| Chapter 8 |

Croatia: Reality of Labor Protection – At the Crossroads of Individual and Collective Labor Law

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ABSTRACT

The chapter is focused on understanding collective agreements and collective bargaining in the Republic of Croatia, as well as the relationship between individual employment contracts and collective agreements through both theoretical and dogmatic approaches to the subject matter. The data on the coverage of workers by collective agreements is intended to provide insight into the reality of the application and scope of collective agreements, but also to highlight the risks of the part of the population in the labor market that does not benefit from their direct or indirect protection. According to available data, more than 50% of workers in the Republic of Croatia are covered by collective agreements. However, the insufficiently reliable records and the fact that there is still no comprehensive national register of all concluded and valid collective agreements are problematic. Special attention is paid both to the open issues de lege lata *and to the phenomena that have characterized the development of Croatian labor law from the independence of the state to the recent events during the pandemic COVID-19 and the announced adoption of the new Labor Act, the fourth in the last twenty-seven years. Since in the process of transformation of employment relationships and fragmentation of the labor market certain institutions of labor law become particularly important, the legitimate question arises not only about the influence of trade unions on the relevant processes, but also about their ability to assert themselves as generators of social dialogue focused on vulnerable groups of workers and consolidation of membership. The author has tried to avoid a purely normative analysis and focus on the sociolegal discourse and methodological pluralism in terms of content structure and approach.*

KEYWORDS

collective agreement, collective bargaining, employment contract, labor law

1. Introduction

From the perspective of the legal environment to which the author of this chapter belongs, collective agreements are certainly the most important autonomous, i.e., professional contractual sources of labor law, reflecting, on the one hand, the content and quality of the additional rights agreed upon for workers and, on the other hand, the scope of the rights to which the employer was willing to agree during collective bargaining. A collective agreement is the result of both the social partners' ability to

Vinković, M. (2022) 'Croatia: Reality of Labor Protection – At the Crossroads of Individual and Collective Labor Law' in Jakab, N. (ed.) *Fundamentals of Labor Law in Central Europe.* Miskolc–Budapest: Central European Academic Publishing. pp. 183–203. https://doi.org/10.54171/2022.nj.fullce_9

negotiate *in bona fide* and each party's awareness of the need to achieve the optimal scope of rights and obligations. In other words, each party to the contract must be clear about the minimum, maximum, and optimal standards it can negotiate. The relationship between optimal rights and criteria may be different from each party's perspective, but the quality and success of the collective agreement will be higher if the optimally planned or agreed upon standards of both parties are more complementary and closer.

The legal nature of collective agreements differs depending on the legal tradition, historical development of (modern) employment relationships in an area and the dogmatic approach of a particular legal culture. The widespread use of collective agreements in most Western European countries in the middle of the last century made them sources of law with a clear place in the hierarchy of legal regulations and a pronounced influence on individual employment contracts, whose provisions they could modify.[1] In some countries, collective agreements are a source of law; in others, they have traditionally had the status of unwritten agreements, *unenforceable* between the parties to collective agreements, but parts of which could be implicitly or explicitly incorporated into individual employment contracts.[2] France, the Benelux countries and Germany are characterized by the possibility of giving *erga omnes* effect to statutory law through collective agreements, while in Northern Europe, Denmark and Sweden, there was no such possibility at all.[3] In some countries, these agreements still cover the vast majority of workers, while in others their influence and number are declining, largely due to the diminishing role and power of trade unions and the transformation of employment relationships. This is less pronounced in continental Europe than in other regions, mainly because traditional employment relationships are still protected by *collective self-regulation*, but there is an objective risk of new forms of work not covered by unions, where other forms of employee representation have not yet been developed.[4]

Bob Hepple points out that 'Labor law is not an exercise in applied ethics. It is the outcome of struggles between different social actors and ideologies, of power relationships.'[5] Paraphrasing this 'naturalistic approach,' as Bogg says,[6] we can say that the same is true, in a broader sense of the word, of collective agreements. Indeed, they are not a set of ethical principles, but the result of a balance of power between the social partners, who, through the agreement, establish labor standards, fundamental principles and, most importantly, economic, and social rights and, *vice versa*, obligations to be respected in their synallagmatic relationship. According to Hepple, the Nordic countries have gone furthest because by maintaining collective co-determination, they have managed to ensure a balance between social protection

1 Hepple and Veneziani, 2009, p. 19.
2 Jacobs, 2009, p. 209.
3 Ibid., p. 210.
4 Weiss, 2011, p. 47.
5 Hepple, 2011, p. 30; Bogg, 2015, p. 78.
6 Bogg, 2015, p. 78.

and labor market reforms that they believe has improved productivity, while other countries must follow this path to compete globally.[7] From this perspective, a look at a post-transition and post-Communist state, a relatively new Member State on the periphery of the European Union, can provide insight into the specifics of the development of national (collective) labor law and collective agreements and reflect the outstanding problems of their transformation and recent position.

2. Collective Labor Law and Collective Agreements in Croatia—the Shaping of the Boundaries

Contemporary Croatian labor law started to develop only in 1995, i.e., in 1996, with the adoption and entry into force of the first modern Labor Act[8] in a democratic environment after a long *vacatio legis*. Thanks to case law and the dynamics of the development of individual and collective employment relationships, this process continues with the adoption of both numerous amendments to labor legislation and completely new labor acts in 2009[9] and 2014.[10] The normative dynamics and the general inflation of regulations in Croatia have gradually improved labor legislation and harmonized it with the *acquis communautaire*, but at the same time, they have led to disorder in case law and possibly to doubts about the degree of general legal certainty. This process is not yet complete, as Croatia will receive its fourth, completely new labor act by August 2022.

The changes in labor legislation in 1995 were significant because they introduced a completely new approach to labor legislation compared to the labor legislation from the undemocratic period and almost fifty years of communist rule. Most of the provisions had a contractual character in contrast to the status provisions that characterized the period of the former republican and federal labor legislation in the period from 1945 to 1991 (from 1991 to 1995 Croatia applied the former republican and federal laws in the field of labor legislation that did not contradict the new democratic order, as well as other laws it adopted independently in the mentioned period after the disintegration of the former state).[11] Collective agreements have actually developed since 1995, as there was no freedom of contracting parties in the former Yugoslavia, and collective agreements had to be concluded only for, in terms of social order, the modest private sector (they were concluded, on the one hand, by the trade union councils of the republics or the corresponding trade union committee and, on the other hand, by the corresponding chamber of commerce). It was only after the end of Yugoslavia that the idea of concluding these agreements in the public sector emerged.[12] In the period

7 Hepple, 2011, p. 42.
8 Labor Act, Official Gazette, Nos. 38/95, 54/95, 65/95, 102/98, 17/01, 82/01, 114/03, 123/03, 142/03, 30/04 and 68/05.
9 Labor Act, Official Gazette, Nos. 149/09, 616/11 and 82/12.
10 Labor Act, Official Gazette, Nos. 93/14, 127/17 and 98/19.
11 Ravnić, 2004, p. 456.
12 Ibid., p. 450.

of workers' self-management collective agreements were irrelevant because the ideological pattern denied the existence of counterparties in the employment relationship—the workers manage the means of production and the labor community, so the employer does not exist as a unit, identity or contracting party.[13] However, the ideological relaxation and liberalization in the late 1980s influenced the former republic's Employment Relationships Act of 1990, which provided that individual employment would be governed by a collective agreement and an employment contract.[14] This gave normative effect to collective agreements and provided for the employment contract the ability to regulate rights and obligations, and not to have only a mere function of a form for establishing an employment relationship.[15] Moreover, the first democratic constitution of the Republic of Croatia, adopted in 1990, gave collective agreements constitutional status by stating *expressis verbis* that the rights of employees and their family members to social security and social insurance shall be regulated by law and collective agreements.[16]

The period from the mid-1990s onwards has long been characterized by a completely different problem—the transition from the phase of *trade union monism* to the phase of *trade union pluralism*, which, with pronounced *social dumping* of trade union membership fees and with the aim of attracting new members, led to considerable confusion in the process of collective bargaining and the conclusion of collective agreements. Indeed, at that time theer was no law in Croatia regulating the representativeness of trade unions, so in the areas of collective bargaining where there were several trade unions, there was an obligation to negotiate with all trade unions operating in that area.[17] Collective bargaining, as Davidov points out, has two democratic characteristics: one that concerns the employment relationship and subjects employers to the rule of law by limiting their arbitrariness and establishing rules for the treatment of workers; and the other that allows workers or their representatives to express their attitudes, views, and demands and to realize, to some extent, a kind of *self-government of the workplace*.[18] Determining the representativeness of unions does not call into question the democratic attribution of collective bargaining mentioned above, and it is not inconsistent with freedom of association and collective bargaining if the decision on the most representative unions is based on objective and predetermined criteria. Therefore, such criteria are best regulated by law, and the determination of representativeness is entrusted to a special body of experts.[19] Notwithstanding the attempts of political elites to flirt with individual unions, progress at

13 Grgurev and Rožman, 2007, pp. 558–559.
14 Potočnjak, 1990, pp. 545-565; Potočnjak, 1992, pp.185–199.
15 Ravnić, 2004, p. 450.
16 The then art. 56(1) of the Constitution of the Republic of Croatia, today art. 57(1). Cf. Constitution of the Republic of Croatia, Official Gazette, Nos. 56/90, 135/97, 08/98, 113/00, 124/00, 28/01, 41/01, 55/01, 76/10, 85/10 and 05/14; Ravnić, 2004, p. 455.
17 Marinković Drača, 2007, pp. 518–519.
18 Davidov, 2016, p. 87.
19 Marinković Drača, 2007, p. 519.

a snail's pace and mistakes, this process was more or less successfully resolved in 2012 with the adoption of the Act on the Criteria for Participation in Tripartite Bodies and Representativeness for Collective Bargaining,[20] i.e., two years later with the adoption of a completely new Act on the Representativeness of Employers' Associations and Trade Unions.[21]

After analyzing the legally subsumed provision on the subject matter of the collective agreement, it becomes clear that the collective agreement in Croatia has a binding effect because it regulates the rights and obligations of the parties to the agreement and it may also contain legal rules governing the conclusion, contents and termination of employment, social security issues, and other issues arising from or related to employment.[22] Its normative effect is optional, as its formation depends on the will of the parties, as Ravnić points out.[23] Thus, the provisions governing the working conditions of those who did not participate directly in bargaining, i.e., workers working for the employer to whom the collective agreement applies, have the effect of a legal norm for individual contracts. This is the normative part of the contract with direct effect, i.e., the provisions of the collective agreement that become part of the individual employment contracts of all employees with the employer on whom the collective agreement is binding (*erga omnes*).[24] The scope of normative effect shall include all persons who have concluded it, who at the time of conclusion of such agreement[25] were or later became members of the association that is a party to the collective agreement, but may also include all persons to whom the application of the collective agreement extends in the public interest. The minister responsible for labor affairs may, upon the proposal of all parties to a collective agreement, extend the application of a collective agreement, provided that the collective agreement has been concluded by trade unions with the highest number of members and an employers' association with the highest number of workers at the level for which the agreement is extended (the application of a collective agreement may be extended only for agreements concluded with an employers' association or a higher-level employers' association).[26]

20 Official Gazette, Nos. 82/12 and 88/12. Rožman points out that this act was extremely poor in legal and technical terms, difficult to apply, and criticized by social partners and experts. It repealed the provisions of the Labor Act referring to the bargaining committee, excluded the possibility of joining a collective agreement, although this had been common practice until then, and, most importantly, introduced instability into collective agreements by allowing a collective agreement previously concluded by several unions to be amended *post festum* by only one union. In addition, it allowed a collective agreement to be concluded with a minority union, thereby allowing the previously concluded collective agreement to be terminated. Such mechanisms were most frequently used by the Government of the Republic of Croatia in its attempts to annul the basic collective agreement concluded for public services. Cf. Rožman, 2016, pp. 13–14.

21 Official Gazette, Nos. 93/14 and 26/15.

22 art. 192(1) of the Labor Act, Official Gazette, Nos. 93/14, 127/17 and 98/19.

23 Ravnić, 2004, p. 500.

24 Grgurev and Rožman, 2007, p. 561.

25 art. 194 of the Labor Act, Official Gazette, Nos. 93/14, 127/17 and 98/19.

26 Ibid., art. 203.

As for the scope of the normative effect of the collective agreement, the question of the application of the collective agreement to non-union members is interesting. National labor law does not at any point *expressis verbis* oblige the employer to apply the benefits of the collective agreement from its normative part to non-union members, but such an obligation arises from another legal provision once introduced into the Croatian labor law. It is a legal solution that introduces a standard for the application of the most favorable law *in favorem laboratoris* in cases where a right is regulated differently by an employment contract, work regulations, an agreement with the works council,[27] a collective agreement or a law.[28] The application of the normative part of the collective agreement to non-union members has long been the focus of attention of trade unions, especially since the Constitutional Court declared unconstitutional the provisions on the contribution of solidarity as an institution that was briefly introduced into Croatian labor law as a compensatory and fair measure intended to protect the interests of trade unions and their members. Namely, the amendments to labor legislation in 2003 introduced the contribution of solidarity as an option that could be regulated by collective agreements, which included the obligation of non-union workers to pay compensation for the benefits of the signed collective agreement. However, the Constitutional Court declared this decision unconstitutional and contrary to the negative aspect of freedom of association including the right to form and join trade unions, i.e., freedom not to associate.[29] We believe that in this case the effects of the application of the *in favorem laboratoris* standard, i.e., the principle of proportionality, were not considered and consequently trade union members were disadvantaged compared to non-members in a comparable situation, especially in terms of enjoying union benefits and the obligation to pay trade union membership fees.

Despite its dual legal nature, a collective agreement is treated primarily as an agreement in Croatian labor law, as the Constitutional Court has clearly and unequivocally denied it the character of a regulation.[30] The reasons for this are probably pragmatic and the result of fears that the Constitutional Court might be exposed to frequent requests to review the constitutionality of certain provisions of numerous collective agreements.[31] Moreover, such reasoning of the Constitutional Court might contradict labor law theory and dogmatics, as well as actual actual practice and the function of collective agreements concluded in Croatia mainly due to their normative part, i.e., normative effect on individual employment contracts. However, they note a certain relativity of normative and contractual autonomy because the legislature prescribes the terms of negotiation (*in bona fide*), the negotiating bodies (trade unions and employers, but not *ad hoc* organized groups or individuals), the negotiation phases

27 About Works Councils' in Croatia see Vinković, 2014, pp. 37–52.
28 Art. 9(3) of the Labor Act.
29 The Constitutional Court of the Republic of Croatia, U-I/2766/2003 of 24 May 2005.
30 The Constitutional Court of the Republic of Croatia U-II/188/2002 of 6 March 2002; U-II-318/2003 and U-II-643/2003 of 9 April 2003.
31 Grgurev and Rožman, 2007, pp. 567–568.

and periods, etc.,[32] but this relativity does not deprive them of the real characteristic of an agreement and regulations with the effect *erga omnes*.

As mentioned above, due to its dual nature and its content structure under national conditions, theoretical approaches to the legal nature of the collective agreement assign it predominantly to mixed theory, i.e., duplicity theory, in which the contractual and normative (status) parts of the collective agreement have a dual effect. The contractual part establishes the mutual rights and obligations of the parties to the collective agreement (the term of the collective agreement, the body responsible for its interpretation, dispute settlement, the status of the trade union representative, etc.), while the normative part contains the legal norms necessary for the conclusion of individual employment contracts.[33] Thus, the collective agreement creates obligations for the signatories and legal rules (regulations) for all workers in the area of its application. The normative effect, in other words, originates from a special mechanism of representation, based on which the organizations of workers and employers with a collective mandate exercise contractual autonomy of the parties and pursue common interests through the creation of provisions of the collective agreement.[34] The collective agreement therefore has a normative effect that does not exclude the obligatory one,[35] although the Croatian normative framework allows the conclusion of a collective agreement that would have only the obligatory effect.[36] However, to the best of our knowledge, such an agreement has not yet been concluded in practice. In contrast, the proponents of contract theory see the legal nature of a collective agreement primarily through contractual obligations, in particular a representation agreement in favor of a third party, but such an interpretation significantly limits the possibility of contextualizing the normative effect of a collective agreement.[37] On the contrary, the extra-contractual, status, or normative theory completely rejects the possibility of analyzing the legal nature of a collective agreement through institutions of civil law, since it is a source/act that is not a contract and does not have the characteristics of a contract but only of an agreement with highly normative character.[38] The solution to these doubts probably lies in the theory of incorporation, which observes the normative character through the experience of the United Kingdom, in which the collective agreement has a normative effect on individual employment contracts only when its content is incorporated by the signatories in the individual employment contract.[39]

The relationships between individual legal entities in the employment relationship, which are inherent in individual labor law, as well as the relationships between

32 Milković and Trbojević, 2019, p. 254.
33 Bilić, 2021, p. 410.
34 Ravnić, 2004, p. 509.
35 Ibid., p. 510.
36 Rožman, 2016, p. 20.
37 Bilić, 2021, p. 409.
38 Buklijaš, 2012, p. 118; Bilić, 2021, p. 409.
39 Ravnić, 2004, p. 509.

collective legal entities, which are inherent in collective labor law, are of crucial importance for a high-quality implementation of the essence and content of labor law. Indeed, collective and individual labor law are inseparable parts of the same but unique (national) system of labor law, in which many individual workers' rights have their basis in the legal rules and sources of collective labor law.[40] The substantive structure and nomotechnical architecture of all labor acts adopted and applied since 1995 confirm both the importance of the relationship between individual and collective legal entities in the employment relationship and the causal relationship and interdependence of individual and collective labor law. Collective agreements are mentioned in several places in the Labor Act, because the function of law is to provide workers with a minimum set of rights, but also the possibility of independently regulating more favorable working conditions through employment contracts, work regulations and collective agreements.[41] However, collective agreements cannot contract contractual liberty rights that are explicitly prescribed by law as *ius cogens* (even if they are more favorable to workers), but they can contain legal rules that enter the realm of peaceful settlement of individual labor disputes based on explicit legislative authorization.[42]

The coverage of Croatian workers by collective agreements was the subject of a 2014 study, which found that collective agreements apply to the individual employment contracts of 648,000 workers, representing approximately 53% of dependent workers.[43] Under these conditions, the analysis of the open issues and difficulties of the Croatian normative framework related to the relationship between employment contracts and collective agreements not only becomes important, but also raises the rhetorical question of whether an expansion of the scope of collective agreements can be expected in the particular circumstances of the transformation of employment relationships, the emergence of new contractual forms and challenges the world of work has faced in the last 2.5 years of the pandemic.

3. Collective Agreement Levels and Current Regulatory (Labor Law) Issues

The analysis of the coverage of Croatian workers by valid collective agreements varies depending on the economic sector, i.e., the type of employer, but also the level of collective agreements concluded. Namely, the coverage of employees in the administration and public services sector is more than 88%, in public companies almost 75%, in the central government 100%, in the business sector over 39%, and in the private sector almost 33%.[44] Bagić points out that the coverage of collective agreements should be considered in context, because then the differences between

40 Buklijaš, 2012, p. 13.
41 Rožman, 2016, p 14.
42 Ibid., p. 24.
43 Bagić, 2014, p. 6.
44 Bagić, 2016, p. 113.

the public sector and the business sector are much smaller and reflect the phenomenon of heterogeneous development of collective bargaining in the business sector, which depends on the size and age of the company and its activity.[45] Therefore, the collective bargaining system does not segment labor markets based on differences between the business sector and the public sector, but based on whether or not the employer engages in collective bargaining.[46] Moreover, there are no significant differences in the rights guaranteed by collective agreements of employees in the civil and public service sectors and employees in the business sector, with the exception of the provisions on the redistribution of working time which is neither regulated nor obviously required in the public sector, but is very pronounced in the business sector.[47]

The structure of collective agreements in Croatia can be divided into a micro level (collective agreements that apply to the level of only one employer and collective agreements valid at the level of only one county), an intermediate level (collective agreements that apply to the level of two or more counties) and a macro level (collective agreements that apply to the entire territory of the Republic of Croatia). Such a structure is actually a consequence of the legal provisions related to the obligation to submit the concluded collective agreement to the competent authority and to publish it in the relevant official gazette.[48]

The aforementioned research from 2014 identified the application of approximately 570 collective agreements that were in force on the territory of the Republic of Croatia according to the criteria and official records prescribed by the Labor Act, regardless of whether they were concluded for a specific (maximum five years) or an indefinite period during the research period.[49] However, the relevant data should be treated with caution, as there is no central and comprehensive register of concluded and valid collective agreements; it is kept in 22 different places (in 21 county government offices and in the relevant Ministry of Labor), it is often not updated and harmonized, or there is a risk that a single agreement is registered in two places because the name of the employer has changed in the period between the signing of two collective agreements.[50]

For approximately 47% of workers in the Republic of Croatia who are not covered by collective agreements, or to whom the scope of a collective agreement has not been extended in the public interest, working conditions, as mentioned above, are regulated in accordance with the provisions of the employment contract and/or work regulations issued by the employer in consultation with the works council,[51] i.e., the

45 Ibid., p. 160.
46 Ibid.
47 Ibid, pp. 157 and 160.
48 Art. 201 of the Labor Act and the Rulebook on the Procedure of Delivery and the Manner of Keeping Records of Collective Agreements, Official Gazette, Nos. 32/2015 and 13/2020.
49 Bagić, 2014, p. 3.
50 Ibid., pp. 3–4.
51 Art. 150(1) and (2) of the Labor Act.

trade union representative[52] who performs the function of the works council if it is not constituted (if the works council is not constituted by the employer or if the trade union representative does not act, no consultations take place). Indeed, every employer employing more than 20 workers is obliged to issue and publish labor regulations regulating salaries, work organization, the procedure and measures for the protection of workers' dignity, measures for protection against discrimination and other issues important for his/her employees that are not regulated by a collective agreement.[53] The law provides for special work regulations that may be issued for parts of an enterprise, certain groups of workers or individual enterprises.[54] The enactment of labor regulations is obligatory both for employers covered by the collective agreement and for employers not covered by the collective agreement if they employ at least 20 workers. Such an obligation does not exist for those employers who employ fewer than 20 workers, and who, under a certain interpretation of the obligation to adopt labor regulations, i.e., the Labor Act, could be considered small employers, so that working conditions are regulated exclusively by employment contracts and are limited by a legal framework of labor law, which, as a rule, establishes only minimum protection. Freedom of contract means that working conditions that are less favorable than those established by the Labor Act can only be agreed upon under a collective agreement, and only if authorized by a general or special act of the party to the collective agreement.[55] Based on the contractual nature of the employment relationship, the general provisions of contract law shall apply to all issues related to the conclusion, validity and termination of an employment contract, a collective agreement or an agreement concluded between the works council and the employer, as well as to all other issues not regulated by the Labor Act or any other law, depending on the nature of such contracts.[56]

We believe that the importance of the emancipation of labor law and its decades-long traditional function as a distinct and separate branch of civil law [57] is particularly evident in the context of protecting the rights of workers employed by small employers who are not covered by a collective agreement. Collective agreements have an *indirect effect* on the employment relationship, as they provide the framework for the conclusion of employment contracts, and a *direct effect*, when some issues are not regulated at all in the employment contract (the duration of paid annual leave, notice periods, the duration of a normal working day or week, basic salary and salary supplements, etc.), or when the provisions of the employment contract are less favorable to the worker, so that the application of the principle *in favorem laboratoris* leads to the direct application of a more favorable and applicable collective agreement. This direct and indirect effect confirms the normative or regulative

52 Art. 153(3) of the Labor Act.
53 Art. 26(1) of the Labor Act.
54 Art. 26(2) of the Labor Act.
55 Art. 9(2) of the Labor Act.
56 Art. 8(4) of the Labor Act.
57 Tucak and Vinković, 2021, pp. 1086–1089.

effect of the collective agreement.[58] However, this effect bypasses those to whom no collective agreement applies, and the employment contract and the framework established by mandatory rules (*ius cogens*) remain the source of rights and obligations. In this respect, employers may be willing to provide only minimal protection, i.e., the rights deriving from general regulations, and to conclude contracts that are quite meager in content, or even readymade forms of simple contracts purchased in bookstores and stationery stores. Croatia's transition past has recorded contracts that did not specify the amount of salary and its due date, vouchers as a substitute for salary, or even tokens issued by some new employers 'lost in time and space' that could be used only in their business facilities and stores. However, these practices have ended, and the legal framework and case law have developed modalities for determining the amount of salary, even if it is not explicitly stated in the employment contract or if it is difficult to determine due to the absence of a collective agreement applicable to a particular employee. The concerns expressed are mitigated by the fact that Croatia is a country with a high percentage of migrant workers, left by a significant number of young people of working age and educated professionals who enjoy free movement of workers after full membership in the European Union. This has led to labor shortages in certain sectors, and the increasing demand for suitable workers on the domestic market has strengthened the possibilities for individual negotiations for better working conditions and higher wages. However, there is still a risk that precarious workers, migrant workers from third countries[59] and workers without sufficient training will not only be bypassed by a collective agreement, but also fail to obtain a valid employment contract.

Collective agreements, which are valid throughout the Republic of Croatia and which must be published in the national gazette (Official Gazette), apply almost exclusively to the civil and public service sectors, but may also be branch-specific collective agreements concluded by an employers' association, or two or more employers. A particular problem with these agreements is the fact that the Government of the Republic of Croatia acts as a party to the collective bargaining agreement. While there is a clear logic related to civil services, because the government acts as a party to the collective agreement and not the state as a direct employer of civil servants, in public services, as Gotovac points out, the question arises as to the justification of such a solution.[60] Indeed, the involvement of political officials and ministers politicizes collective bargaining, and leads to problematic, unlivable and costly consequences, as ministers assume obligations that must be fulfilled by the institutions in which civil servants are employed.[61] Therefore, a rethinking of this

58 Bilić, 2021, pp. 406–407.

59 Cases of both domestic and third-country nationals who lived and worked in conditions of slavery were identified, their personal and travel documents were seized, they were not able to communicate with their families and they were physically punished. See the daily newspapers '24 sata,' 14 April 2018, and 'Jutarnji list,' 22 June 2021.

60 Gotovac, 2017, p. 39.

61 Ibid.

problem or a normative solution *pro futuro* is needed, according to which employers' associations in public services or another expert body that would negotiate without the influence of day-to-day politics could act as parties to such a collective agreement.[62] Collective agreements (e.g., the Basic Collective Agreement for Civil Servants and Employees[63]), in which funds for salaries and other substantive rights are provided from the state budget are exceptions to the mandatory presumption of representativeness as a prerequisite for trade unions and employers to be parties to a collective agreement. On the government side, a negotiating committee appointed by the Government of the Republic of Croatia negotiates, and on the trade union side, it is a negotiating committee, the number and composition of which are determined by the Commission for Determining Representativeness as an independent body established by a special law.[64] Moreover, collective agreements concluded by the Government of the Republic of Croatia should not apply to institutions whose funds for salaries do not come from the state budget (kindergartens, institutions financed from the budget of local self-government units, care homes for the elderly, private institutions, etc.), but for years the practice has contradicted the logic that would follow from the interpretation of general and special laws and bylaws. The basic and branch-specific collective agreements concluded by the Government of the Republic of Croatia are indisputably applied to such entities, and at the same time, public problematization of the issue in question is avoided.[65]

The reality of Croatian labor law and case law has been marked several times in the last thirty years by mass lawsuits brought by civil servants for a failure to comply with the rights guaranteed by collective agreements. Simply put, in times of crisis, recession, and the unfavorable state of public finances, the state or the employers in the civil and public sector services often suspend the payment of various financial bonuses guaranteed by collective agreements (this practice affected employees in the areas of internal affairs, education, health, culture, social affairs, etc.), without terminating them or initiating timely negotiations to amend the concluded collective agreements. Lack of seriousness in the approach, insufficient or inadequate legal arguments, or simply 'the unbearable lightness of being' have resulted in tens of thousands of lawsuits, final judgments in favor of workers and billions of kuna of damage to the state budget. The total amounts of the claims in question, including interest and court costs paid to civil and public servants, or the damage to the state budget have never been officially disclosed to the public. Moreover, to add to the paradox, the state simultaneously acted not only as a debtor in workers' claims, but also as the originator of thousands and thousands of lawsuits, which unnecessarily overburdened the Croatian courts and further slowed public reforms aimed at clearing the backlog in numerous civil cases. However, some substantive rights provided

62 Ibid.
63 Basic Collective Agreement for Civil Servants and Employees, Official Gazette, No. 128/2017.
64 Ibid. See also art. 25(1), (2) and (3) of the Act on the Representativeness of Employers' Associations and Trade Unions, Official Gazette, Nos. 93/2014 and 26/2015.
65 Rožman, 2016, pp. 49–50.

for in such collective agreements have been abrogated by special laws, which, on the one hand, prompted unions to discuss the constitutionality of corresponding legal solutions and to initiate proceedings before the Constitutional Court of the Republic of Croatia[66] to review the constitutionality of the Act on the Denial of the Right to a Salary Increase Based on Length of Service,[67] as well as to hold discussions on the acceptability of legal solutions from the point of view of the obligations entered into by ratifying the relevant ILO conventions.[68] On the other hand, technical discussions have also arisen on the impact of changed circumstances (*clausula rebus sic stantibus*) on collective agreements. According to the provisions of Croatian labor law, a collective agreement may terminate by the expiration of the term specified therein,[69] by the conclusion of a new collective agreement between the same parties, and by termination (in the case of fixed-term agreements, which may be concluded for a maximum term of five year, termination is possible only if such a circumstance is provided for in the collective agreement).[70] In the latter case, the collective agreements must contain provisions on the grounds for termination and notice periods,[71] and if these were not included in the collective agreement, the provisions of the law of obligations on the amendment or termination of a contract due to changed circumstances must be applied.[72] However, the reason for the review of constitutionality was related to the fact that certain provisions of the collective agreement for civil

66 Constitutional Court of the Republic of Croatia, Decision U-I-1625/2014 of 30 March 2015, Official Gazette, No. 40/2015. In the said decision, the Constitutional Court also referred to its earlier Decision II-1118/2013 of 22 May 2013, Official Gazette, No. 63/13, in which it specified that the principle of the rule of law requires respect for the rules of democratic procedure because it is a prerequisite for the development of pluralism and democracy and for promoting collective bargaining as social dialogue in society: 'In other words, the democratic nature of the procedure in which social dialogue takes place on issues of general interest is what the act itself, as an outcome of that procedure, may determine as constitutionally legally acceptable or unacceptable.'

67 Act on the Denial of the Right to a Salary Increase Based on Length of Service, Official Gazette, No. 41/2014.

68 Here we primarily refer to the ILO Freedom of Association and Protection of the Right to Organise Convention (Convention No. 87) of 1948, Official Gazette—International Treaties, Nos. 2/94 and 3/2000, and the Right to Organise and Collective Bargaining Convention (Convention No. 98) of 1949, Official Gazette—International Treaties, No. 3/2000.

69 Prolonged application of legal rules contained in the collective agreement means that after the expiry of the time limit for which the collective agreement has been concluded, the legal rules stipulated therein related to the conclusion, content and termination of employment will be applied as part of previously concluded employment contracts until a new collective agreement is concluded, in the period of three months until the expiration of the period for which the collective agreement was concluded, or three months from the expiration of the termination period. However, as an exception, which is allowed by the Act, a longer period of extended application of the legal rules contained in the collective agreement may also be contracted by a collective agreement. See art. 199(1) and (2) of the Labor Act.

70 Art. 200(2) of the Labor Act.

71 Ibid., art. 200(1) and (3).

72 Ibid., art. 200(4).

servants were overridden by the *lex specialis* provisions. In the specific proceedings, the Constitutional Court took the position that these were privileges of part of civil servants and public service employees, which are by their nature not an integral part of the salary in the sense of the constitutional provisions,[73] and that by adopting these provisions, the government 'did not exceed the limits of its powers to such an extent that this could be qualified as an abuse of the constitutional power to propose legislation.'[74] The Constitutional Court had in mind the ILO practice which clearly shows that economic difficulties cannot justify disrespect for freedom of association and collective bargaining, i.e., that interventions in collective agreements by the authorities should be preceded by dialogue and negotiations between contracting parties (stakeholders),[75] but also by the fact that circumstances have arisen which could not have been foreseen at the time of the conclusion of the agreement, and which imply the application of the *rebus sic stantibus* clause of the law of obligations with regard to possible amendments to or judicial termination of the agreement affected by such circumstances.[76] Croatian labor law theory clearly states that the *rebus sic stantibus* clause as a general rule of the law of obligations cannot be subsidiary to an employment contract, because this matter is regulated *expressis verbis* by the provisions of the Labor Act on the termination of the employment contract.[77] In this sense, in view of the changed circumstances, the Labor Act is a kind of *lex specialis* with respect to the Civil Obligations Act.[78] However, the relevant clause may be applied to the termination of a collective agreement as an exception to the principle of *pacta sunt servanda* of the law of obligations, due to the explicit reference of the aforementioned provisions of the Labor Act to the application of the general rules of the law of obligations in that specific case, and provided that the circumstances have objectively changed since the conclusion of the collective agreement.[79] An objective change of circumstances in each specific case and based on the long-standing judicial interpretation and practice of established tests is ultimately assessed by the court when initiating court proceedings.

The discussion of objectively changed circumstances is probably an appropriate introduction to the conditions mentioned by Bogg and Dukes[80] of the disempowerment of trade unions in political sphere, further deregulation and flexibilization of labor market, and also the recent events during the pandemic.

73 Constitutional Court of the Republic of Croatia, Decision U-I-1625/2014, paras. 54.1. and 70.
74 Ibid., para. 75.
75 Ibid., para 43; Moslavac, 2015, p. 6.
76 Ibid, para. 40.1; Moslavac, ibid.
77 Potočnjak, 2007, p. 376; Nikšić, 2018, p. 4.
78 Nikšić, 2018, p. 5.
79 Ibid.; art. 200(4) of the Labor Act; Nikšić, pp. 5 and 9.
80 Bogg and Dukes, 2016, p. 123.

4. Challenges of Fragmentation of the Labor Market and New Forms of Employment—Where Is the Place for Collective Agreements?

The fragmentation of the labor market, as a phenomenon that has been present in its functional and substantive substrate for a long time, is accompanied by a weakening of the influence of trade unions and the emergence of vulnerable groups in the labor market, mentioned briefly in the paper, employment by agencies, 'zero-hour contracts', but also engaging self-employed persons, the challenges of establishing and proving the existence of a *de facto* employment relationship and, finally, the need to understand the importance and role of an individual employment contract as a 'benchmark' of rights guaranteed to workers.[81] Croatia is not yet affected by some of the above challenges, but the pandemic has undoubtedly imposed the need to discuss open issues in national labor law, highlighted a review of legal solutions related to work outside the premises of an employer (i.e., work at an alternative workplace), but also drew attention to the complete lack of a normative framework regulating platform work.

We believe that these issues have a reversible impact on national trade unions—due to the potential areas to which they can extend their influence and increase the number of their members, but also due to the risks for them resulting from the lack of a normative framework for individual entities and the risk that such legislative shortcomings and inadequate solutions would further undermine the existing positions *pro futuro*. Croatia is known as a country with rigid labor legislation, although it seems that in the last decade, probably under the influence of European labor law, the case law has nevertheless reached a certain level of balance, mainly due to the possibility of looking through the broader prism of available mechanisms and reinforcing previously significant deficiencies in the understanding and application of teleological interpretation. In addition, the expected changes in labor legislation, i.e., the planned adoption of the new Labor Act by August 2018, should lead to, *inter alia*, the transposition of the solutions of Directive 2019/1152 on transparent and predictable working conditions in the European Union and Directive 2019/1158 on work–life balance for parents and caregivers.

It is estimated that there are between 30,000 and 40,000 platform workers in Croatia, mostly of the younger generation, whose work is not regulated. Moreover, it is necessary to regulate all forms of precarious work, refine the provisions on work outside the premises of an employer, especially the use of information and communication tools, i.e., working from home, reducing the number of fixed-term employment contracts (it is estimated that there are about 25% of these contracts in Croatia),[82] promote mechanisms for the use of part-time employment contracts that

81 Albin and Prassl, 2016, pp. 213–216.

82 Government of the Republic of Croatia, Minister of Labor, media statement on 19 October 2021.

have not been brought to life in the existing legislation, affirm additional work for other employers, define properly the term 'salary,' simplify working time regulations, prevent abuse of agency work, prescribe severance pay in the case of the expiry of fixed-term employment contracts, affirm collective bargaining, and specify the provisions on the termination of fixed-term collective agreements (when they are concluded for a period longer than the statutory maximum), and the like.[83]

Many of these entities that are regulated by the new act, either because of improving existing solutions or as newly regulated entities that fill legal gaps in the regulation of certain forms of work, have the potential to become part of future collective agreements. The exceptions are likely to be platform workers, where this will depend not only on who the legislature establishes as the employer of platform workers, but also on the time that will elapse before they form a union. The current estimated number of platform workers in Croatia suggests that a union that may potentially be formed may have a fairly large number of members *pro futuro*.

The COVID-19 pandemic has brought home-based work, i.e., work outside an employer's premises, into the spotlight more than ever. It opened a whole range of issues, from practical implementation to the type of the contract or the immediate replacement of existing standard employment contracts (with provisions on the temporary nature of such work in the existing employment contract or in an annex to the employment contract, or the total disregard of relevant administrative requirements due to special and exceptional circumstances that have afflicted the whole world). Finally, this work raised the question of the use and availability of appropriate equipment, a home workplace, safety at work, and compensation for costs incurred when working from home. This issue was addressed in the Croatian legal framework, as the existing Labor Act contains relatively high-quality and, in certain urgent cases, we believe, provides sufficient provisions.[84] However, these provisions did not provide for the possibility of working temporarily from home, but only for the conclusion of employment contracts for work outside the premises of an employer. Until the COVID-19 pandemic, this facility was not widespread, and was associated mainly with certain professions. The contractual nature of the employment relationship did not prevent the contracting parties from establishing a new place of work, or the employer from sending the employee to work from home due to an essential element of the employment relationship—subordination, especially considering that the circumstances were exceptional and *vis maior*. According to the some case law, until the appearance of COVID-19, the latter possibility, i.e., a unilateral decision of the employer taken based on an essential element of the employment relationship—subordination—to send a worker to work from home, would not be permitted if the possibility of changing the place of work were not provided for in the employment contract.[85] The existing legislation on telework needs to be refined

83 Preliminary Regulation Impact Assessment of the Draft Labor Act.
84 Art. 17 of the Labor Act.
85 See County Court in Varaždin, No. Gž-4050/11, 12 September 2011.

with regard to the use of modern communication technologies to achieve a clearer distinction between teleworkers who use personal electronic devices while working remotely.[86]

It should not be forgotten that while nonstandard forms of work represent new employment opportunities, they also present several difficulties when it comes to integrating them into standardized occupational safety and health systems.[87] Grgurev and Vukorepa emphasize that complex and fragmented labor law norms contribute to legal uncertainty, and the seasonal characteristics of the Croatian economy contribute to the use of fixed-term and temporary agency work, as well as student work.[88] In addition, they estimate that flexibility has increased since 2014 with the new Labor Act, which no longer requires objective justification for entering into a fixed-term contract, although it still considers it an exception. The first such contract may be concluded by the employee for a period of more than three years with possible exceptions based on the replacement of a temporarily absent employee, or on specific legal or collective agreement provisions, and successive employment contracts may be concluded for much longer than the maximum period of three years limited by the general rule.[89] The use of part-time employment has traditionally been low in Croatia, but the regulation of temporary agency work has opened up space for concluding numerous open-ended or fixed-term employment contracts, and the possibility of working in an alternative workplace proved, according to some authors, rigid and inflexible in practice. Furthermore, contracts are often concluded in Croatia outside the scope of labor law, i.e., contracts in the field of the law of obligations, to perform a whole range of tasks, but also to disguise the actual employment relationship[90] and, to some extent, the gray economy. A special law of 2012 introduced a voucher system of work in agriculture[91] for a maximum period of 90 days in a calendar year,[92] which has often been criticized, but it should *pro futuro* be considered how it could be extended, but also expanded to other jobs (home help, care for the elderly, babysitting, etc.).

These institutions, which mainly contribute to flexibility and testify to the gradual but obviously stronger development of nonstandard forms of employment, pose a significant challenge both to the national labor inspectorate and to the ordinary courts, and finally, and perhaps most of all, to trade unions, which need to reflect on their appropriate treatment in *pro futuro* collective agreements. According to many of the institutions mentioned above, which should contribute to flexibility, national jurisprudence is more than modest, and referrals to the Court of Justice of the European Union are, as far as we know, nonexistent.

86 For the difference between telework and remote work, see Vartianinen, 2021.
87 Bodiroga-Vukobrat, Poščić and Martinović, 2018, p. 67.
88 Grgurev and Vukorepa, 2018, pp. 245–246.
89 Ibid, p. 247; art. 12 of the Labor Act.
90 Grgurev and Vukorepa, 2018, pp. 249–251.
91 Employment Promotion Act, Official Gazette, No. 57/2012 and 20/2012.
92 Grgurev and Vukorepa, 2018, p. 249.

5. Concluding Remarks

The reality of Croatian labor law, legal theory and normative framework have continuously evolved over the last three decades, during which Croatia has been an independent state, and a Member State of the European Union for the last nine years. The traditional separation of labor law as a separate discipline emancipated from civil law, but also as an interdependent, teaching, and scientific discipline and branch of law, has certainly influenced the considerable legal fragmentation, for which we can also use hyperinflationary normative epithets. Moreover, due to specific historical and social circumstances, the teaching capacities and modalities of labor law and other legal disciplines were burdened with significant deficiencies in the teleological approach and interpretation and, consequently, not only in implementation but, above all, in legal reasoning and justification.

Collective bargaining and collective agreements, which have developed objectively and have only existed for about thirty years in a democratic environment, cover a relatively good proportion of employees, but with the necessary and legitimate desire to cover *pro futuro* as many employees in the real sector as possible. Given the challenges faced by trade union movements worldwide, such aspirations may seem unrealistic, but are not impossible, considering European traditions, positive practices and specificities. Collective agreements are an undeniable and significant professional, autonomous, contractual source of labor law with *erga omnes* effect and mechanisms that can extend their influence and scope in the public interest (extended application of the collective agreement).

However, the flexibility of the labor market and modern forms of employment permeate the national labor market much faster than it manages to normatively prepare for and promptly adjust to these changes. The reasons for this are probably not only insufficient normative activities, because they are, on the contrary, very intensive, but obviously in insufficient strategic thinking, the peculiarities of legal culture and the aforementioned deficits in teleological interpretation and implementation. Sometimes probably also because of the insufficient quality of social dialogue with a common goal and the partial inability to view human resources and human labor through a paradigm of *value* rather than a paradigm of *cost*.

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