Fundamentals of Labor Law in Central Europe

Legal Studies on Central Europe ISSN 2786-359X

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The book series has been established and is published in cooperation with the Budapest-based Ferenc Mádl Institute of Comparative Law.

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The publication of the book was financially supported by the Ministry of Justice of Hungary.

Fundamentals of Labor Law in Central Europe

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Miskolc – Budapest | 2022

Fundamentals of Labor Law in Central Europe
ISBN 978-615-6474-12-4
ISBN 978-615-6474-13-1 (eBook)
https://doi.org/10.54171/2022.nj.fullce

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Published by
© Central European Academic Publishing
(Miskolc – Budapest, Hungary)

The address of Central European Academic Publishing: 1122 Budapest, Városmajor St. 12 (Hungary)

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Introduction

Nóra JAKAB

There has been a paradigm shift in the global economy. The industrial revolution is long over, and its models are obsolete: we have entered the digital age. If we are looking for an answer as to how the actors have changed, we also need to look at the changes in the game, including the playing field and the rules of the game.

Labor law, like everything around us, is changing. In the 20th century, farming organizations were transformed into huge, vertically structured production systems that shifted to mass production. Employment relationships were created for full-time, indefinite periods, with the hope that the job would last for the rest of the worker's life. Of course, these jobs have not disappeared, but there are clear signs of change, which is weakening the employment model that was prevalent in the 20th century. People are changing jobs more frequently, with fixed-term contracts, seasonal work, temporary agency work, and more frequent job changes. More people are self-employed, working hours are more flexible, and the nature of work has become more varied and flexible. New forms of employment have therefore emerged.

In 2016, a quarter of all employment contracts were for 'non-traditional' forms of employment, and over half of all new jobs in the last ten years have taken a non-traditional form.[1]

Digitalization has facilitated the emergence of new forms of employment, and demographic changes have led to a more diverse active population. The flexibility provided by new forms of employment has contributed significantly to job creation and labor market growth. More than five million jobs have been created since 2014, of which almost 20% correspond to new forms of employment. The ability of new forms of employment to adapt to economic change has enabled the emergence of new business models, including in the social economy, and has allowed people who were previously excluded to enter the labor market.[2] The EU currently has 236 million women and men in work, which means that employment levels in the EU are higher than ever before. In 2016, 14% of workers in the EU were self-employed, 8% were

1 Non-traditional forms include permanent part-time and temporary full-time and part-time employment. European Commission, 2017.

2 Here I note, among other things, the entry of equal opportunities policy recipients, which strongly discourages labor law from applying flexible rules.

Jakab, N. (2022) 'Introduction' in Jakab, N. (ed.) *Fundamentals of Labor Law in Central Europe.* Miskolc–Budapest: Central European Academic Publishing. pp. 11–15. https://doi.org/10.54171/2022.nj.fullce_1

full-time temporary workers, 4% were part-time temporary workers, 13% were part-time permanent workers, and 60% had a full-time contract of indefinite duration.[3]

The prevalence of atypical work and self-employment varies widely across Member States, regions, sectors, and generations. The share of younger workers aged 20 to 30 working under temporary contractual arrangements or 'on other contracts or without a contract' is twice as high as in the other age groups. The gender distribution is also evident, with men predominating among the self-employed and women in temporary and/or part-time positions.[4]

The self-employed are also a heterogeneous group. Most people voluntarily choose to become self-employed with or without employees, embracing the risks of self-employed work, while around 20% become self-employed because they cannot find a job as an employee. Some enjoy good quality jobs and autonomy; others, less than 10% of self-employed workers, experience economic dependence and financial vulnerability. Among the new businesses created each year in the EU, the share of self-employment is at least 15% in Member States where that data were able to be analyzed. For newly created self-employed businesses, the survival rate is typically between 30% and 60% after the first five years.[5]

Within this changed playing field, labor law in Central Europe is examined in the interaction between political and economic systems, because if law were to be separated from other social subsystems, it would be impossible to ensure that social effects would be effective and less guaranteed. This is particularly true of labor law, which is assessed through its social and economic effects. It can therefore be seen as self-reflexive and self-perpetuating. It is closed in organizational terms, but open in cognitive terms. Organizational closure refers to the fact that law creates law, i.e., it can reproduce itself based on the feedback of its internal functioning. Cognitive openness, on the other hand, means that the system builds on external signals. Therefore law, politics, and economics interact. According to this reflexive theory of law, there is a certain degree of interdependence between systems, but this does not mean that law, politics, or economics are completely open to the influence of other systems. The implication is that law uses indirect regulatory techniques to influence, it is self-regulation and self-reflection. Indeed, legal regulation tells us little about how it is received by the actors of another system, which is why, in addition to analyzing internal processes, we need to understand the legal context of social science.[6] In this way, labor law can be interpreted in a reflexive way.

3 European Commission, 2018, p. 1.

4 Ibid.

5 European Commission, 2018, pp. 3–4.

6 See Deakin and Rogowski, 2011, pp. 230–238. The open method of coordination (OMC), announced by the European Council in Lisbon in March 2000, is a model of reflexive labor law regulation. The OMC was subsequently incorporated into the Employment Strategy and provided a completely new direction for policy formulation and implementation, based on a non-legal mechanism. However, as it was introduced in so many areas, it was also necessary to coordinate its coordination in 2003. A broader involvement of actors was introduced at Member State level and the economic, employment and social open coordination mechanisms were linked to

Flexibility and security go hand in hand with addressing the problems of vulnerable groups entering and remaining in the labor market.[7] This poses two main challenges for labor law: creating employment protection rules where necessary and enforcing them against employers' interests in flexibility. Social exclusion affects many groups that are unable to participate in the benefits of the labor market, which is why the aim is to increase employment rates through macroeconomic policies.[8] New regulatory techniques are needed, as opposed to the previous system based on hierarchy and instruction. Examples include tax relief for employees and the self-employed; the operation of occupational pension programs; employee share ownership; or temporary support for business organizations when they employ long-term jobseekers. New information and consultation mechanisms are needed, favoring a partnership between employers and the community of workers. In addition, human rights struggles and globalization, which have been intensifying since the second half of the 20th century, have had a major impact on labor law. Human rights outcomes stand out as a bastion of labor law, such as equality, the right to work, and freedom of choice of employment.[9]

The challenges mentioned here all push the boundaries of labor law, creating internal tensions. We believe that as the trend in labor law has moved toward a less protective labor law regime, with parties increasingly disengaged from the protective institutions of the employment relationship, the need to maintain protection has persisted. This disengagement also works against integrationist efforts, as protective regulation is essential for (vulnerable) workers.

Labor law is based on contracts: employment contracts and collective agreements. We often forget that they are 'contracts.' In this book, we examine the evolution of employment regulation in Central Europe, and the power of employment contracts

increase their mutual effectiveness. The results of the fight against unemployment have also linked employment and economic policies. Reflections of the OMC can also be observed within social policy and have led to the linking of social and economic processes. Thus, national action plans were developed in an integrated way, bringing together social exclusion, pensions, and healthcare, and became known in 2007 as the Joint Social Protection Report. The OMC has certainly become a key player in EU policy-making. See Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions, 2000; Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Renewed Social Agenda, 2008, pp. 168–198.

7 In the integration of vulnerable groups — women, the elderly, parents, people with disabilities — into the labor market, private law, and labor law as part of it, conflicts with human and constitutional rights. György Kiss, in his academic dissertation entitled 'The Conflict of Fundamental Rights,' also points out the conflict between the prohibition of discrimination, freedom of contract and the freedom of disposal guaranteed by property law, which is also manifested in labor law.

8 The assessment of policies and institutions is determined by their ability to fulfill the potential of the individual. It is for this reason that those who have been outside the labor market for a long time have good reason to question the functioning of the labor market as to why it does not allow access to paid work. Deakin and Rogowski, 2011, pp. 238–241.

9 Hugh, Ewing and McColgan, 2012, pp. 38–44; Rogowski, Robert and Noel, 2011, pp. 229–242.

and collective agreements to shape the legal relationships between the parties. In this investigation, the following focus areas emerged while writing the chapters: the systemic positioning of labor law; the concept and characteristics of the employment relationship; the relationship between labor law and civil law; the status of collective labor law; and the liberalization of labor law.

As Mario Vinković points out, quoting Hepple, the Nordic countries have gone furthest because by maintaining collective co-determination, they have managed to ensure a balance between social protection and labor market reforms that they believe has improved productivity, while other countries must follow this path to compete globally. From this perspective, a look at post-transition and post-communist states, relatively new Member States, and non-Member States in the heart of Europe, 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.

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| Chapter 1 |

Theoretical Issues of Employment Contracts and Collective Agreements on Current Regulatory Issues

Nóra JAKAB

Thanks to the intellectual tradition, labor law as a discipline is defined, in part, by its subject matter, which is the employment relationship and the rules that govern it. In a broader context, however, labor law provides a normative framework for all the institutions of the labor market, both active and existing, such as business organizations, trade unions, employers' representatives, and the state as employer and legislature. Moreover, labor law is very closely linked to civil law, social security, financial law, and company law. The starting point for our analysis is the existence of the employment relationship as a separate economic and legal category. The theory of labor law derives from the fact that the employee is subordinate to the employer ('subordination'), so that it is in fact the law of contingent labor. [1] It also corresponds to an economic relationship involving personal service for consideration. Labor law is therefore concerned with the establishment[2] and the way in which these relationships are regulated.[3] Labor law covers not only the relationships of individuals but

1 'The existence of labor law is ultimately due to the birth of the 'free labor contract' (*freier Arbeitsvertrag*), which gave way to the idea of contractual freedom, and thus to private law, instead of the public law approach. At the same time, however, an impartiality emerged in the private law order which gave one party the power to shape the legal relationship in the process of contract and then of performance, if such a distinction can be made at this early stage of development. This inequality, which directly led to the permanent dependence of the individual worker, virtually displaced the principle of contract (*Verdrängung der Vertragsorientierung*), which is also contradictory because in this relationship the basis of dependence was the contract itself.' Kiss, 2014, p. 42.

2 In common law countries, these relationships are usually established by contract. See Collins, Ewing, and McColgan, 2012.

3 In common law countries, this can typically be regulated by common law and social legislation itself, as well as collective bargaining and workplace practice.

Jakab, N. (2022) 'Theoretical Issues of Employment Contracts and Collective Agreements on Current Regulatory Issues' in Jakab, N. (ed.) *Fundamentals of Labor Law in Central Europe.* Miskolc–Budapest: Central European Academic Publishing. pp. 17–35. https://doi.org/10.54171/2022.nj.fullce_2

also those of the collective. In its unity and structure, labor law is situated on the borderline between private and public law.[4]

It is also an essential feature of labor law that its rules are constantly changing, mostly in response to economic and social events. Tamás Prugberger writes that labor law in civil states is the product of an evolutionary development of law.[5] In this evolutionary development of the law, we think it is important to outline the line of thought that explains the disappearance—and then the revival and strengthening—of the private nature of labor law.[6]

As Károly Szladits puts it,

> The development of private law into public law, which is so much talked about today, is not the increasing occupation of space by the idea of community, not the foregrounding of the public interest, but the characteristic feature that individual self-government is shrinking more and more noticeably and very significant areas of the relationships between private individuals are becoming subject to the regulation of public authorities, as in labor law.[7]

In modern labor law, therefore, the unequal position of the parties and state interference mean that the principle of freedom of contract is not applied to the same extent as in civil law, the whole branch of law being imbued with public law elements.

That is, the contractual nature of labor law cannot be disputed, but some of the rights and obligations that comprise the content of the employment relationship are not determined by the contracting parties.[8] Private labor law is a legal expression of the parties' self-determination (individual self-government). Consequently, the fundamental principle of private labor law is the so-called contract principle. More specifically, this means that everyone has the possibility of establishing and shaping their legal relationships through regulations that facilitate self-determination. In

4 Deakin and Morris, 2012, pp. 3–5. On dogmatic issues of labor law, see Richardi, 1992; 1968; 1988. On the development of British labor law, see Deakin and Morris, 2012, pp. 7–49.

5 Prugberger, 2001, p. 73. See Deakin, 2000, p. 2.

6 Not only the changing economic environment and technological developments, but also the changing employer structure that has resulted from them, have played a role in this evolutionary development. The changing employer structure is beyond the scope of this research, but will be the subject of future research. The most important changes are as follows: employers' organizations are increasingly seen as investment and risk communities, so organizational and management methods are changing: risk and loss are minimized (just-in-time, lean management); the network of interests of the enterprise and the employer is changing, and employee representation is changing accordingly; decisions of companies that are often controlled and monitored across borders affect employees, and fresh consultation and new information mechanisms must be developed accordingly. The changing employer structure is beyond the scope of this study, but will be the subject of future research. See Kiss, 2013, pp. 3–4; Collins, Ewing and McColgan, 2012, pp. 38–44; Rogowski, Salais and Whiteside, 2011, pp. 229–242.

7 Kelemen, 1941, pp. 17–18.

8 See Kiss, 2005, pp. 32–33.

addition, however, it is the legislature's task to develop rules that protect the individual employee against the power of the employer.

During the Industrial Revolution in the 18th and 19th centuries, the legal system applied the principles of private law—property law—to the commodification of labor. At first, the labor contract was considered a classical private contract. The freedom of property took absolute precedence over the interests of the worker. However, keeping labor law purely within the framework of private law was untenable in the long term, since the parties subject to private law relationships are those who are subordinate to the market, whereas the asymmetry between employer and employee is clearly.[9] The contractual freedom of the employee's will was only an illusion. In the last century or so the unbridled pursuit of the employer's interest may have led to the emptiness of the employment contract, and today, the emptiness of the employment contract can be considered one of the marginal problems of labor law (both Hungarian and foreign).[10]

There are two ways to protect the weaker party and thus limit contractual freedom: collective action, and state intervention.[11] The first happens in this order: the period of contractual freedom is followed by the gradual recognition of the freedom of association, then a period in which collective agreements are concluded, and they gain the power to transform the terms of individual employment contracts, and their scope is recognized as extending to the legal relationships of non-organized members. The next stage is the period of state intervention, when the state intervenes in the private relationships of the parties—for example, in the event of strike actions, limits on working hours, the imposition of health and safety requirements on employers, and the imposition of minimum wages. However, the norms protecting workers do not mean the abolition of the legal basis for contractual obligations. By World War II, most developed countries had consolidated labor law.[12] In the period following World War II, the general democratization and expansion of the social function of the state became increasingly widespread. The fundamental moral foundations of the so-called welfare state or social state of law began to be laid by the increasingly frequent inclusion in national constitutions of fundamental social rights as elements of the second generation of human rights. Welfare states were based primarily on rapid and

9 Hajdú and Kun, 2011, p. 59.

10 'It may seem that the contract of employment is relevant only as a causa, and plays little or no role in the formation of the legal relationship at the time of performance' (Kiss, 2014, p. 40). This is also reflected in the fact that Dutch labor law theory treats employment contracts as similar to civil law consumer contracts, a view not alien to Tamás Prugberger and György Kiss, which also provides protection for the weaker party to the contract, the employee.

11 Hajdú and Kun, 2011, p. 59.

12 Building on the foundations of private law, state intervention was strengthened on the one hand, while on the other hand collective agreements were incorporated into the legal system, and the field of law began to become more autonomous and unified (between 1910 and 1927 the Code du Travail unified labor law rules, and the Weimar Constitution of 1919 called for a unified labor law). Works constitutions appeared as the embodiment of the principle of democracy, and the internationalization of labor law began (ILO, 1919) See Hajdú and Kun, 2011, pp. 60–61.

sustained economic growth based on large-scale, standardized mass production and Keynesian demand–stimulation economic policies. The economic model that developed from the 1920s onwards, and then enjoyed its golden age in the 1950s and 1970s, is known as Fordism, after Henry Ford. In this Fordist model, the 'breadwinning family man' is the representative worker. Mass production was largely based on the bureaucratic, monotonous organization of large-scale factories based on the management principles of Taylorism. The classical institutions of labor law developed in this period in this socioeconomic order. A new development began in the 1970s within the social dimension of the European Union, and thus European labor law.[13]

It is generally accepted that labor law came about as a reaction to industrialization. The essence of labor law was to define working conditions, as a response to the intolerable working conditions of the time. However, it was essentially a paradigm shift that gave rise to such regulation.[14] This is indeed the case. Bellace refers to the practice under feudalism, where the laborer (serf) lived on the land and in the house that belonged to the property owner. Their relationship could last a lifetime.[15]

Workers who produced an intellectual product with some higher added value typically had a short working relationship with the client. In fact, industrialization changed this system: capital was represented by the 'landowner' and the 'guild-member master/earner' under feudalism and the guild system, and by the 'employer' under industrialization. Bondage remained—with one small difference: the worker received a wage for the work done. The employer was no longer obliged to provide for the worker's housing and food. The employment could thus be considered a cash-only transaction; there was no status relationship between the worker and the employer, and it was 'merely'[16] a contractual relationship.[17]

It is therefore a basic economic fact that during industrialization, the capitalist requires laborers. In this labor market, the capitalist had no need for surplus labor, and the risks of working were transferred by the employer to the worker.[18] However, if risks are imposed on workers they are not prepared to bear and against which they are powerless, this clearly leads to a dilution of the private nature of labor law. In the industrial era, there was no talk about employment predictability, and no

13 One of the milestones was the 1987 conference in Zell am See entitled Flucht aus dem Arbeitsrecht. Hajdú and Kun, 2011, p. 61; Prugberger, 2008, pp. 39–53.

14 Bellace, 2018, pp. 11–12.

15 Bellace describes this relationship with the term 'tied cottage,' referring to the bond between the parties that came with settling and farming on the property owner's property. This was also the case in the family workshop and trade in the medieval guilds, where a similar long-lasting relationship of trust existed between the assistant, the apprentice, and the expert artisan until the emergence of manufactories and the dissolution of the guild system. Assistants and apprentices often lived with the artisan and the guild took care not to employ them for domestic work. See Csizmadia, Kovács and Asztalos, 1991, pp. 113–115, 123; Wenzel, 1877; Werbőczy, 1517, Section III. point 2.6; Prugberger, 1978, pp. 16–18.

16 I think it is important to put 'merely' in quotation marks, because the contractual relationship—the employment contract—is an essential element of the employment relationship.

17 See Bellace, 2018, p. 13.

18 Bellace, 2018, p. 13.

certainty about tomorrow. Workers were paid low wages, which could only increase if they worked longer hours, and they tried to make a living out of it.[19] In the case of workers facing dangerous and harsh working conditions, the serf–landowner relationship became a real worker–employer relationship. In other words, there was no longer a relationship between employer and worker based on a mutual commitment as between serf and property owner. What we see is a contract under which the employer agrees to pay wages for the work. There is no promise other than what the parties negotiate—what they put in the contract, either verbally or in writing. This is where modern labor law comes into being.

Therefore, we think it is important to stress at this point that it is *only* the contract—the employment contract—that binds the parties together. The employment contract has tried to put parties who were never equal before, according to the traditions of past centuries, into a position of equality. In fact, in light of the above reasoning, the principle of freedom of contract made it impossible, in the social and economic circumstances of the time, to define contractual terms on an equal footing. It is clear, therefore, that the subordination of employer and employee does not derive merely from the employer's extensive right to give instructions, to direct and to control the performance of the work. During the industrialization period, the paradigm shift meant that the relationship between the parties based on the employment contract could not have functioned other than through abuses by the employer. Suddenly, the workers had 'freedom' which, because of their immaturity and lack of means, they could not use, nor could they be expected to.[20] Understandably, it was the workers who had some skills and required autonomy who were able to maintain their independence personally and existentially, as they were the ones who had the experience to do so.

Of course, the contractual agreement between employer and employee and its strength were influenced by several factors. It is not possible to draw general conclusions that apply to all, but the following can, in our view, be justified: the initial weakness of the employment contract in shaping the legal relationship between the parties (and thus the contractual terms) can be explained by the contractual relationships prior to industrialization. The individual self-government of the parties has of course developed in different ways in Europe, influenced by the social structure, the economic environment, historical events, and the operation of the legal system. The emergence of atypical employment relationships clearly represents a strengthening of individual self-government.

The lack of will in individual workers made it clear that labor law could not move in any other direction than protectionist, protective rules—hence the emergence of state intervention. The *will* wants to free itself from the shackles of strict rules. When individual self-government is strengthened, the parties are clearly touched by

19 Ibid.

20 Bellace also points this out. At the end of the 19th century, in Britain and Germany, and subsequently in several European countries, minimum working conditions were established through state intervention and collective bargaining (Bellace, 2018, p. 13).

the power of contractual freedom, and they want it. The working person does indeed need protection, but if they can protect themselves, they do not want to work in a strict labor law regulatory environment. We do not wish to simplify the problem in any way, but we must see that changes in the world around us have simultaneously shaped the playing field, and the players, with consequent changes in the rules of the game. That is why we are talking about the future of labor law. It is only natural that labor law has a future, but in a different context and on a different basis than it has had for the last 200 years or so.

Since the development of labor law, there have been different theories about the essence of labor law. Kahn-Freund, for example, saw the purpose of labor law as the regulation, promotion, and restriction of management, and the power of organized labor.[21] There is therefore an inherent inequality in the legal relationship, and the economy is the primary driver of employment relationships, with the law being only a secondary driver.

We think it is important to go into detail about the subject of labor law, which is so-called dependent work or self-employed work, in the context of the essence of labor law. Dependency is the result of economic vulnerability and the related dependence on the one who exploits their labor. At the end of the 19th century, the realization that not all worker–employer relationships are economically dependent was formulated, and this was replaced by the theory of personal dependence. Sinzheimer and his school taught that employees add their personality to their performance, and that the employment contract creates a special personal domination relationship based on the service contract (*Dienstvertrag*). This theory has also been criticized by some, since the inability to provide for one's own existence cannot be taken as a criterion for delimitation in the doctrinal foundation of labor law. Following the demise of economic and personal dependence theory, it was necessary to explain why, in the case of work for others, subordination should be required in some cases but not in others.[22] In our opinion, this dogmatic need for explanation led to the development of the dual and then the triple model.[23] From this point onward, the employment relationship began to be defined in relation to other employment relationships, typically in relation to the undertaking and the assignment. The contractual indeterminacy of the service in the employment contract became a fundamental demarcation criterion. According to György Kiss, labor law is primarily the law of those who are not at a stage of autonomy where they do not need to use their labor for the benefit of others. This entailed the incorporation

21 Bellace, 2018, p. 14.

22 Prugberger, 2006, pp. 66–72; Prugberger, 2014, pp. 65–71. See also Deakin and Morris, 2012, p. 145; Collins et al., 2012, pp. 45–86.

23 See Kiss, 2014, p. 39. 'The subject of labor law is so-called dependent or independent work for another. This characteristic requires an explanation as to why subordination is a *differentia specifica* of the legal relationship of working for another, while in others it is not present. Is it at all possible to explain subordination which, in a private law relationship, on the one hand, makes this status quo acceptable and, on the other hand, justifies the parties' room for maneuver, in particular with regard to the employer's power to determine performance and to formulate the legal relationship, including its limits.'

of protective measures into the legal relationship, which served to maintain a state of equilibrium between the parties. This became the primary task of labor law. While employment relationships under civil law are synallagmatic (bilateral), the content of the employment relationship must be made more bilateral as well.[24]

Bellace argues that if we are talking about limiting the power of the capitalist, we need to understand what economic force creates this power and what instruments can regulate it. National regulation was seen by many in the 20th century as a means of influencing the power of the corporation. By the end of the 20th century, it had become clear that multinational companies could bypass national regulation simply by moving production to another country. In Bellace's view, it is no longer a question of limiting the power of management, but of leveling the playing field, which has changed.[25]

In the last fifty years, three major challenges to which the legal system has had to respond in the context of changes in the economic and social environment must be highlighted: globalization; changes in the forms of work; and the empowerment of the individual—and hence, the decline of collective consciousness. What all three have in common is that technological innovation has had a major impact on the development of these processes.[26] In this evolution, in our view, economic and social changes are pushing the employment relationship toward civil employment relationships, blurring the sharp boundaries between the different legal relationships and often transforming them into each other.

Blanpain wrote of globalization and technological innovation as leading to the fragmentation of companies into interconnected groups where work is organized on a project basis. This changes the role of the employment relationship and the role of the social partners.[27] In effect, the gig economy represents a network of individuals connected to each other along separate projects.[28]

When discussing globalization, many point out that collective bargaining at a national level has been unable to regulate the relationship between employers and workers. What do we mean by this? Collective bargaining can secure higher wages if it has wide coverage, is representative of all workers in a given company, and is strong in a given sector.[29] In this case, companies tried to use workers from other countries. In the last 20 years, many companies in developed economies buy materials and finished products from developing countries under substantially worse working conditions. As rights advocates have stressed that the buyer company can ask the supplier company to respect core international labor standards, even in contractual terms, companies

24 József Radnay sees collective bargaining autonomy as such a protective measure (Radnay, 2001, pp. 259–260; Kiss, 2013, p. 6; Kiss, 2006, p. 255).

25 Bellace points out that in the current economic climate, many people see the future as uncertain, and not without reason. Trends are emerging that are not encouraging. Information technologies are mostly eliminating the jobs of workers with average skills (Bellace, 2018, p. 15).

26 Bellace, 2018, p. 15.

27 Blanplain, 1999, p. 497.

28 Mangan, 2018, p. 65.

29 For nearly forty years, we have heard that multinationals are more powerful than the state, and therefore the response has come from the supranational level.

have created their own codes of conduct.[30] It can be said that companies usually seek to comply with international legal standards through voluntary compliance.[31]

30 At the World Economic Forum meeting in January 1999, Kofi Annan announced the UN Global Impact Principles, four of which are related to working conditions. Available at: https://press.un.org/en/1999/19990201.sgsm6881.html (Accessed: 20 July, 2022). The World Economic Forum also concluded that new technologies pave the way for economic growth and the reduction of social inequalities as much as for less noble goals (e.g., civil wars, propaganda). In its research, the organization created a new measure, digital value to society (DVS), which analyzes the impact of digitalization on health, safety, employment, the environment, and consumers. The resulting DVS indicator expresses how a given instance of digital transformation contributes to value creation in the business sector and society (World Economic Forum, 2017). It was also in the 1990s that the UN became aware of the growing environmental and social pressures that threaten the planet and humanity. In response to this threat, in 1983 it established the World Commission on Environment and Development, better known as the Brundtland Commission. The Commission worked from 1984 to 1987 to try to find solutions to the world's environmental and social problems. The results of their work were published in a report at the end of their work. The solution to these problems was called sustainable development, defined as development that meets the needs of the present without compromising the ability of future generations to meet their own needs (Report of the World Commission on Environment and Development: Our Common Future, 2018).

31 In my view, corporate social responsibility (CSR) and public social responsibility (PSR) activities are part of this process. According to one of the most widely accepted definitions of CSR, it comprises four interlocking areas of responsibility: economic, legal, ethical, and philanthropic expectations, which are addressed to companies from the side of society, where society is understood to mean the broad range of stakeholders of a company. This approach can be traced back to the work of Archie B. Carroll and his CSR pyramid metaphor (Szegedi and Mélypataki, 2016, pp. 51–70).

The European Union has also developed its own definition of CSR as a concept whereby companies voluntarily integrate social and environmental considerations into their business operations and use these principles to shape their relationships with their wider stakeholders, i.e., anyone affected by their activities or who has an influence on the company's operations (European Commission, 2001).

GSR stands for global/collective social responsibility. One of the happy effects of globalization and the development of information technology tools is that different organizations and individuals can find each other with increasing ease. This, together with the willingness of individuals and organizations to seek each other out, is making social responsibility global and cross-sectoral.

To address society-wide problems and to exploit the various opportunities that arise, CSR, PSR and individual social responsibility (ISR) are becoming interlinked and globalized to work together in a multifaceted partnership.

PSR is linked to the specific field of activity of public sector institutions. The monitoring of the functioning of these institutions, of public responsibility, is on the one hand carried out through the public sphere. This responsibility becomes a public social responsibility when the organization, in addition to its statutory tasks, carries out activities within its remit, or sometimes even beyond it, which contribute to meeting important social needs or even to solving problems (Gazdasági Versenyhivatal, 2016).

Public sector corporate social responsibility has received increasing attention in recent years. This is evidenced by several research and projects in this field, including the EU-funded project Governmental Social Responsibility Model: An Innovative Approach of Quality in Governmental Operations and Outcomes, which is part of the South-East European Transnational Cooperation Programme. Social Value and Responsibility in the Public Sector, based on presentations at the National University of Public Service Workshop, 9 November 2018.

Technological advances in telecommunications over the decades and the spread of English as the common language of business have made it much easier for European and North American companies to do business with each other. A series of bilateral trade agreements between countries around the world,[32] following the Uruguay Round negotiations, have made it possible for products destined for the European market to be made in Asia, where labor costs are a fraction of those in Europe. With the creation of the World Trade Organization (WTO), all barriers to international trade seemed to have been removed. A key issue in this context is how individual companies can ensure competitive prices and maximize profits while optimizing and reducing labor costs. In this respect, it is possible to apply an appropriate strategy, considering the legal framework provided by the Member State concerned.[33] Employers can choose flexible working arrangements, leading to precarious employment.

We have been talking about the information age since the advent of the computer and the invention of the microprocessor in the 1970s. The world of work has moved from the factory to the office, where the number of employees has been significantly reduced. Information technology has completely transformed the way people work. Instead of many people performing the same repetitive work processes, fewer workers are using computers to produce products. No wonder companies have put the individual at the center of this change. After all, to thrive in today's open labor market, one needs advanced interpersonal skills, the ability to work in a team, the ability to problem-solve, the ability to learn and innovate continuously, the ability to absorb new technologies (soft skills).[34] Constant adaptation to work has become the key to successful employment. The above qualities all contribute to this flexibility. Employees are even more affected by careerism in the 21st century than before.[35] The work ethic has also changed. Whereas in the past hard work, honesty and integrity were important, today the changes are pushing workers to become less emotionally attached to their jobs and to seek external motivation, for example in leisure activities. In other words, work is no longer necessarily the defining building block of personality.[36] Workers are no longer necessarily substitutes for each other, and the intelligence

32 The series of trade negotiations, which lasted seven and a half years and involved a total of 123 countries, is still considered a unique initiative worldwide. Available at: https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact5_e.htm (Accessed: 2 December 2018).

33 Bellace, 2018, p. 17.

34 The learning process must be based on a methodology that allows the individual to adapt to the new. This is the basis of learning outcome-based education today.

35 Murray and Heron, 2003, pp. 3–4; Holmes, 2007, pp. 7–9.

36 Murray and Heron, 2003, p. 4. Here I refer to the fact that reflexive labor law regulation has a major role to play in the development of a social policy in which as many people as possible live in well-being according to their abilities, enjoying social rights to the fullest. Alongside Freedland and Countouris, Deakin and Rogowski draw on Sen and Nussbaum's theory of capability, described earlier, and relate this to the labor market. See Deakin and Rogowski, 2011, pp. 230–238. Amaryta K. Sen and Martha Nussbaum's theory of capacity takes a holistic human rights perspective. Sen is credited with the capability-based approach to disability. His theory focuses on the person's ability to function, i.e., whether someone can do something. This theory does not refer to the existence of a physical or mental ability, but understands it as a practical opportunity.

and individual commitment of the worker is increasingly important. In this respect, the traditional employer–employee relationship is clearly changing.

In North America and Europe, it was mainly manual workers who were unionized. They truly represent the traditional employer–employee relationship based on the Fordist model. In their case, there is no strong free will, they were able to achieve results together. However, from the 1970s onwards, a completely different generation has grown up, no longer identifiable with the former working class. We call the millennial generation the digital natives, and they are the ones who have lived with technology since birth. These workers feel part of an online community that is very different from the working community of fifty years ago.[37]

Globalization, the changing nature of work, and the increased role of the individual are simultaneously and mutually reinforcing the pushing of boundaries in national labor law. In the 19th and 20th centuries, the improvement of working conditions was achieved through collective bargaining. The collective consciousness of workers was strong. But the cross-border activities of multinational companies have weakened workers' organizations.[38] In the digital economy, it is not easy to get workers to take collective action, as the playing field is completely different.[39]

Another very important component of the employment relationship has changed in the 21st century: employers paid wages not so much for the work done but for the time spent at work.[40] It varied from country to country as to what other benefits the employer also paid, such as the cost of incapacity for work due to illness or pension contributions. Today, however, the employer pays wages for the work done rather

Function is the actual performance of the individual—what the individual achieves through his or her existence and actions. What is practical opportunity? For Sen, it means ability. In the same way, he does not use the traditional notion of action; for him it also means desires rather than specific actions, such as eating *properly*. To illustrate this, he gives the example of two starving people. One does not eat out of religious conviction, the other because he has nothing to eat. This is the difference between action and practical possibility. That is, Sen looks at the interests that drive the person, rather than his or her actions. He distinguishes between two ways to interpret one's interests and performance: the way of well-being, and the way of advantage. 'Well-being' refers to the actions an individual takes for his or her personal well-being; 'advantage' refers to the opportunities that are available to a person, which enable him or her to exercise the ability to choose. A person's capabilities are in fact the courses of action available to him or her, among which the person exercises the freedom of choice. The set of capabilities is influenced by the goods available, the environment around the individual, and his or her personal characteristics, all of which lead to actions. Sen does not specify a method for measuring the capability set, because the problem and the circumstances cause the individual's attributes, abilities, and actions to change constantly (Mitra, 2006, p. 236; Freedland and Countouris, 2011, pp. 378–379).

37 Bellace, 2018, pp. 19–20.

38 In this period in Hungary and in the other former socialist countries, we are faced with an unfavorable situation in which workers with a modest collective consciousness were even more vulnerable after the change of regime. It is noticeable that the disadvantage of nearly forty years after the Second World War is still difficult to compensate for today. Meanwhile, we can see the changes in the Labor Code of 1992 and 2012, and the clear emergence of a more civil rights approach.

39 As Bellace puts it, 'The platform and algorithms work automatically' (Bellace, 2018, pp. 20–21).

40 Bellace, 2018, p. 21.

than for the job done,[41] so the place of work is less important. This has led to the development of atypical forms of work, such as remote work and on-call work, where the employer's right to define the specific nature of the work is clearly reduced.

One can agree with the point of view that sees the information age in the world of algorithms and applications, in the gig economy, as an industrial revolution[42] of work at home,[43] where there is no point in fighting for minimum wages, for decent remuneration for work done in extraordinary hours.[44] At this level, it is of great importance whether the worker is considered as an employee or as a self-employed person[45] (capitalist, owner). Since the Court of Justice of the European Union[46] has considered Uber drivers to be workers rather than employees,[47] the question arises as to what

41 In the case of crowdworking, the project approach is also reflected in the fact that the question is more about how many hours it should take to produce the service for the customer.

42 Mangan also writes: 'The world of the gig-economy is most like working at home or on a piece-rate basis. If the quality of the work is acceptable and it is completed on time, there is no shortage of compensation. It is important that the work done is not a whole but a part of it' (Mangan, 2018, pp. 69–71).

43 Bellace and Mangan also refer to the case of the Fair Labor Standards Act of the 1930s in the United States, which banned work at home (Mangan, 2018, p. 71; Bellace, 2018, p. 22).

44 David Mangan writes at length on the gig economy phenomenon, pointing out, among other things, that those who work on this platform are mostly looking for additional income or are doing so because they have been unable to find work in the 'traditional' labor market. These workers are also generally satisfied with their income (Mangan, 2018, pp. 64–67).

45 The Council's recommendation underlines that an important change is the blurring of the boundaries between labor market statuses because of structural changes in labor markets. In addition to the traditional self-employed' and 'liberal' professions, the self-employed status is becoming more widely used, in some cases even when it is a de facto employment relationship. As the world of work evolves—with more people working as self-employed, on atypical contracts, or alternating or combining economically dependent work with self-employment—an increasing proportion of the workforce does not have sufficient access to social protection because of their labor market status or the type of employment relationship. (The Council of The European Union, 2019, p. 3).

46 Judgment in Case C-434/15 Asociación Profesional Elite Taxi v Uber Systems Spain SL. According to the judgment of 20 December 2017, 'service' is defined as 'Any information society service, i.e., any service provided at a distance, by electronic means, and at the individual request of the recipient, normally for remuneration.' For the purposes of this definition: 'at a distance' means that the service is provided without the simultaneous presence of the parties; 'by electronic means'means that the service is sent from its point of origin and received at its destination by means of electronic equipment for the processing (including digital compression) and storage of data, and is sent, transmitted and received entirely by wire, by radio, by optical means or by other electromagnetic means; and 'at the individual request of the recipient of the service' means that the service is provided at the individual request by the recipient of the service by the transmission of data.

47 C-434/15, point 39: 'In that regard, it is apparent from the information available to the Court that Uber's intermediary service is based on the selection of non-professional drivers who use their own vehicles and for whom that company provides an application without which, first, those drivers would not be able to provide transport services and, second, persons requiring a transfer within the city would not be able to use the services of those drivers. In addition, Uber has a decisive influence on the conditions of service provided by such drivers. On the latter point, it appears explicitly that Uber establishes, through the application of the same name, at least the maximum fare, that it collects that fare from the customer and then pays part of it to the non-professional driver of the vehicle, and that it exercises a certain degree of control over the quality of the vehicles and their drivers and over the conduct of the latter, which may, where appropriate, lead to their exclusion.'

protection is afforded to workers on the new platform.[48] Bellace himself argues that the answer for labor law may be to *return to its core values*. The fundamental value of labor law is that it provides economic security and thus predictability: internally, by providing rules to protect workers, and externally, by the state, by providing a social safety net if workers are unable to work in a situation of disruption. Another very important value is a healthy and safe working environment. In 1998, the ILO set out the fundamental rights that all states must respect: (a) freedom of association and the effective recognition of the right to collective bargaining; (b) the elimination of all forms of forced and compulsory labor; (c) the effective abolition of child labor; and (d) the elimination of discrimination in respect of employment and occupation.[49] These rights should apply as basic rules of the game, regardless of the playing field.[50] Security in labor law is therefore about upholding core values.[51]

Theories of the employment relationship have long held that the employment relationship reflects market processes, and labor law has been identified with the actual agreements that emerge in the labor market, by classifying them as legal categories and extending the protection of labor law to them. Legal analysis throughout the 20th century has shown that there are two main ways in which an employment relationship can be established. Under this legal construction, most working people are either dependent employees or self-employed. This represents the binary divide

48 Mangan refers to an Uber ruling in North Carolina, which found that Uber is not a technology company. According to the ruling, just because someone uses a technology does not make them a technology company. Mangan warns that this argument ignores the changes that have taken place. See O'Connor et al v. Uber Technologies, Inc., C.A. No. 13-03826-EMC (N.D. Cal.); Mangan, 2018, p. 70; and Prassl and Risak, 2016, pp. 619–651.

49 International Labor Conference, 1998.
'The International Labor Conference…(2.) Declares that all Member States, even if they have not ratified the Conventions in question, are bound by their membership of the Organization, in good faith and in conformity with the Constitution, to respect, promote and fulfill the fundamental rights to which these Conventions refer. These principles are: (a) freedom of association and the effective recognition of the right to collective bargaining; (b) the abolition of forced and compulsory labor in all its forms; (c) the effective abolition of child labor; and (d) the elimination of discrimination in respect of employment and occupation.'

50 Mangan also refers to what Bellace pointed out in the case of algorithms—that algorithms can lead to inequalities, i.e., discrimination (Mangan, 2018, p. 72).

51 Freedland's and Countouris's theory of personal employment relationships will not be analyzed in this chapter, as I do not consider the concept feasible. However, there are several elements of the concept that deserve to be highlighted. One of these is about values in work. It is pointed out that, rightly, the normative basis of labor law is the balancing of the positions of parties in unequal situations. Human dignity is a first-generation right with which we are all familiar and which is enshrined in many international documents. Freedland and Countouris complement this thinking on dignity with the concept of autonomy and equality. Autonomy means that a person makes decisions about his or her own life (work life) autonomously, without any constraints. This is complemented by equality, which, like human dignity, is also one of the oldest first-generation human rights. However, equality is thought of in terms of Amaryta Sen's concept of equality—equality based on ability—which is considered the most appropriate for labor and social law. Dignity is closely linked to the person of the worker, based on personal work (Freedland and Countouris, 2011b, pp. 372–376).

of employment relationships. Of the two, the traditional worker enjoys the protection of labor law. This dual model was reinforced by industrial mass production and subordination in the factory. In recent years, Deakin and Freedland[52] have argued that this model has been shaped by political, social and, ultimately, legal pressures, and several authors (J. Pélissier, A. Supiot, A. Jeammaud) have accordingly argued that the changes which have influenced the dual model are due not only to world economic events but also to changes in the law as a result of legal policy.[53] Countouris is quoted as saying: 'The dream of many employers is to be able to afford a workforce without the need for permanent paid employees. This is not a dream that cannot come true... the law prohibits in principle the provision of labor for profit yet, allows for significant exceptions to the prohibition.'[54]

The changes have occurred at two main levels: on the one hand, employers have modified the terms of the agreement in ways that the efficient operation of the business has required. On the other hand, the modified agreements transformed the workforce, and new legal categories emerged in the second half of the 20th century: casual worker, part-time worker, temporary agency worker, false (or 'bogus') self-employed worker, or person with a status like that of an employee, etc.[55] Two distinct strategies have emerged at national and supranational level for managing changes in the employment relationship. One of the regulatory strategies is to extend the scope of labor law. This strategy is based on the theory that there is a grey area between subordination and self-employment, where subordination and autonomy are more nuanced. The redefinition has sought to extend labor law to as many new forms of agreement as possible.[56] The second regulatory strategy sought to regulate and protect new atypical forms of employment through ad hoc legislation. This approach assumed that legal relationships that have some elements of contingent work (e.g., continuity, full-time work) deserve some level of protection. This view does not focus on the subject matter of employment relationships, but rather on taxonomy and classification.[57]

Countouris points out that the law has taken the following approach to employment relationships that do not fit into the dual model.[58] For much of the 20th century,

52 Deakin, 2000; 2001; Davies and Freedland, 1999–2000, pp. 231–248.

53 Countouris, 2007, pp. 2–4. On the Swedish dual model, see Källström, 1999–2000, pp. 157–186. On the Dutch regulation, see Peijpe, 1999–2000, pp. 127–156. On the Japan dual model, see Yamakawa, 1999–2000, pp. 99–126. On the Canadian model, see Langille and Davidov, 1999–2000, pp. 7–46.

54 'The dream of numerous employers is to be able to avail themselves of a workforce without also having salaried workers. This is not a dream that cannot materialize...the law poses a prohibition of principle to the supply of work for profit, by introducing, though, a significant exception to this prohibition (authorization of 'temporary work').'

55 On self-employment, see Szekeres, 2018, pp. 472–484; Countouris, 2007, p. 4.

56 In the same way, Act I of 2012 on the Hungarian Labor Code has sought to extend labor law to as many atypical jobs as possible.

57 Countouris, 2007, p. 5. Mark Freedland and Nicola Countouris propose a new taxonomy by introducing the notion of personal employment relationships (Freedland and Countouris, 2011a, pp. 200–202; 219–224).

58 These are the prohibition, conversion, encouragement, normalization-without-parity, and normalization-with-parity models.

the law prohibited all employment, typically fixed-term and part-time, which did not fit the dual model or fell outside the traditional employment relationship. If not prohibited, it transformed atypical employment into an employment relationship based on subordination, such as the relationship to fixed-term contracts in several continental jurisdictions. In addition, the law has given a lower level of protection to workers who have engaged in atypical employment. At the same time, this regulatory policy also motivates employers to enter into such contracts, as it means cheaper labor. This means that regulation then normalizes atypical work without giving workers the same rights. This also raises the question of a breach of the principle of equal treatment. And the principle of equal treatment is a fundamental value of European labor law that has had and continues to have a significant impact on the new employment relationships. It is a pillar of security.

One of the consequences of normalization is the increased prevalence of atypical forms of work, outside the framework of contingent work and labor law, of course. Countouris cites the UK and France as examples. In the latter, he refers to the conclusion of special contracts that excluded protection against dismissal during the first two years of employment. Later, however, national legal systems have sought to establish rights for fixed-term and part-time workers, and even temporary agency workers, through ad hoc legislation, invoking the principle of equal treatment. This period can be seen as a period of the normalization of rights.[59]

Anyone who examines changes in the employment relationship will inevitably fall into the trap of discourses as determined by the economy, since the prevailing view is that the profound transformations in the economic structure of industrial society are inexorably shaping economic relationships, to which the law in general, and labor law in particular, are adapting. In fact, the newly emerging employment relationships are constantly putting two fundamental concepts of labor law under pressure: the employment relationship and subordination. With the normalization of atypical employment relationships, which enshrines rights, atypical contracts have grown in a way that has not fallen under the umbrella of contingent employment. An example of this is the extension of some elements of employment law in the UK to quasi-contingent workers.[60]

A similar regulation can be observed in Italy with the introduction of the 'Biagi law,' which referred to quasi-subordinate workers as project workers. This was not a move away from the dual model, but rather typified atypical employment, like the fixed-term and part-time employment of the past. The law normalized this by not giving these workers the rights that workers have. It is for this reason that we must be careful in our conceptualization, because if a third category (*tertium genus*) is added to the dual model of employment relationships under labor law and civil law, there is a high risk of creating a more atypical and less protected legal relationship. It would be good if the typification of quasi-contingent work moved toward a normalization

59 Countouris, 2007, pp. 5–6. French term for the special contract: *contrat première embauche.*
60 Countouris, 2007, pp. 7–8. See also Bronstein, 2009, pp. 30–69.

that enshrined rights, like part-time and fixed-term employment, while the latter two were normalized based on the principle of equal treatment. For quasi-regular workers, normalization without guaranteeing rights seems to be maintained.[61]

The myriad of employment relationships, as mentioned above, poses a challenge to legislatures and legal policy, and a variety of strategies have emerged, either moving away from or toward the employment–self-employment dichotomy. In this context, the question is: how is the regulation of the new employment relationships in Central Europe evolving? The question is also how, with all these changes, will the place of labor law in the legal system, the concept of the employment relationship, the employment contract, and the collective agreement evolve in Central Europe? What is the relationship between labor law and civil law in the countries under study? What were the arrangements that were introduced in the spirit of flexicurity? How did the COVID epidemic shape labor law? How is collective bargaining coverage shaped to measure the state of collective consciousness?

The regulation of the countries being studied is therefore about the foundations of labor law. We are convinced, however, that based on these foundations, we can reflect on the future of labor law in the Central European reality in the framework of new research and cooperation. We believe that we can learn from each other, as the bases are the same and the regulations do not differ much. We understand each other and can also determine the future of labor law in Central Europe. This book aims to contribute to that.

61 Countouris, 2007, p. 8. However, one can agree with Countouris that the driving force of change is not only due to processes in the economic system, but that law itself has a huge role to play. Law has just as much influence on economic processes as vice versa. The legal system is constantly conceptualizing agreements, and it can thus be argued that the emergence of the now-defunct dual model was not merely an economic product of industrial society. I link this finding to the view of the reflexive nature of labor law. The term 'reflexive labor law' was first used by Rogowski and Wilthagen in 1994. According to this theory, the legal system should be regarded as a separate order, just like the political and economic system. All three subsystems must protect their own institutions. The separation of law, politics, and the market creates a decentralized social structure in which power is shared between autonomous but interconnected institutions. The autonomy of the legal system is a prerequisite for the existence of the rule of law and objective justice. It would not be appropriate to separate the legal system from its external environment. If the legal system were to lose its autonomy, it would become a mere expression of political power. On the reflexive labor law regulation, see Arthurs, 2007, pp. 19–36.

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| Chapter 2 |

Slovakia: Traditions and New Challenges of Labor Law

Marcel DOLOBÁČ

ABSTRACT

This chapter consists of three basic sections. The first part provides an interpretation of the position of labor law in the legal system, based on the system of labor law itself, the subject of regulation, and the method thereof. The second part analyzes the employment contract, the collective agreement, and the relationship between these agreements, pointing out the selected issues in practice. Finally, the third part is a reflection on the direction of labor law in the context of social changes that occur with the onset of technological boom.

KEYWORDS

status of labor law, contractual freedom, subsidiarity of the Civil Code, employment contract, collective agreement, society 5.0

1. The Position of Labor Law in the Legal System

1.1 Labor Law as a Separate Branch of Law

The theory of law constantly, although to some extent artificially, formulates several features identifying the legal branch as a higher building block of the national legal system. The following are the basic features:

(i) organization of the country's own legal norms into a certain system;
(ii) the actual subject of the legal regulation, i.e., the regulation of social relationships with a certain common characteristic, which distinguishes them from social relationships regulated by other legal branches, and
(iii) the chosen method of legal regulation.[1]

Other professional literature adds specific functions and own legal principles to the features. Labor law meets the characteristics described above in full. Labor law is independent, because due to historical traditions, the effectiveness and clarity of legal regulation of the specific range of social relationships it regulates, it needs its own

1 Večeřa, 2013, pp. 145–146.

Dolobáč, M. (2022) 'Slovakia: Traditions and New Challenges of Labor Law' in Jakab, N. (ed.) *Fundamentals of Labor Law in Central Europe.* Miskolc–Budapest: Central European Academic Publishing. pp. 37–56. https://doi.org/10.54171/2022.nj.fullce_3

code form, though it can exist without it as a scientific field.[2] However, the definition of labor law as a separate branch of law does not mean it should exist independently, in isolation and without functional links to other parts of the legal system.

1.1.1. Systematization of Labor Law

A normative system as a large network or a whole, but also separately, the normative system of each branch of law must be internally logical and interconnected. Any academic division and systematization (although in labor law we find systematization with reference directly in Section 1 par. 1 of the Labor Code) serves primarily for a better perception of legal regulation, understanding of relationships and stimulation of the scientific perception of legal rules. From a scientific point of view, labor law can be classified according to several criteria. The most common classification is a) the general part and the b) special part of labor law. The general part of labor law expresses the basic theoretical background and principles, includes such categories as the concept, subject, functions, and sources of labor law, basic principles, subjects of labor relationships, the scope of standards et al.. The special part may include such labor-related elements such as the establishment, changes, and termination of employment, working hours and rest periods, wages and compensation of wages, safety and health at work, special conditions for women and adolescents, the responsibility of the employer and employee, etc.[3]

In addition to the abovementioned systematization, legal science divides labor law by default into individual, formed by legal relationships between employee and employer and collective, which regulates the relationships between the collective of employees and the employer or the employers' organization.[4] To this traditional dichotomous breakdown, we could add a third area of labor law, namely employment law. We perceive the right of employment as a part of the regulation falling under the branch of labor law, with significant features of public law, which regulates mainly legal relationships in the implementation of the constitutional right to work.[5]

1.1.2. The Subject of Regulation—Dependent Work

Opinions of legal science[6] consider the subject of labor law to be the legal regulation of *dependent work.* According to the valid legislation, the Labor Code defines dependent work as 'work performed under a relationship of superiority of the employer and the subordination of the employee, personally by the employee for the employer, according to the employer's instructions, on its behalf, during working hours determined by the employer.'

2 Štefko, 2012, p. 23.
3 Barancová and Schronk, 2013, p. 41.
4 Ibid, p. 42; also Tröster, 1998, p. 91.
5 Czech and Slovak legal science also perceives this three-part division of labor law. Štefko, 2013, pp. 19–22; Galvas et al., 2015, p. 48.
6 Hůrka et al., 2011, p. 22. Similarly Toman, 2014, p. 43.

The essence of the definition lies in the prohibition of performing dependent work in a relationship other than employment with the regulation of labor law. This means that if the subject of their agreement is the performance of dependent work as defined by the Labor Code, the contracting parties must also submit to labor law regulations, even against their own will. The legislature therefore imposes labor law regulation on the contracting parties, which the parties to the contractual relationship do not always gladly accept. The reasons are relatively clear, as work performed outside of an employment relationship is more flexible and more cost-effective for both parties by not being burdened with all the contribution obligations. As a result, it is to some extent a logical (but not legitimate) interest of employers to have the work performed outside of an employment relationship.

On the other hand, the circumvention of labor law regulation in the performance of dependent work lacks the legal and social protection of the employee and weakens the budget of social insurance funds. The challenge for the state apparatus is to find the most effective way to combat this undesirable phenomenon.

An original definition of dependent work included a total of ten features, and their number became their most serious shortcoming. The practice of employers—and it should be added that this was also helped by the interpretation of the relevant labor inspectors—required a cumulative interpretation of the features of dependent work. A failure to fulfill even one of the many features of dependent work, often fictitious and simulated, made it possible to undesirably contract dependent work under civil or commercial law contracts. The weakest link in the definition chain appeared to be the conceptual feature of the *performance of work using the employer's means of production.* Ad absurdum, it was sufficient if the employee used their own tools in the course of their work,[7] and thus the employers argued that due to the non-fulfillment of all legal definitions, it could not be seen as the performance of dependent work. Another controversy was caused by the defining feature of *work performance at the responsibility of the employer,* which appeared to be more of a consequence of work performance in personal dependence. For this reason, gradual amendments to the Labor Code reduced the conceptual features of dependent work.

The order to perform dependent work in statutory labor-law relationships would be obsolete if there were no appropriate sanctions for violating it. Closely related to disguised employment are the concepts of illegal work and illegal employment, which are defined by a special regulation[8] in which sanctions are also laid down. For illegal employment,[9] the employer faces a fine, the lower limit of which is set at €5,000 for multiple violations, while repeated violations of the prohibition of illegal employment are considered a particularly serious violation of the act on illegal work and

7 Barancová, 2013, p. 59.

8 Act no. 82/2005 Coll. on Illegal Work and Illegal Employment and on Amendments to Certain Acts.

9 Inspections of illegal work and illegal employment are performed by the labor inspectorates pursuant to Act No 125/2006 Coll., Central Office of Labor, Social Affairs and Family and Offices of Labor, Social Affairs and Family pursuant to Act No 5/2004 Coll.

illegal employment and may result in revocation of trade license. In addition to the above financial penalties, the employer is excluded from state aid and, in particular, is obliged to make additional payments, which consist of the payment of the agreed wage due to the natural person it has illegally employed, as well as of income tax and insurance contributions. Responsibility for illegal work is also transferred to the employee, albeit to a limited extent, who may also be fined.

Regardless of the number of features of dependent work, legal theory and practice should take a clear position on the question of the necessity of fulfilling every single feature of dependent work in relation to the order to perform it in an employment relationship. We are convinced that the marked defining features, not only in relation to the current legislation but also to the previous legislation, are only a certain demonstrative calculation, the purpose of which is to help determine whether the given case constitutes performance of dependent work. A strict formal approach to the interpretation of the definition of dependent work suits employers, but it does not correspond to the purpose of the law or the objective pursued by the legal standard. Eventually, also pursuant to ILO Recommendation no. 198/2006 on the employment (arts. 11 to 13), it is not required that all the identifying features of dependent work must be fulfilled for the existence of an employment relationship, due to the great variability of the types of work, which in many cases are characterized by different features.[10]

1.1.3. Methods of Legal Regulation of Labor Law

The method of legal regulation is a way of adjusting social relationships that are subject to regulation by the given legal branch. It represents a legislative technique for choosing the most common type of legal norm used for the regulation of certain social relationships for a certain purpose.[11] The chosen method then expresses the nature and degree of cooperation of individual participants in the legal relationship—in the creation and development of this relationship—as well as the degree of participation of the subjects of the legal relationship in the formation of its content. The application of the appropriate method of legal regulation is used to recognize the elements of public law and private law. The method of mandatory regulation ensures the application of public law elements, while the method of dispositive regulation helps the private law elements. In every branch of law, whether private or public, there are both mandatory and dispositive norms, albeit with a prevalence of one over the other.

The purpose of creating legal standards with such a different (dispositive or mandatory) nature is therefore to enable subjects of legal relationships, if it is consistent with the rule of law, to realize their personal and property ideas in their own way (dispositional legal standards), and at the same time to limit their contractual autonomy as necessary for the functioning of the rule of law (mandatory legal standards). The

10 Toman, 2014, p. 43.
11 Boguszak, Capek and Gerloch, 2004, p. 101.

reason for limiting or even excluding the possibility for parties in legal relationships to agree on their rights and obligations as they would like must not only exist, but the legislature must also be able to explain it adequately.[12] In labor law, one such reason is the social function that diverts contract labor law substantially from other private branches of law. Despite the tendencies for liberalization, both theory and practice are based on the idea that labor law and its basic code, the Labor Code, are fundamentally mandatory in nature. The curtailment of contractual freedom and the mandatory nature of labor law standards pursue the goal of protecting the weaker party, i.e., the employee. And it is precisely under the umbrella of legal and factual protection of the employee in labor law, that the classic division into mandatory and dispositive standards is amended with an extremely plentiful third category——relatively mandatory standards (in the theory of law and in broader contexts, we can combine relatively mandatory standards with the term 'unilateral mandatory standards').[13]

The relative mandatory nature is expressed by the provisions of Section 1 par. 6 of the Labor Code on employment relationships: the terms and conditions of employment and working conditions of an employee may be regulated more advantageously than this law or other labor law regulation provides, unless this law or other labor law regulation expressly prohibits it or unless it follows from the nature of their provisions that they cannot be deviated from. Also, the collective agreements cannot regulate conditions less favorably than the law (see also Section 3.3)

The essence of relatively mandatory standards or unilaterally mandatory standards are clear from their legal anchoring. In accordance with its protective function, the Labor Code allows for dispositive agreements regarding the employment conditions and working conditions in one direction only—to the advantage of the employee.

1.2. The Relationship between the Labor Code and the Civil Code

The definition of labor law in the legal system would not be complete without defining the relationship between the basic code of civil law and labor law. The mutual links between labor law and civil law are provided for by Section 1 par. 4 of the Labor Code:

> Unless this Act provides otherwise in the first part, the general provisions of the Civil Code shall apply to legal relationships under paragraph 1 (individual employment relationships in connection with the performance of dependent work of natural persons for legal entities or natural persons and collective employment relationships).

The legislature thus regulated the relationship between the Labor Code as a *lex specialis* and the Civil Code as a *lex generalis* in the form of subsidiarity, but only to a very limited extent. 'General Provisions' is the title of the first part of the Civil Code.

12 Stránský, 2014, p. 14.
13 For these considerations, see also Večeřa et al., 2013, p. 85.

Subsidiarity thus applies to general issues such as the definition of a natural person, a legal person, legal acts, the method of concluding a contract, etc.

This is confusing, both for theory and practice, because the first part of the Labor Code is also entitled 'General Provisions' as an introduction to rights and obligations (Chapter 1, pt. 8). Despite the apparent conceptual ambiguity, it has been generally concluded that subsidiarity applies only to Part 1 of the Civil Code, but not to the part governing obligations.[14] In practice, such a narrowly defined subsidiarity, together with a closed system of contract types (see explanation below), seriously affects several areas of problems. There are several typical civil law elements that would also find application in labor law, but because they are not regulated in the Labor Code and subsidiarity is not allowed, their application is excluded. A typical example is the set-off of mutual claims or the assertion of the right to payment of statutory interest on arrears, which is still disputed in labor law. It is by these examples that we can illustrate the issue of narrowed subsidiarity.

Regarding the setting-off of receivables, the case law is relatively stable. According to the Supreme Court of the Slovak Republic:

> The rights and obligations arising from employment relationships cannot become terminated in other ways not specified in the Labor Code, even if the employee and the employer have expressed a willingness to do so. Due to the fact that the Labor Code does not recognize other than the above methods of termination of rights and obligations, and because the legal consequence of a set-off is the extinction of a receivable, receivables from employment relationships represent receivables that cannot be set off and cannot be challenged by unilateral action.[15]

The cited justification was also adopted by newer decision-making activity, which states that

> because the Labor Code does not recognize the element of set-off (compensation) as regulated in Section 580 of the Civil Code, the only conclusion is that the employer must assert its claims against the employee by a separate action and not by a set-off objection.[16]

The set-off of mutual claims is thus not possible either from a substantive or a procedural point of view, while the justification lies precisely in the absent possibility of subsidiary application of the Civil Code.

14 Barancová, 2019, p. 115; Tkáč et al., 2014, p. 44. However, the opposite opinion was expressed, for example, by the judgment of the Regional Court in Bratislava, file no. 8Co/375/2017 of 9 September 2014.

15 Resolution of the Supreme Court of the Slovak Republic, file no. 2 Cdo 103/2008 29 September 2009.

16 Judgment of the Regional Court in Banská Bystrica File no. 14Co 316/2012 of 26 February 2013.

At the same time, the right to be awarded statutory penalty default interest in employment relationships is not at all unequivocal. At present, the Labor Code does not contain any regulation concerning default interest if there is a failure to pay in a proper and timely manner. According to the opinions of a part of legal science community (as well as case law, see below), the current form of Section 1 par. 4 of the Labor Code does not allow the application of the provisions of the Civil Code concerning the default interest for statutory penalty in the event of the debtor's delay—not even in the case of granting a claim for invalid termination of employment.

The above considerations are also reflected in the (so far minority)[17] part of the decision-making practice of the ordinary courts that do not award default interest to the compensation for pay.[18]

However, we need to add that the majority case law recognizes and awards penalty interest for late payment, referring precisely to the Civil Code without examining in more detail the reasons for doing so despite the lack of subsidiarity. This does not mean that such a conclusion is incorrect. The penalty default interest can be justified by analogy of law.

At the same time, given the limited subsidiarity of the general provisions of the Civil Code in the relationship between these two private law sectors, a certain analogy also has its place. Let us assume that the basic preconditions for the analogy are an unplanned loophole in the law, and the existence of a legal standard regulating a similar situation—for example, ensuring the rights and obligations in employment relationships by the liability and the establishment of a pledge. In this scenario, the labor law regulation is only a framework, and the supportive use of a civil law regulating liability or pledge agreements is necessary. Analogy is necessary in labor law, because otherwise we would not be able to objectively cover all situations that occur in labor relationships.

But where do we set the boundaries? When is the analogy of the law for contractual obligations permissible, and when does it become an illegal application? The basic boundaries between the allowed and the prohibited use of the analogy of the law can

17 Compare this to the opposite conclusion expressed in the judgments of the Supreme Court of the Slovak Republic file no. 1 Cdo 116/2008, file no. 6 Cdo 246/2010, or file no. 2 Cdo76/2011, to which the general courts also refer in newer decisions, even after the change in the definition of subsidiarity of the Civil Code. For newer decisions, see the judgment of the Regional Court in Bratislava file no. 8Co/375/2017 of 9 September 2014 and its justification: 'The legal conclusion... that the claim of the plaintiff (employee) regarding the payment of interest on arrears from the compensation of wages awarded to them with regard to the invalid termination of employment must be assessed according to Section 517 par. 2 of the Civil Code in conjunction with Section 1 par. 4 of the Labor Code, and that the plaintiff is entitled to interest on arrears of wage compensation for each individual month of the period for which it was granted, from the day following the agreed wage due date, is fully in line with the established case law.' See also the judgment of the Regional Court in Trnava, file no. 11CoPr/5/2014 of 24. September 2014 or also for interest on late payment of wages, see the judgment of the Regional Court in Bratislava 5CoPr/11/2014 of 16 December 2014.

18 Judgment of the District Court of Čadca, file no. 14C/142/2011. Similarly, the judgment of the Regional Court in Bratislava, file no. 5Co/133/2013 of 20 November 2014.

be largely set out intuitively. Simply put, the analogy of the elements of the Civil Code will be allowed where law enforcement authorities *have no other choice,* i.e., in cases where labor law is so insufficient that without the use of a special part of the Civil Code or without the use of other civil law regulations, its provisions will be obsolete.

Finally, a court (indirectly) ruled in favor of the analogy of the law as a way of bridging the limited subsidiarity of the Civil Code[19] (in connection with the decision to return unjust enrichment), stating, 'In the absence of a necessary special regulation in the Labor Code, the legal regulation of the Civil Code must necessarily be applied, even if it is not contained in the general part of the Civil Code.' On the other hand, the analogy of the law and the use of the elements of the special part of the Civil Code will be inadmissible in cases where it would result in the application of such provisions of the Civil Code or special regulations that clearly conflict with the protective function of labor law, i.e., the protection of the weaker party.

To sum up, the Civil Code regulates the employment relationships on two different legal bases: i) in the form of subsidiarity, but only to a very limited extent, and ii) by analogy of law in cases where labor code regulation is insufficient. Such a model is not optimal, and it raises many theoretical and practical issues such as aforementioned judicial award of default interest, etc.

2. Limited Choice of Contract Types

The restriction of contractual freedom is not only due to the insufficient subsidiarity of the Labor Code, but also due to the fixed number of contract types concluded in labor law.[20]

Contractual labor law, despite lengthy professional discussion, does not apply the typical principle of contract law 'what is not prohibited is allowed' and, unlike civil or commercial contract law, insists on regulating the exclusiveness of contract types. Participants in employment relationships may only enter into contracts that are type-regulated (or at least provided for) by labor law, and their contractual freedom applies only if the labor law allows it. The mandatory nature of the Labor Code and the conclusion of contractual types are derived from the wording of Section 18 of the Labor Code, according to which a contract, according to the relevant provisions of labor law, is concluded as soon as the participants have agreed on its content.

From the quoted (and according to the author, very inconspicuous) wording 'according to the relevant provisions of labor law'—the so-called *numerus clasus* of

19 Judgment of the Regional Court in Žilina, file no. 11CoPr 7/2013 of 30 June 2014.

20 It should be added that the issue of restriction of contractual freedom is significantly broader. It affects the choice of the contractual partner (and the associated quota system—restrictions on the employment of foreigners or family members in the state administration), but also mandatory standards, options for the termination of employment, etc. For the purposes of focusing on the restriction of contracting, we will focus only on the area of *numerus clasus* of contract types in labor law.

contracts and arrangements in labor law—was established, which transforms the 'what is not prohibited is permitted,' typical for contract law, into the non-traditional 'what is not permitted is prohibited.' Although the principle of *numerus clasus,* which is based only on the legal wording of the provision of Section 18 of the Labor Code, has no grasp even in the basic principles of the Code, it is, however, significantly strengthened by case law.[21] At present, the professional debate is not even about whether this conclusion is or is not correctly derived from the text of the Labor Code (and thus whether the case law is interpretatively sustainable), but whether the principle of a closed number of contractual types[22] should be retained by the legislature or repealed by an amendment to the Labor Code.

The scientific discussion on this topic is broad and relatively long. Despite several years of effort (especially by employers) to abolish the *numerus clasus* of contract types, the legislation in this area is inflexible.[23]

If we embark on the path of liberalization of labor law, one of the options is to fully legalize the admissibility of atypical contracts in labor law. A legal guarantee against possible abuse of the freedom of types of contracts in labor law could be, as in civil law, a provision according to which an innominate contract should not contradict the content and purpose of the Labor Code, especially its basic principles. If such an atypical (innominate) contract were found to be in conflict with the content and purpose of the Labor Code, it would be absolutely invalid, the same as other acts under labor law according to the Labor Code.[24] Another approach, in an effort not to abuse the open contract system, is to identify legal elements that cannot be changed other than for the benefit of the employee—although we must add that the current restriction on changing the 'working conditions' and 'employment conditions' only for the benefit of the employee is too broad, vague, and ultimately legally incorrect.

3. Employment Contract and Collective Agreement

3.1. Employment Contract

Employment is established based on a written employment contract between the employer and the employee.

21 Compare the judgment of Supreme Court of the Slovak Republic, file no. 3 M Cdo 14/2010 of 30. March 2011. Furthermore, see the decision of the Constitutional Court of the Czech Republic PL. 27/1996 regarding the provision of Section 244 par. 1 of the Labor Code no. 65/1965 Coll. effective until 31.12.2006. See also the decision of the Constitutional Court of the Czech Republic PL. 276/1999.

22 We add only as a side note that while it is possible to scientifically argue about whether labor law includes a 'principle of a closed number of contract types,' the author strongly believes that it is.

23 The Labor Code also regulates atypical relationships: home-work and telework (Section 52), job sharing (Section 49a), employment relationships with reduced working time (Section 49), and fixed term employment relationship (Section 48).

24 Barancová, 1998, p. 537.

3.1.1. Requirements of the Employment Contract

In the employment contract, the employer is obliged to agree with the employee on the essentials, which are:

a) type of work for which the employee is hired and its brief characteristics,
b) place of work (municipality, part of the municipality, or an otherwise designated place),
c) first day of work, and
d) wage conditions, unless agreed in the collective agreement.

In addition to these requirements, the employer must also state in the employment contract other working conditions: payment dates, working hours, the amount of leave, and the length of the notice period. The Labor Code allows that if the working conditions, including wage conditions, are agreed upon in the collective agreement, it is sufficient to make a reference to the provisions of the collective agreement; otherwise, the employer must make reference to the relevant provisions of the Labor Code.

If the wage conditions are not agreed in the employment contract and the provisions of the collective agreement to which the employment agreement refers have expired, the wage conditions agreed in the collective agreement shall be deemed wage conditions agreed in the employment contract until new wage conditions are agreed upon in the collective agreement or the employment contract, albeit for a maximum period of 12 months.

If the place of work is abroad, the employer shall further specify in the employment contract:

a) the period of work abroad,
b) the currency in which the salary, or part of it, will be paid,
c) further compensation connected with the performance of work abroad, whether in cash or in kind, and
d) possible conditions for the employee's return from abroad.

This information must be negotiated in the employment contract only if the period of employment abroad exceeds one month.

Other conditions in which the parties are interested may be agreed in the employment contract—in particular, other material benefits. Any provisions of the employment contract (or other agreement) by which the employee undertakes to maintain confidentiality about his or her working conditions, including wage conditions and employment conditions, are invalid.

Formally, the employment contract must be concluded in writing, but non-adherence to the written form does not result in its invalidity. In other words, the Labor Code does not connect the obligation to write an employment contract to the so-called invalidity clause. The assessment of the legal consequences of non-adherence to the written form is specific in labor law, and differs from other private branches. According to the Labor Code, a legal act that has not been performed in the form prescribed

by this Act is invalid only if it is expressly provided for by the so-called invalidity clause of the Labor Code or a special regulation. The invalidity clause is expressed by the words, 'otherwise it is invalid.' If this clause is absent in the provision about the condition of written form in a legal text,[25] the legal act will be valid despite non-adherence to the written form. The only sanction that applies in this case is a fine by the labor inspection. An oral employment contract could also constitute illegal employment.[26]

3.2. Collective Agreement

Collective agreements govern individual and collective relationships between employers and employees and the rights and obligations of the parties. Collective agreements may be concluded by and between the relevant trade union bodies and employers or their organizations. Legislation does not define a collective agreement, leaving its definition to legal science, which defines a collective agreement as a bilateral legal act that acts as an instrument of social reconciliation between employees and employers or as a political, legal, economic, and social document governing the relationships of relevant entities and their content.[27] Despite the absence of a legal definition, we can define a collective agreement based on the following criteria:

a) it is a bilateral (or multilateral) legal act,
b) it has the characteristics of a contract of a private law nature (even though the state may be a party), to which all relevant provisions of the Civil Code on the process of concluding contracts and their invalidity apply, as well as special procedural rules under the Collective Bargaining Act,[28]
c) has the characteristics of the so-called corporate agreement, because at least one entity is always a collective, and
d) has the characteristics of a normative regulation, because it regulates rights and obligations or legal relationships of an indefinite number and of the same type,

25 In addition to the written form, the invalidity clause applies in the same way to the consent of the legal guardian (e.g., the conclusion of an employment contract with a juvenile employee requires the statement of a legal guardian, but not under penalty of invalidity), the consent of the competent public authority or the consent of employees' representatives (e.g., consent to the work regulations falls under the penalty of invalidity, but the obligation to negotiate an even distribution of working hours is without the penalty of invalidity). For completeness, pursuant to Section 17 par. 2 of the Labor Code, 'a legal act to which the competent authority or legal guardian has not given the prescribed consent or to which the employees' representatives have not given the prescribed consent, a legal act which has not been discussed in advance with employees' representatives, or a legal act not performed in the form prescribed by this Act, shall be invalid only if expressly provided so by this Act or a special regulation.'

26 The assessment of such a conclusion is more complex as it would depend on the facts, e.g., whether the employee was registered with the Social Insurance Agency by the employer, etc. See above for sanctions for illegal employment.

27 Barancová et al., 2019, p. 605.

28 Act no. 2/1991 Coll. on collective bargaining.

which bind a certain number of entities which varies (the number of employees changes during the validity and effectiveness of the collective agreement).[29]

Neither the Labor Code nor the Act on collective bargaining contains a definition of a collective agreement, but the Act (on collective bargaining) provides a classification of collective agreements. Types of collective agreements include:

a) a company, as decided between the competent trade union body or bodies and the employer, which can also be a service office,
b) a higher-level collective agreement concluded for a larger number of employers between the relevant higher trade union body or bodies and the relevant employers' organization or organizations,
c) a higher-level collective agreement concluded between the relevant higher trade union body or bodies and the state as an employer (i.e., for civil service), and
d) a higher-level collective agreement concluded for employers who provide compensation according to a special regulation, between the relevant higher trade union body or bodies, the government-appointed representatives, and the employers' representatives (i.e., for work performed in the public interest).[30]

A higher-level collective agreement is concluded for an industry sector or segment if the parties have agreed to conclude a higher-level collective agreement for the segment. A higher-level collective agreement contains the designation of the sector or segment for which it is concluded, based on the list of employers for which it is concluded. The designation of the industry sector according to the second sentence is the code of the statistical classification of economic activities at the division level. The designation of a part of an industry sector is the code of the statistical classification of economic activities at the group level. A higher-level collective agreement is also binding for an employer who is not associated in an employers' organization which has concluded the higher-level collective agreement, if that employer requests the parties to accede to the higher-level collective agreement and the parties agree to do so. The parties to the higher-level collective agreement shall notify the Ministry of the employer's accession to the higher-level collective agreement within 15 days of that employer's accession to the higher-level collective agreement. The employer's accession to a higher-level collective agreement is announced in the Collection of Laws of the Slovak Republic at the request of the Ministry.

29 This is a theoretical definition of a collective agreement, which may change with the view of each theorist, depending on the specific features that the theorist will consider decisive. Compare with Barancová et al., 2019, p. 606.

30 Provisions of Section 2 of the Act on Collective Bargaining. According to the statistic of the Ministry of Labor, Social Affairs and Family of the Slovak Republic (see www.employment.gov.sk/praca-zamestnanost/vztah-zamestnanca-zamestnavatela/kolektivne-pracovnopravne-vztahy/kolektivne-zmluvy/) as of 3 April 2022, thirty higher-level collective agreements have been concluded, including civil service and employment relationships in the public interests (seven). There are no statistics linked to the company collective agreements.

The collective agreement must be made in writing, and the signatures of the authorized representatives of all contracting parties must be on the same document. This is a stricter formal requirement for the validity of a collective agreement which is not standard in the legislation and occurs only exceptionally. As an example, we can mention the legal acts by which real estate is disposed of, but we do not find such a formal requirement in labor law.

In the case of a higher-level collective agreement, its validity requires that it be substantiated by a list of employers for which it is binding.

A collective agreement is concluded for a set period explicitly specified within. If this period is not determined, it is presumed to be agreed for one year. A collective agreement becomes effective on the first day of the period for which the agreement is concluded and expires at the end of this period, unless the period of validity of certain obligations is agreed differently in the collective agreement. A higher-level collective agreement for the field of civil service becomes effective at the same time as the entry into force of the State Budget Act. In the field of civil service, the law also assumes the extension of the effectiveness of a company collective agreement for individual service offices until a new higher-level collective agreement is concluded. According to the Collective Bargaining Act, if a new higher-level collective agreement for a civil service has not been concluded, and if the period for which the company collective agreement has been concluded in a service office has expired, this company collective agreement is extended until the entry into force of a higher-level collective agreement.

If several trade unions operate side by side at an employer, and they conclude a collective agreement on behalf of all employees, the competent trade union bodies operating at the employer may only act with legal consequences for all employees together and in joint agreement, unless they agree otherwise. If the trade unions do not agree on a procedure, the employer is entitled to conclude a collective agreement with the trade union that has the largest number of members at the employer's company or with other trade unions whose sum of members at the employer is greater than the number of members of the largest trade union.[31]

Recently, the practice has been encountering a relatively serious problem with trade unions reporting their activities to the employer even though none of the employer's employees are members of this trade union and, ultimately, the representation of this trade union is not even formal. These are trade unions that have only founding members (three is enough), and they take advantage of the fact that a trade union can operate at an employer's company even if it has no other members. After

31 It should be added that the employer cannot objectively know which of the trade unions has the largest number of members. Therefore, if the trade unions cannot agree, this becomes a dispute over the determination of a trade union authorized to conclude a collective agreement. A dispute over the determination of a trade union authorized to conclude a collective agreement shall be resolved by an arbitrator entered in the list of arbitrators kept at the Ministry of Labor, Social Affairs, and Family of the Slovak Republic. The arbitrator shall issue a document authorizing the relevant trade union or unions to negotiate and conclude a collective agreement.

their establishment, they subsequently report that they operate at tens to hundreds of large companies, but they practically carry out no other activity. Their motive is either political or just a matter of visibility, or may be obscured. However, the employer gets into serious trouble because it must deal with such a trade union in cases provided by law, including collective bargaining.

The legislature reacted to this undesirable situation and, with effect beginning 1 March 2021, adopted an amendment to the legal regulations of the Labor Code which provides employers with a tool for protection against such actions of de facto inactive trade unions. According to the applicable legislation, if the employer or a trade union operating for the employer has doubts as to whether the members of the trade union which informed it in writing of the commencement of their operation are employed with the company, this becomes a dispute over the operation of a trade union at an employer. A dispute over the operation of a trade union at an employer's company shall be resolved by an arbitrator agreed upon by the parties to the dispute. If the parties to the dispute do not agree on the person of the arbitrator, one shall be appointed by the Ministry of Labor at the request of either party to the dispute, from a list of arbitrators kept in accordance with a special regulation.

The employer must provide the arbitrator with a list of its employees within the time limit specified by that arbitrator. The trade union must provide the arbitrator with a list of employees of said employer who are its members within the time limit specified by the arbitrator, and to prove their membership in the trade union. The parties to the dispute are obliged to provide the arbitrator with any further necessary cooperation. The arbitrator shall inform the parties to the dispute and the employer, if the employer is not a party to the dispute, of the adoption of a settlement of the dispute concerning the operation of a trade union at the employer. For a period of 12 months from the date on which the arbitrator announces that there are no employees who are members of the trade union, that trade union shall not be considered a trade union operating at that employer.

3.3. The Relationship between Employment Contract and Collective Agreement

The collective agreement regulates working conditions, including wage conditions and employment conditions, relationships between employers and employees, relationships between employers or their organizations and one or more employees' organizations more favorably than those regulated by labor regulations. Any part that is contrary to the generally binding legislation is deemed invalid. It is clear from the above that a collective agreement cannot regulate conditions less favorably than the law. Although this fact seems to be elementary, in practice we also see different conclusions reached (see below).

A company collective agreement is also invalid as far as it regulates the rights of employees to a lesser extent than a higher-level collective agreement.

Any claims that arise for individual employees from the collective agreement are applied and satisfied as other claims of employees arising from employment. At the

same time, an employment contract is invalid as far as it regulates the employee's claims to a lesser extent than a collective agreement.

This creates an imaginary pyramid. At its peak is the law, which regulates the minimum protection of the employee, followed by a higher level collective agreement, which is to guarantee greater protection of rights than the law, followed by a company collective agreement, which must provide a greater range of rights for employees than the law, as well as a higher level collective agreement (otherwise it is invalid in that part), and finally the widest protection is to be provided by an employment contract, which must guarantee the widest protection of rights, or it is invalid.

In practice, there have been two areas of problems where collective bargaining agreements have conflicted with legal minimums. The first problem was determining the range of persons with whom the employer can conclude a non-compete clause after the end of employment. Pursuant to Section 83a of the Labor Code, the employer may agree with the employee to limit gainful activities following the termination of employment, 'only if the employee has the opportunity to acquire information or knowledge that is not normally available during its employment and its use could cause significant harm to the employer.' At the same time, the Labor Code in the same Section 83a stipulates that 'in the collective agreement, it is possible to define the range of employees with whom it is possible to agree on limitation of gainful activity following the termination of employment, the duration of restriction of gainful activity following the termination of employment, minimum level of adequate monetary compensation.'

Employers (with the cooperation of trade unions) explained the provision in question as if it gave them the opportunity to define in the collective agreement a range of employees with whom a competition clause can be agreed outside the range of employees provided by the Labor Code, i.e., beyond the law. The practice on this issue was controversial, and finally it became established that 'the collective agreement could not expand the range of employees with whom a competition clause could be concluded beyond the scope' of the Labor Code. On the contrary, this group of employees can only be narrowed in the collective agreement.[32]

We find a similar problem regarding compliance with minimum wage claims. Pursuant to Section 120 of the Labor Code 'an employer who does not have employee compensation agreed upon in the collective agreement is required to provide employees with a wage at least equal to the minimum wage set for the degree of work difficulty (hereinafter referred to as "level") of the job.' Even on this issue, employers have adopted the practice that if compensation is agreed in a collective agreement, there is no obligation to adhere to the minimum wage entitlement as set out in the Labor Code. However, in this respect (although a fundamental decision of a judicial authority is absent), we also are convinced that the said regulation is based on the legal presumption stated in the provision of Section 231 par. 1 of the Labor Code, i.e.,

32 Compare to decision of the Constitutional Court of the Slovak Republic PL. 1/2012 of 3 July 2013.

that the collective agreement may regulate wage conditions more favorably than they are regulated by this Act or another labor law regulation.

Finally, we would like to point out an interesting finding of the Constitutional Court of the Slovak Republic, which ruled on the possibility of asserting claims in favor of an employee even from an invalid collective agreement.[33] Put simply, the essence of the proceedings consisted of a claim by which an employee sought increased severance pay based on a collective agreement. In the meantime, in different proceedings, it was legally decided that the collective agreement was invalid because the authorized persons did not sign it. The employer refused to pay the severance pay because it considered the collective agreement to be invalid and any performance of the invalid act to be unjust enrichment. However, the Supreme Court of the Slovak Republic and ultimately also the Constitutional Court of the Slovak Republic were of the opposite opinion and pointed to the provision of Section 17 par. 3 of the Labor Code, according to which the invalidity of a legal act cannot be to the detriment of employees if the employee did not cause the invalidity themselves. If an employee suffers damage because of an invalid legal act, the employer is obliged to compensate for it. Under the provision in question, they granted the employee the right to severance pay (albeit under the title of 'damages'), because the invalidity of legal act (collective agreement) was not caused by herself.[34]

4. New Challenges for Labor Law

Like society itself, labor law has faced major challenges in recent decades and especially in recent years. The COVID-19 pandemic brought about turbulent times to which labor law also responded. For example, under the transitional provisions, the Labor Code allowed, during an emergency situation or a state of emergency declared in connection with COVID-19, or within two months of their dismissal, to extend a fixed-term employment relationship for those employees for whom the legal requirements were not otherwise met. Telework and home office work have also undergone modifications: the protection of the employee has increased regarding the so-called right to be disconnected, the right to rest, etc.

The COVID-19 pandemic is not the only challenge for labor law. We live at a time when rapid and significant technological advances are bringing decisive economic and social change. We may not realize it, but we are undoubtedly experiencing another industrial revolution. From its first stage, which was characterized by mechanization (First Industrial Revolution), through the intensive use of electricity (Second

33 Decision of the Constitutional Court of the Slovak Republic I. ÚS 501/2011 of 3 October 2012.

34 The concept of a decision is somewhat more complicated when the courts have analyzed the difference between the nullity and invalidity of an act. The protection of good morals was of considerable importance for the final decision, as the proceedings for the invalidity of the collective agreement were initiated by the employer and, finally, also the concept of the employee's legitimate expectations.

Industrial Revolution), which enabled the creation of an industry with large-scale digitization (Third Industrial Revolution). We suddenly found ourselves in the age of smart products and manufacturing processes (Fourth Industrial Revolution). The industrial revolution is not slowing down with the version 4.0—on the contrary, it is gaining momentum. We are currently experiencing the onset of the fifth stage of the industrial revolution—the birth of artificial intelligence.[35]

How do we describe Industrial Revolution 5.0? It is hardly possible to do so with certainty, though no one doubts the impact and changes, as all statistics anticipate the disappearance of 'old' jobs linked to unilateral simple activities, and at the same time assume the creation of 'new' jobs associated with higher demands on education, skills, and competences.

According to a study by the European Parliament,[36] in some Member States of the European Union (Romania and Slovakia), at least 60% of the workforce is expected to lose their jobs in the coming decades due to the introduction of information and communication technologies. On the other hand, other research sees the future of work in the short term largely positively; based on a wide global survey, most employers expect automation and digitalization to increase employment. Eighty-three percent of employers intend to maintain or increase the number of employees and increase their qualifications in the next two years. Only 12% of employers, according to their own statements, plan to reduce due to automation.[37]

During the information era, the standard model of employment, which still means employment for a fixed weekly working time, without being limited to a fixed period, carried out on the employer's premises and under its direct supervision, is replaced by many atypical labor-law relationships that more effectively meet the needs of both employer and employee. Various atypical forms of work have made the boundaries between labor law and civil or commercial law less clear. There is, in any case, no doubt that in the future, modern technologies will make it possible to create new jobs on a larger scale, and to create completely new forms of (dependent) work that will become new business models (such as the collaborative economy). This is also confirmed by one of the other guidelines of the European Commission, according to which collaborative platforms bring the possibility of creating new job opportunities, flexible working conditions, and new sources of income.[38]

This brings us to the core issue. How should labor law deal with new forms of work, characterized by a high degree of freedom and liberty? We believe that labor law must ask itself two basic questions:

1. Is the ambition of labor law to regulate such performance of work legitimate?

35 For development trends, see Lasi et al., 2014, p. 239; Brettel et al., 2014, p. 38.
36 Bernhard, 2018, p. 8.
37 Rezlerová, 2017.
38 Commission to the European Parliament, 2016. See also Žuľová and Švec, 2021, p. 60; Seilerová, 2018, pp. 18–42.

2. If so, by what methods and to what extent should it regulate the performance of such work, which is in its very essence significantly different from standard dependent work?

We are convinced that labor law must answer the first question in the affirmative, as it is a desirable and necessary ambition of labor law to cover with its own legislation the new forms of work that arise from the expansion of new technologies and procedures in recruiting and using labor. The essential content of labor law, its principles, and values, as well as its position in the legal system, are the result of a historical awareness of the need to protect the economically weaker. This imbalance will not disappear with new forms of work performance; on the contrary, there is a real risk that it will become deeper. If labor law were to ultimately abandon the regulation and protection of new forms of employment, over time the pressure to reduce social protection would seep into the typical performance of dependent work.

The more difficult question seems to be how to regulate these emerging relationships. There are several proposals, among other things she raises the question of potential tripartite agreements in labor law, where, in addition to the direct contracting party, the client or a person who ultimately benefits directly from the performance of his work would accept social responsibility for the provider of the work.[39] One can only appreciate the ideas leading to a new approach to employee protection and a new perspective on the regulation of labor law. We would like to add the following to these considerations.

Applying the current regulation of labor law to new forms of employment such as strategic employee-sharing, temporary management, mobile work based on information technology, work based on vouchers, portfolio work, platform work, or collaborative self-employment[40] is impossible. Labor law should focus on the minimum standards that it will apply to such work. We consider the following to be fundamental:

a) It should be the responsibility of the contracting party and the person benefiting economically from work to ensure safety and health at work;
b) There should be a maximum range of working time and regulations for a minimum number of breaks at work, including rules on their scheduling; and
c) There should be a ban on the transfer of financial risk of the business to the persons performing the work.

We are aware that such a scope appears to be minimal and insufficient, but let us consider it to be the basis that should apply to many people working in new forms of employment, even if this work is presented as self-employed. If we identify the work done under new forms of employment as dependent work, there is no reason to abandon the applicable legislation and standard employee protection.

39 Barancová, 2018, pp. 7–24.
40 Križan, 2018, pp. 127–145.

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| Chapter 3 |

Romania: Development of Labor Law Under the Banner of Flexibility

Magdolna VALLASEK

ABSTRACT

The last decade of Romanian labor law has been marked by a series of innovations and amendments under the banner of flexibility. In the case of both individual and collective labor law, the acceleration in the introduction of more flexible regulatory elements has been caused by the economic crisis that started after 2006, although there are also strong voices in the literature that the reference to the global economic crisis is not always tenable and has sometimes served as a good excuse for introducing certain legislative changes. In this chapter, we present the current regulation of individual and collective employment contracts, together with its theoretical and practical issues, starting from the specificities of the development of Romanian labor law.

KEYWORDS

labor law, labor contract, collective agreement, flexicurity, Romania

1. Introduction

In this chapter, we present the current regulation of individual and collective employment contracts, together with its theoretical and practical issues, starting from the specificities of the development of Romanian labor law. The analysis of the topic requires a complex approach because, on the one hand, it is necessary to view labor law institutions in the context of their historical development, and on the other hand, it is essential to describe the transformations of the dynamically changing legal background, to outline its current challenges, and to identify future directions. While in Romania we are witnessing a very active process of regulation in the field of individual labor law, the role of collective labor law has become more marginal since the entry into force of Law No. 62 of 10 May 2011 concerning social dialogue (Social Dialogue Act). At the same time, the amendments to Law 53 of 2003, the Romanian Labor Code, cannot always be considered as positive or encouraging labor relationships. Regardless of this, however, the Labor Code has undergone several very recent amendments and additions in this field, which were made necessary by

Vallasek, M. (2022) 'Romania: Development of Labor Law Under the Banner of Flexibility' in Jakab, N. (ed.) *Fundamentals of Labor Law in Central Europe.* Miskolc–Budapest: Central European Academic Publishing. pp. 57–79. https://doi.org/10.54171/2022.nj.fullce_4

the COVID-19 pandemic, but will in all likelihood be part of Romanian labor law even after it passes.

2. The Place of Labor Law in the Romanian Legal System

To better understand the place and role of labor law in the Romanian legal system, it is necessary to shortly present the development of Romanian labor law.

In Romanian legal history, the unification of the country in 1918 is an inevitable point of reference. Different laws had previously been in force in different regions of the unified new state, and one of the most important tasks for the newly created Romanian state was to establish a uniform legal system throughout its territory, as soon as possible. This was not achieved in the same way or with the same success in all fields of the law. In the case of labor law, the development of uniform legislation was facilitated by the fact that there was not yet a consolidated, comprehensive body of law, and the period in question practically coincides with the dynamic development of labor law itself, when its regulations were becoming increasingly defined as an autonomous branch of the Romanian legal system.

In the first period after 1918, the fundamental question was how to establish a unified Romanian legal system. Initially, the Russian (Bessarabia), Austrian (Bukovina), Hungarian (Transylvania) and of course Romanian (Old Kingdom) laws were applied in the different regions of the country. The length of time needed to bring uniform standards into force varies from one field of law to another, as does the method used to achieve this: either by extending the application of previous Romanian laws to the whole country, or by drafting and bringing completely new legislation into force.[1]

In the field of labor law, the legislation applied in the Old Kingdom was initially extended, including the 1912 law regulating the status and insurance of workers, which in the domestic scholarly literature is also referred to by some authors (in our opinion, with great exaggeration) as the first Romanian Labor Law.[2] From the 1920s onwards, a very active legislative process began in Romania, partly in connection with the activities of the ILO, and the new labor legislation was applied throughout all regions of the country. The labor law legislation of the period culminated in the 1929 law regulating employment contracts, but the 1920 law regulating labor disputes and the 1921 law on trade unions also played a prominent role.

The first piece of legislation in Romania that could truly be considered a Labor Law in title and content was Law 3 of 1950, which was later repealed by the next Labor Law of 1972. The 1972 Labor Law, which underwent several amendments and additions of a novel nature, formed the basis of the Romanian labor law legislation after the regime change until the current Labor Law, Law 53 of 2003, was published.

1 Țiclea, 2018, p. 18.

2 Gâlcă, 2012. Much of the literature takes the opposite view, see Țop, 2018, pp. 56–58; Ștefănescu, 2012a, pp. 207–218, among others.

In the scholarly literature on Romanian labor law, there are divergent opinions as to which law can be considered the first true labor law, nevertheless, there is consensus on the autonomy of labor law as a legal discipline.[3]

The solution of regulating employment contracts within the Civil Code is alien to the tradition of Romanian labor law, and the unanimous position of the domestic scholarly literature is in line with the idea of the autonomy of labor law. There are also isolated views that labor law developed in parallel with civil law, and that the individual employment contract itself cannot be derived from any type of contract regulated by the Civil Code, since its roots are to be found in the contracts used by guilds.[4] The vast majority of Romanian legal scholars, however, are of the opposite opinion, and take the view that the regulation of the employment contract has its roots in the succinct articles 1412 and 1470 of the 1864 Romanian Labor Code, which settled the issue of *locatio operarum* until they were repealed by the 1950 Labor Code.[5] Subsequently, and under the 1972 Labor Code, the possibility that a contract of employment could be governed by a law other than the Labor Code, the primary source of labor law, was not even considered.

After the regime change, a new Labor Code (2003) and a new Civil Code (2009, in force since 1 October 2011) was adopted in Romania and the relationship between the two pieces of legislation was clearly defined. The Civil Code does not contain any provisions on employment contracts, and the preparatory theses adopted in Government Resolution No. 277 of 2009 already state that the monistic Civil Code deals with contracts, family, and commercial legal relationships, as well as issues of private international law. Art. 2 merely states, in general terms, that the provisions of the Civil Code are to be regarded as a set of rules constituting common law in all matters governed by its letter and spirit. However, the Labor Code makes it clear in art. 278 that civil law is to be applied in a complementary manner, provided that the provisions in question are not in conflict with the specific characteristics of employment relationships.[6]

3. The Place and Importance of the Individual Employment Contract in Romanian Labor Law

Art. 1 of the Romanian Labor Code states that employment relationships in general fall within its scope. However, this seemingly *lato sensu* scope must be interpreted in the context of arts. 2 and 278 (2), which show a somewhat restrictive interpretation of the scope of the Labor Code. Art. 2 lists the entities to which the legislation applies,

3 Moreover, in the domestic literature there is an isolated opinion that the Civil Code played no role whatsoever in the development of labor law, and labor law developed completely in parallel with civil law (Gâlcă, 2012).

4 Gâlcă, 2012.

5 Cf.: Țop, 2018, pp. 54–59; Ștefănescu, 2012b, pp. 113–135; Ștefănescu, 2014, pp. 7–8; Țiclea, 2015, pp. 14–18; Athanasiu-Dima, 2005, p. 23; Ghimpu et al., 1978, p. 163.

6 Cf.: Ștefănescu and Beligrădeanu, 2009, pp. 11–55; Duțu, 2013, p. 21.

and it is clear from this list that only those working under an individual employment contract are included.[7] Art. 278 (2) returns to the question of the scope of the law in its concluding provisions, stating that the provisions of the Labor Code apply as common law to employment relationships other than those based on an employment contract as well, provided that the specific provisions are not exhaustive and their application is not incompatible with the particular nature of the employment relationship in question.

In conclusion, we can say that, *stricto sensu*, the full scope of labor law under Romanian labor law covers only and exclusively employment relationships based on an employment contract, but *lato sensu* it covers all employment relationships regardless of their source.[8] However, there is no complete consensus in the domestic scholarly literature as to the actual scope of labor law and the contractual employment relationships that should and can be taken into account. Without going into the details of the analysis of the literature, the situation of domestic workers, who, according to some opinions, can work based on an employment contract, is mentioned as an example, based on the fact that, according to the Labor Code, a physical person can be an employer and can therefore conclude an employment contract for domestic work with another physical person.[9] Similarly, an interesting question has been raised as to whether it is possible to apply employment and labor law by concluding a simple civil law service contract between the parties instead of an individual employment contract, but the answer is clearly that employment in the labor law sense can only be carried out based on an employment contract.[10]

Following the entry into force of GD 488/2017 on the approval of the regulation on the organization and functioning of the Labor Inspectorate, art. 12(1), Pct. B, letter d, the labor inspector has the right to decide on the very legal nature of the contract concluded between the parties, determining whether it corresponds to an employment relationship or not. However, the criteria according to which he could do so are not laid down, nor are the effects of such a reclassification. The question also arises as to whether, once the contract has been reclassified as an employment contract,

7 Art. 2 of the Labor Code. The provisions of this code apply to:
a) Romanian citizens *under an individual employment contract,* engaged in an activity in Romania; b) Romanian citizens *under an individual employment contract* and engaged in an activity abroad, under contracts concluded with a Romanian employer, unless the legislation of the country where the individual employment contract is performed is more favorable; c) foreign nationals or stateless persons *under an individual employment contract,* engaged in an activity for a Romanian employer on Romanian territory; d) persons having acquired the refugee status and employed *under an individual employment contract* on Romanian territory, under the terms of the law; e) apprentices engaged in an activity *under an on-the-job apprenticeship contract*; f) employers, natural and legal persons; e) trade unions and employer's representative organizations.
However, an apprenticeship contract is defined in art. 208 as a 'specific type of employment contract,' which means that it is in fact an employment contract.

8 Beligrădeanu, 2010, pp. 87–93.

9 See Tinca, 2006, pp. 39–46; Țop, 2013, pp. 172–180.

10 See Beligrădeanu, 2013, pp. 239–249; Gheorghe, 2013, pp. 225–229; Rogozea and Anghelie, 2018, pp. 63–72; Ștefănescu, 2018, pp. 25–42.

the labor inspector could apply the appropriate penalties for undeclared work. There is a strong opinion in the literature that the labor inspector's ability to identify the employment relationship himself should be abolished, and that only the labor court should do this.[11]

The publication of the 2019 Administrative Code (Emergency Government Decree No. 57 of 2019) has brought the interpretation of the relationship between employment and public-law employment to the fore once again, as the legislation contains provisions for the entire public sector. Thus, it has become a key issue to distinguish between the categories of 'employee,' 'civil servant,' and 'contract staff' to which the law applies, based on precise criteria, especially considering that art. 542 of the Administrative Code, while referring to the corresponding provision of the Labor Code, also includes explicit provisions for individual employment contracts.[12] The provisions of the new administrative legislation on individual employment contracts are based on the Labor Code, the characteristic feature of the employment relationship being that the employee has been employed in the public sector.[13] For the first time in domestic legislation, this law includes specific provisions regarding the possibility of employees with a labor contract to switch to working from home,[14] although in our view, instead of referring to the provision of the Labor Code on working from home, a reference to the Telework Act No. 81 of 2018 would have been more appropriate.

In conclusion, labor law in its entirety only covers legal relationships based on individual employment contracts, but Romanian law also regulates numerous other employment relationships, which are covered to a greater or lesser extent by labor law. However, situations of employment that remain outside this regulatory area are also present, such as those of the gig economy or platform-based employment, leaving the workers completely unprotected by labor law.

4. The Place of Individual and Collective Labor Contracts in the Labor Law and Their Interrelationship

The first Romanian Labor Code contained almost the same number of articles, and albeit quite briefly, it included provisions for the most important issues of individual and collective labor contracts. Similarly, the 1972 Labor Act included provisions for both institutions in employment contracts. In its original version, the Romanian Labor Code in force provided for collective agreements in a separate title, but the legislature later transferred the regulation of collective labor law to a separate law, Law No. 62 of 2011 on Social Dialogue, so that now the Labor Code only discusses collective

11 Dimitriu, 2018, pp. 63–81.
12 Godeanu, 2020, pp. 45–53.
13 The employment relationship of public servants based on an act of appointment is referred to in some of the literature as an individual administrative contract, similar to the term individual employment contract (Ștefănescu, 2020, p. 23).
14 Ștefănescu, 2019, pp. 41–46.

labor agreements at the level of a reference, or merely defines the framework of collective labor law institutions.

While the individual employment contract is the main cornerstone of the overall individual labor law and its importance is unquestionable, the role of the collective employment contract in Romania has been increasingly marginalized, especially since the new collective labor law has abolished the possibility of collective bargaining and contracting at national level.

The essence of the relationship between individual and collective employment contracts is described in art. 11 of the Labor Code, which states that an employment contract may not contain provisions on a lower level of rights, nor provisions that are contrary to those laid down by law or collective agreements. A similar provision is contained in art. 132 of the Law concerning Social Dialogue. Based on the two provisions above, the provisions on employees' rights must comply with the following rules: an individual employment contract may not set a lower level of rights than that provided for in the collective agreement or in a statutory provision; and a collective agreement may not set a lower level of rights than that provided for in a piece of legislation. Consequently, in the context of Romanian labor law, it is not possible to deviate from the legal level to the detriment of workers, either through individual or collective bargaining.

5. Regulatory Developments and Trends in Romanian Labor Law

The last decade of Romanian labor law has been marked by a series of innovations and amendments under the banner of flexibility. In the case of both individual and collective labor law, the acceleration in the introduction of more flexible regulatory elements has been caused by the economic crisis that started after 2006, although there are also strong voices in the literature that the reference to the global economic crisis is not always tenable and has sometimes served as a good excuse for introducing certain legislative changes.[15] Legislative interventions in the field of individual labor law have in many cases led to genuinely positive results, filling necessary gaps. In contrast, from the point of view of collective labor law and social dialogue, the introduction of the new code has had a disastrous effect, and it is not by chance that the literature has called the consequences of the 2011 legislative changes a 'post-earthquake' situation.[16] An important milestone on the road leading to the slow death of realistic and effective social dialogue was Law 62 of 2011, which is still in force with minor amendments. In addition, the amendments to the Labor Code have also had an impact on the system of collective bargaining and trade union life, for example by weakening the legal instruments available to protect trade union representatives.

15 Voiculescu, 2011, pp. 48–57.
16 Roșioru, 2018, p. 73.

The most significant of the amendments to the Labor Code in terms of making labor law more flexible is Law 40 of 2011. The introduction of the legislation was heavily criticized by the trade unions, which explains why it finally entered into force with the government taking responsibility.[17] The literature extensively shows the opinion that this was not at all a fortunate decision, as a law of this magnitude should not have been enacted without the agreement of the social partners. The Constitutional Court also examined the law, but in its decision No. 383 of 2011, it was declared constitutional in its entirety.[18]

The explanatory memorandum of the law explicitly states that the objective of flexible regulation is to contribute to a more dynamic labor market and to bring the Romanian Labor Code closer to international standards and the requirements of EU directives. However, this does not mean that there were problems of compliance regarding the Romanian Labor Code in the past.[19] Similarly, overall, the amending law cannot be said to have introduced flexible elements at the expense of security, but has indeed introduced innovations in line with the flexicurity principle in several respects. The more dynamic functioning of the labor market depends, of course, on several factors which the amendment of the Labor Code cannot and will not necessarily be able to influence, such as the decreasing number of the active population due to low birth rates and emigration; nevertheless, the instruments of labor law regulation are obviously not negligible in terms of, for example, eradicating the black economy, increasing the employment rate, or reducing unemployment.[20]

Regardless of this, it is no coincidence that the amendments introduced by Law 40 of 2011 were considered to have been primarily aimed at meeting the labor market needs of foreign investors, and thus to have contributed to improving employment indicators, but it would have been better to pay more attention to the social realities at home and the real risk of poverty faced by Romanian workers.[21] Similar views were expressed by other prominent Romanian labor lawyers, who argued that although the amendments are in line with flexicurity principles and the EU standards, they clearly favor employers and reflect the demands for change formulated by employers.[22]

What are the main areas of the Labor Code affected by the amendments introduced by Law 40 of 2011? The new legislation introduced substantial changes to the provisions on temporary agency work, fixed-term contracts, working time and probationary periods, but also covered several other issues.

The new legislation still contains a taxative list of cases in which fixed-term employment contracts can be concluded, but the range of possibilities has been broadened. The maximum duration of this type of contract has been increased from 24 months to 36 months, but it can be extended for certain projects for the entire

17 Vallasek and Petrovics, 2018, pp. 27–28.
18 Beligrădeanu and Ştefănescu, 2011, p. 11.
19 Voiculescu, 2011, pp. 48–57.
20 Incălţărău and Maha, 2014, pp. 44–66.
21 Voiculescu, 2011, pp. 48–57.
22 Gheorghe, 2011, p. 102.

period needed to complete the work. However, the maximum number of successive employment contracts that can be concluded with the same worker is three. In contrast to the previous provisions, the new legislation no longer contains the rule that, after the expiration of a fixed-term employment contract or contracts, the employer is obliged to employ the next worker for an indefinite period. However, the maximum possible probationary period for fixed-term employment contracts has not changed, despite the fact that they can be concluded for a significantly longer period than under the previous provisions.[23] In the case of temporary agency work, there are also several amendments, which, among other things, have allowed a wider possibility to conclude such contracts for a limited period, unlike the previous legislation, which only allowed temporary agency work if an employer needed workers to cover the interruption of an employee's contract.[24]

The new regulation on the probationary period was also intended to allow for more flexible employment, providing for a longer period of 90 and 120 calendar days respectively, within which the parties should have the possibility to terminate the employment relationship with immediate effect without giving any reason. The only exceptions are for disabled workers, for whom a uniform maximum probationary period of 30 days can be set.[25] Although the provision in the Labor Code that determined the maximum number of consecutive probationary periods for employees has been deleted, there is still a limitation for employers, as there is a maximum of 12 months of probationary period for a given job.[26]

Some elements of the working time and rest period rules have also been changed to the detriment of workers. For example, the introduced legislation allows the employer to decide on a longer reference period than the previous provision allowed. Similarly, a much-analyzed new provision was the one that allowed the employers to reduce the working week from five to four days, with proportionately reduced pay, if they were forced to reduce their activities for economic, technological, or structural reasons for a period of more than 30 days, until the economic reasons for the reduction ceased to exist.[27]

Law 40 of 2011 contains 14 articles that deal with the termination of employment contract.[28] Overall, it can be concluded that the amendments were necessary in many respects because of shortcomings that could be identified in the previous legislation, without weakening the protection of workers. However, as pointed out in the literature, there remain several questions whose interpretation is not clear. Such is the case

23 For more details see Gheorghe, 2011, pp. 95–103.
24 For details see Pătrașcu, 2011, pp. 67–76.
25 Pătru, 2013, p. 113.
26 Art. 82 of the Romanian Labor Code specifies that 'no more than three successive individual labor contracts for a definite period may be concluded between the same parties. The individual labor contracts for a definite period concluded within three months from the termination of a labor contract for a definite period shall be considered successive contracts and may not have a duration exceeding 12 months each'.
27 Beligrădeanu and Ștefănescu, 2011, p. 17.
28 Dumitriu, 2011b, p. 66.

of the termination of an employment contract due to the fulfillment of retirement conditions, which was only one in a series of amendments. But the new legislation also affects certain cases of termination of an employment contract by the employer and the rules on termination by the employee, and the ban on trade union leaders for two years after their mandate has been lifted, which is a significant change in prohibitions on termination.[29]

In addition to the amendment of the Labor Code by Law 40 of 2011, the emergence of Law 81 of 2018 on teleworking is another reference point that characterizes the evolution of individual labor law over the last decade. The emergence of the legislation is a significant step forward, and in retrospect it is particularly fortunate that it came into force just before the outbreak of COVID-19 pandemic. At the same time, it is also a fact that the new teleworking legislation has several serious flaws, and the shortcomings or practical difficulties of its application became clear precisely in the context of the pandemic, when masses of workers were affected by the forced transition to teleworking.[30]

The introduction of the telework law was virtually unanimously viewed positively by the Romanian labor law community, but also by the social partners, and its introduction was indeed necessary.[31] The need for more flexible forms of employment, including the regulation of teleworking, has been increasingly expressed in the Romanian literature of the early 2000s and by the social partners, and this is particularly true after the 2011 amendment of the Romanian Labor Code.[32] The amendment already discussed above, as we have seen, should also be seen as a response to the need for flexibility,[33] but it only addressed fixed-term contracts and temporary agency work among atypical forms of employment. The plan to introduce teleworking was explicitly explained in Chapter 5 of the government program for 2017–2020 with the justification that the 70% employment rate target can only be achieved if the labor market is sufficiently dynamic and flexible, and the strategy for creating new jobs includes the creation of a regulatory framework for teleworking as a priority. This idea is present in the explanatory memorandum of the law, which stresses that teleworking is a key to increasing productivity and competitiveness, while at the same time providing the necessary balance of flexibility and security for the worker. The introduction of the Telework Act was thus preceded by considerable anticipation, but experts had already highlighted several problems with the draft law, and the critical voices did not disappear after its publication. It is also not clear why the legislature wanted to address the issue of telework in a separate piece of legislation,

29 Dumitriu, 2011b, pp. 58–64.

30 Previously, only an insignificant number of workers worked remotely or from home. 0.4% in 2018, and slightly more in 2019, but still only 0.8%. See https://ec.europa.eu/eurostat/web/products-eurostat-news/-/DDN-20180620-1 (Accessed: 15 February 2021).

31 Georgescu, 2019, pp. 35–40.

32 For example, some argue that the rise in oil prices in 2008 has highlighted the need to introduce regulation on telework (Țiclea, 2015, p. 379).

33 Voiculescu, 2011, pp. 48–57.

instead of adding provisions on telework to the Labor Code. In our opinion, this solution would have better reflected the tradition of code-based regulation of labor law in Romania.[34]

The most frequent criticism, however, was that the law leaves much to be desired exactly in the much-discussed area of flexibility. For example, the provisions on health and safety and authorization reduce the worker's flexibility to work in different locations, even spontaneously, and ultimately the place of work is most likely to be the worker's place of residence. On the other hand, the regularity of teleworking was questionable because the stated that for the employee to be considered a teleworker, it was sufficient to work at a place other than the employer's premises for one working day per month.[35] In the context of the COVID-19 pandemic, it was already amended twice, in 2020 and 2021, and the amendments are clearly a move toward simplification and restructuring in response to the criticisms previously made.

For example, the definition of telework in art. 2 of the Telework Act was also changed, and in its current form, telework is now defined as a form of work organization in which the employee, voluntarily and on a regular basis, performs the typical tasks of his/her position, occupation, or profession away from the employer's premises, using computer and communication equipment. The definition has therefore been amended to exclude one working day per month. The definition clearly shows the main characteristics of telework in the Romanian legislature's concept of telework: *its voluntary nature*, which means that the employee cannot be assigned to telework by unilateral decision of the employer;[36] *regularity*; and the fact that *the work is carried out at a place other than the workplace* and *with the help of computer equipment*. The telework contract has some mandatory elements, listed in art. 5. This means that it is necessary to define the place of work and to indicate precisely how much time the employee spends on the employer's premises. The contract must lay down the method of documenting working time; the conditions for the exercise of the employer's right of control; the specific obligations of the parties regarding health and safety and other matters; the rules for the distribution of any costs incurred; the method of fulfilling the employer's obligation to provide information; and the method of transporting materials necessary for the work to the place of work. However, the employment contract must also state the measures the employer will take to facilitate the worker's integration into the workplace.[37]

The process of making individual labor law more flexible is still ongoing, with several pieces of legislation recently adopted to counter the negative effects of the COVID-19 pandemic, which have made substantial amendments to the Labor Code. These amendments will be discussed later.

34 Vallasek and Mélypataki, 2020, pp. 177–191.
35 Teleoaca Vartolomei, 2018, pp. 45–52, Marica; 2018, pp. 81–100; Popescu, 2018, pp. 50–55.
36 Popescu, 2018, pp. 50–55.
37 Georgescu, 2018, pp. 105–106.

The regulation of collective labor law institutions has changed radically following the introduction of the new Social Dialogue Act in 2011. Since its entry into force, the law has been amended several times, but all the problems that the social partners, especially the trade unions, have criticized from the beginning and which have been repeatedly highlighted in the literature, are still present.

As with Law 40 of 2011, which amended the Labor Code, this legislation was enacted through governmental ownership, without any broader consensus. The lack of proper consultation with the social partners is, in our view, unacceptable for a law that aims to define a framework for real social dialogue. In some opinions, it would have been appropriate to include the issue of social dialogue itself in the Labor Code,[38] but we do not believe that such a unified framework of labor law rules is necessary. Some authors have also pointed out that it would have been more appropriate to call the new legislation *a collective labor relationships law* rather than a social dialogue law.[39]

However, it is indeed problematic that the social dialogue law has not been properly aligned with the provisions of the Labor Code on several points. Such overlaps can be observed between the two pieces of legislation, for example on labor disputes.[40] But questions are also raised by the limited formulation of the exercise of the right of association in art. 3 of the law, according to which 'employees with an employment contract, civil servants, civil servants with special status, members of cooperatives and agricultural workers' may form or join a trade union. To ensure that the right of association is not violated in the case of unlisted professional categories, such as those in the liberal professions or in special situations, such as temporary unemployment, the literature has also suggested that the wording of the law should only list the exceptional prohibitions, and not those who are free to exercise their constitutional right to association, such as in the case of the police and military personnel.[41]

In the hastily and inadequately drafted law, we can also observe that, in the case of the same rights and institutions, it contains different wording for trade unions and employers' organizations, whereas ideally these should be 'mirror norms.'[42]

In addition to the special law, the Labor Code contains separate titles on social dialogue (Title VII), collective labor agreements (Title VIII), labor conflicts (Title IX) and strikes (Title X), but these contain only a general framework in a few articles, while for all other issues, Act No. 62 of 2011 is applicable.

38 Țiclea, 2011, p. 11.
39 Popescu, 2011, pp. 11–12.
40 Țiclea, 2011, pp. 12–16
41 Popescu, 2011, pp. 13–14.
42 Popescu, 2011, p. 14.

6. The Content and Regulation of Individual Employment Contracts in Romanian Law

As we have seen above, in Romanian labor law, the central element and pillar of the employment relationship is the individual employment contract. After the publication of the Social Dialogue Law, some of the Romanian literature formulated a specific criticism according to which, contrary to the spirit of the Labor Code, it could in fact be called a code of individual labor contract rather than a real Labor Law.[43] To paraphrase Simon Deakin, if it can be stated that the employment relationship is the cornerstone of society and of modern labor law,[44] then in Romanian labor law the essential building block of this cornerstone is the individual employment contract.

Art. 10 of the Labor Law defines a contract of employment as a contract under which a natural person, the employee, undertakes to work for the benefit and under the direction of a natural or legal person employer in return for remuneration called wages. The concept of *employee* is not defined in the Romanian Labor Code, which in its art. 13 only deals with the conditions of capacity to work. Based on the definitions in the literature, an employee is considered a person who makes his or her own labor available for the benefit of the employer and for which he or she is paid wages by the employer in return. The definition of the term *employer* in the Labor Code is also rather general, the normative text emphasizes the conditions of legal capacity, but in the first paragraph of art. 14 it states that 'an employer within the meaning of the present Code is a natural or legal person who is entitled to employ workers under a contract of employment pursuant to the law.' The definition in the literature follows the legal definition, generally listing slightly more characteristics, meaning that an employer is defined as a natural or legal person who provides a workplace for the employee, ensures working conditions, and pays the employee in return for working in a subordinate position.[45]

It is also clear from the definition of an employment contract that Romanian labor law does not recognize *multiple legal personality,* i.e., the possibility of more than one person on the employer's or employee's side being party to an employment contract. This does not mean that in practice there are no situations that resemble job sharing or employee sharing, but in all such cases the only legal instruments available to the parties are those offered by domestic legislation, such as part-time contracts or the cumulation of employment contracts.

In Romanian law, an employment contract is a type of contract linked to form or formal contract. Following the amendment of the Labor Law in 2011, the written form is no longer only necessary for provability, but also *ad validitatem,* i.e., it is a condition of validity. Art. 16 (1) places the responsibility for meeting this

43 Ștefănescu, 2013, pp. 17–18.
44 Deakin, 2000, p. 10.
45 Ștefănescu, 2014, p. 243. For more, see Vallasek, 2020, pp. 19–22.

condition on the employer. However, in addition to the literature, case-law also points out that the responsibility also lies with the employee, who must be aware that his or her employment is only valid based on a written and signed contract of employment.[46]

As an addition to the written form, in the context of the COVID-19 pandemic, Emergency Government Decree No 36 of 2021 was published, which, by extending art. 16, allows the employment contract to be drawn up in electronic form, with an electronic signature, if both parties wish to choose this option. During the period of social distancing and teleworking, the introduction of this option was indeed a logical step. It not clear, however, how in such a case art. 16 (3) of the same directive, which requires the employer to provide the employee with a copy of the employment contract before the start of the employment relationship, should be interpreted and applied in the future. Para. 4 requires that a copy of the employment contract be kept at the place of work, but the legislature inserted art. 16,[1] which explicitly provides that the employment contract may also be kept in electronic form.

In the 2011 amendment, the legislature also introduced the requirement that the employment contract must be drafted in the Romanian language. The Labor Code does not prohibit the drafting of an employment contract in any language other than Romanian, but a contract drafted solely in another language cannot be considered valid. There have been lively debates in the literature on this issue, with some authors considering the linguistic validity requirement to be contrary to Community law, as it constitutes an obstacle to the free movement of persons, their freedom of employment and their freedom of establishment.[47] In another approach, some argue that the wording of art. 16[48] is not without question marks, since, after stating the formal requirements, it provides for the employer's liability only in respect of the written form and not the language of the contract, and therefore it could be interpreted that, although the written form is a valid criterion, the language of the contract is not.[49] Nevertheless, the majority of the literature and practice itself considers both conditions as conditions for validity.[50]

As a rule, an individual employment contract is for an indefinite period. This is stipulated in art. 12 and employment can be carried out otherwise in the case of legitimate exceptions. As they constitute exceptions, it should always be specified in the employment contract. If we look at the additional provisions on 'atypical' employment in the Labor Law or the Telework Law, we can see that in principle

46 Curtea de Apel București, Secția a VII—a pentru cauze privind conflicte de muncă și asigurări sociale, Decizia nr. 3973/2015 and Decizia nr. 4578/R/2014 cited in Uță, 2016, pp. 41–45 and pp. 157–161.

47 Ținca, 2014, pp. 141–155; Athanasiu and Vlăsceanu 2016, pp. 48–63.

48 Art. 16 (1): The employment contract is concluded by agreement between the parties, in written form, in Romanian, before the employee starts work. The employer is obliged to conclude the employment contract in writing.

49 Dimitriu, 2012, p. 105.

50 Ținca, 2014, pp. 141–155; Athanasiu and Vlăsceanu 2016, pp. 48–63; Țiclea, 2015b, pp. 31–34; Panainte, 2017, pp. 32–33; Țop, 2018, pp. 207–213.

in all such cases it is necessary to include in the employment contract appropriate clarifications on the type of contract, and that in addition to the generally mandatory content elements, there may be additional mandatory content elements specified by law.

For guidance on the mandatory content elements of an employment contract, see arts. 17 and 18 of the Labor Code on the duty to inform, which transpose the provisions of the Council Directive of 14 October 1991 on an employer's obligation to inform employees of the conditions applicable to the contract or employment relationship (91/533/EEC) into domestic law. Art. 17 lists 15 mandatory content elements whose modification requires a written amendment to the employment contract. These are the data identifying the parties, the place or places of work, the employer's registered office or place of residence, the occupation defined according to the Romanian Classification of Occupations, the job description, the scope of duties, the criteria used by the employer to classify the professional activity, the risks involved in the performance of the activity, the starting date of the employment relationship, the duration of the employment relationship if there is a fixed-term contract, the duration of the rest leave, the notice period, the remuneration, the payment periods, the daily and weekly working hours, the collective labor agreement in force, the length of the probationary period, and procedures for the use of electronic signatures.

In the case of work abroad, art. 18 extends the scope of the duty to inform to include information arising from the specific characteristics of the place of work, such as the climate, local customs, the currency in which the remuneration is paid, etc.

The content of the employment contract is regulated by art. 20 of the Labor Code, which lists four specific clauses that may be included in the employment contract based on negotiations between the parties, but the list is not exhaustive and any other clause that is in accordance with the legal framework may be agreed upon by the parties. The Labor Code only regulates in detail the conditions of the confidentiality agreement, the non-competition agreement, the continuing vocational training agreement, and the mobility agreement.

Title XII of the Labor Code considering the labor jurisdiction establishes the general provision that the object of the labor jurisdiction shall be to solve labor conflicts concerning the conclusion, execution, amendment, suspension, and termination of individual or collective labor contracts stipulated in the present code, as well as the requests concerning the legal relationships between social partners. Although in Romania there are no special courts for labor jurisdiction, according to Law 304/2004 on judicial organization art. 35 and 36, depending on the complexity and number of cases, there shall be divisions or, where appropriate, specialized panels for civil cases, professional cases, criminal cases, juvenile and family cases, administrative and tax cases, and cases concerning labor and social security disputes, insolvency, unfair competition or other matters, as well as specialized panels for maritime and river cases. The panel for the first instance in labor disputes and social security cases shall consist of one judge and two judicial assistants.

7. The Content and Regulation of Collective Labor Lontracts in Romanian law, Data, and Problems

Collective agreements in Romania date back to 1919 as with the Romanian Railway Company or the Bucharest Gas and Electricity Works, so the first collective agreements actually appeared a decade before the legislation was even in place.[51]

The 1989 regime change led to a renewal of collective bargaining legislation, which was then regulated in detail in the 2003 Labor Act, until the entry into force of Act 62 of 2011 on social dialogue. Thereafter, social dialogue was pushed into the background, and today the Labor Law contains only a very general framework for collective bargaining and contract in Articles 229–230. The most important provision in the Labor Code is the one that makes collective bargaining at the plant level compulsory, except in cases where the institution employs fewer than 21 workers.

The recent weakening of social dialogue is not just a Romanian phenomenon. However, in the Romanian literature, the negative impact of the law on social dialogue on real social dialogue is practically universally acknowledged and considered all the more regrettable, since collective bargaining can be considered as a cornerstone of labor law.[52] The 2011 Act itself has already undergone numerous amendments, the most significant of which is the 2016 amendment. This however has not necessarily been a positive change, but rather an opportunity for further criticism.[53]

According to art. 229 of the Labor Code, a collective labor agreement is an agreement in writing between the employer or employers' organization, on the one hand, and the trade unions or other legally represented workers, on the other, which lays down provisions on working conditions, pay and other rights and obligations arising from the employment relationship. Art. 1 of the Social Dialogue Act contains a similar definition of the term: a collective agreement is a written agreement between an employer or employers' organization and a trade union or workers' representative body, which defines the rights and obligations arising from the employment relationship. Collective agreements are concluded to protect and represent the interests of the contracting parties, to avoid or limit labor conflicts, and to ensure social peace. The two legal definitions found in the Romanian labor law in force therefore have basically similar content, are partly complementary in nature, and differ only in nuances of complexity.[54]

In the case of civil servants, a similarly written agreement between a trade union or a representative body of civil servants or representatives of public offices and public institutions is called a *collective agreement*.

Prior to the publication of Act 62 of 2011, under Act 130 of 1996, perhaps the most important level of collective bargaining was national bargaining.

51 Țop, 2018, p. 119; Țichindelean, 2015, pp. 13–18.
52 Volonciu, 2019, p. 80.
53 Țichindelean, 2016, pp. 27–37; Țiclea, 2016, pp. 15–18; Uluitu, 2016, pp. 286–290.
54 Moarcăș Costea, 2012, p. 181.

Collective agreements at national level were binding for all employers and employees in Romania, and thus the coverage of employees by collective labor agreements was practically exhaustive. The importance of collective bargaining at the national level was also acknowledged by the Romanian Constitutional Court in its examination of the constitutionality of the previous legislation, when in its Decision 96/2008, it said the state was obliged to guarantee minimum labor rights for all workers in a uniform manner. Later, however, in relation to Law 62 of 2011, in its Decision 574/2011, it took the position that the State has discretion to organize the rules of collective bargaining. The new legislation abolished national collective bargaining, resulting in the fact that collective bargaining coverage fell to around 36% in a single year, according to union statistics, and remained low thereafter as well.[55]

The employer or the employers' representative bodies have the primary right to initiate collective bargaining, but trade unions or workers' representatives also have the right of initiative. As a rule, there is no obligation to bargain on the part of the employer, but the exceptional, plant-level obligation to bargain under the Labor Code, as indicated above, is repeated in art. 129 of Law 62. However, there is no obligation to negotiate or conclude contracts at the level of enterprise groups or sectors.

Partly for this reason, very few collective agreements have been concluded at the sectoral and plant group levels under the new legislation, so the focus has shifted to the plant level, but at this level most collective agreements are negotiated not by trade unions but, in their absence, by employee representation, which has much less leverage and power in practice. The trend is also clear from the official data: while at sectoral level, six to eight sectors managed to conclude collective agreements under the old legislation, after 2011 this number has been reduced to two at most, with practically only education and health having sectoral collective agreements.[56] At the plant group level, the situation is slightly better, with the number of collective agreements concluded in a year still ranging between five and 10 after 2011.[57] Similarly, official ministry figures show that in 2020, there were 43,531 employers who were obliged by law to initiate collective bargaining due to the number of employees, as the Labor Code, art. 229 specifies that collective negotiation at the unit level is mandatory, except when the employer has less than 21 employees. Nevertheless, the data show only 5,742 factory-level collective agreements, of which nearly 1,500 are amendments or extensions of preexisting collective agreements.[58] Although there is no reason to believe that the number of collective agreements has been significantly affected by this fact, as the statistics for the past year are in line with the trend observed previously, it is necessary to note that collective agreements expiring during the state of emergency and alert declared under COVID-19 provide for the extension of collective

55 Vallasek and Petrovics, 2018, p. 18; Guga et al., 2016, p. 30. We do not have exact official figures, but other authors, referring to ILO and OECD data, estimate an even lower rate. Cf.: Chivu et al., 2013, p. 18; Stoiciu, 2019; Trif and Paolucci, 2019, p. 504.
56 Ministerul Muncii și Protecției Sociale, 2020a.
57 Ministerul Muncii și Protecției Sociale, 2020b.
58 Ministerul Muncii și Protecției Sociale, 2020c, pp. 28–48.

agreements under Decree 195 of 2020 and Law 55 of 2020, for the entire period of the special conditions and for a further 90 days thereafter.

The collective employment contract shall be concluded for a fixed period of not less than 12 months and not more than 24 months. Still, the parties can decide to extend the application of the collective labor contract, under the conditions of the law, only once, for a maximum of 12 months. If there is no collective labor contract in an establishment, the parties may agree to negotiate it at any time.

In the case of contracts negotiated at sectoral level, the collective agreement will be registered at that level only if the number of employees in the member establishments of the signatory employers' organizations is more than half the total number of employees in the sector. Otherwise, the contract will be registered as a group contract. If this condition is met, the application of the collective agreement recorded at the level of a sector of activity shall be extended to all the units in that sector.

In addition to the termination of national-level bargaining, the provisions of the existing legislation on the establishment of trade unions and their representativeness have also contributed significantly to the weakening of social dialogue.

A trade union is considered representative at plant level if more than half of the employees are members.[59] Pursuant to art. 134 (2)(a), employees at the enterprise level may be represented at the time of the conclusion of a collective agreement by legally constituted and representative trade unions or, where there is no representative trade union, by a trade union federation representative of the sector concerned, and of which the trade union in the enterprise is a member or, in the absence of trade unions, by the elected representatives of the employees. In addition to the fact that, despite the plural used in the wording, since representativeness requires half of the members plus one, it is impossible to have more than one representative trade union at the enterprise level at the same time, the current wording of art. 134 leads to the conclusion that it is possible to conclude a contract exclusively by a representative federation.[60] However, as the content of art. 135 has not changed, in the absence of a representative trade union at company level, bargaining without employee representation is still excluded. Art. 135 continues to provide that, in companies where there is no representative trade union, either the representative confederation shall negotiate the collective agreement with the elected representatives of the employees on the employees' side or, where the trade union in the company is not a member of a trade union federation representative at sectoral level, the employees' representative shall be entitled to negotiate.

The general regulatory framework for the content of collective agreements is laid down in art. 229 (1) of the Labor Code. According to this provision, as we have seen above, a collective agreement is an agreement on *working conditions, pay, and other rights and obligations arising from the employment relationship*. Within the limits

59 However, the provision, which has been widely criticised in the literature, is also considered to be not excessive, although indeed difficult to implement. Naubauer, 2012, pp. 32–35.
60 Ionescu, 2016, pp. 65–69.

of the above short definition, the parties' freedom to negotiate and conclude contracts prevails. Art. 132 of the Law on Social Dialogue merely expands on the above provisions by introducing four specific rules defining the concrete content of collective agreements. These rules are as follows: a collective agreement may only provide for rights and obligations in accordance with legal conditions; statutory provisions on workers' rights are minimal; a collective agreement at a lower level may not provide for fewer rights for workers than those provided for in a higher-level agreement, and individual employment contracts may not provide for a lower level of workers' rights than those provided for in a collective agreement.

Any provisions of a collective agreement that are in conflict with the above rules are considered null and void. Art. 142 of the law, which provides for nullity, also stipulates that in the event of a declaration of nullity, the parties have the right to renegotiate the provisions in question, with the clarification that until the renegotiation is concluded, the more favorable provisions for the employees on the matter in question, as provided for by law or by the higher level collective agreement, will apply.[61]

Thus, Romanian labor law does not allow for the possibility, which has seeped into the labor law practice of some Western European countries that collective agreements may limit the benefits and rights of employees compared to those provided for by law.[62]

However, there are several provisions in the Social Dialogue Act, the Labor Code or even other legislation that outline the scope of the content of collective agreements. Firstly, the definition in the Social Dialogue Act refers to the categories of rights and obligations arising from the employment relationship, agreements on the resolution of labor disputes and arbitration awards as the subject of collective agreements. And the chapter on trade unions shows that a collective agreement can define the various additional rights of trade union leaders. Examples of other provisions of the Labor Code include the possibility of a collective agreement to specify more days off than the statutory minimum, and the possibility of a company plan for continuing vocational training as an annex to the collective agreement. Act No 202 of 2002 on equal opportunities between women and men makes it compulsory for collective agreements to include a prohibition of all gender discrimination. Act No 204 of 2006 on voluntary private pension insurance states that it is possible to propose in a collective agreement to join a certain voluntary pension fund.

The list of examples could go on, but it can be clearly stated that, based on Romanian labor law practice, and without claiming to be exhaustive, the following can be identified as the scope of collective agreements adopted at different levels: working conditions, working time and rest periods, probationary period, vocational training, provisions on wages (except in the public sector) and provisions specifying the various obligations of employees.

61 Grety, 2018, pp. 60–64.

62 This interpretation is confirmed by the consistent position of the Romanian Constitutional Court: in its Decision 438/2011 it refers back to its previous Decisions 511/2006 and 294/2007 (Țiclea, 2015a, p. 260).

8. Concluding Remarks on Current Issues in the Development of Romanian Labor Law

The COVID-19 pandemic, which began in 2020, hit Romanian labor law in a phase of development that strongly emphasized flexibility and shaped the rules of individual and collective labor contracts accordingly. This process, in our opinion, has been accelerated by this unforeseen situation. The mass shift of workers to teleworking has made it necessary to rethink the regulation of teleworking, the first signs of which are already visible in the legislation, and further changes are likely to follow. In the period between 2020 and 2021, 18 pieces of legislation were published that have amended, supplemented, or in some way affected the provisions of the Labor Code. These include two pieces of legislation which are, in our view, significant but not necessarily thought through well, and which will have a debatable impact on labor law practice in the period ahead. Both were adopted by emergency government decree, which was an unfortunate but obvious solution in the context of the pandemic to change a piece of legislation as significant as the Labor Code.

Emergency Government Decree No. 36 of 2021 introduced the previously mentioned rules on electronic signatures and electronic contracts of employment, but it also redefined the concept of teleworking in a simpler form than before, and introduced simplifying novelties in terms of labor protection issues, allowing the use of digitalization tools.

Emergency Government Decree No. 37 of 2021 abolished the obligation for companies with no more than 9 employees to draw up internal rules and job descriptions. In our opinion, this provision will not be of any practical use, but it may create numerous problems in the future, for example in terms of sanctioning disciplinary offences or evaluating the performance of the employee, the rules of which are contained in this document.

Simpler but mutually beneficial provisions for the employer have been introduced by the Labor Code Supplementary Act No. 213 of 2020, which allows the employer to outsource HR tasks to an expert and, in the case of individual labor disputes, the conciliation procedure itself to an external person, usually an expert in labor law.[63]

The direction of development of Romanian labor law is therefore clearly outlined, and is moving toward the adoption of the principles of flexicurity. However, the issue of security should not be forgotten alongside flexibility, as the primary task of labor law remains to provide workers with adequate protection in an unbalanced employment relationship. As Davies and Freedland put it in their book entitled Labor and the Law, 'The main object of labor law has always been, and we venture to say will always be, to be a countervailing power to counteract the inequality of bargaining power which is inherent and must be inherent in the employment relationship.'[64]

63 Țop, 2020, pp. 26–32; Sâmboan, 2020, pp. 70–86.
64 Davies and Freedland, 1983, p. 18.

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| Chapter 4 |

Slovenia: Social Law and Labor Law – an Overview of Key Concepts

Grega STRBAN, Luka MIŠIČ

ABSTRACT

The chapter, grounded in most relevant domestic literature on employment and labor relationships, provides the reader with a general overview of Slovenian individual and collective labor law regulation, its relation to EU law, and its placement in the wider field of social law, alongside social security law or social insurance regulation. It consists of an analysis of key sources of labor law, i.e., the Slovenian Constitution, the Employment Relationships Act or, simply, the Slovenian labor code,[1] and autonomous legal sources like different-level collective agreements. Other important acts, like the Labor Inspection Act, Public Employees Act, or the Public Sector Salary System Act, are also referred to in places as to depict the regulatory framework as a whole. The chapter also addresses key aspects of most important labor law institutions, like the employment relationship, established by the employment contract, never staying far away from the evergreen interplay between labor law and (contract) civil law. It also considers some of the common challenges, faced in the field today, like disguised employment relationships or the conclusion of successive fixed-term contracts.

KEYWORDS

individual labor law, collective labor law, social law, constitution, Employment Relationships Act, employment relationship, employment contract, Slovenia

1. Constitutional Provisions

Next to general provisions of the Slovenian Constitution,[2] like art. 1 (determining Slovenia is a democratic state), or art. 2 (according to which, Slovenia is a state governed

1 Throughout the contribution, the authors use the suggested names (translations) of acts, provided by the Legal Information System of the Republic of Slovenia. They only depart from such naming in cases of syntactically completely inappropriate translations.

2 Official Gazette of the RS, No. 33/91-I to 92/21. All citations refer to the legislation applicable at the time of the initial submission of the chapter for publication. Due to COVID-19 emergency legislation, several pieces of legislation were later amended. All amendments that are highly relevant for this discussion have been considered. Most recent issues of Official Gazettes concerning the applicable legislation are listed among the sources of Slovenian labor law at the very end of the chapter. Some legal sources, like the Criminal Code or the Civil Code or, for example, *lex specialis* antidiscrimination provisions, are included in the text but omitted in the final overview

Strban, G., Mišič, L. (2022) 'Slovenia: Social Law and Labor Law – an Overview of Key Concepts' in Jakab, N. (ed.) *Fundamentals of Labor Law in Central Europe.* Miskolc–Budapest: Central European Academic Publishing. pp. 81–107. https://doi.org/10.54171/2022.nj.fullce_5

by the rule of law and a social state), at least six provisions enshrined om the human rights chapter of the Constitution are relevant in the field of labor law.

First, art. 49 stipulates the freedom of work, according to which everyone shall choose his or her employment freely, and shall have access under equal conditions to any position of employment. Art. 49(4) prohibits forced labor. Blaha notes that according to the case law of the Slovenian Constitutional Court, art. 49 guarantees not only that a person has the possibility of obtaining means for subsistence from employment or work but also entails the right to pursue one's chosen profession, the right to vocational training and education, and career advancement or promotion.[3] According to the author,[4] the personal scope of application of art. 49 comprises both employees as well as self-employed persons.[5]

Second, art. 50 stipulates the right to social security, guaranteeing citizens' the right to social security and the right to a pension, under conditions provided by law. According to art. 50(2), the state shall regulate compulsory health, pension, disability, and other social insurance, and shall ensure its proper functioning. According to art. 50(3), special protection in accordance with the law shall be guaranteed to war veterans and victims of war. At first glance, it might seem that there exists no link between art. 50 and labor law regulation. However, the Slovenian social security system is grounded in the notion of a Bismarckian, employment-based social insurance scheme, linking one's economic activity to his obligation of insurance. Since employees and self-employed persons are compulsorily insured in all social insurance branches, i.e., health, pension and disability, unemployment, and parental protection insurance, the link between art. 50 and labor law might not be *direct* or straightaway noticeable, but is still very much relevant. As observed by Bubnov Škoberne, social insurance is insurance against the occurrence of a social risk of one's temporary or long-term loss of earnings.[6] Traditional social risks, like unemployment, sickness, and old age, which are also covered by the Slovenian social insurance system, namely lead to a loss or reduction of one's salary or wage obtained from employment or other income, obtained from self-employment. From this perspective, the fact that the right to social security seems reserved for Slovenian citizens only must be approach with caution. If transgressing the sheer linguistic interpretation of art. 50, it is clear that all persons paying social security contributions in Slovenia, on the grounds of either employment or self-employment, are

of sources. Conversely, some legal sources are listed only within the final overview. Due to the high number of *lex specialis* labor law provisions included in, for example, legislation in the field of firefighting, healthcare, the judiciary, military service, policing, etc., those provisions are excluded from the final overview. The same applies to numerous decrees and other by-laws as well as collective agreements.

3 Blaha, 2011a, p. 767.

4 Ibid., p. 773.

5 Slovenian labor law as a rule refers to a *worker* (sl. *delavec*) as persons, performing work within an employment relationship. Due to the international readership, the authors however use the term *employee* (sl. '*zaposleni, zaposlena oseba*').

6 Bubnov Škoberne, 2010, p. 91.

entitled to receive social security benefits either in cash or in kind within the double-sided social insurance relationship.[7] In most cases, the latter is not grounded in the notion of citizenship or (permanent) residency but in other the legal grounds, like the conclusion of an employment contract, that lead to the obligation of insurance due to person's performance of a lawful economic activity. Any withdrawal, suspension, or reduction of social security benefits on the grounds of personal circumstances such as citizenship or residency would also lead to a violation of the right to private property, enshrined in art. 33 of the Constitution.[8]

Third, art. 75 of the Constitution stipulates that employees shall participate in the management of commercial organizations and institutes in a manner and under conditions provided by the law. Employees participation is in general governed by the Workers' Participation in Management Act (WPMA).[9] Blaha however notes that according to the case law of the Constitutional Court, the legislature is free to regulate the said right in different acts, such as workers employed in the private and in the public sector, and provide for a different scope of rights.[10] In doing so, he has no obligation of providing for employees' participation in management boards and/or supervisory boards. If not provided by special legislation, private sector workers exercise their rights on the grounds of the general WPMA. Concerning workers employed within public institutions, the author points out that the legislature should have stipulated special rights and obligations under the Institutes Act.[11]

Fourth, art. 76 of the Constitution stipulates that the freedom to establish, operate, and join trade unions shall be guaranteed. It is strongly related to the more general right of assembly and association, provided for in art. 42. As observed by Kresal Šoltes, the provision does not determine the content of the right itself, which can be derived from international law.[12] The constitutional right is further regulated by the Collective Agreements Act.[13]

Fifth and finally, art. 77 of the Constitution stipulates employees' right to strike. According art. 77(2), the latter may be restricted by law when required by public interest protection and with due consideration given to the type and nature of the involved activity. Additionally, art. 74 on freedom of enterprise is relevant for self-employed persons, wishing to pursue market activities. As observed by Zagradišnik, the Constitutional Court has determined the freedom of enterprise as the freedom of establishment, management, selection of market activities, business partners, etc., regardless of the size, status, or other characteristics of the enterprise.[14]

7 Extensively on the relationship in Strban, 2005, pp. 89 et seq.
8 For a recent discussion on proprietary protection of social rights see Strban and Mišič, 2020, pp. 1 et seq.
9 Official Gazette of the RS, No. 42/07 to 45/08.
10 Blaha, 2011b, p. 1071.
11 Official Gazette of the RS, No. 12/91 and the following (Blaha, 2011b, p. 1071).
12 Kresal Šoltes, 2011, p. 103.
13 Official Gazette of the RS, No. 43/06 to 45/08.
14 Zagradišnik, 2011, p. 1038.

Legislative labor law provisions (and health and safety at work provisions) also share a link with art. 34, of the Constitution, stipulating the right to personal dignity and safety, or art. 14, guaranteeing equality before the law, according to which everyone shall be guaranteed equal human rights and fundamental freedoms irrespective of national origin, race, sex, language, religion, political, or other conviction, material standing, birth, education, social status, disability, or any other personal circumstance. According to art. 6 of the Employment Relationships Act (ERA),[15] employers must respect the prohibition of discrimination when hiring, throughout the course of the employment relationship and concerning the termination of the employment contract.

The Protection against Discrimination Act,[16] in art. 2, explicitly prohibits unequal treatment concerning employment and access to self-employment, employment conditions and selection criteria, promotions and working conditions, including remuneration and the termination of employment contracts. Equal treatment provisions apply to all industries and sectors. Art. 2 also prohibits unequal treatment concerning trade union or workers' association participation or participation in any other professional association, also considering equal treatment concerning benefits granted to members of such associations. Art. 13 however allows for several departures from categorical equal treatment protection in the field of employment. Different treatment on the grounds of age is for example allowed when it is objectively and rationally upheld by a legitimate aim, like employment and labor market policies or vocational training aims, and if the means to achieving such legitimate aim are adequate, necessary, and proportionate.

Similarly, religious, or other personal beliefs may represent lawful grounds for unequal treatment in cases of employment by churches or other religious organizations or public and private organizations, possessing a particular set of ethical beliefs, if employees' religious and personal beliefs represent a justified professional requirement according to the type and context of employment.

According to art. 15(3) of the Constitution, human rights and fundamental freedoms shall be limited only by the rights of others and in cases provided by the Constitution. Generally, every human right infringement must be grounded in a constitutionally legitimate aim and must pass the proportionality test. Whenever considering antidiscrimination provisions in the field of labor law, not only the provisions of the ERA, but also the provisions of the Constitution and of the general Protection against Discrimination Act must be considered. Prior to its enactment in 2016, it was the Implementation of the Principle of Equal Treatment Act[17] that had to be considered alongside pure labor law provisions on equal treatment.

Recently, however, the Slovenian Parliament introduced new grounds for dismissal, possibly considered as less favorable and unjustified unequal treatment of

15 Official Gazette of the RS, No. 21/13 to 203/20.
16 Official Gazette of the RS, No. 33/16 to 21/18.
17 Official Gazette of the RS, No. 93/07 to 33/16.

employees on the grounds of (old) age. Even if bound by ILO Convention No. 158 concerning the termination of employment at the initiative of the employer, and the European Social Charter (ESL), Parliament introduced a new cause of dismissal by which an employer can one-sidedly terminate an employment contract if the employee fulfills old-age retirement criteria. It must be established that there is no genuine reason for dismissal, either from the employee or the employer, e.g., a business reason. The Slovenian Constitutional Court has suspended the use of the said amendment of the ERA until it reaches a substantive decision in the case put forward by the trade unions on the grounds of unlawful age discrimination.[18] One the one hand, the amendment that was introduced by emergency coronavirus legislation is said to have followed the legitimate or public interest aim of securing employers' existence during the COVID-19 crisis.[19] However, from this perspective, the traditional business reason should have sufficed. On the other hand, the amendment was also supposed to have enabled enhanced employment of younger people instead of the old, who already enjoy social security (for old age), even if this legitimate aim of the labor market seems unrelated with the general aims of emergency coronavirus legislation. Even so, in cases of such dismissals, the employment of younger persons was not required by law, making the amendment inadequate in following the said legitimate aim. Since ERA already regulates the common business reason for dismissal, the part of the amendment relating to the legitimate aim of keeping businesses afloat during and after the health crisis, is to be considered not inadequate but unnecessary. From this perspective, both measures fail the proportionality test even before subject to its final step, the balancing of individual rights or constitutionally safeguarded values.[20]

2. Systematic Placement of Slovenian Labor Law

According to Vodovnik et al., labor law represents an independent branch of the Slovenian legal system, a characteristic confirmed by the fact that it possesses its own particular structure of regulation with its own principles and the fact that individual rights, stemming from the particular branch of labor law, enjoy protection under a

18 The final decision that annulled the amendment of the ERA and the Public Employees Act (Official Gazette of the RS, 63/07 to 202/21), containing the same provision as the ERA, was reached in November of 2021, after the chapter had been initially submitted for publication. See Decision of the Constitutional Court of the RS No. U-I-16/21, U-I-27/21 of 11 November 2021.

19 As in other EU Member States, COVID-19 reshaped the way we are to think of work organization, especially within particular service industries, where telework became the new norm, of course with all of its benefits and drawbacks, posing challenging questions of employee's autonomy, health, and safety (at the home office), supervision and privacy, work-life balance, etc. In the field of social security, countless measures concerning either new social security benefits or the amendment of the existing conditions were taken.

20 See also Bagari and Strban, 2021, pp. 9 et seq.

special branch of the court system.[21] According to art. 5 of the Labor and Social Courts Act,[22] labor courts possess competence concerning the following individual labor disputes: a) on the conclusion, existence, duration, and termination of the employment relationship, b) on the rights and obligations from the employment relationship, c) on the rights and obligations of posted workers and user undertakings, d) on rights and obligations from employment (hiring) proceedings between the employer and candidate, e) on industrial property rights stemming from an employment relationship, f) on child and student labor, g) on scholarships, h) on volunteer internships, and i) on other individual labor disputes as provided by the law. Concerning collective labor law, art. 6 stipulates the following labor disputes: a) on collective agreement validity and enforcement, d) on collective bargaining competences, e) on mutual compliance of collective agreements and their compliance with the law, f) on employees' participation, g) on trade unions' competence regarding labor relationship, h) on trade unions' representativeness, and i) on other collective labor disputes as provided by the law.

In a way, it is precisely art. 5 and art. 6 of the Labor and Social Courts Act that paint the picture of the Slovenian labor law system as a whole, encompassing both individual and collective employment relationships. Disputes, stemming from such relationships are resolved before specialized labor (and social) courts.[23] The same applies to art. 7, stipulating the material scope of coverage of specialized social courts, e.g., in the field of pension and disability insurance, parental protection and family benefits, social assistance benefits. Labor law regulation's inextricable link to social security law, placing labor law in the wider field of social law, has already been discussed in the previous paragraphs,[24] dealing with art. 50 and the constitutional human right to social security, transgressing its national personal scope of application due to the prevailing notion of the social insurance relationship. As observed by Kresal et al., it is also labor or collective agreements that sometimes contain norms concerning social security, e.g., on supplementary pension insurance (i.e., occupational social security schemes) or on the amount of particular benefits (provided by employers), such as sickness benefits,[25] making the link between social security and labor law even stronger. Apart from public expenditure side-constraints of public sector employers, there of course exist no limitations for private-sector employers to provide, even one-sidedly, additional benefits with a social aim to their employees.

21 Vodovnik, Korpič-Horvat, and Tičar, 2018, p. 36.

22 Official Gazette of the RS, No. 2/04 to 10/17.

23 According to art. 23 of the Labor and Social Courts Act, the law or a collective agreement may prescribe a mandatory attempt of a peaceful dispute resolution prior the initiation of a court proceeding. In such cases, the attempt represents a formal requirement for action.

24 However, as generally observed by Pieters, 2006, p. 23, the *wage earner* in social security law may differ from the *employee* concept in labor law since persons, considered as employees by labor law, may, under some national systems or regarding some branches of social insurance be exempt from insurance and vice versa. As aforementioned, all employees in Slovenia *ex lege* enjoy full social security (insurance) coverage.

25 Kresal, Kresal Šoltes and Strban, 2016, p. 36.

Health and safety provisions, stemming primarily from the Health and Safety at Work Act[26] as the *lex generalis* in the field, also form part of the link between labor and social security law provisions.

Even if sharing a profound connection to social security law as a discipline of public law, labor law has generally developed from civil law, an element that is, according to Vodovnik et al., still visible in the current regulation of the employment contract. According to the authors, the link is also or even most visible in cases when civil law provisions directly regulate parts of labor law, e.g., the liability for damages from the employment relationship.[27] The link between civil and labor law is further examined below, when analyzing the key elements of the employment relationship and the employment contract. However, in general terms Slovenian labor law could be considered as, on the one hand, falling within the realm of social law as a wider notion (comprised of labor law, social security law, health and safety regulation, etc.)[28] and a special discipline of public law, and, on the other hand, sharing a profound link to civil law regarding parties' private autonomy both in the field of individual as well as collective labor law. In that sense, civil law characteristics take over once a minimum level of protection, offered by public law provisions, is in place.

Vodovnik et al. also highlight the important connection between labor law and penal law, with the latter offering special definitions concerning criminal offences of employees but most importantly employers.[29] The Slovenian Criminal Code[30] consists of eight labor- or social security law specific criminal offences, stipulated in Chapter 12, like the violation of basic rights of employees (art. 196), workplace harassment (art. 197) or, for example, safety at work endangerment (art. 201). The Criminal Code also stipulates in its art. 289 that a person who knowingly does not adhere to a final court decision, by which it has been decided that an employee is to return to work (workplace reintegration with the employer), is fined or imprisoned for a term, not exceeding one year. As observed by the authors, criminal law on the one hand determines and regulates particular criminal offences that can be committed by employers and managers against their employees and, on the other hand, determines less harmful criminal offences that are punishable only by fines.[31] Additionally, statutory descriptions of intent, negligence, self-defense, accountability, etc., ought to be strictly considered whenever employers or managers are deciding on sanctions stemming from employees' culpable behavior.[32] Researchers also point out the important link to corporate law, administrative law, and international and European Union law,

26 Official Gazette of the RS, No. 43/11.
27 Vodovnik, Korpič-Horvat, and Tičar, 2018, pp. 35–36.
28 *Social law,* however is commonly used as a synonym for *social security law.*
29 Vodovnik, Korpič-Horvat, and Tičar, 2018, p. 36.
30 Official Gazette of the RS, No. 50/12 to 95/21.
31 Vodovnik, Korpič-Horvat and Tičar, 2018, p. 37. For a full analysis of the link between labor and criminal law see the recent scientific commentary on the Criminal Code, Korošec and Filipčič, 2019, pp. 327–416, with individual commentaries by Filipčič, Tičar and Strban.
32 Vodovnik, Korpič-Horvat and Tičar, 2018, p. 37.

noting the specific regulation concerning particular labor law related legal institutions, like minimum salary, industrial property, or the aforementioned health and safety legislation.[33]

Specific labor or, more precisely, employment law provisions also stem from the Public Employees Act—prescribing, for example, special tenders and selection procedures, special conditions for fixed-term employment, promotions, etc.—and from the Public Sector Salary System Act,[34] prescribing special conditions concerning remuneration, for example, the classification of pay scales, the basic salaries of apprentices, public officials, general secretaries, or managers. Even so, Slovenian employment law, commonly considered as a notion wider than labor law, corresponds to the theoretical paradigm of monism.[35] Employment relationships of civil servants fall under the same regulatory framework as private-sector employees' relationships. Put differently, general labor law provisions are applicable for both private and public-sector employees who are employed with state bodies, public agencies, funds or institutions, self-governing local communities, etc.[36] According to art. 2 of the ERA, the latter also applies to employment relationships of employees, employed with state bodies, self-governing local communities, public institutions and other organizations or private public service providers unless otherwise provided by special legislation. However, Senčur Peček[37] notes that officials or office-holders do not fall under the category of a civil servant, meaning that their rights and obligations, and some in the field of labor law, are defined by special legislation, like the Deputies Act[38] or the Judicial Service Act.[39]

3. Basic Concepts of Slovenian Individual Labor Law

In his theoretical systematization of major legal disciplines, Pavčnik describes labor law through its gradual separation from civil law, next to the then developing discipline of social security law.[40] According to Pavčnik, the liberal 19th century state first regulated work through civil law contracts, stemming from the then applicable Civil Code (in German, *Bürgerliches Gesetzbuch*), however, with gradual development, increasing numbers of heteronomous (state) legal rules begun to limit party autonomy as to offer a wider set of rights to workers (employees).[41] As noted above, the now autonomous legal branch or legal subsystem of Slovenian labor law developed from

33 Ibid., pp. 38–40.
34 Official Gazette of the RS, No. 108/09 to 84/18.
35 Vodovnik, Korpič-Horvat and Tičar, 2018, p. 55.
36 Ibid.
37 Senčur Peček, 2019, p. 30.
38 Official Gazette of the RS, No. 112/05 to 48/12.
39 Official Gazette of the RS, No. 94/07 to 36/19.
40 Pavčnik, 2007, p. 575.
41 Ibid.

civil (contract) law.[42] According to Vodovnik et al.,[43] the ERA from 2002,[44] amended in 2013, represents the basis of contemporary employment law in Slovenia. The 2013 ERA, which also represents the central piece of domestic legislation governing individual labor relationships, introduced several new labor law institutions, like the economically dependent person, i.e., a self-employed person who provides the majority of his or her services for a single client, thus enjoying a limited scope of labor law protection.[45] It also amended the regulation of the employment contract, probationary employment, fixed-term employment and other flexible forms of work.[46] Two of the key institutions, the employment relationship and the employment contract, are further examined in the following paragraphs.

3.1. The Employment Relationship

The ERA consists of a definition of an employment relationship. Art. 4 defines it relationship as a relationship between employee and employer, in which the employee voluntarily enters an *organized work process* within which he *personally* and for *remuneration* carries out *continuous work* in line with the *employer's instructions* and under his or her *supervision*.

According to Tičar, the definition of an employment relationship helps us to define someone as an employee and to afford him proper labor protection and while it at the same time allows us to better define the very elements of an employment contract.[47] Unlike in cases of work performed on the grounds of a civil law contract, that commonly means a one-off provision of a particular service, long-term mutual trust represents one of the key elements of an employment relationship, from which both the employee's and employer's specific obligations, like the prohibition of competitive activity, trade secret protection, etc., can be derived.[48] Another departure from the traditional civil law relationship lies in the indefinite duration of the employment relationship, in which work is performed continuously. Continuous work performance also applies to fixed-term employment relationships, since the contractual activity cannot be considered as a one-off provision of a particular service, under which the service provider is bound only by his or her obligation of result.[49] If some services can be outsourced, an employment relationship represents a *personal* relationship between the employee and his or her employer. Put differently, work must

42 On contractual approaches to the employment relationship see Končar, 2007, pp. 19 et seq.
43 Vodovnik, Korpič-Horvat and Tičar, 2018, p. 39.
44 Official Gazette of the RS, from No. 42/02 to 21/13.
45 The special category of an *economically dependent person* represents the ERA's main answer to atypical or new forms of work, since any person who performs any economic activity that meets the legislatively prescribed definition of an employment relationship should, according to law, perform the said activity on the grounds of a contract of employment and not, for example, as an self-employed person or on the grounds of individual civil law contracts.
46 Belopavlovič, 2019, pp. 7–8.
47 Tičar, 2012, p. 21.
48 Ibid., p. 23.
49 Ibid., p. 24.

be performed by the person who concluded the employment contract. That is also the key reason employers take advantage of tests, exams and trial or probation periods of employment.[50]

Unlike a *pro bono* provision of a service, work must be remunerated. Non-payment or payment of a significantly lower salary represents grounds for extraordinary termination of the employment contract by the employee.[51] According to Kresal and Senčur Peček,[52] whenever deciding on the existence of an employment relationship, two basic premises must be followed. First, the key element of differentiation between independent work, self-employment or, put differently, (civil) contract work, is the element of subordination, which always must be considered in the wider context of particular employment, technological progress, etc., and cannot be understood merely as constant and direct supervision by the employer. Such reasoning is also confirmed by Končar, who notes that workers today commonly possess better education and expertise, are more autonomous and creative and commonly no longer require several detailed instructions from their employers.[53]

Similar to Tičar,[54] Kresal and Senčur Peček mention several possible tests like the *control* or *subordination and control test*, accompanied by the more up to date *business* and *integration test*. Due to new patterns of work organization, also the *mixed test*, merging criteria from other tests, and the *risk test* have gained importance.[55] Second, facts of every individual case ought to take priority over the formal elements of a particular contract. Kresal, referring to ILO Recommendation No. 198 on the Employment Relationship, lists additional specific criteria that could be used as to determine whether an employment relationship does or does not exists among the parties, concerning mostly work performance and remuneration.[56] She for example points to the questions of who supplies the necessary tools, materials, and technologies, whether the payment is periodical, who bears the business or financial risk, who covers commuting expenses, whether the obtained income is the sole or main source of subsistence, etc. As highlighted by the author[57] and stipulated in art. 11(2) of the Recommendation, Members should a) allow for a broad range of means for determining the existence of an employment relationship and b) provide for a legal presumption that an employment relationship exists where one or more relevant indicators are present. As follows, Slovenian labor legislation follows the Recommendation from 2006 in full in this regard.

The definition of an employment relationship, stipulated in art. 4, means that in theory, every civil or other legal relationship in which indicators of an employment

50 Končar, 2008a, pp. 37–38.
51 Tičar, 2012, pp. 24–25.
52 Kresal and Senčur Peček, 2019a, p. 35.
53 Končar, 2016, p. 261.
54 See Tičar, 2012, pp. 25 et seq.
55 Kresal and Senčur Peček, 2019a, p. 35.
56 Kresal, 2019, p. 137.
57 Ibid.

relationship appear should be considered as such and that an employment contract, possibly of an indefinite duration, should be concluded. Even more so, art. 18 of the ERA provides for a legal presumption according to which the existence of defining elements of an employment relationship determines the existence of an employment relationship. Such presumption however only takes effect within a dispute on the existence of the said relationship between the employee and employer. Even more generally, the establishment of an employment relationship due to the presence of its defining elements in as a rule possible only within a dispute, when contract workers, student workers or self-employed persons, e.g., architects, journalists, or taxi drivers, sue their *de facto* employers within a disguised employment relationship and claim its existence and the conclusion of an employment contract. There, employees may prove the existence of indicators and the employment relationship itself with all available evidence. The determination of a single indicator is commonly not enough, while the court must consider all different types of employment contracts and all evidence or indicators as a whole as to fore and foremost determine whether the claimed employee is subordinate to the his or her claimed employer.[58] The indicator of subordination of course cannot be considered as full loss of autonomy by the employee, especially in cases of highly skilled professionals and modern forms of work organization, nor as constant and direct employer's oversight and control. It should be looked at more as a general context of dependence and subordination in which work is carried out.[59] Since the Labor and Social Courts Act provides almost no special provisions concerning proceedings determining the existence of an employment relationship, according to art. 19, provisions of the Civil Procedure Act[60] mostly apply.[61] Thus, the existence of an employment relationship can also represent a preliminary question according to art. 13 of the Civil Procedure Act, when the decision of a court depends on a prior determination of whether a particular right or legal relationship exists.[62] However, as long as no suit is filed or as long as no labor inspection proceedings take place, party autonomy, even if misused in favor of the *de facto* employer, prevails.

Even so, a lack of initiated judicial proceedings does not mean that an employment relationship cannot be established *ex officio*. According to art. 13(2) of the ERA, it is prohibited to perform work on the grounds of a civil law contract, apart from special cases provided by law, if the defining elements of an employment relationship exist. According to art. 19(1)(6) of the Labor Inspection Act,[63] a labor inspector can issue a decision prohibiting work performance if work was performed on the grounds of civil law contracts, contrary to the ERA and, according to art. 19(2), demand that a written employment contract is offered to the employee within three days from receiving the decision. The competence to demand for an employment contract to

58 Ibid., p. 139.
59 Ibid.
60 Official Gazette of the RS, Nos. 73/07 to 70/19.
61 Kresal, 2016, p. 220.
62 Ibid., p. 221.
63 Official Gazette of the RS, Nos. 19/14 to 55/17.

be offered and concluded was granted to labor inspectors with the amendment of the Labor Inspection Act in 2017,[64] with the aim of offering a higher level of protection to false self-employed persons, contract workers, etc., without the need for a separate action in which they would must claim the existence of an employment relationship. In 2016, a year prior to the amendment, labor inspectors were still very much critical of the fact that with no additional competences or employers' obligations to offer employment contracts, the latter would continue to seize their unlawful conduct by simply ending whatever relationship they had with the worker.[65]

However, such labor inspectors' competences could lead to the imposition of an employment relationship to cases in which equivalent parties autonomously decided not to conclude an employment contract but govern their relationship by civil law contracts. Additionally, Scortegagna Kavčnik[66] notes that the Department of Legal and Legislative Services of the Slovenian Parliament deemed new powers as questionable, possibly exceeding inspectors' powers according to the general Inspection Act.[67] Even so, the recognition and imposition of employment relationships also serves legitimate labor market and social security (insurance) aims, not necessarily fulfilled if *de facto* employment is exercised as self-employment or, even more so, (civil) contract work due to different tax and social security contribution payment obligations or at least due to greater opportunities for earnings manipulations. As observed by Tičar, it is also the key aims of Slovenian labor law regulation enshrined in art. 1(2) of the ERA that allow for limitations to parties' autonomy concerning the conclusion, content, termination, etc., of the employment contract. However, both the employer and the employee remain bound by typical civil law standards like, due diligence, good business practices, etc.[68]

3.2. The Employment Contract

ERA dedicates a specific chapter of more than 100 articles to the regulation of both formal and substantive elements of the employment contract like means of its conclusion, suspension, amendment, termination, or form. Tičar notes that it is not only lawmakers from countries belonging to the continental but also from countries belonging to common law traditions that have posed greater limitations to parties' private autonomy concerning the content or rights and obligations stemming from employment contracts. Heteronomous statutory provisions, following the general trend from *contract* to *status*, are drafted with the aim of offering a higher level of protection to employees as weaker contractual parties, thus bringing the employment contract closer to a somewhat declaratory legal act, merely marking the conclusion of an employment relationship.[69]

64 Official Gazette of the RS, No. 55/17.
65 Rakita Cencelj, 2017, p. 71.
66 Scortegagna Kavčnik, 2020, p. 28.
67 Official Gazette of the RS, No. 43/07 to 40/14.
68 Tičar, 2012, p. 54.
69 Ibid., pp. 55–56.

ERA, for example, provides for a written form of conclusion, the set of contractual parties, capacity and freedom of contract, mandatory posting of vacancies, etc. Kresal and Senčur Peček consider the employment contract as a special and autonomous contract of labor law, regulated next to general civil law provisions. According to the authors, the placement and definition of the employment contract as either an independent labor law contract or a specific civil law contract is left to the discretion of national legislatures and thus cannot be governed by neither international nor EU law.[70] Under Slovenian legislation, if there is an absence of particular labor law rules, civil law rules thus *mutatis mutandis* apply regarding the conclusion, validity, termination, and other elements of the employment contract. Civil law rules concerning the conclusion of an employment contract apply, for example, to parties' capacity and consent, consideration and grounds for conclusion, contract form, etc. Regarding some institutions, like liability for damages or absolute and relative nullity, the ERA even directly refers to the application of civil law rules.[71] Nullity of an employment contract for example leads to restitution claims on the side of both the employee and the employer, concerning salaries for example. However, if for example the employer is recognized by the court as a fraudulent party to the employment contract, the latter can deny his or her claim for restitution, considering the unlawful conduct of (possibly) both parties and the status of the violated legally protected categories or values.[72]

Concerning partial (absolute) nullity, art. 88(1) of the Civil Code,[73] stipulates that nullity of a particular contract provision does not lead to the nullity of the contract as such, if the contract can remain in force without the validity of the said provision and if the provision does not represent a contractual condition or consideration. Mežnar lists the example of a contract provision, providing for a below-minimum pay or a below-minimum number of days of annual leave. In such cases, statutory regulation would apply.[74] According to art. 32 of the ERA, if there is any employment contract provision conflicting with the general statutory, collective agreement, or an employer's general act provisions concerning parties' minimum rights and obligations, the latter provisions apply directly. From this point of view, Slovenian employment contract regulation on the one hand allows for a certain degree of parties' private autonomy, mirroring the traditional civil law foundations of employment relationships. The application of civil law rules in particular cases, when prescribed by the ERA, further contributes to this fact. On the other hand, any unforeseen departure by the ERA from its or other heteronomous public law rules or autonomous legislation is countermanded by their direct applicability as to offer sufficient labor (and social) law protection to the employee. As observed by Kresal,[75] the level of employees' protection

70 Kresal and Senčur Peček, 2019b, pp. 107–108.
71 Ibid., p. 108.
72 Mežnar, 2019, p. 113.
73 Official Gazette of the RS, No. 97/07 to 20/18.
74 Mežnar, 2019, p. 113.
75 Kresal, 2019, p. 121.

is furthered by the mandatory written form of the employment contract, also mirroring both the longevity of the relationship and the common conflict of interests, and may be increased in cases where no written agreement on mutual rights and obligations would have been made. Kresal thus points out that the written form of the contract is stipulated to the maximum benefit of the employee.[76] If the parties did not conclude an employment contract in written form or have failed to include all its mandatory elements, this does not affect the existence or validity of the contract. Put differently, the employment contract is lawfully concluded once the parties have agreed in whatever form on all its mandatory elements listed in art. 31 of the ERA, e.g., the duration of the employment relationship, working time, type and description of the performed work, etc. According to art. 49, a change of key conditions of employment, agreed upon with the employment contract, like a change to the type and description of the performed work, contract duration, etc., a new contract must be concluded. A mere amendment to the existing contract does not suffice.

Kavšek, when discussing *factual* employment relationship, grounded not in a written employment contract but in its determining elements or indicators, suggests that the employee would also must prove that a consent between two parties was reached.[77] The author however notes that the Slovenian Supreme Court does not follow the suggested contract-based understanding of labor relationships, since it determined that the presumption of an existing labor relationship, more precisely, the existence of factual employment triggers the presumption of an existing employment contract.[78] Kavšek follows the presumption of an existing employment contract from art. 5 of the Prevention of Undeclared Work and Employment Act,[79] according to which a worker, who did not conclude an employment contract or whom his or her employer did not register within or deregistered from all mandatory social insurance branches, is presumed to have obtained a full-time employment contract of an indefinite duration.

Finally, yet importantly, ERA predicts a full-time employment contract of an indefinite duration as the general rule.[80] If the employment contract does not stipulate the duration of the employment relationship, it is presumed, under art. 12(2), that a contract of an indefinite duration has been concluded. According to art. 54 and 55, a fixed-term employment contract can be concluded as an exception only,[81] under special conditions provided by the law, e.g., in cases of project work, season work,

76 Ibid.
77 Kavšek, 2020, p. 37.
78 Ibid.
79 Official Gazette of the RS, No. 32/14 to 43/19.
80 Such general rule is also mirrored in art. 39 (transitional provisions) of the Market Regulation Act, Official Gazette of the RS, No. 80/10 to 54/21 as amended by ZUTD-A, Official Gazette of the RS, No. 21/13, according to which employers, concluding employment contract of an indefinite duration are relieved of paying employment contributions for two years, while employers, concluding fixed-term employment contracts, pay five times the general percentage.
81 It also must be distinguished from *probation* or *probationary period*, stipulated in art. 125 of the ERA.

temporarily increased work demand, absent worker replacement. However, as made clear by a recent extensive study on precarious work in Slovenia,[82] fixed-term employment, even in cases of steady, long-term demand for work, seems to be the new (unlawful) norm. Interestingly, ERA contains no limitations concerning minimum working hours. A part-time employment contract could also be concluded for example for a minimum duration of one hour per day.

Ways or reasons of termination are listed in art. 77. An employment contract is terminated a) with the expiry of time, b) in cases of employee's or employer's (natural person as employer) death, c) by agreement, d) by regular (e.g., business reason) or extraordinary (severe violations) termination, e) by court judgment, f) *ex lege* in cases provided by the law, and g) in other cases provided by the law.

4. Basic Concepts of Slovenian Collective Labor Law

As aforementioned, the Slovenian Constitution stipulates not only the general right of assembly and association (art. 42) but also, like Germany, France, Spain, Italy, Finland, or Belgium,[83] a specific and autonomous right guaranteeing the freedom of trade unions (art. 76). Kresal Šoltes notes that both the legal theory and case law of the Constitutional Court interpret trade union freedom in a way as to relate both to the organizational and functional aspects of trade unions' operations.[84] She also points out that art. 76, even if grammatically limited to the positive aspect of the right, encompasses both its positive and negative side, as established in international law,[85] meaning both the freedom *of* and the freedom *from* trade union association. As already discussed, the Slovenian *system*[86] of collective agreements is regulated by the Collective Agreements Act (CAA), while workers' participation and the right to strike fall under the material scope of the WPMA and the Strike Act,[87] with the latter dating all the way back to 1991 and with some of its provisions still in force 30 years after had Slovenia gained independence.

Upcoming paragraphs further examine the regulation and nature of collective agreements, key wide-scale sources of autonomous labor law, their hierarchy and relationship to the employment contract and employers' autonomous legal acts (employer's general acts), and their validity or scope of application, as well as the representativeness and trade union coverage in Slovenia. Additionally, the regulation of works councils, employees' representatives, and workers' participation in management is briefly reviewed under this section. The paragraphs do not discuss individual agreements, concluded at the company level, since both the ERA and the CAA afford

82 See Kresal Šoltes, Strban and Domadenik, 2020.
83 Kresal Šoltes, 2011, p. 95.
84 Ibid., p. 96.
85 Ibid.
86 Ibid.
87 Official Gazette of the SFR Yugoslavia, No. 23/91.

normative power only to collective agreements.[88] Strikes, picketing, lockouts, and other forms of industrial action are not discussed.

4.1. The Collective Agreement: Between Autonomy and Obligation

According to Vodovnik et al., the Slovenian collective bargaining system has developed spontaneously, based on the 1991 Constitution and based on the relevant ILO conventions in the field.[89] Until the enactment of the CAA from 2006, the then-applicable ERA prolonged the application of the Basic Rights from Employment Act[90] from 1989. Kresal Šoltes notes that during that period, all collective agreements passed at the level of the state or industry *de facto* applied to all employers since on the one hand the government acted as the public-sector employer and representative while on the other hand membership in the Chamber of Commerce and the Chamber of Craft was mandatory for all employers.[91] Noticing important drawbacks to private autonomy and the freedom *from* association regarding that period, the author points out that until the 2006 CAA was passed, the legislature's general orientation was to empower the system of collective bargaining as much as possible after a long period of no free employers' association. Such orientation led to the situation in which some of the key aspects of collective agreements, like mandatory arbitration, levels of collective bargaining, etc., were regulated by heteronomous legislation. It is only after the CAA was passed that the principle of free and autonomous conclusion of collective agreements came into force.[92] According to art. 32 of the CAA, employers' organizations with compulsorily membership, like chambers can, as of 2009, due to a three-year transitional period in place then, no longer conclude collective agreements. However, as observed by Kresal Šoltes, the important change of legislation had only little effect since the Chamber of Commerce, the major employers' representative in Slovenia, already moved away from compulsory to voluntary membership with other legislative amendments from 2006.

According to Vodovnik et al., who in this regard refer to Cvetko,[93] contemporary Slovenian regulation of collective bargaining and collective agreements in generally based on social partners' autonomy and does not impose on them the duty to regulate particular elements regarding their employment relationships. Autonomy is strongest in the private sector, where social partners can freely regulate all employee-related social or economic issues.[94] However, as the authors point out, statutory legislation like the ERA commonly imposes on the employer to govern aspects of employment relationships by autonomous regulatory acts. Concerning internal regulation, statutory legislation favors bipartite autonomous acts, like the participatory agreement or internal

88 Kresal Šoltes, 2018, p. 218.
89 Vodovnik, Korpič-Horvat and Tičar, 2018, p. 292.
90 Official Gazette of the SFR Yugoslavia, No. 4/91 to 43/06.
91 Kresal Šoltes, 2011, p. 47.
92 Ibid., pp. 47–48.
93 Vodovnik, Korpič-Horvat and Tičar, 2018, p. 293.
94 On the role of social partners in *social security* see Strban and Mišič, 2018, pp. 43 et seq.

collective agreement, before unilateral general enactment by the employer, according to the statue.[95] Statutory legislation may demand, on the one hand, for specific rules to be governed by internal, autonomous legislation passed at various levels, or may on the other hand allow for additional or different provision of rights and obligations by means of autonomous law-making. In the public sector, however, the content of collective agreements is regulated more precisely,[96] mostly concerning conditions for their conclusion, enshrined in art. 41 and the following of the Public Sector Salary System Act.

Art. 22 of the ERA for example stipulates that the employee, concluding an employment contract, must fulfill statutory or other conditions, prescribed by a collective agreement or employer's general act. Art. 55(4) for example provides that *project work*, representing lawful grounds for concluding a fixed-term employment contract, is defined within a collective agreement, concluded at the level of the industry. According to art. 59(3), an industry-level collective agreement may provide for a higher percentage of posted workers performing work for a single user undertaking. The three brief examples point to cases in which autonomous legislation may stipulate additional rights and obligations. If it does, the latter apply next to statutory provisions. Next, to cases in which a collective agreement, concluded at the particular level of the industry, must determine specific rights and obligations or legal institutes as such, and to cases, in which it may do so. Similar are the provisions of the ERA, stipulating a particular right or obligation under the condition that the said right or obligation is not governed differently by a collective agreement, concluded for example at the level of the industry. This for example applies to the regulation of a minimum notice period (art. 94) severance pay (art. 108). In some cases, a lack of autonomous regulation triggers the application of bylaw regulation, like in the case of art. 130, stipulating work-related cost reimbursement. If the amount of reimbursement is not provided by an industry-level collective agreement, the latter is governed by implementing legislation. The examples also show a vivid interplay between statutory legislation or the normative power of the general legislature and autonomous legislation or the normative power of both the employer and employees' and employers' organizations. All of the examples also point into the direction of the overriding, but not absolute *in favorem laboratoris* principle of Slovenian labor law, securing a higher level of labor law protection for the employee as the commonly weaker party to the employment contract. The relationship between labor law regulation, more precisely, the relationship between the ERA and collective agreements, from which the limits of the *in favorem laboratoris* principle can be derived, is governed both by the ERA itself in art. 9 and the CAA in art. 4.

Art. 9, which sets limits to the private autonomy of the parties to the employment contract, stipulates that an employment contract or collective agreement may provide only for more favorable employees' rights than the ERA. However, in several cases provided by art. 9(3) of the ERA, collective agreements may regulate rights differently from the act itself, meaning also less favorably. Less favorable treatment for example

95 Vodovnik, Korpič-Horvat and Tičar, 2018, p. 294.
96 Ibid.

stems from additional grounds for the conclusion of a fixed-term contract, additional grounds for overtime work, or additional disciplinary sanctions. According to Vodovnik et al., the basic principle concerning parties' autonomy is that autonomous sources of law cannot diminish the level of employees' rights, safeguarded by statutory legislation, collective agreements, or international law, unless such possibility is explicitly anticipated by those legal acts.[97]

The relationship between the application of the *in favorem laboratoris* and the *in peius* principle is also determined by the abovementioned art. 4 of the CAA, stipulating that, unless otherwise provided by the ERA, a collective agreement may only stipulate provisions that are more favorable for the employee than statutory provisions. Similar to art. 9 of the ERA, art. 4 of the CAA also sets limits to parties' (private) autonomy concerning the content of an autonomous legal act, of course not of the employment contract but of the collective agreement. The hierarchy between collective agreements concluded at different levels is regulated by art. 5 of the CAA. Employers, bound by a collective agreement, may within a lower-level collective agreement only provide for more favorable employees' rights and working conditions. Less favorable treatment may only be provided under the conditions, prescribed by a higher-level collective agreement. However, as observed by Kresal Šoltes, the CAA does not stipulate mandatory levels nor types of collective agreements. The levels and types are left to the collective bargaining autonomy.[98]

Additionally, art. 10 of the ERA, regulating two types of employer's general acts must be considered. Not only do trade unions, organized with the employer, issue an opinion on the general act, this type of one-sided autonomous regulation may also regulate employees' rights and obligations with the respect of the ERA and the applicable collective agreements. As observed by Končar back in 2008, the regulation of employer's general acts, either acts on work organization, or acts, stipulating rights and obligations, has been subject to several revisions and changes during the processes of drafting the then applicable ERA due to a specific societal and political background of the time.[99]

4.2. The Collective Agreement: Parties and Validity

The CAA represents comprehensive statutory legislation governing the collective agreement system in Slovenia. It stipulates parties to the agreement, its content, split into the normative part of the collective agreement and the part, concerning parties' rights and obligations (i.e., obligatory part), the form and means of conclusion, termination, collective labor dispute resolution, records and publication, and supervision. Even if, as pointed out by Kresal Šoltes, the CAA does not define a collective agreement as such, it regulates all of its key elements.[100] Vodovnik et al. note that only normative

97 Vodovnik, Korpič-Horvat and Tičar, 2018, p. 294.
98 Kresal Šoltes, 2011, p. 101.
99 Končar, 2008b, pp. 57–58.
100 Kresal Šoltes, 2011, p. 98.

parts of the collective agreement provide for a legally binding effect.[101] The validity of that conclusion depends on how we are to understand the notion of *binding effect* in law as such, since the obligatory part of the collective agreement of course does have a binding effect for the parties, who have concluded the agreement. Without such an effect, any party to the agreement could at any time revoke its consent. However, what Vodovnik et al. must have had in mind, also following their further deliberations, is the fact that employees' and employers' rights and obligations, binding due to their provision within the normative part, stem only from the latter part of the collective agreement. As they very well point out, the normative part of the collective agreement cannot be considered a set of contractual clauses but rather autonomous regulation of the specific subject of working conditions. To apply, they must be published.[102] Additionally, some collective agreements consist of what the authors refer to as *hybrid* clauses, which concern both the obligatory and the normative parts. They also contain *institutional* clauses, determining bodies and procedures necessary to secure communication between the parties.[103]

After the already mentioned 2009 transitional period had expired, only voluntary employers' organizations are allowed to act as parties to a collective agreement. Art. 2 of the CAA lists the following legal persons, possessing the capacity to conclude a collective agreement: trade unions and trade unions' associations and employers and employers' associations. The government, a ministry, or other authorized public authority carrier acts as a public-sector employer, including also public commercial institutions and other public organizations, if enjoying indirect public funding from the general budget of the Republic of Slovenia or local communities' general budgets. Kresal Šoltes points out that the Constitutional Court of Slovenia found no violations of the Constitution because works councils, established according to the WPMA, cannot act as parties to collective agreements.

According to the general rule of art. 10(1) of the CAA, a collective agreement applies to its parties and their members. According to art. 10(2), whenever employers' or trade unions' associations sign a collective agreement, the latter determines to which of their members it applies.

Arts. 11 and 12 regulate the general and the extended validity of the collective agreement, the latter representing a novelty of the CAA. According to Kresal Šoltes, the institution of extended validity would have even been redundant prior to the 2006 legislative change, since its role was then already taken by the *ex lege* general validity of collective agreements for all employees and by the *de facto* general validity for all employers due to their mandatory membership in employers' organizations. Even so, the institute of extended validity, also known in the majority of EU MS, did form part of pre-wartime Yugoslav legislation.[104]

101 Vodovnik, Korpič-Horvat and Tičar, 2018, p. 294.
102 Ibid.
103 Ibid., p. 298.
104 Kresal Šoltes, 2011, p. 99.

According to art. 11(1) of the CAA, a collective agreement that is concluded by one or more representative trade unions, applies to all employees employed with employers, who are bound with that collective agreement, i.e., employers, who are members of the employers' organization that has concluded the agreement, regardless of trade union membership. Art. 11(1) regulates the so-called general validity on side of the employees, not employers, since the latter still must be members of the contracting organization. If, according to art. 11(2), an employer is bound by several collective agreements of the same type and concluded at the same level, provisions that are more favorable for the employees apply.

If, according to art. 12(1), an industry or multi-industry collective agreement is concluded by one or several representative trade unions and one or several representative employers' organizations, a party to the agreement may propose to the minister of labor to extend the validity of the collective agreement or its part to all employers in a given industry or industries. According to art. 12(2) the minister recognizes the extended validity if the employers concerned, employ more than half of the employees employed with employers, to whom the collective agreement is said to extend. In such cases, the collective agreement applies not only to the employers but also their employees, with no need of trade union membership on their side.

Next to the important introduction of extended validity, the 2006 CAA abolished the statutory obligation of arbitration in cases of collective labor disputes. The act now recognizes voluntary arbitration and several other voluntary means of dispute resolution.[105]

Kresal Šoltes notes that so far, all state- and industry-level collective agreements enjoyed general (not extended) validity in line with art. 11(1), since they were concluded by representative trade unions. According to the author, this also applies to the level of the company.[106] However, from 2006 onwards, Slovenia is showcasing one of the most negative trends of collective agreement coverage in the EU.[107] Even if 80% of employees are said to enjoy collective agreement protection due to general and extended validity, trade union membership is also dropping rapidly.[108] According to the collective agreements records, 47 state-level collective agreements were applicable in Slovenia on 26 January 2021. Additionally, during the past few months Slovenian trade unions were protesting a common lack of social dialogue,[109] also within the three-tier Economic and Social Council of the Republic of Slovenia, in which social partners and the government discuss social and economic policies, goals and measures. Coupled with the rather common practice of concluding successive

105 Ibid., p. 100.
106 Kresal Šoltes, 2011, p. 99.
107 Kresal Šoltes, 2018, p. 218.
108 See https://rgzc.gzs.si/Portals/rgzc-gzs/Analiza%20socialni%20dialog.pdf (Accessed: 12 July 2021).
109 See for example https://www.epsu.org/article/slovenia-unions-protesting-lack-social-dialogue-and-disregard-trade-unions (Accessed: 12 July 2021) or https://www.efbww.eu/news/weakened-social-dialogue-in-slovenia/1730-a (Accessed: 12 July 2021).

fixed-term employment contracts, the practice of performing work on the grounds of civil law contracts or by relying heavily on student workers or false self-employed persons, a further breakdown of bonds between employees' (at least in the private sector), needed for a long-term effective social dialogue and industrial action, might become the bleak future of Slovenian collective labor law or industrial relationships. In 2018, Vodovnik et al. noted that no independent trade unions of atypical workers existed. However, the Precarious Workers Trade Union, established in 2016 as an internal organizational unit of the Association of Free Trade Unions of Slovenia, is one of the most trade unions dedicated to reducing the number of precarious forms of work, the active inclusion of precarious workers, the improvement of their social status and legal certainty, etc.[110]

Even if CAA is considered the key piece of statutory legislation when it comes to collective agreement regulation, one should always keep in mind the provisions of the ERA: the two acts, combined, set out the central parameters of the collective agreement system in Slovenia. It is the ERA, not the CAA, that determines the relationship between minimum standards of labor law protection and collective agreements and employer's general acts and, finally, the relationship between collective agreements and individual employment contracts.[111] Additionally, constitutional provisions and international law obligations must be considered. Collective agreements or other autonomous legal acts cannot depart from what Kresal Šoltes considers the Slovenian *social public order* or set of central binding provisions of labor law.[112] The notion, further developed by judge-made law, comprises basic rights and basic constitutional and other principles of labor law regulation like equal treatment, freedom of work, dignity and health and safety at work, the aforementioned *in favorem* principle, different means of employees' participation, as well as due process of law concerning labor disputes.[113] However, to get a full picture of the collective bargaining system or even the system of industrial relationships as such, additional statutory legislation like the abovementioned Trade Unions' Representativeness Act, Strike Act, or the WPMA must be taken into account.

4.3. Representative Trade Unions

Due to spatial constrains, the chapter only briefly addresses conditions[114] under which a trade union may gain the status of a representative trade union. It is representative trade unions that, among others, have the competence to conclude collective agreements of a general validity. To obtain the status, a trade union must fulfill both qualitative and quantitative conditions. According to art. 6 of the Trade Union Representativeness Act,[115] trade unions ought to be democratic and should exercise

110 Vodovnik, Korpič-Horvat and Tičar, 2018, p. 269.
111 See Kresal Šoltes, 2011, p. 97.
112 Ibid., p. 173.
113 Ibid., pp. 171–173.
114 For a comprehensive overview see Vodovnik, Korpič-Horvat and Tičar, 2018, pp. 269 et seq.
115 Official Gazette of the RS, No. 13/93.

the freedom to join trade unions, the freedom of their activities, and the freedom to exercise members' rights and obligations. They also must be independent from public authorities and employers, financed mainly from membership fees and other independent sources, and must be established for at least six continuous months. Art. 8 stipulates particular conditions concerning membership quotas for trade unions' associations or confederations at the level of the state, while art. 9 stipulates conditions concerning trade unions, established different levels, e.g., at the level of the industry level, the occupational level, or the local community level. They either gain the status of a representative trade union via their membership within a state-representative trade unions' association or confederation, or if including at least 15% of employees of a particular level of its establishment. The inclusion of the state or local municipalities' level should not come as a surprise since trade unions' structure follows the common European practice of vertical lines of organization, comprising different types of associated trade unions that are active at different levels, and the horizontal lines, aggregating trade unions or their units within a specific territory or geographical area.[116]

4.4. Employees' Participation

Vodovnik et al. describe employees' or workers' participation as a phenomenon that occurs in different types of work units and encompasses both employees' financial participation and their participation within different decision-making processes. Both types of participation have its basis in the social state principle (art. 2 of the Slovenian Constitution);[117] however, they could also be derived from the basic principle of a democratic society. According to the authors, social dialogue is the essential element of what can be considered as *industrial democracy*.[118] Since art. 75 of the Slovenian Constitution refers directly to employees' participation in the management of commercial organizations and institutions, Vodovnik et al. also refer to the rather particular principle of *universality*, according to which the general legislature should pass legislation that provides all employees with the right to influence employer's decision-making processes.[119] Their right should be independent of the fact whether they are employed with public- or private-sector employees and independent of the type of organization of a particular undertaking. However, as observed by Franca and Strojin Štampar, major differences appear for example in cases when a joint stock company is transformed into a limited liability company, since the Companies Act[120] provides no obligations for the establishment of a supervisory board or a multi-member management board.[121] From this perspective, special legislation, e.g., in the

116 Vodovnik, Korpič-Horvat and Tičar, 2018, p. 270.
117 Ibid., p. 305.
118 Ibid., p. 306.
119 Ibid., p. 309.
120 Official Gazette of the RS, No. 65/09 to 18/21.
121 Franca and Strojin Štampar, 2019, p. 518.

field of corporate law, must be considered alongside collective labor law regulation, at least in cases of employees' participation in management.

The WPMA provides in art. 2 for the right to pass initiatives and opinions and to obtain the employer's reply, the right to information, the possibility or obligation of common consultations, the right to joint decision-making, and the right to withhold an employer's decision. Participatory rights can be exercised individually or collectively, via works councils, assemblies, employees' trustees, and employees' representatives in management. The WPMA, as pointed out by Vodovnik et al., represents the basic act concerning employees' participation in a variety of decision-making processes, while defining the scope of participation by means of defining the demarcation line between trade unions' activities and the activities of employees' elected representatives.

5. Conclusion

The aim of the chapter was to provide the reader with a brief overview of the Slovenian system of individual and collective labor law, together with its main characteristics. Among the most important ones of course lies the rather detailed definition of an employment relationship provided in art. 4 of the ERA, together with the presumption of its existence in cases where its defining elements or indicators emerge. With its shift to contract-based employment relationships with the passing of ERA, Slovenian labor law is now also characterized by a vivid mix of public and private law influences. On the one hand, employment contracts and other autonomous legal acts, either passed by the employer or concluded within social dialogue processes, must respect minimum labor law standards as determined by international law, the Constitution, and basic statutory legislation, like the ERA. From this point of view, labor law seems strongly embedded within the wider field of social law. Specific rights and obligations are also governed in other pieces of statutory legislation, e.g., in hitherto unmentioned Vocational Rehabilitation and Employment of Persons with Disabilities Act[122] or the Employment, Self-Employment, and Work of Foreigners Act.[123] To get a full picture of the (binding part) of the legal subsystem, one must consider at least 10 acts next to the ERA, the majority of which have been mentioned. Additionally, due to the epidemic, countless (and countlessly amended) umbrella pieces of emergency legislation passed mostly during 2020 and 2021 must be considered to get a full overview of social law provisions currently in force.[124] On the other hand, parties to the employment contract possess a rather high level of private autonomy, once minimum standards or more favorable rights for the employees—for example, those stipulated in collective agreements—are met.

122 Official Gazette of the RS, No. 16/07 to 18/21.
123 Official Gazette of the RS, No. 91/21.
124 For a variety of measures, aimed at preventing closure of businesses, unemployment, social exclusion, etc., during the COVID-19 epidemic in Slovenia see, for example, Strban and Mišič, 2022.

Even so, the Slovenian labor market, marked by high numbers of outgoing posted and frontier workers, is not immune to challenges of enhanced precarization and flexibilization of labor in all shapes and sizes, from the on-call student work, commonly turning into full-time disguised employment, to false self-employed persons or contract workers performing work for a *de facto* employer, with all defining elements of the employment relationship present. In general, the labor market also seems marked by low levels of elderly peoples' participation or economic activity, and early retirement, possible under conditions of pensions' negative indexation after 60 years of age and 40 years of the pension period.[125] In 2014, Slovenia still remained below average in the category of employing workers, older than 55, with low levels of in-work training, education and skill development.[126] At the same time, younger employees commonly find themselves within unsteady, fixed-term employment relationships.

Regarding EU law, Slovenia seems to have been a model Member State so far, transposing all the necessary directives into the domestic legal order—for example, by amending the ERA or by passing the new Health and Safety at Work or the Protection against Discrimination Act. Necessary pieces of legislation were also passed in the field of workers' participation concerning, for example, cross-border mergers and European cooperative societies and limited-liability companies. However, a great legislative delay in the transposition of Directive (EU) 2018/957 of the European Parliament and of the Council of 28 June 2018 amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services,[127] and the bypassing of EU rules on the coordination of unemployment benefits in favor of frontier workers residing in Slovenia[128] might indicate a recent change of heart of the Slovenian legislature. This also applies to the abovementioned breaches of the ILO Convention No. 158 and the ESL concerning age discrimination regarding dismissals, which came with a rather great ease.[129] Once the amendment to the Transnational Provision of Services Act[130] enters into force as to transpose the Directive (EU) 2018/957, the next big conformity test might come in the form of a timely transposition of the Work–Life Balance Directive in 2022.

125 See art. 29 of the Pension and Disability Insurance Act, Official Gazette of the RS, No. 96/12 to 51/21. If 60 years of age are accompanied by 40 years of pension period, comprised only of periods of active insurance, then old-age retirement (with no negative indexation) is possible. General old-age retirement conditions are the following: 65 years of age, min. 15 years of insurance, or 40 years of insurance for a full old-age pension. Later retirement is awarded by positive indexation of pension rights and their general yearly increase. Occupational insurance is mandatorily available to persons, performing hazardous jobs or work that cannot be carried out professionally after reaching a certain age.

126 See Jelenc Krašovec, pp. 56 et seq.

127 OJ L 173/16 from July 9 2018.

128 See https://europeanlawblog.eu/2021/04/07/unemployment-benefits-in-the-eu-is-slovenia-fighting-the-good-fight-or-just-trying-to-get-away-with-a-free-lunch/ (Accessed: 14 July 2021).

129 See, for example, Mišič, 2021, pp. 79 et seq.

130 Official Gazette of the RS, No. 10/17. The amendment entered into force in July of 2021, after this chapter had been initially submitted for publication. See Official Gazette of the RS, No. 119/21 from 20 July 2021.

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| Chapter 5 |

Serbia: Regulation of Employment Contracts and Collective Bargaining – Labor and Contract Law Aspects

Senad JAŠAREVIĆ, Attila DUDÁS

ABSTRACT

The authors give an overview of the current Serbian labor law—the theoretical and practical approach to employment contracts and collective bargaining. First, the chapter presents basic and supplementary sources of Serbian labor law. Secondly, an overview of the different theoretical approaches to the notion of employment contract in the literature is given. The effective labor law regulation is accentuated, with special regard to the rules of general law of obligations, which is being applied in subsidiary manner. This is followed by an overview of the regulation on collective agreements. A special part of the paper is dedicated to the issue of reforms of labor law in Serbia. In this context, regulatory issues related to employment contracts and collective bargaining are highlighted.

KEYWORDS

labor law, employment relationship, employment contracts, collective bargaining

1. The Position of Labor Law in the Serbian Legal System

Serbian labor law has undergone profound changes in the last three decades, under the influence of abandoning socialism, transition to a market economy, the process of joining the European Union, globalization, and changed circumstances in the world in the field of labor (flexibility, deregulation, digitalization). These changes are hallmarked by three trends: 1) further harmonization with international legal standards; 2) the 'marketization' of labor law; and 3) the liberalization and flexibilization of labor legislation.

Labor law represents a key branch of law in Serbia. However, it seems it does not always receive the necessary attention from the state. Legislative solutions are often belated in the light of the needs of practice. In addition, the state does not take sufficient care of the effective application of labor law, which is why regulations are often circumvented in practice. The Labor Inspectorate does not show sufficient

Jašarević, S., Dudás, A. (2022) 'Serbia: Regulation of Employment Contracts and Collective Bargaining – Labor and Contract Law Aspects' in Jakab, N. (ed.) *Fundamentals of Labor Law in Central Europe.* Miskolc–Budapest: Central European Academic Publishing. pp. 109–133. https://doi.org/10.54171/2022.nj.fullce_6

initiative in the supervision of the application of labor law, especially in the case of work without an employment contract and in terms of protection of health and safety at work.[1]

In addition, judicial protection in labor disputes is too slow, so employees are reluctant to sue the employers in cases of violations of labor rights.[2] Due to the long duration of labor disputes and flawed execution of court decisions, Serbia has been held liable in several cases before the European Court of Human Rights in Strasbourg (due to the violation of the right to a fair trial).[3] This motivated the legislature to adopt the Law on Protection of the Right to Trial within a Reasonable Time in 2015. However, the situation has not yet improved significantly.

The sources of labor law in Serbia are manifold. Labor law is regulated by several types of legal sources. These are: 1) the so-called basic legal sources, 2) special statutes, 3) specific statutes, and 4) auxiliary acts. In particular, labor legislation consists of the Constitution, statutes, governmental and ministerial decrees, collective agreements, regulations on the work of employers and other acts of autonomous law and acts of the employer (statutes, labor rulebook, the systematization of job positions, acts on risk assessment, etc.).

The basic legal source is the Constitution of the Republic of Serbia. It specifies, among others, the basic socioeconomic rights, sources of labor law (statutes, collective agreements, general acts) and entities who create them.[4]

The most important so-called *systemic source* of labor law is the Labor Code (LC), adopted in 2005 (revised in 2014). The LC is the 'umbrella law' for all areas related to work, so it applies to all activities and all types of employees (in the private sector, in government agencies, and in the public sector).[5] It regulates the most important questions of individual and collective labor law. *Separate statutes* regulating specific and significant issues related to labor relationships, such as safety and health at work, the means of socioeconomic dialogue, the peaceful settlement of labor disputes, the prevention of harassment during work strikes, etc. In addition, there are so-called *special statutes* regulating the labor law status of specific categories of employees: civil servants, persons employed by the police and the army, employed in public services, etc. Finally, as source of labor law may also be considered statutes regulating various fields, but containing rules applicable to matters of labor law (so-called *mixed sources*

1 For example, regarding mortality of construction workers, Serbia is at the top in Europe. Every year on construction sites in Serbia, according to the data of the Trade Union of Construction Workers, between 25 and 30 workers die, and about 10 more die from injuries sustained at work. See *Svake godine u Srbiji na radu pogine oko 40 građevinaca,* BIZLife, 25 August 2011, https://www.bizlife.rs/21923-svake-godine-u-srbiji-na-radu-pogine-oko-40-gradevinaca/.

2 See Bećirović-Alić, 2018, pp. 175, 177, 185.

3 See for instance: *Stevanović v. Serbia*, Application No. 26642/05; *Stanković v. Serbia*, Application No. 29907/05.

4 Constitution, arts. 55, 60, 61 and 97.

5 LC, art. 2.

of law).[6] The most notable ones are the statutes pertaining to the law of obligations, bankruptcy law, personal data protection, etc.

Although not formally a source of law, case law plays a significant role in the system of sources of labor law. It supports the application of labor legislation, especially when it comes to legal gaps, vague or unconstitutional provisions of the law, and other acts. In this regard, decisions of the Supreme Court of Cassation of Serbia and the Constitutional Court of Serbia are particularly important. All courts of lower instance deciding in labor disputes (basic and higher courts) are obliged to abide to the decisions and principles laid down by the Supreme Court of Cassation, as required by the Law on the Regulation of Courts. Also, according Constitution the decisions of the Constitutional Court are final, executive, and generally binding.[7] This applies to decisions on the constitutionality and legality of regulations, collective agreements and acts of employers,' as well as to decisions on a constitutional appeal, which can also be filed when rights relating to employment relationships are infringed.[8]

2. Employment Contracts in Serbian Law

Labor law contracts (individual and collective) have undergone significant changes in Serbia, as in other countries. In addition, they have been changed under the influence of the development of labor law in the world, and under the influence of time and circumstances in which they have been applied.

Prior to the First World War, when a capitalistic environment has begun developing in Serbia, employment contracts were only beginning to emerge. Their legal regulation and scholarly analysis were in their infancy.

Between the two world wars, as in other European countries, Serbia's economy became increasingly based on capitalistic economic logic. Employment contracts and collective agreements began to be concluded intensively. During that time, a quite advanced Law on the Protection of Workers (1922), the Law on Shops (1931), and the Governmental Decree on Determining Minimum Wages, Concluding Collective Agreements, Reconciliation and Arbitration (1936) were passed. At that time, these acts regulated labor relationships, employment contracts, and collective agreements in a modern way.

In the 'socialist period,' employment contracts and collective agreements were of marginal relevance. They applied only in the narrow private sector.[9] Instead of employment contracts and collective agreements in the socialist enterprises, some

6 An indicative list of separate and special statutes, and mixed sources of labor law is given in Part II.

7 Constitution, art. 166 s. 2.

8 Constitution, art. 170.

9 An employer could not have more than five employees, thus collective agreements were in fact inapplicable, and employment contracts were rare.

other legal instruments were used (agreement on employment,[10] agreements on mutual employment— instead of employment contracts; self-governing agreements and social agreements— instead of collective agreements). They reappear in the legal practice after the abolition of socialism, which happened in the field of labor relationships with the adoption of the Law on Fundamental Rights from Employment (1989), adopted in the legislative competencies of the former Yugoslavia (of which Serbia was a part until its disintegration).[11]

It seems remarkable that some scholars of labor law in the 'socialist period,' although in practice they were almost nonexistent, under the influence of the Western theory of labor law, paid serious attention to the notion of employment contract. Today's theoretical assumptions are mainly based on the works from that period. Prof. Nikola Tintić should be singled out as having made the greatest contribution to the theory of labor law in the former Yugoslavia.

It should also be noted that in the former Yugoslav and modern Serbian theory, treatises on employment contracts and the legal nature of the employment relationship are constantly intertwined and overlap. In addition, when scholars write about the labor contract, they quite often actually mean employment relationship, and vice versa.[12]

2.1. Employment Contracts in Yugoslav/Serbian Doctrine

According to Tintić, the employment contract

> is traditionally a central category of labor law. [It is] the basis for establishing a labor relationship; form of regulating labor relationship; a basic means of scheduling the workforce; a means of regulating the intensity of work and harmonizing the interests of each worker with social interests as well as collective interests.[13]

Its *essential features* are voluntariness and consensuality. When it comes to its *content*, it expresses elements of onerosity, bilaterality and exchange.[14]

According to Tintić, the *constitutive elements* of an employment contract are: subjects (capable of establishing an employment relationship), consent of will

10 The agreement on employment was used from 1957 until the 1970s. See Baltić and Despotović, 1981, p. 168.

11 By the adoption of this law the Law on Associated Labor was repealed, according to which the employment relationship was a mutual relationship between workers, and not a relationship between the employer and employee, which excluded the use of employment contract (except for rare private employers). Instead of collective agreements, so-called self-governing agreements and social agreements were used.

12 See for more details Jovanović, 2018, p. 173; Šunderić, 1997, p. 946; Lubarda, 2012, p. 335; Baltić and Despotović, 1981, p. 190; Mirjanić, 2020, p. 117.

13 See Tintić, 1972, p. 165.

14 Ibid.

(agreement), subject matter, *cause,* and the prescribed form.[15] He divides them into employment contracts for indefinite and definite period. Their effect can be direct and indirect.[16] The condition for the *validity* of the contract is its perfection.[17] As with any contract, sometimes its interpretation is needed. *Revision* of the employment contract is also possible.

Speaking of the basic *legal features* of the employment contract, Tintić states that it is a contract creating obligations, consensual, commutative, synallagmatic and bilateral contract. By the way, as a variant of the employment contract in that (socialist) period, the same author mentions *contract of service* applicable to intellectual workers. In fact, the contract of service was used as a synonym for the employment contract before the Second World War.

According to Tintić, the key elements of an employment contract are the subject matter and the cause (causa).[18] The *subject matter* must be possible, permissible, determined or at least determinable. Similarly, the *cause* must also be sufficiently defined and (legally and morally) permissible.[19] The cause of the employment contract represents its economic and social function,[20] which is recognized by the legal order.

One of the most prominent Serbian scholars of labor law today, Lubarda,[21] points out that the *subject matter* of the employment contract must be a work conducted for the benefit of another person that is not prohibited. He asserts that the general rules of the law of obligations must be applied, in the sense that the subject matter of the contract must be *determined* or *determinable*, consisting of: 1) defined work, 2) remuneration, and 3) subordination.[22] If after the conclusion of the employment contract is established that there is a disagreement on some irrelevant element, the employment contract remains in force. The general rule of contract law shall be applied subsidiarily in this case, according to which this point will be determined by the court, if it may be inferred that the parties would have concluded a contract even without reaching an agreement on that specific point.[23]

According to the same author, a *de facto employment relationship* will occur if either of the two conditions for the existence of an employment relationship is not met when concluding the employment contract: 1) that the contract has a valid legal basis 2) the

15 Ibid.
16 Tintić, 1972, p. 166.
17 Ibid.
18 See Tintić, 1972, p. 175.
19 Tintić highlights that the cause of contract should be differentiated from parties' motives. See Tintić, 1972, p. 178.
20 According to Perić, it is the purpose for which the employment contract is concluded (Perić, 1950, p. 330). As for the differences between the cause of contract and motives in Serbian law see Dudaš, 2010, pp. 146–150; Dudaš, 2011, pp. 668–678.
21 Besides Lubarda, great contributions to the Serbian contemporary doctrine of labor law were made by other eminent scholars, such as Šunderić, Jovanović, Baltić, Despotović, Mirjanić, Pešić, Brajić, Jašarević, et al.
22 Lubarda, 2012, p. 328.
23 See Lubarda, 2012, p. 328.

employee began to conduct work. He notes that illegal work cannot qualify as a de facto employment relationship, as far as the cause (admissibility) of the employment contract is concerned, such as work of children under 15, which is prohibited by the LC.[24] De facto employment relationship will also exist if the legal basis for the employment contract has ceased to exist (e.g., if the employee loses his ability to work).[25] He states that in the case of de facto employment relationship, the person who worked in fact still has some rights. Therefore, in that case, the annulment has *ex nunc*, and not *ex tunc* effect, which is the rule in the general law of obligations. This means that the employer must fulfill the accrued obligations (pay the salary) and indemnify the employee in the event of an accident at work.[26]

Lubarda differentiates several *subtypes* of employment contract: fixed-term employment contracts, employment contracts of private and public law, and contracts on professional training.[27] He also identifies an interesting novelty: the appearance of the so-called *trilateral employment contracts* (which are, instead of two, as usual, concluded by three contracting parties). Such contracts appear in recent times in the case of 'assignment of employees,' or so-called agency work (assignment of employees through temporary employment agencies).[28]

In addition, Lubarda elaborates in detail the differences between employment and similar contracts (special service contracts, mandate contracts, employment contracts of adhesion, contracts for representation and agency, contracts for supplementary work, contracts for vocational training and internship, etc.).[29] As noted above, there is an element of conducting work in these contracts as well, but they do not establish an employment relationship. In essence, the distinction between these and the employment contract concerns the nonexistence of important elements of the employment relationship. In short, in most of these at least one of the basic features of the employment relationship is missing: 1) subordination (dependence), 2) onerosity (receiving a salary), 3) personal labor law relationship (conducting work personally within the organization), and 4) voluntariness, as well as durability and some other features of the employment relationship mentioned by some authors.[30] The purpose

24 The statutory condition of establishing an employment contract is that the employee is older than 15 years. (LC, art. 24 s. 1). See Lubarda, 2012, p. 331.

25 LC, art. 176.

26 See Lubarda, 2012, p. 333.

27 Lubarda, 2012, p. 339.

28 Lubarda, 2012, p. 348.

29 Lubarda, 2012, p. 357.

30 The list of essential elements of the employment relationship differs among scholars. In addition, there are important elements (without which the employment relationship cannot exist) and indicators (factors that can be indicators that there is an employment relationship). In this context, a notable source is the ILO's Recommendation on Employment, no. 198. As indicators of employment, the ILO recommendation specifies, for example: integration into work organization, supply of tools and materials, work at scheduled hours and at agreed times, economic dependence, organizational subordination, control of work, performing of work personally, etc. For Serbian theory see Baltić and Despotović, 1971, p. 30; Pešić and Brajić, 1979, p. 96; Jašarević, 2013, pp. 173–192.

of each of these contracts, the manner of work, payment of remuneration, management of the work, work organization, and even the legal basis, differ in relation to the employment contract. For example, in the case of special service contract, the subject matter is to deliver a thing or perform a certain work, but not to conduct permanent work by the employer's orders.[31] A contract on mandate is aimed at performing a certain task, without permanent engagement, inclusion of the mandatee in the work organization, etc.

For a long time in Serbia, one of the major topics regarding the issue of subsidiary application of the law of obligations was the amendment of the employment contract (explicitly or implicitly), and its unilateral termination. Lacking explicit regulation in the statute pertaining to labor law, it was a subject matter of profound theoretical debates for a considerable time. At present, it is explicitly regulated by the LC.[32] However, the court may still take into account the rules of contract law on the prohibition of exercising rights contrary to the purpose for which it was established or recognized by law, to interpret the behavior of the parties to the employment contract.[33]

In case law, the number of cases rises when it is necessary to determine whether there is an employment or another contract, which is in line with the growing practice of simulating some contractual obligations (usually contract for work) with content that unequivocally implies an employment contract. In assessing whether it is an employment contract or another contract of the law of obligations, the courts are generally guided by the doctrine of *primacy of facts*, irrespective of the 'labelling' the parties gave to the contract. In other words, it has been noticed lately that simulated contracts are being concluded for occasional and temporary work, fixed-term contracts, contracts for the recruitment of workers through work agencies, and other contracts of general law of obligations. In the assessment whether an employment relationship exists, the courts are mainly guided by the 'true nature' of the contract, i.e., they consider the essential components of the work performed by the employer (type of the work, its duration, the contractor's relation to the employer). This is the main reason a civil law contract or 'sham flexible work contract' between the employer and the contractor is forbidden, when the services or work to be performed coincide

31 A distinction between the employment contract and the special service contract can be found for example in the work of Baltić and Despotović. They mention, among others, legal and economic subordination as differences—which does not exist in a special service contract. Also, they notice that the risk in the case of an employment contract is borne by the employer, while in the case of a special service contract by the contractor. They also mention that in the case of a special service contract, the subject matter is the realization of concrete work, and not a permanent activity, as in the case of an employment contract. See Baltić and Despotović, 1971, p. 171. See also Tintić, 1972, p. 661; Lubarda, 2012, p. 338. Baltić and Despotović also write on the differences between the employment contract on the one hand, and hiring contracts, mandate contracts, and contracts on partnership on the other. See Baltić and Despotović, 1971, pp. 173–175.

32 LC, arts. 171 and 172.

33 See Milković, 2016, p. 694.

in essence with the characteristics of an employment relationship, or fall within the employer's regular scope of business.[34]

Regarding the application of the general rules of the law of obligations to issues of labor law, it should be mentioned that during the existence of an employment contract, other contractual relationships may emerge between the same parties that *do not arise from the content of the employment contract*. For instance, the employer may lend a certain amount of money to the employee, when a loan contract is concluded according to the general rules of the law of obligations. Another frequent example is a contract on education or specialization of the employee.[35] Quite similar are the disputes regarding the so-called *managerial contracts*. Namely, the managing director or a member of the management can conclude either a classic employment contract with the company (and establish an employment relationship) or another contract according to the general rules of contract law (called a managerial contract).[36]

2.2. The Regulation of the Employment Contract in the Effective Serbian Law

A brief overview of the effective Serbian rules on the employment contract is required to have a clearer picture of its legal nature. It is quite unusual that the legislature did not regulate the notion of the employment contract (neither the notion of the collective agreement). There is no definition in the LC, nor in the LO. The LC only indirectly defines an employment contract as a contract by which an employment relationship is established.[37] This provision of the LC applies only to private sector, public companies, and services. As we said, civil servants are, however, appointed and enter into employment relationship by an act called a 'decision.'

Many issues in relation to employment contract are regulated by the LC, such as the obligation to conclude an employment contract, the form of the employment contract, the different forms of employment (for a definite and indefinite period, for work outside the employer's premises, or for work at home), the time of conclusion of the contract, the content and its place in the legal system, appendices to the contract, termination, etc.[38] To other issues in relation to the employment contract, not regulated by the LC, the rules of the LO are applicable.

The LC specifies several formal requirements of the formation of an employment contract. It must be concluded in writing before the employee begins work, it must be signed and made in triplicate.[39] Also, the LC specifies the obligatory content of an employment contract.[40] It does not require additional verification by the notary public or any other public body. The employer is, however, bound to keep the employment

34 See the Decision of the District Court in Valjevo, Gž. I. br. 266/05 of 26. 05. 2005.
35 See Milković, 2016, p. 689.
36 LC, art. 48.
37 LC, art. 30 s. 1.
38 LC, Arts. 37, 42 and 43.
39 Pursuant to LC, art. 30, s. 2-4 and art. 32 s. 2.
40 LC, art. 33.

contract or any other contract falling in the scope of application of the LC, or its copy in the head office or other premises or the place of the work of the employee or any other person engaged to work for him or her.[41]

The LC specifies that apart from the employment contract, the following types of contracts may be concluded as well: temporary or occasional work contracts, special service contracts, contracts on apprenticeship or professional development, or additional work contracts.[42]

An employment contract cannot be concluded validly by a simple verbal agreement. However, if upon a verbal agreement concluded with the employer, the employee starts to work for him, it will be deemed that he is employed.[43] In this case, entering into an employment contract is considered to be 'consequential,' i.e., as conduct implying an intention to form a contract. The Supreme Court of Cassation holds that in such case, even though a contract has not been entered into, there is a legal presumption that the employee has entered into employment relationship for indefinite term.[44]

Nonetheless, LC specifies fines for the employer failing to conclude a contract with the employee (ranging from RSD 800,000–2,000,000, i.e., roughly EUR 6,500–16,500).[45]

The very conclusion of the contract is still not sufficient for entering into an employment relationship. The employee should commence with the work as well.[46] Should the employee fail to assume work, the employment relation shall be deemed not entered into, despite the fact that the employment contract has been signed.[47]

Also, a possibility to 'transfer an employment relationship,' i.e., an employment contract, is regulated. It occurs when an employee is being sent to another employer or if a business or part of it is being transferred to another owner. According to the LC, if there is a change of status, i.e., change of the employer, pursuant to the law, the succeeding employer shall take over the 'general act' (collective agreement or labor rulebook) and employment contracts concluded with the preceding employer in force on the day when the transfer occurred. The preceding employer shall notify in writing the employees affected by the transfer of the employment contracts to the succeeding employer. Should any employee refuse the transfer of the employment contract or fail to agree to it within five days after the notification of the transfer, the preceding employer may terminate the employment contract.[48]

41 LC, art. 35.
42 These contracts are regulated by LC, Arts. 197-202.
43 LC, art. 32 s. 2.
44 See the Decision of the Supreme Cassation Court, Rev. 2761/2012, of 23. 01. 2013, Belgrade and the Decision of the Supreme Cassation Court, Rev2 602/2014 of 23. 10. 2014.
45 For small employers (entrepreneurs) fines are somewhat less—RSD 300,000–500,000 (c. EUR 2,500–4,170). Anticipated fines for a responsible person with the employer are ranging from RSD 50,000–150,000 (c. EUR 420–1,250).
46 LC, art. 34.
47 LC, art. 34 s. 2.
48 LC, Arts. 147 and 149.

Certain provisions of the employment contract stipulating less favorable working conditions than the ones stipulated in the law and general act of the employer, [49] i.e., those that are based on incorrect information provided by the employer on certain rights, duties, and responsibilities of employees shall be invalid.[50] Invalidity of certain provisions of an employment contract is established by the regular civil courts. There are no statutes of limitations for the right to establish such invalidity.[51]

There is no specific regulation relating to the consequences of the invalidity of an employment contract. However, the LC implies that the parties must adjust their mutual relationship according to the law (and the employment contract) from the starting date of the employment relationship. A salary and other benefits received by the employee shall not be returned and such employee will be entitled to receive any unduly withheld payment. On the other hand, if the employee has received more than he was entitled to (i.e., contrary to mandatory rules), he must return the surplus. If a person was not eligible to enter into an employment contract (e.g., if the person is underaged and thus fails to meet the minimum age requirement),[52] the contract is considered null.

2.3. Special Labor Law Provisions Instituted because of the COVID-19 Pandemic

The COVID-19 pandemic imposed certain changes in the legal regulation of employment relationships. The need to adapt the legal environment to the new circumstances emerged at least in relation to two sets of questions: performing work under the state of epidemic declared by the government, and performing work at home.

To provide legal frame of conducting work under the new circumstances, the Ministry of Labor in 2020 enacted a ministerial decree on the preventive measures for safe and healthy work for the prevention of emergence and spread of an epidemic of an infectious disease. It prescribes the duty of the employer, among others, to enact a plan of implementation of measures for to prevention of emergence and spread of an epidemic of infectious disease,[53] which is considered a part of the employer's act on risk assessment. Its purpose is to adapt the general working conditions and individual labor of employees to the new circumstance, hence it does not require the modification of the employment contract.

The second set of questions in times of COVID-19 pandemic relates to setting up of a legal framework for organizing the employee's work from home. In this case it is necessary to conclude an annex to the employment contract[54] in line with the guidelines for safe and healthy work from home, issued in 2021 by the Directorate of Safety

49 Pursuant to LC, art. 8, collective agreement and labor rulebook are considered to be general acts.
50 LC, art. 9 s. 2.
51 LC, art. 11.
52 According to LC, art. 24 it is 15 years of age.
53 Arts. 3 and 4 of the Decree. Art. 8 prescribes the obligations of employees in relation to labor during the epidemic declared by the state.
54 Guidelines, point 2.

and Health at Work, within the Ministry of Labor, Employment, Veterans, and Social Affairs. Among other things, a risk assessment must be performed that work can take place safely from home. In this regard, the guidelines suggest that attention should be paid to the work environment, equipment for work including adequate computer resources, fire risk, and mental health of employees (stress is specifically mentioned as a serious risk).[55] It is expected that the employers change the terms of the employment contracts in light of the guidelines. Studies have shown that many companies, especially from the IT sector, plan to continue to organize their working processes partially based on the work of employees from home even after the pandemic ends. It is estimated that by 2025, 70% of the workforce will work from home at least five days a month.[56]

3. Collective Agreements in Serbian Law

3.1. Collective Agreements in Yugoslav/Serbian Doctrine

The approach to collective agreement in the Serbian theory of labor law is similar to that of the individual employment contract. Relatively few scholars paid due attention to the legal nature and theoretical features of collective agreements.[57] The majority discussed mostly the interpretation of statutory provisions and legal problems arising in the practice of collective bargaining.

Collective agreements in the former Yugoslavia appeared and began to develop somewhat later than in other, Western European countries. Before the Second World War, in the part of the territory of today's Serbia that formerly belonged to the Austro-Hungarian Monarchy (province of Vojvodina), collective bargaining was introduced by an amendment to the Austrian Act on Commerce in 1907. Though in the Kingdom of Serbia before the First World War, there was some sporadic practice of collective bargaining,[58] it is not mentioned is the Law on Shops from 1910.[59] After the First World War, the importance of collective agreements grew. They became regulated by statute in the Kingdom of Serbs, Croats, and Slovenes by the Law on the Protection of Workers from 1922.[60] In practice, they were called 'tariff agreements,' as their main goal was to regulate 'workers' tariffs' (wages). However, the trade union movement was not strong enough, so the concept collective bargaining was not well developed. After the Second

55 Guidelines, point 5.

56 https://startit.rs/pravilnik-o-radu-od-kuce-prava-i-obaveze-poslodavaca-i-zaposlenih/ (Accessed: 25 March 2022).

57 In this context, the most notable works are Tintić, 1969, p. 263; Adžija, 1928, p. 391; Sladović, 1939; Krekić; Kun, 1940; Lubarda, 1990; Jovanović, 2009; Jovanović, 2007, p. 9; Jašarević, 1992; Jašarević, 2005, p. 153; and Jašarević, 2003, p. 339.

58 According the Report of the Main Federation of Unions in Serbia. Cited in Tintić, 1969, p. 23.

59 However, according to art. 98 of that law, the association of employees (establishment of a trade union) was allowed.

60 See arts. 5, 37 and 109 of the Law. See Jašarević, 1992, p. 150.

World War, collective agreements almost disappeared from the Yugoslav legal order. They have been reintroduced in 1989 after abandoning the socialist economy.

As with the individual employment contract, the greatest scientific contribution and basis for the scientific study of collective agreements was given by Tintić.[61] According to him, 'a collective agreement is one of the autonomous, but professional, non-state sources of (labor) law, because it is the result of an agreement concluded between professional organizations and employers.'[62] He specifies the following *basic features* of a collective agreement: (a) by its legal nature—it is a *normative agreement* (containing rules that are being applied as general rules of law); (b) a trade union organization acts on behalf of the workers as a contracting party, while another entity not organized as a trade union may act on behalf of the employees, if permitted by law and when there are no trade unions to represent the employees; (c) it must be concluded in writing (the form is an *essential element*)—hence it is a *formal contract*; (d) is always concluded for an indefinite period; (e) the clauses of the contract may not infringe the law unless they act *in mellieus* (for the benefit of the worker); (e) the collective agreement has the legal effect vis-a-vis individual employment contract as statute; (d) the collective agreement aside its essential part (normative) part, may also contain an accessory part (obligations of the contracting parties,[63] as well as special clauses such as 'union security clauses').[64]

Tintić asserts that the *process of conclusion* of a collective agreement always has certain necessary elements: a) subjective and b) objective, which are either formal or substantive (essential). *Subjective* elements include: subjects (contracting parties), initiative and legitimacy of representation to conclude an agreement, consensus of the parties, and signing of the agreement. *Objective* formal elements include the procedure of conclusion of the agreement, form of contract, approval, deposition of the agreement, its publication, entry into force and control of its application. The important objective essential elements are its content and cause. The content of a collective agreement can be essential (without which there can be no agreement at all) or accessory.[65] The *procedure of the conclusion* of the agreement is left to the parties themselves to regulate. Regarding consensus (which consists of freely expressed will, without coercion, threat, defects, mistakes, dolus), the general rules of civil law on the conclusion of contracts apply. The same applies to the *interpretation* of a collective agreement. The conditions for concluding a collective agreement are reduced to 1) the form, 2) the content, and 3) the cause.[66]

61 See Tintić, 1969, pp. 263–334.
62 Tintić, 1969, p. 263.
63 In that sense, according to the Serbian contemporary theory of labor law the subject matter of a collective agreement comprises issues that could be classified in two categories: 1) the normative part of the collective agreement and 2) the obligations of the parties according the general rules of the law of obligations. See Jovanović, 2018, p. 74; Lubarda, 2012, p. 887.
64 Tintić, 1969, p. 264. On the 'union security classes' see Tintić, 1969, p. 280; Obradović, 2003, p. 289; Lubarda, 2012, p. 888; Jašarević, 1992b, p. 184.
65 Tintić, 1969, p. 278.
66 Tintić, 1969, p. 279.

According to Tintić, the *temporal validity* of the collective agreement should be limited and determined by the agreement.[67] A collective agreement may be *terminated*: 1) by agreement of the parties, 2) by concluding a new collective agreement, or 3) by unilateral termination: a) due to non-performance, or b) subsequent objective or absolute impossibility of its performance.[68] The *territorial scope* of the application of a collective agreement depends on the area of 'professional representation' of the trade union. In this sense, the following types mare possible: a) inter-confederal (i.e., inter-categorial) collective agreements, b) territorial (regional, local), and c) collective agreements within companies.[69]

The *personal scope* of a collective agreement implies that it applies to all employees falling under the scope of the application of the agreement, unless that agreement itself provides otherwise. In this sense, there can be an *extension* of the collective agreement (*imposed collective agreement*). This happens by a decision of a state organ, which extends its effect in terms of professional and territorial scope to all workers in a certain activity or in a certain territory. This ensures that the collective agreement has a normative effect broader than it would normally have.[70]

Tintić's views on the *legal nature* of the collective agreement are indispensable. They are mostly accepted and incorporated into contemporary textbooks of labor law in Serbia. According to the legal features arising from their conclusion (agreements) and effects (normative acts), collective agreements are 'at the crossroads between private and public law,' which is why it is rightly said that they are 'legal chameleons in the world of legal beings.'[71] Collective agreements are 'atypical agreements,' as they do not only affect the persons who conclude them (unions and employers), but all employees, even those who are not union members. The legal nature of the 'extended collective agreement' is especially unclear, which, according to Tintić, is 'one of the most original features of the collective agreement.'[72]

In general, concepts explaining the legal nature of collective agreement may be divided into: 1) contractual, 2) status-related, or 3) mixed (dualistic). Tintić states therefore that a collective agreement is a 'normative contract,' and not one concluded under the general rules of the law of obligations.[73] In addition, it is not a preliminary

67 In Serbia, until the amendments to the Labor Code from 2014, there were collective agreements concluded for indefinite period, since according to the Labor Code from 2001 collective agreements could have been concluded for indefinite or definite period. According to the amendments to the Labor Law of 2014, the provisions of collective agreements (and labor regulations) that were not in conflict with that Code could remain in force for the longest time six months. Since then, all collective agreements are valid for a maximum of three years.

68 Tintić, 1969, p. 282.

69 In some countries, so-called 'plant/production unit' collective agreements are also concluded (authors' remark).

70 Tintić, 1969, p. 283.

71 Cited in Fahlbeck, 1987, p. 268; S. Jašarević, 1992a, p. 11.

72 Tintić, 1969, p. 318.

Tintić, 1969, p. 318. On the nature of collective agreements see Lubarda, 1990, pp. 142, 144.

73 Tintić, 1969, p. 288.

contract either (as a basis for concluding individual employment contracts subsequently). In this context, Tintić offers various 'contractual concepts' as a ground of determining the legal nature of collective.[74]

Simply put, Tintić's (and our) conclusion is that collective agreements have some of the features of all the mentioned contracts and concepts. However, there are more merits to consider them more like *sui generis* juridical acts, with a mixture of contractual and elements related to legal status (which is closer to the theory of duplicity).[75] Such specific acts do not exist in any other branch of law, and some features of collective agreements cannot be explained otherwise than within the confines of labor law. By being classified as a concept of labor law, collective agreements gain an environment corresponding to their importance and role in the practice of employment relationships, which enables their unhindered development. Civil law regulations on contracts provide often only a narrow a framework for collective agreements. This does not mean that the numerous rules of the general law of obligations cannot be applied here either, especially when it comes to the legal and contractual capacity of the contracting parties (and their representatives) to conclude the contract, the form, interpretation, termination, and nullity of the contract.

According to Lubarda, 'The right to collective bargaining is a special expression of the philosophy of dialogue in general, that is, the philosophy of social dialogue.'[76] For him, collective bargaining is a kind of negotiating mechanism or 'negotiating machinery,' as a subsystem within the national economic and social system, directly including negotiating parties and social partners—unions and employers' associations from the enterprise level, across the branch into the cross-border level at the national level (both centralized and decentralized).[77] It can be bipartite or tripartite (when, in addition to trade unions and employers, state representatives also participate). He also states that collective bargaining is a collective right (of representative unions).[78] Then he explains in more detail some other issues, which we have already talked about, such as: domain of application (*ratione personae* and *ratione materiae*), negotiation mechanism (based on the principle of freedom of collective bargaining, good faith, subsidiarity principle, etc.).[79]

3.2. The Regulation of Collective Agreement in the Effective Serbian Law

The effective legal regulation of collective agreements in Serbia corresponds to the aforementioned theoretical views. As in relation to the employment contract, the legislature, for some reason, did not consider necessary to incorporate a *definition* of a collective agreement into the LC, though its subject matter and form are regulated.

74 Tintić, 1969, pp. 294–314.
75 See Jašarević, 1992a, p. 12.
76 Lubarda, 2012, p. 874.
77 Lubarda, 2012, p. 877.
78 Lubarda, 2012, p. 880.
79 Lubarda, 2012, pp. 880–884.

A collective agreement must be concluded *in writing*.[80] In accordance with the law and other regulations, the collective agreement regulates the rights, obligations, and responsibilities arising from an employment relationship, the procedure of amendments to the collective agreement, mutual relationships of the participants in the collective agreement, and other issues of importance for the employee and the employer.[81] This determines the frame of the potential *content* of the collective agreement, though the details depend on the negotiating will and 'negotiating power' of the subjects of collective bargaining. The parties are, in essence, free to determine the subject matter and content of the collective agreement.

The LC specifies the following *types* of collective agreements: 1) general, 2) special, or 3) concluded with the employer. A general collective agreement is concluded for the entire territory of the country. A special collective agreement is concluded for a certain branch, group, subgroup or activity, and can be concluded for the territory of the whole of Serbia, as well as for the territory of a unit of territorial autonomy (province) or local self-government (municipality).[82] The *participants* in the negotiations and formation of a collective agreement are a representative association of employers and a representative trade union of employees (the principle of bipartism).[83] Regarding collective agreements concluded on the level of enterprises, the signatory of the contract can also be a single employer. When it comes to public companies and public services, the founder (state), i.e., the competent body appears on the side of the employer.[84] In the case of a public enterprise (company), as well as a private employer, the collective agreement is signed on behalf of the employer by a person authorized to represent the employer.[85]

The LC also governs the situation when *no association can be considered representative*. Then the unions or the employers' associations can conclude an *association agreement*, to satisfy the condition of representativeness.[86]

The LC specifies another category of juridical act, in addition to the collective agreement. It is simply named 'agreement' (on wages), concluded by the employees' council or the workers themselves with the employer. If the union is not organized at all by the employer, the salary, salary compensation, and other employee benefits

80 LC, art. 240 s. 2.
81 LC, art. 240 s. 1.
82 LC, arts. 241–250.
83 The condition of the representativeness of a trade union is that it acts on the principle of freedom of actions of the union, that it is independent, mostly self-financed, registered, and having an appropriate number of members (15% of the employees of the given employer, or 10% in the branch, group, or activity). Employers are required to bring together 10% of employers in the branch, industry, and other negotiating unit, provided that these employers employ at least 15% of the total number of employees in the sector to which the agreement relates to. LC, Arts. 218–220, 221 and 222.
84 LC, art. 246.
85 LC, arts. 246–247.
86 LC, art. 249.

may be regulated by an agreement.[87] The agreement is considered concluded when it is signed by a person authorized to represent the employer and a representative of the employees' council or an employee who has received an authorization of at least 50% of the total number of employees. In this situation, too, the legislature favors the collective agreement (as he did in relation to the labor rulebook)[88] by specifying that the agreement ceases to be valid the day the collective agreement enters into force.

The rule prescribing that representatives participating in the negotiations must have the *authorization of their bodies*[89] seems democratic. Its goal is to have the representatives respect the interest of their 'base' in the negotiations, so as not to negotiate in their own name and in their own interest (which occasionally happened in the practice, to obtain certain privileges for themselves).

As in many other countries, the participants in the process of formation of a collective agreement have a *duty to negotiate*, but have no obligation to reach an agreement. If no agreement could be reached, they can initiate arbitration within 45 days to resolve contentious issues.[90] The composition and procedure of the arbitral tribunal and the effect of the arbitral award shall be determined by agreement of the parties. The deadline for delivering an arbitral award is 15 days from the day of the formation of the arbitration.[91] The next possibility is a mediation before the Agency for Peaceful Settlement of Labor Disputes. Also, according to the Act on Peaceful Settlement of Disputes, conciliators can help the parties in collective bargaining.[92]

The *personal scope of the application* of collective agreements is regulated bilaterally: in relation to employees, and in relation to employers. The collective agreement is binding on all employees, including those who are not members of the union, which signed the collective agreement.[93] Defining the agreement's scope of application in relation to employers is somewhat more complicated. The general rule is that a collective agreement applies to all employers who are members of the association that signed the collective agreement, as well as to those who join it subsequently. The collective agreement obliges even those employers who withdrew from the association

87 LC, art. 250.

88 According to the LC art. 3, the employer can adopt a labor rulebook only if no collective agreement in the company is concluded (there are no unions, negotiations were not initiated or they failed). An employer who does not accept the initiative for negotiations for the conclusion of a collective agreement, has no right to adopt a rulebook. When the collective agreement is signed, the rulebook is deemed repealed.

89 LC, art. 253.

90 LC, art. 254.

91 LC, art. 255.

92 According to art. 16 s. 1 of the Act on Peaceful Settlement of Disputes, participants in the negotiations may submit a proposal to the Agency for Peaceful Settlement of Labor Disputes for the participation of conciliators in collective bargaining to provide assistance and prevent the occurrence of a dispute. The conciliator in the collective bargaining procedure: 1) attends the negotiations; 2) indicates to the participants proposals that are not in accordance with the law and other regulations; and 3) provides assistance to participants to prevent the occurrence of a dispute. The conciliator is obliged to be impartial during the negotiations (art. 17).

93 LC, art. 262.

for the next six months from the day of the withdrawal.[94] The collective agreement may be accessed subsequently by an employer who is not a member of the association that signed it.[95]

The government may *extend* the effect of a collective agreement by prescribing that the collective agreement *as a whole* or *its individual provisions* also applies to employers who are not members of the association that signed the agreement. The legislature prescribed this procedure in detail.[96] The government may extend the effect of a collective agreement, if there is a justified interest. The condition is that the collective agreement whose effect is extended obliges employers employing more than 50% of employees in a certain branch, group, subgroup, or activity.

The LC also regulates the *temporal validity* of a collective agreement. It can be concluded for a maximum of three years. After the expiry of that period, the agreement ceases, unless the participants agree otherwise, no later than 30 days before the expiration of its validity. Its validity may be terminated earlier by an agreement of the participants or by termination, in the manner determined by that agreement. In that case, the collective agreement shall apply for a maximum of six months from the date of submission of the notice. After the termination, the participants are obliged to commence negotiations within 15 days.[97]

Dispute resolution has also been regulated by the LC, though not quite systematically. Disputes concerning the application of collective agreements (so-called legal disputes) can be resolved by ad hoc arbitration, formed within 15 days from the emergence of the dispute.[98] The composition and the procedural rules of the arbitration is to be governed by a collective agreement. In addition, judicial protection is also allowed.

To have the text of a collective agreement available to the public and facilitate the determination of its content, collective agreements concluded at all levels above the company level (general and special collective agreement) must be registered with the Ministry of Labor, Employment, Veterans, and Social Affairs, as well as their amendments.[99] They are also to be published in the Official Gazette of the Republic of Serbia.[100]

3.3. The Relationship between Individual and Collective Labor Law

The relationship between individual and collective labor law was not in the special focus of the legislature in Serbia. The provisions of collective and individual labor law are mostly regulated by the same act, usually in a basic law—the Labor Code.[101] The

94 LC, art. 256.
95 LC, art. 256a.
96 LC, arts. 257–258.
97 LC, arts. 263–264.
98 LC, art. 265.
99 According to the Ministerial Decree on the Registration of Collective Agreements.
100 LC, arts. 266–267.
101 The exceptions are the Act on Strikes and the Act on the Socioeconomic Council, which may be considered as special statutes in the field of collective labor law.

LC however does not clearly separate the provisions of collective and individual labor law, but are mostly intertwined.

Several provisions of the LC however tackle the relationship between individual employment contracts and collective agreements. The LC clearly gives priority to collective agreements. It stipulates that the rights, obligations, and responsibilities from the employment relationship, in addition to that law and special laws, are regulated by the collective agreement and the employment contract.[102] However, the significance of the individual contract is relativized in the LC: in the continuation of the same provision, it is stated that the employment relationship can be regulated by the labor rulebook and the employment contract only when the LC so provides. Thus, if there is a collective agreement, it has primacy. The priority of collective agreement is also confirmed by a rule stipulating that certain provisions of the employment contract that allow less favorable working conditions than the conditions determined by law and the general act of the employer (which include collective agreements and the labor rulebook) are automatically null and void.[103]

In practice, in collective agreements are often merely repeated the rules of the statutes, with few genuine legal solutions. In general, they represent a significant additional legal source on which employment contracts are based when it comes to topics such as salaries, benefits, salary supplements, other benefits, leave, severance pay, redundancy selection rules, additional social insurance. Collective agreements have been concluded in almost all areas and public sector enterprises, while they are quite rare in the private sector. Therefore, in the private sector, the impact of collective agreements on employment contracts is almost negligible.

4. Current Labor Law Regulatory Issues and Problems (with a Focus on Employment Contracts and Collective Agreements)

The effective labor law legislation in Serbia can in general be assessed positively.[104] However, that does not mean that it requires no 'fine-tuning.' In addition to the need for further harmonization with international standards (ILO and EU), the following reasons impose the need to innovate current labor legislation: 1) systemic inconsistency of regulations (inconsistency of individual regulations with the main legal source—Labor Code), 2) imperfection and obsolescence of certain legal solutions, 3) harmonization with new tendencies in the field of work.[105]

102 LC, art. 1. s. 2.

103 LC, art. 9. The general acts according to LC, art. 8 are the collective agreement and the labor rulebook.

104 This is the general assessment of the experts of the International Labor Organization as well. See for example Memorandum of Technical Comments on Draft Amendments to the Labor Code of the Republic of Serbia, 2014.

105 See Jašarević, 2019, p. 69.

Amendments to the Labor Code and some other laws are needed, along with the adoption of a new Law on Strike.[106] The levels of these changes would be in systemic—basic solutions (e.g., the concept of employee, employer, employment, employment contract would be innovated), as well as in changes concerning certain labor law institutes (strike, dismissal, earnings, violence at work). New concepts should also be introduced into labor legislation, such as 'digital worker,' 'worker' (a person who is not employed by the employer, but depends on him), 'dependent co-employee,'[107] 'secondary employer,' etc. An important reason imposing the need to innovate labor legislation around the world are the *new circumstances* in the field of labor. They are imposed by digitalization, which entered all areas of life and work. The result of the new way of working is a series of new forms and concepts of labor, such as digital work, digital worker, platform work, platform economy, etc.[108] The new concepts will require the revision of labor law regulations, which will regulate not only the position of employees, but all others who live from work and make their living outside an employment relationship, working for clients (working across platforms) or 'undercover employers'—who for employment use contracts of general law of obligation instead of employment contracts.

The contracts of general law of obligations are increasingly used to conceal the true nature of the employment of a person working through 'platforms,' 'digitally,' 'temporarily,' 'occasionally' or in any other nonstandard form of work. The goal of concluding such contracts is to hide the true nature of the relationship between the contracting parties, i.e., to avoid establishing an employment relationship and legal effects that it entails (responsibility like that of an employer toward the employee, tax obligations, social benefit payment obligation, etc.). Instead of concluding an employment contract, often an 'innominate' contract is concluded, according to which the 'fake' or 'secondary' employer (platform) is presented as a software service provider, intermediary, etc. This transfers all responsibilities to the worker. To avoid this, it would be necessary to innovate the Labor Code, the rules on the employment contract, the concept of the employee, and the employment relationship, to extend the protection of labor law to all persons who are in dependent work (element of subordination), and making their living out of such work (element of conducting work as one's trade or profession). It would be advantageous if all contracts of the law of obligations suitable to provide legal form to various forms of conducting work were included in the Labor Code and become a source of law applicable to such employees or workers. In that sense, some rules from the Slovenian and Croatian legislation could be singled out and implemented into Serbian law.

106 The ILO and EU consider the adoption of the new Act on Strike the most topical issue of labor law legislation in Serbia. See Memorandum of Technical Comments on Draft Strike Law, 2018; European Commission, 2011, p. 116.

107 These legal concepts could provide protection to workers who work on different 'platforms'—both international and local.

108 See the ILO's *World Employment and Social Outlook 2021: The Role of Digital Labor Platforms in Transforming the World of Work*.

The amended Slovenian Act on Labor Inspection deals with the role of labor inspection in determining 'false civil law contracts' when it comes to employment relationship. If the labor inspector established that a contract of general law of obligations has been concluded, which is contrary to the rule of the Labor Code which prescribes that if there are elements of employment relationship, the work cannot be performed based on such contracts. In that case the inspector orders the employer to provide the contractor a written employment contract within three working days of delivery of the decision.[109] The written contract must correspond to the actual situation arising from the decision (regarding the type and scope of the work performed), the salary must be comparable to the salary prescribed for the same work by the collective agreement and general acts binding on the employer (whereby the contributions to obligatory social insurance and tax obligations are also taken into consideration). If the employer fails to offer the contractor an employment contract, he or she has a right to resort to court within 30 days.[110]

Similarly, the solution of the Croatian Labor Code may also be qualified as progressive. If the employer concludes a contract with the employee for the performance of work which, given the nature and type of work and the employer's authority, has the characteristics of the job for which the employment relationship is established, according to the Croatian Labor Code it shall be considered that an employment contract has been concluded, unless the employer proves otherwise.[111] Furthermore, the Croatian Labor Code specifies that if there is an assignment of an employee to conduct work by a linked company, the former shall be considered employer in terms of the duty to apply the provisions of the Labor Code and other statutes and regulations governing safety and health at work (a so-called linked employer).[112] It would strengthen the protection of employees if a similar rule could be adopted in Serbia as well.

A conclusion may be inferred that there is a high level of compliance of the Serbian regulation of collective agreements with the international standards in this area, those of the ILO.[113] However, some solutions should be improved. First, the law should contain a definition of a collective agreement. By that would collective agreements be clearly differentiated from other agreements. According to ILO experts who analyzed the law of Serbia, there is a problem with the regulation of the *content of the labor rulebook* and its *relationship with the collective agreement*. They assert that the rulebook should not in any way replace the collective agreement (as provided in art. 3 of the Labor Code), since in comparative perspective, it usually has a narrower content than the collective agreement. In comparative law, for instance, wages are not regulated by the rulebook, as is the case with collective agreements, but work discipline and similar issues. In that sense, the memorandum explicitly states: 'If

109 Slovenian Law on Labor Inspection, art. 19. s. 2.
110 See Senčur Peček and Laleta, 2018, p. 422.
111 Croatian Labor Code, art. 10 s. 2.
112 Croatian Labor Code, art. 10 s. 4 p. 7. See Senčur Peček and Laleta, 2018, p. 421.
113 See Jašarević, 2000, p. 39.

there is no collective agreement, then the individual employment contract defines the rights and obligations established through individual negotiations.'[114] Therefore, the ILO considers that the issue of substitution of a collective agreement by a rulebook should be regulated differently, but still affirming the principle of good faith and fair dealing in negotiations.[115]

Furthermore, according to the experts of the ILO, the *possibility of expanding the scope of application of collective agreements* is not properly regulated in the LC. They should be fully in line with the standards of the ILO. They assert that legal solutions to this issue should arise from consultations with the social partners, in accordance with point 5 of Recommendation no. 91 on ILO collective agreements from 1951.[116] In addition, the effective legal solution (art. 257 LC) lacks the possibility provided for in art 5. sec. 2 subsection (c) of the recommendation, according to which, prior to the extension of the agreement, the employers and workers to whom the agreement would be made applicable by its extension should be given an opportunity to submit their observations.

The provision on the termination of a collective agreement also causes a great deal of difficulties in application. The validity of a collective agreement may cease before the expiration of three years by an agreement of all participants or by termination reached in a manner determined by collective agreement.[117] The source of the difficulties is in the wording that the contract is valid 'for a maximum of six months from the day the notice on termination was submitted.' Who decides how long the act will be valid after the cancellation? The party cancelling it (usually the employer) usually wants the termination as soon as possible, while the other party relies thereon that it will apply for another six months. In this 'vacuum,' expensive court disputes may occur, mostly regarding salaries and other compensations. The difference is not negligible. The amounts according to the 'new calculation' and according to the previously valid collective agreement may greatly differ. Therefore, the mentioned rule in this way does not support legal certainty, but on the contrary, it weakens it with the 'extensibility' of the mentioned deadline.

To facilitate the determination of the existence and the content of collective agreements in the event of a dispute, it would be useful to introduce a systematic database of concluded collective agreements available to the public—which does not currently exist in Serbia. Since the Ministry of Labor, Employment, Veterans, and Social Affairs already has a register of collective agreements (general and special), this could be easily implemented. In addition, we would propose the mandatory deposit of collective agreements with the employer in the same database, so that the authenticity of collective agreements could not be disputed later.

114 Memorandum, pp. 14–15.
115 Ibid.
116 See Memorandum on the LC from 2014, p. 13.
117 LC, art. 264.

5. Harmonization of Serbian Labor Law with EU Law

Until 2000, during the adoption of labor law regulations, Serbia was primarily guided by the documents of the ILO.[118] At the turn of the millennium, Serbia began the process of approaching and accession to the Union, while in 2012 gained the status of candidate country. By this the process of harmonization of Serbian Law with the *acquis communautaire* commences: the legal solutions from the *acquis* have been implemented into the national legal frame directly or only with minor changes.[119] In addition, the harmonization of domestic law with the law of the European Union influenced the development of special areas in relation to particular segments of labor law legislation, such as anti-discrimination laws, the protection of whistleblowers, protection against harassment at work, the protection of personal data related to work, legislation strengthening, social dialogue, etc.

After 2000, the legislative model has primarily been the EU law. Thus, in framing the Labor Code, the legislature referenced a range of the EU legislative acts. The most notable acts include: Directive 94/45/EC on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees; Council recommendation 92/443/EEC concerning the promotion of participation by employed persons in profits and enterprise results (including equity participation); Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation; Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions; Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data; Directive 93/104/EC concerning certain aspects of the organization of working time; Directive 80/987/EEC on the approximation of the laws of the Member States relating to the protection of employees in the event of the insolvency of their employer; Directive 77/187/EEC on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses; Directive 98/59/EC on the approximation of the laws of the Member States relating to collective redundancies; Directive 97/80/EC on the burden of proof in cases of discrimination based on sex; Directive on an employer's obligation to inform employees of the conditions applicable to the contract of employment relationship; Directive 1999/70/EC concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP; Directive 97/81/ECconcerning the Framework Agreement on part-time work

118 Serbia has adopted 77 ILO conventions. The list of adopted ILO conventions can be seen at: https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11200:0::NO::P11200_COUNTRY_ID:102839 (Accessed: 25 March 2022).

119 See Jašarević, 2014, pp. 153–169.

concluded by UNICE, CEEP and the ETUC; Directive 93/104/EC concerning certain aspects of the organisation of working time (and Directive 2000/34/EC); Framework Agreement on Telework, 2002.

Therefore, the Serbian Labor Code, as well as all other subsequent documents of the labor law, were largely harmonized with the EU legal standards. However, certain issues and institutes should be further developed, in the light of their evolution in the EU directives and regulations.[120] Alternatively, the rules of EU directives relating to labor law should be transposed integrally as it has been done in the laws of numerous member states.

120 Ibid.

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| Chapter 6 |

Czech Republic: Critical Legal Analysis on Dogmatic and Current Issues of Labor Law

Martin ŠTEFKO

ABSTRACT

The purpose of this chapter is to analyze Czech labor law. The first part describes its position in the Czech legal order, the parts of which it is composed, and the 'big' legislative compromise derived by the Czech legislature, when the more flexible approach was taken after the millennium. The second part identifies two key legal issues that need to be addressed in relation to Czech labor law in the post-COVID period. The Czech political representatives have not yet been able to agree on basic conceptual measures to protect society, the country, or the economy. The indebtedness of the country and individuals is rising, as is mortality and the domestic violence rate. The Czech society is split, both ideologically and as far as the discourse between generations is concerned. Some people want to protect themselves, while others want to live even at the expense of those facing a threat.

KEYWORDS

COVID-19 testing, collective agreements, voluntary fire fighters, occupational injuries

1. Dogmatic Part

Czech labor law is a general term for a set of rules governing the performance of dependent work; it frames working conditions in an individual employment relationship, sets down rules for collective bargaining, governs the legal nature of collective agreements and sets forth rules governing the labor market.

1.1. Labor Law

Czech labor law is a legal branch on the border between public law and private law**.** Although labor law regulates the rights and duties of individuals who are formally equal, its main significance for private law is the protection of employees in negotiating with an employer. The protection from encroachments on employees' personal lives, from economic disadvantages and from health risks associated with the exercise of a particular job, is performed in name of public policy. Furthermore, certain parts of labor law shall demonstrate the authority of the State (e.g., regulation of

Štefko, M. (2022) 'Czech Republic: Critical Legal Analysis on Dogmatic and Current Issues of Labor Law' in Jakab, N. (ed.) *Fundamentals of Labor Law in Central Europe.* Miskolc–Budapest: Central European Academic Publishing. pp. 135–162. https://doi.org/10.54171/2022.nj.fullce_7

public holidays as memorials for the State[1]) or ensure the maintenance of the State (e.g., concept of day-off when an employee is delivered a draft notice, or she takes maternity leave).[2]

For research and study reasons, private law is divided into particular legal branches that are taught in law schools. Provided that labor law is classified as a part of private law, as most Czech authors do, it must be distinguished from other divisions of private law, such as civil law, commercial law, family law, and international private law.

According to Czech legal theory (and historical tradition), labor law is not distinguished from private law (in the sense of being a legal branch of private law). Private law is conceived as the body of laws regulating ordinary private matters, distinct from laws regulating business relationships, family relationships or relationships arising from the performance of dependent work. Labor law is comprised of provisions regulating the legal relationship between employer (old-fashioned 'master') and employee ('servant'). The nature of an employment relationship is that an employee 'sells labor'[3] to an employer.[4] The theory names the employee's work as 'the performance of dependent work.'

1.2. Work Relationship

Czech employees are represented on statutory and contractual bases. The latter applies to a national social dialogue that is performed by a special created body named the Council of Economic and Social Agreement (CESA). Since its creation, the CESA has been based on an unwritten tripartite agreement concluded between the government, the strongest trade union confederations, and employers' associations. The respective agreement of 1990 has never been replaced by a statute, court, or any arbitration award.[5]

All remaining representatives can be formed only on statutory bases and their status is governed by the Czech constitution and state statutes. Respective rules are

1 The tight connection between the State and labor law may be demonstrated by the fact that the only State Memorial Day (public holiday) during nearly the whole Communist era was the day when Czechoslovakia was 'liberated' by the Soviet Army (9th of May). The original State Memorial Day—the day when Czechoslovakia was established—was renamed and celebrated as the Day of Nationalization. See Act No. 93/1951 Collection.

2 Another example of the lack of a bright line rule between public and private law. Civil law is a part of private law; however, the Act on Responsibility for Injury Sustained because of Illegal Decision or Procedural Error, which is conceived as a part of civil law, governs the responsibility of public authorities acting in the framework of public law. See Constitutional Court decision on 30 April 2002, file number Pl. ÚS 18/01, published Sb.n.u.US. Vol. 26, No. 53, p. 73.

3 See Declaration Concerning the Aims and Purposes of the International Labor Organization in the ILO Constitution. According to art. 1 a) of the Declaration, *labor is not a commodity.* The Constitution was published in the Collection of Laws 1921, under No. 217.

4 For example, a builder builds an extension to a house, or a watchmaker repairs a watch.

5 Even if an agreement had been concluded, it would of course have been an unwritten agreement to which the signatories would not have been legally bound.

considered to be within the scope of public law and can be found in the Charter, Labor Code, Collective Bargaining Act, and Civil Code. Law recognizes four types of representatives: trade unions, works councils,[6] representatives concerned with occupational safety,[7] and European work councils.

An employer is required to create conditions for employee representatives to enable them to perform their duties, in particular to provide them, in accordance with operational means and to an appropriate extent, with reasonably equipped rooms, to cover the costs of maintenance and operation and to provide them with background documents and information.[8] Employees are entitled to time off work for union work; all representatives are entitled to undertake these activities during working hours and to be compensated for the loss of wages, if it occurs. But only trade union officials enjoy the highest protection against dismissals for trade union activities. Section 61 of the Labor Code states that a dismissal of a trade union official is to be regarded as automatically void and invalid, unless the employer has valid grounds for the dismissal and a court considers the further employment of the trade union official as unjust.[9] Other representatives of employees are under substantially weaker protection. This is true even for European Works Council members.[10]

At the end of a strong 1980s, the monopolist single-trade union organization had almost the same number of members as the whole United Kingdom union movement of 2006. The end of the totalitarian Communist regime caused an outflow of trade union members like other ex-Communist Central and Eastern European countries. Based on Eurostat data, the density of unionized workers was around 80% in 1993. However, Czech trade unions suffered a sharp decline after 1989 according to many experts.[11] In 2006, 21% of workers were unionized. Three years later, trade unions represented that the unionization rate is 17%. Since then, neither the respective Czech agencies nor trade unions published any data on this subject. Today, experts assess that only 10% of the whole workforce is unionized. The main reason for this sharp decline from 1993 in unionization can be identified as a loss of credit and power on the side of the official trade union organization. The Communist party and the official trade union organization were closely tied, and trade unions executed several state

6 Works councils can mediate in relationships between employers and employees and are called upon to enforce the right of employees to information and consultation. They have at least three and at most 15 members.

7 These rules enabled the Czech Republic to ratify the ILO Workers' Representatives Convention, 1971 (No. 135), in October 2000.

8 Despite this, there are cases where employers in certain companies try to exert influence on trade union bodies, including by means of offering certain benefits to trade union representatives.

9 This is a unique protection guaranteed by Czech Labor Code; no other employee enjoys the same level of legal protection against dismissals.

10 As derived by Supreme Court decision docket file No. 21 Cdo 398/2016.

11 It is thus possible that the Eurostat statistics of 1993 consider the total union organization not only in the original single trade union organization (which was called the 'Revolutionary Trade Union Movement') but also in the trade unions newly established after 1989.

functions and distributed several government benefits or sanctions to their members, whose membership was not entirely voluntary.

1.2.1. Trade Unions

Employees, including managerial personnel, are granted the right to join trade union organizations of their own choosing, without interference from either their industrial relationship opponents or from state authorities. Trade unions are also granted the right to establish their own constitutions and rules, to organize their internal administration, and to elect their representatives.[12]

Czech law does not recognize shop stewards; employees are represented by trade unions. From a legal perspective, Czech law recognizes one legal status of trade union organization regardless of its scope of operation. The strongest trade union federation with thousands of unionized members, and a trade union organization operating at a particular facility with three employees have the same legal status of private-law associations. In accordance with the law, three members can establish a trade union organization or employer organization. The legislation does not set forth other criteria for association, not even the criterion of just minimum density of union members.

The Civil Code spells out that a trade union is a society (in Czech *spolek*). But trade unions despise this classification due to its legal implications. The main reason given for their level of contempt for the new regulations of societies is a significant restriction of their room for maneuver, which they even consider to be violating respective ILO conventions. In fact, the Civil Code and supplementary legislation have brought many duties for societies. But the relevant Civil Code regulations shall apply only when appropriate regarding international obligations of the Czech Republic.

A trade union is an incorporated association, which means it is a separate entity from its members. The union rule book, like the articles of association of a company, provides for the institutions that govern the union. Trade unions are voluntary associations. A trade union organization can come into being as a creature of law by a formal procedure. The registrar shall not put under scrutiny an application for a trade union organization lodged at a regional court. and the trade union organization is established the subsequent day after the day its application was delivered.

In accordance with Czech law, trade unions are the only legitimate representative bodies of employees that have the right to collective bargaining. Trade unions represent all employees in labor relationships, including those who are not affiliated with any union.[13] The Labor Code of 2006 gives trade unions the right to participate

12 ILO Convention No. 87, supra note 7, art. 2. Convention 87—Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87).

13 The low number of affiliated trade union members is not reflected in the legislation for several reasons. First, in certain sectors, trade unions have managed to maintain a leading role due to traditional respect (typically mining), and second, top trade union officials have been able to maintain a close connection with national politics for decades.

in decision-making,[14] the right to co-determination, and the right to consult and gain information in matters relating to employees' interests. Furthermore, trade unions enjoy a significant right of control over the observance of labor law by the employer and the right to perform controls over occupational safety. Trade unions had been chosen by the legislature as the sole representative of employees short after 1945. During the Communist era, trade unions were incorporated into state mechanism and no other representatives were allowed to be created. Understood only in legal terms, trade unions were able to maintain their exclusive position as the sole representative of employees long after 1989. They have ever been able to stop any attempts to water down their prerogatives. Trade unions supremacy over other employee representatives represents the most important part of mixed legacy from previous totalitarian era up to date.

1.3. Labor Code

Czech labor law is codified. Most provisions of the Labor Code of 2006 set forth conditions of the employment relationship and only a few concern rules for employment contracts.[15] Hence, the second important concept in Czech labor law is that of employment relationships. The relationship is understood as a legal relation between two different individuals who are subject to rights and duties arising from that relationship. The noun adjunct 'employment' means that it is labor law which governs the relation in question. The dependent work is the object of employment relationship. The employment relationship and the contract of employment are two different things. The contract is a legal act that may establish an employment relationship; however, the employment relationship may come into being also second way—the employer may appoint an employee.

The Labor Code simplifies the process of concluding an employment contract. Parties do not need to agree on most terms because they are set forth directly in the law. Thus, both parties must establish only three conditions of work to form an employment relationship: the position (job title) the employee will hold and the tasks to be performed; the place of work; and the day on which the employee begins work. The place of work is confined to places where the employee will render service. The stipulation must be specific and understandable. If the place of work is defined as broader than one community (e.g., Prague), then either the parties must agree upon a regular place of work (for the purpose of determining what constitutes a business trip), or the employer is obligated to determine a regular place of work unilaterally. Therefore, an employer may not avoid his/her obligation to finance an employee's business trip.

14 The Labor Code envisions giving trade unions the right to prior consultations on proposals of labor legislation. See Section 320 of the Labor Code.

15 Czech lawmakers are responding to new forms of work. Agency employment has been regulated since 2004 and job sharing since 2021. Platform or digital employment has not yet received special regulation.

Furthermore, the Labor Code enables the employer to shift his/her employees' work tasks from those that were agreed upon. If it is not possible to agree upon the change, the employer may shift his/her employee to another job (with the same employer) that was not agreed upon in the employment contract nor in any other contract only in cases explicitly mentioned in Section 41 of the Labor Code. It is a unilateral legal action taken by the employer.

Once the employment has been constituted, its legal life is torn, to a certain extent, from the existence of contract of employment. For example, the fixed-term contract may elapse, but if an employee continues in the performance of work with the knowledge of the employer (the acceptance is not prescribed), the same employment relationship continues to exist.

The Czech Labor Code differentiates between cases where the employer *must* do it (e.g., because of the employee's health, in the event of pregnancy or caring for a newborn child, or the decision of a court or regulation authority) and cases where he merely *can* do so (e.g., dismissal due to a breach of work discipline or non-compliance with contractual requirements or needs, criminal prosecution for an intentionally committed illegal act that happened during the fulfillment of a labor task or an act that directly caused harm to the employer's property, the temporary loss of certain requirements for work that were agreed upon, or in the event of an extraordinary circumstance or accident). In such a case, the employer is obligated to discuss the reason for the shifting of tasks and how long it will last. If the employment contract is affected by the aforementioned changes, the employer must issue his/her employee a written confirmation regarding both the reason for the shift and how long it will last. The only exceptions to this rule are cases when an employee loses the requirements necessary for performing the work or in the case of an extraordinary event or an accident—in these cases informing the employee would be redundant.

If the employee cannot fulfill his work due to down-time or an interruption of the work caused by bad weather conditions, the employer can only second him/her to another place that was agreed upon in the employment contract if the employee consents.[16]

If the employer shifts his/her employee to other work than that listed in the employment contract, and the employee does not agree with this, he/she can only shift him/her after negotiating with a trade union. The negotiation is not necessary if the shift does not last more than 21 days per calendar year.

1.3.1. Employment Agreement

Both parties must contract only three conditions of work to establish to form an employment relationship (a so-called *essentialia negotii*): the position (job title) that

16 Consequently, this is a legal change to the previous regulation set forth in Act No. 65/1965 Collection (the Labor Code of 1965), where, according to Section 37 Subsection 4 Paragraph A of the Labor Code of 1965, consent was not necessary.

the employee will perform; the place of work; and the day on which the employee begins work.[17] The place of work is confined to places were the employee will render service. The stipulation must be specific und understandable.[18]

The Labor Code sets forth that an employer (but not employee) shall contract in writing.[19] The violation of form does not make the contract invalid.

According to Section 37 of Labor Code,[20] an employer must provide employees with a written statement of the terms and conditions of employment, either in the employment agreement, in the collective agreement, in internal regulations, or in additional documents. The terms and conditions include information about the rights and obligations ensuing from the concluded agreement, including working conditions, payments for the work to be performed, the length of annual leave, the notice period, and facts on collective agreements.

In addition to the essential conditions, the parties of an employment agreement may agree on other terms (e.g., probationary period, limited duration of employment relationship or restrictive covenant).

1.4. Changes toward Flexibility

The democratic revolution in 1989 and the subsequent fundamental changes in the political, social, and economic life of society exposed the insufficiency of the existing Labor Code of 1965. There have been more than 50 amendments, but the basic framework has remained the same since the Communist era. Therefore, the government decided to develop a new code that would be more appropriate for the changing conditions.

One of the basic principles that the new Labor Code of 2006 should have been founded upon, was the principle called freedom of contract. Because of this rule, both the employer and employee should have been permitted to form their mutual rights and duties of the employment relationship in accordance with their needs to a much larger extent than before. The principle of 'anything that is not expressly forbidden by the law is permitted,' was set forth in the Constitution and in Art. 2, Paras. 2 and 3 of the Charter.[21] However, the final and approved version of the respective sections of

17 If parties do not agree on these three requirements, the employment agreement will be not concluded and the employment relationship established.

18 If the place of work had been contracted as broader than one community (e.g., Prague), than the parties must agree upon a regular place of work for the purpose of business trips or the employer is obligated to determine a regular place of work unilaterally. Therefore, an employer may not avoid the duty to finance an employee's business trip.

19 The non-fulfillment of this duty is penalized as an offense.

20 The section contains the implementation if so-called Written particulars of employment. See Council Directive 91/533/EEC.

21 The Charter of Fundamental Rights and Freedoms was adopted as an appendix of statute No. 23/1991 Collection. After the extraordinary situation of 1992, when the Charter's predecessor was abolished, the Charter was re-established on 16 December 1992 as a component of the Czech constitutional order (Manifestation No. 2/1993 Coll.).

the Labor Code did not satisfy anybody.[22] It was too complicated and ambiguous. The reason was that the legislature tried to guarantee the same level of protection as in the Labor Code of 1965 and, at the same time, it wanted to widen the room to maneuver for both parties. Due to a complaint, the principle of the freedom of contract was examined by the Constitutional Court of the Czech Republic.[23] The Constitutional

22 The provisions concerning the freedom of contract were set forth in Sections 2 and 363 of the Labor Code of 2006. Parties were not to violate or abandon the Labor Code's regulation when the provisions were declared as overriding (mandatory) rules. The Labor Code of 2006 in its original edition set forth the following categories of rules as mandatory: provisions enumerated in Section 363, Paragraph 2; definitions of parties of labor law relationships (e.g., employer, employee or trade unions); provisions referring to the provisions of the Civil Code (the delegation principle); regulations regarding remedies; provisions in which the law is explicitly written; and provisions from which the law could be derived. These provisions could not be changed in whole or in part. Parties were to follow them in all their legal documents. Said provision has been amended several times from 1 January 2007. Section 2 was changed six times and Section 363 more than twenty times. The original legal approach was left for legal uncertainty. As it has been repeatedly found by experts or courts, the legislature omitted to regulate several institutes as mandatory and, on the contrary, established some institutes as mandatory to the detriment of the matter.

23 During the preparation of the Labor Code of 2006, the legislation was forced to deal with several theoretical problems. One of them was how to manage the relationship between civil law and labor law, or more particularly, the scope of the Civil Code and the scope of new Labor Code of 2006. Because the Civil Code contains many general rules which may be used in labor law, it seemed to be useless to rewrite and repeat such rules in the new Labor Code of 2006 as it did the Labor Code of 1965. Experts considered the two main approaches available—the concept of subsidiarity or the concept of limited application through express reference (delegation). The former means that the Civil Code would have applied as more general law in cases where the Labor Code of 2006 did not contain a specific regulation. On the contrary, the latter prescribes that it is the Labor Code which must enumerate which provisions of the Civil Code shall apply in labor law. The Civil Code must not be applied unless there is an express provision of the Labor Code which calls for the application of civil law. The legislature chose the delegation approach at the end. Therefore, the Labor Code of 2006 referred to almost 150 provisions of the Civil Code which, in accordance with Section 4 of the Labor Code of 2006, ought to apply to labor relationships. The same provision contained an interpretation rule that the Civil Code shall not be applied if the Labor Code of 2006 does not explicitly refer to a provision of the Civil Code. These referred provisions of the Civil Code are considered parts of the Labor Code of 2006 and, therefore, are governed by the general principles set forth in the Labor Code of 2006. However, such a legislative technique led to several problems regarding the application of Civil Code provisions in labor law. For example, the legislature made also reference to provisions which are inapplicable to labor relationships, and worse, to provisions which are contrary to ILO international treaties ratified by the Czech Republic and its predecessors (only some of these treaties enjoy direct applicability in Czech law). Additionally, it forgot to enumerate certain provisions of the Civil Code that are necessary for just application of the referred provisions. Large problems arose because of the invalidity of these legal acts. Both laws in question are based on different concepts concerning the invalidity of legal acts. Which of them shall apply in labor law? At the end, the Labor Code of 2006 was tearing out certain provisions of the Civil Code that the legislature envisioned to apply together. Therefore, due to legal uncertainty, the relevant provisions were finally annulled by the Constitutional Court in its judgment of 12 March 2008. The decision was published under No 116/2008 Collection.

Court profoundly simplified the principle with its intervention. Nevertheless, the Labor Code remains very protectionist toward employees.

If we perceive the flexibility of Labor Law as a lowering of the protection of employees from the termination of a labor relation,[24] it is necessary to mention that the Czech Labor Code has not adopted this principle yet. Czech labor law still prohibits an employer from dismissing his/her employees without a fair reason. The only exception is when a probation clause is contained within the employment contract.[25] Even a collective agreement cannot exempt an employee from protection against accidental or wrongful termination. Nor can a higher-level collective agreement provide for an exception. Thus, the only real blanket exception to the protection against termination of the employment relationship through an agreement is provided for in the Labor Code for agreements on work performed outside the employment relationship. These are two agreements that create a kind of second-class employment relationship, where employees have little protection.[26]

Nevertheless, significant changes are visible in fixed-term contracts and temporary agency work.

1.4.1. Permanent and Fixed-term Contracts of Employment

Unless the duration of the contract is explicitly stipulated, Section 39 of the Labor Code provides that the contract of employment is concluded for an unlimited period (a permanent job). Therefore, assuming an employer wishes to hire an employee only for a restricted period, he/she must stipulate it explicitly.

Because of the high level of protection regarding employees, particularly pregnant women and employees caring for small children, employers hesitate to hire such employees for tenure. Section 39 of the 2006 Labor Code adopted the old regulation that had implemented EC Law requirements on fixed-term work contained in Directive 1999/70/EC. An employer may hire an employee and continue the fixed-term employment relationship up to a maximum period of up to three years and can it repeat twice.[27] If an employer contracts with an employee in breach of the prescribed conditions, he/she, i.e., the employer, may be fined by the state oversight agency

24 See Mitrus, 2008, p. 518; Kristiansen, 2008, p. 509.

25 If a probation clause is included in the contract, either party is free to terminate the employment relationship within the probationary period. According to Section 35 of the Labor Code of 2006, the duration of the probationary period may be three months at most. The two parties may contract a shorter probation period, but the period of three months cannot be extended. The probation period can be agreed to only by means of the contract of employment and, at the latest, on the day when the employment relationship is established. The stipulation must be written to be valid.

26 Another traditional exception is the protection for so-called agreements on work performed outside the employment relationship, where the employee is not comparably protected before the termination of the employment relationship. Thus, if the employment relationship based on one of the outside employment agreements is terminated by a notice of dismissal, the court does not examine whether the grounds for termination are fulfilled.

27 Primary and secondary school teachers, civil servants, and military personnel have special fixed-term employment arrangements in respective statutes.

(called the Work Inspection). However, the agreement regarding a fixed-term contract will be valid until the employee, as the injured party, claims the invalidity in writing to the employer. The employee must do so before the fixed-term period elapses. If the employee claimed to be employed further (for an indefinite period) and the employer ignored his/her demand, the employee must appeal to the court within two months of the day when the employment relationship would have elapsed.

Where, after the expiration of the agreed period, the employee continues working without any objections on the part of the employer, such employment relationship is deemed to have changed to permanent employment relationship (tenure), unless the two parties' contract specifies otherwise. Fixed-term contracts can also be terminated by other reasons referred to in Section 52 of the Labor Code of 2006.

1.4.2. Temporary Agency Work

In 2004, the explicit regulation of the temporary employment relationship was introduced. Until that time, the Labor Code had enabled every employer, based on a contract concluded with their employee, to temporarily reassign his/her employee to a different employer. As of 1 October 2004, only an employer who has a permit to act as an employment agency can transfer employees to another employer for temporary work (however, as of 1 January 2011, an employer other than an employment agency may assign a temporary worker to another employer, but only if the conditions set out in Section 43a of the Labor Code are met). The temporary employment relationship is continuously gaining importance in the Czech Republic; nevertheless, official statistics have not been published yet.

The core of the temporary employment relationship remains unchanged. The employer (employment agency) temporarily allocates his/her employee to a different employer (user) based on an agreement in the employment contract or an agreement on working activity. Due to this, the employment agency commits itself to providing the employee a temporary exertion of work according to the employment contract or the agreement on working activity on the user's premises; and the employee commits him/herself to do this work according to the user's instructions and based on the contract of secondment that has been agreed upon by the labor agency and the user.

Protection of the temporary worker is assured by the duty to guarantee equal labor and wage conditions.[28] The employment agency and the user must ensure that the labor and wage conditions of the temporarily assigned worker are not worse than the conditions a comparable employee has or would have. If the labor or wage conditions of the temporarily assigned worker are worse during his/her exertion of work, the employment agency has the duty to guarantee equal treatment per the employee's request; or if it discovers this fact another way, to take the same steps even without a request. The temporarily assigned worker has the right to call for the fulfillment of his or her rights. The employment agency cannot assign the same temporary worker

28 The Czech Republic ratified the ILO Convention on Private Employment Agencies in 2000.

to work for the same employer for more than 12 subsequent calendar months. This restriction is not valid in cases where the employee of the employment agency asks the agency to do so, or in the case of substitute work for a user's worker who is on maternal or parental leave. (As far as parental leave is concerned, this applies both for the substitution of male and female workers). It is possible to limit the range of the temporary employment relationship in the collective agreement.

2. Current Labor Law Issues

This section demonstrates that the most important requirement in the prevention of infectious diseases is testing and vaccination. As the civil defense units are hardly visible and the active reserves are very small, volunteer firefighters have taken on a key role following professional firefighters, and these must help the undersized army and overburdened police for a long time. However, they are performing this task while being insufficiently protected against the consequences of an occupational accident.

2.1. COVID-19 Testing and Vaccination

It is the employer's duty to prevent a health detriment or damage to the property of employees and third parties. In this relation, the Czech Republic is primarily bound by the key ILO Convention no. 155 on the Safety and Health of Workers and a Safe Working Environment of 1981,[29] ILO Convention no. 161 on Occupational Health Services, 1985,[30] and Convention no. 187. As far as specific protection against certain risks is concerned, we should mention Conventions no. 115 of 1960, no. 139 of 1974, no. 148 of 1977, no. 162 of 1986 and no. 170 of 1990. The legal basis for the EU legislature's activities is laid down in art. 151 et seq. Treaty on the Functioning of the European Union (TFEU), in accordance with the European Social Charter and the 1989 Community Charter of the Fundamental Social Rights of Workers. Pursuant to art. 153 par. 1 Letter a) of the TFEU it is the EU's task to promote the Member States by cooperating on improving the working environment so that the employer's health is protected and doing so in relation to achieving the general objectives set out in art. 151 TFEU.[31]

29 See no. 20/1989 Coll. ILO Convention No. 155 which lays down in arts. 4 and 5 the basic principles and preventive principles in the field of occupational safety and health and in art. 8, it regulates the cooperation with employees' representatives (trade unions) to address occupational safety and health issues; in art. 9, it provides for the presumption of an independent state supervision over the area of occupational safety and health; and in art. 11, for the reporting and investigation of occupational accidents and occupational diseases.

30 See 145/1988 Sb. ILO Convention No. 161 which regulates the obligation to introduce company-internal health services at the national legal system level, which the Czech Republic subsequently did in the shape of the so-called occupational medical services. According to Act No. 373/2011 Coll., the occupational health services providers' task is—in accordance with ILO Convention No. 161—to provide for the prevention of health damage, including the protection of health against occupational diseases and other occupational injuries and the prevention of accidents at work.

31 See art. 156 TFEU.

Art. 31 of the EU Charter of Fundamental Rights regulates the right to decent and fair working conditions. According to paragraph 1 of this article, every worker has the right to working conditions minding his/her health, safety, and dignity. The most important piece of legislation in this area is Directive 89/391/EEC on the introduction of measures to encourage improvements in the safety and health of workers at work, as amended. The national regulation is laid down in Act no. 262/2006 Coll. Labor Code, as amended, Act no. 309/2006 Coll. as amended and the implementing labor law regulations on the issue of safety and health at work.

According to Act no. 262/2006 Coll. the Labor Code, as amended, every employer is obliged to set aside sufficient material and personnel resources to implement risk prevention measures at his facilities. These risk prevention measures thus form an integral and equal part of all employers' activities at all management levels. In other words, managers at all management levels are responsible for them within the scope of their tasks. Every employer is obliged to keep records of the search for and the evaluation of risks.

Act no. 258/2000 Coll., on the protection of public health and on the amendment of some related acts, as amended, regulates the procedure for detecting an infectious disease incidence, including obligations affecting natural and legal persons as well as natural persons running a business. The regulation concludes with a sanction mechanism, a definition of the merits of the offenses, including violations of the provisions governing vaccinations or non-compliance with special measures pursuant to Act no. 258/2000 Coll. The key provision is contained in art. 46 of Act no. 258/2000 Coll.

It should be noted that no legislation was prepared for the arrival of a pandemic. This applies both to the Labor Code and the so-called crisis laws. The Czech Labor Code lays down the basic regulation of working and wage conditions for employees and it is implemented by several special legal regulations. Act no. 240/2000 Coll., on Crisis Management and on the Amendments to Certain Acts, as amended (hereinafter only referred to as the 'Crisis Act') serves for these purposes and there is also the critical infrastructure, which was implemented into the Crisis Act in connection with Council Directive 2008/114/EC of 8 December 2008 on the identification and designation of European Critical Infrastructure and the assessment of the need to improve their protection.[32]

In art. 2, the Crisis Act defines the basic terminology.[33] Another critical infrastructure regulation is contained in the Government Regulation No. 432/2010 Coll., on the

32 The Celex no. of said directive is: 32008l0114.

33 In general, the critical infrastructure element 'means in particular a building, facility, facility or public infrastructure, determined according to interdisciplinary and sectoral criteria; if the critical infrastructure element is part of a European Critical Infrastructure, it shall be considered as a European Critical Infrastructure element.' To understand the context, it would be appropriate to add that the Crisis Act defines the critical infrastructure protection measures as 'measures to reduce the risk of a critical infrastructure element being disrupted' and that the critical infrastructure entity is 'critical infrastructure element operator; if it is the operator of a European Critical Infrastructure element, it shall be considered as a European Critical Infrastructure Entity'.

criteria for determining the critical infrastructure element, as amended. The Czech Republic government's resolution No. 140/2020 Coll. defines critical infrastructure entities employees as 'employees of critical infrastructure entities' according to art. 2 letter K) of the Crisis Act and these employees anticipate, within the scope of their work tasks, in providing for the critical infrastructure element functioning in the sense of Government Decree No. 432/2010 Coll., on the criteria for determining the critical infrastructure element, as amended by Government Decree No. 315/2014 Coll.[34]

In particular, the specific rules, set of duties and restrictions in relation to critical employees are defined by Government Resolution No. 377 with effect from 2 April 2020, as it:

> provides that critical infrastructure entities which are classified as employers in the sense of point III. Government Resolution No. 332 of 30 March 2020, on the adoption of a crisis measure, promulgated under No. 140/2020 Coll., may identify critical staff whose presence at the workplace is necessary to provide for the function of the relevant critical infrastructure element, to which the prohibitions and obligations set out in points I, II, and IV of Government Resolution No. 332 of 30 March 2020 will be applied.

With effect from October 5th 2020, a similar authorization is contained in the Government Decree UV 957:

> Critical Infrastructure Entities may designate critical staff whose presence at the workplace is required to provide for the functioning of the relevant critical infrastructure element to which prohibitions and obligations will apply.

In the case of the spread of the contagious COVID-19 disease, the public interest that the population be healthy is expressed by the existence of the merit of a crime of the spreading a contagious human disease according to art. 152 of the Criminal Code and by the existence of the merit of spreading a contagious human disease due to negligence according to art. 153 of the Criminal Code. Annex No. 1 to Government Order No. 453/2009 Coll. contains a closed enumeration of contagious human diseases. COVID-19 has also been added to this list.[35] If an employee breaches his/her duties disseminating thus COVID-19, he/she may, depending on the circumstances of the case,

34 Although Resolution no. 140/2020 Coll. was not formally repealed but supplemented by further Government Resolution No. 1185 in conjunction with Government Resolution No. 957, which defined critical infrastructure entities employees as employees whose presence at the workplace is required to provide for the relevant critical infrastructure element functioning and such persons are designated by the critical infrastructure entity in the sense of art. 2 letter K) Crisis Act.

35 The application on COVID-19 was sealed by Government Decree No. 75/2020 Coll. of 13 March 2020, amending Government Decree No. 453/2009 Coll. laying down, for the purposes of the Criminal Code, what are considered contagious human diseases, contagious animal diseases, contagious plant diseases and pests of commercial plants.

fulfill the merit of the negligent offense of spreading a contagious disease through negligence. If such an act is committed during another event seriously threatening the life or health of people, public order or property, the offender may be imprisoned for up to three years.

After almost one year, the Czech Parliament decided that the situation is severe and there is no hope to restore efficient healthcare without a COVID-19 testing. The respective statute was passed[36] and the government issued a few measures ordering a COVID-19 testing for all employees and majority of freelancers. Even so, the two-year period of the pandemic, it is possible to assess the effectiveness of Czech labor law as not being prepared for the arrival of the pandemic. The government has not decided to introduce an unambiguous regulation allowing employers to enforce non-compliance with anti-epidemiological measures directly at the workplace. The most egregious cases were eventually resolved through criminal prosecutions. Similarly, no consistent policy can be found on the obligation to vaccinate employees. Although the relevant regulation was eventually adopted—the newly elected government repealed it.[37] Thus, clear rules were eventually enforced only for the so-called key personnel, but there was no political will to enforce either disciplinary sanctions for non-compliance or mandatory vaccinations.

2.2. (Non-)obligatory testing

The employer is obliged to provide for a safe working environment. However, there's no labor law authorizing the employer to check upon the employee's health. This interpretation is backed by the wording of art. 106 of the Labor Code. Thus, there is no applicable private law provision that would permit an employer to impose an obligation toward an employee to be tested for COVID-19 regularly or even once. This is one of the fundamental principles stemming from the autonomy of the contractual will.

The obligation to present a negative test result to be admitted to the workplace, or rather to be permitted to work, can neither be enforced by the employer in the shape that he or she would define this obligation as a work-performance-related requirement. The reasons for this are the restrictions posed toward the employee as a contracting party, as well as prohibitions concerning reviewing the employee's health condition, discrimination due to health status reasons, and protection of the employee's personality. The employer may not decide him/herself whether it is required or appropriate to subject employees to COVID-19-testing, and at the same time s/he can neither assess their health condition in any other way, as he or she is

36 Act No. 94/2021 Collection on Emergency Measures Against COVID-19 (in Czech: *o mimořádných opatřeních při epidemii onemocnění COVID-19 a o změně některých souvisejících zákonů*).

37 On 10 December 2021, Decree no. 466/2021 Coll., amending Decree no. 537/2006 Coll., on vaccination against infectious diseases, as amended, was published in the Collection of Laws. The Decree entered into force on the day following its promulgation. The decree introduced mandatory vaccination against COVID-19 disease for persons over 60 years of age and selected professions from March 2022. The compulsory vaccination was abolished by Decree No. 22/2022 with effect before it could even begin.

simply not competent to do so. To be able to do so, employers need special legislation, or rather a binding decision made by the competent public authority.

Referencing to the obligation to provide for the safety and health of employees, the Ministry of Labor and Social Affairs of the Czech Republic published the interpretation that the employer is entitled to call upon his/her employees to undergo an examination at the occupational health service provider or at his/her general practitioner when returning from a COVID-19 affected area in particular, if it is justified in relation to the work performed or if the employer suspects that the employee is not qualified to perform the work.[38] In this interpretation context, we would like to point out that the Czech Ministry of Labor and Social Affairs has in no way been legally authorized to issue a binding opinion in the sense of art. 2, paragraph 3 of Act no. 1/1993 Coll. the Constitution of the Czech Republic, as amended, as well as art. 2(2) of the Charter of Fundamental Rights and Freedoms,[39] or rather art. 2 paragraph 1 of Act no. 500/2004 Coll. Administrative Procedure Code, as amended. This fact is important from the point of view of the legality principle, which also applies to so-called binding opinions, which condition further procedure in the relevant proceedings. These findings are also backed by correspondence practice in individual matters. When answering such individual questions, the Ministry of Labor and Social Affairs has repeatedly denied that it would be entitled to issue a binding interpretation of the given provisions from the Labor Code or the relevant implementing regulation.[40]

According to applicable regulations, the employer is not entitled to order employees to undergo a COVID-19 testing. The employer cannot straightforwardly request and enforce COVID-19 testing, nor can s/he derive legal consequences for the performance of work from such a fact. The fact that explicit legislation is missing and that protectionist jurisprudence has not yet given us solid hope that an employee's absence from work due to refusing to undergo a COVID-19 test could automatically

38 The given press release furthermore reads as follows: 'In this case, an extraordinary occupational medical examination at the occupational medical services provider is possible, i.e., in the sense of art. 12 of Decree No. 79/2013 Coll., On occupational medical services and on certain assessment care types.' Ministry of Health, 2020a.

39 The document was published as an appendix to Constitutional Act No. 23/1991 Coll. introducing the Charter of fundamental rights and freedoms as a constitutional law of the Federal Assembly of the Czech and Slovak Federal Republic and published under No. 2/1993 Coll. The Charter has been declared a constitutional law in Articles 3 and 112 of the Constitution.

40 The following notice is contained in these letters: 'Employees and employers are provided with basic information and counselling on labor relationships by the regional labor inspectorates (Act No. 251/2005 Coll., On Labor Inspection).' The competence, which is not included in the cited law, can neither be inferred even by judicial interpretation. As stated by the High Court in Prague in its decision from 24 June 1994 with docket file no. 6 A 59/93 (the decision was not published in any sort of official collection of court decisions): 'When interpreting and applying the law, the court must proceed based on what has been formulated by the legislature the Act, not on what he may have wanted to state but did not do so; when applying unclear, contradictory and interstitial provisions, the court is for sure obliged to use generally accepted rules of interpretation. However, it is not possible to interpret something that is not in the law, or to come to such a conclusion by interpretation'.

be considered an unexcused absence or an unpaid employee-related hindrance. This will always depend upon the circumstances of the case, as well as the reasons the employee refuses to undergo an employer-paid COVID-19 test. However, without adequate provisions, such a procedure cannot be explicitly recommended.

The Ministry of Labor and Social Affairs had been at least partially trying to remedy the lack by proposing that the employer send such an employee to an extraordinary preventive medical examination. However, at present, such a recommendation is completely unrealistic in several districts, as even the patients themselves cannot access their general practitioners without prior appointment, and the doctor's work frequently resembles telemedicine.

2.2.1. Temperature Measurement and Test Obligation

Apart from ordinary employees, there were different rules set up for the so-called critical infrastructure with indispensable employees demonstrated. After the initial surprise phase, the state decided to protect its personnel (the so-called indispensable critical employees) and critical infrastructure. Based on arts. 5 and 6 of the Crisis Act and under the resolution of the Government of the Czech Republic, a critical infrastructure entity was authorized[41] to identify so-called indispensable critical staff whose presence in the workplace is required to provide for the relevant element of critical infrastructure functioning and who are subject to increased reporting obligations regarding their health and the obligation to be re-tested for COVID-19 under certain circumstances. Making this resolution, the government amended the rights and obligations of critical infrastructure entities employees with effect from 30 March 2020.[42] The government has further ordered that the critical infrastructure entities

41 See Resolution no. 145/2020 Coll. of 1. April 2020. It is numbered 377 and its official title is 'On the adoption of a crisis measure (critical infrastructure entities) with effect from 2 April 2020. The Resolution of the Government of the Czech Republic No. 391/2020 Coll. of 30 September 2020, on the declaration of a state of emergency contains a similar authorization'.

42 The government prohibited that 'critical' employees, i.e., employees in critical infrastructure entities who do, while performing their tasks, contribute to providing for that the critical infrastructure element work, take leave during a state of emergency, except for quarantine-ordered persons. Furthermore, critical employees were also obliged to immediately inform the employer upon learning that they were in a so-called risky contact without adequate personal protective equipment, i.e., in direct contact with a person whose COVID-19 disease was confirmed. The government ordered that a critical employee showing no clinical symptoms who had a risky contact and whose work is indispensable, according to the employer's decision, to provide that the relevant element of critical infrastructure work which is operated by the relevant employer, to comply among other with these rules:
– take temperature measurements ahead of each shift immediately before starting work, and inform the superior about the temperature result and one's current state of health or any health problems,
– undergo a nasopharyngeal swab including a RT-PCR examination for COVID-19 five days after the risky contact, and at the same time a capillary blood rapid test to check for the presence of IgM and IgG antibodies, and
– if both aforementioned examinations are negative, continue working and undergo a second nasopharyngeal swab including a RT-PCR examination for COVID-19 fourteen days after the risky contact and at the same time a capillary blood rapid test to check for the presence of IgM and IgG antibodies.

operating a critical infrastructure element to fulfill several obligations in this regard, yet mandatorily testing all critical employees for COVID-19 is not yet included. This is also backed by the list of published recommendations by the Critical Infrastructure Association.[43] The Methodical Instruction issued by the Chief Hygienist of the Czech Republic on the single procedure for regional hygienic stations in deciding on ordering quarantine measures to persons who were in close contact with a person who had been diagnosed with COVID-19 via a laboratory examination, and whose employer has declared them to be persons who are indispensable, provide for operating the state's critical infrastructure, or ensure activities that are similarly indispensable, also does not call for general preventive testing.[44]

Furthermore, the government has also ordered that public health authorities and healthcare providers do not order a quarantine for critical employees not showing clinical symptoms who have come into risky contact and whose work is necessary according to the employer's decision to make the relevant critical infrastructure element operated by the employer work, if such an element is operated by the given employee. This shall be done if the employee and the employer concerned observe the aforementioned procedures and none of the tests performed is positive.

Based upon another resolution, the government has stipulated that critical infrastructure entities may designate critical staff whose presence at the workplace is required to provide for the functioning of the relevant critical infrastructure element to which prohibitions and obligations apply. Another provision was adopted via Government Resolution no. 1185.[45] However, this provision is less stringent, particularly as it only instructs designated critical staff to measure body temperature at the beginning of each shift immediately prior to commencing work.[46]

43 Chief Hygienist of the Czech Republic (2020): 'On the single procedure for regional hygienic stations in deciding on ordering quarantine measures to persons who were in close contact with a person who had been COVID-19 diagnosed via a laboratory examination and whose employer declared them to be persons indispensable,' decision of 29 September 2020, document fine no. MZDR 38651/2020-4/OES. Critical Infrastructure Association of the Czech Republic, 2020.

44 Ministry of Health, 2020b.

45 Published under No. 462/2020 Coll. Although Government Resolution No. 332 has not been formally repealed, there are reasonable doubts concerning its effectiveness. According to one of the interpretations, Government Resolution no. 332 (as well as Government Resolution no. 377) was to cease to have effect upon the state of emergency ending under which it had been declared, i.e., to end on 17 May 2020. However, the biggest problem is whether the Crisis Act allows that employees be ordered to be COVID-19-tested. Some of the doctrinal views support this by referring to the opinion that the Crisis Act provides for entirely replacing another (any) legal regulation, as it is a special regulation for crisis situations such as a state of war or emergency. Unfortunately, it is also true that the Crisis Act itself does not explicitly mind the existence of a pandemic. Given the absence of any other legal regulation, we tend to interpret Government Resolution No. 1185 not only in connection with Government Resolution No. 957, but also with Government Resolution Nos. 332 and 377.

46 Government Resolution No. 1185 instructs, inter alia, all critical employees, if they find that they have come into direct contact with a COVID-19 diagnosed person, while not wearing adequate personal protective equipment (which is understood as a risky contact), to immediately inform their employer thereof. The employer is then obliged to decide whether the critical

A critical employee violating the obligation to undergo a COVID-19 test represents a misdemeanor according to the Crisis Act. The crisis management body may impose a fine of up to CZK 20,000 on a critical employee when he/she commits such an act. Depending upon the circumstances of the relevant case, a critical employee may also have committed a criminal offense, i.e., spreading a contagious human disease, or spreading a contagious human disease due to negligence.

Yet neither the Crisis Act nor the implementing regulations provide that a critical employee is to or may be penalized by the employer for breaching the obligations imposed on a critical employee. This is due to the somewhat controversial legal basis for imposing the testing obligations on COVID-19. It is thus relatively risky to punish employees for these acts according to labor law regulations. If the given case refers to a critical employee violating his/her obligations under the Crisis Act and a crisis measure, then the employer is obliged to report the critical employee violating his/her obligations to the crisis management body and to wait for instructions from the crisis management body. If the critical infrastructure entity has a reason to believe that the employee is COVID-19 infected and is spreading this contagious disease intentionally or negligently, it is entitled to call upon the police of the Czech Republic to help and to prevent the spread of contagious human disease.

2.3. Volunteer Firefighters

There are 6,698 firefighting units (in CZ: JPO, an abbreviation of *Jednotka požární ochrany*) registered within the Czech Republic, 237 of which pertain to category JPO

> employee performing his/her work is necessary to provide for the function of the relevant critical infrastructure element operated by the employer in question. If it is not indispensable that the critical employee performs his/her work so that the relevant of critical infrastructure element operated by the employer concerned works, then the employer concerned must inform the locally competent public health authority which then orders the critical employee to quarantine. If the critical employee can work despite a potential COVID-19 infection, and if the critical employee's work performance is necessary to provide for the relevant critical infrastructure element functioning, then the relevant employer shall inform the locally competent public health authority and this indispensable critical employee shall, at minimum:
> – measure bodily temperature ahead of each shift immediately before starting work and inform the superior about the temperature measurement result and their current state of health or any health problems,
> – undergo a nasopharyngeal swab including a RT-PCR examination for COVID-19 five days after the risky contact, and at the same time a capillary blood rapid test to check for the presence of IgM and IgG antibodies, and
> – if both aforementioned examinations are negative, continue working and undergo a second nasopharyngeal swab including a RT-PCR examination regarding SARS-CoV-2 fourteen days after the risky contact and at the same time a capillary blood rapid test to check for the presence of IgM and IgG antibodies.
> Only if the result of both tests is negative, the critical employee shall continue performing work in the usual work mode. If the critical worker is diagnosed with any known clinical COVID-19 symptoms or if any of the test results is positive within 14 days from the risky contact, then the employer concerned shall inform the local public health authority, which will then order quarantine or isolation for that critical worker.

II, 1,356 to JPO III and 5,105 to JPO V.[47] In all, there are more than 67,149 volunteer firefighters (as of 2019). There were also further 3,013 firefighters in an employment relationship serving in company-internal firefighting units in the Czech Republic.

Given the nature of their activities, firefighters are in a dangerous environment, facing an increased risk of injury or death. When being deployed, firefighters are constantly exposed to adverse environmental impacts including various life-threatening dangers. The most serious cases include exposures to hazardous substances, high or low temperatures, combustion products, road work hazards, risks from working at high altitudes, electric shock hazards, infectious diseases, and many other hazards when rescuing people. When intervening in an extraordinary emergency, standard procedures commonly applied under usual conditions are frequently not abided by. This quite often refers to other than the use of technical means as listed in the instruction manuals, exceeding recommended limits, limited options of safety protection, etc.[48]

While professional firefighters are security forces members and are employed as well as properly secured for the case of an accident at work or an occupational disease, if a volunteer firefighter gets injured or dies, a problem arises. Volunteer firefighters are in various difficult legal relationships as far as their promoter is concerned (mostly corresponding to the municipality where they are). They are frequently carrying out this activity free of charge or for a symbolic fee in an employment relationship established by an agreement to complete a job. If such a firefighter gets injured or dies, the victim or his/her family receives little or no support.[49]

The compensation provided for a volunteer firefighter who is an employee and suffers a damage is regulated by Act no. 133/1985 Coll., On fire protection, as amended (hereinafter only referred to as the 'Fire Protection Act'), as well as by the Labor Code.

According to the opinion stated by the Ministry of Labor and Social Affairs of the Czech Republic, File no. 2009/60163-51 of 21.8. 2009, a volunteer firefighter who suffers a health impairment is entitled to seek reimbursement according to the cited provision art. 393 of the Labor Code and according to art. 29 par. 1 let. b) of the Fire Protection Act. If a volunteer firefighter is injured during his/her training or when being deployed, then the his/her insurance for the event of suffering a damage is primarily governed by labor law, if he/she is in an employment relationship.

47 These are different types of firefighters' units, which are divided according to the degree of readiness to intervene. Volunteer firefighters serve in all these units. An exception is the fire brigades set up at major or hazardous undertakings, which use the services of professional firefighters. However, these firefighters are hired and work under the Labor Code.

48 In 2020, firefighters were deployed more than 42,700 times, with the municipal volunteer firefighters participating in 31.5%, the company-internal firefighters in 5.4% and the company-internal volunteer firefighters in 0.5% of the cases.

49 Number of injured firefighters in recent years: 123 (in 2016), 209 (2017), 173 (2018) and 170 (2019). Czech Statistical Unit, 2020 issued this as a supplement to its magazine 112, No. 3. The statistical finding has not been published as an art. it is a state report.

The security of an employee if he/she suffers from an occupational disease, or an occupational accident is still not being addressed by accident insurance within the Czech Republic, but by the employment law regulations and the employer's liability for damages.[50] This is due to the institute of the employer's strict liability for the result—for the health impairment (damage) that an employee suffers while performing work tasks or in direct connection with it. The employer is liable even if another person causes the damage. To the extent that employer is liable for the damage, the employer is obliged to compensate the employee who has suffered an occupational accident or who has been diagnosed with an occupational disease for the loss of earnings, the pain suffered, and increased difficulty in socializing; furthermore, the employer must compensate treatment costs and possibly also material damage. If an employee dies as the result of an occupational accident or disease, the employer is obliged to provide the following, within the scope of its responsibility: compensate purposefully incurred treatment costs, appropriate funeral expenses, expenses for supporting the surviving spouse, a one-off compensation for the survivor, and possibly a material damage compensation.[51]

According to art. 271p par. 1 sentence 1 of Labor Code, the following applies:

> An employee who suffers…in a fixed-term employment relationship or when performing work under a fixed-term agreement to perform work shall be entitled to receive compensation for a loss of earnings only until the time when such an employment relationship is to end. When this period elapses, he/she is entitled for a compensation due to loss of earnings if it can be assumed, depending on the circumstances, that the affected person would have been employed further on.

Although the regulation in question governs only one of the claims of the injured employee, it is usually the financially most demanding one. The purpose of this regulation is to limit this entitlement to employees who are performing the gainful activity only occasionally or who for whom the gainful activity does not represent the main source of income, which is why they have entered into a fixed-term

50 Act No. 266/2006 Coll., On accident insurance, has not yet become effective as far as most of its provisions are concerned (cf. art. 99 cit. of the Act) and according to the decision made by the government, this will not happen in the future. See e.g., the statement of the Minister of Health, 2012.

51 Based upon the Soviet model, the legal regulation in question was introduced virtually at the beginning of the 1960s has not changed even when the new Labor Code was adopted. Yet at present, it no longer corresponds to the fundamental changes in society, nor those in the national economy that have taken place since then. With effect from 1 January 1993, a new statutory insurance for damage caused to employees due to an occupational accident or an occupational disease was introduced in 1993, but this (then declared) temporary measure only mitigated the problem, without actually solving it. Unfortunately, the current regulation shortcomings are even more significant when it comes to volunteer firefighters. In this case, a volunteer firefighter's activities is regulated only via an agreement to complete a job.

employment relationship only on an occasional basis and would no longer work in that employment relationship, even if the occupational accident had not occurred. For this reason, it is also necessary to include employees performing work based on an agreement to complete a job, although this type of employment relationship is not explicitly mentioned in the Labor Code. Otherwise, an absurd situation would arise where employees working quantitatively for the potentially shortest number of working hours would enjoy greater security than employees working on a fixed-term basis, or an employment-law relationship established by agreement to perform work.

An employment relationship or another employment relationship type agreed for a definite period, which is usually the case with voluntary firefighters, terminates irrespective of the situation in which the employee finds himself. In such a case, the right of an employee to receive compensation for a loss of earnings is conditional by the proof that, if the occupational accident or the occupational disease had not happened, he/she would have been employed further on. However, this is a complicated issue due to the secondary nature of such an employment, i.e., the dependence of the agreement to complete a job on the budgetary possibilities of the municipality and the amount of this income. Current Supreme Court jurisprudence also offers some interpretation space in this regard. The entitlement to compensation for a loss of earnings also arises when a volunteer firefighter's further employment can only be assumed depending upon the circumstances.[52] We can reasonably presume such a situation only when considering the circumstances that existed at the time of the accident, indicating whether the employee had entered into a fixed-term employment relationship only occasionally (and anyway would not have worked after the agreed period), or whether the gainful activity was the primary source of income and the employee had been working regularly until then (and it can therefore be assumed, depending upon the circumstances, that s/he would have been re-employed after the termination of the employment relationship).

> If a worker succeeds in proving this fact, compensation for the loss of earnings may be granted up to the amount of the average earnings which he achieved permanently at the organization in which he suffered an occupational accident.[53]

The significant problem consists in the difficulty to prove the earning loss amount. In accordance with applicable jurisprudence, when determining the average earnings prior to suffering the damage, we cannot base this upon the income the injured party received from the former employer, if it is about the right to compensation of damages for a period following the time when the employment relationship ends

52 See the Czech Supreme Court judgement of 6. 6. 2006 file no. 21 Cdo 2023/2005.
53 Assessment of the NS ČSR (Supreme Court of Czechoslovakia) from 27. 1. 1975, file no. Cpj 37/74 (R 11/1976, pp. 51–52).

between the employee and the employer, who is liable for the loss, and if the employment relationship ends for reasons other than the impact of an occupational accident. The Supreme Court ruled that in such a case, there is a causal connection between the occupational accident and that loss of earnings based on the average earnings that the injured employee would have demonstrably achieved from another employer for the work he would have done for him if the accident had not occurred.[54] In such a case, the injured employee is essentially forced to prove how much he would have been paid for work done for another employer if he had not suffered the occupational accident or an occupational disease. The situation becomes much simpler if the injured employee becomes a job seeker. In such a case, the law defines that the earnings received after an occupational accident shall be regarded as equaling the minimum wage earned. However, if an employee had already been receiving compensation for a loss of earnings after the end of an incapacity to work prior to becoming a jobseeker, he shall be entitled to a compensation equaling the amount to which he became entitled during the employment relationship.

3. EU Law

The Czech labor law must respect EU law as the Czech Republic has become a part of the EU. According to art. 10(a) of the Constitution, declared international treaties are part of the Czech legal order when they have been approved by the Czech Parliament, ratified by the president, and are binding for the Czech Republic. International treaties supersede national law if there is a conflict (in the case of 'self-executing treaties'). That means if there is a differing regulation in the international treaty and in the national law, the regulation of the international treaty prevails.[55] Two principles govern the relation between Czech law and EU law which has been derived by the CJEU—the principle of priority and the principle of direct applicability.[56] However, the application of both principles is limited by the tenant of subsidiary as it is set down in art. 4 and 6 of the Treaty on the Functioning of the European Union. EU law is a specific part of Czech law, because sources of EU law which are directly applicable in all Member States cannot be amended or reproduced by the Czech legislature. Such

54 See the judgment of the Czech Supreme Court of 10. 12. 2002, file no. 21 Cdo 1185/2002 (R 64/2003).

55 Another important rule is incorporated into art. 95, paragraph 1 of the Constitution. According to this article, a judge decides cases bound by an international treaty, which is a part of the legal order. As proof see, Land Court in Prague decision of 29 January 1999, 6 A 85/97. Land Court in Prague, 2002.

56 The ECJ ruled in the case *Commission* v. *French Republic*: 'Since the provisions of art. 48 (of the EC Treaty, today art. 39) and of Regulation no. 1612/68 are directly applicable in the legal order of every Member State, and Community law has priority over national law, these provisions give rise, on the part of those concerned, to rights which the national authorities must respect and safeguard and as a result of which all contrary provisions of internal law are rendered inapplicable to them.' See C-167/73 *Commission* v. *France*.

sources of EC law (e.g., regulations) come into force solely by virtue of their publication in the Official Journal of the European Union.[57]

3.1. Working Time

The provisions concerning working time and rest periods primarily concentrate on the protection of employees against exploitation of their labor; only to a lesser extent does it aim to provide an employer with an experienced organization of working time. Thus, the Labor Code prescribes the maximum limits of working time and minimum limits of rest periods, which were to be adjusted in accordance with EU law. Statutory regulations are universally applicable and cover the whole territory of the Czech Republic. Due to historical reasons, collective bargaining has a significantly weaker position compared to Western Europe. If there are collective agreements, they are mostly negotiated at the plant level. Generally speaking, social partners are not very active in working time matters. Therefore, the position of the state remains to be very strong despite it being more than 25 years since the end of the Communist regime in the former Czechoslovakia.

As in the German regulation, the Czech regulation also distinguished on-call time at the workplace, which was not considered to be working time. This has changed thanks to the case law of the CJEU, in particular cases like Pffeifer[58] or Jäger.[59] Vorel was a Czech version of those cases.[60] Following these decisions, the Czech legislature regulated that on-call time held at the workplace is considered working time. According to Section 78 para. 1 Lit. A of the Labor Code, working time is defined as a period either when an employee is required to render service for an employer or when an employee is ready to work under the employer's supervision at the workplace. Hence, all the time in which an employee is present at the workplace is considered working time even when the employee is not working (e.g., when a doctor is on call but not actually working in the hospital).

An employee may contract an agreement with an employer for shorter working hours. The Labor Code does not lay down reasons, but parties usually make such agreements because of an employer's operational imperatives or due to an employee's health or other private problems. Such an agreement regarding shorter working times may be contained within the employment contract or within a separate contract (or at any later time during the employment relationship). Provided an agreement on shorter working time is reached, the employee's duty to perform the agreed work and the corresponding

57 See CJEU Cases C-93/71, Orsolina Leonesio v. Ministero dell'agricoltura e Oreste; C-39/72 Commission of the European Communities v. Italian Republic; and C-34/73, Fratelli Variola S.p.A.v. Amministrazione italiana delle Finance. The ECJ inferred in Case C-39/72 that all methods of implementation are contrary to the EC Treaty because they would result in the creation of an obstacle to their direct effect and simultaneous and uniform application in the whole European Community.

58 CJEU judgment of 5 October 2004, Bernhard Pfeiffer et al., cases C-397/01 to C-403/01.

59 CJEU decision case C-151/02, Landeshauptstadt Kiel v Jaeger, and the decision in the joint cases C-397/01 to C-403/01).

60 CJEU C-437/05.

duty of the employer to assign the employee work during the whole working time (set forth in the Labor Code) are restricted only to the stipulated period of working time. The shorter the time an employee renders his/her service, the lower is his/her remuneration. Such an employee shall not be required to work overtime but may agree to do so.

Unless there is an enforceable contract that determines working time in another way, the employer is authorized to set down and change the length and distribution of working time. The distribution of working time involves particular issues concerning the beginning and end of shifts on individual workdays, the determination of breaks, the division of the workday, and the distribution of working time over a certain number of days. According to Section 99 of the Labor Code, an employer shall consult with trade unions in advance regarding collective measures concerning working time. In distributing working hours, the employer shall consider such factors as the capacity of public transportation facilities, occupational safety, and public interest.

The Labor Code distinguishes two basic work regiments: the regular regiment of working time and the irregular regiment of working time. After the most recent amendments, the regulation is rather unclear on these points. However, the following distinction can be derived from the Labor Code: the regular regiment of working time is applied when an employee renders service for the same length of working time in every work week. If an employee's hours vary in different weeks, the irregular regimen of working time is used.

One of the real (not simply proclaimed) changes that the Labor Code of 1 January 2007 brought was the establishment of the working time account. This account is another way of planning working time and can only be used by an employer who is not linked to a public budget. The core of the working time account lies in the definition of an account period—a period throughout which the working time account will be applied toward employees. Employees working under the umbrella of a working time account must render service. However, they may be paid according to wage rates set, to a certain degree, independently from the work performed. Within this account period, the employee can be given work above or below the normal working hours—this can happen without the previous consent of the employee. If there is no collective agreement that contains a stipulation for a longer stretch of time, the settlement period may last for a maximum of 26 subsequent weeks. However, a collective agreement can only define the settlement period for a time of up to 52 subsequent weeks. The maximum limits for the working time account are mandatory.

The working time account is advantageous for the employer. By introducing it, the employer can not only be more flexible with the working time in response to his/her needs, but the employer can also save money (e.g., through deferred payments and a different conception of overtime). A clear disadvantage is insufficient legal regulation, the absence of judicial decisions, as well as higher administrative costs regarding proof of working time and salaries. Although the working time account can be substituted to a certain extent, it is not possible to reach effects comparable to the possibility to demand a lower amount of work than the set weekly working time or other assessments of impediments on the employer's side.

3.2. Not Enough Time

Some branches of the Czech economy have always had problems with strict labor law provisions on limited working time. Understaffed hospitals pushed the legislature to waive EU based limits for 2008–2013. The Czech legislature made use of an article from directive 2003/88/ES, which enables a member state to alter the maximum weekly working time of 48 hours under certain conditions. Further regulations concerning overtime work were also introduced.[61] During COVID-19 time, the legislature decided to not to react, and we can only guess how healthcare providers managed to keep working time records in undermanned facilities.

A similar problem relates to professional firefighters who were lodged to CJEU.[62] In said case, a firefighter was forced to remain ready to participate in action within two minutes from the call. However, the employer, being a legal entity founded and controlled by Prague, classified that period as breaks in work[63] and enjoyed for it a wage-free legal regime. The Ministry of Labor and Social Affairs answered the CJEU's request for opinion that the employer shall not demand the performance of work within breaks, but he or she may insist on the obedience of instructions concerning occupational safety. In September 2021, the CJEU held that those breaks constitute 'working time' within the meaning of EU law.[64] In October 2021, the Constitutional Court of the Czech Republic abolished the relevant decisions of the civil courts (the Supreme Court's decision included), holding as a matter of law that there was a violation of the right to fair remuneration in relation to the employer's requirement to be available during break times.[65]

In 2022, the Czech Republic faces a record number of proceedings for breach of the obligation to communicate properly and for breach of the obligation to implement EU directives.[66]

4. Conclusion

The Labor Code of 2006 and its amendments enacted following years introduced several rewritten or new regulations that increased the flexibility of working time (e.g., working time account, fixed-term contracts or offsets against the employee's wages).[67] Apart from those regulations concerning working time, the government has not met its obligation to implement the principle of flexicurity in the law yet.

61 Act No. 294/2008 Sb. effective from 01.10.2008.

62 C-107/19 Dopravní podnik hl. m. Prahy (Transportation Facility of Prague).

63 The employer decides the beginning and end of breaks in work after consultations with the respective trade union organization. Breaks in work are considered an example of periods of rest.

64 CJEU judgment of 9 September 2021, C-107/19.

65 Constitutional Court judgment of 18 October 2021, docket file No. II.ÚS 1854/20.

66 See https://ec.europa.eu/ (Accessed: 17 February 2022).

67 However, it was not a new regulation. It was only over time that the period for which fixed-term employment could be concluded was substantially extended. From the original 2 years to up to 9 years.

Generally, we cannot say that the concept of 'flexicurity' has been fully recognized by Czech labor law. Nevertheless, it is possible to highlight some specific rules that have led to a greater flexibility in Czech labor law. For example, regulations concerning fix term contracts and temporary agency work.[68]

However, the real transformation of Czech labor law took place during the pandemic and subsequent ongoing war in Ukraine. Although formally not so much has changed in the current labor law regulation, society has conceived a completely different understanding of homework. Despite the explicit regulation in the Labor Code, according to general practice, the employer is entitled to order the employee to work at home. In the context of the war in Ukraine, the regulation of the so-called labor market test was broken. Thanks to the invocation of union temporary protection and a set of new Czech statutes, tens if not hundreds of thousands of Ukrainian refugees were granted as a overnight success the right to work on the Czech labor market in a form equal to EU citizens; something that was otherwise impossible to enforce for decades.

Major problems have emerged in occupational health and safety. When an adequate regulation is missing, employers are unable to provide for a safe working environment. Given the current legislation, an employer simply cannot require employees to measure their temperature, undergo a COVID-19 test, or work at home. The inspiration for amending labor law is the crisis law, where, based on a government resolution, critical employees were required to measure their temperature and communicate the temperature measurement result to their employer.[69] Critical staff who were reported—based upon an epidemiological survey—that they had got into close contact with a person who had been diagnosed with COVID-19 are classified into the groups of indispensable and dispensable, based on their work, and this decision is made by the critical infrastructure entity. Indispensable critical staff, who must continue performing their work, must comply with increased testing and reporting obligations.

Given the absence of the right to order the appropriate crisis measures according to the Crisis Act, in the case of critical employees is it not possible to order compulsory vaccination, which obviously poses a problem, so the question is whether employers should not be offered a solution for what to do with employees who do not want to be vaccinated, although otherwise their safety at the workplace cannot be provided for.

Especially last year revealed that the compensation for voluntary firefighters who suffer an injury is entirely inadequate and requires changes to be able to provide for

68 Again, temporary agency work was already regulated in the previous Labor Code (Act No. 65/1965 Coll.) since 2004. The change came with the new Employment Act (Act No. 435/2004 Coll.). On the other hand, the conditions of temporary agency work have undoubtedly changed with the Labor Code and work agencies were on the winning side of those new regulations.

69 This is due to the Resolution of the Government of the Czech Republic No. 140/2020 Coll. of 30 March 2020 No. 332, on the adoption of a crisis measure, or rather with effect from 17 November 2020 from 00:00 by Government Resolution No. 1185 published in the Collection of Laws under No. 462/2020 Coll.

occupational safety and health of firefighters who diligently, voluntarily, and constantly expose their health to hazards to rescue people at risk. Given the analysis of legislation and decision-making practice[70] we have carried out, the most appropriate way seems to be to define within the relevant legislation that volunteer firefighters do not to undergo training nor be deployed as municipal employees, but to consistently act as volunteer firefighters performing this activity free of charge, as in this case, the state is obliged to provide for compensation for the damage they suffer as if they had suffered it in their main employment, where they earn their living.

This paper examines the level of implementation of flexicurity in the Czech labor law. One of the basic principles the new Labor Code of 2006 should have been founded upon was the principle called freedom of contract. Because of this rule, both the employer and employee should have been permitted to establish, according to their needs, the mutual rights and duties of their labor relationship to a greater extent than before. However, the final and approved version of the respective sections in 2006 did not satisfy anybody. It was too complicated and ambiguous. Due to a complaint, the principle of the freedom of contract has been examined by the Constitutional Court of the Czech Republic. The Constitutional Court repealed certain provisions and profoundly simplified the principle. Nevertheless, the Labor Code remains very protectionist toward employees.

Acknowledgement: This article was written and published thanks to the financial support of the grant project COOPERATIO/LAW.

70 The research was carried out in the years 2020 and 2021. Legal regulations, court decisions and decision-making practice of the fire brigade were analyzed. The results of the research were taken over by the Ministry of Labor and Social Affairs for further use. Due to a decision of the Ministry, the results of the research cannot yet be published.

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| Chapter 7 |

Poland: Employment Relationship from the Perspective of Individual, Collective Labor Law and EU Law

Michał BARAŃSKI

ABSTRACT

In Poland, labor law is now an independent branch of law (within a uniform legal system). The employment relationship is a central concept in Polish labor law. This relationship has a specific legal character, which distinguishes it, e.g., from civil law, administrative law, and criminal law relationships. In the Polish legal order, employment does not must have an employee character (within the employment relationship). This chapter is devoted to Polish national regulations concerning employment contracts and collective labor agreements, with particular emphasis on their power to shape legal relationships. The content of the chapter shows the relationship between the individual and collective labor law. An analysis has been made of the compliance of Polish regulations on employment relationships with EU law. It also presents selected current regulatory issues of Polish labor law through the prism of issues concerning the formative power of an employment contract and a collective agreement (in terms of the impact of COVID-19 and automation on employment relationship regulations).

KEYWORDS

employment contracts, collective agreements, Poland, labor law, EU law, COVID-19, automation

1. Place of Labor Law in the Polish Legal System

In the current Constitution of the Republic of Poland, the notion of work has been included in various contexts and meanings, with the notion generally being broader than 'work' as understood in the Polish Labor Code.[1] According to art. 24 of the Constitution, work (of any kind) is under the protection of the Republic of Poland and the State exercises supervision over the conditions of work.

1 Constitution of the Republic of Poland of 2 April 1997, Journal of Laws of 1997, no. 78, item 483 as amended; Act of 26 June 1974—Labor Code, consolidated text, Journal of Laws of 2020, item 1320, as amended, hereinafter referred to as KP (translation of Labor Code: Jamroży, 2019, with the exception of the translation of art. 22 §11 KP—own translation). See also Sobczyk, 2013, pp. 65–67.

Barański, M. (2022) 'Poland: Employment Relationship from the Perspective of Individual, Collective Labor Law and EU Law' in Jakab, N. (ed.) *Fundamentals of Labor Law in Central Europe.* Miskolc–Budapest: Central European Academic Publishing. pp. 163–182. https://doi.org/10.54171/2022.nj.fullce_8

In Poland, labor law is currently an independent branch of law (within a uniform legal system), separate inter alia from civil law and administrative law. The subject of labor law does not include social insurance, although there are close relationships between labor law and social insurance law. At the same time, it should be stressed that labor law has quite strong relationships with civil law, from which it is partly derived. In accordance with art. 300 KP 'in cases not regulated by the provisions of labor law, the provisions of the Civil Code apply accordingly to an employment relationship, provided they are not contrary to the principles of labor law.'

The Labor Code contains a legal definition of labor law itself, formulated, however, only for the purpose of this normative act. Labor law includes the provisions of the Labor Code and the provisions of others laws and subordinate legislation setting out the rights and duties of employees and employers, as well as provisions of collective labor agreements and other collective agreements, regulations, and statutes based on the law and determining the rights and duties of the parties to an employment relationship (art. 9 §1 KP). If an employment relationship concerning a specified category of employees is regulated by special provisions, the provisions of the Labor Code apply to the extent not regulated by those provisions (art. 5 KP). Many acts separately define employees' status (the so-called employee pragmatics). These regulations govern the employment relationships of such categories of employees as seafarers, teachers, academic teachers, local government employees, court and prosecutor's office employees, foreign service employees and state office employees.

According to art. 22 §1 KP, 'By establishing an employment relationship, an employee undertakes to perform work of a specified type for the benefit of an employer and under his supervision, in a place and at the times specified by the employer; the employer undertakes to employ the employee in return for remuneration.' It is accepted in the literature that labor law is a set of legal norms governing subordinate employment relationships and other legal relationships inherent in them.[2] This specific obligatory relationship, which is the employment relationship, is a central concept in labor law. It is precisely the criterion of the subject of regulation that makes it possible to distinguish labor law as a separate branch of law. It is common in both jurisprudence and literature to contrast employment relationships with other workers' work.[3] The employment relationship, as a legal relationship governed by labor law, has a specific legal character that distinguishes it, for example, from civil law relationships,[4] administrative law relationships (work relationships in which officers of militarized formations remain in connection with the performance

2 Wyka, 2017, p. 171. See also Szubert, 1980, pp. 7–9.

3 More on this subject Musiała, 2011; Gersdorf, 2013; Baran, 2015a.

4 This division is, for example, clearly visible in the regulations on the employment of temporary employees. A temporary work agency hires temporary employees based on an employment contract for a definite period. However, the agency may also, based on a civil law contract, direct persons who are not employees of such agency to perform temporary work (art. 7 of Act of 9 July 2003 on the employment of temporary workers, consolidated text, Journal of Laws of 2019, item 1563, as amended).

of a specific service), and criminal law relationships (work under conditions of compulsion). In the Supreme Court's view, the work does not have to be of an employee nature.[5] According to K.W. Baran, 'Non-employment work includes all non-incidental provision of work except for classically conceived employment of a legal employee nature.'[6]

The structural features of an employment relationship are voluntary commitment, the need to perform work personally, the aforementioned employee subordination,[7] the employer's risk,[8] the remuneration of work and continuity of work.[9]

Labor law has two primary functions characteristic of this branch of law: a protective function and an organizational function.[10] The protective function of labor law stems from the need to establish, at the level of universally binding legislation, specific guarantees and benefits for employees, since the employee, as the weaker party in the employment relationship, cannot safeguard his professional and social interests on his own.[11] The protective function manifests itself primarily in the principle of preference for the employee (described later in this chapter), as well as the general and specific protection of the permanence of the employment relationship, wage guarantees and compulsory annual leave (labor law defines a minimum of rights and a maximum of obligations for the employee). The organizational function of labor law, on the other hand, is

> to ensure the efficient organization of teamwork processes by defining the powers of management and the duties of employees, the legal measures to counteract their violation, as well as the role of the representative bodies of the workforce and the forms of their interaction with the management of workplaces.[12]

5 Judgment of the Supreme Court of 7 October 2004, II PK 29/04, LEX no. 145435. See also judgment of the Supreme Court of 9 December 1999, I PKN 432/99, LEX no. 39601.

6 Baran, 2015b, p. 22.

7 It is expressed primarily in the ability to give work instructions to an employee.

8 The employer bears the negative consequences of the employee's improper work performance. Moreover, in situations specified in the labor law, the employer is obliged to tolerate the employee's absence from work and release the employee from the obligation to provide work (often with retention of the right to remuneration). The employer has specific obligations under the Act of 4 March 1994 on the company social benefits fund (consolidated text, Journal of Laws of 2021, item 746, as amended). As a rule, the employer is also obliged to pay remuneration in cases of disruptions in the functioning of the workplace (situations of over- or under-employment, as well as the inability of employees to provide work). The negative consequences of economic events cannot in principle be shifted to the employee.

9 Work within the framework of an employment relationship involves the performance of specific activities at repeated intervals during a permanent bond between the employee and the employer. The employee is also obliged to act diligently throughout the work process.

10 Ćwiertniak and Salwa, 2017, p. 476.

11 See also judgment of the Constitutional Court of 18 October 2005, SK 48/03, OTK z 2005 r., no. 9/A, item 101; judgment of the Constitutional Court of 24 October 2006, SK 41/05, OTK z 2006 r., no. 9/A, item 126.

12 Szubert, 1971, p. 567.

Thanks to this function, employers can maximize the effects of the work of subordinate employees without the risk of infringing the interests of these employees (e.g., through detailed regulation of working time systems). The indicated functions of labor law, although they perform different tasks, their directions of action are not opposed to each other.[13]

2. The Employment Contract as the Basis for the Employment Relationship

According to art. 2 KP, 'An employee is a person employed based on an employment contract, an appointment, an election, a nomination or a co-operative employment contract.' This list is enumerative (it is not possible to employ the employee on any other basis). Therefore, as it has been stressed earlier, among others, persons employed under civil law contracts (e.g., under a contract of mandate) do not acquire the status of an employee, as they are employed under the so-called non-employment of the civil law type subject to the regime of civil law. Moreover, work under the conditions specified in art. 22 §1 KP is considered work based on an employment relationship, regardless of the name of the contract concluded between the parties (art. 22 §11 KP). Employment contracts cannot be replaced with a civil law contract where the conditions of the performance of work specified in §1 remain intact (art. 22 §1[2] KP). In its judgment of 7 June 2017, the Supreme Court emphasized that by the parties' will, the basis of work cannot be changed when the employee performs the activities specified in the contract falls within the regime of art. 22 §1 KP.[14]

The employment contract is the most common basis for the employment relationship.[15] It is a bilateral legal action, consensual (it comes into effect through the mere making of consensual declarations of intent), bilaterally binding, and pecuniary.[16] An employment relationship is established on the date specified in the employment contract as the date of commencing work, and if this date is not specified—on the date of the conclusion of the employment contract (art. 26 KP). The form and contents of the employment contract are, in turn, defined in art. 29 KP.

According to art. 25 §1 KP an employment contract is concluded for a trial period, for an indefinite period or for a definite period. The employment contract for a trial period not exceeding 3 months is concluded to check the qualifications of the employee and the possibility of his employment for the purpose of performing a specified type

13 Ćwiertniak and Salwa, 2017, p. 476.

14 Judgment of the Supreme Court of 7 June 2017, I PK 176/16, LEX no. 2300072. See also judgment of the Supreme Court of 14 September 1998, I PKN 334/98, LEX no. 37685. It should be noted here that the National Labor Inspectorate (the body established in Poland to supervise and control the observance of labor law) has the right to bring actions, and with the consent of the person concerned—to participate in proceedings before an labor court, in cases for determining the existence of an employment relationship (art. 10(1) point 11 of Act of 13 April 2007 on National Labor Inspectorate, consolidated text, Journal of Laws of 2019, item 1251, as amended).

15 Głowacki, 2018, p. 4.

16 Zieliński, 1986, p. 3.

of work (art. 25 §2 KP).[17] In turn, under art. 251 §1 KP the employment period based on an employment contract for a definite period time, as well as the total employment period based on employment contracts for a definite period concluded between the same parties to the employment relationship, may not exceed 33 months, and the total number of these contracts may not exceed three (however, the legislature provides for several exceptions in this respect). However, it is the employment contract for an indefinite period that fulfills the already mentioned protective function of labor law. This is because this contract realizes the rights and obligations of employees and employers in the most accurate way and is characterized by the strongest bond between the parties to the employment relationship.[18] This means that 'an employment contract for a definite period time should be an exception to the principle of employment of indefinite duration, to be used when objective circumstances are justifying the temporary employment.'[19]

3. The Collective Labor Agreement as an Autonomous Source of Labor Law

In the earlier fragments of this study, it has already been indicated that the Polish legislature includes within the conceptual scope of labor law, among others, collective labor agreements (art. 9 §1 KP). Autonomous (specific, peculiar) sources of labor law do not come from any state authority—they are created by social partners (collective labor agreements, other collective agreements) or by the employer itself (regulations, statutes). Each autonomous source of labor law has its statutory basis and determines the rights and obligations of the parties to the employment relationship.

According to the hierarchy of autonomous sources of labor law established in the Labor Code, the provisions of regulations and statutes may not disadvantage employees more than the provisions of collective labor agreements and collective agreements (art. 9 §2 KP). The provisions of regulations and statutes may not disadvantage employees more than the provisions of collective labor agreements and collective agreements (art. 9 §3 KP).

A collective labor agreement is a normative agreement (an agreement that is a source of norms).[20] In literature, it is emphasized that defining a collective labor agreement as a normative agreement means that within this category, two aspects may be distinguished—normative and contractual. Normativity is expressed: in the

17 According to art. 25 §3 KP it is possible to re-sign an employment contract for a trial period with the same employee: 1) if the employee is to be employed for the purpose of performing another type of work; 2) after a lapse of at least three years from the date of termination or expiry of the previous employment contract if the employee is to be employed for the purpose of performing the same type of work; in this case it is permissible to re-assign an employment contract for a trial period.

18 Judgment of the Supreme Court of 22 August 2018, III PK 66/17, LEX no. 2549369.

19 Judgment of the Supreme Court of 22 August 2018, III PK 66/17, LEX no. 2549369.

20 Dörre-Kolasa et al., 2017, pp. 856–857.

statutory empowerment of this act indicated in art. 9 KP, in the way its provisions function,[21] in the subjective scope of its impact (it is not limited only to the parties to the agreement, but also includes employees regardless of their trade union affiliation) and in the subjective scope (every collective labor agreement defines rights and obligations of the parties to the employment relationship).[22] The contractual aspect of the collective labor agreement, on the other hand, is mainly expressed in the procedure of creating this act (autonomous negotiations of the social partners), the provisions contained in its content defining the mutual obligations of the parties to the collective agreement, as well as the procedure of amending and terminating the collective labor agreement.[23]

The Labor Code distinguishes two types of collective agreement: single employer collective labor agreements (*zakładowy układ zbiorowy pracy*), to be concluded by employers and representative trade unions,[24] and multi-employer collective labor agreements (*ponadzakładowy układ zbiorowy pracy*), to be concluded by the appropriate statutory body of a multi-enterprise trade union, acting for the employees, and the appropriate statutory body of an employers' association, acting for the employers, on behalf of the employers united in the association.[25] The provisions of an enterprise agreement may not be less advantageous to employees than the provisions of the multi-enterprise agreement that covers them (art. 241^{26} §1 KP). Collective labor agreements must be concluded in writing, for an indefinite or a definite period (art. 241^{5} §1 KP). According to art. 241^{5} §3 KP prior to the expiry of the period of an agreement concluded for a definite period, the parties may extend its validity for a definite period, or recognize the agreements as concluded for an indefinite period.[26]

Through the registration obligation, the number of collective labor agreements can be determined. By the end of 2015, 8,032 single-employer collective labor agreements had been registered, covering nearly 1.8 million workers, of whom slightly above 1 million were employed in the public sector, and nearly 800,000 in the private sector.[27] At the same time, there were 86 multi-employer collective labor agreements covering 390,000 employees.[28] Currently, only 61 multi-employer collective labor agreements remain in the ministerial register.[29] Only a minority of employees in

21 See further sections of the chapter on art. 18 KP and art. 2411^{3} KP.
22 Dörre-Kolasa et al., 2017, p. 856 and the literature referred to therein.
23 Ibid.
24 According to art. 238 §1 point 2 KP 'For the purposes of the provisions of this Section [Section Eleven. Collective Labor Agreements—M.B.] a trade union representing employees includes a trade union of employees for whom an agreement will be concluded. This also applies to federations of trade unions comprising such trade unions, as well as national confederations of trade unions uniting trade unions or federations of trade unions'.
25 Czarzasty, 2019, p. 469.
26 Amendments to an agreement are introduced by way of additional reports. Provisions applicable to the agreement apply accordingly to the additional reports.
27 Czarzasty, 2019, p. 474
28 Ibid.
29 Ministerstwo Rozwoju, Pracy i Technologii, 2021.

Poland are covered by collective bargaining, which takes place largely at company or workplace level. As of 2018 collective bargaining in Poland can only be described as 'being in its death throes: it plays a marginal role, both in terms of the volume of collective agreements and the number of employees covered.'[30] A report by the European Trade Union Institute (ETUI) shows that the number of employees covered by collective labor agreements in Poland is among the lowest in the European Union. In 2018, only 18% of employees were covered by collective labor agreements.[31]

	2015	At present
Single-employer collective labor agreements	8,032	Data not available
Multi-employer collective labor agreements	86	61

4. The Relationship between Individual and Collective Labor Law

Systematizing the Polish labor law, one should distinguish the general part of labor law, which consists primarily of the issues of norms, sources, and labor law principles. Only then it is justified to distinguish particular sections of labor law: individual labor law, procedural labor law, and collective labor law. Individual labor law contains legal norms regulating the relationships between the employer and a particular employee. Closely related to this branch of labor law is procedural labor law, which regulates legal protection proceedings in labor relationships (individual labor dispute law). Collective labor law, in turn, contains the legal norms regulating the relationships between employers and entities representing the collective interests of employers and entities representing the collective interests of employees and between these entities and public authorities.[32]

Individual and collective labor law are not entirely separable. L. Florek notes that 'the legal regulation of individual employment relationships is not based only on statutory provisions, but also on autonomous sources of law created by the parties to collective employment relationships.'[33] It is an essential instrument of trade union influence on the content of individual employment relationships. As L. Florek adds, 'This applies especially to collective labor agreements, which are an institution of both individual and collective labor law'[34].

30 Czarzasty, 2019, p. 466.
31 Czarzasty, 2019, p. 478. Poland is the largest of the new EU Member States with a population of approximately 38 million.
32 More on this topic Florek, 2007a. An example of such a regulation is Act of 23 May 1991 on the resolution of collective disputes, consolidated text, Journal of Laws of 2020, item 123, as amended.
33 Florek, 2007b, p. 18.
34 Ibid.

Unlike individual labor law, collective labor law is characterized by a balance of the parties to collective employment relationships. Trade unions have been established to counterbalance the weaker position of employees against employers.[35] In this context, W. Sanetra emphasizes that the functional dependence of collective labor law on individual labor law speaks against its autonomization and shaping it as a separate branch of law.[36] In the thematic scope of the relationship between the individual and collective labor law, however, it is impossible to overlook the fact that essentially the entire Act of 5 July 2018 amending the Act on trade unions and certain other acts,[37] which is the implementation of the Constitutional Court's judgment of 2 June 2015, entered into force on 1 January 2019.[38] The amendment mentioned above brought about a significant (even fundamental) change in right of association in trade unions. At present, according to art. 2(1) of the Act of 23 May 1991 on trade unions the right to create and join trade unions is granted to persons performing paid work.[39] By a person performing paid work legislature means an employee or a person performing paid work on a basis other than employment relationship, if he does not hire other persons for such work, regardless of the basis of work, and has such rights and interests related to the performance of work that may be represented and defended by a trade union (art. 11 point 1 UZZ). Thus, in principle, also persons working under civil law contracts and the self-employed gained the full right of association. In the judgement mentioned above, the Constitutional Tribunal stated that the obligation on the legislature to implement the freedom of association in trade unions must consist of granting the possibility to establish unions and join them to all persons who, on constitutional grounds, may be classified as workers (in the broad sense). At the stage of public consultations of the draft of the amendments mentioned above, it was emphasized that granting the status of a trade union to an organization that does not associate any employee does not consider the specific nature of labor law.[40] However, it should be stressed that the attribute of a trade union organization, although related to the scope of individual labor law, does not prejudge the exclusivity of the tasks carried out by trade unions under labor law.[41] At the same time, it is rightly argued in the literature that although the expansion of the right of coalition on the grounds

35 Florek, 2007b, p. 17.

36 Sanetra, 2007, p. 42.

37 Act of 5 July 2018 amending the Act on trade unions and certain other acts, Journal of Laws of 2018, item 1608.

38 Judgment of the Constitutional Court of 2 June 2015, K 1/13, Journal of Laws of 2015 r., item 791.

39 Act of 23 May 1991 on trade unions, consolidated text, Journal of Laws of 2019, item 263, as amended, hereinafter referred to as UZZ.

40 Opinia w sprawie projektu ustawy o zmianie ustawy o związkach zawodowych oraz niektórych innych ustaw z dnia 2 sierpnia 2016 r. Available at: http://legislacja.rcl.gov.pl/docs//2/12283551/12343252/ 12343255/dokument254231.pdf (Accessed: 13 June 2021).

41 Zestawienie uwag do projektu ustawy o zmianie ustawy o związkach zawodowych oraz niektórych innych ustaw zgłoszonych przez reprezentatywne organizacje pracodawców w trybie art. 16 ustawy o organizacjach pracodawców. Available at: http://legislacja.rcl.gov.pl/docs//2/12283551/12343252/ 12343255/dokument255874.pdf (Accessed: 13 June 2021).

of collective labor law was necessary, the specific regulatory solutions raise a lot of interpretative doubts. B. Mądrzycki rightly notes that the main problem is that 'the legislature still does not take any real steps to organize the forms of employment.'[42]

It should also be stressed that because of the amendment as mentioned above, according to art. 21(3) UZZ the provisions of section eleven of the Act of 26 June 1974—the Labor Code (entitled 'Collective Labor Agreements') shall apply accordingly to persons other than employees who perform paid work and their employers, as well as to organizations uniting these entities. At present, therefore, 'non-employee' collective labor agreements can be concluded for a vast range of persons in paid work outside the employment relationship.

5. Current Regulatory Issues of Polish Labor Law Through the Prism of Issues Concerning the Shaping Power of the Employment Contract and the Collective Labor Agreement

5.1. Introductory Remarks

The most important consequence of qualifying a collective labor agreement as a provision of labor law is applying to the provisions of such an agreement, defining the rights and obligations of the parties to the employment relationship, of the special mechanism resulting from art. 18 KP. The Polish Labor Code establishes in this provision the principle of privilege of the employee, according to which the provisions of employment contracts and other acts based on which an employment relationship is established may not disadvantage an employee more than the provisions of labor law (art. 18 §1 KP). Any provisions of these contracts and acts defined that are less favorable to an employee than the provisions of labor law are invalid; the appropriate provisions of labor law will apply instead (art. 18 §2 KP). The principle of privilege of the employee sets limits on the parties' freedom to the employment relationship to shape their mutual rights and obligations. In its judgment of 5 October 2016, the Supreme Court indicated that the essence of the regulation of art. 18 §1 and 2 KP is to ensure that the employment contract does not violate the standards arising from the provisions of the labor law, while at the same time the parties are free to shape the terms and conditions of employment in the contract in a manner more favorable to the employee. These more favorable contractual provisions 'may introduce into the employment relationship employee rights to an extent greater than that provided for by the labor law, but they may also establish a right to benefits not provided for by those provisions.'[43] On the other hand, the principle of privilege of the employee

42 Mądrzycki, 2021, p. 37. See also Duraj, 2020, pp. 67–77; Barański and Gredka-Ligarska, 2018, pp. 24–39.

43 Judgment of the Supreme Court of 5 October 2016, II PK 205/15, LEX no. 2165563.

cannot be reduced to a simple relation to resolving doubts in favor of the employee because a principle of this content cannot be derived from labor law provisions.[44]

Through the prism of the issues concerning the formative power of the employment contract and the collective agreement, mention should also be made of art. 2411[3] §1 KP, according to which upon the collective labor agreement entering into force, more advantageous provisions of an agreement will, by operation of law, replace the conditions of an employment contract or of other forms of employment that results from existing provisions of labor law. According to art. 2411[3] §2 KP the provisions of an agreement that are less advantageous to employees will be introduced by notice of termination of the current conditions of an employment contract or of other forms of employment. Notice of termination of the current conditions of an employment contract or of other forms of employment is not subject to provisions limiting the possibility of notice of termination of the current conditions of an employment contract or of other forms of employment.

5.1.1. COVID-19 and Its Influence on the Employment Relationship

In the current legal state in Poland, there are several anti-crisis regulations related to preventing, counteracting and combating COVID-19, which are often controversial in terms of changes in labor law and directly affect the situation of employees.

Pursuant to art. 15g(11) of the Act of 2 March 2020 on special solutions related to preventing, counteracting and combating COVID-19, other infectious diseases and crisis situations caused by them,[45] it is possible to conclude an collective agreement specifying the conditions and procedure for performing work during the period of economic work stoppage or reduced working hours. It refers to the status of employees, but its personal scope may also include persons working outside an employment relationship, for example, under civil law contracts and the self-employed[46].

The employer concludes the aforementioned collective agreement with a representative trade union organization or with employee representatives (if there is no trade union at the workplace).[47] The agreement shall specify at least: 1) the occupational groups covered by the economic standstill or reduced working hours; 2) the reduced working hours applicable to employees; 3) the period for which the solutions concerning the economic standstill or reduced working hours apply (art.

44 Judgment of the Supreme Court of 22 August 2018, III PK 66/17, LEX no. 2549369.

45 Act of 2 March 2020 on special solutions related to preventing, counteracting, and combating COVID-19, other infectious diseases and crisis situations caused by them, consolidated text, Journal of Laws of 2021, item 2095, as amended, hereinafter referred to as the Anti-Crisis Act.

46 Baran, 2020, p. 194.

47 The employer shall forward a copy of the collective agreement to the competent district labor inspector within five working days from the date of the conclusion of the agreement. Suppose a multi-employer collective labor agreement covered the employees employed by the employer. In that case, the district labor inspector should transmit information on the agreement on determining the conditions and procedure for performing work during the period of economic stoppage or reduced working hours to the register of multi-employer collective labor agreements (art. 15g[12] of the Anti-Crisis Act).

15g[14]) of the Anti-Crisis Act). From the perspective of the subject of the present study, the most relevant is the fact that, under art. 15g(13) of the Anti-Crisis Act, to the extent and for the period specified in the collective agreement as mentioned above, the terms and conditions of employment contracts and other forms of employment resulting from the multi-employer collective labor agreement and the single-employer collective labor agreement shall not apply. Therefore, the agreement under consideration is a unique mechanism for suspending the provisions of a collective labor agreement[48]. Moreover, under art. 15g(15) of the Anti-Crisis Act, art. 42 §1–3 KP also does not apply when determining the conditions and procedure of performing work in the period of economic stoppage or reduced working hours (this provision regulates the notice of termination of the existing work or remuneration conditions). On the other hand, the legislature did not exclude in this case the application of art. 42 §4 KP, according to which no notice of termination of the existing work or remuneration condition is required if the employee is assigned, where justified by the needs of the employer, to work other than that specified in the employment contract, for a period of up to 3 months in a calendar year, provided that it does not result in the reduction in the remuneration of the employee and corresponds to the employee's qualification.

It is argued in the literature that art. 15g(14) of the Anti-Crisis Act sets out only the minimum requirements of an anti-pandemic agreement. This means that

> Within the framework of freedom of agreement, the social partners may define all other conditions of importance for them, both those of an individual nature, concerning the rights and obligations between the parties to the employment relationship and those of an obligation nature, referring to the relationship between the social partners.[49]

It is possible, for example, to suspend the payment of bonuses or other remuneration components (e.g., seniority bonuses), but it is not permissible to reduce the benefits of those employed below the legal minimum (minimum wage).[50] This remark should also be applied to other labor standards of statutory rank (the suspension of the implementation of the collective labor agreement cannot limit the protection stemming from provisions of statutory rank).

The regulation mentioned above is not the only anti-crisis regulation that affects labor relationships. At this point, it is also worth noting the regulations concerning remote work. According to art. 3(1) of the Anti-Crisis Act, in the period of validity of an epidemic emergency or a state of epidemics, declared due to COVID-19, and in three months after their cancellation, to counteract COVID-19, an employer may order an employee to perform, for a specified period, work specified in the employment

48 Baran, 2020, p. 195.
49 Baran, 2020, p. 194.
50 Baran, 2020, pp. 194–195.

contract, outside the place of its regular performance (remote work).[51] It is unnecessary to enter into a separate agreement between the parties to the employment relationship regarding the temporary performance of remote work by the employee (although the parties to the employment relationship may establish this form of work provision by way of an amending agreement).[52] It should be stressed that the legislature in the aforementioned art. 3 of the Anti-Crisis Act uses such terms as 'employee,' 'employer,' 'employment contract,' which clearly indicates the limited subject scope of this provision. It covers only employment cases of an employee (within the employment relationship framework). The regulation applies only to employees employed under an employment contract (it does not apply to employees employed under appointment, election, or nomination)[53]. Legislative proceedings are currently underway in Poland to permanently introduce the concept of remote work into the Labor Code (to replace the regulation on telework).

5.1.2. Automation and Its Influence on the Employment Relationship

In Poland the discussion on work automation and the future of work focuses mainly on the number of jobs that will be lost because of automation.[54] Much less attention has been paid to the legal analysis of the risks associated with the ever-growing interaction between people and technological tools (both in the form of advanced machines and software used to manage enterprises and production processes) and its influence on the employment relationship.

K. Stefański rightly notes that a decrease in the amount of work ('technological development may result in a decrease in demand for human labor') with an increasing supply of work must mean the necessity to redistribute the good, which is work.[55] Flexible working time arrangements can be an excellent instrument here.[56] In this context, special attention should be paid to such flexible forms of work as part-time work, on-call work, or job-sharing. However, in its judgment of 19 March 2013, the Supreme Court emphasized that on-call work with fully paid waiting time does not constitute employment as defined in art. 22 §1 KP.[57]

One of many interesting examples of the impact of automation on the employment relationship is the creation of an employee work using weak artificial intelligence (AI).

51 Under art. 2(2) of the Anti-Crisis Act, whenever the Act refers to 'counteracting COVID-19,' it is understood to mean all activities related to eradicating infection and preventing the spread, prophylaxis and combating the effects of the disease. As long as the employee is not absent from work on an excused basis (e.g., due to illness), in the event of the need to take measures to counteract COVID-19, the employer should, therefore, give the employee an order to work remotely.

52 Barański, 2021, p. 274.

53 Barański, 2021, pp. 274–275.

54 Błachowicz, 2019, pp. 10–14; Rojszczak, 2019, pp. 5–13. Until recently, the term 'automation' itself was associated only with the streamlining of production processes. Today, algorithms in the form of computer programs are beginning to compete with many different employees.

55 Stefański, 2016, pp. 28–32.

56 Ibid.

57 Judgment of the Supreme Court of 19 March 2013, I PK 223/12, LEX no. 1415490.

Indeed, the personal nature of providing work within the employment relationship does not exclude the possibility of creating such work.[58] In its judgment of 9 February 2007, the Supreme Court indicated that

> In the light of art. 22 §1 KP, the employment relationship cannot be understood so that any assistance provided to the employee in the performance of his duties is contrary to it. Such a rigorous understanding of the requirement of personal performance of work would not only be unreasonable but would also result in the elimination of a great many legal relationships from the scope of influence of the labor law.[59]

The Polish literature emphasizes that today the computer has essentially merely taken over 'the previous role of a musical instrument, a paintbrush or a typewriter, leaving the essence of the creative process unchanged.'[60] Doubts of a legal nature (copyright law) arise, however, e.g., in those factual situations where an employee—user of a computer program, creating a product of an intellectual nature, uses ready-made elements developed by the programmer for the purposes of the program.[61]

6. Demonstration of Compliance of Polish Regulations on Employment Relationships with EU Law

It is assumed in the literature that Poland's membership in the European Union means that EU law does not pose a threat to Polish labor law. On the contrary, it is 'an important guarantee of its further existence and development.'[62] It is true that the implementation of EU law has resulted in a decrease in the technical and legislative quality of the Polish Labor Code (this process is complex and complicated), but at the same time, it has 'contributed to raising the level of protection of employees' interests and to raising the standards which characterize social progress.'[63]

In Poland, the Labor Code has become the main instrument for implementing EU directives.[64] At the same time, as W. Sanetra emphasizes, despite the fact that it

58 Barański and Jankowska, 2018, pp. 198–199.
59 Judgment of the Supreme Court of 9 February 2007, I UK 221/06, LEX no. 948780.
60 Jankowska, 2011, p. 336.
61 Barański and Jankowska, 2018, pp. 198–201.
62 Mitrus, 2017, p. 421.
63 Sanetra, 2015, p. 95.
64 Sanetra, 2015, p. 81. As L. Mitrus points out, EU regulations in the field of EU labor law are of little significance, because they are an instrument for harmonizing legal solutions on a European Union scale. Therefore they do not allow for flexibility in terms of their implementation. EU regulations do not consider the specifics of labor law institutions or the particular conditions existing in a particular Member State (Mitrus, 2006, p. 169).

follows from the Treaty on the Functioning of the European Union[65] that directives may be implemented by way of the enactment of normative acts of a different nature (of a different form and legal position in the system of sources of law), and thus also by way of the conclusion of a collective labor agreement with the relevant content,[66] in Poland, for various reasons, directives are not implemented by way of collective agreements (collective labor agreements) concluded by the social partners.[67]

In the sphere of individual employment relationships, the European Union seeks to harmonize national systems. However, EU law regulates only certain aspects of employment relationships but in no way interferes with the permissibility of certain forms of employment (these matters are left to national legislatures).[68] Polish literature emphasizes that the implementation of EU directives must not lead to a lowering of the level of protection existing in Member States, which means that national solutions that are more favorable to employees remain in force.[69] In this connection, L. Mitrus points out that 'the relationship between EU labor law and Polish law is based...on the principle of the privilege of the employee' and 'this principle is the most important criterion for assessing whether Polish regulations comply with EU standards.'[70] Nevertheless, each assessment of the compatibility of Polish labor law with EU law requires an analysis of the legal nature of the given norm of EU law and the relevant regulations of national law.[71]

Regarding the correct implementation of EU regulations on employment relationships in the Polish national law, particular attention should be paid to two issues: the employer's obligation to provide employees with information on essential components of the employment contract and the legal situation of employees employed under atypical employment relationships.[72]

65 Treaty on the Functioning of the European Union of 25 March 1957, Journal of Laws of 2004 no. 90, item 864, hereinafter referred to as TFUE.

66 According to art. 288 zd. 3 TFUE a directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods. Under art. 153 par. 2 TFUE a Member State may entrust management and labor, at their joint request, with the implementation of directives adopted pursuant to art. 153 par. 2 TFUE, or, where appropriate, with the implementation of a Council decision adopted in accordance with art. 155 TFUE. In this case, it shall ensure that, no later than the date on which a directive or a decision must be transposed or implemented, management and labor have introduced the necessary measures by agreement, the Member State concerned being required to take any necessary measure enabling it at any time to be in a position to guarantee the results imposed by that directive or that decision.

67 Sanetra, 2015, pp. 81–82.

68 Mitrus, 2006, p. 206.

69 Florek, 2004, p. 31.

70 Mitrus, 2006, p. 173.

71 Mitrus, 2006, p. 176.

72 According to J. Wratny, the necessity to incorporate the EU regulations into the Polish national law created an impulse thanks to which the theory and practice began to promote atypical forms of employment as a means of combating unemployment (this phenomenon has been described as 'a more sophisticated form of influence of Community norms') (Wratny, 2005, p. 3).

The applicable art. 29 KP corresponds in principle to the content of art. 2 of the Council Directive 91/533/EEC of 14 October 1991 on an employer's obligation to inform employees of the conditions applicable to the contract or employment relationship.[73] Art. 29 §1 and 11 KP define the essential components of an employment contract.[74] An employment contract must be made in writing and if an employment contract is not made in writing then the employer must, at the latest on the date when the employee is allowed to perform work, provide the employee with a written statement that confirms arrangements regarding the parties to the contract, the type of the contract as well as its conditions (art. 29 §2 KP).[75] Moreover, the Polish Labor Code, unlike Directive 91/533, among other things, introduces an obligation inform an employee, in writing, not later than within seven days of the date of concluding the employment contract about the frequency of the remuneration payments, and, if the employer is not obliged to establish work regulations—additionally about the night-time hours, and the adopted procedure of confirming the arrival and presence of employees at work, as well as the procedure of excusing their absence from work (art. 29 §3 KP).[76] The details of the procedure for providing the indicated information are contained in art. 29 §31-33 KP.

The provisions mentioned above (art. 29 §1-4 KP) shall apply accordingly to employment relationships established on a basis other than an employment contract (art. 29 §5 KP).

Although art. 1 par. 2 of Directive 91/533 allows national authorities to exclude certain categories of employees from its scope, art. 29 of the Labor Code introduces the obligation to communicate the relevant information to all employees, without any distinction.

In breach of art. 2 par. 2e of Directive 91/533, the Polish legislature does not require the employer to inform the employee of the expected duration of the contract or employment relationship. Furthermore, in view of the case-law of the Court of Justice of the EU, the Labor Code should also provide the requirement to inform the employee of the permissible limits of overtime work and the conditions for its performance

73 Council Directive 91/533/EEC of 14 October 1991 on an employer's obligation to inform employees of the conditions applicable to the contract or employment relationship, OJ L 288 of 18.10.1991, pp. 32–35; hereinafter referred to as Directive 91/533.

74 An employment contract must specify the parties to the contract, the type of contract, the date of its conclusion, as well as the work and remuneration conditions, and in particular: 1) the type of work; 2) the place of performing the work; 3) the remuneration corresponding to the type of work, with a specification of the remuneration components; 4) the length of working time; and 5) the date of commencing work. Art. 29 §11 KP provides that in the event of the conclusion of an employment contract for a definite period, exceeding the time and quantity limits specified in art. 251 KP, the contract specifies this purpose or circumstances of this case by providing information about objective reasons justifying the conclusion of such a contract.

75 The Polish legislature did not use the possibility of flexible regulation of this issue, which is criticized in the literature (Mitrus, 2006, pp. 212–213).

76 See also art. 29 §2 and §31-3[3] KP.

(however, this is currently not the case).[77] It is also stressed in the literature that the differentiation mentioned above of the information obligations of the employer, depending on whether it is obliged to establish work regulations or not, raises doubts as to the compliance of such a solution with Directive 91/533 (the Directive does not provide for such a differentiation, allowing only for the exclusion of certain categories of employees from the scope of the employer's information obligation).[78]

At this point, it should be made explicit that Directive 91/533 shall be repealed with effect from 1 August 2022. On 31 July 2019, Directive (EU) 2019/1152 of the European Parliament and of the Council of 20 June 2019 on transparent and predictable working conditions in the European Union entered into force.[79] According to art. 22 of Directive 2019/1152, the rights and obligations set out in this Directive shall apply to all employment relationships by 1 August 2022. Member States shall take the necessary measures to comply with this Directive by 1 August 2022. Preliminary actions are currently underway in Poland to transpose this Directive into Polish law.

As regards the legal situation of employees employed under atypical employment relationships, following W. Sanetra, it should first of all be pointed out that a separate problem of proving the compliance of Polish regulations concerning employment relationships with EU law is the issue of 'full adjustment of the already established norms of the Labor Code to the requirements resulting from the implemented directives, possibly to a more rational use—considering our realities—of the possibilities which these directives create.'[80] Until the amendments to the Labor Code, which came into force on 22 February 2016,[81] this problem concerned, for example, the regulation of art. 251 KP to the extent that this provision excluded term employment contracts other than employment contracts for a definite period[82]. According to Clause 3(1) of the Annex to Council

77 Wolfgang Lange v. Georg Schünemann GmbH, App no. C-350/99, ECR 2001/2/I-1061. See also Mitrus, 2006, pp. 209–211.

78 Mitrus, 2006, p. 211.

79 Directive (EU) 2019/1152 of the European Parliament and of the Council of 20 June 2019 on transparent and predictable working conditions in the European Union, OJ L 186 of 11.07.2019, p. 105; hereinafter referred to as Directive 2019/1152. In accordance with recital 4 of the Directive 2019/1152 since the adoption of Directive 91/533, 'Labor markets have undergone far-reaching changes due to demographic developments and digitalization leading to the creation of new forms of employment, which have enhanced innovation, job creation and labor market growth. Some new forms of employment vary significantly from traditional employment relationships regarding predictability, creating uncertainty with regard to the applicable rights and the social protection of the workers concerned. In this evolving world of work, there is therefore an increased need for workers to be fully informed about their essential working conditions, which should occur in a timely manner and in written form to which workers have easy access. In order adequately to frame the development of new forms of employment, workers in the Union should also be provided with several new minimum rights aiming to promote security and predictability in employment relationships while achieving upward convergence across Member States and preserving labor market adaptability'.

80 Sanetra, 2015, pp. 90–91.

81 Act of 25 June 2015 on amending the Act—Labor Code and some other acts, Journal of Laws of 2015, item 1220.

82 Sanetra, 2015, pp. 90–91.

Directive 99/70/EC, 'fixed-term worker' means a person having an employment contract or relationship entered into directly between an employer and a worker where the end of the employment contract or relationship is determined by objective conditions such as reaching a specific date, completing a specific task, or the occurrence of a specific event[83]. As has already been mentioned, the regulation of art. 251 KP now regulates the employment contract for a definite period and the multiplicity of this contracts. Thus, this regulation still focuses exclusively on the employment contract for a definite period. At the same time, however, as a result of the amendment mentioned above, in art. 25 §3 KP, the legislature specified the rules for re-conclusion of an employment contract for a trial period with the same employee.[84] Moreover, the legislature deleted one type of employment contract from the catalogue of term employment contracts: a contract concluded for the time of performance of specific work.[85]

The above interventions of the Polish legislature in the scope of types and duration of term employment contracts have not resolved all doubts of legislative nature.[86] The exclusion of certain categories of employees from the construction mentioned above provided for in art. 25 §1 KP should still be regarded as incorrect. Indeed, according to Clause 2(2) of the Annex to Council Directive 99/70/EC, subject to additional conditions, the Directive may not apply to: a) initial vocational training relationships and apprenticeship schemes; b) employment contracts and relationships which have been concluded within the framework of a specific public or publicly-supported training, integration, and vocational retraining program. The Polish legislature, in art. 251 §4 KP, has defined differently, and therefore incorrectly, the categories of employees deprived of protection against employer abuse.[87]

Finally, it should be noted that, according to art. 153(5) TFUE, this act does not apply to remuneration for work, the right of association, the right to strike and the right to lock-out. Therefore, the law-making activities of the European Union omit, inter alia, the collective labor agreements law.[88]

83 Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP, OJ L 175, 10.7.1999, pp. 43–48.

84 It is possible: 1) if the employee is to be employed for the purpose of performing another type of work; 2) after a lapse of at least 3 years from the date of termination or expiry of the previous employment contract if the employee is to be employed for the purpose of performing the same type of work; in this case it is permissible to re-assign an employment contract for a trial period.

85 It differed from a employment contract for a definite period in that, unlike the latter, the duration was not fixed by calendar but by indicating the work on the completion of which the parties agreed to terminate the contract.

86 Currently, an amendment to the Labor Code is being drafted in Poland, which aims, inter alia, to introduce changes to ensure full compliance of the provisions on termination of fixed-term employment contracts with Directive 1999/70/EC—in connection with the European Commission's statement on unjustified unequal treatment regarding the termination of employment contracts of fixed-term employees compared to permanent employees.

87 See also Mitrus, 2006, p. 220; Walczak, 2005, p. 63; Czerniak-Swędzioł and Mądrzycki, 2018, pp. 95–109.

88 Franzen, 2012, pp. 245–246.

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| Chapter 8 |

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

Mario VINKOVIĆ

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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| Chapter 9 |

Hungary: Contracts in Labor Law

Nóra JAKAB

ABSTRACT

The employment contract and collective agreement have force if parties disclose this. Behind them is the freedom of individual and collective will. In fact, the new employment relationships reflect this autonomy and the desire for it. For me, examining the dogmatics of the employment contract is not a matter of adapting Anglo-Saxon solutions, but of looking for the key to a solution in our rich private law literature. Indeed, in the field of civil law, this individual self-government is widespread, whereby legal entities themselves create the law for life relationships not compellingly regulated by law, or for unregulated parts of them. In labor law, therefore, I believe that it is in the employment contract that the law-making power of individuals must be rediscovered, for which the principle of partnership is essential. And the collective agreement is the key to the fulfillment of this partnership.

KEYWORDS

codification, employment contract, collective agreement, atypical employment law, relationship between labor law and civil law

1. Introduction

The aim of this chapter is to provide an insight into the basics of Hungarian labor law by illuminating three areas. The main question of the first part is how the codification of labor law finally developed, has the regulation emphasizing the autonomy of the parties been strengthened? I considered it important to elaborate on this because the Hungarian labor law codification took place at the same time as the civil law codification, and in Hungarian discourse experts dealt in depth with the nature of the employment contract and the collective agreement and the connection of labor law with civil law. Examining the relationship between labor law and civil law raises the question of the contractual and legatory sources of labor law, as labor law regulation is approaching civil law rules in times of employment crisis. An employment contract can become a zealous source of breach of duty if the parties are able to flexibly shape the content of the legal relationship. The last three years have been defined by COVID, which also has an impact on the world of work. Here I consider it important to mention the granting of leave, breaks between work, wages, unpaid leave, absence

Jakab, N. (2022) 'Hungary: Contracts in Labor Law' in Jakab, N. (ed.) *Fundamentals of Labor Law in Central Europe.* Miskolc–Budapest: Central European Academic Publishing. pp. 205–226. https://doi.org/10.54171/2022.nj.fullce_10

at the initiative of the employee, unilateral imposition of a working time limit of up to twenty-four months, support for reduced working hours, vaccination obligations during emergencies. However, I am going to talk more about the differentiation of telework. There is a lot to read in the literature about the birth of atypical working relationships, and now with the proliferation of the home office, we are facing a regulatory dilemma. It is true that the regulation of atypical forms of work seems to be a never-ending activity, because if the legislature succeeds in setting the boundaries of the employment relationship, it is certain that an atypical new employment relationship will appear immediately, frustrating the newly created regulations.[1] Finally, I collected data to make collective bargaining coverage visible in Hungary.

2. Dogmatic Issues

As a result of the economic changes, a radical transformation of labor law was needed in Hungary, which, according to György Kiss, had to take place with a conceptual revision of civil law. Professor Vékás also believed that the comprehensive reform of the Mt. (Act I of 2012 on the Labor Code, furthermore, referred to as 'Labor Code' or 'Mt.') (including the continuous fulfillment of the requirements of European Community law) and the new Civil Code. (Act V of 2013 on the Civil Code, furthermore, referred to as 'Civil Code' or 'Ptk.') should be a mutually coordinated process.[2]

The question then is how did the codification of labor law finally develop? Has the regulation giving priority to the parties' autonomy become stronger?[3]

In the dogmatic placement of the labor law regulation, the solution prevailed was that the Civil Code does not refer in any way to an employment contract, a collective agreement, an employment agreement either in the general part of the obligation or in the special part of the obligation. The two codifications took place side by side. The Civil Code regulates the property and personal relationships between persons based on equality (Section 1:1), which is why a separate law regulates the employment relationships based on subordination and the individual and collective rules applicable to them.

At the same time, the sharp separation of the two regulations was resolved by the Labor Code, as the Labor Code changed the silence of the previous regulations and explicitly states the possibility of applying certain rules of the Civil Code. According to Section 31 of the Labor Code, for example, legal declarations, unless otherwise provided by law, are subject to the provisions of Ptk. listed in Mt. The rules that can be

1 Countouris, 2007, pp. 43–44.

2 Vékás, 2006, p. 393. On the 1992 Labor Code, György Kenderes wrote: 'Due to the starting point of the corporate model, the labor law regulation is too… employee-centric and in many places leaves little room for free agreement between the parties involved in the employment relationship; that is to say, it is in any event in breach of the principle of civil law, which emphasizes the autonomy of the parties' (Kenderes, 2001, p. 280).

3 For a change in the regulatory concept of the employment contract appearing during the Civil Code codification, see Prugberger and Kenderes, 2011, pp. 188–191; Prugberger, 2008, pp. 20–22.

utilized from the point of view of Mt. has been incorporated into the Mt. and the Civil Code is selectively considered as an underlying or additional legal act. Many labor law institutions have been given a strong civil law character (liability for damages: scope of control,[4] predictability[5]), and several civil law rules have been incorporated into the Introductory Provisions of the Labor Code. Thus, due to the nature of the main service that is the subject of the employment relationship, labor law is indeed a separate branch of law, a relatively independent law, part of private law within the legal system, with stronger civil law connections in Act I of 2012.

With all this, the codification of labor law took place in the way indicated by György Kenderes that the rules of Civil Code which can be utilized from the point of

4 As the employer's liability for damages has essentially been taken over by the Civil Code, it is worth examining what is meant by the scope of control in civil law matters. The concept of the scope of control is defined in the Civil Code. However, as the concept appears within the scope of responsibility, the approach to responsibility must emerge when exploring its meaning. The objective liability approach requires that the subjective assessment of the conduct should not be the basis for legal liability for the damage caused, but that the damaging facts cannot be separated from the 'person' of the offender. Thus, in the context of the conduct of the party in breach of contract, the scope of review draws attention to a relatively objective judgment, not closely to the conduct, but to a circumstance which may be linked to the breach of contract. It therefore requires an examination of whether the circumstance causing the damage falls outside the control of the person held liable. The scope of control roughly covers the group of circumstances over which the contractor may have influence, or at least can influence it. They are therefore outside the scope of control like natural disasters: earthquake, fire, epidemic, drought, frost damage, flood, windstorm, lightning, etc., as well as certain socio-political events: uprising, sabotage, war, revolution, traffic closure. In addition, certain state measures can be listed: import-export bans, embargo, boycott. However, organizational, or other disturbances in the breaches of the contract by the party in breach of contract, the conduct of the party's employees, difficulties in obtaining a market, etc., shall not be considered to be outside the scope of the control (Leszkoven, 2016, pp. 150–152). EBH2016. M.10. says: Ensuring the adequacy of the working method, work equipment, materials, number of employees and skills is the responsibility of the employer, so it has an influence on it. Exploring all this may be necessary to determine the scope of the audit [Labor Code, Section 166 (1), (2)] the Curia stated that the scope of the audit limits the employer's liability for damages to the extent in which it has the opportunity and obligation to take the necessary measures to prevent the damage. The scope of control should be understood as all objective facts and circumstances that the employer has had any opportunity to shape. There may be an overlap between the scope of control and the scope of operations, but the scope of operations may also include circumstances over which the employer has no indirect influence.

5 The Civil Code requires that a circumstance outside its control be unforeseeable at the time of the conclusion of the contract. Grosschmid calls this a branch of factual foresight. As a conjunctive condition, it is related to being outside the scope of control. It follows that proof of being outside the scope of the control does not result in a successful rescue if the harmful circumstance had to be foreseen and foreseen by the offending circumstance. Here, the yardstick is like the objectified form of expected conduct, since foreseeability is judged by the expected conduct of a reasonably prudent third party in place of the party in breach of contract. The same is true of the Curonian interpretation of the scope of control. (Vékás and Gárdos, 2014, p. 1536; Leszkoven, 2016, p. 152). Its obligation to reimburse is limited to that, which means a practical benefit of predictability (Farkas, 2009, pp. 189–203). If he could not have foreseen the occurrence of the damage event and the damage in any way, and of course outside the scope of control, he could be released from liability.

view of Mt. have been incorporated into the Mt. and the Civil Code was considered as an additional legal act.[6]

The above has the following consequences: due to the nature of the main service, which is the subject of the employment relationship, labor law is indeed a separate area of law within the legal system. However, the employment contract is governed by the principles of civil law contracts. Due to the special subject of the employment relationship, these principles appear more differentiated in the Labor Code. Because of the above, we can repeatedly feel that there is a duplication of regulation in the two codes, for example in the case of validity theory, which is a matter of legal theory and not law specific. In my opinion, however, the legal separation of labor law may justify the adoption of the full text of the civil legislation instead of the rule referring in the Labor Code. This is because there are always service-specific differences. At the same time, there has been no consistent separation of contractual institutions and public law provisions in labor law.

Further, I examine what changes can be seen as bringing labor and civil law regulations closer together:

ad1. From 1 July 2012, with the entry into force of the Mt. the general rules of conduct laid down in Ptk. have been applied in full, apart from the prohibition of abuse of rights. Thus, the Mt. does not contain a referring rule, but repeats the text of Civil Code with specific differences in labor law.
ad2. The legal declarations and the method of making legal declarations. contains several general rules of obligation of the Ptk., in Section 31 of the Mt. the provisions of the Civil Code apply to legal declarations. György Kiss's demand in 2000 for the incorporation of unilateral declarations into law and for the regulation of condition, representation and formality was fulfilled. However, the regulation of the institution of the offer and the binding nature of the offer, the preliminary contract and the general terms and conditions was not followed.[7]
ad3. In terms of validity, civil and labor law regulations are almost doubled.[8] Instead of the unconditional and conditional invalidity proposed in 2000, the category of nullity and voidability remains unchanged. The objective time limit for an appeal is six months instead of one year in civil law. The difference is thought-provoking. If we start from the specialty of the employment relationship and the situation of the parties, it would be that a one-year deadline would be justified. However, we can look at the issue differently: legal certainty requires the invalidity to be settled as soon as possible, yet the

6 See Prugberger and Jakab, 2014, pp. 477–485.
7 Problems arising from the lack of a pre-contract, see Kenderes, 2007, pp. 115–117; Rácz, 2008, pp. 681–692.
8 Tamás Prugberger considers the duplication unnecessary (Prugberger, 2001, pp. 172, 176).

shorter deadline can be seen as a risk to the employee, which is in line with the Western European regulatory process.
ad4. The employee is in a vulnerable position compared to the employer. This vulnerability means personal and economic dependence. In my opinion, this dependence is different in nature from that which binds the consumer to the economic entity, but by analogy *iuris*, both the employee and the consumer should enjoy similar protection.[9] Dependence can be explained not only by vulnerability but also by subordination. At the same time, the principle of subordination is constantly changing because of economic and social changes, and it would be appropriate to extend some or all of the labor law legislation to protect economically dependent workers in general. Economically dependent workers are those employed in the grey zone who are not personally dependent but are economically dependent. They are persons with a legal status like that of employees, for which provision was made in the draft Labor Code but was no longer included in the existing text. In my opinion, the change in the concept of subordination, the extension of the scope of atypical employment relationships, and the new provisions of the Labor Code is one of the signs that labor law is moving toward civil law.
ad5. The Mt. encourages the parties, including the employee, employer, union and works council, to negotiate with each other. This aims to freely determine the contractual terms and conditions and increases the contractual autonomy of the parties.

Act CCLII of 2013 brought to the fore one of the long-standing issues of Hungarian labor law. By amending the Mt., this law, among other things, designates the rules of the Civil Code that are also applicable in labor law. As a result of the amendment, such reference rules are contained in Sections 9, 31, 160, 177, 228–229, 286 of the Labor Code. Reviewing these rules, it can be concluded that they are provisions (mainly contract law) that can be applied without concern in labor law. A related problem is the scope of the General Provisions of Mt. These are the general rules of conduct—in part applying the rules of the Civil Code with the same content—mainly applicable to the individual employment relationship. The undoubted shortcoming of the Mt. is therefore that it does not clearly (specifically) apply the rules of civil law in collective labor law, particularly in the law of collective agreements. This necessarily raises the question of whether the rules of civil law apply (in particular) to collective agreements. In the absence of the relevant provisions of the Mt. according to Gyula Berke and György Kiss, this principle of labor law should be applied to collective agreements even after the entry into force of the Mt. The reason for this is that the Mt. does not contain any reference rules on this subject, in other words: the legislature, unlike the employment relationship, did not want

9 On the protection of the vulnerable party see Prugberger, 2006, pp. 72–83; Nádas, 2019, pp. 105–120.

to create a provision on this subject. On the other hand, a collective agreement, although it has a normative content, has (also) the characteristics of a contractual obligation. There is no doubt that the situation created by the entry into force of the Labor Code may pose several difficulties for the judiciary, since—similarly to the situation in the employment relationship under the 1992 Labor Code—the court will be forced to decide on a case-by-case basis whether the applicable civil law principle or rule is contrary to the principles of labor law in matters not regulated by the Labor Code.[10]

The special system of labor law norms in Hungarian law perfectly shows the way in which the legislature tries to strengthen the individual self-government of the parties in the labor law regulation, despite the existence of public law elements.[11]

The Mt. seems to be pursuing a policy of social policy based on the prominent role of the social partners and social dialogue, and employment policy objectives aimed at strengthening competitiveness and raising employment levels, or at least their dominance can be observed. Thus, Hungarian labor law has a market corrective and market stimulating function, going beyond the market restricting function defined by Deakin, i.e., the protection of dependent subject.[12] This is essentially in line with the changes also taking place in Europe. The subjects of labor law regulation are increasingly excluded from labor law protection,[13] they take mutual risks,[14] and thus the civil law regulatory nature of the labor law regulation is strengthened, the freedom of contract and decision of the parties comes to the fore, the parties

10 Berke and Kiss, 2015; Kiss, 2020.

11 I must refer to György Kiss's statement that labor law is a 'political barch of law,' a right of 'advances and retreats.' It can be seen from the above that the labor law literature of the last decade has determined the relative independence of labor law and its connection to civil law based on a double model.

12 See Deakin and Morris, 2012, pp. 30–37, 131–190.

13 A good example of this is that an employee redeems employment protection by purchasing a certain number of shares, as he or she is not entitled to severance pay and protection in the event of unlawful termination from the time of purchase. In fact, this regulation provides a minimum level of protection for an employee against other non-shareholder employees. Jobs are repeatedly offered to a job seeker in such a way that they can fill the position, but only as shareholder employees. Jeremias Prassl pointed out that no other category of workers was born with this regulation. Rather, the parties, by exercising their freedom of contract, contract themselves out of traditional employment and social protection. A high level of protection is directly proportional to subordination. Outsourcing also reduces subordination. Based on a presentation by Jeremias Prassl (Corpus Christi College, Oxford) at the November 2013 conference 'The Labor Code in the Light of International Labor Law'.

14 On mutual risks see Freedland and Countouris, 2011, pp. 439–440. The work of Freedland and Countouris is separate from the dichotomy previously used, notably from the binary model of those working in the subordination we also mentioned and the self-employed. It exceeds the summary works we have read so far in Hungarian, English and German. They begin to think completely differently about labor law, treat personal employment relationships as a unit and look at the employee himself for a lifetime, rather than at a particular point in time and in a particular legal system. They do not see the employment relationship as the starting point of any employment relationship, not as if a force were all drifting in and out of here.

move from a subordinate position to a more side-by-side (but not side-by-side) position.[15] The reduction in protection is in the spirit of mutual risk-taking, if we accept that the employer now has the means to determine working conditions. However, the limits to contractual freedom are imposed by the provisions of the cogens, the individual relative dispositive labor law rules, where deviations to the detriment of the employee are limited or unlimited, and the employment contract may deviate from the collective agreement only based on the welfare principle. *Freedom of contract is therefore also provided in labor law.* As defined in the Fundamental Law, everyone is free to choose their job and occupation freely. The parties have an effect on the shaping of the legal relationship, as pursuant to Section 43 (1) of the Labor Code, the employment contract may deviate from the individual employment law rules and the employment relationship rule in favor of the employee, unless otherwise provided by law. According to (2), the derogation must be assessed by comparing the interrelated provisions. The *different agreement* stipulated in the Mt. contains when the agreement of the parties may not deviate from the provisions of the Labor Code.[16] According to the commentary, interdependent provisions are to be understood as rules or elements of an agreement having the same purpose (the raisin principle—*Rosienentheorie*—does not apply, as is the case in judicial practice). However, the limits of the freedom of contract are the mandatory provisions, the individual relative dispositive labor law rules, when it is possible to deviate to the detriment of the employee with limited or no restrictions, or to deviate from the collective agreement only based on the welfare principle.[17] According to Section 13 of the Labor Code, the basic sources of labor law are the rules on employment: the law (law, exceptionally and additionally a government decree, possibly a ministerial decree), the collective agreement and the works agreement, as well as the binding decision of the conciliation committee as provided for in Section 293. The three normative parts of the latter are employment relationship rules:

15 Tamás Prugberger described the escape from long-term business and agency contracts as circumvention of social security rules and labor law social rule. Prugberger, 2014, pp. 65, 70–71. Tamás Gyulavári is of the same opinion: 'There are two reasons for the spread of sham civil law contracts: on the one hand, the circumvention of labor law rules and thus the reduction of indirect costs, on the other hand, the exploitation of lower tax and contribution burdens. minimizing expenses. As the former is the essence of labor law, the costs of labor law inevitably arise from the application of even the lowest level of labor law' (Gyulavári, 2014, p. 59).

16 It is important to emphasize that Section 43 (1) of the Labor Code only stipulates the relationship of the employment contract to the employment rule. However, a higher source of labor law may change the rights and obligations related to the employment relationship not explicitly stipulated in the employment contract to the detriment of the employee. The employment relationship, at least the non-contractual parts thereof, may be modified by a higher-ranking source of collective labor law to the detriment of the employee. In practice, this legal principle is also expressed in such a way that the principle of 'acquired rights' does not apply in the employment relationship, ie the employment rule may change the employment relationship to the detriment of the employee (collective agreement and employment agreement—by definition—only within legal limit (Berke and Kiss, 2015; Nádas, 2019, pp. 105–120).

17 Gyulavári, 2014, pp. 59–60.

- Quasilegal norms for employment relationships: a collective agreement, which is created on a consensual basis like a private contract, but has the force of law, i.e., it has a dual legal nature.
- Works agreement: an agreement between a works council and an employer which may contain a rule on the employment relationship if the employer is not covered by a collective agreement concluded by the works council or if the employer does not have a trade union entitled to conclude a collective agreement.
- A binding decision of a conciliation committee, regulated by Section 293 of the Labor Code: the employer and the works council or the trade union may agree in writing in advance to submit to the decision of the committee. In this case, the decision of the committee is binding. In the event of a tied vote, the chairperson shall have a casting vote.

György Kiss emphasizes that the content of the employment contract depends solely on the agreement of the parties to the contract (legal fact), while its legal effect and the employment relationship are influenced by several factors. These are the most legal sources of law. That is, we see that there are differences in the content of the employment contract and the employment relationship: the employment contract changes according to the economic environment, while the content of the employment relationship is generally constant. It would be important to treat the legal fact and the legal effect in unity. According to Tamás Prugberger, a contract is a legal norm in a narrow context, while a regulation within an organization is a legal norm in a broader context, while a public legal norm emanating from a public authority is a statutory norm. However, the distinction between legal norms cannot be treated rigidly. In his view, an employment contract is a source of law within a limited scope, i.e., between the parties, in the substantive sense.[18]

It can be seen, therefore, that the employment contract has the potential to expand individual self-government, making it flexible in line with economic changes. However, the prevailing view of labor law is that the employment contract is not a source of law. The employment contract, although it feeds the employment relationship itself, is not a rule on employment relationship because it contains rights and obligations for two parties.[19] The employer's regulations are also not a rule of employment, although various unilateral legal acts of the employer are playing an increasingly important role in the employment law literature. After all, these are becoming increasingly important in practice: within this, there are regulatory (normative) legal declarations and individual legal declarations.[20]

However, György Kiss approaches the issue differently: the legal source system of labor law is characteristically different from that of other branches of law due to the distinct legal nature of certain legal source elements. Perhaps the most characteristic

18 Kiss, 2017, p. 270; Prugberger, 2006, pp. 158–163.
19 Gyulavári, 2014, p. 53.
20 Kiss, 2017, p. 269.

feature of the labor law source system is the duality of sources. He distinguishes between the most general and contractual sources of law (collective agreements: collective agreement and works agreement). Due to the normative content of the collective agreement, it could be part of the legal system of legal sources, but on a dogmatic basis it is not, and its relation to the legal norm is derived from the general validity of the agreements. At the top of the contractual hierarchy in European labor law is the individual employment contract. The employment contract may not contain any less favorable terms for the employee than those contained in the collective agreement. This is welfare principle (*Günstigkeitsprinzip*).[21] That is, the employment contract is also a source of law: a contractual source of law.

What does it mean for us that an employment contract is a contractual legal source? Here I quote László Kelemen's reflection on obligation and contract:

> In its nature, the obligation is a dynamic and organic phenomenon, directed to the attainment of a definite end, to the production of some future change, and once it has fulfilled this function, it ceases to exist as if it had never existed. In contrast to rights in rem, which are reborn immediately after their termination and therefore appear to have a continuous existence, it appears to be a short-lived, transient phenomenon with a beginning, an end and a life span comprising various moments, just like living beings. It gives rise to a whole new set of subject rights which never existed before and which cannot exist without it, and to persons who previously had no legal relationship of any kind, who enter into a close relationship with each other, usually not only one with the other, but both of them, in a relationship which is mutually exclusive, and from which—in certain respects, notably in contrast to dispositive legislation—rights and obligations stronger than the law are created. This phenomenon is called the formation of obligations, of which the contract is the most abundantly fervent source.[22]

According to László Kelemen, the contract is thus *lex contractus, a real source of law,* when the substantive law enables the human private apparatus to legislate.[23] In

21 Kiss, 2017, pp. 268–269.

22 Kelemen, 1941, pp. 7–8.

23 Kelemen, 1941, p. 8. 'Among the sources shaping the employment relationship, the right of individual instruction (*Weisungsrecht*) deriving from the employer's right to manage (*Direktionsrecht*) and the collectively addressed norms (*Verhaltensnormen*) developed unilaterally by the employer rank low in the legal facts shaping the content of the employment relationship. In this ranking, the employment contract comes first, ahead of the collective agreement. at the same time, this means that in the system of sources of law of labor law and in the structure of the legal facts that shape the content of the employment relationship, the employment contract is the most important limitation of the non-contractual means of formation. consequently, the richness of the content of the employment contract and the way in which the contractual conditions are defined in the contract fundamentally determine the framework for the external shaping of the employment relationship, which is a long-term legal relationship involving several uncertainties.' See Kiss, 2014. p. 50.

the field of civil law, this individual self-government is indeed widespread,[24] in the framework of which legal entities themselves create the right to life relationships not regulated by law or to unorganized parts thereof. In the field of labor law, the law-making power of individuals must be rediscovered in the employment contract, for which the principle of partnership is essential. Section 13 of the Labor Code also establishes a hierarchy of rules governing the employment relationship, which hierarchy is broken by the principle of a rule more favorable to the employee, which in civil law means clausually cogent and clausibly dispositive rules. At the same time, the regulatory technique of the Labor Code clearly demonstrates respect for the principle of freedom of contract and the promotion of individual self-government. Proof of this is that the Labor Code has made absolute dispositivity the main rule compared to the relative dispositive rule of the old Mt. Part II of Mt. (individual labor law) is relatively dispositive regarding the employment contract. The parties may otherwise agree on any matter which is not a mandatory provision. According to the commentary, this solution considers the traditional feature of the world of work, where there is no equilibrium between the parties at the level of individual agreements, which is the legal policy reason for the rule of disposition in the traditional system of private law. Regarding the employment contract, therefore, the Mt. and the collective agreement set minimum standards from which the agreement of the parties may deviate in a positive direction in favor of the employee. Part II (individual labor law) and III (collective labor law) of the Labor Code is dispositive about the collective agreement. Deviation to the detriment of the employee is possible if permitted by the Mt. The aim is to increase the role of the collective agreement as a source of contractual law.[25] The same is the case for a normative agreement of the work council. An exception to this is wage bargaining, i.e., the remuneration of work. Deviations can only be made if the derogation is expressly permitted by law. One-sided deviation, relative dispositivity (claudication cogency) is also common when it is only possible to deviate in favor of the employee. The rules for liability for damages are typically such. Limited bilateral dispositivity, to the detriment of the employee, allows only a certain degree of deviation. Extraordinary working hours are limited to 250 hours per year, from which a collective agreement may deviate, but may not exceed 300 hours per year. Exceptions to the general rule of absolute dispositivity can be found under the heading Derogation agreement at the end of each chapter.[26]

It can be seen, therefore, that the regulatory technique of the Labor Code provides an opportunity for the principle of freedom of contract to prevail in labor law, even

24 Kelemen, 1941, p. 8.

25 'The idea of coalition freedom at the level of fundamental rights has meant the emergence of a new quality of contractual entity in a private law approach, and with the development of technology, in some areas even without it, due to the nature of the work itself, collective performance has come to the fore or has become exclusive, and collective rights have emerged' (Kiss, 2014, p. 45).

26 Gyulavári, 2014, p. 57.

if the protection of the weaker party forces the legislature to enact mandatory and public law rules.

An examination of the relationship between labor law and civil law raises the distinction between the contractual and the most latent sources of labor law, as labor law regulation is moving closer to civil law rules in times of employment crisis. And the employment contract can become a fervent source of commitment if the parties have the flexibility to shape the content of the legal relationship. Accordingly, the aim is to change the content of the employment contract and the employment relationship according to the economic environment. This is how the legal fact and the legal effect are treated in unity.

According to Section 34 (1) of the Labor Code: An employee is a natural person who performs work based on an employment contract. Section 42 (1) sets out the concept of employment and (2) the actual content of the employment contract: The employment relationship is established by an employment contract. (2) Pursuant to the employment contract, a) the employee is obliged to perform work under the direction of the employer, b) the employer is obliged to employ the employee and pay wages.

Based on the above, Hungarian legal policy is based on the dual model, i.e., work performed based on an employment contract, including personal and economic dependence, is what remains within the framework of labor law. It is important in the drafting of the concept of a person having a status like that of an employee, the demarcation would have been the absence of personal dependence.[27] The lack of personal and economic dependence belongs to the field of self-employment, which, as Tamás Gyulavári[28] and Bernadett Szekeres[29] point out, has no definition in Hungarian law. The Labor Code has also included under the concept of employee legal relationships with a low level of personal dependence, such as teleworking and subcontracting. It follows that a minimum level of personal dependence already justifies extending the personal scope of labor law.

In addition, the Hungarian legislation brought incapacitated employees within the definition of an employee. This was in fact an attempt to normalize the economic dependency of workers and sham contracts. The legal policy intention is the right one, but the legislature has lost its way, because, in my opinion, the employment of incapacitated workers can be achieved within the framework of a much more thoughtful regulation.[30]

27 See Szekeres, 2018c, pp. 128–144; Szekeres, 2018a, pp. 439–450; Szekeres, 2017, pp. 561–569.

28 Gyulavári, 2014, pp. 9–10.

29 See Szekeres, 2018d; Szekeres, 2018b, pp. 24–31.

30 The Constitutional Court ruled in Resolution of 39/2011. (V. 31) that the Parliament had implemented unconstitutionality by failing to create the legal conditions and guarantees for the employment of incapacitated adults based on employment or other legal relationships. The Constitutional Court therefore called on the National Assembly to fulfill its legislative task by 31 December 2011. 'The National Assembly can fulfill its legislative task in several ways....But it can also choose—as it has not entered into force Act CXX of 2009 on the Civil Code. It was stated in the law—that the regulation provides the courts with the possibility to decide during the custody to determine on a case-by-case basis: whether the given person may establish an employment

The concept of a person with a status like that of an employee in the Draft has moved strategically toward the *tertium genus*. I agree with György Kiss that in the future it will be the task of labor law to define the legal basis of employee dependency and, separately, to define the criteria of dependency of a person with a similar legal status as an employee.[31]

The regulatory technique and strategy of the Labor Code was clearly to try to include as many previously unnamed personal employment relationships as possible, so that fixed-term, part-time or temporary workers could enjoy employment and social protection in connection with the employment contract.[32] Thus, a rather common regulatory technique for dealing with emerging employment relationships was chosen by the Hungarian legislature, ie. it sought to classify new phenomena under the category of employment contract or service contract based on the dual model. It is here that the transformation of working conditions from precarious to secure employment is most noticeable. This was accompanied by the fight against undeclared work, which led to the creation of Regulation 7001/2005. (MK 170.) FMM-PM joint directive on the aspects to be considered when classifying the contracts on which the work is based[33], however, it was repealed by the Act of CXXX of 2010 before the entry into force of the Mt. in Section 47 with effect from 1 January 2011.[34] In addition, the way in

relationship or other legal relationship for work and under what conditions....The employment and occupational safety aspects of persons who are incapacitated shall be considered when enabling incapacitated persons to take up employment, which shall require special rules for persons with a total and permanent lack of foresight [guarantee that] employers will not abuse employment provided under an employment relationship or a special employment contract specified by law....[Guarantees] the conditions for the establishment (and other performance) of the employment relationship as regards the mandatory elements of the contract.'
An incapacitated employee, as a type of employment relationship, is listed as a foreign body in Chapter XV of the Labor Code. The employment of an incapacitated employee is conceivable in a regulatory system, the creation of which is not the task of labor law regulation. There is no question of rehabilitating an incapacitated employee, training them, assisting them in the workplace, and supporting them in making legal statements.

31 See Kiss, 2013, p. 13.

32 György Kiss sees this as a source of danger that labor law is increasingly drifting toward civil law, and in the quality of legal relationships others. Kiss, 2006, p. 273; Kiss, 2005, p. 95.

33 Qualification marks, in my opinion, indicate the elements of personal and economic dependence, whereas the elements of dependence under labor law either do not appear or appear more nuanced in the case of employment relationships covered by civil law. There is no personal dependency and the recipient's right to instruct and control the subject matter of the service is limited. However, economic dependence is also conceivable in civil cases.

34 Tamás Gyulavári proposes the following weighting of the primary and secondary rating marks in terms of rating: 'We recommend the use of the following primary criteria, partly changing the previous case-based system of rating marks: a) subordination, a wide range of employer management, instruction and control rights; (b) an obligation to work in person; (c) payment of wages; (d) regular performance of the tasks assigned to the job; e) the employer's obligation to employ and the employee's availability. In comparison, the secondary marks are: (a) determination of working time; (b) place of work; (c) the use of the employer's work equipment and raw materials; (d) to ensure safe and healthy working conditions....The central question is whether the primary and secondary tickets, in their entirety, support the existence of the degree of subordination and personal dependence necessary for the establishment of the

which the Labor Code leaves working conditions precarious and unregulated can be observed. Full employment and social protection apply to those in the labor market who work under conditions based on personal and economic dependence. Judicial practice, similar to German and British practice, can interpret the content elements of an employment relationship through legal cases and open up to the gray zone in it. This may be one way of moving forward with Hungarian labor law. After all, economically dependent workers are currently excluded from the scope of employment law institutions by these criteria.

This was also the case with the concept of a person with a similar status to a grey zone worker. The technique used in Italian and German law to recognize the third type of workers, those belonging to the grey zone (*arbeitnehmerähnliche Person, parasubordinati, co.co.co., co.co.pro.*) was included in the drafting of the new Labor Code. The codifiers were, of course, aware of the importance of the regulation, trying to extend labor and social protection, but this was not acknowledged in the final text. In fact, it was a political decision, as was the fact that the Labor Code included quite several personal employment relationships in chapter XV of the Labor Code. In addition to fixed-term and various forms of part-time employment, teleworking, employment, simplified employment, employment with a public employer, a managerial employee, temporary agency work and incapacitated employees are also included in the protection scheme. Each of these employment relationships defines itself in relation to the general rules of the employment contract, highlighting the differences from typical employment under a normal employment contract in the content of the employment contract, instructions, supervision, cost bearing, remuneration, etc.

What can we say about the protective nature of Hungarian labor law?

The regulation is a risk transfer to the worker. Let us assume for a moment that the employee in this individualized world is prepared to make use of the contractual freedom conferred on him. He has the right to help shape the content of the employment relationship. I find the special system of norms and the hierarchy of norms of the Labor Code appropriate for this. In my opinion, the labor law regulation has responded to the changes in economic and social life, in the labor market, by emphasizing the principle of partnerships. Quoting György Kenderes: 'The reduction of cogency has positive effects,' although he did not write this in the context of risk

employment relationship' (Gyulavári, 2014, p. 5). Original order of rating marks: primary rating marks: nature of activity, job definition as job; the obligation to work in person; employment obligation on the part of the employer, availability of the employee; subordination. Secondary rating marks: the right to direct, instruct and control; determining the duration of work, the schedule of working hours; place of work; remuneration for work performed; use of the employer's work equipment, resources, and raw materials; ensuring safe working conditions that do not endanger health; literacy. See Bankó, 2010, p. 185. Wage payment and the obligation of employment and availability can be considered as real, essential elements of the employment relationship. The right of command, command and control was the unspecific specificity of the difference resulting from sub-order, which was originally considered unreasonable. In fact, Tamás Prugberger and György Kenderes suggested the inclusion of the above content criteria in the general part of the obligation of the Civil Code. Kenderes and Prugberger, 2001, pp. 113.

placement. However, he did not see the rigid labor law rules as a way forward, and proposed a reasonable relaxation of them.[35]

At the same time, the fairness of risk-taking is determined by the extent to which human rights are upheld in a state governed by the rule of law, and the extent to which basic protection based on human dignity, equality and autonomy permeates the regulation of a social and labor market program. I believe that the new legislation in the Labor Code has placed employees at risk. All this was sharply criticized by Tamás Prugberger.[36] And indeed, labor law protection institutions should not be abandoned; this is what provides stability for employees in times of changes. At the same time, it is not possible to make labor law regulations rigid with overly protective rules, because then employers will choose other forms of employment. That is why I consider the rules undermining workers' rights to be fundamentally risk-averse, which can only be achieved with human rights guarantees.

On the question of how the relationship between individual and collective labor law develops, my position can be summarized as follows.

Indeed, the collective labor law rules, due to the superiority of the employer and the imbalance between the parties, serve to make the obligation between the employer and the employee more syntagmatic and to set limits on the employer's power, even though the rules on industrial relationships institutions are mandatory. In the case of individual labor law rules, the collective agreement may establish a stricter rule than that laid down in the Mt., unless bilateral disposition is achieved. For example, a collective agreement provides that up to three hundred hours of extraordinary working time per year may be ordered.[37] The works council has been given a primary role in the Labor Relationships section of the Labor Code, which clearly means the strengthening of partnerships, as the works council is about cooperation between the employer and the employees and participation in the employer's decisions. The foundations of partnerships, as well as working relationships, are defined by general behavioral requirements. I see the principles set out here as an umbrella whose shadow casts on all working relationships. Information and good faith play a key role in contractual relationships.

3. Current Issues

The last three years have been defined by COVID, which also has an impact on the world of work. [38] Here I consider it important to mention some areas which have been affected: the granting of leave, breaks between work, wages, unpaid leave, absence at the initiative of the employee, unilateral imposition of a working time limit of up

35 See Kenderes, 2001, p. 299; Kenderes, 2007, pp. 210–216.
36 Prugberger, 2001, p. 174.
37 See Section 277 (2) of the Labor Code: 'Unless otherwise provided, a collective agreement may deviate from the provisions of Parts Two and Three of the Labor Code.'
38 Board of the Hungarian Labor Law Society, Editorial Board of the Labor Law Journal, 2020.

to twenty-four months, support for reduced working hours, vaccination obligations during emergencies. However, I rather highlight the differentiation of telework in more detail. It was necessary to regulate the home office at the legal level, as most Hungarian experts also had the opposite opinion about its essential elements. [39] This debate was concluded by the legislature in Case T / 17671. Since the bill on certain regulatory issues related to the emergency situation, the new regulation on teleworking, i.e., Act CXXX of 2021 on Certain Regulatory Issues Related to the Emergency (hereinafter: the Act), amends the rules of the Mt. on telework with effect from the end of the emergency. The new regulations are as follows:

> Section 196 (1) In the case of telework, the employee shall perform the work for a part or all of the working time in a place separate from the employer's premises.
> (2) The employment contract shall stipulate the employment of the employee in the framework of teleworking.
> (3) Unless otherwise agreed during teleworking
> (a) the employer's right of instruction extends to the definition of the tasks to be performed by the employee,
> b) the employer exercises his right of control remotely using a computer device,
> (c) the employee works at the employer's premises for a maximum of one third of the working days in the year in question, and
> (d) the employer ensures that the worker can enter his territory and maintain contact with another worker.
> (4) If the employer exercises the right of inspection at the place of telework, the inspection shall not impose a disproportionate burden on the employee or on another person using the property serving as the place of telework.
> (5) The employer shall provide the teleworker with all information provided to another employee.

In Szekeres Bernadett's[40] analysis, we read that the legislature has broadened the category of teleworking: in addition to the previous mainly regular work done remotely, teleworking also includes the case where the employee spends only part of the working time away from the employer's premises. Accordingly, it is very important for an employee to work part-time at the employer's part of his or her working time. In our opinion, this has transformed the essence of teleworking, as so far teleworking has served as an independent atypical category of legal relationships, but because of this modification, belongs to its construction. It should be emphasized

39 Pál, 2018, pp. 56–59; Czirók and Nyerges, 2018, pp. 40–46; Bankó et al., 2021, paras. 196–197; Molnár, 2020, pp. 38–46; Kártyás et al., 2020; Venczel-Szakó et al., 2021, pp. 73–86; Herdon and Rab, 2021, pp. 59–82.
40 See Szekeres, 2022, in press.

that the legislation does not specify a mandatory ratio between on-site and remote work for a given legal relationship to qualify as telework, the law contains only one background rule that can be circumvented by consensus of the parties. According to this, if the parties stipulate in the employment contract that the employment relationship in question has been established for teleworking in accordance with para. 2, they may freely adjust the proportion of time spent working away and at the site in the absence of a provision. If this is not the case, para. 3 (c) applies only, according to which the employee may spend no more than one-third of his or her working time on-site. Accordingly, the employer may only instruct the employee to work in an office for a maximum of one-third of the working time, but if the parties wish otherwise, the law allows this. This freedom would allow either overwhelming office work or even the rare occurrence of teleworking in the context of an atypical telework relationship. However, in our opinion, this freedom destroys the stability of the hitherto independent atypical legal institution, as it also puts hybrid work within its framework, even though the legal consequences of telework are specifically in a situation where there is no place for regular office work. The previously regulated legal consequences of telework will generate more controversy when applying to hybrid work than limiting the scope of employer instruction, as it has been specifically developed for the distance between the two parties. In practice, for example, it can also lead to tension between employees if the employer can exercise close control, supervision, and instruction about employees working in the same position in the office. Among the many other issues, it can also be pointed out that the background norm that the work schedule of a teleworker is not binding, unless otherwise agreed by the parties, disappears from the regulation. The casual work schedule for telework is fully appropriate and follows the essential features of telework. According to the amending act, however, if the parties fail to rule on this issue, the non-binding rules of procedure shall prevail. This can have particularly serious consequences for the remuneration of extraordinary work that may be incurred while working remotely, even from home. It should also be mentioned that the new regulation still does not explicitly provide for the home office, as it approaches it from a distance, from the perspective of hybrid work, and places it under the umbrella of telework. Related to this is the fact that, due to several practical difficulties, employers often enter into agreements with employees to employ them remotely, but the legal consequences and rules of telework are applied only when the employee works remotely, and traditional rules apply to time spent in the office. Thus, among other things, the traditional rights of command and control of the employer apply. Based on the above lines, the practice with this hybrid system of legal consequences tries to circumvent what is caused by the current regulations, i.e., the integration of hybrid work into telework. It is not clear whether the subjects of an employment relationship can establish a telework relationship whose rules depend on where the employee is doing his or her work. This issue may give rise to more controversy, but at the same time this practical need is understandable, as highlighted above, the application of telework rules to clerical work can lead to several contradictions. We must not forget, however, that this kind

of (practical and legislative) approach runs counter to the separate entity of teleworking, being a separate, *sui generis* atypical employment relationship. With this broad aspect, teleworking can still not be maintained as a separate, separable atypical legal relationship. Continuous changes, new practical problems, and unforeseen technological advances all point to the need to re-examine telework from both a domestic and an international, EU perspective to be able to apply it to hybrid conditions without internal contradiction.[41]

In the case of occupational safety for teleworking, Section 86 of Act XCIII of 1993 on occupational safety[42] shall apply. These rules do not allow an exception to the general rules for an employer-run job. Due to the introduction of home office during the first wave of the pandemic, the question arose as to the extent to which these requirements should apply. Two different opinions emerged.[43] According to the first, they apply only to workplaces set up and operated by the employer to provide workplaces for several workers. According to them, occupational safety and health should be specifically implemented in situations that exist in the longer term, such as teleworking. Thus, it is not justified to apply all regulations to temporary work such as working from home. These obligations are limited to a limited number. Such can be the use of a laptop, which is a necessary tool for work. In this respect, the employer must act in such a way that he carries out the necessary risk analyses as if he were carrying out his workplace. In addition, the employer is obliged to provide information. These include calling for, preventing, or eliminating hazards at work, and working to create a safe and healthy work environment. The employee must be aware of the contents of the information. This view also reflects the sudden situation, as it considers that due to the shortness of time, the employer does not have the opportunity to establish the conditions for working from home or the system of control. According to the other view, since there is no substantive difference in terms of content between working from home and working remotely, the same rules on health and safety apply to both works.

4. Data

According to the electronic register of collective agreements, 5,176 collective agreements are registered in Hungary, of which 396 are fixed-term collective agreements.[44]

At present (based on pre-2012 data still available), a total of around 880,000–900,000 workers are covered by collective agreements in Hungary. This coverage is less than a third of the total number of employees concerned. Of these, 650,000 workers are covered by single-employer collective agreements (20–22%), 78,000

41 See the work of Bernadett Szekeres on this.
42 Act XCIII. of 1993 Chapter VII/A on occupational safety and health. Section 86/A shall apply to different occupational safety rules for teleworking.
43 Board of the Hungarian Labor Law Society and Editorial Board of the Labor Law Journal, 2020.
44 See the data in the Industrial Relationships Information System at the following website: http://www.mkir.gov.hu/ (Accessed: 5 May 2022).

by multi-employer collective agreements (2–3%), 135,000 by collective agreements concluded by an employer representative body (4–5%), while 230,000 are covered by extended collective agreements (8–9%). In the latter, the average increase in coverage from extension is only 5–7%. In terms of coverage of single-employer collective agreements, the energy, water supply, transportation, postal mail, and telecommunications sectors are outstanding. Almost 90% of workers in these sectors are covered by collective agreements. The sectors with the lowest coverage are construction (around 5%), trade (15%), repair of transport equipment (15%), accommodation services (10%), wood, paper, and printing (19–20%). Almost half of the workers (35–55%) are covered by collective agreements in textiles, clothing, leather, oil, rubber, financial activities, mining, education, and health. The same proportions are also found for other types of collective agreements (multi-employer, employers' representative body, etc.), albeit to a much lesser extent, in the following sectors of the economy.[45] In practice, the implementation of extended collective agreements is negligible, '[the] institution of extension has been recognized in the Labor Code since 1992, and post-2002 labor policy has also expressed its receptiveness to extension proposals, but only a few sectors have so far reached the stage of an extension decision.' These are the electricity industry, the baking industry, the catering industry and, more recently, the construction industry. 'With the extension in the construction sector, the impact of the extensions on collective bargaining coverage has increased significantly: from 2.4% in the past, the number of workers whose wages and working conditions are covered by collective agreements has now increased by 6%.'[46]

What is thought-provoking is the high number of collective agreements of indefinite duration. If the parties conclude a collective agreement with each other for an indefinite period, the legal relationship between them will be emptied and they will not be motivated to conclude another collective agreement. Single-employer collective agreements typically occur in the field of public services. There is an increasing number of multi-employer employment relationships, in which it is usually difficult to find the party (either on the employer or employee side) who is entitled to negotiate, in accordance with the principle of the bargaining unit. We have little information about these in Hungary. The willingness to expand also shows the strength of the collective consciousness in our country. The question is whether, and to what extent, the parties intend to raise it to a higher level in terms of the outcome of lower-level agreements. However, this requires organization. This is not strong in Hungary.

45 Szabó, 2015, pp, 21–22.
46 Szabó, 2015, pp. 32–33.

5. Closing Remarks

In the evolutionary development of labor law, the private law character of labor law has disappeared, then revived and strengthened. After all, in the changed economic and social environment, it was impossible to keep the employment relationship within the framework of private law, it was necessary to infiltrate elements of public law. However, this does not mean the separation of labor law from private law. In the relationship between labor law and private law, we can observe first self-identity, then a kind of distancing, and finally a rapprochement. Globalization, the change in the nature of work, and the increased role of the individual can be said to simultaneously, reinforcing each other, pushing the boundaries of national and thus Hungarian labor law regulations.

The fundamental value of labor law is that it provides security in the economic sense and thus creates predictability: on the one hand, with rules to protect the employee from the inside, and by building a social network on the outside if the employee is unable to work in a disturbed situation. In 1998, the ILO set out the fundamental rights that all states must respect: (a) the freedom of association and the effective recognition of the right to collective bargaining; (b) the elimination of all forms of forced and compulsory labor; (c) the effective abolition of child labor; and (d) the elimination of discrimination in respect of employment and occupation. These rights should apply as fundamental rules of the game, regardless of the playing field. Security is therefore also about upholding core values within labor law.

Examining the basics of Hungarian labor law, I presented the system of the Labor Code and its connection to civil law rules. In the differentiation of telework, the need for protection and flexibility arises at the same time, the regulation of which is a challenge for the legislature. The power inherent in an employment contract to shape the employment relationship of the parties is typically not found in a traditional employment relationship. And the statistics on collective bargaining show that the parties have only limited use of the possibility of partnerships in the Labor Code.

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| Chapter 10 |

Central European Reality of Labor Law—A Comparative Chapter Fundamentals of Labor Law

Nóra JAKAB

The myriad of employment relationships, as mentioned above, poses a challenge to legislatures and legal policy. In this context, the questions were: how is the regulation of the new employment relationships in Central Europe evolving? The question is also how, with all these changes, the place of labor law in the legal system, the concept of the employment relationship, the employment contract and the collective agreement will evolve in Central Europe? What is the relationship between labor law and civil law in the countries under study? What were the arrangements that were introduced in the spirit of flexicurity? How did the COVID epidemic shape labor law? How is collective bargaining coverage shaped to measure the state of collective consciousness?

We provided insight into the specifics of the development of national (collective) labor law and collective agreements in Central Europe and reflected the outstanding problems of their transformation and recent position by the relevant Central European literature worked up by Mišič, Štefko, Barański, Strban, Dudás, Jašarević, Dolobáč, Vinković, Vallasek, based on the thoughts of Florek, Tintić, Tičar, Končar, Vodovnik, Lubarda, Stefański, Kresal, Senčur Peček, Kavšek, Wyka, Musiała, Gersdorf, etc., on issues that have long been present in Western European discourses and are accessible to all.

Labor law is independent, because due to historical traditions, the effectiveness and clarity of legal regulation of the specific range of social relationships which it regulates, it needs a separate (own) code form, but at the same time it can exist without it as a scientific field.[1] However, the definition of labor law as a separate branch of law does not mean that it should exist independently, in isolation and without functional links to other parts of the legal system.

1 Štefko, 7.

Jakab, N. (2022) 'Central European Reality of Labor Law—A Comparative Chapter. Fundamentals of Labor Law' in Jakab, N. (ed.) *Fundamentals of Labor Law in Central Europe.* Miskolc–Budapest: Central European Academic Publishing. pp. 227–251. https://doi.org/10.54171/2022.nj.fullce_11

This book has focused on the fundamentals of labor law: the rules on employment contracts and collective agreements and their power to shape employment relationships. In labor law the essential building block of this cornerstone is the individual employment contract and the collective agreement. L. Florek notes that 'the legal regulation of individual employment relationships is not based only on statutory provisions, but also on autonomous sources of law created by the parties to collective employment relationships.'[2] It is an essential instrument of trade union influence on the content of individual employment relationships. As Florek adds, 'This applies especially to collective labor agreements, which are an institution of both individual and collective labor law.'[3] According to Tintić, the employment contract 'is traditionally a central category of labor law.'[4] It is: 'the basis for establishing a labor relationship; the form of regulating labor relationship; a basic means of scheduling the workforce; a means of regulating the intensity of work and harmonizing the interests of each worker with social interests as well as collective interests.' Its essential features are voluntariness and consensuality. When it comes to its content, it expresses elements of onerosity, bilaterality, and exchange.[5] Tintić's views that collective agreements are 'at the crossroads between private and public law,' which is why it is rightly said that they are 'legal chameleons in the world of legal beings.'[6] According to Lubarda, 'The right to collective bargaining is a special expression of the philosophy of dialogue in general, that is, the philosophy of social dialogue.'[7] For us, after him, collective bargaining is a kind of negotiating mechanism or 'negotiating machinery,' as a subsystem within the national economic and social system, directly including negotiating parties, social partners—unions and employers' associations from the enterprise level, across the branch into the cross-border level at the national level (both centralized and decentralized).'[8] Vinković says 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. 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.[9]

2 Florek, 2007, p. 18.
3 Ibid.
4 Tintić, 1972, p. 165.
5 Ibid.
6 Cited in Fahlbeck, 1987, p. 268; Jašarević, 1992, p. 11.
7 Lubarda, 2012, p. 874.
8 Lubarda, 2012, p. 877.
9 Davidov, 2016, p. 87.

Vinković says 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 [10] 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 effect of the collective agreement.[11] 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, it is to be feared that employers will be willing to provide only minimum protection, i.e., the rights deriving from general regulations, and to conclude contracts that are quite meagre in content, or even ready-made forms of simple contracts purchased in bookstores and stationery stores.

Tičar notes that it is not only lawmakers from countries belonging to the continental but also from countries belonging to common law traditions that have posed increased limitations to parties' private autonomy concerning the content or rights and obligations stemming from employment contracts. Heteronomous statutory provisions, following the general trend from *contract* to *status*, are drafted with the aim of offering a higher level of protection to employees as weaker contractual parties, thus bringing the employment contract closer to a somewhat declaratory legal act, merely marking the conclusion of an employment relationship.[12] Končar, who notes that workers today commonly possess better education and expertise, are more autonomous and creative and commonly no longer require several detailed instructions from their employers.[13]

Vinković also highlights 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, 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.[14] Pandemic has undoubtedly imposed

10 Tucak and Vinković, 2021, pp. 1086–1089.
11 Bilić, 2021, pp. 406–407.
12 Ibid., pp. 55–56.
13 Končar, 2016, p. 261.
14 Albin and Prassl, 2016, pp. 213–216.

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 because of 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*. Trade unions have been established to counterbalance the weaker position of employees against employers.[15] In this context, W. Sanetra emphasizes that the functional dependence of collective labor law on individual labor law speaks against its autonomization and shaping it as a separate branch of law.[16] The 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.

1. Systematic Placement of Labor Law

In Slovenia according to Vodovnik et al., labor law represents an independent branch of the Slovene legal system, a characteristic confirmed by the fact that it possesses its own particular structure of regulation with its own principles and the fact that individual rights, stemming from the particular branch of labor law, enjoy protection under a special branch of the court system. Labor law regulation's inextricable link to social security law, placing labor law in the wider field of social law, has already been discussed. Even if sharing a profound connection to social security law as a discipline of public law, labor law has generally developed from civil law, an element that is according to Vodovnik et al. still visible in the current regulation of the employment contract. According to the authors, the link is also or even most visible in cases when civil law provisions directly regulate parts of labor law, e.g., the liability for damages from the employment relationship. However, in general terms, Slovene labor law could be considered as, on the one hand, falling within the realm of social law as a special discipline of public law, and, on the other hand, sharing a profound link to civil law regarding parties' private autonomy both in the field of individual as well as collective labor law. In that sense, civil law characteristics take over once a minimum level of protection, offered by public law provisions, is in place. In his theoretical systematization of major legal disciplines, Pavčnik describes labor law through its gradual separation from civil law, next to the then developing discipline

15 Florek, 2007, p. 17.
16 Fahlbeck, p. 42.

of social security law. According to Pavčnik, the liberal 19th century state first regulated work through civil law contracts, stemming from the then applicable Civil Code (Germ. *Bürgerliches Gesetzbuch*), however, with gradual development, increasingly heteronomous (state) legal rules begun to limit party autonomy as to offer a wider set of rights to workers (employees). Slovene employment law, commonly considered as a notion wider than labor law, corresponds to the theoretical paradigm of monism. Employment relationships of civil servants fall under the same regulatory framework as private-sector employee relationships. Put differently, general labor law provisions are applicable for both private as well as public-sector employees who are employed with state bodies, public agencies, funds or institutions, self-governing local communities, etc.[17]

In the scholarly literature on Romanian labor law, while there are divergent opinions as to which law can be considered the first true labor law, there is consensus on the autonomy of labor law as a legal discipline. The solution of regulating employment contracts within the Civil Code is alien to the tradition of Romanian labor law, and the unanimous position of the domestic scholarly literature is in line with the idea of the autonomy of labor law. There are also isolated views that labor law developed in parallel with civil law, and that the individual employment contract itself cannot be derived from any type of contract regulated by the Civil Code, since its roots are to be found in the contracts used by guilds. Most Romanian legal scholars, however, are of the opposite opinion, and take the view that the regulation of the employment contract has its roots in the succinct articles 1412 and 1470 of the 1864 Romanian Labor Code, which settled the issue of *locatio operarum* until they were repealed by the 1950 Labor Code. Subsequently, and under the 1972 Labor Code, the possibility that a contract of employment could be governed by a law other than the Labor Code, the primary source of labor law, was not even considered.[18]

According to Czech legal theory (and historical tradition), labor law is not distinguished from private law (in the sense of being a legal branch of private law). Private law is conceived as the body of laws regulating ordinary private matters, distinct from laws regulating business relationships, family relationships or relationships arising from the performance of dependent work. Labor law is comprised of provisions regulating the legal relationship between employer (old-fashioned 'master') and employee ('servant'). The nature of an employment relationship is that an employee 'sells labor' to an employer. The theory names the employee's work as 'the performance of dependent work.'[19]

In Poland, labor law is currently an independent branch of law (within a uniform legal system), separate inter alia from civil law and administrative law. The subject of labor law does not include social insurance, although there are close relationships between labor law and social insurance law. At the same time, it should be stressed

17 Strban and Mišič, Chapter 4.
18 Vallasek, Chapter 3.
19 Štefko, Chapter 6.

that labor law has quite strong relationships with civil law, from which it is partly derived. Labor law represents a key branch of law in Serbia and Hungary. However, as Jašarević and Dudás note, it seems it does not always receive the necessary attention from the state. Legislative solutions are often belated in the light of the needs of practice. In addition, the state does not take sufficient care of the effective application of labor law, which is why regulations are often circumvented in practice.[20]

2. Flexibility and Security

COVID-19 reshaped the way we are to think of work organization, especially within particular service industries, where telework became the new norm, of course with all of its benefits and drawbacks, posing challenging questions of employee's autonomy, health and safety (at the home office), supervision and privacy, work-life balance, etc. In the field of social security, countless measures concerning either new social security benefits or the amendment of the existing conditions were taken.

Recently, despite the constitutional protection laid down the Slovenian Constitution the Slovene Parliament introduced new grounds for dismissal, possibly considered as less favorable and unjustified unequal treatment of employees on the grounds of old age. Even if bound by the ILO Convention No. 158 concerning the termination of employment at the initiative of the employer and the European Social Charter (ESL), Parliament introduced a new cause of dismissal by which an employer can one-sidedly terminate an employment contract if the employee fulfills old-age retirement criteria. No genuine reason for dismissal, either on side of the employee or the employer, e.g., a business reason, must be established. The Slovene Constitutional Court has suspended the use of the said amendment of the ERA until it reaches a substantive decision in the case put forward by the trade unions on the grounds of unlawful age discrimination. One the one hand, the amendment that was introduced by emergency coronavirus legislation is said to have followed the legitimate or public interest aim of securing employers' existence during the COVID-19 crisis. However, from this perspective, the traditional business reason should have sufficed. On the other hand, the amendment was also supposed to have enabled enhanced employment of younger people instead of the old, who already enjoy social security (for old age), even if this legitimate aim of the labor market seems unrelated to the general aims of emergency coronavirus legislation. Even so, in cases of such dismissals, employment of younger persons was not required by law, making the amendment inadequate in following the said legitimate aim. Since ERA already regulates the common business reason for dismissal, the part of the amendment relating to the legitimate aim of keeping businesses afloat during and after the health crisis, is to be considered not inadequate but unnecessary. From this perspective, both measures fail the proportionality test even before subject to its final step, the balancing of individual rights or constitutionally

20 Barański, Chapter 7; Jašarević and Dudás, Chapter 5.

safeguarded values. According to Vodovnik et al., the ERA from 2002,[21] amended in 2013, represents the basis of contemporary employment law in Slovenia. The 2013 ERA, which also represents the central piece of domestic legislation governing individual labor relationships, introduced several new labor law institutions, like the economically dependent person, i.e., a self-employed person, providing the majority of his or her services for a single client, thus enjoying a limited scope of labor law protection. It also amended the regulation of the employment contract, probationary employment, fixed-term employment, and other flexible forms of work.[22]

In Romania, the most significant of the amendments to the Labor Act in terms of making labor law more flexible is Law 40 of 2011, the new legislation introduced substantial changes to the provisions on temporary agency work, fixed-term contracts, working time, and probationary periods, but also covered several other issues. Overall, it can be concluded that the amendments were necessary in many respects because of shortcomings that could be identified in the previous legislation, without weakening the protection of workers. However, as pointed out in the literature, there remain several questions whose interpretation is not clear. Such is the case of the termination of an employment contract due to the fulfillment of retirement conditions, which was only one in a series of amendments. But the new legislation also affects certain cases of termination of an employment contract by the employer and the rules on termination by the employee, and the ban on trade union leaders for two years after their mandate has been lifted, which is a significant change in prohibitions on termination.[23]

In Croatia, 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. 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. 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 and, to some extent, the grey economy. A special law of 2012 introduced a

21 Official Gazette of the RS, from No. 42/02 to 21/13.
22 Strban and Mišič, Chapter 4.
23 Vallasek, Chapter 3.

voucher system of work in agriculture for a maximum period of 90 days in a calendar year, 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.[24]

If we perceive the flexibility of Labor Law as a lowering of the protection of employees from the termination of a labor relation, it is necessary to mention that the Czech Labor Code has not adopted this principle yet. Czech labor law still prohibits an employer from dismissing his/her employees without a fair reason. The only exception is when a probation clause is contained within the employment contract. Even a collective agreement cannot exempt an employee from protection against accidental or wrongful termination. Nor can a higher-level collective agreement provide for an exception. Thus, the only real blanket exception to the protection against termination of the employment relationship through an agreement is provided for in the Labor Code for agreements on work performed outside the employment relationship. Nevertheless, where the significant changes are visible in longer period are: fixed-term contracts and temporary agency work.[25]

The Labor Code in Serbia specifies that apart from the employment contract, the following types of contracts may be concluded as well: temporary or occasional work contract, special service contract, contract on apprenticeship or professional development, additional work contract.[26]

The Hungarian Labor Code included quite several personal employment relationships in chapter XV of the Labor Code. In addition to fixed-term and various forms of part-time employment, teleworking, employment, simplified employment, employment with a public employer, a managerial employee, temporary agency work and incapacitated employees are also included in the protection scheme. Each of these employment relationships defines itself in relation to the general rules of the employment contract, highlighting the differences from typical employment under a normal employment contract in the content of the employment contract, instructions, supervision, cost bearing, remuneration, etc. The recent telework regulation shows greatly the flexibility and security issue responding to the practice (like Telework Act in Romania).[27]

24 Vinković, Chapter 8.
25 Štefko, Chapter 6.
26 Jašarević and Dudás, Chapter 5.
27 Jakab, Chapter 9.

3. The Employment Relationship

In Slovenia the ERA consists of a definition of an employment relationship. Art. 4 defines it relationship as a relationship between employee and employer, in which the employee voluntarily enters an *organized work process* within which he *personally* and for *remuneration* carries out continuous work in line with *employer's instructions* and under his *supervision*. Which means there is a promise in the employment relationship for the long term.[28]

In Slovakia opinions of legal science consider the subject of labor law to be the legal regulation of *dependent work.* According to the valid legislation, the Labor Code defines dependent work as work performed under a relationship of superiority of the employer and the subordination of the employee, personally by the employee for the employer, according to the employer's instructions, on its behalf, during working hours determined by the employer.[29]

Similar to Tičar, Kresal and Senčur Peček mention several possible tests like the *control* or *subordination and control test,* accompanied by the more up to date *business* and *integration test*. Due to new patterns of work organization, also the *mixed test,* merging criteria from other tests, and the *risk test* have gained importance. The definition of an employment relationship, stipulated in art. 4, means that in theory, every civil or other legal relationship in which indicators of an employment relationship appear should be considered as such and that an employment contract, possibly of an indefinite duration, should be concluded. Even more so, art. 18 of the ERA provides for a legal presumption according to which the existence of defining elements of an employment relationship determines the existence of an employment relationship. The indicator of subordination of course cannot be considered as full loss of autonomy by the employee, especially in cases of aforementioned highly skilled professionals and modern forms of work organization, nor as constant and direct employer's oversight and control. It should be looked at more as a general context of dependence and subordination in which work is carried out. At this point the role of labor inspection is also an interesting issue, because it might goes against the free will of the parties. The concept of Slovakian labor law also prescribes the prohibition of performing dependent work in a relationship other than employment with the regulation of labor law. This means that if the subject of their agreement is the performance of dependent work as defined by the Labor Code, the contracting parties must also submit to labor law regulation, even against their own will.[30]

In Slovakia an original definition of dependent work included a total of ten features and their number became their most serious shortcoming. The practice of employers, and it should be added that this was also helped by the interpretation of

28 Strban and Mišič, Chapter 4.
29 See Dolobáč, Chapter 3.
30 Strban and Mišič, Chapter 4.

the relevant labor inspectors, required a cumulative interpretation of the features of dependent work. A failure to fulfill even one of the many features of dependent work, often fictitious and simulated, made it possible to undesirably contract dependent work under civil or commercial law contracts. The weakest link in the definition chain appeared to be the conceptual feature of the performance of work using the employer's means of production. Ad absurdum, it was sufficient if the employee used their own tools in the course of their work, and thus the employers argued that due to the non-fulfillment of all legal definitions, it could not be seen as the performance of dependent work. Another controversy was caused by the defining feature of work performance at the responsibility of the employer, which appeared to be more of a consequence of work performance in personal dependence. For this reason, gradual amendments to the Labor Code reduced the conceptual features of dependent work. The relative mandatory nature is expressed by the provisions of Section 1 par. 6 of the Slovakian Labor Code In employment relationships, the terms and conditions of employment and working conditions of an employee may be regulated more advantageously than this law or other labor law regulation provides, unless this law or other labor law regulation expressly prohibits it or unless it follows from the nature of their provisions that they cannot be deviated from. In accordance with its protective function, the Labor Code allows for dispositive agreements regarding the employment conditions and working conditions in one direction only—to the advantage of the employee. Kavšek follows the presumption of an existing employment contract from art. 5 of the Prevention of Undeclared Work and Employment Act, according to which a worker, who did not conclude an employment contract or whom his or her employer did not register within or deregistered from all mandatory social insurance branches, is presumed to have obtained a full-time employment contract of an indefinite duration. Finally, yet importantly, ERA predicts a full-time employment contract of an indefinite duration as the general rule. If the employment contract does not stipulate the duration of the employment relationship, it is presumed, under art. 12(2), that a contract of an indefinite duration has been concluded. According to art. 54 and 55, a fixed-term employment contract can be concluded as an exception only, under special conditions provided by the law, e.g., in cases of project work, season work, temporarily increased work demand, absent worker replacement. However, as made clear by a recent extensive study on precarious work in Slovenia, fixed-term employment, even in cases of steady, long-term demand for work, seems to be the new (unlawful) norm. [31]

In Romania labor law in its entirety only covers legal relationships based on individual employment contracts, but Romanian law also regulates numerous other employment relationships, which are covered to a greater or lesser extent by labor law. However, situations of employment that remain outside this regulatory area are also present, such as those that can be observed in the gig economy or platform-based employment, leaving the workers completely unprotected by labor law. Art. 10 of the

31 See Dolobáč, Chapter 2.

Labor Law defines a contract of employment as a contract under which a natural person, the employee, undertakes to work for the benefit and under the direction of a natural or legal person employer in return for remuneration called wages. The concept of *employee* is not defined in the Romanian Labor Code, which in its art. 13 only deals with the conditions of capacity to work. Based on the definitions in the literature, an employee is considered to be a person who makes his or her own labor available for the benefit of the employer and for which he or she is paid wages by the employer in return. The definition of the term *employer* in the Labor Code is also rather general, the normative text emphasizes the conditions of legal capacity, but in the first paragraph of art. 14 it states that 'an employer within the meaning of the present Code is a natural or legal person who is entitled to employ workers under a contract of employment pursuant to the law.' The definition in the literature follows the legal definition, generally listing slightly more characteristics, meaning that an employer is defined as a natural or legal person who provides a workplace for the employee, ensures working conditions and pays the employee in return for working in a subordinate position.[32]

In Serbia, in the case law, the number of cases rises when it is necessary to determine whether there is an employment or another contract, which is in line with the growing practice of simulating some contractual obligations (usually contract for work) with content that unequivocally implies an employment contract. In assessing whether it is an employment contract or another contract of the law of obligations, the courts are generally guided by the doctrine of *primacy of facts,* irrespective of the 'labelling' the parties gave to the contract. In other words, it has been noticed lately that simulated contracts are being concluded for occasional and temporary work, fixed-term contracts, contracts for the recruitment of workers through work agencies and other contracts of general law of obligations. In the assessment whether an employment relationship exists, the courts are mainly guided by the 'true nature' of the contract, i.e., they consider the essential components of the work performed by the employer (type of the work, its duration, the contractor's relation to the employer). This is the main reason is a civil law contract or 'sham flexible work contract' between the employer and the contractor forbidden, when the services or work to be performed coincide in essence with the characteristics of an employment relationship or fall within the employer's regular scope of business. It is quite unusual that the legislature did not regulate the notion of the employment contract (neither the notion of the collective agreement). There is no definition in the LC, neither in the LO. The LC only indirectly defines employment contract as a contract by which an employment relationship is established. This provision of the LC applies only to private sector, public companies, and services. As we said, civil servants are, however, appointed and enter into employment relationship by an act called 'decision.' One of the most prominent Serbian scholars of labor law today, Lubarda, points out that the *subject matter* of the employment contract must be a work conducted for the benefit of

32 Vallasek, Chapter 3.

another person that is not prohibited. He asserts that the general rules of the law of obligations must be applied, in the sense that the subject matter of the contract must be *determined* or *determinable*, consisting of: 1) defined work, 2) remuneration and 3) subordination If after the conclusion of the employment contract is established that there is a disagreement on some irrelevant element, the employment contract remains in force. The general rule of contract law shall be applied subsidiarily in this case, according to which this point will be determined by the court, if it may be inferred that the parties would have concluded a contract even without reaching an agreement on that specific point.[33]

Czech labor law is codified. Most provisions of the Labor Code of 2006 set forth conditions of the employment relationship and only a few concern rules for employment contracts. Hence, the second important concept in Czech labor law is that of employment relationships. The relationship is understood as a legal relation between two different individuals who are subject to rights and duties arising from that relationship. The noun adjunct 'employment' means that it is labor law which governs the relation in question.[34]

In Poland, according to art. 22 §1 KP, 'By establishing an employment relationship, an employee undertakes to perform work of a specified type for the benefit of an employer and under his supervision, in a place and at the times specified by the employer; the employer undertakes to employ the employee in return for remuneration.' It is accepted in the literature that labor law is a set of legal norms governing subordinate employment relationships and other legal relationships inherent in them. This specific obligatory relationship, which is the employment relationship, is a central concept in labor law. It is precisely the criterion of the subject of regulation that makes it possible to distinguish labor law as a separate branch of law. It is common in both jurisprudence and literature to contrast employment relationships with other workers' work. The employment relationship, as a legal relationship governed by labor law, has a specific legal character which distinguishes it, for example, from civil law relationships, administrative law relationships (work relationships in which officers of militarized formations remain in connection with the performance of a specific service), and criminal law relationships (work under conditions of compulsion). In the Supreme Court's view, the work does not must be of an employee nature. According to K.W. Baran, 'non-employment work includes all non-incidental provision of work except for classically conceived employment of a legal-employee nature.' The structural features of an employment relationship are voluntary commitment, the need to perform work personally, the aforementioned employee subordination, the employer's risk, the remuneration of work and continuity of work. The priviledge of the employee is a concept in the examined countries: the most important consequence of qualifying a collective labor agreement as a provision of labor law is applying to the provisions of such an agreement, defining the rights and obligations

33 Jašarević and Dudás, Chapter 5.
34 Štefko, Chapter 6.

of the parties to the employment relationship, of the special mechanism resulting from art. 18 KP. The Polish Labor Code establishes in this provision the principle of privilege of the employee, according to which the provisions of employment contracts and other acts based on which an employment relationship is established may not disadvantage an employee more than the provisions of labor law (art. 18 §1 KP). Any provisions of these contracts and acts defined that are less favorable to an employee than the provisions of labor law are invalid; the appropriate provisions of labor law will apply instead (art. 18 §2 KP). The principle of privilege of the employee sets limits on the parties' freedom to the employment relationship to shape their mutual rights and obligations. In its judgment of 5 October 2016, The Supreme Court indicated that the essence of the regulation of art. 18 §1 and 2 KP is to ensure that the employment contract does not violate the standards arising from the provisions of the labor law, while at the same time the parties are free to shape the terms and conditions of employment in the contract in a manner more favorable to the employee. These more favorable contractual provisions 'may introduce into the employment relationship employee rights to an extent greater than that provided for by the labor law, but they may also establish a right to benefits not provided for by those provisions'[35]. On the other hand, the principle of privilege of the employee cannot be reduced to a simple relation to resolving doubts in favor of the employee because a principle of this content cannot be derived from labor law provisions.[36]

4. Civil Law and Labor law

As far as good practices are concerned, for the sake of security the amended Slovenian Act on Labor Inspection deals with the role of labor inspection in determining 'false civil law contracts' when it comes to employment relationship. If the labor inspector established that a contract of general law of obligations has been concluded, which is contrary to the rule of the Labor Code prescribing that if there are elements of employment relationship, the work cannot be performed based on such contracts. In that case the inspector orders the employer to provide the contractor a written employment contract within three working days of delivery of the decision. The written contract must correspond to the actual situation arising from the decision (regarding the type and scope of the work performed), the salary must be comparable to the salary prescribed for the same work by the collective agreement and general acts binding on the employer (whereby the contributions to obligatory social insurance and tax obligations are also taken into consideration). If the employer fails to offer the contractor an employment contract, he has a right to resort to court within 30 days. Similarly, the solution of the Croatian Labor Code may also be qualified as progressive. If the employer concludes a contract with the employee for the performance

35 Judgment of the Supreme Court of 5 October 2016, II PK 205/15, LEX no. 2165563.
36 Barański, Chapter 7.

of work which, given the nature and type of work and the employer's authority, has the characteristics of the job for which the employment relationship is established, according to the Croatian Labor Code it shall be considered that an employment contract has been concluded, unless the employer proves otherwise. Furthermore, the Croatian Labor Code specifies that if there is an assignment of an employee to conduct work by a linked company, the former shall be considered employer in terms of the duty to apply the provisions of the Labor Code and other statutes and regulations governing safety and health at work (so-called linked employer). It would strengthen the protection of employees if a similar rule could be adopted in Serbia as well. In Slovenia, Kresal and Senčur Peček consider the employment contract as a special and autonomous contract of labor law, regulated next to general civil law provisions. According to the authors, the placement and definition of the employment contract as either an independent labor law contract or a specific civil law contract is left to the discretion of national legislatures and thus cannot be governed by neither international nor EU law. Under Slovene legislation, if there is an an absence of particular labor law rules, civil law rules thus *mutatis mutandis* apply regarding the conclusion, validity, termination, and other elements of the employment contract. Civil law rules concerning the conclusion of an employment contract apply, for example, to parties' capacity and consent, consideration and grounds for conclusion, contract form, etc. Regarding some institutions, like liability for damages or absolute and relative nullity, the ERA even directly refers to the application of civil law rules. Nullity of an employment contract for example leads to restitution claims on the side of both the employee and the employer, concerning salaries for example. However, if for example the employer is recognized by the court as a fraudulent party to the employment contract, the latter can deny his or her claim for restitution, considering the unlawful conduct of (possibly) both parties and the status of the violated legally protected categories or values.[37]

In Slovakia the legislature thus regulated the relationship between the Labor Code as a *lex specialis* and the Civil Code as a *lex generalis* in the form of subsidiarity, but only to a very limited extent. 'General provisions' is the title of the first part of the Civil Code. Subsidiarity thus applies to general issues such as the definition of a natural person, a legal person, legal acts, the method of concluding a contract, etc. *subsidiarity applies only to Part 1 of the Civil Code, but not to the part governing obligations*. In practice, such a narrowly defined subsidiarity, together with a closed system of contract types, seriously affects several areas of problems. There are several typical civil law elements that would also find application in labor law, but since they are not regulated in the Labor Code and at the same time subsidiarity is not allowed, their application is excluded. A typical example is the set-off of mutual claims or the assertion of the right to payment of statutory interest on arrears, which is still disputed in labor law. The set-off of mutual claims is thus not possible either from a substantive or procedural point of view, while the justification lies precisely in the absent

37 Strban and Mišič, Chapter 4.

possibility of subsidiary application of the Civil Code. On the other hand, the right to be awarded statutory penalty default interest in employment relationships is not at all unequivocal. At present, the Labor Code does not contain any regulation concerning default interest if there is a failure to pay in a proper and timely manner However, the majority case law recognizes and awards penalty interest for late payment, referring precisely to the Civil Code without examining in more detail the reasons for the lack of subsidiarity. In Slovakia it is pointed out: analogy is necessary in labor law, because otherwise we would not be able to objectively cover all situations that occur in labor relationships. But where do we set the boundaries? When is the analogy of the law for contractual obligations permissible and when does it become an illegal application? The basic boundaries between the allowed and prohibited use of the analogy of the law can be largely set out intuitively. Simply put, the analogy of the elements of the Civil Code will be allowed where law enforcement authorities *will have no other choice,* i.e., in cases where labor law is so insufficient that without the use of a special part of the Civil Code or without the use of other civil law regulations, its provisions will be obsolete. According to Judgment of the Regional Court in Žilina the analogy of the law and the use of the elements of the special part of the Civil Code will be inadmissible in cases where it would result in the application of such provisions of the Civil Code or special regulations that clearly conflict with the protective function of labor law, i.e., the protection of the weaker party.[38]

In Romania the Labor Code makes it clear in art. 278 that civil law is to be applied in a complementary manner, provided that the provisions in question are not in conflict with the specific characteristics of employment relationships.[39]

In Serbian law, Tintić's (and Jašarević-Dudás's) conclusion is that by being classified as a concept of labor law, collective agreements gain an environment corresponding to their importance and role in the practice of employment relationships, which enables their unhindered development. Civil law regulations on contracts provide often only a narrow framework for collective agreements. This does not mean that the numerous rules of the general law of obligations cannot be applied here either, especially when it comes to the legal and contractual capacity of the contracting parties (and their representatives) to conclude the contract, the form, interpretation, termination, and nullity of the contract.[40]

In Croatia, 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. In Croatian law, an interesting aspect has been outlined. According to the provisions of Croatian labor law, a collective agreement may terminate by

38 See Dolobáč, Chapter 2.
39 Vallasek, Chapter 3.
40 Jašarević and Dudás, Chapter 5.

the expiration of the term specified therein, by the conclusion of a new collective agreement between the same parties, or by termination (in the case of fixed-term agreements, which may be concluded *nota bene* for a maximum term of five years; termination is possible only if such a circumstance is provided for in the collective agreement). In the latter case, the collective agreements must contain provisions on the grounds for termination and notice periods, 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. However, the reason for the review of constitutionality was related to the fact that certain provisions of the collective agreement for civil 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, 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.' 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), 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. 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. 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. 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. 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.[41]

In the Czech Republic during the preparation of the Labor Code of 2006, the legislation was forced to deal with several theoretical problems. One of them was how to manage the relationship between civil law and labor law, or more particularly, the scope of the Civil Code and the scope of new Labor Code of 2006. Because the Civil Code

41 Vinković, Chapter 8.

contains many general rules which may be used in labor law, it seemed to be useless to rewrite and repeat such rules in the new Labor Code of 2006 as it did the Labor Code of 1965. Experts considered the two main approaches available—the concept of subsidiarity or the concept of limited application through express reference (delegation). The former means that the Civil Code would have applied as more general law in cases where the Labor Code of 2006 did not contain a specific regulation. On the contrary, the latter prescribes that it is the Labor Code that must enumerate which provisions of the Civil Code shall apply in labor law. The Civil Code must not be applied unless there is an express provision of the Labor Code that calls for the application of civil law. The legislature chose the delegation approach at the end. Therefore, the Labor Code of 2006 referred to almost 150 provisions of the Civil Code which, in accordance with Section 4 of the Labor Code of 2006, ought to apply to labor relationships. The same provision contained an interpretation rule that the Civil Code shall not be applied if the Labor Code of 2006 does not explicitly refer to a provision of the Civil Code. These referred provisions of the Civil Code are considered parts of the Labor Code of 2006 and, therefore, are governed by the general principles set forth in the Labor Code of 2006. However, such a legislative technique led to several problems regarding the application of 'Civil Code's provisions' in labor law. For example, the legislature made also reference to provisions which are inapplicable to labor relationships, and worse, to provisions which are contrary to ILO international treaties ratified by the Czech Republic and its predecessors (only some of these treaties enjoy direct applicability in Czech law). Additionally, it forgot to enumerate certain provisions of the Civil Code that are necessary for just application of the referred provisions. Large problems arose because of the invalidity of these legal acts. Both laws in question are based on different concepts concerning the invalidity of legal acts. Which of them shall apply in labor law? At the end, the Labor Code of 2006 was tearing out certain provisions of the Civil Code that the legislature envisioned to apply together. Therefore, due to legal uncertainty, the relevant provisions were finally annulled by the Constitutional Court in its judgment of 12 March 2008. The decision was published under No 116/2008 Collection.[42]

In Poland, in accordance with art. 300 KP, 'In cases not regulated by the provisions of labor law, the provisions of the Civil Code apply accordingly to an employment relationship, provided they are not contrary to the principles of labor law.'[43]

The Hungarian Labor Code seems to be pursuing a policy of social policy based on the prominent role of the social partners and social dialogue, and employment policy objectives aimed at strengthening competitiveness and raising employment levels, or at least their dominance can be observed. Thus, Hungarian labor law has a market corrective and market stimulating function, going beyond the market restricting function defined by Deakin, i.e., the protection of dependent subject. This is essentially in line with the changes also taking place in Europe. The subjects

42 Štefko, Chapter 6.
43 Barański, Chapter 7.

of labor law regulation are increasingly excluded from labor law protection, they take mutual risks, and thus the civil law regulatory nature of the labor law regulation is strengthened, the freedom of contract and decision of the parties comes to the fore, the parties move from a subordinate position to a more side-by-side (but not fully side-by-side) position. The reduction in protection is in the spirit of mutual risk-taking, if we accept that the employer now has the means to determine working conditions. However, the limits to contractual freedom are imposed by the provisions of the cogens, the individual relative dispositive labor law rules, where deviations to the detriment of the employee are limited or unlimited, and the employment contract may deviate from the collective agreement only based on the welfare principle. The codification of labor law took place in the way that the rules of Civil Code which can be utilized from the point of view of Labor Code have been incorporated into the Labor Code and the Civil Code was considered as an additional legal act.[44]

5. Collective Labor Law

In 2018, Vodovnik et al. noted that no independent trade unions of atypical workers existed. However, the Precarious Workers Trade Union, established in 2016 as an internal organizational unit of the Association of Free Trade Unions of Slovenia, is the one most dedicated to reducing the number of precarious forms of work, the active inclusion of precarious workers, the improvement of their social status and legal certainty, etc. In Slovenia there is a Collective Agreement Act regulating all important matters regarding collective agreements. Art. 22 of the ERA for example stipulates that the employee, concluding an employment contract, must fulfill statutory or other conditions, prescribed by a collective agreement or employer's general act. Art. 55(4) for example provides that *project work*, representing lawful grounds for concluding a fixed-term employment contract, is defined within a collective agreement, concluded at the level of the industry. According to art. 59(3), an industry-level collective agreement may provide for a higher percentage of posted workers performing work for a single user undertaking. The three brief examples point to cases in which autonomous legislation may stipulate additional rights and obligations. If it does, the latter apply next to statutory provisions. The examples also show a vivid interplay between statutory legislation or the normative power of the general legislature and autonomous legislation or the normative power of both the employer and employees' and employers' organizations. All the examples also point into the direction of the overriding, but not absolute *in favorem laboratoris* principle of Slovene labor law, securing a higher level of labor law protection for the employee as the commonly weaker party to the employment contract. The relationship between labor law regulation, more precisely, the relationship between the ERA and

44 Jakab, Chapter 9.

collective agreements, from which the limits of the *in favorem laboratoris* principle can be derived, is governed both by the ERA itself in art. 9 and the CAA (Collective Agreement Act) in art. 4.[45]

In Slovakia, legislation does not define a collective agreement, leaving its definition to legal science, which defines a collective agreement as a bilateral legal act that acts as an instrument of social reconciliation between employees and employers or as a political, legal, economic, and social document governing the relationships of relevant entities and their content. However, it has—among others—the characteristics of a contract of a private law nature (even though the state may be a party), to which all relevant provisions of the Civil Code on the process of concluding contracts and their invalidity, as well as special procedural rules under the Collective Bargaining Act, apply.[46] In Slovakia, there is an imaginary pyramid. At its peak is the law, which regulates the minimum protection of the employee, followed by a higher level collective agreement, which is to guarantee greater protection of rights than the law, followed by a company collective agreement, which must provide a greater range of rights for employees than the law as well as a higher level collective agreement (otherwise it is invalid in that part) and finally the widest protection is to be provided by an employment contract, which must guarantee the widest protection of rights, otherwise it is invalid. There is an interesting finding of the Constitutional Court of the Slovak Republic, which ruled on the possibility of asserting claims in favor of an employee even from an invalid collective agreement. Put simply, the essence of the proceedings consisted of a claim by which an employee sought increased severance pay based on a collective agreement. In the meantime, in different proceedings, it was legally decided that the collective agreement was invalid because it was not signed by the authorized persons. The employer refused to pay the severance pay because it considered the collective agreement to be invalid and any performance of in relation to Law 62 of 2011, in its Decision 574/2011, it took the position that the State has discretion to organize the rules of collective bargaining. The new legislation abolished national collective bargaining, resulting in the fact that collective bargaining coverage fell to around 36% in a single year, according to union statistics, and remained low thereafter as well.[47]

In Romania the essence of the relationship between individual and collective employment contracts is described in art. 11 of the Labor Code, which states that an employment contract may not contain provisions on a lower level of rights, nor provisions that are contrary to those laid down by law or collective agreements. A similar provision is contained in art. 132 of the Law concerning Social Dialogue. Based on the two provisions above, the provisions on employees' rights must comply with the following rules: an individual employment contract may not set a lower level of rights than that provided for in the collective agreement or in a statutory provision;

45 Strban and Mišič, Chapter 4.
46 Act no. 2/1991 Coll. on collective bargaining, as amended.
47 Štefko, Chapter 6.

a collective agreement may not set a lower level of rights than that provided for in a piece of legislation. Consequently, in the context of Romanian labor law, it is not possible to deviate from the legal level to the detriment of workers, either through individual or collective bargaining. In relation to Law 62 of 2011, in its Decision 574/2011, Romanian Constitutional Court took the position that the State has discretion to organize the rules of collective bargaining. The new legislation abolished national collective bargaining, resulting in the fact that collective bargaining coverage fell to around 36% in a single year, according to union statistics, and remained low thereafter as well. Thus, Romanian labor law does not allow for the possibility, which has seeped into the labor law practice of some Western European countries that collective agreements may limit the benefits and rights of employees compared to those provided for by law.[48]

The Serbian Labor Code also regulates the *temporal validity* of a collective agreement which is a good sign of collective consciousness. It can be concluded for a maximum of three years. After the expiration of that period, the agreement ceases, unless the participants agree otherwise, no later than 30 days before the expiration of its validity. Several provisions of the LC however tackle the relationship between individual employment contracts and collective agreements. The LC clearly gives priority to collective agreements. It stipulates that the rights, obligations, and responsibilities from the employment relationship, in addition to that law and special laws, are regulated by the collective agreement and the employment contract. However, the significance of the individual contract is relativized in the LC—specifically, in the continuation of the same provision, it is stated that the employment relationship can be regulated by the labor rulebook and the employment contract only when the LC so provides. Thus, if there is a collective agreement, it has primacy. The priority of collective agreement is also confirmed by a rule stipulating those certain provisions of the employment contract determining less favorable working conditions than the conditions determined by law and the general act of the employer (which include collective agreement and the labor rulebook) are (automatically) null and void. In practice, in collective agreements are often merely repeated the rules of the statutes, with few genuine legal solutions. In general, they represent a significant additional legal source on which employment contracts are based when it comes to topics such as salaries, benefits, salary supplements, other benefits, leave, severance pay, redundancy selection rules, additional social insurance. Collective agreements have been concluded in almost all areas and public sector enterprises, while they are quite rare in the private sector. Therefore, in the private sector, the impact of collective agreements on employment contracts is almost negligible.[49]

In Croatia the substantive structure and nomotechnical architecture of all labor acts adopted and applied since 1995 confirm both the importance of the relationship

48 Vallasek, Chapter 3.
49 Jašarević and Dudás, Chapter 5.

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. 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.[50]

In Poland according to the hierarchy of autonomous sources of labor law established in the Labor Code the provisions of regulations and statutes may not disadvantage employees more than the provisions of collective labor agreements and collective agreements (art. 9 §2 KP). The provisions of regulations and statutes may not disadvantage employees more than the provisions of collective labor agreements and collective agreements (art. 9 §3 KP). As of 2018 collective bargaining in Poland can only be described as 'being in its death throes: it plays a marginal role, both in terms of the volume of collective agreements and the number of employees covered.' A report by the European Trade Union Institute (ETUI) shows that the number of employees covered by collective labor agreements in Poland is among the lowest in the European Union. In 2018, only 18% of employees were covered by collective labor agreements. In the thematic scope of the relationship between the individual and collective labor law, however, it is impossible to overlook the fact that essentially the entire Act of 5 July 2018 amending the Act on trade unions and certain other acts, which is the implementation of the Constitutional Court's judgment of 2 June 2015, entered into force on 1 January 2019. The amendment mentioned above brought about a significant (even fundamental) change in right of association in trade unions. At present in Poland, according to art. 2(1) of the Act of 23 May 1991 on trade unions, the right to create and join trade unions is granted to persons performing paid work. By a person performing paid work legislature means an employee or a person performing paid work on a basis other than employment relationship, if he does not hire other persons for such work, regardless of the basis of work, and has such rights and interests related to the performance of work that may be represented and defended by a trade union (art. 11 points tp 1 UZZ). Thus, in principle, also persons working under civil law contracts and the self-employed gained the full right of association. In the judgement mentioned above, the Constitutional Tribunal stated that the obligation on the legislature to implement the freedom of association in trade unions must consist of granting the possibility to establish unions and join them to all persons who, on constitutional grounds, may be classified as workers (in the broad sense). At the stage of public consultations of the draft of the amendments mentioned above, it was emphasized that granting the status of a trade union to an

50 Vinković, Chapter 8.

organization that does not associate any employee does not consider the specific nature of labor law. However, it should be stressed that the attribute of a trade union organization, although related to the scope of individual labor law, does not prejudge the exclusivity of the tasks carried out by trade unions under labor law. At the same time, it is rightly argued in the literature that although the expansion of the right of coalition on the grounds of collective labor law was necessary, the specific regulatory solutions raise a lot of interpretative doubts. B. Mądrzycki rightly notes that the main problem is that 'the legislature still does not take any real steps to organize the forms of employment.'[51]

Section 13 of the Hungarian Labor Code (Mt.) also establishes a hierarchy of rules governing the employment relationship, which hierarchy is broken by the principle of a rule more favorable to the employee, which in civil law means clausually cogent and clausibly dispositive rules. At the same time, the regulatory technique of the Labor Code clearly demonstrates respect for the principle of freedom of contract and the promotion of individual and collective self-government. Proof of this is that the Labor Code has made absolute dispositivity the main rule compared to the relative dispositive rule of the old Mt. Part II of Mt. (individual labor law) is relatively dispositive regarding the employment contract. The parties may otherwise agree on any matter which is not a mandatory provision. According to the Commentary this solution considers the traditional feature of the world of work, where there is no equilibrium between the parties at the level of individual agreements, which is the legal policy reason for the rule of disposition in the traditional system of private law. Regarding the employment contract, therefore, the Mt. and the collective agreement set minimum standards from which the agreement of the parties may deviate in a positive direction in favor of the employee. Parts II (individual labor law) and III (collective labor law) of the Labor Code is dispositive about the collective agreement. Deviation to the detriment of the employee is possible if permitted by the Mt. The aim is to increase the role of the collective agreement as a source of contractual law. The same is the case for a normative agreement of the work council. An exception to this is wage bargaining, i.e., the remuneration of work. Deviations can only be made if the derogation is expressly permitted by law. One-sided deviation, relative dispositivity (claudication cogency) is also common when it is only possible to deviate in favor of the employee. The rules for liability for damages are typically such. Limited bilateral dispositivity, to the detriment of the employee, allows only a certain degree of deviation. Extraordinary working hours are limited to 250 hours per year, from which a collective agreement may deviate, but may not exceed 300 hours per year. Exceptions to the general rule of absolute dispositivity can be found under the heading Derogation agreement at the end of each chapter.[52]

51 Barański, Chapter 7.
52 Jakab, Chapter 9.

6. Values

According to a study by the European Parliament,[53] in some Member States of the European Union (Romania, but also Slovakia), up to more than 60% of the workforce is expected to lose their jobs in the coming decades due to the introduction of information and communication technologies. On the other hand, other research sees the future of work in the short term largely positively; based on a wide global survey, most employers expect automation and digitalization to increase employment. Eighty-three percent of employers intend to maintain or increase the number of employees and increase their qualifications in the next two years. Only 12% of employers, according to their own statements, plan to reduce due to automation.[54] The 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.

This brings us to the core issue according to Marcel Dolobáč. How should labor law deal with new forms of work, characterized by a high degree of freedom and liberty? We believe that labor law must ask itself two basic questions:[55]

1. Is the ambition of labor law to regulate such performance of work legitimate?
2. If we answer the first question in the affirmative, by what methods and to what extent should it regulate the performance of such work, which is in its very essence significantly different from standard dependent work?

We are convinced that labor law must answer the first question in the affirmative, as it is a desirable and necessary ambition of labor law to cover with its own legislation the new forms of work that arise or will arise from the expansion of new technologies and procedures in recruiting and using labor. The essential content of labor law, its principles, and values, as well as its position in the legal system, is the result of a historical awareness of the need to protect the economically weaker. This imbalance will not disappear with new forms of work performance; on the contrary, there is a real risk that it will become deeper. If labor law were to ultimately abandon the regulation and protection of new forms of employment, over time the pressure to reduce social protection would also seep into the typical performance of dependent work.

Employment contracts and other autonomous legal acts, either passed by the employer or concluded within social dialogue processes, must respect minimum labor law standards as determined by international law, the constitution, and basic statutory

53 Dachs, 2018.

54 These are the results of a presentation by ManpowerGroup based on a survey of 18,000 employers in 43 different countries which examined the impact of automation on employment in the future (Rezlerová, 2017).

55 See Dolobáč, Chapter 2.

legislation. In Slovenia, for example, collective agreements or other autonomous legal acts namely cannot depart from what Kresal Šoltes considers as the Slovene *social public order* or set of central binding provisions of labor law.[56] The notion, further developed by judge-made-law, comprises basic rights and basic constitutional and other principles of labor law regulation like equal treatment, freedom of work, dignity and health and safety at work, the aforementioned *in favorem* principle, different means of employees' participation, as well as due process of law concerning labor disputes.[57]

If we embark on the path of liberalization of labor law, one of the options is to fully legalize the admissibility of atypical contracts in labor law. A legal guarantee against possible abuse of the freedom of types of contracts in labor law could be, as in civil law, a provision according to which an innominate contract should not contradict the content and purpose of the Labor Code, especially its basic principles. If such an atypical (innominate) contract were in conflict with the content and purpose of the Labor Code, it would be absolutely invalid, same as other acts under labor law according to the Labor Code. Another way, in an effort not to abuse the open contract system, is to identify legal elements that cannot be changed other than for the benefit of the employee, although we must add that the current restriction of changing the 'working conditions' and 'employment conditions' only for the benefit of the employee it is too broad, vague, and ultimately legally incorrect.

Applying the current regulation of labor law to new forms of employment such as strategic employee sharing, temporary management, mobile work based on information technology, work based on vouchers, portfolio work, platform work or collaborative self-employment is impossible. Labor law should focus on the minimum standards that it will apply to such work. We consider the following to be fundamental:

a) responsibility of the contracting party and the person benefiting economically from work for safety and health at work,
b) maximum range of working time together with regulations for minimum breaks at work, including rules on their scheduling, and
c) a ban on the transfer of financial risk of the business to the persons performing work.[58]

We are aware that such a scope appears to be minimal and insufficient, but let us consider it to be the basis that should apply to many people working in new forms of employment, even if this work is presented as self-employed. If we identify the work done under new forms of employment as dependent work, there is no reason to abandon the applicable legislation and standard employee protection.

We consider the values presented here the pillar for security in times of need for flexible working solutions. This seems to be the reality of labor law not only in Central Europe but in the world of work.

56 Ibid.
57 Ibid.
58 Ibid.

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Design, layout
IDEA PLUS (Elemér Könczey, Botond Fazakas)
Kolozsvár / Cluj-Napoca (Romania)

Printed and bound by
AK NYOMDA
Martonvásár (Hungary)