| 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.

Bibliography

Barancová, H. (1998) 'K prípustnosti atypických zmlúv v pracovnom práve', *Právny obzor,* 81(6), pp. 535–538.

Barancová, H. (2013) 'Pracovné právo Slovenskej republiky po reforme k 1.1.2013 (1. Časť)', *Justičná revue*, 65(1), pp. 57–62.

Barancová, H. (2019) *Zákonník práce.* Commentary, 4th edn. Prague: C. H. Beck.

Barancová, H., Schronk, R. (2013) *Pracovné právo.* 2nd edn. Bratislava: Sprint dva.

Barancová, H., Olšovská, A., Hamuľák, J., Dolobáč, M. (2019) *Slovenské pracovné právo.* 1st edn. Bratislava: Sprint 2.

Bernhard, D. (2018) *The impact of new technologies on the labor market and the social economy.* Study. Science and Technology Options Assessment [Online]. Available at: http://www.europarl.europa.eu/RegData/etudes/STUD/2018/614539/EPRS_STU(2018)614539_EN.pdf (Accessed: 4 April 2022).

Boguszak, J., Capek, J., Gerloch, A. (2004) *Teorie práva*. Prague: ASPI Publishing.

Brettel, M., Friederichsen, N., Keller, M., Rosenberg, M. (2014) 'How Virtualization, Decentralization and Network Building Change the Manufacturing Landscape: An Industry 4.0 Perspective', *International Journal of Information and Communication Engineering*, 8(1), pp. 37–44.

Commission to the European Parliament, the Council, the European Economic and Social Committee,the Committee of the Regions (2016) *Communication, A European Agenda for the Collaborative Economy* [Online]. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2016%3A356%3AFIN (Accessed 24 March 2022).

Galvas, M., Gregorová, Z., Horecký, J., Hrabcová, D., Chrastáková, K., Komendová, J., Machálek, P., Stránský, J., Zachovalová, J. (2015) *Pracovní právo.* Brno: Masaryk University.

Hůrka, P., Bezouška, P., Brůha, D., Jakubka, J., Kottnauer, A., Matejka, J., Randlová, N., Steinichová, V., Tomandlová, L., Úlehlová, H., Vysokajová, M. (2011) *Pracovní právo.* Pilsen: Aleš Čeněk.

Lasi, H., Fettke, P., Kemper, H., Feld, T., Hoffmann, M. (2014) 'Industrie 4.0.', *Business & Information Systems Engineering,* 6(4), pp. 239–242.

Rezlerová, J. (2017). *Digitalization and robotics forever change the labor market* [Online]. Available at: http://www.goodwill.eu.sk/clanky/item/159-digitalizacia-a-robotics-forever-changes-the-labor-market (Accessed 24 March 2022).

Seilerová, M. (2018) *Legal regulation of the occupational health and safety in the non—standard work in the Slovak Republic* [Online]. Available at: http://iusetadministratio.eu/wp-content/Zeszyty_naukowe/2018/2_2018/2_2018_2_Seilerova.pdf (Accessed: 4 April 2022).

Štefko, M. (2012) *Pracovní právo v kontextu občanského práva.* Prague: Auditorium.

Štefko, M. (2013) *Vymezení závislé a nelegální práce*. Prague: Charles University, Faculty of Law.

Stránský, J. (2014) *Vývoj a postavení pracovního práva jako soukromoprávního odvětví*. 1st edn. Brno: Masaryk University, Edition Scientia.

Tkáč, V., Matejka, O., Friedmannová, D., Masár, B. (2014) *Zákonník práce. Commentary.* Bratislava: Wolters Kluwer.

Toman, J. (2014) *Individuálne pracovné právo. Všeobecné ustanovenia a pracovná zmluva*. Bratislava: Friedrich Ebert Stiftung.

Tröster, P. (1998) 'Postavení pracovního práva v právním systému České republiky' in Malý, K. (ed.) *Kodifikace a dekodifikace soukromého práva v dnešním právním vývoji*. Prague: Karolinum.

Večeřa, M., Gerloch, A., Beran, K., Schlosser, H., Rudenko, S. (2013) *Teória práva*. 5th extended and supplemented edn. Bratislava: Euro Code.

Žuľová, J., Švec, M. (2021) *Legal issues of pre-employment background checks : (in context of industry 5.0)*. Hürt: Wolters Kluwer Deutschland.