

Transition of a Contract of Employment: from the *Locatio Conductio* to the *Relational Contract*

GYÖRGY KISS*

Abstract

This article presents the correlation between the economic background of a given era and legal regulation of labour. It aspires to answer the question: what legal construction most suits a current global economy. The author shows the effect of *locatio conductio* on the employment contract of today and offers three possible scenarios regarding future labour law. One such scenario is the maintenance of the current, traditional concept that strives to secure a balance between security of the employee and flexibility of employment. The second scenario entails possibilities provided by the so-called gig economy; it deconstructs almost all limitations provided by labour law and, at the same time, annuls the structure of labour law as it is today. The third scenario proposes an adaptation of a specific interpretation of long-term contract – relational contract – to labour law.

I. The evolution of the structure of traditional employment relationship

The purpose of this study is to analyse the connection between the changing economic requirements and the legal form of work done for others. The main question is: when is the connection between the law and the economy regarded as adequate and inadequate? The impact of the economy is extremely complex. Ultimately, the advancement of the economy determines the societal evaluation of work. For this reason, it is important to explore the philosophical and the political evaluation of work in the different ages. It seems necessary to give a short historical overview, although this method might be questionable. Some authors believe that labour law is a relatively young area of the law system, with new dogmatic basis; therefore, it is unnecessary to find its roots in the long history or, at most, it is sufficient to refer to its historical preliminaries with due criticism. This argument is in connection with the efforts concerning the autonomy of labour law.¹ However, the history of labour law justifies that labour law has not surpassed its ancient heritage – at least in a legal dogmatic sense. A good example of this is the appearance of a *locatio conductio* between jurisprudence and legislation in the 18th to 19th centuries. Another question is: in what age was the *locatio conductio* in line with the social and economic requirements?²

* Professor, National University of Public Service; University of Pécs; Chair of MTA-PTE Research Group of Comparative and European Employment Policy and Labour Law; Kiss.Gyorgy@uni-nke.hu; kiss.gyorgy@ajk.pte.hu

¹ The dispute on the autonomy of labour law became more pronounced in German law after the creation of the BGB. See about the two opposite approaches Heinz Potthoff “Probleme des Arbeitsrechts” (Diederichs, Jena, 1912). Sinzheimer emphasised: “*Das Arbeitsrecht umfaßt ein sachliches und persönliches Element. Das sachliche Element ist die abhängige Arbeit. Das persönliche Element bilden die Arbeitnehmer.*” Hugo Sinzheimer “Grundzüge des Arbeitsrechts” (Jena, Fischer, 1927) 7-9. “Über Grundgedanken und die Möglichkeit eines Einheitsarbeitsrechts in Deutschland” [in *Arbeitsrecht und Rechtssoziologie*]. (1922 Frankfurt am Main, 1976 Europa Verlag)

² See the critique of pandectistic Paul Oertmann “Volkswirtschaftslehre des Corpus Juris Civilis” (Berlin, Prager, 1891) 75-79.

a. *Evaluation of work in ancient Greece*

The first area of this research is ancient Greece. First of all, it is to be emphasised that what we call ancient Greece was hardly a uniform structure, either politically or philosophically. It is sufficient to refer to the significant difference between Athens and Sparta. The notion of ‘work’ was synonymous with ‘slave-labour’, and the economic system was built on this form of working.³ However, it is necessary to analyse the activity of free persons and their attitude to work. In this respect, Hesiod’s paper ‘Works and Days’ is remarkable.⁴ Catharina Lies and Hugo Soly remark that this work “was not merely a condemnation of idleness, but also and especially a relentless encouragement of diligence”.⁵ Hesiod recognised that a society, and above all, an economy cannot be based on looting and pillaging. Nevertheless, the evaluation of the so-called ‘hard-work’ was not clearly positive. In the early periods, the significant majority of Athenians preferred to live a so-called contemplative life. At that time, farmers and artificers worked as self-supporters, or for direct barter trade. It was a so-called non-market economy, but some kind of competition between free persons was taking shape. Later, the activities of farmers, smiths and artificers were appreciated by society, however, traders did not enjoy such appreciation even though the economy of city-states would have collapsed without the trade sector, which contributed significantly to the development of law. Despite the increasing value of work, there was another factor hindering the evaluation of work, namely the political structure of city-states. While in Athens the most appreciated activity was participation in political life, in Sparta, military activity was considered most important. Both of these societies were deeply divided. The all-time elite stood above the average free persons, and the ‘oligarchic perspective’ established their inequality and immunity in Athens.⁶ The situation was similar regarding soldiers in Sparta.

Nevertheless, as far as the legal framework is concerned, contracts forms, on which the contractual system of Rome was based, were in place.⁷ While it is not possible to find a concrete, denominated contract, it is provable that, under this contract, the work was done by a free person, and paid for by the other party paid. It can be stated that this contract is likely to have been similar to a rental deal.⁸

b. *Inheritance of *locatio conductio operarum**

The dispute of unity versus diversity of the *locatio conductio* allows several conclusions to be drawn. It is important that the separated expressions (*rei*, *operarum*, and *operis*) were unknown.⁹ However, Mayer-Maly stated that the *locatio conductio* is a complex legal concept; it is far more than a terminological unit.¹⁰ Many authors stand for the position that the *locatio*

³ ‘Work as we know it is a modern invention’. See Catharina Lies and Hugo Soly “Worthy efforts: attitudes to work and workers in pre-industrial Europe” (Leiden – Boston, Brill, 2012) 13; (Referring André Gorz “Critique of economic Reason”, eng. transl. (London – New York, Verso, 1989) 14.

⁴ Hesiod: Works and Days, Trans. Martin, Litchfield West (Oxford, Oxford University Press, 1978)

⁵ Catharina Lies and Hugo Soly above n3, at 20.

⁶ Christian Meier “Griechische Arbeitsauffassungen in archaischer und klassiker Zeit. Praxis, Ideologie, Philosophie. Weitere Zusammenhang” [in Manfred Bierwisch ed. Die Rolle der Arbeit in verschiedenen Epochen und Kulturen (Berlin, Akademie Verlag, 2003) 19-76.

⁷ Herbert Applebaum “The concept of work, Ancient, Medieval and Modern” (New York, State University of New York Press, 1992), particularly 75.

⁸ See earlier Julius Georg Lautner: “Altbabylonische Personenmiete und Erntearbeitsverträge” (Leiden, Brill, 1936) 3. Lautner used the “Selbstvermietung” phrase.

⁹ See Fritz Schulz “Classical Roman law” (Oxford, University Press Oxford, 1951) 543.

¹⁰ Against the so-called “Einheitsfunktion” see Theo Mayer-Maly „Locatio Conductio” (Wien – München, Verlag Herold, 1956) 19.

conductio is both unified and fragmented.¹¹ Pókecz highlighted that it had been a false approach to focus on the unity or diversity of the *locatio conductio*. More importantly, it deals with any process when additional value is created by work.¹²

However, it is highlighted that the Roman economy cannot be interpreted the way we do nowadays. Schulz stated that slave labour was more important than the labour of free persons.¹³ According to Oertmann's analysis, the economic situation can be interpreted as goods produced by the slave were used by others for their own benefit. Consequently, this cannot be regarded as an overall benefit to society as a whole. The economy consisted of the isolated activities of individual people.¹⁴ From that, Schulz draws the conclusion that "classical law of hire was in harmony with these social and economical facts."¹⁵ Thus, the *locatio conductio* survived as long as the fabric of the society was changing in response to the influence of economic development. This change meant the decline of the classical contractual Roman law. Contract law did not continuously allow for the absence of abstraction. In later times, various legal transactions were probably used as legal expressions of work. Thus, we can refer to the *stipulatio* or *mancipatio* and the *iusiurandum liberti*.¹⁶

c. *The status-relationships in the feudalistic society*

At first sight, the significant features of the feudalistic society were the so-called status-relationships, instead of contracts. These relationships were weaved into all areas of life.¹⁷ The status relationship determined, in particular, the relationship between the liege and the serf. It is no accident that agriculture was generally a most valued activity in the Middle Ages "as the greatest wealth-producing" sector. The legal status of the person was not obtained on a contractual basis; they were born into this status. In the status relationship, reverse allocation was applied. The serf received no remuneration for their work, but was obliged to work for the land they used.¹⁸

Later, urban communities strengthened and, for this reason, society became polarised and the diversification of work began. Many kinds of work was based on contract, and the first elements of collective labour law, e.g. in mining, started to take shape. Nevertheless, the primitive labour-market was under rigid control.¹⁹ This control was either internal or external. Internal control was present in the organisation and operation of guilds. "The monopolistic logic behind the guild system thus dictated the type of vocational training which was provided in the form of strictly disciplined apprenticeship."²⁰ The monopolistic logic covered the market too. The strict regulation of apprenticeships and the artificial exclusion of market competition were the biggest barriers to development. External control was partially connected to the

¹¹ Armando Torrent "The controversy on the trichotomy 'res, operae, opus' and the origin of the 'locatio conductio'. *Revista Internacional de Derecho Romano*, (2012) 10, 396.; Vincenzo Arangio-Ruiz 'Istituzioni di diritto romano' (Napoli, Jovene, 1984) 235-240.

¹² Attila Pókecz Kovács "A munkavégzésre irányuló szerződések tipológiája a római jogban" (The typology of the so-called works contract in the roman law) *Tudományos Dialóg* 2000 22-25.

¹³ Schulz, Fritz above n9, at 544.

¹⁴ Paul Oertmann above n2, at 78-79.

¹⁵ Schulz, Fritz above n9, at 545.

¹⁶ Francesco de Robertis "I rapporto di lavoro nel diritto romano" (Roma, Zanichelli, 1967) 223.

¹⁷ See Herbert Summer Maine "Ancient law, its connections with the early history of society and its relation to modern ideas" (London, John Murray, 1908)

¹⁸ Werner Ogris "Geschichte des Arbeitsrechts vom Mittelalter bis in den 19. Jahrhundert" *Recht der Arbeit* (1967) 4, 86-289.

¹⁹ Bruno Veneziani "The evolution of the contract of employment" [in Bob Hepple (ed.) *The making of labour law in Europe*] (London – New York, Mansell, 1986) 32-33.

²⁰ Bruno Veneziani above n19, at 38.

guild's relationships. Many medieval cities governed the prices and wages against market requirements.²¹ These orders, rules and different 'work-books' meant a rigid restriction on the employee's freedom of contract – if it is possible to talk about contract and freedom in today's sense at all.

At all events, the contract became increasingly important in the determination of the legal status of domestic and agricultural servants.²² The status of domestic servants and agricultural servants show a duality. On the one hand, the *de facto* status is highlighted, namely: direct dependency, strict subordination and the unquestioned obedience. On the other hand, their work was based on 'contracts'. These contracts were concluded verbally. The servant did not contract their services for a certain work/job, but leased their own labour. In this sense, this contract was similar to the *locatio conductio operarum*.

It can be concluded that the different legal forms were in line with the social and economic circumstances and requirements. The *locatio conductio operarum* was a typical contract between free persons, but the *de facto* status of the *locator* did not differ much from the situation of the slave.²³ Later, the appearance of new contracts (*stipulatio, mancipatio, etc.*) reflected the need for changes, but it did not lead to a breakthrough. Obviously, these developments cannot be evaluated in a uniform way across different periods of the Middle Ages. But the so-called 'status' was an arrangement determined by society, not by a contractual relationship. At this point we should refer, again, to the famous sentence by Maine: "we may say that the movement of the progressive societies has hitherto been a movement from Status to Contract."²⁴

II. The first breakpoint; the industrial revolution and the "mass-production economy" – the development of traditional structure of employment relationship

a. From status to contract

Status to contract meant the freedom of contract, or in other words, the principle of *laissez faire, laissez passer*. This principle "can be taken as the programme of economic liberalism."²⁵ Another famous sentence of this era is the following: "*Qui dit contractuel, dit juste*".²⁶ This was the period when the so-called free market emerged, inducing fundamental change in the economy. Development into a market economy was in progress. The guilds were banned²⁷ and, as a main principle, a contract was concluded between free and equal persons. The subordinated working person, previously in a 'status relation', gained a new legal position. They were no longer a 'servant', but a free employee.

²¹ Bruno Veneziani above n19, at 35; Catharina Lies and Hugo Soly above n3, at 222-276.

²² See James Rogers "Six centuries of work and wages; The history of English labour" (London, Sweet & Maxwell, 1894), 467-492.; Wilhelm Ebel, "Quellen und Geschichte des deutschen Arbeitsrechts" (Berlin, Duncker & Humblot, 1964); Henri Pirenne "A középkori gazdaság és társadalom története" (History of medieval economic and society) (Budapest, Gondolat, 1983)

²³ See a *se locare* and *operas suas locare* expressions.

²⁴ Henry Sumner Maine above n17

²⁵ "*Laissez faire, laissez aller, le monde va de lui-même*" See Thilo Ramm "*Laissez-faire* and state protection of workers" [in Bob Hepple (ed.), *The making of labour law in Europe*, (London – New York, Mansell, 1986) 72.

²⁶ See Louise Rolland «*Qui dit contractuel, dit juste*» (Fouillée) ...en trois petits bonds, à reculons" IXe Congrès de l'Association internationale de méthodologie juridique (Tunis, nov. 2005) Les principes généraux de droit.

²⁷ See *Loi de Chapelier* in France

However, in this context, it is necessary to interpret the notions of ‘equality’ and ‘freedom’. At this point it is worthwhile to refer to the Havighurst’s argument²⁸ regarding equality, he questions if the use of this word is appropriate. Equality may be interpreted in two ways, namely: ‘equality for the strong’ and ‘equality for the weak’. In his opinion:²⁹ “...contract in its wild anarchic state contributes to equality for the strong. When it is domesticated and subjected to law, it still shows traits that make for this kind of equality.”

As far as ‘freedom’ at that time is concerned, it meant the free decision to conclude and terminate a contract. The employee had little say in the determination of the content of the contract. For this reason:³⁰

...the history of the idea of the “contract of employment” can be seen as the history of a false aspiration. The promise of freedom of contract in the employment relationship was never fully achieved. The freedom of the worker in the labour market was impeded by his social condition – that is, by the status.

In this context, it is helpful to highlight Friedmann’s remark, that the law should not be sitting with folded arms and tolerate that the contract be a disguised form of the status.³¹

*b. The continued existence of **locatio conductio** in the legislation*

The principle of freedom of contract and the assumption of equality were important because these principles appeared at the level of legislation. The French Civil Code implemented these principles. The principle itself was new but the legal form remained unchanged as rent, *louage*. Veneziani draws attention to an important contradiction. In its original form, it was prohibited to apply the *locatio conductio* to life and living persons.³² But the construction of the rent was, nevertheless, implemented in the French Civil Code.³³ The substance of this solution was ‘*le contrat de louage de services*’. See Pothier’s statement: “*Contrat de louage de services ‘consensuel, synallagmatique et commutatif’ ...*”³⁴ A similar solution is found in German law, too. In this context, the approach of the pandectists is remarkable. Windscheid’s famous sentences reflect the essence of the solution: “*Die Mieth, welche den Gebrauch einer Sache zum Gegenstand hat, heißt Sachmieth; die Mieth welche den Gebrauch einer Arbeitskraft zum Gegenstand hat, heißt Dienstmieth.*”³⁵

The regulation based on the lease-theory received heavy criticism. Oertmann emphasised that an entirely new legal system, based on new principles, should have been established. Instead of this, the law took over, without criticism, the *locatio conductio*, which had been designed for a totally different social and economic environment.³⁶ It can be argued that no other

²⁸ Harold Havighurst “The nature of private contract” (Evanston, Illinois, Northwestern University Press, 1961)

²⁹ Harold Havighurst above n28, at 128-129.

³⁰ Bruno Veneziani above n19, at 70.

³¹ Wolfgang Friedmann “Law in the changing society” (London, Stewens & Sons, 1971) 122.

³² Bruno Veneziani above n19 at 41

³³ See Henry Guillaume Camerlynck “Traité de droit du travail” (Paris, Dalloz, 1968) 9-26.; Robert-Joseph Pothier “Traité des obligations” (Paris, Dalloz, 2011)

³⁴ Robert-Joseph Pothier above n33, Cit: Henry Guillaume Camerlynck above n33, at 2-12.

³⁵ Bernhard Windscheid – Theodor Kipp “Lehrbuch des Pandektenrechts” 9. Aufl. (Frankfurt, 1906, Band 2) § 399. About the pandectistic see Georg Friedrich Puchta “Lehrbuch der Pandekten” (Leipzig, Verlag von Ambrosius Barth, 1838) 630; Eduard Hölder “Pandekten – Allgemeine Lehren, mit Rücksicht auf den Civilgesetzentwurf” (Freiburg, Akademische Verlagsbuchhandlung, 1891) 404.

³⁶ Paul Oertmann, above n2, at 79.

contractual construction was available. Nevertheless, in connection with the draft of *Bürgerliches Gesetzbuch* (BGB), Gierke emphasised that the contract of employment was not a simple exchange contract. In his view, the contract of employment's substance is its 'personality and community' (*personenrechtliches Gemeinschaftsverhältnis*) character³⁷ under BGB § 611 "Durch den Dienstvertrag wird derjenige, welcher Dienste zusagt, zur Leistung der versprochenen Dienste, der andere Teil zur Gewährung der vereinbarten Vergütung verpflichtet. Gegenstand des Dienstvertrags können Dienste jeder Art sein." The basic question is the following: does the regulation of *Dienstvertrag* in itself represent a significant difference compared to '*Dienstmiete*'? Probably not. For this reason, it was necessary to regulate a particular kind of *Dienst*, namely the *Arbeitsvertrag*. BGB § 611a introduces additional elements to the *Dienstvertrag* that allow the regulation to be brought closer to reality.³⁸

c. *The subordination as **differentia specifica** of employment relationship*

The most important expressions in this text are '*weisungsggebundene, fremdbestimmte Arbeit*', '*persönliche Abhängigkeit*' and '*Weisungsrecht*'. Previously, it was quite an effort to justify why there was no subordination in certain types of work performed for other persons; while this was self-evident in employment relationship,³⁹ the task was far from simple. With the appearance and recognition of *Dienstvertrag*, it should have been reasonable to emphasise the equality of parties. However, all authors sought to justify the subordination of the employee, in various approaches. Despite the fact that the theory of economic and personal dependence had later been dismissed, Veneziani pointed out that freedom of employees – within the framework of contractual freedom – was not to become a reality on the labour market due to their social status.⁴⁰ Richardi has a noteworthy approach regarding the justification of subordination. He stated that the reason behind dependent work must be found in factors within law, and it is nothing else but the abstract definition of service. Whereas in the service contract and in the contract of assignment, the person rendering the service undertakes an obligation to perform a service which is limited by legal transaction. Under these obligations, the recipient of the service (customer, agent) does not have the option to obtain a ruling position over the person providing the service in the course of performance.⁴¹ Before going into the analysis of the consequences of an abstract definition of service in the contract, it is necessary to highlight that labour law is fundamentally the law of those who generally do not have the opportunity or skills to participate in the legal transaction as an independent party.

d. *The special features of the contract of employment*

The 'abstract definition of service in the contract' means that the contract of employment (*Arbeitsvertrag, contrat du travail*) is a so-called incomplete contract. The term of 'incomplete

³⁷ Otto Gierke "Der Entwurf eines Bürgerlichen Gesetzbuches und das deutsche Recht" (Leipzig, 1889) 245-246.

³⁸ BGB § 611a: "Durch den Arbeitsvertrag wird der Arbeitnehmer im Dienste eines anderen zur Leistung weisungsgebundener, fremdbestimmter Arbeit in persönlicher Abhängigkeit verpflichtet. Das Weisungsrecht kann Inhalt, Durchführung, Zeit und Ort der Tätigkeit betreffen. Weisungsgebunden ist, wer nicht im Wesentlichen frei seine Tätigkeit gestalten und seine Arbeitszeit bestimmen kann. Der Grad der persönlichen Abhängigkeit hängt dabei auch von der Eigenart der jeweiligen Tätigkeit ab."

³⁹ Richardi referred to the dependence of individual employees as the premise of labour law. "Die Abhängigkeit des einzelnen Arbeitnehmers ist der Grundtatbestand des Arbeitsrechts." Reinhard Richardi "Kollektivgewalt und Individualwille bei der Gestaltung des Arbeitsverhältnisses" (München, Beck, 1968) 1.

⁴⁰ Bruno Veneziani above n19, at 31-72.

⁴¹ See above n 38 about the *fremdbestimmte Arbeit*.

contract' does not originate in labour law⁴², but its interpretation, with regards to the evaluation of contract of employment as a long-term contract and as a 'relational contract', is very important. At this point, it is necessary to clarify that subordination and the incomplete character of the contract of employment together make the employee's protection necessary.

Added to this is the long-term nature of employment relationship. In other words, a correlation is detectable between an incomplete contract, legal subordination of an employee and long-term character of an employment relationship. Originally, the employment relationship was established for an indefinite period, with the purpose of providing full time. Thus, the contract of employment is interpretable as a manifestation of the long term contract, though the long-term character of employment relationship has a specific feature. As a starting point, we use Freedland's⁴³ standpoint on the nature of employment relationship whereby the employment relationship is a long-term legal one with multiple time levels, irrespective of whether it was established for an indefinite or fixed period. This, at the same time, determines the mutuality of rights and obligations. The first tier of the contract of employment is a kind of base tier, part of every contract established with the purpose of performing work, and relates to the present. This means that one party is obliged to perform certain work, while the other party is obliged to pay compensation for this work. It is apparent that this is not only part of the contract of employment, but also of business contracts, assignments, brokership, etc. However, Freedland emphasises that the contract of employment has an inherent promise for continued work and continued provision of work. Eventually, this mutual promise provides the stability of the employment relationship, which can be, in certain cases, crucial to the employer as well, but it is obviously the fundamental, vital interest of the employee.⁴⁴ Accordingly, the employment relationship has a so-called two-tiered structure; the essence of this is the employer's implicit promise for continued provision of work, which is manifested in legislation as an obligation for the provision of work.

What are the consequences of a long-term employment relationship in general? The long-term nature described above enforces certain characteristics in the dynamics of the legal relationship. In this respect, the most important element is the problem of foreseeability. Naturally, in this context, it is not the liability for damages, reasonably unforeseeable at the time of conclusion of the contract, which brings predictability into the focus, but the justification of altering the contract's future content.⁴⁵ The documents referred to primarily do not analyse predictability in respect of long-term contracts; and because liability is involved in this institution, predictability has a different interpretation here than in case of long-term contracts where the focus is not on liability for damages,⁴⁶ but on the assessment of circumstances that might facilitate the alteration of the content of the legal relationship, within certain limits.

⁴² Jean Tirole "Incomplete contracts: where do we stand?", *Econometrica* (1999) 4, 741-781.; Oliver Hart and John Moore "Incomplete contracts and ownership: Some new thoughts" <<https://scholar.harvard.edu/files/hart/files/incompletecontractsandownershipaer.pdf>> >.

⁴³ Mark Freedland „The contract of employment” (Oxford, Clarendon Press, 1976).

⁴⁴ *Ibid.*, at 19-21.

⁴⁵ The problems of predictability, in fact, did not arise in the relation to the contract and the legal relationship – that is, not in respect of the alterability of this legal relationship. Instead, predictability came into the forefront in the relation of unforeseeable events and damages occurring during contract performance. See: Convention on Contracts for the International Sale of Goods Section 74; The Principles of European Contract Law Article 9:503; UNIDROIT Principles Article 7.4.4.; Draft common Frame Reference III Section 7 III. – 3:703, and also CESL Art. 159-165.

⁴⁶ Just a few examples from the abundant literature on liability and foreseeability: Franco Ferrari "Comparative ruminations on the foreseeability of damages in contract law" *Louisiana Law Review*, (1992-1993) 4 1257-1269.; Ole Lando "Foreseeability and remoteness of damages in contract in the DCFR" *European Review of Private Law* (2009) 619-639.; Jeffrey M. Perloff "Breach of contract and foreseeability doctrine of Hadley & Baxendale" 10

The next question is, what are the consequences arising from the contractual content of the employment relationship? The essence of the problem is whether, in such circumstances, it is possible— or maybe more importantly, whether it is necessary at all – to define contractual content in a precise and detailed way. The idea of the incomplete contract primarily aims to prevent expenses which are unforeseeable at the time of performance. Periodic review is an essential feature of such contracts. This is when the parties must reconsider the mutual benefits deriving from the legal relationship.⁴⁷ Thus, long-term, incomplete contracts need periodic review (re-negotiation), also, because this ensures the safe sustainability of this type of legal relationships and, at the same time, the security of the parties' status.⁴⁸ Regarding the labour law aspects of incomplete contracts, it has been highlighted that there is an increasing number of professions or work types where advance predictability – as a requirement – is simply not feasible, it does not operate. Such unpredictability, along with pre-design, particularly based on it, has had and may still have diverse consequences even today. One such consequence is providing the opportunity of unilateral alteration of conditions of employment relationship by the employer.

III. The second breakpoint; the heterogeneity of work versus homogeneity of labour law

a. The tensions of traditional approach of employment relationship

The long-term character of an employment relationship and subordination of employee had an unexpected effect also. The regulation was based on the traditional characters of labour law, but employment had become more diverse in the meantime. The consequence of this was that many people sought the solution outside labour law.⁴⁹ The reasons of this trend were analysed in detail. It was clear that the macro-economic changes were not conducive to the traditional form of employment. The requirement of a change in labour law is formulated in the 'Lisbon Strategy' (LiS).⁵⁰ The document highlighted that the European Union (EU) "is confronted with a quantum shift resulting from globalisation and the challenges of a new knowledge-driven economy"⁵¹. The LiS evaluated the EU's strengths and weaknesses, and formulated the need to create "more and better jobs for Europe"⁵² and urged to begin discussions on an active employment policy.

The content of the Green Paper based on the LiS, and its purpose⁵³ "...is to launch a public debate in the EU on how labour law can evolve to support the Lisbon Strategy's objective of achieving sustainable growth with more and better jobs.

Journal of Legal Studies (1981) 39-64.; Edwin Peel "The Law of Contract" (13th Edition) (Sweet & Maxwell, London 2011) 3.

⁴⁷ Jean Tirole above n 42, at 741-781.

⁴⁸ Douglas Bernheim and Michael Whinston "Incomplete contracts and strategic ambiguity" (1999) *The American Economic Review* 9, 902.

⁴⁹ See the title of the conference in Zell am See (1987): *Flucht aus dem Arbeitsrecht* (Escape from the labour law). Summary of the conference see: Klaus Firley "Flucht aus dem Arbeitsrecht" (1987) *Das Recht der Arbeit*, 4-5, 271-289, 411-422.

⁵⁰ Lisbon European Council 23 and 24 March 2000 Presidency Conclusion.

⁵¹ LiS The new challenge, point 1.

⁵² *Ibid.* The way forward, point 5.

⁵³ Green Paper – Modernising labour law to meet the challenges of the 21st century; COM (2006) 3.

”The Green Paper stated that European labour markets face the challenge of “combining greater flexibility with the need to maximize security for all”⁵⁴. For this reason the Green Paper, amongst others, encourages the identifying the key challenges that have not yet yielded an adequate response. It also mirrors the clear gap between legal and contractual framework and the realities of the world of work. The paper seeks to encourage discussion on how different types of contractual relations, this, together with employment rights applicable to all workers, could facilitate job creation and assist both workers and enterprises by easing labour market transitions, assisting life-long learning and fostering the creativity of the whole workforce.

It is worth highlighting two elements in the latter quotation. One is ‘different types of contractual relations’ (*unterschiedliche Arten vertraglicher Beziehungen*), the other one is ‘labour market transitions’ (*Übergänge auf dem Arbeitsmarkt*). In this context, the Green Paper analysed the situation of labour law. It is emphasised that the original purpose of labour law was to offset the inherent economic and social inequality within the employment relationship.⁵⁵ This evaluation of the document is correct. Labour law centered on the statement of the employee’s legal status, and built up its legal system from the traditional concept of an employee. This system consists of three elements, namely: the typical content of the contract of employment is establishing an employment relationship for an indefinite period; the exclusive causa of employment relationship is the contract of employment⁵⁶; and finally, the parties in the employment contract/relationship are one employer and one employee. Under the Green Paper, the “rapid technological progress, increased competition stemming from globalisation, changing consumer demand and significant growth of the services sector have shown the need for increased flexibility”.⁵⁷

b. New labour market policies – unilateral altering’s power of employer

The argument of the Green Paper is not without antecedents. The attempt to create a new labour-market policy has already begun; for example the Danish model of ‘flexicurity’,⁵⁸ the Biagi-reform in Italy,⁵⁹ and the Spanish labour law reform.⁶⁰ These solutions have many common features but, most important, for our topic, is the opportunity to modify the working conditions of the employment relationship, found particularly in the new Spanish regulation.⁶¹ These regulations are important from a certain respect. Namely, while the strengthening of the employer’s power to change the relationship did not have a legal basis, these rules were in favour and supported the efforts of the employer.

⁵⁴ Ibid. at 3.

⁵⁵ Ibid. at 5.

⁵⁶ The significant difference between employee and worker (*Arbeitnehmer und arbeitnehmerähnliche Personen*) see Guy Davidov “Who is a worker? (2005) *Industrial Law Journal*, 3, 57-71.; Nicole Neuvians, “Die arbeitnehmerähnliche Person” (Berlin, Duncker & Humblot, 2002)

⁵⁷ Green Paper above n53 at 5.

⁵⁸ See Kongshøj Madsen “The Danish modes of ‘flexicurity’ – A paradise with some snakes” Conference Paper was presented at the Annecy Conference on the Future of Work and Social Protection arranged by ILO and the French Government on 16-18 January 2002 in Lyon

⁵⁹ Michele Tiraboschi “The reform of the Italian labour market over the past ten years: a process of liberalization?” (2008) *Comparative Labor Law & Policy Journal*, 427-458.

⁶⁰ Federico Durán López “Spain’s post-reform labour market legal framework, SEFO Spanish Economic and Financial Outlook, 2015, May.; Javier Gómez Aballeira “The Spanish Labour Reform and the Courts: Employment Adjustment and the Search for Legal Certainty” (2012) *Spanish Labour and Employment Relations Journal*, 41-45.

⁶¹ Giménez, Daniel Toscani “La modificación unilateral de condiciones e trabajo por el empresario – Comentarios a la Ley 3/2012, de 7 de julio” (El Derecho, Madrid, 2014); Manuel Lague Perra and Anna Ginés “Modification of working conditions in Spain” (2014) *IUSLabor*, 3

What were the options available to employers? Comparative analyses confirm that the ability to alter the content of the employment relationship in the process of performance has become increasingly important. In this context, it is necessary to highlight that the sources of labour law are of diverse legal nature. These sources can generally be classified into legislative and contractual components. The complexity of the sources of labour law is highlighted by Adomeit, who also analysed the source system of law in terms of altering the content of the employment relationship. Employment relationships differ from other legal relationships because their content is determined and affected by various factors (*Bestimmungsgründe*).⁶² As far as contractual sources are concerned, the content of the contract of employment fundamentally determines the employer's possibility and power to alter. This is important to highlight, especially in today's unpredictable economic environment, because, behind the desire for unilateral, or quasi-unilateral changes to the employment relationship, there are the employer's economic interests. When the parties regulate the working conditions in the contract of employment in detail, these conditions can only be modified by an amendment of the contract. However, this is where the concept of the above mentioned incomplete contract comes into the picture. The contract of employment as an incomplete contract may entitle the employer or, for example, the collective agreement, to regulate the employer's power to change.

Thus, it is possible to change the working conditions without changing the employment contract. Such a distinction can be found in French labour law. Nevertheless, it can be stated that the contract needs to be amended in case of all events that can lead to changes in the essential content elements of the employment relationship.⁶³ The distinction between the content of the contract of employment and the employment relationship can also be observed in English labour law. The content of the employment relationship is fundamentally determined by two factors: the express terms laid down in the contract of employment, and the implied terms traditionally attached to it. The elements determining the content of the employment relationship are not included in the contract of employment but generally in the collective agreement. Naturally, the terms of the contract of employment are mutually binding by the parties, but the 'vital part of the contract'; more precisely the dynamics of the employment relationship is not provided for in this contract. Accordingly, the English employment relationship is referred to as an incomplete contract for a number of reasons.⁶⁴ The incomplete contract provides abundant room for the employer to exercise certain 'privileges'. A number of experts support the principle of managerial prerogative from the employer's perspective, with the argument that every long-term investment comes with risks. These investments are implemented through specific legal transactions; such is the contract of employment and its legal effect, the employment relationship. In this context, the following argumentation may apply to employment relationship as well. In case the content of a legal transaction that establishes a longer-term investment does not cover every detail, deriving from privileges based on property/ownership the investor has the right to unilateral altering, therefore the effectiveness of the business is guaranteed from the start.⁶⁵

The problem of changing working conditions (*Gestaltungsrecht*) is a focal area of German labour jurisprudence.⁶⁶ The employer's power to change is associated with the long-term

⁶² Klaus Adomeit "Rechtsquellenfragen im Arbeitsrecht" (München, C. H. Beck'sche, 1969) 5.

⁶³ These elements are mainly outside the employer's unilateral decision power concerning how work is performed. For further details see Paul-Henry Antonmattey "Les clauses du contrat du travail" (Rueil-Malmaison, Liaisons, 2009)

⁶⁴ Ann Pankhurst "Work effort under the incomplete contract of employment" (Cambridge, New Hall, 1988) 5-8.

⁶⁵ Oliver Hart, and John Moore above n 42

⁶⁶ Eduard Bötticher "Gestaltungsrecht und Unterwerfung im Privatrecht" (Berlin, Walter de Gruyter & Co., 1964); Ulrich Preis "Grundfragen der Vertragsgestaltung im Arbeitsrecht" (Neuwied, Luchterhand, 1993) 37-50, 51-85.;

character of the employment relationship and, consequently, with the uncertainty of the contractual promise (*Umbestimmtheit*).⁶⁷ But, the question is whether the employer's general right to conduct (*allgemeines Weisungsrecht*) could serve as a base for the employer's so-called extended right to discretion (*erweitertes Weisungsrecht*). The majority position in German literature assumes that the employer's general right to conduct could be extended through individual contracts. This would be allowed via a clause called *Versetzungsklausel* (*Versetzungsvorbehalt*) which would permit the employer to change the nature of the employee's job activities as well as their place of work. This would help to avoid frequent amendments to the contract of employment when there are changes in circumstances requiring significant modification in performance, and these changes only become evident after the conclusion of the contract. The subject of this, ultimately agreement-based, right to conduct reaches beyond an employee's obligation to contract performance, as it would also allow changes outside the contract, not specified in advance.⁶⁸ Mentzel refers to the fact that German law enforcement developed the limits of such right to conduct relatively early, stating that, although a general right to conduct might not exceed the contract, its extension by the contract of employment or by a collective agreement was permitted.⁶⁹ Recent legislation has also recognised this possibility, emphasising that the change, apart from being agreement-based, must be objectively grounded.⁷⁰

IV. A new approach to the long-terms contracts

a. Theory of relational contract

Contracts can be grouped into two general categories: short-term and long-term contracts.⁷¹ Many refer to the former as 'discrete transactions'.⁷² According to the evaluation by Macneil, such contracts are characterised by two general features: they are short and limited in scope.⁷³ The following are, not exclusively, the features of these exchange-type contracts. The transactional type generally involves fewer parties and able to be monetised in terms of its contents; from an economic perspective, it is a contract of exchange. The elapsed time between performance and then conclusion of the contract is short; contract performance generally does not require continuity. The contents of the agreement are clear; it is designed and worded for the present. The actual contents of the contract is complete, its design is also complex. The substance of the contract is the act of the exchange itself; its temporal dimension is 'presentation of the future'.⁷⁴ Consequently, the parties are fully bound to the plan, i.e. to the contents of the contracts concluded.

Walter Böttner "Das Direktionsrecht des Arbeitgebers" (Marburg, Elwert, 1971) Alfred Böker "Das Weisungsrecht des Arbeitgebers" (Frankfurt a. Main, Athäneum, 1971); Rolf Birk (Die arbeitsrechtliche Leitungsmacht (Köln, Carl Heymanns, 1973) 23-79.

⁶⁷ Thomas Mentzel "Die Änderung von Arbeitsbedingungen kraft Direktionsrecht oder im Wege voran konsentierter Änderungsverträge" (Hamburg, Verlag Dr. Kovač, 2003) 3-4

⁶⁸ Thomas, Mentzel above n 67, at 91-92.

⁶⁹ Ibid. at 163-180.

⁷⁰ See § 315 BGB „Bestimmung der Leistung durch eine Partei“;

⁷¹ Morten Hviid "Long-term contracts and relational contracts" Encyclopaedia, encyclo.findlaw.com/4200book, 46-47., Ian Roderick Macneil "The many futures of contracts" (1973-1974) Southern California Law Review, 691-816; "Essays on the nature of contract" (1978-1979) North Carolina Central Law Journal 159-200.

⁷² Ian Roderick Macneil "The many futures of contracts" above n 71, at 693.

⁷³ Ibid, at 720.

⁷⁴ Macneil's theory is that the term "presentation" plays an important role in the classification of contracts. "Presentation" is only a manner in which a person perceives the future's effect on the present; but it depends upon events outside the individual psyche, events viewed as determining the future. Presentation is, thus, a recognition that the course of the future is bound by present events, and, by those events, the future has, for many

In contrast, a so called 'relational contract' is not simply a contract of exchange. Further to the economic effects of the contract, there are other factors not of an economic but basically of social nature. A large part of these contracts cannot be, or is difficult to monetise. Relational contracts are long-term, and do not terminate when one or two obligations are met. Macneil highlights that individuals entering into such relations so do gradually, in some cases, starting with their birth and the contract ends with their death. The substance of relational contracts is continuous planning. While transactional contracts have the nature of 'presentation of the future', the relational contracts is "futurizing of the present".⁷⁵

However, is every long-term contract is also a relational contract? The dilemma of long-term contracts, according to Baird, is the "need to fix responsibilities at the outset and the need to readjust them over time permeates the long-term contractual relationship"⁷⁶. The first one means loyalty to the contractual obligation, while the second means the flexible adjustment of the contract to the circumstances that have changed or will change in the future.⁷⁷ Hviid emphasises that this 'tension' is observed both in cases of long-term and relational contracts. According to this, there would be two contract types, "although closely related, neither is a subset of the other."⁷⁸ Goetz and Scott emphasise that relational contracts "encompass most generic agency relationships, including distributorships, franchises, joint ventures, and employment contracts."⁷⁹ At the same time, the author draws attention to the fact that the concepts of simple long-term contract and relational contract are often intermixed. Their standpoint is that classic contingent contracts need to be distinguished from and relational contracts.⁸⁰

However, the contract of employment does not paint a sophisticated picture While the contract of employment can, without a doubt, be evaluated as an incomplete contract, the following statement is true for the contract of employment: "relational contracts also require more creative control mechanisms than conventional contingent contracts do."⁸¹ The authors of this paper have detected an important difference between the 'traditional' relational contract and the contract of employment. The parties of a relational contract want to maintain this relationship and, because of the invested financial and intellectual property, they seek to avoid ceasing the contract. In other words, the parties have become a so-called 'forced-community'. This does not apply to the contract of employment.

b. Contract of employment as a relational contract

Bird clearly states that "employment is a relational contract",⁸² however, the emphasis that "employment relations immediately transcend wage-for-services exchanges and develop into complex whole person relationships based upon trust, commitment, and shared solidarity"⁸³ Reveals that the interpretation is also multifaceted. He is of the opinion that "one-third of employees work without a contract referencing discharge laws; work norms influence virtually

purposes, been brought effectively into the present.' Ian Roderick Macneil "Restatement (second) of contracts and presentation" (1974) Virginia Law Review, 589.

⁷⁵ See Ian Roderick Macneil "The many futures of contracts" above n 71, at 738-740.

⁷⁶ Douglas Baird "Self-interest and cooperation in long-term contracts" (1990) The Journal of Legal Studies 586.

⁷⁷ Ibid. at 586.

⁷⁸ Morten Hviid above n 71, at 46.

⁷⁹ Charles J. Goetz and Robert E. Scott "Principles of relational contract" (1981) Virginia Law Review 1091.

⁸⁰ Similar Morten Hviid above n 71, at 46

⁸¹ Charles J. Goetz and Robert E. Scott above n 79, at 1093.

⁸² Robert C. Bird "Employment as relational contract" (2005) U. Pa. Journal of Labour and Employment Law 215.

⁸³ Ibid. at 209.

all employees present in a workplace”.⁸⁴ He describes in detail the similarities between the contract of employment and the relational contract, but points out a significant difference: the subordination of the employee. Nevertheless, his conclusion is as follows:

Relational contracts represent the dominant bargain between employer and employee. An enforceable relational contract, based upon well-established sources of culture, credo, and expectation, is an accurate representation of what the parties intend in the employment context.⁸⁵

In the English literature, this connection was addressed by Brodie.⁸⁶ He points out that the employment relationship has multiple forms, and more than one of these, such as certain atypical forms of employment, allow the employer to bypass basic employee protection rights. Concerning the traditional contract of employment, it is doubtless that

the implied term of mutual trust and confidence is much more wide ranging but, in all probability, would not extend to requiring an alteration of the parties’ obligations in the light of radically changed circumstances.⁸⁷

Apparently, Brodie refers here to unilateral changes, to which the employee is not obliged to consent, however. It is important to note that, further on, the duty of trust and confidence could not be used to render the original content of the contract meaningless.⁸⁸

Undoubtedly, Macneil’s criteria are clear in his own system. At the same time, the content of the contract of employment has evolved in a different direction from that of the values represented by Macneil’s theory of contract.⁸⁹ Consequently, the adaptation of the criteria of relational contract to the contract of employment is doubtful. Brodie draws attention to the fact that the commercial contract and the employment contract exist in two different areas. The employee is not in a competitive position in their own environment, they are unable to easily convert a contractual partner, i.e. their possibility to conclude a new contract is minimal.

V. Limits of unilateral changing of the content of employment relationship – regulatory environment

An essential purpose of labour law regulation is safeguarding the employee’s legal status, referred to as status protection. Due to expected problems arising from the long-term nature of the employment relationship and the dominant position of the employer, the contract of employment – in the majority of cases – contains predefined conditions.⁹⁰ However, if these conditions evolved as a result of implied terms, they might allow the employee abundant opportunity for changes.⁹¹ Therefore, the contract of employment can easily show the features

⁸⁴ Ibid. at 215.

⁸⁵ Robert C. Bird above n 82, at 206.

⁸⁶ Douglas Brodie “How relational is the employment contract?”(2011) *Industrial Law Journal* 236.

⁸⁷ Ibid. at 238.

⁸⁸ Ibid. at 236.

⁸⁹ In this context see *State of South Australia v McDonald* [2009] SASC 219. The following argument can be found in this decision: “The development of the implied term can be seen as consistent with the contemporary view of the employment relationship as involving elements of common interest and partnership, rather than of conflict and subordination”.

⁹⁰ Martin Henssler and Wilhelm Moll “AGB-kontrolle vorformulierter Arbeitsbedingungen” (München, C. H. Beck’sche, 2011); Jens Suckow (et al) “Der vorformulierte Arbeitsvertrag” (Köln, Luchterhand, 2011)

⁹¹ Ian Smith and Nicolaus Randall “Contract actions in modern employment law: Developments and issues” (London, Butterworths, 2002) 29-96.; Catherine Barnard “Reconsidering the mechanism to regulate working conditions in the light of diversified and individualised employees and the declining labour unions”

of the general conditions of contract. Accordingly, the content elements of the contract of employment must be flexible and adaptable. As a consequence, a general condition applicable to the contract of employment may include an employer's unilateral right to contract changes, and reference to the collective agreement (or work council's agreement).

When altering the content of the employment relationship, the crucial factor is content control, which has multiple levels. The first immanent level lies within the contract itself; this derives from the fact that the basis of entitlement to unilateral altering power is also rooted in the contract. Content control of the contract is fundamental at this level.⁹²

The second level of control should be provided by labour law regulation. The requirement of equitable assessment has relevance in this respect. Section 315 of BGB applies to the modification of the content of the employment relationship as well as to control of this modification. If the employer's altering power derives from the contract of employment, while referring to the reservation by Birk on contractual entitlement,⁹³ we do not refer to control of the content but of equitable assessment.⁹⁴

The next phase of the regulatory environment is connecting the alteration of the content of the employment relationship and termination of the employment relationship. In this respect, the regulation of so-called *Änderungskündigung* is remarkable.⁹⁵ The precise determination of the condition of termination by the employer can create a balance between the altering power of employment and the protection of the employee.

VI. Conclusion

a. Contract of employment as a relational contract – prerequisites

Despite the fact that – in a contract of employment – the parties are not reunited community interests as in in the case of a relational contract, it may also become necessary to maintain the employment relationship in changing circumstances. This can be ensured by the employer's unilateral, or more precisely 'quasi' unilateral, power to alter.

Labour law regulation should be based on the principle of the contract. Consequently, unless otherwise provided in the labour regulation, the principle of civil law and provisions of the

http://www.jil.go.jp/english/events/documents/ells04_barnard1.pdf, 51-58.; Hugh Collins "Regulating the employment relation for competitiveness" (2001) *Industrial Law Journal* 17-47.; Wolfgang Grobecker "Implied terms und Treu und Glauben" (Berlin, Duncker & Humblot, 1999) 231-256.

⁹² See as comparison Dorothea König "Die Inhaltskontrolle von Arbeitsverträgen in Deutschland, England und Frankreich" (Freiburg, Rombach, 2010), and further Loraine Watson "Employees and the Unfair Contract Terms Act" *Industrial Law Journal*, (1995) 4, 323-336.; Mark Freedland, "The personal employment contract" Oxford, Oxford University Press, 2003) 190-192.

⁹³ In any case, it is worth considering Birk's remark asserting that the altering and concretising power of the employer had been fundamentally adopted on the basis of unwritten law and judicature – also as a consequence of legal history experience. Rolf Birk above n 66-n 77.

⁹⁴ Rolf Birk above n 66, at 55-56.; Gerrick von Hoyningen-Huene "Die Billigkeit im Arbeitsrecht" (München, C.H. Beck, 1978) 47-85, 128-172.; Hugh Collins – Keith D. Ewing – Aileen McColgan "Labour Law" (Cambridge, Cambridge University Press, 2012) 765-799.; In connection with control of discretion, see the reasonable test Douglas Brodie "The contract of employment" (Edinburgh, W. Green & Son Ltd., 2008) 87-91.

⁹⁵ See Franz X. Wallner „Die Änderungskündigung" (München, C.H.Beck, 2005); Jens Jüttner "Der Vorrang der Änderungskündigung vor Beendigungskündigung" (Baden-Baden, Nomos, 2010); Günther Löschnigg (Hrsg) "Die Kündigung aus wirtschaftlichen Gründen und ihre Beschränkungen im internationalen Vergleich" (Wien, OGB Verlag, 2008)

Civil Codes are to be applied. This problem has been raised mainly in continental law. Nevertheless, the application of the rules of civil law does not depend on whether or not there is codified legislation. However, this solution has strict conditions. In this context, a good example is the German draft on contract of employment.⁹⁶

An employer's entitlement to unilaterally alter the content of employment relationship should be based on the contract of employment or collective agreement. As far as the entitlement of the employer is concerned, this would be better regulated in the collective agreement, because it is only in this way that balance between the parties can be assumed. However, this solution requires clarification of the relationship between contract of employment and collective agreement. In this respect, it is important that the collective agreement has a more significant role.⁹⁷

Control of the contract of employment and of the collective agreement is needed especially in cases when, upon entitlement by contract, one of the parties can alter the content of the legal relationship. This control is equally applicable to the employment contract and the collective agreement. The control has to designate the content and the limitation of the contractual entitlement on the basis of regulation of the general conditions.

Special protection is necessary against dismissal for economic reasons. It is safe to say that dismissal for economic reasons within EU Member States is generally considered an ultima ratio option, preceded by appropriate measures. Naturally, this applies to dismissal due to changes in the employer's economic circumstances, and is shown in a number of cases of facts, institutions and procedures in each state. In this respect, in French labour law it is worth noting how the altering of content of the employment relationship due to economic reasons (*modification du contrat de travail pour motif économique*) is connected to termination, due to the same *licenciement pour motif économique*)⁹⁸, which could refer to the principles of unfair labour practice as it is known in English law, in particular, the institutions of prohibition of unfair dismissal and the right to justified dismissal.⁹⁹ Finally, the German system for protection of dismissal needs to be mentioned here which, apart from *Änderungskündigung* mentioned above, introduced multiple restrictions to protect the employee.¹⁰⁰

The role of collective labour law should be strengthened. A function of collective labour law is to establish a balance between the parties. The labour law cannot be imagined without the correlative unit of individual and collective labour law. The collective part of labour law plays an important role in the development of the EU labour law, although their impact in Central European countries is still low in our days.

b. Possible versions of future labour law

⁹⁶ See, Diskussionsentwurf eines Arbeitsvertragsgesetzes (ArbVG) 2. Fassung – Stand: August 2006. Bertelsmann Stiftung; The Section 1 of this draft stated the following: “Das Arbeitsverhältnis wird durch Vertrag begründet. Soweit dieses Gesetz nichts anderes bestimmt, gelten die Bestimmungen des Bürgerlichen Gesetzbuches. (Unless otherwise provided in this Act, the provisions of the Civil Code shall apply.) Martin Henssler, and Ulrich Preis “Entwurf eines Arbeitsvertragsgesetzes” (München, Beck, 2015)

⁹⁷ About the voluntary/contractual sources see Simon Deakin and Gillian S. Morris “Labour Law” London, Butterworths, 1989), 75-80.

⁹⁸ Jean Pélissier – Alain Supiot, – Antoine Jeammaud “Droit du travail” (Paris, Dalloz, 2006) 461-468.; Françoise Favennec-Héry “Modification du contrat de travail: le glissement de l’objectif vers le subjectif” (2003) *Revue de jurisprudence sociale*, 6, 459–465.

⁹⁹ Hugh Collins – Keith D. Ewing – Aileen McColgan above n 94, at 800-854.

¹⁰⁰ See Gerrick von Hoyningen-Huene „Kündigungsschutzgesetz” München C.H. Beck, 1992); Ulrich Preis “Prinzipien des Kündigungsrechts bei Arbeitsverhältnissen” (München, C.H. Beck, 1993)

In summary, the following may be laid down. The labour reforms so far have been implemented under the influence of state intervention. The legislator generally took into account the lawfulness of the contract law, however, flexibility aspirations favoured the ‘equality of the strong’.¹⁰¹ Furthermore, the success of reforms always depends on the state of the economy. For these reasons it should be asked: does the current legal construction of labour law meet the economic requirements? There are several signs that it does not.

One possible road to take is to keep the current system, to limit the content of traditional *locatio conductio* within the framework of strict social restrictions. It is apparent that, despite all efforts, this version pushes the boundaries of traditional labour law; controlled flexibility approach and various active labour market policy measures have not rendered results.

Another possible road leads to total freedom of employment and provision of employment.¹⁰² This version almost completely annuls the current system of labour law. Its reality is, indeed, evident with regard to the emergence and spreading of new methods of employment as well as provision of employment. This started with the appearance of the so-called *crowdsourcing* where certain groups of employees saw a chance for themselves to become a factor to regulate economic movements or at least a chance to participate more actively in processes concerning them.¹⁰³ Visibly, the legal practice tries to manage employment by digital platforms within the framework of traditional labour law institutions.¹⁰⁴ It remains to be seen how successful this approach is.

The third road is the adaptation of the *relational contract* to employment contract. The interpretation of contract of employment as a relational contract has received many criticisms. Nevertheless, this interpretation and implementation to the praxis is not necessarily to be rejected. This idea is based on the contract itself.¹⁰⁵ This contract, however, is a lot more than a mere agreement of exchange. In this context, the legislation only creates conditions and protects against abuses.

¹⁰¹ See Harold Havighurst above n 28 at 127-129.

¹⁰² One of the symptoms is the employment by the digital platform. See Jeremias Prassl and Martin Risak “Uber, TaskRabbit, & Co: Platforms as Employers? Rethinking the Legal Analysis of Crowdwork” (2017) *Comparative Labor Law & Policy Journal* 3. 619-652; Miriam A. Cherry “Beyond Misclassification: The Digital Transformation of Work” (2016) *Comparative Labor Law & Policy Journal* 10 577-603; Valerio de Stefano “Introduction: Crowdsourcing, The Gig Economy, And the Law” (2017) *Comparative Labor Law & Policy Journal* 10, 461-470.

¹⁰³ See Prassl, Jeremias – Risak, Martin: Uber, TaskRabbit, & Co: Platform as Employers? Rethinking the Legal Analysis of Crowdwork. *Comparative Labour Law & Policy Journal*, 2016/3. 619.

¹⁰⁴ See C-437/15. *Asociación Profesional Elite Taxi v. Uber System Spain SL*, 48.

¹⁰⁵ In this context see Ian Roderick Macneil “The new social contract” (Yale University Press, New Haven and London, 1979)