudence it would be possible to think of the traditional concept of employment relationship in a new way based on the real attributes and circumstances of the person carrying out the working duties. Thus, it will become clear that which rights or persons are “imprisoned” and who can “break in” or “break out”.*

**Keywords:** *employee, employment contract, labour law, labour rights, social protection*

### INTRODUCTION

If we look at the current trend of the academic and legislative issues of labour law, we can easily conclude that both the present and the future of labour law is disputed. Essentially its existence and necessity in its present form is questionable,<sup>2</sup> and its regulatory focus seems more and more obscure and uncertain.<sup>3</sup> Several positions have been revealed that tried to link certain areas of labour law – considering certain aspects of the norms of and internal legal principles of labour law – to the changes of the labour market, as well as the economic and the social conditions.<sup>4</sup> Hence, labour law has been placed in such a general context that, according to our current knowledge, its original idea can be legit-

\* Dr. Péter Sipka PhD, Senior Lecturer, University of Debrecen Faculty of Law, Debrecen, Hungary

\*\* Dr. Márton Leó Zaccaria PhD, Senior Lecturer, University of Debrecen Faculty of Law, Debrecen, Hungary

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<sup>2</sup> See e.g.: ARTHURS, H. W. Labour Law After Labour. *Osgood CLPE Research Paper*. 2011, No. 15, pp. 12–29. KISS, G. A munkajog szabályozásának dilemmái. *Miskolci Jogi Szemle*. 2017, Vol.12, No. 2. különszám, pp. 269–270.

<sup>3</sup> GYULAVÁRI, T. points out that labor law regulation is directed towards a kind of “unmanageable” situation when the current set of concepts are intended to be applied to the newer types of work. In: GYULAVÁRI, T. *A foglalkoztatás jövője a munkajogviszonyban és a munkajogviszonyon túl*. 2017. “A globalizált gazdaság hatása a munkajog intézményrendszerére – az Európai Unió és Magyarország Munkajogának jövője a nagy régiók viszonylatában” conference, Budapest, 27. 10. 2017 (conference presentation).

<sup>4</sup> JAKAB, N., RAB, H. A munkajogi szabályozás foglalkoztatási viszonyokra gyakorolt hatása a szociális jogok és a munkaerőpiac kapcsolatának függvényében. *Pro Futuro*. 2017, Vol. 6, No. 1, pp. 27–29.

imized, though its principles and methodology can be developed. However, there have been approaches that have not just recognized the existence of the labour law of the 21<sup>st</sup> century, but also even stressed its social nature,<sup>5</sup> while also predicting the possible instruments and directions for the development that has fallen far beyond the traditional concept of classical labour law.

Our intention is not to present all the trends of labour law – even if we would, perhaps, just focus on Europe – but to highlight through some ideas, that, on the one hand, the theoretical labour law discourses can be characterized by issues and dilemmas rather than exact responses; and on the other hand, that the differences that necessarily appear between the possible responses of the jurisprudence, legal theory and the legislation, fundamentally determine the presented directions of development.

Therefore, we would like to consider the aforementioned as a kind of pathfinding in this study,<sup>6</sup> and we also wish to express our statement on – partly theoretical, partly regulation-oriented – issues that may affect both the present and the future of labour law, in such a way that it would fit the perspective of the summarizing statements and phenomena.

In the course of our examination, even if it pushes the classical labour law approach to the background, we are starting from the economic necessity of labour law, that, though not as obviously as in the past decades, it indisputably entails the burden of protecting and guaranteeing the interests and rights of employees' from a social perspective, while the concept of an "employee", in a traditional sense, seems to lose its content. In our view, these social considerations cannot be avoided, as far as the academic approach of the current axioms of labour law regulations are concerned, also, the circumvention of this issue would fundamentally question the existence of the autonomy of labour law.

## I. "IMPRISONING" LABOUR RIGHTS BASED ON THE STRICT CONCEPTUAL APPROACH

The fundamental elements of the concept that we would like to outline are not extraneous to the doctrines of labour law, either from a theoretical or from a legislative perspective. However, these elements are not necessarily commonly used and approached under the previously mentioned pathfinding processes.

We have no intention of demonstrating the relevance of labour law or the necessity of its existence by the already archaic principle of the fundamental right approach of employee protection,<sup>7</sup> although, in our opinion, the current form of the labour law regulatory structure is largely based on this kind of protection, even if this is often difficult to recognize (beside the not less significant and recognized economic interests), and is rather associated with a kind of obsolete concept.

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<sup>5</sup> KUN, A. Globális szabályozás a munkajogban? Trendek, új fejlemények és tanulságok. *HR & Munkajog*. 2016, Vol. 7, No. 10, pp. 31–36.

<sup>6</sup> HOWE, J. The Broad Idea of Labour Law. In: G. Davidov – B. Langille (eds.). *The Idea of Labour Law*. New York: Oxford University Press, 2011, pp. 299–300.

<sup>7</sup> As far as the obsolescence of the social focused perspective, see: HEPPLER, B. Fundamental Social Rights since the Lisbon Treaty. *European Labour Law Journal*. 2011, Vol. 2, No. 2, pp. 150–154.

Despite the above, the necessity and importance of the principle is supported by the strong argument that the basis of the (largely theoretical) disputes surrounding the designation of the scope of labour and employment law and the scope of the employment relationship is typically the existence or not the existence, and sometimes, the kind of absurdity<sup>8</sup> of the legal protection mechanisms that are linked to the employee status.

These theoretical basics – in a legal dogmatic sense and in a simplified manner – outline the limits of the personal and relational scope of the labour law in a reasonable manner, since, in a consistent manner, the clear designation of these boundaries simultaneously identifies the content of labour legislation.<sup>9</sup> It is difficult to highlight what can be rational in this respect. We would like to recall that labour law norms do not exclusively include elements of fundamental employee rights protection, but the aforementioned discourse and pathfinding seems to walk down the same road of paradigms from time to time. In our view, most of these paradigms can be described the most expressively with the employee status itself, including the relating protective norms of labour law with social nature, in a traditional sense.

In this work, that is intended to serve as a foundation of further research, we start from the legal separation system that is typical to the Hungarian legal thinking and its current regulatory concept. In addition, we would also like to refer to certain definitions elaborated by the European Court of Justice and international labour law, in order to mark the cornerstones of our concept. In our view, the Hungarian conceptual structure with its fragmentations and rigidity,<sup>10</sup> but also inflexibility gives an illustrative example of why the diversity of work-related legal relationships can cause serious problems when determining the issue of the scope of legal protection.

Our starting point is, therefore, that although the practitioners of labour law today often try to struggle for freedom in order to break away from labour law traditions,<sup>11</sup> this struggle is fated to fail because such a swing is not allowed by the nature and internal logic of labour law.<sup>12</sup> Differences with smaller amplitudes are of course accepted, for example combining the employment relationships with civil law relationships,<sup>13</sup> but labour law would indeed

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<sup>8</sup> For example, the question may arise how a person working as an Uber driver can be classified as an employee if, depending on interpretation, there is no employer power or more than one employers exercise powers? - See: RÁCZ, I. Munkavállaló vagy nem munkavállaló? A gig-economy főbb munkajogi dilemmái. *Pécsi Munkajogi Közlemények*. 2017, Vol. 10, No.1, pp. 84–86.

<sup>9</sup> Like in a simple example: workers working under the scope of the Hungarian Act I on the Labor Code ex lege provided more protective rights, than the people who perform work under the Act V of 2013 on the Civil Code because of the type of the relationship.

<sup>10</sup> KISS, G. Foglalkoztatás gazdasági válság idején. A munkajogban rejlő lehetőségek a munkajogviszony tartalmának alakítására (jogdogmatikai alapok és jogpolitikai indokok). *Állam- és Jogtudomány*. 2014, Vol. 55, No. 1, pp. 58–64.

<sup>11</sup> Struggle is largely the result of the evolution of the forms of employment and market demands generated situations that are actually independent of the law. See for example the “classical” atypical forms of work that had appeared in the previous decades and the nowadays appearing “atypically atypical” legal relationships (sharing economy, human cloud, generally see: HAJDÚ, J. A “human cloud” és a munkajog. “A globalizált gazdaság hatása a munkajog intézményrendszerére – az Európai Unió és Magyarország Munkajogának jövője a nagy régiók viszonylatában” conference, Budapest, 27. 10. 2017 (conference presentation).

<sup>12</sup> The “freedom fight”, besides separation, aims to incorporate new, typically unconventional labor law approaches into labor law, such as corporate responsibility (CSR) and *due diligence* or human resource management (HR).

<sup>13</sup> KISS, G. A munkavállalóhoz hasonló jogállású személy problematikája az Európai Unióban és a jogállás szabályozásának hiánya a Munka Törvénykönyvében. *Jogtudományi Közöny*. 2013, Vol. 68, No. 1, pp. 1–14.

transform into a “law without labour” if the compliance with the market demands were accepted unconditionally, and if the primacy of economic and competitive interests was recognized as the antithesis of the social approach. In this context, it is also important to note that, at present, the protection focuses on employee status and the related protective instruments of law. However, as mentioned earlier, labour law legislation is much more deep and complex and more fragmented than if it was solely recognized as “the law of employee interest protection”.<sup>14</sup>

The outcome of the current identity crisis of labour law is that the regulation often does not enable it to respond to labour market and economic changes in a timely and adequate fashion.<sup>15</sup> Although it is a cyclical phenomenon,<sup>16</sup> it still requires a change in the regulatory concept. The appearance and the regulation of atypical employment relationships is quite a clear attempt to do so.<sup>17</sup> The Green Paper of 2006<sup>18</sup> that can closely be linked to this progress, also provided priority to traditional labour law concepts, but was given new perspectives and application requirements (e.g. flexible working time management instruments). Nowadays, it is common that work is more and more regarded as an economic indicator and therefore it is more likely that the content of the underlying legal relationship becomes a secondary factor.<sup>19</sup> Thus, it is questionable whether the economic processes of our time could shape labour law along similar principles.

Among the ideas that have offered solutions, we focus in particular on two in the present study, the association of which assumes a new viewpoint. This is since it is considered desirable to separate the strictly interpreted employee status – which is essentially hypothetical, because there is no uniform concept of employee<sup>20</sup> – as a rigid legal concept and the traditional expectation for the protection of workers' rights and fundamental interests. As we have already mentioned, the fact that labour law has been overshadowed and that

<sup>14</sup> Prassl directly points out that the European labor law has reached a crossroads in the legal development, a process that will put an increasing pressure on the theoretical and practical forms that are already in place, given the economic and social changes. See PRASSL, J. Future Directions in EU Labour Law. *European Labour Law Journal*. 2016, Vol. 7, pp. 323–324. Consequently, the traditional framework based on legal protection can become more flexible, too.

<sup>15</sup> JAKAB, N., RAB, H. *A munkajogi szabályozás foglalkoztatási viszonyokra gyakorolt hatása a szociális jogok és a munkaerőpiac kapcsolatának függvényében*. pp. 34–37.

<sup>16</sup> ARTHURS, H. W. *Labour Law After Labour*. pp. 13–14.

<sup>17</sup> See in this process in details, also the legal dogmatic characteristic of the new types of legal relationships based on the principle of contractual freedom in: BANKÓ, Z. *Az atipikus munkajogviszonyok*. Budapest–Pécs: Dialóg Campus Kiadó, 2010, pp. 11–44.

<sup>18</sup> *Green Paper on Modernising Labour Law to Meet the Challenges of the 21<sup>st</sup> Century*. European Commission, Brussels, 22. 10. 2006, COM (2006) 708 Final.

<sup>19</sup> Doing Business. In: *World Bank* [online]. 2017 [2019-01-09]. Available at: <<http://documents.worldbank.org/curated/en/664761478508138028/pdf/109845-WP-DB17-PUBLIC-Hungary.pdf>>. See p. 110.

<sup>20</sup> Regarding this conceptual dilemma, see: GYULAVÁRI, T. A gazdaságilag függő munkavégzés szabályozása. Kényszer vagy lehetőség? *Magyar Munkajog*. 2014, Vol.1, No. 1, pp. 7–13.; GYULAVÁRI T. *A szürke állomány. Gazdaságilag függő munkavégzés a munkaviszony és az önfoglalkoztatás határán*. Budapest: Pázmány Press, 2014, pp. 143–198.; VAN PEIJPE, T. EU Limits for the Personal Scope of Employment Law. *European Labour Law Journal*. 2012, Vol. 3, No. 1, pp. 35–53.; WAAS, B. The Legal Definition of the Employment Relationship. *European Labour Law Journal*. 2010, Vol. 1, No. 1, pp. 45–57.

it is more and more becoming the law of the labour market,<sup>21</sup> also will result in either insisting rigidly on the – though extensively understood but with a classical content – legal status of employees,<sup>22</sup> or it shall be admitted that it does not exist, and is irrelevant. Our point of view is that the latter can really make labour law regulations inconsequential, while the former ties the hands of legislation, therefore, regulation should view these phenomena according to a new perspective.<sup>23</sup>

In addition, it is important to emphasize that, although employee status (presumably) gradually loses its traditional content and scope,<sup>24</sup> in our view it does not demonstrate the irrelevance of the conceptual approach, but the necessity of the amendment of the regulation. In the course of our research, we rely heavily on the view that with the declaration of a certain kind of “floor of rights” the status paradox can be resolved, since if the legislator guaranteed the most basic rights for every worker, technically, those legal dogmatic walls would fall, that are, for example, still required by the strict conceptual diversity as it was highlighted in the Hungarian example.

## II. “INHABITANTS” VERSUS “PRISONERS” IN LABOUR LAW

As we have mentioned previously, our idea is built on the existing elements of labour law, but its perspective is reversed, as we do not seek to find out what traditional labour rights should be extended to individuals who engaged in work that is covered with remuneration, but we rather view all the people who can be categorized, but have a different status, as a homogeneous group.

We try to specify the rights and obligations that define the status of members of this group so that it should not be linked to the individual characteristics of work and employment – such as the scope of the right to order, the superordinate-subordinate structure of the parties, the status of the cooperative association members – but directly to the common denominator of these legal relationships, that is to say, the performance of work in exchange for a consideration. To illustrate this novel labour law perspective, we present an “architect dilemma”, that is to say a different way of thinking of the castle and prison architects.

The fundamental goal of raising a castle or a fortress is to protect the people inside the walls against external attacks. Consequently, the castle walls, ramparts, and thick walls are built around the guards of the fortress to make it difficult to get inside from the outside, but it is quite easy to get out or break out from the inside. Although, the

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<sup>21</sup> FENWICK, C., NOVITZ, T. Conclusion. Regulation to Protect Workers' Human Rights. In: C. Fenwick – T. Nowity (eds.). *Human Rights at Work*. Oxford–Portland (OR): Hart Publishing, 2010, p. 605.; KUN, A. *A munkajogi megfelelés ösztönzésének újszerű jogi eszközei*. Budapest: L'Harmattan Kiadó, 2014, p. 21.

<sup>22</sup> This can lead to such interesting and contradictory situations in which the UBER driver can be classified as “worker” in the traditional way. See: Employment Appeal Tribunal, Appeal No. UKEAT/0056/17/DA (judgment of November 10, 2017).

<sup>23</sup> DEAKIN, S. The Contribution of Labour Law to Economic and Human Development. In: G. Davidov – B. Langille (eds.). *The Idea of Labour Law*. New York: Oxford University Press, 2010, pp. 56–159.

<sup>24</sup> KISS, G. *Alapjogok kollíziója a munkajogban*. Pécs: Justis Bt., 2010, pp. 235–237.

foundations of this principle cannot be denied, it is a well-known fact that no fortresses have been built recently, due to the development of weapons and warfare, which makes this type of defense, is ineffective, i.e. it is not a suitable defense against assaults. In our view, the current legislative approach in the field of labour law is similar: it constantly examines the economic processes that are considered as attacks and that should be responded to somehow (allowing, regulating or prohibiting), however, it is powerless against the emergence of the modern “weapons” (challenges), as it only considers the attackers (economic processes with labour law effects) and the people who defend the fortress (working people).

By contrast, prisons are built according to other logical considerations. The prisoner is at the center of the goals of the building, as their escape must be prevented, therefore, an “inverse fortress” is built around them that prevents him to leave the area. This way of thinking also leads to the fact that the building protects the interior, so the protected values remain protected regardless of external influences. In our view, the latter attitude is worth thinking over, as far as choosing the methodology of legislation regarding the regulation in the future is concerned. Based on the interaction between labour law and today's changes in the world economy, we can conclude that the law is unable to respond to all external influences on time. This results in workers facing with serious legal uncertainty and even legal defiance until the appearance and spread of the right solution (or any solution). This is obviously an undesirable phenomenon that cannot be completely eliminated but its effects can be reduced. The method for this could be the specific designation and identification of the corner points that are generally required by law in relation to legal relationships with certain characteristics, so the hardly “scrambled and captured” values shall not be released and allowed to “escape”.

In order to be able to follow the logic of prison architects, we need to define the concept of the prisoner, that is, it is necessary to determine what legal relationships are to be included in the scope of the investigation or what the subject of regulation should be. In our view, considering the traditional principles of labour law, the primary aim of regulation is to protect the people who perform work. Consequently, the subject of the contract may be the *differentia specifica*, along with the legal relationships should be examined and categorized. All legal relationships in which, regardless of how the work is performed and what type of work is carried out, the activity performed by the person, as a principal element is present and should be examined in the sense of whether or not they should be provided protection.

While we are examining legal relationships, the labour force (which can be both physical force or intellectual product) appears as a special element, as its presence or absence determines whether the human labour exists in a particular legal relationship as an added-value-generating segment, thus, its regulation should or should not be considered from a labour law aspect whatsoever. According to our starting point, any contract, the subject of which is the labour force, shall be subjected to some level of regulation, that is, protection, even if remotely, shall be provided. These contracts are hereinafter referred to as labour force contracts (or labour service contracts), irrespective of their specific content and current name. If, therefore, the primary subject of a given legal relationship is the labour force, that is, the result of the performance of

the contract is realized and arise from human activity, is considered as a labour contract.<sup>25</sup>

This approach that assumes an extensive legal status shows consistency with the position of the Court of Justice of the European Union that was expressed in the Haralambidis and Levin judgement,<sup>26</sup> where the Court expressed that a person who pursues real and genuine activities, and in return for which he receives remuneration, shall be regarded as a ‘worker’, and shall be entitled to the rights relating to the worker status, regardless of how pure private law nature the underlying legal relationship has.

While reading these lines, the question may arise as to how each relationship should be treated as a type of contract within the traditional legal dogmatic framework, i.e. how to integrate this principle into the current legal environment. Current (Hungarian) legal scholars and legal thinking distinguish between (personal) service contract, agency and employment contracts in the field of legal relationships of employment. As a result, certain questions (such as UBER driver employees) are not necessarily answered substantively, as if the primary and secondary qualification marks and characteristics of the employment relationship do not appear regarding the employment of a person, horrible dictum, the work is performed as an individual entrepreneur. This view is, however, unsustainable in the end, as it will necessarily constitute a permanent disadvantage in addition to the emergence of new professions and forms of work, which may result in vulnerability and uncertainty.<sup>27</sup> Hungarian law should be prepared to deal with situations that are virtually impossible to interpret with the current (and in this context, obsolete) toolbox of the labour law in the next decade(s).

### III. OVERSHADOWING THE DEFINITION OF EMPLOYMENT BY THE “LEGAL PROTECTION CORE”

The persistent *ex lex state* can be avoided if the legislator overrides the classical dogmatic division and places contracts the subject of which is the labour force (labour force contracts) under separate regulation and associates a separate set of rules piercing the boundaries of civil law and labour law for this type of contract. As a result, the parties’ contractual freedoms are limited in terms of obligations with a predominantly labour force subject, and some minimum standards shall be observed during performance.

Of course, we do not claim that, according this principle, (personal) service contracts and agency contracts would not occupy a justified position between individuals in the future, but if some additional conditions are met (such as persistence, economic depend-

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<sup>25</sup> Although, among other things, the few examples mentioned demonstrate that the rethinking of work related relationships also bears the transformation of the legal status of the workers who perform their work in this status, so the distinction between current definitions of *employment*, *employee*– and, of course, the *employment contract*– is currently a problems to be solved.

<sup>26</sup> In the context of freedom of work, the Court draws the attention to the unified meaning of this definition, considering that, in our view, the theoretical ground of the judgement is not far from the foundations outlined in this study. See: C-270/13. *Iraklis Haralambidis versus Calogero Casilli*, pp. 27–29.

<sup>27</sup> We would like to remind to the judgement of the Employment Appeal Tribunal, Appeal No. UKEAT/0056/17/DA (judgment of November 10, 2017).

ence, personal work performance, strong right to order), regardless of the name of the contract and the pre-contractual status of the parties, the legal relationship shall be treated as a labour force contract. This would make it possible for the Hungarian court in a hypothetical Hungarian counterpart of the Uber affair in the United Kingdom, to take a position, in the same way that it occurred in the British decision, so the protection of workers could be provided by underlining the extension of labour law protection, however, we cannot present such a developed labour law construction as far as the present regulatory scheme is concerned.

It should be noted that this principle has already been examined by the judicial practice, when the court qualified legal relationship between certain parties that are concerned individuals, such as a housekeeper<sup>28</sup> or night watchman, as employment relationships. An additional example is Section 4 of the Hungarian Act I of 2012 on the Labour Code that has already formulated this principle for workers who have not reached the age of eighteen, because in their case, the basic rules of working time and rest periods are also applicable if engaged in a civil law. Thus, the approach outlined is not unprecedented, but is more limited in its use.

When employing under a labour force contract, the fundamental rights of the worker (legal protection core or the “floor of rights”) shall be guaranteed to the person actually performing the work, irrespective of the legal status of the contracting parties and the name of the contract, so it must also apply to the individual entrepreneur, as well as to the personal cooperation of the member of a company, also to the work of the member of a co-operative association. It should be emphasized that the principle of the labour force contract is not just a utopian theory, but it is also an opportunity: a change in the labour market that is projected in the next decades is unavoidable, so rapid and effective adjustment is an elementary interest of the economy as it has a direct impact on production and competitiveness. Thus, a worker that is sufficiently protected, but handled in a sufficiently flexible manner, can become an important, productive participant in society instead of appearing on the expenditure side of social or pension insurance. In other words, we do not reject the mindset of flexicurity, but we highlight its extended side, that places a more labour activity-centered perspective in its focus.

## CONCLUSION

It is going to be a major question to answer for the labour lawyers in the coming years as to whether the values fought for and elaborated by our predecessors can be protected and saved for future generations. It is out of the question that, because of development, an era of classical labour law has ended and a new era has just begun with new ways, where some legal institutions are rather seen to be a forgettable burden than a value to be protected. At the same time, it should not be overlooked that even in the near future; the human element will remain the determining factor of labour, even if its intensity, denomination and form will be much different than it is today. From this perspective, labour law

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<sup>28</sup> Judgment no. BH 2011.4.114. of the Supreme Court of Hungary.



of the future and the choice of values is not provided by a legal status but by the fact of the presence of the human labour force, so the regulation should be rethought along with a kind of “more permissive” and expansive approach.

By summarizing our concept described above, we would like to emphasize that the recognized methodology and perspective has been linked to the almost arbitrary association of the rights linked to work and that its extent depends on the specific relationship. In our view, however, the legislator should consider the reverse side of this, so that the enforcement of certain legal protection mechanisms does not (solely) depend on the legal dogmatic nature of the specific underlying legal relationship. Otherwise, the essence of the service disappears easily, that is to say, the personal performance of work, yet as far as the latter is concerned, a certain “line of defense” must necessarily be associated with it, just as a properly designed prison.