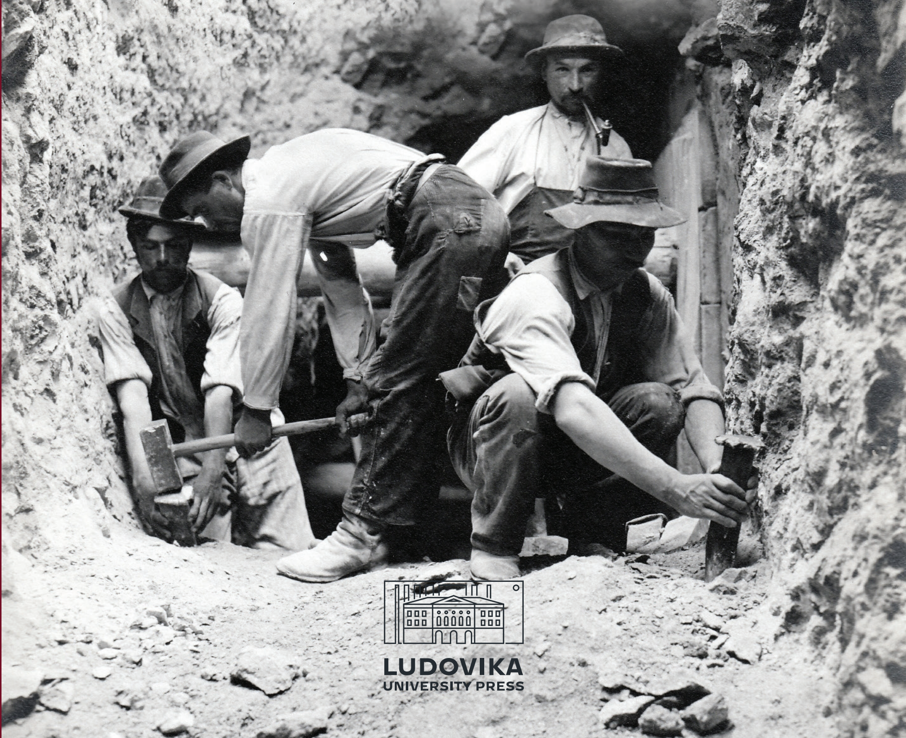
György Kiss

FRAGMENTS TO THE LEGAL BASIS FOR EFFECTIVE EMPLOYMENT

The Hungarian Experiences



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ACKNOWLEDGEMENTS

This study was the result of a lengthy deliberation. The reason for this may be that I think the purpose of labour law is somewhat different from the prevailing view. Namely, I distinguish the legal dogmatic identity of basic legal institutions from the legal policy factors affecting their operations. I thank the help and support of all those who listened to my arguments and offered their advice during my struggles. First and foremost, I would like to express my gratitude to Professor Emeritus Lajos Vékás, whose intellectual influence has been a source of strength to me throughout my work. I also thank Professor Gyula Berke for the many discussions and conversations that have shaped my opinion. I am grateful to research associate Ms. Rebeka Kiss for her research which has greatly helped to systematise and process the case law.

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And for her love, care, patience, and, last but not least, her wise counsel – which have helped me through every difficulty – I am eternally grateful to my wife, Zsuzsa Jobbágy.

Budapest, 31 May 2026

György Kiss

PREFACE

In no civilized system of law will such extorted "agreements" be enforced; in our system, we explained that they were unenforceable because they lacked "consideration". In any civilized system the same agreements, provided that they are entered into voluntarily and in good faith, will be enforced – as of course they should be.

Grant Gilmore: *The Death of Contract,* 84.

I am convinced that Grant Gilmore's thoughts on the contract must be true for all human relationships. Of course, such an ideal condition does not exist, but that does not mean that we should believe in or support the opposite of this. What Gilmore says about the contract is also true in a broader context for labour law. In other words, in every civilised society, employment relationships and the laws governing them should be based on voluntariness and good faith. If this is not the case, it is not the labour law as such that is in crisis, but the society that allows this deterioration.

PROLOGUE

PROLOGUE, PURPOSE OF THE STUDY, THE FRAMEWORK OF THE RESEARCH

This book is an introductory study on a rather complex area of research. The Research Group of Comparative and European Employment Policy and Labour Law of the Hungarian Research Network, the University of Pécs and the Ludovika University of Public Service is conducting analyses on the topic of "The Legal Basis of Effective Employment". The ultimate goal of the research is to reveal the current state of Hungarian labour law and to demonstrate and justify the possibilities for its transformation. As an introduction, it is advisable to clarify the approach and interpretation of two important concepts in the study. One is 'employment', the other is 'efficiency' in the context of employment. I consider it necessary to analyse the first concept in more detail because many new forms of personal work have become widespread nowadays, causing considerable trouble in the determination of their legal nature. A conceptual uncertainty can also be traced in the terminology used. And the concept of efficiency must be explored because it is essentially a complex interest-based phenomenon. Since labour law involves several interests, the orientation or the focus of efficiency must be assigned by defining the purpose of labour law.

ANALYSIS AND INTERPRETATION OF CERTAIN CONCEPTS

EMPLOYMENT, EMPLOYMENT POLICY, EMPLOYMENT LAW, LABOUR LAW

The following concepts and related institutions are continuously analysed during this research: 'employment', 'employment policy', 'employment law' and 'labour law'. The content and differences between these concepts can be approached in several ways.

Employment law, labour law in the traditional sense

The first approach of 'employment' concerns the internal structure of labour law itself. Countless monographs and studies dealing with the concept of labour law have confirmed the complexity of this branch of law (legal field), which arises from the coexistence of elements of both private and public law. The emergence of modern labour law came about due to two factors, namely state intervention, which has contributed, at least, to taming the 'wild anarchy of contracts', and the recognition of collective legal entities and collective agreements. State intervention determines the nature and structure of labour law in two main ways. Through state intervention, cogent and dispositive norms are incorporated into the content of the employment relationship (and partly in the content of the contract of employment). In this context, Kahn-Freund's observation has to be taken into account. He – referring to Dicey – emphasises that it is important to bear in mind that any rule of labour law which imposes a restriction on the content of a contract derives precisely from the contractual autonomy of the parties.[1] The relationship between the parties is, nevertheless, based on the contract

[1] Kahn-Freund, Otto (1967): A Note on Status and Contract in British Labour Law. *Modern Law Review,* 67(30), 640.

itself, despite the fact that a number of external elements are incorporated into the content of the employment relationship due to the intention of the legislator, independently of the will of the parties. Labour law, as a contract-based branch of law, is part of private law, and a contract of employment is an element of the system of private law contracts.[2]

Intervention in the contractual relationship between the parties is only one – albeit undoubtedly important – part of the state's complex public law activity. The history of labour law in the narrower sense,[3] i.e. the private labour law, obviously cannot be separated from the economic policy of a particular state and the employment policy that is closely linked to it. Consequently, the term 'employment' in the title of this study – in this context – should be understood as all the efforts, policies and norms that affect the contractual relationship of the parties of employment relationship.

Another factor in the development of modern labour law is the emergence and recognition of the collective aspects of the law. The principle and practice of *qui dit contractuel, dit juste* from the point of view of labour law also meant that there could be only one 'source of law' for this nascent future branch of law: the individual contract.[4] However, the discrepancy between collective performance and the atomised contract system soon led to an untenable situation. Ultimately, the collective nature of work is self-evident at a certain level of technology development, since effective performance requires cooperation within an organisation. From the point of view of legal transactions, this reality of collective performance meant

2 However, this does not mean that, at the legislative level – let us say – legal technicalities, there will be a merger between civil law and labour law, or that the characteristics of employment will be abolished. See Richardi, Reinhard (2000a): Begriff und Enstehung des Arbeitsrechts. In Richardi, Reinhard – Wlotzke, Ottfried (eds.): *Münchener Handbuch zum Arbeitsrecht.* Band I. München: Verlag C. H. Beck, § 1 RdNr. 30.

3 Not including here the civil service law *(Beamtenrecht, droit des service public).*

4 Rolland, Louise (2005): *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. In other words, only individuals could participate in legal transactions, while any kind of collective legal entity was excluded. See in this context the impact of the *décret d'Allarde* (2 mars 1791) and *loi Le Chapelier* (14 juin 1791).

that the existence of a collective legal entity had to be recognised in the law of Contracts (obligations); the collective had to have some form of legal 'subject'. The nature of this legal entity is complicated by the fact that the legal formula for the representation of collectives has not been clarified and thus, for example, the range and legal nature of employee representatives are still disputed.[5] An even more important development than the emergence of the collective legal entity was the inevitable rise of a new type of agreement characterised by its normative content. The problems caused by this are not purely theoretical, but also raise questions in practice, legislation and judicial lawmaking. In addition to the legal nature of the collective agreement, these relate to parties' capacity (ability) to enter into a collective agreement and the scope of the normative part of the collective agreement.

Regarding the internal cohesion of labour law, it can be established that this area of law can be characterised as a correlative unit of individual and collective legal institutions, the balancing of individual and collective autonomy.[6] State intervention, with its public law norms as well as the

5 For the German solution see RICHARDI, Reinhard (1968): *Kollektivgewalt und Individualwille bei der Gestaltung des Arbeitsverhältnisses*. München: Verlag C. H. Beck; DÄUBLER, Wolfgang ed. (2006): *Tarifvertragsgesetz. Mit Arbeitnehmer-Entsendegesetz.* Baden-Baden: Nomos, 1131. For the English law see BROWN, Henry Phelps (1983): *The Origins of Trade Union Power.* Oxford: Clarendon Press; MORRIS, Gillian S. – ARCHER, J. Timothy (2000): *Collective Labour Law.* Oxford – Portland, Oregon: Hart Publishing, 287–291; CARBY-HALL, Jo (1993): The Collective Agreement – Legal Enforceability? *Managerial Law,* 35(1–2), 3–24; BOGG, Alan (2009): *The Democratic Aspects of Trade Union Recognition.* Oxford – Portland, Oregon: Hart Publishing, 210–217.

6 This statement is certainly true at the abstract level of research. The recent history of the development of this branch of law confirms that the unity and points of overlap of the two areas are by no means static, as certain shifts in emphasis can be detected from time to time. In the 1970s – the so-called golden age of labour law – the emphasis shifted from individual autonomy towards collective relations, and some countries even underwent significant centralisation in the system of collective agreements. See about this period in BARNARD, Catherine (2012): *EU Employment Law.* Oxford: Oxford University Press, 8–27; KRIMPHOVE, Dieter (2001): *Europäisches Arbeitsrecht.* München: Verlag C. H. Beck, 15–18. This process seems to have been reversed later, indicating that the principle of individual contractual freedom has not been broken by the collective legal institutions of labour law. For a comparative analysis, see among others KATZ, Harry C. (1993):

collective legal institutions of labour law not only created this branch of law but continue to define its character and orientation today. The evolution of labour law can perhaps be best traced by examining its system of sources, considering the proportions and weight of the source elements. This is because it is the only branch of law with a notable duality of its norms – in addition to legislative norms, 'contractual norms' play a decisive role – in other words, labour law has a system of contractual sources that complement legislation.

In the following chapters, the purpose of labour law and the legal basis for effective employment will be examined through the functions of the sources of labour law. It is sufficient to note here that the term 'employment law' – in this context – covers any institution relating to employment, whether it be a rule, a rule of public or private law, a collective agreement or an individual contract. In another approach: if by the concept of 'labour law' we mean only the dogmatics of labour law in a narrower sense, that is the law of contracts, the 'employment law' in a broad sense includes all state activities and legal norms that indirectly influence the motivation, interests, opportunities and behaviour of the parties to the contract of employment.

The Decentralization of Collective Bargaining: A Literature Review and Comparative Analysis. *ILR Review,* 47(1), 3–22; Aglio, Daniele – Di Mauro, Filippo (2020): Decentralisation of Collective Bargaining: A Path to Productivity? *IWH-CompNet Discussion Papers,* (3). For the sensitivity of the debate in French literature, see Daugareilh, Isabelle (2020): The Tremendous Upheaval in Sources of Labour Law in France. In Gyulavári, Tamás – Menegatti, Emanuele (eds.): *The Sources of Labour Law.* Alphen aan den Rijn: Kluwer Law International, 213–228; Javillier, Jean-Claude (1984): *Les reformes du droit du travail depuis le 10 mai 1981.* Paris: L.G.D.J. This was described by Mazeaud as labour law being more of a collective discipline, but there is a growing demand for individualisation. Mazeaud, Antoine (2008): *Droit du travail.* Paris: L.G.D.J. – Montchrestien, 29.

When the 'employment' goes outside the traditional framework and demands a sui generis entity

However, the terms 'employment' and 'employment law' mentioned above can also be interpreted in other respects in relation to labour law. There are several types of contracts that may describe work done personally for another person. For a long time, the coexistence of the contract of employment and civil law contracts relating to work did not cause problems, primarily because the tests determining the content of the employment relationship and thus the legal status of the employee were stable. However, this theoretical separation was broken in practice after a while. Freedland's description is apt about the misconception of the unity of law of contract of employment and the duality between contract of employment and other contract expressing personal work.[7] A part of the working population had emerged whose legal status and the corresponding factual possibilities for legal transactions were incompatible. In terms of legal status, this working person is an independent contractor, but is in a similar situation to an employee in the performance of his or her legal relationship. It is typical, and it can be said that it is understandable, that traditional labour law has responded to this phenomenon with the concept of the employee, rather than approaching the problem from the perspective of the legal status of the entrepreneur.[8] However, deriving the concept of this intermediate category from the status of an employee raises a number of questions and

[7] "The false unity of law of the contract of employment" [...] "the false duality between the contract of employment and other personal work or employment contract." FREEDLAND, Mark (2003): *The Personal Employment Contract.* Oxford: Oxford University Press, 15–27. This conclusion is generally valid despite the fact that his analysis is based primarily on English labour law.

[8] There was an exception to this, the legal status of the so-called *"Angestelltenverhältnis tätigen Mitarbeiter der Werbeaußendienstes der Versicherungswirtschaft"*. See LIEB, Manfred (1976): Unternehmerähnliche Arbeitnehmer – Überlegungen zur Rechtsstellung der im Angestelltenverhältnis tätigen Mitarbeiter des Werbeaußendienstes der Versicherungswirtschaft unter besonderer Berücksichtigung ihrer Abgrenzung zum selbständigen Vertreter. *Zeitschrift für die gesamte Versicherungswissenschaft,* 65(2), 207–233.

causes tensions. Since, moreover, each country relies on the concept of its own employee, no results can be achieved with this method.

Nowadays, there seems to be a growing need to develop a new 'employment law' *(Beschäftigungsrecht)* framework that represents an alternative to the expansion of the legal institution of traditional labour law. The question inevitably arises: if there is a need for the creation of a new *sui generis* employment law, why has it not been achieved so far? There are several reasons for this, which will be discussed in the Third Chapter of the First Part of this study. Langille rightly raises the question of the place of 'employment law' in this wider context: "If Labour Law Is a Subset of Employment Law, What Is Employment Law a Subset of?"[9]

However, the framework of traditional labour law is not only stretched by the surreal category of 'dependent self-employed'. Namely, the work organised by platform – the so-called platform work has appeared. It seems that platform work would transform the entire dogmatic system of labour law, or at least represent a new *sui generis* legal relationship. Leaving aside the details for now, it should be pointed out that the platform – as such – is not a legal concept, but a technological one. The digital platform, as a set of technological developments, is suitable to be a basis for any process or activity, or for the development of newer applications.[10] The platform is a pure innovation[11] and therefore, by its nature – it is reasonable to claim – it inherently departs from all traditional rules, behaviours and relationships.[12]

9 Langille, A. Brian (2020): If Labour Law Is a Subset of Employment Law, What Is Employment Law a Subset of? *Dalhousie Law Journal,* 43(2), 581–604. See also details about this in the analysis of possible answers to the latest challenges facing labour law.

10 Ruonan, Sun – Gregor, Shirley – Keating, Byron (2015): *Information Technology Platforms: Definition and Research Directions.* Conference: The 26th Australasian Conference on Information Systems.

11 The California Public Utilities Commission sought to avoid stifling innovation. Dubal, Veena B. (2017): The Drive to Precarity: A Political History of Work, Regulation, & Labor Advocacy in San Francisco's Taxi & Uber Economies. *Berkeley Journal of Employment & Labor Law,* 38(1), 128.

12 Davidov, Guy (2017a): The Status of Uber Drivers: A Purposive Approach. *Spanish Labour Law and Employment Relations Journal,* 6(1–2), 6.

The platform therefore offers extremely diverse, rapid and efficient solutions, and is consequently different from its environment. One way to use the platform is to 'organise' different activities. This diversity is reflected in the heterogeneous legal structure of the work of the platform and the different legal positions of the parties.[13] The question is, how does this complex triangular (or even more actors) structure change the approach of traditional labour law? Furthermore, is there any chance of developing a broad employment law covering all forms of platform work?

Brief conclusion

Summarising what has been said so far regarding the concept of employment, this study aims to analyse the legal basis of employment not only within the narrower framework of traditional, historical labour law. Thus, the research also extends to the public law elements of labour law, which has a significant impact on the dogmatic part of labour law, i.e. on the 'private law of labour'. The economic and employment policy contexts of labour law should also be examined, in as much depth as is necessary for our topic. The concept of employment is also important in describing the different legal relationships of personal work for another person. It can answer the important question of whether the expansion of traditional labour law thinking is sustainable or whether some new approach is needed. However, in relation to each topic to be examined, it must be emphasised that the analysis is carried out in the context of Hungarian labour law. This also means that the researcher must stand on the ground of reality and, accordingly, sometimes keep his imagination in check.

13 A study by Prassl and Risak attempted to define these potential contractual relationships by examining the parties involved in this structure. Prassl, Jeremias – Risak, Martin (2016): Uber, Taskrabbit, and Co.: Platforms as Employers? Rethinking the Legal Analysis of Crowdwork. *Comparative Labor Law & Policy Journal,* 37(3), 619–651.

EFFICIENCY – FOR WHAT OR FOR WHOM?

What does effective employment mean? What interests and objectives does the state serve in developing its employment policy? It is clear that employment and labour regulation cannot be examined in isolation from other processes. The assessment of employment is part of current economic and social policy. The content of employment depends on the orientation of current economic and social policies. Consequently, employment has never been neutral, and it is not neutral today either. In every age, the approach to employment is teleological in nature, taken in order to achieve a specific goal.[14] This may be the assertion of the employer's economic interests or meeting the social needs of the employee. However, these are rather abstract concepts and merely the surface manifestations of a complex system and process. Ultimately, the perception of the society in a particular age and the conceptions of economic and socio-political ideas that express it determine the legal institutional system which is also the subject of this research. And at this point I refer back to the public law part of labour law, the importance of which I explained in the previous point. Namely, the so-called 'subjective efficiency' of employment – i.e. giving preference to the interests of one side or the other – can only be interpreted if there exists a stable reference point. This reference point must be above the subjective interests; in other words, it must, in the interest of the most vaunted common good, take into account the inputs and outputs of the entire employment system.

The question is, of course, how objective this interest as a reference point is, and who embodies the 'common good'? This question is important because the abstract definition of the purpose of employment is nothing more than a continuous pursuit of a goal. But this does not mean a constancy of content. In other words, it does not mean to deny that the orientation of labour law has been influenced in a markedly different way by the socio-economic conditions of certain ages. A good example of this is the birth of labour law itself, which in this context was a possible response to the unlimitedness of contractual freedom. In these circumstances, labour

14 See this approach specifically in relation to labour law in Davidov, Guy (2016): *A Purposive Approach to Labour Law.* Oxford: Oxford University Press.

law emerged as a law of protection for employees. During this period, the employee had to be protected against the overriding power of an 'alien or external determination' *(Fremdbestimmung)* which dominates the content of the transaction. The subordination thus formed, taking into account the financial and social situation and social classification of employees at the time, was identified countless times with vulnerability. In addition to being socially unsustainable, this era was also economically doomed, as the market threatened to collapse due to pauperism. State intervention – as a social and economic necessity – inevitably changed the power relations between the employer and the employee (community of employees), which also meant the transformation of the purpose of labour law.

It was a new era, with new ways of organising the state, new legal structures, and a different assessment of subordination. The social state, the social rule of law[15] and then the welfare state has undoubtedly cast a beneficial veil over many social problems. The purpose of labour law could no longer be reduced to the protection of employees, since labour law constituted a complex system of sources of law, both legislative and normative-contractual, and was therefore capable of dealing with economic and social problems and interests in a flexible manner. The new function of labour law has been to ensure a balance between the rights of the entrepreneur/employer to meet economic requirements and the rights of employees to ensure their social protection needs *(Schutzbedürftigkeit)*.[16] The state of labour law has been

15 Under the French Constitution: "La France est une République indivisible, laïque, démocratique et sociale" (Article Premier). The German Grundgesetz lays down: "Die Bundesrepublik Deutschland ist ein demokratischer und sozialer Bundesstaat" (Article 20). The Spanish Constitution states: "España se constituye en un Estado social y democrático de Derecho" (Article 1). In this connection, Richardi's comment is apt, namely, that the social rule of law is not merely a matter of constitutional declaration but expresses the purpose, the goal setting of the state. Richardi, Reinhard (2000b): Rechtsquellen und arbeitsrechtliche Verwatung. In Richardi, Reinhard – Wlotzke, Ottfried (eds.): *Münchener Handbuch zum Arbeitsrecht. Band I. Individualarbeitsrecht.* München: Verlag C.H. Beck, § 9 RdNr. 7.

16 Wiedemann, Herbert (1966): *Das Arbeitsverhältnis als Austausch- und Gemeinschaftsverhältnis.* Karlsruhe: C. F. Müller Juristischer Verlag, 15–19.

stabilised, along with it, the protection of employees' legal status – which in retrospect, can be said to be safe – has been established.

But this state of affairs did not and could not last indefinitely. If we only look at the history of European integration, the Lisbon Declaration[17] and then the Green Paper[18] dealing with employment policy – referring to the Lisbon Declaration – drew attention to the dangers of not following 'quantum shift' changes. What happened? The traditional structure of work and employment has broken down – perhaps not so gradually. A considerable number of researchers examining the state of labour law and the potential for breakthroughs in the field have written about the crisis of labour law, and this assessment was especially reinforced by the economic and financial crisis that began in 2007.[19] It is not the aim of this study to expand on the concept of this crisis, but a few remarks are inevitable. In my view, a crisis should be understood as a change of state in a certain direction, in so far as a crisis is a state entered into by a relatively long-standing system (economic, social, ideological, psychological, etc.) that requires and then forces change. One feature of this state of affairs is that at this stage it is not clear what the consequence of the change will be, namely whether the new system that emerges from it will be better or worse. Indeed, the Greek word *κρίσις* (crisis) also means, among other things, to choose, to decide or to judge. Thus,

17 European Parliament, Lisbon European Council 23 and 24 March 2000 Presidency Conclusions.

18 Commission of the European Communities, Green Paper Modernising Labour Law to Meet the Challenges of the 21st Century, Brussels, 22.11.2006 COM(2006) 708 final.

19 Tridico, Pasquale (2013): The Impact of the Economic Crisis on EU Labour Markets: A Comparative Perspective. *International Labour Review,* 152(2), 175–190; Supiot, Alain (2010): A Legal Perspective on the Economic Crisis of 2008. *International Labour Review,* 149(2), 151–162; Supiot, Alain (2011): *Critique du droit du travail.* Paris: Presses Universitaires de France; Crouch, Colin (2014): Introduction: Labour Markets and Social Policy after the Crisis. *Transfer: European Review of Labour and Research,* 20(1), 7–22. Of course, this attitude is far from being new; it has permeated labour law analyses to varying degrees since the 1980s. One of the most noteworthy was the 1987 conference in Zell am See entitled *Flucht aus dem Arbeitsrecht* [Escape from Labour Law]. See the summary of the conference in Firlei, Klaus (1987): Flucht aus dem Arbeitsrecht. *Das Recht der Arbeit,* 190(4–5), 270–289, 411–422.

a particular state of a given system forces those concerned into a situation of choice. When considering the 'crisis facing labour law', it is reasonable to refer to Mazeaud's characterisation of labour law as the law of conflicts, which is also due to the fact that labour law is the law of continuous change.[20] Consequently, viewing the link between labour law, crisis and the current situation of labour law as some kind of low point, should be approached with some reservations.

In these changing circumstances, the considerations on which the decision-maker is guided in dealing with the changed situation are crucial for the efficiency of work and employment. Furthermore, in terms of employment policy, it is not incidental whether the State, as the political decision-maker, legislator, takes its decision alone or whether the social partners are involved in the decision-making process. The involvement or lack of involvement of social partners may be an indication of a shift in priorities. And this leads to the next question. What are the criteria on the basis of which decision-maker(s) choose? Therefore, the decision-maker's intention regarding efficiency is relevant as a 'subjective factor'. What does the decision-maker wish to achieve by improving efficiency, restarting the economy, or possibly reorganising it? Does it take social considerations into account or not? Nor is it irrelevant whether the legislator is willing to put certain interest groups in a more favourable or less favourable position than before, on the basis of some considerations.[21]

Examining the efficiency of employment, it is almost stereotypical that the primary task of the state is the prioritisation of economic aspects and the initiation of economic processes. When creating employment policy, the general view is that economic and social considerations are usually contrasted quite diametrically. Nevertheless, it should be remembered that the market, however homogeneous it may seem at first sight, is highly complex in its subject matter and content. Consequently, the assessment and treatment of the market cannot be one-sided. For the purposes of

[20] Mazeaud 2008: 29.
[21] Supiot 2010: 151–162.

this research, likewise, the differentiation between the goods market and the labour market cannot be ignored. At the same time, it is important to emphasise that the heterogeneity, complexity and differentiation of the market referred to above does not imply that there are several markets operating independently of each other, but that each element of the market is part of a single system. In this context, it is necessary to note the crisis management index method used by Tridico to rank the economic indicators of the 27 EU Member States between 2007 and 2011, which concluded that those countries that were able to implement a complex set of measures to revive the market, including labour market recovery, were able to weather the crisis relatively painlessly.[22]

As a result of the above, the following questions can be raised about the effectiveness of employment. Referring to the previously discussed difference between labour law in the narrower sense and employment law in the broader sense, the first question to be decided is: Who is covered by the concept of the labour market, who does the state want to take into account in the formulation of employment policy? In Supiot's approach: How is the work itself, which brings the person into contact with things, qualified?[23] This question concerns whether work is a thing or a person for the law.[24] In summary: Does employment policy cover only labour law in the narrow sense, or does it cover all personal work?

The next question is related to the structure of the economy. The economic policy of the state may prefer sectors that build on innovation, generate high added value, or those that are essentially service-oriented and use lower-level technology much of which has been introduced by others.

22 See TRIDICO 2013: 175–190.

23 SUPIOT 2011: 6–7.

24 This approach, which may seem unusual at first glance, is justified because the value of almost all things is determined to some extent by work. However, the role of the person who contributes to the creation of that value is a specific part of that, and although he or she gives her or his name in the contract of employment, subsequently he/she has no legal connection with this given thing. On this topic see SIMON, Herbert A. (1951): A Formal Theory of the Employment Relationship. *Econometrica,* 19(3), 293.

The quality of the structure of the economy, its geographical distribution, the ratio of production to services and the technology used affect the level of education, competence and motivation of the members of society. In this context – to put it simply – there are two types of state presence, such as the state that ensures the priority of the market, competition and legal transaction, or the state, which supports the directed economy, top-down legal transactions, limited and non-market preferences adapted to competition. The first one gives space to agreements, which leads to the diversification of employment and work, and the formation of new legal positions outside of the traditional employment relationship. The second approach reduces the means and scope of employment. In this case, the state tends to decide alone without the involvement of the social partners, and among the sources of labour law, the role of collective agreements is small. The two economic policies described above have a fundamental impact on the market and thus on the competitiveness of the labour market.[25] This problem – it is perhaps not an exaggeration to assert – has influenced the development of the fate and perception of labour law from the outset.[26]

To summarise the interpretation of the concept of efficiency, two observations are necessary. The starting point is my hypothesis on the purpose of labour law. In my opinion, the purpose of labour law is an attempt to maintain a balance between economic requirements and social needs at all times. Although this standard goal has received different emphasis

25 Frerichs, Sabine (2024): The Place of Law in Political Economy. J. R. Commons' *Legal Foundations of Capitalism* at 100: A Retrospective Article. *Contributions to Political Economy,* 43(1), 37–60; Warren, S. Samuels (2003): Institutional Economics: Retrospect and Prospect, 1968. *Research in the History of Economic Thought and Methodology,* 3(21), 191–250; Commons, John R. (1951): *Institutional Economics. Its Place in Political Economy.* New York: MacMillan.

26 Kaufman, Bruce E. (2007): The Impossibility of a Perfectly Competitive Labour Market. *Cambridge Journal of Economics,* 31(5), 780; Simon 1951: 263–305.

from time to time, but the trend is towards equalisation. In the context of today's economic, technological changes and differentiated social needs, this sensitive correspondence can only be achieved by labour law as a whole, using its entire system of legal sources. I am also convinced that labour law is not in crisis these days, but has to face the challenges of a new change. This has happened several times in the relatively short life of this area of law.[27] Therefore, crisis as a starting point a priori cannot be an effective solution.

[27] In this regard, I refer to the statement of Bódog Somló, who has noted on the era of contractual liberalism that the era of *laissez-faire* is merely a brief interval, which is really nothing more than a fleeting transition from an imperfect way of regulating to a more perfect way of regulating. Somló, Bódog (1907): *Állami beavatkozás és individualismus* [State Intervention and Individualism]. Budapest: Grill Károly Könyvkiadóvállalata, 173.

THE STARTING POINT OF THE RESEARCH, THEORETICAL FOUNDATIONS, STRUCTURE OF THE STUDY

THE APPROACH TO THE TOPIC OF THE RESEARCH

According to the original starting point of the research, the analyses would have covered only the private law aspects of employment, in other words, it would have affected the dogmatical part of labour law. It would have dealt with the public law aspects of employment only in so far as they concern the main line of research. However, subsequent preparatory work has shown that the analysis of labour law policy, the 'public law of employment' or the administrative part of employment cannot be ignored either. Consequently, research into the legal framework for employment can be assessed as complex. Furthermore, the exploratory work goes somewhat beyond the examination of legal compliance, if it is necessary to refer to the economic policy contexts that ultimately shaped the employment policy and labour law regulations.

Studies analysing Hungarian labour law and its current situation cannot be treated in general terms, and their findings and conclusions cannot be accepted without criticism. I argue that the objectives that have been identified and the need for the transformation of labour law in general indicate that change is not autotelic in nature, it is not an 'academic construction', but is the result of objectively identifiable economic and social movements. This insight has informed the approach of the present research. In this study, I will attempt to trace the changes in the basic principles and institutions of Hungarian labour law and to explore the reasons for these changes. As a result, I will examine the legal formulas of employment, with particular regard to the dual-nature legal source system of labour law.

In analysing employment and labour law frameworks, I have started from the premise that a legal system is only effective if it satisfies social movements while meeting economic requirements and social needs. However, this 'efficiency' changes in time and space and can be called malleable.[1] The change in perceptions of efficiency over time is well exemplified in the present day by the multitude of efforts that look for the breaking points of labour law in different solutions. I will therefore refer only to the theoretical and practical institutions of flexicurity,[2] and the relational contract,[3] among the many solutions, and, in addition, to a rather strong tendency to reinforce, so to speak extend, the institutions of traditional labour law, regardless of the changed circumstances.[4]

Assessing the effectiveness of the legal frameworks of employment/labour can lead to rather misleading conclusions if specific environmental circumstances are ignored. A convincing example of this can be found by examining the general legislative intention expressed in the first Hungarian Labour Code after the demise of the socialist regime and the subsequent change in the economic-political system, the way the legal institutions was regulated and the enforcement of the regulation, and ultimately the

1 The change in the evaluation of efficiency over time is excellently exemplified by the endeavour and fate of the German pandectology. In his fierce criticism of the prevailing legal regime, Oertmann argued that instead of a precise explanation of the institutions of Roman law, a legal order based on a completely new principle should have been built. Firstly, because economic relations had changed significantly, especially in the commercial sphere, and secondly, because the legal society of the time (19th century K. Gy.) was 'selfishly proud' of a legal arrangement that was in reality quite distant from it and which it could not understand. Oertmann, Paul (1891): *Volkswirtschaftslehre des Corpus Juris Civilis.* Berlin: Verlag von R. L. Präger, 79.

2 See among others Bekker, Sonja (2013): *Flexicurity: The Emergence of a European Concept.* Cambridge: Intersentia; Flexicurity in Europe. Administrative Agreement JRC N.31962–2010–11 NFP ISP – Flexicurity 2. European Commission. Final Report.

3 For a comprehensive analysis of the relational contract, see among others the symposium devoted to Macneil's work: Relational Contract Theory: Unanswered Questions. A Symposium in Honor of Ian R. Macneil (2000). *Northwestern University Law Review,* 94(3) Special Issue, 737–936.

4 Kiss, György (2023a): A munkajog lehetőségei és határai [The Possibilities and Limits of Labour Law]. *Jogtudományi Közlöny,* 78(6), 261–268.

failure of the whole initiative.[5] Consequently, when examining the legal framework of employment/labour, a fundamental aspect is the background to the development and content of the legal institution in question, and its connection with the economic and social policy of the legislator. The subject of the research is therefore not labour law "in general", but a labour law system existing in a given time and space. It should be emphasised that, due to the nature of labour law, it would not be appropriate to ignore the political background of some institutions, but at the same time, care must be taken to ensure that the presentation remains completely apolitical.

During the analysis, I formulated the purpose of the also current labour law – as a hypothesis – as being concerned with creating and maintaining a balance between economic requirements and social needs. It should be pointed out that this balance is not static either; it depends on the will of the legislator, on its priorities, and ideally on the influence of the social partners. This calls for an examination of the decision-making mechanism of labour

[5] Kiss, György (2019): A jogalkotó felelőssége a munkajog állapotáért [The Legislator's Responsibility for the State of Labour Law]. In Bankó, Zoltán et al. (eds.): *Ünnepi tanulmányok Lőrincz György 70. születésnapja tiszteletére* [Festive Studies in Honour of György Lőrincz's 70th Birthday]. Budapest: HVG-ORAC, 210–224. The legislator sought to create a regulation that would be suited to a 'market economy', but this lacked the proper economic background, while the typical market players were not present either. Thus, some labour law institutions, while formally mirroring similar private labour law institutions, were in practice moving in a vacuum. Therefore, it is quite misguided to criticise, among other things, the current Hungarian labour law in relation to the falsely idealised image of the Labour Code created in 1992, especially in such a way that the purpose and development of the given legal institution are lost. For criticisms that are unfounded or without background information, see Kollonay, Csilla (2013): Génmanipulált újszülött – Új munkatörvény az autoriter és neoliberális munkajogi rendszerek határán [Genetically Engineered Newborn – New Labour Law on the Border of Authoritarian and Neoliberal Labour Law Systems]. In Kun, Attila (ed.): *„Az új munka törvénykönyve dilemmái" című tudományos konferencia utókiadványa* [Proceedings of the Scientific Conference Entitled "The Dilemmas of the New Labour Law"]. Budapest: Károli Gáspár Református Egyetem Állam- és Jogtudományi Kar, 24–56; Gyulavári, Tamás (2020): The Hungarian Experiment to Promote Collective Bargaining: Farewell to 'Principle of Favour'. In Gyulavári, Tamás – Menegatti, Emanuele (eds.): *The Sources of Labour Law.* Alphen aan den Rijn: Kluwer Law International, 245–260.

legislation, in particular the problem of the so-called democratic deficit, which is often identified with subordination of the content of employment relationship.[6] At the same time, I do not wish to transfer the fundamentally political, public law institutions to the 'private law of labour', or to use this fundamentally 'alien body' in the relations of the contract of employment law.

Another hypothesis of the research is that labour law is a branch of law belonging to contract law, an expression of private autonomy,[7] and as such is part of the system of the private law. This is the fate of employment law, with all its advantages and disadvantages. Due to its contractual origin, labour law has had to defend itself almost throughout its history, with various theories trying to reconcile the contract and subordination, or somehow to justify it.[8] However, the formula is relatively simple: the employment contract bears the legacy of the lease *(locatio conductio)* to this day. But

[6] For a general approach to the democratic deficit see among others RAZ, Joseph (2018): The Democratic Deficit. *King's College London, The Dickson Poon School of Law, Legal Studies Research Paper,* 2018-07; BEKKERS, Victor et al. eds. (2007): *Governance and the Democratic Deficit. Assessing the Democratic Legitimacy of Governance Practices.* London – New York: Routledge; FEATHERSTONE, Kevin (1994): Jean Monnet and the 'Democratic Deficit' in the European Union. *Journal of Common Market Studies,* 32(2), 149–170; MORAVCSIK, Andrew (2002): In Defence of the 'Democratic Deficit': Reassessing Legitimacy in the European Union. *Journal of Common Market Studies,* 40(4), 603–624; FOLLESDAL, Andreas – HIX, Simon (2006): Why There Is a Democratic Deficit in the EU: A Response to Majone and Moravcsik. *Journal of Common Market Studies,* 44(3), 533–562; FRIESS, John C. (2023): ESG's Democratic Deficit: Why Corporate Governance Cannot Protect Stakeholders. *Virginia Law and Business Review,* 17(2), 245–280. On the connection between subordination and the democratic deficit see DAVIDOV 2016: 35–43.

[7] RICHARDI, Reinhard (1973): *Betriebsverfassung und Privatautonomie.* Berlin – New York: Walter de Gruyter; RICHARDI, Reinhard (1988): Der Arbeitsvertrag im Zivilrechtssystem. *Zeitschrift für Arbeitsrecht,* 19(2), 221–255.

[8] LÖWISCH, Manfred (1996): Schutz der Selbstbestimmung durch Fremdbestimmung – Zur verfassungsrechtlichen Ambivalenz des Arbeitnehmerschutzes. *Zeitschrift für Arbeitsrecht,* 27(2), 293–318; WEDDERBURN OF CHARLTON, Kenneth William (1971): *The Worker and the Law.* Harmondsworth: Penguin, 51; HART, Oliver – MOORE, John (2007): Incomplete Contracts and Ownership: Some New Thoughts. *American Economic Review,* 97(2), 182–186; AUBERT-MONPEYSSEN, Thérèse (1988): *Subordination juridique et relation de travail.* Paris: CNRS; SAVATIER, René (1934): Vers la socialisation du

this only applies to the structure of the contract, and its legal effect, the employment relationship must express the peculiarity that the labour force is not only the object but also the subject of this legal transaction.[9] Despite all temptations, I do not intend to deviate from these theoretical foundations.

STRUCTURE OF THE STUDY

The research covers Hungarian labour law as a whole. However, this does not preclude, and indeed requires, an overview of the evolution of labour law more generally, tracing its main points of development and identifying its current trends. Of course, the literature on these subjects provides an almost inexhaustible storehouse of knowledge. I nevertheless consider it necessary to provide a general overview of the topic.

'Part One' of the study provides a general comparative and historical overview. This Part consists of three Chapters. The first deals with the circumstances of the emergence and development of modern labour law, the second summarises different views on the purpose of labour law and explores the role of the legislative and contractual sources in this. This Chapter discusses in detail the functions of the different levels of legal sources, thus analysing the contract of employment, the collective agreement and the legal norm. Finally, the third Chapter provides an overview of the current situation of labour law and outlines possible trends for future.

'Part Two' is devoted to the exploration of Hungarian labour law. This Part cannot omit comparative analysis, but only to the extent necessary for the placement of legal institutions in Hungarian law (legal institutional

contrat de louage d'industrie. *Droit, D. H.,* 37; Supiot, Alain (2000): Les nouveaux visages de la subordination. *Droit Social,* (2), 131–145.

9 Pothoff, Heinz (1928): Ist das Arbeitsverhältnis ein Schuldverhältnis? In Pothoff, Heinz: *Arbeitsrecht. Das Ringen um werdendes Recht.* Leipzig: Mauritius Verlag, 19–41; Sinzheimer, Hugo (1976) [1914]: Über den Grundgedanken und die Möglichkeit eines einheitlichen Arbeitsrechts für Deutschland. In Kahn-Freund, Otto – Ramm, Thilo (eds.): *Hugo Sinzheimer: Arbeitsrecht und Rechtssoziologie. Gesammelte Aufsätze und Reden.* Frankfurt am Main: Europa Verlag, 35–61; Sinzheimer, Hugo (1927): *Grundzüge des Arbeitsrechts.* Jena: Fischer.

comparison). The structure of this part follows that of Part One, but with one more chapter. Namely, it is necessary to present the economic background of the current Hungarian labour law system and the economic policy of the governments of each time, as well as the changes in the corresponding employment policy. Chapter I explores the development of Hungarian labour law and the main stages of its evolution up to the present day. Chapter II analyses the economic and economic policy background of Hungarian labour law, and this chapter also summarises the changes taking place in employment policy. The substantive part of the analysis of the current Hungarian labour law begins with Chapter III, which demonstrates, through the functioning of the legal source elements of labour law, how the current Hungarian labour law meets its purpose, i.e. how it serves the previously defined effective employment. Chapter III analyses the purpose and operation of the contract of employment, while in Chapter IV this investigation is carried out for the collective agreement. Chapter V explores the relationship between state intervention and labour law by presenting the impact of legal norms.

The concluding part of the book summarises the research results to date and makes suggestions for possible future developments of Hungarian labour law. In this context, it should be noted that, at least in the Hungarian context, the proposal is forced to take into account several economic and employment policy considerations. One type of proposal assumes unchanged circumstances and attempts to outline opportunities for increasing employment efficiency within the existing framework. Another type of proposal places breaking points and their contribution to the development of this country in a new economic and employment policy context.

PART ONE

GENERAL COMPARATIVE AND HISTORICAL OVERVIEW

Chapter I

THE CIRCUMSTANCES OF THE EMERGENCE AND DEVELOPMENT OF MODERN LABOUR LAW – A NEW AREA OF LAW BORN IN THE ABSENCE OF THE LEGISLATION APPLICABLE TO IT

LEGACY: THE LOCATIO CONDUCTIO OPERARUM

The impact of the legal institutions of the past on the labour law of today has not always been uniformly assessed by labour law scholars. In particular, proponents of the view of the complete independence of labour law argued that labour law is a young law with new dogmatic foundations, and therefore it is unnecessary to look for its roots in the distant past – as most of its antecedents should be noted, with sufficient criticism. This position has gained strength despite the fact that the Roman private law conception of the hiring of labour survived into the jurisprudence of the eighteenth and nineteenth centuries and in the great legislative achievements *(Miethe, louage)*. This construction was able to occur simply because no form of contract existed that could replace this contractual arrangement. Of course, this approach not only had legal dogmatical limitations, but the idea of contractual liberalism also lacked the social considerations which were soon invoked to remove the contract of employment from the contractual system of private law. The law of this age was based exclusively on the law of contract, with a rigid and definitely specific opposition to the status law of feudalism.[1]

When dealing with the ancient history of contract of employment, it is impossible to avoid mentioning the views on the unitary versus differentiated formation of the institution of *locatio conductio* (hereinafter: *l.c.*), if only

[1] See Maine, Henry Sumner (1906): *Ancient Law. Its Connection with the Early History of Society and its Relation to Modern Ideas.* Fourth American from the Tenth London Edition. New York: Henry Holt and Company.

because they also represent a refutation of the sometimes oversimplified views on *l.c.* However, as it is not the main subject of this study to analyse *l.c.* in detail, I shall deal with it only in so far as it affects the development of the modern contract of employment. The main outline of the debate over whether *l.c.* is uniform versus differential[2] can be summarised in a somewhat simplified way, by Torrent's conclusion that *l.c.* is both unitary and multiple.[3] It is uniform in the sense that all its variations are based on the synallagma of the *merces uti frui*. It is multiple or complex in the sense that the subject of the obligation may vary from time to time, thus leaving a space between the *actio locati* and the *actio conducti.*[4] More recently, in the Hungarian literature, Pókecz analysed in detail the segmentation of *l.c.* His argument proceeded from the fact that while a precise definition of *l.c.* is not available, this is not sufficient in itself to refute the existence of trichotomy. He argues that it is the commonalities of the activities covered by *l.c.* and not their differing legal forms that should be given primary importance; in other words, their common economic purpose. To put it more specifically, in all cases it is about making something more valuable through work.[5]

Nevertheless, it is not the dogmatic aspect of the discourse on the segmentation of the *l.c.* that is the most interesting in terms of the present topic. The differing approaches to the hiring of labour – as such – reflect the ancient Roman society's conception of work, which is much more complex

2 For a detailed analysis of the debate, see the Hungarian literature in PÓKECZ KOVÁCS, Attila (2001): *A locatio conductio tagolódásának problematikája a modern romanisztikában* [The Issue of the Fragmentation of the Locatio Conductio in Modern Romanistics]. Pécs: Jogtörténeti Tanulmányok, 337–369; see also MAYER-MALY, Theo (1956): *Locatio conductio. Eine Untersuchung zum klassischen römischen Recht.* Wien: Verlag Herold; TALAMANCA, Mario (1990): *Istituzioni di diritto romana.* Milano: Giuffrè; ARANGIO-RUIZ, Vincenzo (1960): *Istituzioni di diritto romano.* Napoli: Jovene Editore; FIORI, Roberto (1999): *La definizione della locatio conductio. Giurisprudenza romana e tradizione romanistica.* Napoli: Jovene Editore.

3 TORRENT, Armando (2012): The Controversy on the Trichotomy "Res, Operae, Opus" and the Origin of the "Locatio Conductio". *Revista Internacional de Derecho Romano,* (10), 396.

4 TORRENT 2012: 405; FIORI 1999: 362.

5 PÓKECZ KOVÁCS 2001: 344, 358.

than one might at first think, and far from simplistic. A complex evaluation of work is also presented in Lis and Soly's comprehensive monograph.[6] The authors base their conclusions essentially on two factors. One is the varying economic situations typical of the different eras of the Roman Empire, and the other is the impact of philosophy on society, and more specifically on the way in which certain activities in society were perceived. In his analysis of work *(Die Arbeit),* Oertmann points out that the Romans characterised certain forms of work as the adornment of the citizen.[7] This kind of assessment of work was basically characteristic of the intellectual work performed by the wealthier bourgeoisie, the ruling social stratum, as well as some kinds of physical work, the evaluation of which was not without certain idealistic elements. This was explained by the low level of technology, production and industrial capacity. It can be concluded that there was a sharp discrepancy between the political role of the Roman Empire in the world at that time and its economic basis. It is worth recalling Wallerstein's finding that in this system the leaders of the empire never succeeded in building a world economy because they were simply hostile to trade.[8]

It is clear, however, that greater than average professional – whether intellectual or physical – knowledge, ability or training was valued highly, and this was also a consequence of the autocratic nature of the Roman Empire. Both the freeborn *(ingenuus)* and the liberated *(libertinus)* citizens were allowed to engage in activities requiring greater skill. After a while, the belittling and negative perception of certain activities of non-free people – even if they required greater professional knowledge – slowly turned into more

6 Lis, Catharina – Soly, Hugo (2012): *Worthy Efforts. Attitudes to Work and Workers in Pre-Industrial Europe.* Leiden–Boston: Brill, 55–98.

7 Oertmann 1891: 78–79. See also Wallerstein, Immanuel (1990): *The Modern World System.* Book I. New York: Academic Press; Woolf, Greg (1990): World-systems Analysis and the Roman Empire. *Journal of Roman Archaeology,* 3, 44–58.

8 Wallerstein 1990. See also Woolf 1990: 44–58. I would also refer to Finley's assessment of the Roman economy, who makes a sharp distinction between the quantity and extent of economic activity and its quality when classifying the Roman economy. Finley, Moses I. (1973): *The Ancient Economy.* Berkeley – Los Angeles: University of California Press, 25–65.

positive assessments.[9] Persons performing activities requiring no special skills were predominantly able to undertake only unhealthy, dangerous work, and these contracts were for seasonal or temporary work. These activities were legally expressed in the *l.c. operarum.* Later on, the negative assessment of *l.c. operarum* slowly changed. This was partly because the *l.c. operarum* became the dominant legal expression of work and partly because the *mandate* and *l.c. operis* applied to other types of work and involved actors from other social strata.

At this point it is worth considering again the contrast between the unity *versus* the differentiation of *l.c.* mentioned above. Namely, a lease involves the use of something or someone. In this context, Mayer-Maly refers to an important difference between the objects of a lease of a thing and the lease of 'some' work.[10] It can be seen that the root of Supiot's question as to whether the employee is in fact the subject or object of the employment contract lies here.[11] While the definition of the subject of the lease of things is straightforward, attempting to determine the subject of a lease of work raises a number of questions. The disposition of a leased/hired object is clear, but it is less straightforward to decipher what and who the lessee has control over if person is involved. The term *se locare* suggests that there is self-leasing (self-hiring), i.e. the lessor has not only leased a person's labour, but even her/his whole self. In other words, the leasing of the 'labour force' (in the sense of the effect of the labour) and the leasing of the person who embodies it were not separate. Another term – *operas suas locare* – meant that the person doing the work was not completely under the control of the person hiring him.[12] To conclude this line of thought, I would like to point out that the subordination created by self-leasing has not disappeared over time. It is

9 Lis–Soly 2012: 83.

10 Mayer-Maly 1956: 29–29.

11 Supiot 2010: 151–162.

12 However, De Robertis notes that the actual situation when the two terms were used did not differ significantly. De Robertis, Francesco M. (1946): *I rapporti de lavoro nel diritto romano.* Milano: Giuffrè, 127–152. In the Hungarian literature see Molnár, Imre (2013): *A locatio conductio a klasszikus kori római jogban* [Locatio Conductio in Classical Roman Law]. Szeged: Pólay Elemér Alapítvány, 71–73. De Robertis 1946: 127 –152.

evident in the distinction between subordination and dependency,[13] in the theory of *persönliche Abhängigkeit* in the German science of labour law[14] and more recently in legislation.[15]

The place of *l.c. operarum* among the contracts of work is well defined by its relation to *l.c. operis.* According to Weiss's concise formulation, the category of *l.c. operis (Werkmiete)* includes a contract whose object is the performance of some work or a task *(corpus aliquod perfectum)*.[16] Kaufmann points out that the difference between *opera fieri* and *opera locare* was based on the way in which the task to be performed was carried out. It seems that the former included a structure of the contract whereby the contractor had to carry out the work independently. In connection with the fact that the role of the parties is reversed in the case of the *operis* in comparison with the *operarum,* Kaufmann, analysing the term conductor, stresses that the tenant in this case has an active will-forming power, expertise and experience which affects his whole activity. At the same time, this almost completely excludes the fact that the hirer-entrepreneur is only a simple recipient of instructions concerning his work *(Arbeitsbefehlen)*.[17]

It can be stated that the typification of contracts for the expression of work met the needs of the ancient Roman economy, and that the *l.c. operarum,* originally of little importance apart from in relation to slave labour, became

13 Arthurs, Harry W. (2013): Labour Law as the Law of Economic Subordination and Resistance: A Thought Experiment. *Comparative Labor Law & Policy Journal,* 34(3), 585–604; Perulli, Adalberto (2015a): Il lavoro autonomo, le collaborazioni coordinate e le prestazioni organizzate dal committente. *Working Paper CSDLE "Massimo D'Antona". IT,* (272), 9–10; Williams, Colin C. – Lapeyre, Frédéric (2017): Dependent Self-Employment: Trends, Challenges and Policy Responses in the EU. *ILO Employment Policy Department Working Paper,* (228), 13–14.

14 "Das Arbeitsrecht umfaßt ein sachliches und persönliches Element. Das sachliche Element ist die abhängige Arbeit. Das persönliche Element bilden die Arbeitnehmer." Sinzheimer 1927: 7–9.

15 BGB § 611a: "Durch den Arbeitsvertrag wird der Arbeitnehmer im Dienste eines anderen zur Leistung weisungsgebundener, fremdbestimmter Arbeit in persönlicher Abhängigkeit verpflichtet."

16 Weiss, Egon (1949): *Institutionen des römischen Privatrechts.* Basel: Verlag Recht und Gesellschaft, 377.

17 Kaufmann, Horst (1964): *Die altrömische Miete.* Köln–Graz: Böhlau Verlag, 206–210.

increasingly important without, however, any change in the form of the lease. In evaluating the *l.c. operarum,* the contemporary characteristics of the 'economy' cannot be ignored. Oertmann emphasises in his work cited above that the fruits of work were used by everyone for their own benefit and well-being, and that the work and the worker were assessed in this context on a purely subjective basis. Consequently, the knowledge of the overall economic, objective efficiency or profit – as a concept in society as a whole – was not demonstrated. According to his formulation, the people or society existed only as a collection of individuals with little or no connection to each other.[18]

THE SURVIVAL OF THE LEASING/HIRING CONCEPT OF WORK IN THE 19TH CENTURY – THE RESULTS OF THE MAJOR CODIFICATIONS OF PRIVATE LAW IN CONTINENTAL EUROPEAN CIVIL LAW

The question inevitably arises: with such characteristics how could a contract for the 'leasing/hiring of work' be the starting point for the birth of modern labour law? The essence of civil society is summarised in the following words by Maine: "There are few general propositions concerning the age to which we belong which seem at first sight likely to be received with readier concurrence than the assertion that the society of our day is mainly distinguished from that of preceding generations by the largeness of the sphere which is occupied in it by Contract. [...] It is certain that the science of Political Economy, the only department of moral inquiry which has made any considerable progress in our day, would fail to correspond with the facts of life if it were not true that Imperative Law had abandoned the largest part of the field which it once occupied, and had left men to settle rules of conduct for themselves with a liberty never allowed to them till recently."[19] Indeed, in the era of contractual liberalism, the 'new order', which sought

[18] OERTMANN 1891: 8–79; KRÜGER, Paul (1912): *Geschichte der Quellen und Literatur des römischen Rechts.* München: Verlag von Duncker & Humblot, 150.

[19] MAINE 1906: 295.

to free itself from the constraints of status, prioritised the recognition of freedom, equality and individual liberties.

However, Havighurst's assessment reveals the scale of the distorting effect of the omnipotence of the contract: "Contract in its wild anarchic state contributes to equality for the strong."[20] Moreover, during the period of contractual liberalism, a contract intended to express work done for another was covered by the general classification of a contract, even if only because it was neither in name nor in substance new compared to the *l.c. operarum.* It is unnecessary for this study to present in great detail the influence of Roman private law in the process of drafting either the French *Civil Code* or the German *Bürgerliches Gesetzbuch,* especially with regard to the typification of obligations. Therefore, I will only touch on some of the more important elements of the reception process and the subsequent emergence of the contract of employment.

French and German codification in terms of the development of subsequent contract of employment

Discussing the beginnings of French civil law, Hamza notes that Jacques de Maleville, one of the authors of the Code Civil,[21] "borrowed much more from the *Iustinian Institutios* and the *Digesta* than from the common law of Paris *(Coutume de Paris)*".[22] In this respect, the work of Robert-Joseph Pothier is outstanding, and his influence on the understanding of

[20] HAVIGHURST, Harold C. (1961): *The Nature of Private Contract.* Evanston, Illinois: Northwestern University Press, 128–129.

[21] See DE MALEVILLE, Jacques (2012) [1805]: *Analyse raisonnée de la discussion du code civil au conseil d'état.* Paris: Nabu Press.

[22] See in the Hungarian literature HAMZA, GÁBOR (2013): Gondolatok a római jog szerepéről a XXI. században [Thoughts on the Role of Roman Law in the 21st Century]. In SZALMA, József (ed.): *A Magyar Tudomány Napja a Délvidéken 2013* [Hungarian Science Day in Vojvodina 2013]. Újvidék: Vajdasági Magyar Tudományos Társaság, 22–39.

the dogmatic foundations of the *Code Civil* cannot be overlooked.[23] His approach is well illustrated by his work *Pandectae Justinianeae in novum ordinem redactae,* written between 1748 and 1752.[24] The *Traité des obligations,* published in 1761, also proclaims the unity of law and applies the system of institutions defined by Gaius. In this work, the classification of contracts and the definition of their legal nature correspond to the system of *Institutiones.*[25] Pothier's seminal work on the leasing/hiring of work is the *Traité du contrat de louage,*[26] in which the nature of the hire contract and the various types of contracts for the leasing/hiring of things are dealt with in six chapters, while the leasing/hiring of work is dealt with in one chapter, the seventh. Pothier's approach to the leasing/hiring of service is in line with the general principles he sets out on the general concept of leasing/hiring.[27]

The theoretical conceptions of labour in this era were dominated by the unitary view of the lease, where the worker is assimilated into the employer's property, as he gives the employer something of his own accord – namely his own labour power – from which the employer profits. Camerlynck points out that such an approach to the leasing of labour merely classifies the lease as an element of the system of the lease of things, and that this

[23] De Montmorency, James Edward (1913): Robert-Joseph Pothier and French Law. *Journal of the Society of the Comparative Legislation,* 13(2), 265–287.

[24] Pothier, Robert-Joseph (1821): *Pandectae Justinianeae, in novum ordinem digestae, cum legibus Codicis et Novellis, quae jus Pandectarum confirmant, explicant aut aborgant.* Parisiis: ex typis Dondey-Dupré. See in the Hungarian literature Hamza, Gábor (2005): A modern jogrendszerek tagozódása és a római jogi tradíció [The Classification (Divisio) into 'Branches' of Modern Legal Systems (Orders) and Roman Law Tradition]. *Állam- és Jogtudomány,* 26(1–2), 20. This study is based on the inaugural lecture presented on 6 October 2004 on the occasion of the author's admission to the Hungarian Academy of Sciences as a corresponding member.

[25] Pothier, Robert-Joseph (1761): *Traité des obligation.* Paris: Chez Débure l'aîné, Quai des Augustins à l'Image S. Paul, 10–12.

[26] Pothier, Robert-Joseph (1764): *Traité du contrat de louage.* Paris: Chez Débure l'aîné, Quai des Augustins à l'Image S. Paul.

[27] Camerlynck described this implementation and partial delimitation as a serious legacy of the French private law doctrine, which has long marked the development of labour law. Camerlynck, Guilleaume-Henry (1968): *Traité de droit du travail. Contrat de travail.* Paris: Dalloz, 2–12.

may be distorted and less evident from today's perspective, but in any case, it reflects well the absolute influence exerted by the *Ancien Régime* on the legal system. In the context of the principle of freedom of contract, he draws attention to a very significant breach of this principle. In fact, the leasing/hiring of labour is contrary to contractual freedom in so far as the individual becomes a slave to his own contract. This realisation demonstrated that a situation had arisen in the system of obligations in which one of the contracting parties was in need of protection, precisely in order to ensure freedom of contract. For the moment, the question of why this has not happened is secondary. At this point, it is much more important to focus on how this contract fits into the uniform concept of contracts (obligations).[28]

The Roman law of obligations also defined the German *Pandekta* jurisprudence and legal system. Leaving aside the individual details and the discussion of the different schools of thought,[29] I will focus on the understanding of *Pandectism* in relation to leasing/hiring of work. In this respect, Puchta's summary of the idea, *Pandekten,* published in 1838,[30] is outstanding. In it, he discusses the hire on the basis of the concept of *locatio conductio* of Roman private law. Thus, the object of the hire may be a thing or a right *(locatio conductio rerum)* or the supply of some power (work), either directly by the work *(locatio conductio operarum)* or indirectly by the result of the promised service (goods, transport) *(locatio conductio operis)*. Some two decades after Puchta's work, Windscheid – as the most influential representative of the dogmatic trend among pandectists – published his work

28 Camerlynck 1968: 6.

29 Hugo, Gustav (1819): *Lehrbuch des Naturrechts, als einer Philosophie des Positives Rechts, besonders des Privatrechts.* Berlin: August Mylius (Vierte, sehr veränderte Ausgabe); von Savigny, Friedrich Carl (1937): *Das Recht des Besitzes.* Giessen: Heyer; von Savigny, Friedrich Carl (1814): *Vom Beruf unserer Zeit für Gesetzgebung und Rechtswissenschaft.* Heidelberg: Mohr und Zimmer; Thibaut, Anton Friderich Justus (1814): *Über die Nothwendigkeit eines allgemeinen bürgerlichen Rechts für Deutschland.* Heidelberg: Mohr und Zimmer.

30 Puchta, Georg Friedrich (1838): *Pandekten.* Leipzig: Verlag von Johann Ambrosius Barth.

Lehrbuch des Pandektenrechts.[31] He formulated the following definition of the hire: "Die Miethe, welche den Gebrauch einer Sache zum Gegenstand einer Sache zum Gegenstand hat, heißt Sachmiethe; die Miethe, welche den Gebrauch einer Arbeitskraft zum Gegenstand hat, heißt Dienstmiethe."[32] Windscheid calls this obligation the *Werkvertrag,* and refers to it in a note as the *locatio conductio operis* known from Roman private law.

The pandectistic view of the contract of lease was somewhat made more nuanced by the approach taken later by Jhering. He dealt with the service contract/lease in several of his works,[33] and explained his most important findings in this regard in his work *Der Zweck im Recht.*[34] In his interpretation, the contractual behaviour of the party in a forced situation is determined by the fact that he has no other choice but to accept the conditions set by the other party. This was later captured in the theory of the so-called *accession treaty*[35] – with surprisingly effective results.[36] He emphasises that individual egoism works against society, and that its effect can only be eliminated or at least dampened by equivalence. This should be reflected in the balance between service and reward, which simply equates to ensuring justice in transactions.[37]

31 Windscheid, Bernhard (1862): *Lehrbuch des Pandektenrechts.* Düsseldorf: Julius Buddeus.

32 The second volume § 398.

33 Jhering, Rudolf (1852–1865): *Der Geist des römischen Rechts auf den verschiedenen Stufen seiner Entwicklung.* Leipzig: Breitkopf und Härtel.

34 Jhering, Rudolf (1877): *Der Zweck im Recht.* Leipzig: Druck und Verlag von Breithoff & Härtel.

35 Salleilles, Raymund (1914): *Étude sur la théorie générale de l'obligation.* Paris: Libraire Générale de Droit & de Jurisprudence, 444–448.

36 At this point, I refer to the incomplete contract nature of the contract of employment, which inevitably brought with it the involvement of implied terms and various clauses. See Austen-Baker, Richard (2011): *Implied Terms in English Contract Law.* Cheltenham: Edward Elgar; Grobecker, Wolfgang (1999): *Implied terms und Treu und Glauben.* Berlin: Duncker & Humblot; Antonmattei, Paul-Henri (2009): *Les clauses du contrat de travail*. Paris: Editions Liaisons.

37 Jhering 1877: 142.

Intermediate assessment

Examining both the French and German history of development of contractual law confirms that the contract of employment was simply considered a contract of exchange and no social considerations played a role in shaping the content of the contract. Perhaps it is not an exaggeration to say that modern labour law ultimately arose in the absence of the relevant legal material that expresses its identity.[38] The contract of employment of the employees in large-scale industry was only a semblance, which did not have any formal requirements, and whose content was unstable and variable, and it involved monthly and often weekly commitments.[39]

After the antecedents described, it is not surprising that the French Civil Code did not deal with the institution of the contract of employment at all. Camerlynck draws attention to the fact that in this period labour law (as a set of norms) – according to today's interpretation – did not exist, and the contract was the only legal possibility and legal source of work.[40] The idea of the freedom of contract was well expressed in the former Article 1103 of the CC, according to which "les conventions légalement formées tiennent lieu de loi á ceux qui les ont faites".[41] The "du louage d'ouvrage et d'industrie", regulated in the third chapter of Title VIII of Book III of the CC, regulates complex and not homogeneous contracts. These include

38 With regard to French law, Halpérin notes that until the establishment of the Second Empire (1852), the vast majority of workers worked in pre-industrial structures, and the relations of small communities typical of the craft industry remained the dominant pattern. Freedom of work was interpreted as meaning that workers could choose their profession, be self-employed or work for a master. They were mostly considered entrepreneurs who entered into fixed-price contracts with employers/customers, who were usually suppliers of raw materials. These employers were the owners of the means of production who hired the services of the workers. Halpérin, Jean-Louis (2012): *Histoire du droit privé français depuis 1804*. Paris: Presses Universitaires de France, 180; Castaldo, André (1977): L'histoire juridique de l'article 1781 du Code Civil: "Le maître est cru sur son affirmation". *Revue historique de droit français et étranger,* 55(2), 211–237.

39 Halpérin 2012: 182.

40 Camerlynck 1968: 8.

41 The current text of the Code Civil is as follows: "Les contrats légalement formés tiennent lieu de loi à ceux qui les ont faits."

the contract of service or labour in the narrower sense, the contract for the carriage of passengers and goods by land and sea, and the contract for service, or as it is included in the edition published in 1866 and translated by Barna Kún, the "műbérlet".[42] In summary, it can be said about the regulations of the Civil Code that labour as the object of the lease is *de jure* no different from the lease of things. This situation is also illustrated by the fact that the *de facto* result of the work once it has been carried out – since it is not a results obligation but merely work – is in no way linked to the legal status of employee. The result produced by his work is given new meaning not by the concrete result of his contractual obligation, but by the market activity of the recipient of the service. In this second, real market relation, another supply–demand relation then appears, which may not be at all consistent with the supply–demand relation of labour.

With regard to the development of German contract law, the dissolution of the Holy Roman Empire in 1806 did not bring about an immediate and complete break with the *Corpus Iuris Civilis,* and a unified German code of private law could not be formed either, because the creation of private law rules fell within the competence of each *Länder.*[43] When tracing the history of the development of the service contract, it is worth recalling the amendment of the *Landrecht* in 1831.[44] The service-lease contract, as a special type of lease, was regulated under the title of the "right to use or benefit from alien property" *(Rechte zum Gebrauche oder Nutzung fremden Eigenthums),* strictly as an exchange obligation *(Handlungen gegen Sachen oder Handlungen gegen Handlungen).* In essence, the *Landrecht* amendment attempted to combine the previous feudalistic regulation of this legal institution with the liberal approach.[45] In the later amendments to the civil

42 *Franczia Polgári Törvénykönyv (Code Napoleon)* (1866). Translated by Barna Kún. Pest: Kugler Adolf.

43 Bernert, Günther (1972): *Arbeitsverhältnisse im 19. Jahrhundert. Eine kritische dogmatische Analyse der Rechtswissenschaftlichen Lehren über die allgemeinen Inhalte der Arbeitsverträge und Arbeitsverhältnisse im 19. Jahrhundert in Deutschland.* Marburg: N. G. Elwert Verlag, 21.

44 *Das Allgemeine Landrecht für die Preußischen Staaten* (ALR) 1794. The 1831 amendment was a so-called non-targeted amendment.

45 Bernert 1972: 187.

codes in the specific provinces – including the drafts of the civil codes of the Kingdom of Saxony (1852), the Grand Duchy of Hesse (1853) and the Kingdom of Bavaria (1861) – the simple exchange nature of the contract (obligation) remained unchanged, however.[46]

In analysing the development of the modern form and content of the contract of employment, the approach taken by the Dresden Draft: Law on Obligations of 1866 *(Dresdner Entwurf),*[47] which can also be regarded as a forerunner of the later German Civil Code, the *BGB,*[48] cannot be ignored. Its importance is further heightened by the fact that it was the first norm that regulated the contracts (obligations) uniformly across all German provinces. The draft regulates the contract of lease in exhaustive detail, but strictly limited it to the lease of things (Sections 538–575), and the lease for utility (Sections 576–589) and structurally separates these types of contract from those related to the performance of some kind of service or work (result) in exchange for consideration.[49] This chapter of the Draft is divided into five parts and includes the contract of service *(Dienstverdingung),* the contract for service *(Werkverdigung),* the special outsourcing contract *(Verlagsvertrag),* the brokerage contract *(Mäklervertrag)* and finally the offering of rewards *(Auslobung).* In itself, the fact that the regulation of leases and of services (activity or result) was sharply separated in the draft was of decisive importance for the future. This separation also followed from the structural logic of the special part of the law of contract *(Obligationsrecht)* in the draft. However, it is still worth considering whether the structural separation brought with it any substantive changes in comparison with the previous lease of service.

For our purposes, the relevant legal instrument is the *Dienstvertrag,* which traditionally defines the concept of *Dienstverbindung,* whereby

46 Bernert 1972: 188–221.

47 *Dresdner Entwurf einen allgemeinen Obligationenrecht,* 1863–1866.

48 Haferkamp, Hans-Peter (2009): Bürgerliches Gesetzbuch. In Basedow, Jürgen – Hopt, Klaus J. – Zimmermann, Reinhard (eds.): *Handwörterbuch des Europäischen Privatrechts.* Tübingen: Mohr Siebeck, 229–230.

49 *Dritte Abteilung. Schuldverhältnisse aus Verträgen, welche auf eine Dienstleistung oder auf eine Werklieferung gerichtet sind.*

the service provider *(Dienstverdinger)* is obliged to provide a service to the service recipient *(Dingenden–Diensthern)* under the *Dienstvertrag* and the service recipient is obliged to pay a consideration for this service.[50] As for the service itself and the consideration, a service may consist not only in the application and performance of physical labour *(nur eine körperliche Kraftanwendung)*, but also in the provision of work that requires some special expertise, craft knowledge, or even scientific ability and training, which the service provider performs for a consideration. In connection with this definition, it should also be noted that the Roman legal equivalent of *operae illiberales versus liberales* can also be discerned from this wording. This is also suggested by the parenthetical reference to *Vergütung: Lohn, Honorar.* It is noteworthy, however, that the next chapter of the draft regulates the legal status of the *Auftrag* in the context of its *Schuldverhältnisse aus fremder Geschäftsverhältnisse aus fremder Geschäftsführung.* Finally, it should be noted that while the draft provides for a situation where the consideration is not specified, the relevant Section 617 is far from constituting a socially based wage protection provision in the current sense.[51]

The rules on performance contain elements of both classical private law and a somewhat modern approach to labour law. This is essentially due to the fact that the *Dienstvertrag–Dienstverhältnis* and the *Arbeitsvertrag–Arbeitsverhältnis* are not regulated separately at all. This is well reflected in the provisions that were included in the content of *Dienstverhältnis* because in the employment relationship, which is part of the service relationship, the receiver of the service is treated as being in a superior position. Accordingly, the service provider is obliged to carry out the work in accordance with the instructions of the *Dienstherr* and, in the absence of such instructions, to take account of the purpose of the contract and to carry it out with due care.

Although the *Dresdner Entwurf* certainly changed the content of the *Dienstvertrag* in relation to the *l.c. operarum* in the light of the economic and social conditions of the time, it did not – and could not – represent a real

50 *Dresdner Entwurf. Dienstverbindung* Article 614.

51 In this case, the price set by the authority will apply if where there is no commonly accepted local price, and where there is no such price, the discretion of the service provider shall prevail.

breakthrough towards a coherent regulation of the contract of employment. However, the importance of the *Dresdner Entwurf* goes beyond the anomalies surrounding the regulation of the *Dienstvertrag,* hence Hedemann's assessment that the draft took the first steps towards the unification of German contract law is correct.[52]

Moving on to developments in French labour law, it is necessary to briefly introduce the regulation which, in terms of its origin, belongs to the past, but which still defines French labour law today. Namely, in 1901, the construction of the *Code du Travail* began. The Act itself is a compilation whose purpose was to collect the labour law provisions that had been created up to that time into a code. The compilation was given impetus by the centenary of the *Code Civil* and the recognition that the Code Civil's regulation of the contract of employment and the employment relationship had proved inadequate. During this period, a comprehensive revision of the Code Civil was proposed, but the debate in the National Assembly also led to the conclusion that a new code regulating work was justified in addition to the Code Civil.[53] However, the compilation completed by December 1910 took over several of the previously scattered and different levels of legislation almost without changes. The content of the first and early compilations was far from complete, as the regulation of trade unions and strikes only became part of the compilation later.

Although the new law attempted to regulate fragmented 'employment contracts' uniformly, but the Code du Travail does not provide for the concept of these contract, i.e. the definition of their content. Thus, the concept of a contract of employment is not found in the Code either. The conceptual elements of the contract of employment were developed by jurisprudence, essentially as a *pandant* of the Code Civil's "du louage d'ouvrage et d'industrie".[54] In summary, it can be stated that the specific duality of the dogmatic

52 HEDEMANN, Justus Wilhelm (1936): *Der Dresdner Entwurf von 1866. Ein Schritt auf dem Wege zur deutschen Rechtseinheit.* Berlin: C. Heymann.

53 For a detailed treatment of the history of the Code du Travail see HORDERN, Francis (1974): *Droit du Travail.* Aix-en-Provence: Institut Régional du Travail; HORDERN, Francis (1976): *Les droits des travailleurs.* Paris: Éditions Économie et Humanisme.

54 See in particular on this AUBERT-MONPEYSSEN 1988.

approach and the regulation of the contract of employment has developed in French labour law. In the Code Civil, the concept of a lease is based on the principles and system of Roman private law, and thus includes the lease of labour. Despite several significant amendments to the Code Civil, the legislator's perception and the regulation has not changed.[55] The term "contrat de travail" had already been established in practice before the Code came into force; nevertheless, the Code du Travail does not contain a legal definition of it. All of this suggests that in this era French labour law did not forget the institution of lease, it only sought to make it applicable to the economic conditions of the time.[56]

Spillover effects in continental civil law

It can be seen that, despite differences in some of the essential details, modern labour law was not able to rid itself of the form *locatio conductio* in the course of its development. Since the development of European private law was influenced chiefly by French and German legislation, it seems appropriate to briefly take a broader view.

Considering the development of Spanish labour law, its roots are of course to be found in the institution of *l.c.*[57] Of decisive importance for later private law – or indeed for the development of law as a whole – was the *Siete Partidas,* a body of law drawn up in the 13th century during the reign of King Alfonso X of Castile, with the aim of establishing a unified legal code for the kingdom.[58] The influence of these codices was so strong that when the first work on the Spanish Civil Code began, one of the fundamental debates unfolded around what proportion of its civil sources should be

55 Brun, André – Galland, Henry (1978): *Droit du travail.* Paris: Sirey.

56 It should be added that the situation regarding labour law changed significantly later on due to the increased content of the Code du Travail. See on this in the next Chapter.

57 See Olea, Alonso (2002*): Introducción al Derecho del Trabajo. Sexta edición, revisada, renovada y ampliada.* Madrid: Civitas; Álvarez de la Rosa, Manuel (2011): *La construcción jurídica del contrato de trabajo.* Granada: Comares.

58 It took its name in the 14th century, referring to the number of chapters.

drawn from the *Partidas,* which prevailed almost everywhere as a custom.[59] The *Código Civil* took into account both the French Civil Code and Castilian legal traditions. The reason for this was that a substantial difference between the two can hardly be discovered, since the *l.c.* continued to prevail in the Partidas, adopting its uniform character. This perception also determined the theory of Spanish private law in the 19th century.[60] The collapse of the powerful guild system in Spain in the 19th century contributed significantly to the development of the legal system and the establishment of private law. The reason for this were the wars of the era and the discovery of the New World, which resulted in the appearance of a large number of foreign workers, which led to the gradual deterioration of the established market conditions that had developed up to that point.[61] The formula of the lease was ultimately no different from the Windscheid definition cited earlier.[62] It can be concluded from the above that neither the first nor the second draft of the Código Civil of 1836 introduced many differences from the French approach or from the Castilian tradition.[63] This situation continued until the Code came into force in 1889.[64] Thus, the lease of works – "arrendamiento de obras o servicos" – bears traces of the lease in the relationship between the parties.[65]

59 Serna Vallejo, Margarita (2012): La Codificación civil española y las fuentes del derecho. *Anuario de Historia del Derecho Español,* 82(1), 19–21.

60 See Martínez Vela, José Antonio (2012): El contrato de "locatio conductio". Notas sobre su recepción en el derecho castellano medieval, con especial referencia al código de "las Partidas". *Revista de Derecho UNED,* (11), 620–621; Severin Fuster, Gonzalo (2016): La recepción del modelo de la "locatio conductio" en la regulación del "arrendamiento de obras y servicios" del Código civil español de 1889. *Revista de Estudios Histórico-Jurídicos,* 38(5), 209–219.

61 Núñez de Arenas, Manuel – Tuñón de Lara, Manuel (1970): *Historia del movimiento obrero español.* Barcelona: Terra Nova, 7–8.

62 See Windscheid's *Sachmiethe, Diensthmiethe* distinction. Windscheid 1862: § 399.

63 See in particular the provisions on the interpretation of the contract. Serna Vallejo 2012: 22.

64 Serna Vallejo 2012: 23–29.

65 See Article 1544 of the Código Civil.

A significant milestone in the development of Spanish labour law was the *Código del Trabajo* of 1926.[66] The relationship between the *Código Civil* and the *Código del Trabajo* is somewhat similar to the relationship between the French *Code Civil* and the *Code du Travail*. A common feature of both is that while the civil codes invariably treated work as a type of lease, the two labour codes contained so-called normative part of the labour law, i.e. the legal norms relating to this contract. Another common element was that a significant proportion of both labour codes was derived from the compilation of already existing labour law provisions outside of civil law. The two laws differ significantly, however, in their approach to the employment relationship, as the *Code du Travail* does not define the concept of this legal relationship, while the *Código del Trabajo* at least attempts to do so. Although this may seem to be only a formal difference, it involves important differences in content. This difference is due to the circumstances in which the *Código* was created. The Código that was designed to protect the workers was the product of a military dictatorship, whose rather populist motto was the creation of social peace *(paz social),* and this did not differ much from the ideas of the Italian fascist corporate state or aspects of German national socialist doctrine. The Spanish dictator – General Primo de Rivera – promised the workers "paternal intervention" *(paternal interveción)*.

Article 1 of the law defined an employment contract as follows: "A contract under which an employee undertakes to perform work or provide services to an employer for a certain amount (of money)."[67] Two characteristic features of this model are worth highlighting. The terms "trabadajor" and "empresario", referring to the legal status of employee and employer, are not used uniformly to designate the subjects of the contract of employment, as the archaic terms "obrero" and "patrono", are used to represent physical work. Furthermore, the text uses the expression fixed price ("precio cierto")

66 See in detail Ramírez Cremades, Francisco José (2018): *El Código del Trabajo de 1926.* Universidad Miguel Hernández de Elche, Departamentos de la UMH: Ciencia Jurídica.

67 Article 1. "A los efectos del presente del Títolo, se entenderá por contrato de Trabajo aquel por virtud del cual un obrero se obliga a ejecutar una obra o na prestar un servicio a un patrono por precio cierto."

typical of private legal transactions instead of the term wage ("salario"). Several authors have concluded that the Code has not succeeded in treating the legal status of workers in a uniform manner, and that, in certain legal institutions it has taken over civil law institutions.[68]

The greatest virtue of the Códico del Trabajo was also its greatest contradiction. The Code contained a number of provisions which are clearly designed to protect the employee, i.e. to support one of the parties to a contractual relationship, e.g. protection against dismissal, protection of wages, modern rules on accidents at work, etc. However, the reasons for this protection – such as the concept of subordination and externally determined performance, i.e. the definition of the employer's right to determine performance and the limits of this right – were not included in the text.[69] To sum up, the Spanish legislation of 1926, if not in a completely closed system, took the first steps towards partially and mostly formally removing employment contracts and their legal effects – employment relationships – from the scope of civil law.

The regulation of *lavoro* in Italian private law developed under rather specific circumstances. Cazzetta correctly notes that referring to French legislation is an almost mandatory starting point for reconstructing the changes in Italian civil law in the 19th century.[70] At the same time, there was an ambivalent attitude to the rule of the Code Civil, since it was not a completely voluntary takeover.[71] On the one hand, it provoked resistance in some areas, since it eliminated the previous scattered statutes, and in addition to the emergence of new legal institutions, it tried to establish social equality through its own legal instruments, which were opposed to the feudal and post-feudal relations of that time. On the other hand,

68 Ramírez Cremades 2018: 18.

69 Nevertheless, the suggestion that the subordination of the individual employee is latently included in the Code is an acceptable explanation. Ramírez Cremades 2018: 29.

70 Cazzetta, Giovanni (2018): *Codice Civile e identità giuridica nazionale. Percorsi e appunti per una storia delle codificazioni moderne.* Torino: G. Giappichelli, 4.

71 On this topic see Solimano, Stefano (2006): L'edificazione del diritto privato italiano: dalla Restaurazione all'Unità. In *Il Bicentenario del Codice Napolenoico.* Roma: Bardi Editore, 57.

it was obvious that the economy and legal transactions of the time were increasingly demanding greater cohesion from the fragmented legal system, which was still far from representing a unified private law system, and the French model served as the basis for efforts to remedy this.[72]

The period of the restoration – at least at first sight – seemed to have erased the traces of the Code Civil and, in contrast to the earlier unity, fragmentation and a return to the past became the dominant trends.[73] Despite the fragmentation of regulations in this period, the impact of the Civil Code was also evidenced by the fact that the commissions that were created to develop the civil codes of certain regions – where the social structure allowed for this – indirectly referred back to the French model.[74] The preparation of the *Codice Civile,* which eventually entered into force in 1865 (and which began in 1859), was also modelled on the Code Civil. This in itself would not have been problematic if the legislator had taken into account the economic and social transformation that took place in Italy in the six decades between the two codes.

What did all this mean for the regulation of the employment relationship? According to Article 1568, the object of the lease is the goods or the work.[75] The general definition of Article 1570 for the lease of work is as follows: Based on the labour lease contract, one party undertakes to do something for the other party in return for the negotiated wage.[76] Later on, the details of the two types of leases, their regulation, and the relationship between

72 Solimano 2006: 57.

73 Without going into detail, it is succinctly characterised by Cazzetta, who referred to this period as the era of code by code (dal codice ai codice). However, the Code Civil remained in force in Genoa and Lucca for a longer period, until 1837 and 1865, respectively, when the unified Codice Civile came into force. It is also worth noting that private law relations were governed not only by the Code Civil, which was applied in some areas in addition to scattered regulations, but also in the Lombardy-Veneto region that was annexed to the Austrian Empire by the *Allgemeines bürgerliches Gesetzbuch (ABGB)* from 1816 onwards. Cazzetta 2018: 29.

74 Solimano 2006.

75 Il contratto di locazione ha per oggetto le cose o le opere.

76 La locazione delle opere è un contratto, per cui una delle parti si obbliga a fare per l'altra una cosa mediante la pattuita mercede.

property leases and work leases reflect the content of the Code Civil. The discrepancy between the approach of the Codice Civile and the reality of work performance has been the subject of heated debates. One such controversy arose in the Chamber of Deputies in 1885 and then in the Senate in April 1886 over the so-called *Berti Draft* on reversing the burden of proof in cases of industrial accidents.[77] The debate concerned whether it would be possible to deviate from the principles and institutions of private law in case of social issues. A typical response was the thesis of Grimaldi (Berti's successor): in legal and social matters, the Code should not be considered an 'insurmountable obstacle'.[78] It is clear, however, that changing the principles of private law with elements of public law in reference to social interests was quite a risky endeavour. The focus of the ongoing debate in Italian jurisprudence in this period was eerily similar to the discourse that erupted in German jurisprudence at roughly the same time, namely the intactness and indissolubility of the private law code, or the possibility of including of social elements.[79]

Lodovico Barassi, who is considered the creator of Italian labour law, made an outstanding contribution to the interpretation of this problem. He published an influential article in the journal *Il Filangieri* in 1899 entitled *Sui limiti della codificazione del contratto di lavoro* [On the Limits of the Codification of the Contract of Employment].[80] In a later fundamental monograph he explained his position in detail on the nature and place of

77 For more about this see QUARRANTA, Flavio (2013): Le origini dell'assicurazione contro gli infortuni sul lavoro e le malattie professionali (testimonianze vercellesi). *Rivista Degli Infortuni e delle Malattie Professionali,* 100(3), 297–323.

78 For a detailed summary of this see CAZZETTA 2018: 114–120.

79 Various ideas emerged, including the suggestion that "industrial labour contracts *(il contratto di lavoro industriale)* should be regulated outside of private law", because the criterion of contractual freedom was increasingly not being met. Hence, the moment "the principle of freedom of contract is undermined, we are no longer in private law". See about this in SOLARI, Gioele (1980): *Socialismo e diritto privato.* Milano: Giuffrè, 228.

80 BARASSI, Lodovico (1899): Sui limiti di una codificazione del contratto di lavoro. *Il Filangieri,* 24, 3–17.

the contract of employment.[81] Cazzetta regards this work as a manifesto of Italian labour law.[82] Barassi argued for the autonomy of labour law precisely by strengthening the institutions of private law. This observation is of particular importance for social legislation, since it is not primarily concerned with the content of the agreement between the parties, i.e. with the establishment of the terms of the agreement, but instead with the creation of protection which goes beyond that. In addition to strictly separating social legislation from private law, Barassi affirms the almost eternal truth of Roman private law.[83]

THE 'SEPARATE WAY': THE TRANSFORMATION OF THE MASTER–SERVANT RELATIONSHIP IN THE ENGLISH COMMON CONTRACT LAW SYSTEM

Perhaps the most pertinent observation regarding the different features of the development of the contract of employment was made by Otto Kahn-Freund: "The first thing you have to understand if you want to understand England is that Hegel was not an Englishman."[84] There is no doubt that the approach is different, but the basis is the same, namely the contract. During the general historical development of contracts, common law appeared as a phenomenon that developed in complete isolation from continental law and that created specific institutions. This is somewhat refuted by Helmholz, who attempts to demonstrate the impossibility of

81 Barassi, Lodovico (1901): *Il contratto di lavoro nel diritto positivo italiano*. Roma–Milano–Napoli: Società Editrice Libraria.

82 Cazzetta 2018: 141.

83 "Vera nel diritto romano, e vera ancor sempre oggi." Barassi 1901: 6. See more in Cazzetta, Giovanni (1988): Leggi sociali, cultura giuridica ed origini della scienza giuslavoristica in Italia tra Otto e Novecento. *Quaderni Fiorentini per la storia del pensiero giuridico moderno,* 17, 232.

84 Kahn-Freund, Otto (1981): Postscript. In Lewis, Roy – Clark, Jon (eds.): *Labour Law and Politics in the Weimar Republic.* Oxford: Blackwell, 201; see also Dukes, Ruth (2009): Otto Kahn-Freund and Collective Laissez-Faire: An Edifice without a Keystone? *Modern Law Review,* 72(2), 220–246.

this position based on practical-historical data and the dogmatic-historical analysis of certain common law institutions. He notes from his research that the majority of English lawyers of the early modern period had adequate knowledge of continental law and its institutions, and were sufficiently versed in *ius commune* and later in natural law.[85]

Without going into the development of common contract law in detail in this work,[86] it should be stressed that the later contract of employment and its contemporary counterpart, the contract between *master and servant* was a part of this contractual system, and its development and its assessment cannot be treated separately from the general doctrine of common law. The contract of employment emerged at about the same time as the development of German and French law. In addition to emphasising the unified common contract law, it is worth highlighting that legislation in the second half of the

85 HELMHOLZ, Richard H. (1990): Continental Law and Common Law: Historical Strangers or Companions? *Duke Law Journal,* 40(6), 1226. On its effects on American law see COQUILETTE, R. Daniel (1984): Justinian in Braintree: John Adams, Civilian Learning, and Legal Elitism, 1758–1785. *Colonial Society of Massachusetts,* 62, 359–418; see also PRINGSHEIM, Fritz (1935): The Inner Relationship between English and Roman Law. *The Cambridge Law Journal,* 5(3), 347–365. This was based on the fact that the teaching of continental law was part of the training of common lawyers (outside universities) and could thus be demonstrated in practice. The relative adaptation of continental law took place, and was applicable in conjunction with the common law. Its origins can be traced back to the Norman conquest in the 11th century. As a result of the Battle of Hastings in 1066, England came under Norman rule, which had the consequence from the point of view of the development of law that German and French (Norman) customary law also appeared in England. However, this law was somewhat transformed in accordance with the feudal circumstances in England at this time, since the power of the feudal lord lands was represented by their property so its regulation was more important than anything else. See BUHOFER, Stephen P. (2007): Structuring the Law: The Common Law and the Roman Institutional System. *Swiss Review of International and European Law,* 6(5), 347–365.

86 See in more detail FIFOOT, Cecil H. S. (1970): *History and Sources of the Common Law.* New York: Greenwood Press Publisher; SIMPSON, Alfred William Brian (1987): *A History of the Common Law of Contract. A Rise of the Action Assumpsit.* Oxford: Clarendon Press; TUDSBERY, Frank (1913): Equity and the Common Law. *Law Quarterly Review,* 29(2), 154–162. In the Hungarian literature see VÉKÁS, Lajos (1977): *A szerződési rendszer fejlődési csomópontjai* [Key Points in the Development of the Contract System]. Budapest: Akadémiai Kiadó, 36–60.

19th century already sought to regulate the relationship between employers and workers in a relatively distinct way,[87] and a considerable proportion of the current academic literature is concerned with the autonomy of the contract of employment.[88] The economic and social reorganisation caused by the industrial revolution and the contemporary appearance of modern labour law raised the same fundamental social problems that had to be dealt with in French and German labour contract law. The common law system was thus also concerned with the question of whether the contract of employment had been able to break out of the indirect inheritance of the structure of the lease of its own accord.

As regards the *master–servant* relationship, the term 'master' is not necessarily identical with the term 'employer', even in today's sense. In Deakin's view, the master's separation from and control over the assistants and other craftsmen he employed was a product of his superior knowledge, as well as his position in his guilt and in the boards of the town. At the same time, the term master's degree was also used in the sense that, based on his knowledge and experience, he himself could be the subject of a legal transaction as an independent contractor.[89] The following statement reveals a great deal about the legal conception of work: "labour may be classed along with commodities generally", and "it is usual and correct to speak of a labourer being hired; his labour may also be described as purchased".[90] In his work on this very issue, Macdonell (1908) notes that it is only recently that economists and jurists have begun to separate labour, i.e. labour power, from commodities, the valuation of which in Roman law was identical. It can also be observed that in the medieval English law there was no sharp distinction between certain types of work performed for others, as the *locatio*

87 See the Employers and Workmen Act of 1875.

88 Brodie, Douglas (2016a): The Autonomy of the Common Law of the Contract of Employment from the General Law of Contract. In Bogg, Alan et al. (eds.): *The Contract of Employment.* Oxford: Oxford University Press, 124–144.

89 Deakin, Simon – Wilkinson, Frank (2005): The Origins of the Contract of Employment. In *The Law of the Labour Market. Industrialization, Employment, and Legal Evolution.* Oxford: Oxford University Press, 41–109.

90 Macdonell, John (1908): *The Law of Master and Servant.* London: Stevens and Sons, 2.

conductio operis, operarum and sometimes *mandatum* were often mixed in the sense that the terms *master and servant* were applied to a part of these transactions. Consequently, a *servant,* in the narrow sense of the term, is a person who, under a contract, undertakes work for another person, for consideration, at the latter's direction. At the same time, a distinction was made between *servant* and *contractor, servant* and *bailee, servant* and *agent,* and *servant* and *partner.*[91] The narrower conceptual definition of servant therefore includes a reference to the master's right of disposal. In this respect, however, it was relevant to consider what kind of service the servant was engaged in and what kind of work he undertook, since his attachment to the master's person and environment depended to a large extent on this. Even in the 19th century, the category of servant in the strict sense of the term was still specifically designated, meaning a worker – usually unmarried – who was usually contracted for a year, was either entitled to compensation or not, and was entitled to separate compensation under the poor law after the termination of the contract. The term labourer was used to describe a casual manual worker who was usually hired by the day or for a maximum of one week or for periods of several weeks.

However much the relationship between master and servant was based on a contract, this relationship was in practice for a long time defined by statutes.[92] These norms ultimately strengthened the contractual basis of the master–servant relationship, as they all applied to the framework of small farms (on a domestic level).[93] The Master and Servant Act, which came

91 MACDONELL 1908: 8.

92 See among others the Ordinance of Labourers (1349), Statute of Labourers (1351), Statute of Artificers (1563), Poor Relief Act (1601). ATKINSON, Evelyn (2015): Out of the Household: Master–Servant Relations and Employer Liability Law. *Yale Journal of Law & the Humanities,* 25(2), 205–270; CLARK, Elaine (1983): Medieval Labor Law and English Local Courts. *The American Journal of Legal History,* 27(4), 330–353.

93 KAHN-FREUND, Otto (1977): Blackstone's Neglected Child: The Contract of Employment. *The Law Quarterly Review,* 93, 508. This approach is interesting because in 1896 Eversley was still discussing some of the employment relationships in this relation. See EVERSLEY, William Pinder (1896): *The Law of the Domestic Relations. Including Husband and Wife, Parent and Child, Guardian and Ward, Infants, and Master and Servant.* London: Stevens and Haynes, 859–936.

into effect in 1823, was the last product of this system or era. The bond it embodied had by then lost its meaning in the midst of factory production, and the Employers and Workmen Act (1875) undoubtedly opened the way to formal equality, or, as Deakin and Wilkinson put it, the possibility was created for the service relationship to be assimilated into the common law contract system.[94]

INTERMEDIATE CONCLUSIONS

The *locatio conductio* formula of contract in Roman private law determined the legal expression of work for another party, and this was true not only for the contract of employment *(locatio conductio operarum)* but also for the so-called contract for work and labour *(locatio conductio operis)*. The notion of a lease could not be ignored even at the time of the great codifications of private law, and in the private law of almost all European states it was expressed in the later service contract *(Dienstvertrag, contract of service)* and the contract of employment *(Arbeitsvertrag, contract of labour, contrat du travail)*. It could be argued that this circumstance has hindered the development of the content of labour law – it has slowed down the process of transforming labour law into an independent area of law. However, practical experience does not necessarily support this hypothesis.

Namely, the evolution of labour law regulation does not entail a rigid separation of the contract of employment and the public law rules applicable to it from the 'inviolable part' of private law. This also means that the public law provisions of labour law also protect the employee by interfering to some extent with the terms of the contract, but there are limits to this intervention. The eternal dilemma of the freedom to choose a type as one of the decisive elements of the freedom of contract versus indirect forms of coercion also reflects this necessary overlap. The orientation of labour law is ultimately determined by the ratio between its private law basis and the

94 Deakin–Wilkinson 2005: 75.

influence of public law. Changes in this ratio also affect the approach to the purpose of labour law. The complex nature of labour law was perhaps most accurately formulated by Richardi. Although labour law is an expression of private autonomy – like traditional private law – it does not fall within the scope of the legality of the codification of civil law. The reason for this is that labour law as a whole, including private law (contractual) norms, has developed into an independent field of law, which in the constitutional system has independent legislative authority besides or beyond civil law.[95]

95 Richardi 2000a: § 1 RdNr. 30.

Chapter II

DIFFERENTIATED APPROACH TO THE PURPOSE OF LABOUR LAW IN THE LIGHT OF THE COHESION OF LEGAL SOURCES

LEVELS OF SOURCES OF LABOUR LAW AND THEIR DIFFERENT LEGAL NATURE

Regarding the purpose of labour law, the literature generally treats labour law as an abstract, unified phenomenon. This restriction seems obvious, but it also implies many dangers. A typical example of an abstract approach presents labour law as being independent of the economic and social conditions of each country or region. Nevertheless, the contradictions involved in this unification were evident – and are still present today – for example, in the labour law of the former socialist countries after the change of regime as a consequence of joining the European Union. Furthermore, factors affecting the general abstraction can also be observed due to differences in the legal culture and legal principles of each country. Finally, there are also significant differences in the principles, institutions and approach to labour law of the European Union and those of other large economic and political regions.

These differences, in addition to determining the appropriate level of abstraction in the present study, require the identification of the factors that cause the differences. Obviously, the major efforts towards integration and the international labour law organisations are aimed at creating a converging institutional system operating on the basis of certain uniform principles, but it would be a mistake to ignore the differences which remain. Differences are far from being an end in themselves, and did not appear out of nowhere, but are mostly the results of long-lasting economic and political processes.

The portrayal of labour law as a homogenous phenomenon is also reflected in the undifferentiated treatment by the institutional system of the purpose and function of labour law in general. In my view, however, the institutions of labour law are actually extremely complex and their legal nature is different. The contractual instruments of labour law include the contract of employment, collective agreements and various forms of employee participation. However, a significant part of the legal institutions of labour law consists of legislation affecting the content of the employment relationship and determining the legal status, influencing interests and circumstances of the employee. If one examines the development of these institutions and their relationship to each other, it would be rather difficult to define the purpose of labour law as solely focusing on the interests of one or the other party.

Furthermore, the purpose of the rules of labour law cannot be considered independently of their historical context. During the process of the development of (modern) labour law, this area of law had to justify its existence, primarily in relation to the private law system that was not necessarily tailored to it. As I was referring to, this also meant that the essence of labour law at the beginning was exclusively the protection of employees. However, it is also accurate to characterise labour law as the law of advances and retreats. In addition to ensuring the protection of the employee, it was therefore necessary to find the means to ensure the efficiency of the economy, since it is one of the important conditions for employment. This development led to a clash between fundamental rights, namely economic and social rights, and later to the recognition of their interdependence.

Today's labour law, or rather so-called employment law, is, in my view, being influenced by two further factors: globalisation and digitalisation. The consequence of this is not necessarily that the principles and the content of labour law will be the same everywhere –perhaps this may happen later – but that the traditional concepts of labour law will become blurred, as for example in the erosion of the concepts of the workplace, working time, the company as an organisation, the contract of employment, etc. Labour law needs to address these emerging circumstances, and it is by no means certain that the mechanical relying on old reflexes is the best answer to them.

In this chapter, I analyse the purpose and function of labour law, examining its legal sources and defining the purpose and function of each area. I ought to stress at this point that this does not mean that labour law has multiple institutional purposes at the same time. I agree with Davidov that different areas of labour law have different problems and need different tools to solve them. There is no doubt, however, that "besides the various specific problems, it is possible and useful to identify a larger, comprehensive 'problem' that explains why we need labour law at the level of the project as a whole".[1]

I shall first examine the contract of employment as a fundamental institution of labour law, and then various types of collective agreements in terms of their role in the tasks of labour law, according to the logic of their own legal nature. Finally, the legislation relating to labour law and affecting labour law will be the subject of this analysis.

PURPOSE, NATURE AND PRINCIPLES GOVERNING THE CONTRACT OF EMPLOYMENT

Labour law as a specific kind of contractual law

Das Arbeitsrecht als Vertragsrecht – was the title Wolfgang Gast gave to his excellent monograph.[2] The main idea of his work, written in 1984, is a paradigm shift in labour law, in which the dependency of the employee *(Abhängigkeit des Arbeitnehmers)* must be replaced by equality based on the principle of contract *(das Paradigma Gleichordnung als Prinzip umfassender Vertraglichkeit)*.[3] Gast draws this conclusion from the nature of the employment contract as a 'basic norm of labour law'. Honeyball highlights the importance of the contract of employment from another perspective. Based on the common law doctrine of contract, he argues that the vast majority of the rights and obligations of the parties to an employment relationship arise from the contract of employment. "In consequence, it is natural to think of the contract of employment and the employment relationship as

1 DAVIDOV 2016: 34–35.
2 GAST, Wolfgang (1984): *Das Arbeitsrecht als Vertragsrecht.* Heidelberg: R. v. Decker & C. F. Müller.
3 GAST 1984: 39.

coexistent."[4] In contrast, the prevailing view on the equivalence of the content of the contract of employment and the employment relationship in continental European labour law is somewhat different. This is well characterised by Birk's comment, according to which the contract of employment and the employment relationship are not identical concepts *(Arbeitsvertrag und Arbeitsverhältnis sind nicht identische Begriffe).*[5] This not only means that the content of the employment relationship is also composed of elements outside the contract of employment, as indicated by the legal norms – for the time being apart from the fact that they are cogent or dispositive – but also refers to the nature of the contract of employment as an incomplete contract.

The nature of the contract of employment must be examined from several perspectives. The main question is whether the content of the contract of employment is the same as or different from the employment relationship; furthermore, whether the contract of employment merely creates the employment relationship, or whether it determines its content (or whether it only develops it to a greater or lesser extent). If we start from the assumption that the employment relationship is the legal consequence of the contract of employment, this contract naturally shapes the content of the employment relationship. However, the extent of this influence depends on several factors. In the context under consideration, it is state intervention, the objectives of the legal norm, and especially its nature that are decisive. I will discuss the purpose and classification of legal norms later, here I will only refer to their importance. When examining the nature and purpose of an contract of employment, the role of collective agreements, another contractual source of labour law, in shaping labour relations cannot be

4 Honeyball, Simon – Pearce, David (2006): Contract, Employment and the Contract of Employment. *Industrial Law Journal,* 35(1), 30. In contrast, however, an interpretation had previously emerged that contracts of employment, in addition to their contractual nature, have a number of so-called 'status' characteristics. In this context, the interpretation of the employment relationship as a status relationship also arose. See Beale, Hugh ed. (2017): *Chitty on Contracts. Thirty-Second Edition. Volume II. Specific Contracts. Chapter 40. Employment.* London: Sweet & Maxwell – Thomson Reuters, 40–002.

5 Birk, Rolf (1973): *Die Arbeitsrechtliche Leitungsmacht.* Köln: Carl Heymanns Verlag, 67.

ignored. These connections highlight the fact that a contract of employment cannot be examined in isolation, but only in the context of other individual contracts. For this reason, the first step is to examine the 'contractuality' of the contract of employment.

The specific 'contractuality' of the contract of employment

The starting point for the classification of the contract of employment is that this contract has the same purpose as all private law contracts in terms of its specific content and terms of performance. This is nothing more than fulfilling the purpose specified in the contract. This means, in case of contracts for the performance of work, that, taking into account the interests of the recipient of the service and in accordance with the legal status of the working person, it should be ensured that the parties can exercise their rights and fulfil their obligations in accordance with the contract. However, there is a specific feature of performance under a contract of employment, namely that the other party, the employer, decides – after the contract has been concluded – how the employee is to perform. This also reflects the unequal position of the parties, i.e. the subordination of the employee.

At this point a substantial discrepancy can be discovered between the contractual grounds of the employment relationship and the raw reality of the employment relationship, the actual circumstances of performance. In itself, the contractual causa of the employment relationship presupposes that this contract *(Obligation)* must meet the requirements of private law based on the principle of private autonomy, contractual freedom and equality.[6] In this regard, a number of plausible theories have emerged, emphasising that the regulation of the contract of employment is based

6 These questions regarding the equivalence of requirements were posed by Boehmke. BOEHMKE, Burkhard (1999): *Schuldvertrag und Arbeitsverhältnis.* München: Verlag C. H. Beck, 198.

on the self-determination of the employee and the employer *(Selbstbestimmung)*.[7] Löwisch also argues, however, that these fundamental rights apply to the freedom of legal transaction of the parties in general, and if the protection of fundamental rights covered by the contract of employment does not extend the employee's freedom of legal transaction then the legal order must intervene to protect the legal status of the employee.

What should the legal order protect the employee from? The obvious answer seems to be that the employee must be protected against the overriding influence of 'external determination' *(Fremdbestimmung)*, which dominates the content of the legal transaction in an employment relationship.[8] Is this, then, the key to the employee's subordination, or is it a consequence or symptom of some deeper cause? There have been many explanations for the subordination of the employee and every theory has some basis in reality. Following the theory of economic and personal dependence, some scholars looked for the source of the subordination in the content of the employment relationship in the contract of employment itself. An analysis of private law contracts related to work (work contract for service, mandate – *Wekvertrag, Auftrag*) and the contract of employment, led to the conclusion that in the former types of contracts, the service is legally limited, i.e. the service provider undertakes to perform the service specified in the contract. However, the contract of employment does not

7 Löwisch 1996: 294. According to his point of view, the employee's influence should extend from the establishment of the contract, through the determination of its content, to participation in the design of its performance. These areas, therefore, cannot be determined by the unilateral dictates of the employer. These are all part of the employee's constitutional right or interest in freedom *(Freiheitsinteresse)*. Löwisch bases this argument on the norms of the right to free self-determination and the right to freely choose one's occupation ensured by the Basic Law of Germany as well as citing the definition of the rights of the parties to transactions by the Federal Constitutional Court of Germany *(Bundesverfassungsgericht)*. BVerfG vom 19.10.1983, BVerfGE 65, 196, 200.

8 The external (alien) determination of the performance promised in a contract of employment is tantamount to the employer's right of control, which is nothing other than the concretisation of the employee's obligation. For an account of this in Hungarian see Román, László (1972): *A munkáltatói utasítási jog alapproblémái* [Basic Problems of the Employer's Right to Give Instructions]. Budapest: Közgazdasági és Jogi Könyvkiadó, 65, 130–131.

contain such a restriction, and the employee usually undertakes to perform work, which is determined according to its nature and type at the most, as a result of which the employer has the right/entitlement to unilaterally determine the manner of performance.[9] On this basis, work done for another party is performed according to the will of the other party, and if we wish to avoid the terms subordination, dependence or dependent work, we can also employ the term 'not self-contained' work for this activity. This argument is undoubtedly attractive, but it does not answer the question of why other incomplete contracts – in economic transactions – do not have this subordination, and in itself does not reveal the scope and limits of the other party's right of specification and control.

The nature of an incomplete contract of a contract of employment draws attention to another problem, namely the importance of the so-called implied terms inherent in the contract. What do implied terms mean for the contract of employment? It can be argued that no contractual system is conceivable without the terms and conditions inherent in the contract. The common contract law has developed specific tests, defining the criteria that make the application of a condition almost automatic as well as the circumstances in which the parties must at least indicate their intention to apply a condition.[10] One of the essential inherent conditions of the contract of employment is the right to unilaterally shape the content of the employment relationship. In this context, there is a certain discrepancy between express terms and implied terms, since employers sometimes overemphasise their unilateral right to shape them, which cannot necessarily be derived from the explicit content of the contract of employment. Nevertheless, Austen-Baker's observation that the role of implied terms is to eliminate inconsistencies caused by express terms seems reasonable.[11]

9 Richardi 1988: 237.

10 Austen-Baker 2011; Beale, Hugh ed. (2012): *Chitty on Contracts. Volume I. General Principles.* London: Sweet & Maxwell – Thomson Reuters, 13–000–13–037; Peel, Edwin (2011): *The Law of Contract.* London: Sweet & Maxwell, 222–235; Furmston, Michael et al. (2012): *Law of Contract.* Oxford: Oxford University Press, 177–195.

11 Austen-Baker 2011: 50.

As regards the employer's right to unilaterally shape terms, according to the prevailing view, a change in the terms of performance usually entails a modification of the contract of employment. However, the employer may reserve the right to change certain aspects of the required performance by the simultaneous notification of the other party. At the same time, it should be clear from the text but more from the circumstances of the contract of employment that one of the parties reserves this kind of unusual right.[12] In any event, it can be concluded that one of the essential inherent conditions of the contract of employment is the right to unilaterally alter/shape the content of the employment relationship.

The right or entitlement to unilaterally shape the terms of performance – as an implied term of contract – has a decisive influence on the contractuality of the contract of employment. This needs to be pointed out because this construction basically only takes into account the interests of one party. The motivation for the employer's unilateral right to shape the conditions of a contract of employment is approached in several ways in the literature and in the judicial lawmaking. One large category of motivations is related to the employer's operation (functional flexibility), which is linked to technological change, changes to the employer's profile or even mobility.[13]

What does all this mean in practice? In German labour law, the absolute public law character of the so-called *Befehlsrecht* is incompatible with the contract of employment. At the same time, it is quite difficult to interpret the employer's right to unilaterally determine performance *(einseitige*

[12] See the *Wandsworth London Borough Council v. D'Silva* case [1998] IRLR 193, 197.

[13] In most cases, the demand for and implementation of the unilateral right to shape a contract related to the employer's operation does not occur in isolation, but is accompanied by quantifiable changes (numerical flexibility). This change can serve to further maintain the employment relationship, if the employer wishes to use this measure to avoid the termination of the employment relationship and thus the loss of qualified and experienced employees. Another important intention may be to unilaterally change certain wage elements (wage flexibility), which is frequently an employer's response to market changes, but which may also simply be a way to increase profits. This cannot be examined in isolation either, as it can be accompanied by changes to the already mentioned work schedule, changes in the shift schedule, etc. Collins, Hugh et al. (2012): *Labour Law.* Cambridge: Cambridge University Press, 58–162.

Leistungsbestimmung) as a simply 'formative' right (unilateral private law power, *facultas*).[14] While the classic private *facultas* ceases once it has been exercised, the one-time exercise of the employer's right to instruct does not annul this right of the employer (discretionary acts).[15] The severity of this problem is indicated by the fact that several theories have been put forward to determine the basis of the employer's right to alter the content of the employment relationship in the sixties.[16] The same problem, namely the contractual basis of the employer's unilateral shaping of the conditions, was confirmed by case law (when the *einseitige Vertragsgestaltung*[17] was recognised about three decades later) – largely relying on Gast's theory of agreed direction *(vereinbartes Direktionsrecht)*.

The next question is, what contractual construct does the employer get authorised to use, and what is the technique for the presence of implicit conditions today? Two solutions are possible. One is a so-called anticipated amendment agreement *(antizipierter Änderungsvertrag),* which would have left it to the discretion of the employer to unilaterally alter the employment relationship at a later date. This arrangement has already been considered inappropriate by the case law, which has qualified it as an empty authorisation for the employer to modify the contract at a later stage, which goes beyond the scope of contractual freedom.[18] It is more

[14] The latter also implies that the rightholder has the power to bring about a change in the law by a unilateral act for himself or for another person, whether in law or in fact, or other situation. In the Hungarian literature see SZLADITS, Károly (1937): *A magyar magánjog vázlata* [Outline of Hungarian Private Law]. Budapest: Grill Károly Könyvkiadóvállalata, 39.

[15] See in detail in the Hungarian literature ROMÁN 1972: 11.

[16] See about the so-called theory of Direktionsklausel in SÖLLNER, Alfred (1966): *Einseitige Leistungsbestimmung im Arbeitsverhältnis.* Wiesbaden: Verlag der Akademie der Wissenschaften und der Literatur in Mainz in Kommission bei Franz Steiner Verlag GmbH., 46; ADOMEIT, Klaus (1969): *Rechtsquellenfragen im Arbeitsrecht.* München: Verlag C. H. Beck, particularly 101.

[17] The decision was clearly taken in order to avoid collective redundancies and to preserve jobs. GAST, Wolfgang (1978): *Arbeitsvertrag und Direktion.* Berlin: Duncker & Humblot, 299–309.

[18] See BAG Urt. v. 28.5.1997; BAG AP Nr. 6 zu § 2 KSchG 1984. See WANK, Rolf (1990): Einvernehmliche Änderung von Arbeitsbedingungen. In HROMADKA, Wolfgang (ed.): *Änderung von Arbeitsbedingungen.* Heidelberg: Verlag Recht und Wirtschaft, 37.

acceptable to include an amendment reservation or an amendment clause *(Änderungvorbehalt)* in the employment contract. The essence of this, as opposed to the previous arrangement, is that the parties define in advance the conditions and requirements for any subsequent unilateral change, which the employer may not override by subsequent instructions. This can be interpreted as the parties defining (extending) the framework of the employment contract for the future, while authorising the employer to unilaterally change the previous (original) situation.[19] Clauses also play an important role in French labour law.[20] In this context, it should be noted that only normative acts are classified as sources of labour law. In addition to legal norms, the literature lists the application of law, customs and collective agreements which have normative content.[21] This list does not include the contract of employment, instead citing the employer's decision-making authority.

19 This type of contract can also be evaluated as corresponding to the mechanism of 'futurising of the present' described by Macneil. The expressions 'the presentation of the future' and the 'futurising of the present' play a central role in Macneil's relational contract theory. The archaic term 'presentiate' in this context means: to make or render present in place or time; to cause to be perceived or realised as present. The 'futurisation' of the present refers to several phenomena, including planning, forecasting and promising, but in Macneil's view the currently obsolete term 'presentiate' best conveys the two processes, i.e. the representation of the future in the present moment or situation. Both expressions reflect that the perception of contemporary individuals is increasingly directed towards the future, while the facts of the present are seen merely as the psychological processing of the past. MACNEIL, Ian Roderick (1973–1974): The Many Futures of Contracts. *Southern California Law Review,* 47(2), 800.

20 In this context it has to be remarked that the theory of the relational contract also had a clear influence on French contract theory. See on this topic DELFORGE, Catherine (2016): Le contrat à long terme entre firmes, un contrat relationnel exemplaire? *Revue interdisciplinaire d'études juridiques,* 76(1), 57–95; DELFORGE, Catherine (2014): *Le contrat à long terme: quand la relation enrichit le contrat.* Bruxelles: Larcier, 1–20; SUPIOT, Alain (2003): Un faux dilemme: la loi ou le contrat? *Droit Social,* (1), 59–71; MUIR WATT, Horatia (2000): Du contrat relationnel. In *La relativité du contrat. Travaux de l'association Henri Capitant.* Paris: L.G.D.J.; LAITHIER, Yves-Marie (2006): A propos de la réception du contrat relationnel en droit français. *Recueil Dalloz,* (4), 1003–1008.

21 See PÉLISSIER, Jean et al. (2006): *Droit du travail.* Paris: Dalloz, 66–136.

At the same time, however, the contract of employment is a key element of labour law. Thus, the contradiction between the contract of employment, which meets the requirements of the present, and the employment relationship, which is oriented toward the future in terms of future performance, can also be perceived in French labour law. Since the employer is not in a position to amend the contract of employment unilaterally,[22] the legislation must look for other ways so that the institutions gradually formed in the practice of the parties are recognised by judicial lawmaking.[23] The employment contract and related clauses contain numerous provisions that grant the right to unilaterally change the terms of performance at a later stage, as one or more circumstances are likely to arise during performance that will necessitate a change in the terms. This likelihood is therefore independent of whether or not the employment contract contains the relevant authorisation or whether or not such authorisation is included. This could be interpreted as a change of circumstances due to objective reasons, which refutes the claim that the only source of the employer's unilateral right to shape the employment relationship is the contract of employment.

Nevertheless, in French labour law, the contract of employment takes priority over the unilateral power of the employer. If the content of the contract of employment goes into fine detail, the employer has little room for manoeuvre, but in the opposite case, there is wider scope for action. This problem is related to the concept of *contrat commutatif versus contrat aléatoire.* A so-called *commutative contract* expresses full equivalence between the parties, ensuring that each party undertakes to provide the other with a benefit equivalent to that which it receives.[24] In contrast, a *contrat aléatoire* (random) arises if the parties agree that uncertain events in the future may affect the proportion of advantages and disadvantages. In

22 In this regard see Code Civil L 1134 that also applies to the contract of employment. Article 1134: "Les conventions légalement formées tiennent lieu de loi à ceux qui les ont faites. Elles ne peuvent être révoquées que de leur consentement mutuel, ou pour les causes que la loi autorise. Elles doivent être exécutées de bonne foi."

23 Nagéde, Claude (2010): *La variabilité du droit du travail.* Université d'Angers, 140.

24 Code Civil Article 1108: "Le contrat est commutatif lorsque chacune des parties s'engage à procurer à l'autre un avantage qui est regardé comme l'équivalent de celui qu'elle reçoit."

other words, they expect the counter-value used under the commutative contract to be overturned.[25]

A fundamental question in this regard is which category does the employment contract belong to? If we consider the phase of concluding the employment contract a point of reference, then the employment contract expresses equivalence between the parties, because the employee receives consideration for the performance of an agreed service. However, the contract also creates a long-term legal relationship, and this already implies the possibility of uncertain factors arising, thus undermining the equivalence. At this point, the extent of the employer's unilateral right to shape the conditions becomes relevant. If certain elements are precisely specified by the parties in the contract, it is not possible to change them unilaterally, since they do not involve changes of the conditions of work or performance. Typically, for instance, wages can be defined as such.[26] Finally, it is important to emphasise that in French labour law the distinction between an amendment of the contract of employment and altering the terms and conditions of the work or of the performance of the contract is therefore of particular importance and has been significantly developed by the case law.

Intermediate conclusions

What, then, is the purpose of the contract of employment? What content should this contract 'have'? Only one segment of contractuality has been examined so far, the freedom of the contract – the freedom of formation of the content of the contract. This freedom takes a unique form compared to classical contracts of private law. The following introductory sentences of Dockés's study help to illustrate the difference between the original (mutual) contractuality and the unilateral power of altering it: "Contract

[25] Code Civil Article 1108: "Il est aléatoire lorsque les parties acceptent de faire dépendre les effets du contrat, quant aux avantages et aux pertes qui en résulteront, d'un événement incertain."

[26] For an analysis of this see Nagéde 2010: 148; Antonmattei 2009: 17–26.

conveys an image of equality and common agreement. Power is inequality and unilateralism. A priori, therefore, contract and power seem far apart."[27] However, he also suggests that the antinomy of contract-power has now lost its rigidity, and that in certain relationships, in order to ensure their sustainability, the conflict between these paradigms has taken on a new aspect.[28] This is necessary because, on the one hand, a contract of employment is a contract in the general sense and, on the other hand, the principles of the contract must be applied in the relationship between the parties, even if one of them is in a subordinate position. The enforcement of the principles of the contract, such as the free exercise of subjective rights, freedom of contract, good faith and fair dealing, as well as the principles of cooperation, must be ensured by the control of the content of the contract *(Inhaltskontrolle).* The control of the content of contracts is therefore also of outstanding importance in the case of the contract of employment.[29]

All of this requires the following remarks. As regards contractual control, Rieble emphasises that checking compliance with the contract is essentially the same for all contract, only other conditions need to be checked.[30] However, in order for the principles characteristic of private law contracts to prevail in contract of employment, the equalising effect of the market is not enough.[31] If the contract of employment exists only in 'pure

[27] "Le contrat renvoie une image d'égalité et de commun accord. Le pouvoir est inégalité et unilatéralisme. Contrat et pouvoir semblent donc a priori bien éloignés l'un de l'autre." Dockès, Emmanuel (2004): *De la supériorité du contrat de travail sur le pouvoir de l'employeur. Analyse juridique et valeurs en Droit social.* Etudes offertes à Jean Pélissier. Paris: Dalloz, 203.

[28] Dockès 2004: 204.

[29] König, Dorothea (2010): *Die Inhaltskontrolle von Arbeitsverträgen in Deutschland, England und Frankreich.* Freiburg: Rombach Druck- und Verlagshaus.

[30] Rieble, Volker (1998): Die relative Verselbständigung von Arbeitnehmern – Bewegung in den Randzonen des Arbeitsrechts? *Zeitschrift für Arbeitsrecht,* 29(3), 340–341.

[31] Flume points out that although the unequal position of the partners in private law transactions may be regarded as an almost universal phenomenon, this does not mean that the weaker partner's right to self-determination and thus bargaining power is diminished, because their private autonomy is based in the economy, and the economic power of the stronger partner is usually balanced. Flume, Werner (1979): *Allgemeiner Teil des bürgerlichen Rechts.* Berlin–Heidelberg: Springer, 10.

contractual form', it embodies a material inequality that is difficult to fit into the private law contractual system. Namely, it is also part of the purpose of contract of employment contracts that they should serve the interests of the employer by recognising the employer's unilateral right to shape the terms and conditions of performance. Furthermore, if we only consider the contract of employment in terms of the reality of contractuality, it is easy to overlook the enforceability of the other party's, i.e. the employee's existential needs. Consequently, it is not possible to derive the purpose of labour law directly from the purpose of the contract of employment alone. In order to assess the overall picture, the impact of collective autonomy and its limitations should be examined.

THE LEGAL NATURE AND PURPOSE OF THE COLLECTIVE AGREEMENT

The emergence of the legal institution of collective agreement marked a clear break with the idea and practice of individual contractual freedom. From the middle of the 19th century onwards, the essential features of collective agreements gradually became consolidated, at least in continental European law. The most important of these characteristics was the recognition of the extensive scope and transformative power of collective agreement. The significance of this change can be appreciated if we consider that at the end of the 18th century, any association of workers was forbidden. In the beginning, collective agreements were largely formed and developed outside the legal framework, but by the 1930s they were integrated into the legal system, although at that time their impact on employment processes was already decisive regardless of legal regulations. Collective agreements have increasingly become normative-contractual sources of labour law.

The legal nature of collective agreements and its consequences

The legal nature of a collective agreement seems clear at first sight: it is a contract. Of course, this definition is only accurate in so far as it is an agreement between specific parties, and none of these parties has legislative authority and legitimacy. Nevertheless, there may be other agreements between the employer and the employees which can be categorised as falling under the general rules of the contract. However, collective agreements differ from these agreements in terms of their quality. The division of the collective agreement into contractual and normative, in terms of their content, clouds the picture, as this agreement is applied to a specific third party in a manner similar to a legal norm. Although they are not identical – i.e. the normative part of the collective agreement and the legal norm – there are many similarities between the two forms. This is explained in more detail below. Both the similarities and the differences between them are illustrated by the long-standing concept of industrial bargaining: "Instead of the employer making a series of separate contracts with isolated individuals he meets with a collective will, and settles in a single agreement, the principles upon which, for the time being, all workmen of a particular group, or class, or grade, will be engaged."[32]

What makes a contract a collective agreement? First of all, it should be emphasised that a collective agreement is the result of negotiations between private parties.[33] The essence of this negotiation is to bridge differences and resolve conflicts of interest between the parties. In the German literature on this field, many argue that it is inaccurate to apply the term 'contract' to a collective agreement, but that certain 'formal compromises'

32 Hepple, Bob – Fredman, Sandra (1986): *Labour Law and Industrial Relations in Great Britain.* Deventer: Kluwer Law International, 64.

33 Däubler 2006: 192; French law also emphasises that a collective agreement is an agreement resulting from negotiations. Favennec-Héry, Françoise – Verkindt, Pierre-Yves (2014): *Droit du travail.* Paris: L.G.D.J., 139.

(Formalkompromissen) can be made to achieve the end result.[34] The prevailing view in Italian law is that collective agreements are a form of collective (private) autonomy, which can accordingly be classified under Article 1321 of the Codice Civile.[35] Noteworthy in this regard is Article 1322 of the Codice Civile, according to which contractual autonomy also means that “the parties may conclude contracts which do not fall within the types of special rules, provided that they are aimed at the realisation of interests which, according to the ‘legal rules’, deserve protection”.[36] However, a collective agreement is a uniform agreement that predetermines the content of certain existing and future employment contracts.[37] In this respect, Sinzheimer’s term, “der korporative Arbeitsnormenvertrag” is apt.[38]

It can therefore be concluded that such agreements do differ in their conceptual elements and effects from the classical private contract. Thus, it is a matter of dispute whether a collective agreement can be considered to be a general contractual condition or rather a normative pre-contract, or something similar. I discuss the relationship between collective agreements and general contractual terms and conditions in detail in the Second Part

34 Herschel, Wilhelm (1961): Die Auslegung der Tarifverträgen. In Nipperdey, Hans-Carl (ed.): *Erich Molitor zum 75. Geburtstag 3. Oktober 1961.* Berlin: Verlag C. H. Beck, 161.

35 Codice Civile Article 1321: “Nozione: Il contratto è l’accordo di due o più parti per costituire, regolare o estinguere tra loro un rapporto giuridico patrimoniale.” Santoro-Passarelli, Giuseppe (2014): Autonomia privata individuale e collettiva e norma inderogabile. *Rivista italiana per le scienze giuridiche,* Special Issue, 336–354.

36 Codice Civile Article 1322: “Esso, quindi, non può essere ricondotto all’interno dell’alveo dei contratti tipici, rientrando a pieno titolo nell’ambito delle manifestazioni della autonomia contrattuale di cui all’art 1322 c.c., secondo cui ‘le parti possono concludere contratti che non appartengono ai tipi aventi una disciplina particolare, purchésiano diretti a realizzare interessi meritevoli di tutela secondo l’ordinamento giuridico’.”

37 Pessi, Roberto (2010): *Lezioni di diritto del lavoro.* Torino: Giappichelli Editore. For a summary see, Alessi, Roberto (2019): *Rapporti tra contratti collettivi di diverso livello*. Libera Universita Internazionale Degli Studi Sociali, Dipartimento di Giurisprudenza Cattedra di Diritto del Lavoro. Anno Accademico 2018–2019, 28–33.

38 Sinzheimer, Hugo (1907–1908): *Der korporative Arbeitsnormenvertrag. Eine privatrechtliche Untersuchung.* Berlin: Duncker & Humblot.

of this study. So, it cannot be ignored that collective agreement is a contract that establishes norms.[39] There is a point of view according to which collective agreement is treated as a contract at the moment of conclusion, binding the signatories. However, when applied, it is classified as a norm.[40] While several examples could be cited of interpretations of the collective agreement, all the approaches taken suggest that, although this agreement has many links to a contract, its essence is its normative nature.

What makes a collective agreement normative? Pélissier approaches the solution with a question. If the collective agreement is concluded by a representative organisation on behalf of and in the interests of the employees or, in the case of a higher-level collective agreement, on behalf of the employers, how can the subjects of an individual contract of employment be forced to comply with the provisions of the collective agreement which are intended to determine the content of the current or future contracts of employment?[41] Morin emphasises the authorisation of the normative nature of collective bargaining by delegation. In this arrangement, the agreement is binding on the whole group (irrespective whether the workers belong to a trade union) in the same way as a law.[42] This approach that derives the normativity of the collective agreement from the legal nature of the negotiation itself is an essential one. In this sense, the collective

39 Pélissier et al. 2006: 894.

40 Pélissier et al. 2006: 894.

41 Pélissier et al. 2006: 895. In the German literature Däubler points out that, according to the established practice of the Bundesarbeitsgericht, collective agreement rules should be treated as 'law'. Däubler 2006: 92–193.

42 See in detail Morin, Marie-Laure (1966): Droit imposé et droit négocié: regards à partir du droit des salariés à la négociation collective en France. In Gérard, Philippe – Ost, François – van de Kerchove, Michel (eds.): *Droit négocié, droit imposé?* Bruxelles: Presses de l'Université Saint-Louis, 643–675; Bernier, Jean (1969): L'extension des conventions collectives dans le droit du travail: France, Grande-Bretagne et Canada. The Extension of Collective Agreements: France, Great Britain and Canada. *Relations industrielles – Industrial Relations,* 24(1), 141–166; Machu, Laure (2019): Construction et pratiques de la régulation salariale de branche (1936–1950). In Margairaz, Michel – Pigenet, Michel (eds.): *Le prix du travail.* Paris: Éditions de la Sorbonne, 25–36.

bargaining right of employees is not merely an individual right exercised by several persons. Namely, if the right to negotiate could be interpreted in the latter manner, the norms resulting from this agreement would have to be incorporated directly into the contract of employment. In that case, however, the normativity would lose its real content, since it would only be a question of standardising the contracts of employment of the parties to the agreement. Although that is no small achievement, it would not be in line with the extended scope of the collective agreement and would not say anything about the actual normativity of the collective agreement. The prevailing opinion is that the collective bargaining right of the employees is the right to collective action of the group members. While this does not in itself establish the essence of normativity of the collective agreement, proving that it has an extended scope beyond the contractual, the legal order does associate a public law character with such collective participation.[43]

These varying conclusions on the nature of collective agreements warrant further investigation. Due to the specific legal nature of collective bargaining, in particular its normative character, it is necessary to analyse the nature of the capacity to conclude collective agreements, as well as the scope of collective agreements, in particular their personal scope and binding force. The latter area then leads to new problems such as the relationship between the norm and the collective agreement, the relationship between the collective agreement and the contract of employment, and finally the hierarchy of collective agreements.

[43] Some commentators refer to the preamble to the French Constitution, which entrusts the legislator with the task of establishing a procedural system enabling 'workers' to participate in the drafting of the rules which affect them in the field covered by the principle of participation. MORIN 1966: 645. Furthermore BOLDT, Gerhard et al. (1962): *Les sources du droit du travail.* Luxemburg: Communauté Européenne du Charbon et de l'Acier Haute Autorité, 102; RIVERO, Jean – VEDEL, Georges (1947): Les principes économiques et sociaux de la Constitution. *Droit Social,* (31), 13–35.

The first consequence – Assessment of the capacity to conclude collective agreement

While the capacity to conclude collective agreement, generally speaking, is based on contractuality, it is by no means identical with a simply contractual capacity in private law. The capability for collective agreement can be established in a number of ways, especially from the point of view of the employee. While the natural subject of a collective agreement is the employer, on the employee side, the number of participants in the agreement, or the number of employees employed by the employer enterprise, is usually a requirement for this capacity. For the sake of simplicity, I will first look at the solution where only the trade union has the possibility to conclude a collective agreement. In the future, however, it will be increasingly unavoidable to take into consideration the legal status of non-unionised workers' representatives or the aspirations of self-employed organisations for collective agreements and the legislative responses to these efforts.

Trade unions operate as associations with legal capacity. But at this point, it becomes necessary to depart from the logic of contractual capacity in private law.[44] The definition of the capacity to conclude collective agreement depends primarily on legal policy factors, rather than on legal doctrines. Therefore, it is not possible to envisage a uniform description of it, as a kind of model to follow, since even formulating uniform principles would be difficult. All that can be stated confidently is that each approach tries to achieve the objective of a collective agreement, i.e. to ensure that the social partners, in balance with each other, can reconcile their interests on an ongoing basis. The development of collective bargaining capability depends fundamentally on the traditions of a certain legal system, and on

44 It could be said that sometimes even the legal capacity and the 'tariff capacity' *(Tariffähigkeit)* have become disconnected. A good example of this is the draft *Arbeitstarifgesetz* of the Weimar Republic, which laid down *"Tariffähige Berufsvereine haben in allen Tarifangelegenheiten die Stellung von Rechtsfähigen Vereinen, auch wenn sie sonst nicht rechtsfähig sind"*. See § 29 (1) of the *Sinzheimer Draft*. Furthermore SINZHEIMER, Hugo (1915): *Ein Arbeitstarifgesetz. Die Idee der sozialen Selbstbestimmung im Recht.* Berlin: Duncker & Humblot, 51–86.

the perceptions of the relationship between private autonomy and state intervention. A wide range of approaches have been taken to collective agreement, but the basic indicators of the contractual capability to enter a collective agreement show some similarity in each country. We could also say that the foundations are different, but the end result is convergent. These are usually the following: the number of members, financial background, tradition, and the ability to exert sufficient pressure on the opposing party at the given level of negotiation.[45]

One way that these criteria – for example in Great Britain – can be fulfilled is by imposing an obligation to negotiate with so-called recognised trade unions, where the legal instrument of recognition of trade unions and the certification procedure itself are decisive.[46] German law also does not regulate the legal concept of the capacity to enter into collective agreement, leaving it to the courts, which have developed criteria for *Tariffähigkeit*. The essence of this approach is that an employee's organisation is capable of collective bargaining if it has a so-called social power *(soziale Mächtigkeit)*.[47] Finally, in French labour law, the coalition system was institutionalised

45 Simpson, Bob (2000): Trade Union Recognition and the Law, a New Approach – Parts I and II of Schedule A1 to the Trade Union and Labour Relations (Consolidation) Act 1992. *Industrial Law Journal,* 29(3), 193–222; Wedderburn of Charlton, Kenneth William (2000): Collective Bargaining or Legal Enactment: The 1999 Act and Union Recognition. *Industrial Law Journal,* 29(3), 1–42; Lourie, Julia (2000): Trade Union Recognition. *House of Commons Library Research Paper,* 00/55, 23 May 2000; Le Friant, Martine (2010): Kollektivautonomie als Aufgabe und Herausforderung. *Europäische Zeitschrift für Arbeitsrecht,* 3(1), 23–37; Mazeaud 2008: 181–272; Favennec-Héry – Verkindt 2014: 96–109, 128–138.

46 Pursuant to Article 5 of the TULR(C)A and Article 235 of the ERA, an independent trade union is an organisation that is not under the control or control of an employer or employers' association and is not subject to financial or other interference by the employer or other organisation. The designation 'independent professional organisation' may be used by a professional organisation of employees which holds a certificate to that effect. This certificate is issued on request by the Certification Officer. The verification procedure is set out in detail in the *Guidance for Trade Unions Wishing to Apply for a Certificate of Independence.* See Morris–Archer 2000: 54–57.

47 Hemmen, Wolfgang (1988): *Durchsetzungsfähigkeit als Kriterium für den Gewerkschaftsbegriff im Tarifvertragsrecht.* Münster: Waxmann, 153–157.

for a long time. The general (material) criteria of trade union representativeness *(la représentativité syndicale)* in France are more or less the same as in German labour law, i.e. the existence of social power and support.[48] However, the capacity to enter into collective agreements and the degree of representativeness were somewhat different at each level of the trade unions. Without going into detail, it should be noted that the ranking of these organisations was established in 1936, and the five major trade unions were recognised under the name *représentativité propre.* The real stability of the coalition system – its almost centralised structure – was the recognition of what is termed derived representativeness *(représentativité dérivée).* The essence of this is that all the trade unions which have joined the five large federations of organisations which are considered to be representative by the State were also considered to be representative. This system – especially since the law introduced in 1982 as part of the *Auroux* reform – has caused deep divisions. While trade union affiliates were presumed by law to have the collective bargaining capacity even in the absence of their own representativeness – *praesumptio iuris et de iure* – other, non-affiliated, essentially workplace-level trade unions must prove their representativeness *(représentativité prouvé).*[49] This system has changed fundamentally in 2008.[50] The essence of the change is that the representativeness of trade unions must be recognised on the basis of uniform criteria, both at the employer, sectoral

48 See Code du Travail Article L. 2121-1: "La représentativité des organisations syndicales est déterminée d'après les critères cumulatifs suivants: 1. Le respect des valeurs républicaines; 2. L'indépendance; 3. La transparence financière; 4. Une ancienneté minimale de deux ans dans le champ professionnel et géographique couvrant le niveau de négociation. Cette ancienneté s'apprécie à compter de la date de dépôt légal des statuts; 5. L'audience établie selon les niveaux de négociation conformément aux articles L. 2122-1, L. 2122-5, L. 2122-6 et L. 2122-9; 6. L'influence, prioritairement caractérisée par l'activité et l'expérience; 7. Les effectifs d'adhérents et les cotisations."

49 See in detail Chauchard, Jean-Pierre (1988): *Conventions et accord collectifs de travail. Droit de la negociation collective.* Paris: Dalloz; Morin, Marie-Laure (1994): *Le droit des salariés á la négociation collective: Principe général du droit.* Paris: L.G.D.J., 354–382.

50 Loi no 2008-789 du 20 août 2008 portant rénovation de la démocratie. Titre ii: Le temps de travail (articles 18 à 27).

and cross-sectoral level. Particular importance in this system is attached to trade union participation in the various elected bodies.[51]

It can be concluded, therefore, that the development of the capacity of trade unions for collective agreement is highly teleological, 'goal-oriented'. On the one hand, this is because it is not a general contractual capacity and is used to conclude a rather specific contract. Therefore, this capability, as distinct from the legislative power *(Gesetzgebung)* and 'mere' private contractual capacity *(Vertragsfähigkeit)*, is classified in German law as *Regelungsbefugnis*, which does not, however, give the parties the right to create a legal norm *(Rechtssetzungsbefugnis)*.[52] Furthermore, the representativeness of trade unions is tied to a specific goal, because in order to maintain the stability of labour law and the security of the contractual legal source, the continuity of the balance between the parties must be maintained. This also indicates one of the purposes of the collective agreement.

The second consequence – The scope and binding force of the collective agreement

A further problem that needs to be analysed in relation to the normativity of collective agreement is the scope and binding force of such agreement. Regarding the material scope of the collective agreement, it can be stated that there is no regulatory area specifically reserved only for the collective agreement. In labour law, unlike in the system of classical private law, cogent norms play a greater role in determining the legal effect of a contract, i.e. the content of the legal relationship. This means that the parties cannot deviate from them in either a contract of employment or in a collective agreement. These norms are basically representative of some values, certain interests that are superior to the interests of private parties. Thus, the cogent norms limit the contractual power or autonomy of the parties to a collective agreement. A good example of this is the *ordre public* in French law, which has been

51 See Code du Travail Article L. 2121-1 – L. 2122-13.

52 Zöllner, Wolfgang (1966): *Die Rechtsnatur der Tarifnormen nach deutschem Recht.* Wien: Manz Verlag, 27–38.

a defining requirement in private law since 1803. Pursuant to Section 6 of the Civil Code, private agreements may not be contrary to the rules of public order and morality.[53] The Code du Travail transposed the basic concept of the ordre public into Article L. 132-4 (previous numbering, current number: L. 2251-1). However, according to that article, a collective employment contract or collective wage agreement may include the possibility of an agreement more favourable to the employee, although it must not be contrary to the rules of public interest.[54] Several authors have drawn attention to the fact that the concept and content of the ordre public is extremely diverse, and consequently it is not at all certain that the so-called classical concept of public interest, as it has developed in private law, can be applied in labour law in all circumstances.[55] Moreover, the category of public interest, when applied to different areas, is differentiated in several aspects. In the context of the subject under discussion, absolute public order is essential, since it constitutes the strongest restriction on collective autonomy and encompasses all the written and unwritten rules from which the parties to the collective agreement cannot deviate even in favour of the employee.[56]

53 CC Article 6: "On ne peut déroger, par des conventions particuliere, aux lois qui intéressent l'ordre public, et les bonnes moeurs." See in this context WEILL, Alex et al. (1984): *Les grands arrêts de la jurisprudence civile.* Paris: Dalloz, 248–263.

54 CT Article L. 132-4: "La convention et l'accord collectif de travail peuvent comporter des dispositions plus favorables aux salariés que celles des lois et règlements en vigueur. Ils ne peuvent déroger aux dispositions d'ordre public de ces lois et règlements."

55 MORIN 1994: 601–604; KRIEGER, Gabriel (1991): *Das französische Tarifvertragsrecht.* Heidelberg: Decker & Müller, 240–241; WEILL et al. 1984: 253–254.

56 This was confirmed by the Conseil d'État in a decision of 22 March 1973: "Les dispositions législatives ou réglementaires prises dans le domaine du droit du travail présentent un caractère d'ordre public en tant qu'elles garantissent aux travailleurs des avantages minimaux, lesquels ne peuvent en aucun cas être supprimés ou réduits, mais ne font pas obstacle à ce que ces garanties ou avantages soient accrus ou à ce que des garanties ou avantages non prévus par les dispositions législatives ou réglementaires soient institués par voie conventionnelle. [...] Une convention collective ne saurait légalement déroger ni aux dispositions qui, par leurs termes mêmes, présentent un caractère impératif ni aux

German law has a similar institution, the *zwingendes Gesetzrecht.*[57] It can be observed that there are norms which do not allow deviations to be set out for certain rights or obligations and, if these can be measured quantitatively, they are transformed into one-sided (relative) dispositive norms at most during their concretisation. Thus, the norms that do not allow deviations do not refer to the so-called inner core of the contract, to the terms governing the entity of the contract, but either to the public interest, to the interest of the economy, and to the protection of the weaker party basically 'outside the contract' for social reasons.

This thesis is particularly true for the content of English collective agreements, where private autonomy takes priority in the interpretation of contractuality. This is well reflected in Deakin's view that protection for the individual worker is primarily dealt with in the collective agreements, and that the norms that do not allow deviations are primarily in areas where collective agreements may not apply.[58] These norms have become the conditions of the legal relationship.[59] It is significant, however, that these 'conditions' did not replace one obligatory element with another, but displaced an element that was previously considered obligatory for reasons of guarantee. The contractual core of working conditions, however, is also

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principes fondamentaux énoncés dans la Constitution ou aux règles du droit interne ou, le cas échéant, international, lorsque ces principes ou règles débordent le domaine du droit du travail ou intéressent des avantages ou garanties échappant, par leur nature, aux rapports conventionnels."

57 Däubler 2006: 1036–1041.

58 These areas also relate to fundamental protection, such as the protection of women and minors, several aspects of health and safety, and pay mechanisms for certain groups of employees in need of special protection. From this point of view, the publication of the rules on the requirement of equal treatment in the 1970s is definitely considered a milestone. These include the Equal Pay Act (1970), the Sex Discrimination Act (1975), the Race Relations Act (1976), and later, the Employment Rights Act (1996) and the National Minimum Wage Act (1998). Deakin, Simon – Morris, Gillian S. (2005): *Labour Law.* Oxford – Portland, Oregon: Hart Publishing, 67.

59 Deakin–Morris 2005: 68.

not affected by these norms.[60] To summarise, the content of a collective agreement can be quite broad and is limited by legal norms to a notable extent only in areas outside the scope of the agreement.[61]

One more segment of the content of the collective agreement deserves attention, namely the cogency and dispositivity of the normative part. This analysis is relevant in relation to collective agreements and contract of employment. The starting point for approaching this problem is the unity of and correlative relationship between collective and individual autonomy. This seems simple at first sight, but this relationship has many ramifications. If the normative part of the collective agreement may contain cogent rules, individual private autonomy loses its meaning in the area covered by them. Such an approach corresponds to the problems of *Kollektivgewalt und Individualwille* analysed by Richardi, which can be solved precisely by linking the freedom of coalition with individual autonomy.[62] In other words, these two levels of private autonomy are or should be on the same side. The first is a form of realisation of individual autonomy, while the latter is another component of development of personality based on the former and thus also expression of human dignity. Consequently, individual and collective autonomy cannot be set against each other at the level of the collision of fundamental rights. Therefore, the content of the collective agreement cannot exclude the enforcement of individual autonomy, so

60 In general, it can be said that the factors determining English labour law have undergone a fundamental change under the influence of Community law. A good example of this is the Statutory Instrument 2002 No. 2034 on "The Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations 2002". However, it should be noted that the legal classification of cogent norms is not clear even today. Thus, as far as German law is concerned, Gamillscheg classifies the non-derogable norms as "das öffentlich-rechtliche Arbeitsschutzgesetz". GAMILLSCHEG, Franz (2000): *Arbeitsrecht I.* München: Verlag C. H. Beck, 46–37.

61 The broad scope of the content of the collective agreement is clearly shown in Section 1(1) of the German Tarifvertragsgesetz. Accordingly to this: "Der Tarifvertrag regelt die Rechte und Pflichten der Tarifvertragsparteien und enthält Rechtsnormen, die den Inhalt, den Abschluß und die Beendigung von Arbeitsverhältnissen sowie betriebliche und betriebsverfassungsrechtliche Fragen ordnen können."

62 RICHARDI 1968.

it cannot contain a rule that does not allow derogation, and it must leave room for agreement in the contract of employment on conditions more favourable or even more less favourable to the employee.

The particularity of the content of the collective agreement can be justified by the priority of individual contractual autonomy, but this argument is irrelevant in the hierarchy of collective agreements. This issue has sparked a debate in French labour law. The question may arise as to whether a higher-level collective agreement may contain a provision that prohibits deviation from its norms for a lower-level collective agreement. Morin approaches the problem in terms of the contrast between autonomy and integration.[63] Namely, the relationship between collective agreements can be interpreted in two ways. One is the classical hierarchical view, according to which a norm with a broader scope takes priority over a norm with a narrower scope, unless the latter contains a more favourable element of agreement. In contrast, the horizontal approach assumes that all levels of negotiations are autonomous, and parties must be given the opportunity to formulate the content of each normative agreement. Morin points out that these two concepts are not necessarily opposed to each other, and that they can even coincide when dealing with a particular economic, social and employment situation.[64] The cogency of the normative content and the possibility of deviation are treated differently in German law. Without going into exhaustive detail, it should be emphasised that, according to the prevailing view in German law, the possibility of deviating between different collective agreements does not apply to norms of the same nature.[65] The difference between the two legal systems stems fundamentally from the previously different structures of collective bargaining systems, in particular from the way in which the hierarchical relationship between collective agreements was assessed.

One of the most sensitive issues of collective autonomy is the personal scope of the collective agreement and, in this context, the binding force of the collective agreement. As mentioned above, in general, the employer is

[63] Morin 1994: 651.

[64] Morin 1994: 652.

[65] Däubler 2006: 1131.

the natural subject of a collective agreement. The employer is also a subject if it enters an employer organisation that has a collective agreement, and in some cases the collective agreement is binding the employer even if its position within that organisation changes, it changes its activities or it leaves the organisation.[66] German law takes a slightly different approach to most other legal systems. In the German model, it is necessary to examine the so-called *Tarifgebundenheit* (hereinafter: tariff-binding). The basis of tariff-binding is membership *(Mitgliedschaft)*. According to Däubler, in order for a collective agreement to be binding, the employment relationship must first of all fall within the territorial, material and temporal scope of the collective agreement. In addition, it is necessary for the employees to belong to an association covered by a collective agreement.[67] Employees gain such membership by joining a union which has concluded a collective agreement. This, in turn, raises the issue of the tariff-binding of non-members. Such an idea requires a complex and thoughtful legal solution. Although Section 4 of the Tarifvertragsgesetz (TVG) provides for the direct applicability of the normative part only to parties who have concluded a collective agreement, many employers also apply these norms to non-organised employees *(Außenseiterklauseln)*. This behaviour causes a number of tensions, and according to the trade unions, this results in workers not being motivated to join the union. However, many collective agreements contain so-called 'opt-out clauses' *(Ausschlussklauseln)*, whereby certain benefits are only granted to organised employees. This puts into question the validity of clauses of this type, specifically in the context of the violation of the negative freedom of association.[68] Nevertheless, it can be said that such clauses, as well as similar clauses *(Differenzklauseln)* are not in themselves unconstitutional

66 For example Code du Travail L. 2261-14. In this context, see in general the requirements of Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses.

67 Däubler 2006: 894.

68 BAG, Urteil vom 9.05.2007, 4 AZR 275/06 § 3 TVG; Art. 9 Abs. 3 GG.

or invalid.[69] In conclusion, the *Außenseiterklauseln* do not automatically and directly grant collective bargaining benefits upon outsiders, but it is to be regarded as a simple contractual obligation between the parties to a collective agreement to secure, for the benefit of third parties, certain benefits contained in the collective agreement, which may be invoked by outsiders before the employers are bound by the collective agreement.

English law takes a different approach from the one described above. In the English system, there is not only one type of collective agreement, but three, and this formula in itself complicates the assessment of the binding force of the agreement.[70] There is a type of agreement that needs to have a specific clause in order to be binding.[71] For another group of agreements, binding force is presumed even in the absence of a clause excluding it. Finally, a third type of collective agreement does not have a legal definition, but can be considered a cooperative agreement to involve trade unions in decisions concerning the future development of the enterprise.[72] As far as employees are concerned, the binding force of the collective agreement is not based fundamentally on the differentiation between organised and unorganised employees.

Intermediate conclusions

It is evident from the discussion above that the structure and content of the collective agreement and determining its place in the list of legal sources of labour law is extremely complex and varied, and as a result it is quite difficult to define the homogeneous function of the institution. The original function of the collective agreement was to break the employer's

69 BAG, Urteil vom 18.03.2009, 4 AZR 64/08. See furthermore *Tarifvertragliche Differenzierungsklauseln. Ausgewählte Rechtsprechung und Kritik.* Berlin: Deutscher Bundestag, Wissenschaftliche Dienste, 2023 and BAG, Beschluss vom 29.11.1967, GS 1/67.

70 Morris–Archer 2000: 287–291; Carby-Hall 1993: 3–24.

71 See the so-called TINALEA clause: this is not a legally enforceable agreement.

72 Morris–Archer 2000: 289.

'contractual supremacy' arising from individual contractual freedom. This was accomplished in two ways. One is to recognise the possibility of negotiation itself and to make it an obligation for employers; the other is to incorporate the content of the agreement into the contract of employment. At this level, the purpose of the collective agreement was, originally, clearly the protection of employee interests, as well as the transformation of these interests into rights and the creation of duties towards them. This function of the collective agreement has remained the same to this day.

The collective agreement – by its very nature – did not remain at the level of the employer's organisation, but the standardisation of content extended to the level of associations. This started a fluctuating process, with the centralisation and decentralisation of collective agreements occurring at different times. However, the higher level of collective agreements has also transformed their function. Collective agreements concluded at the level of employers' and employees' associations can have an impact on the economy as a whole if they determine the framework of the wage level of a sector and thus affect the social situation of those covered. In my opinion, this is the essence of the normativity of a collective agreement – in addition to the expansion of its scope and its transforming power, noted previously.

THE PURPOSE OF THE LEGAL NORMS IN LABOUR LAW

The legal norm can only be referred to in the singular if it serves a specific, unified purpose within labour law. Indeed, the rules that apply in labour law can be categorised according to several criteria. The first is the private versus public law approach to labour law, or to put it another way, the approach which follows the dogmatics or politics of labour law. Analysing the dogmatics of labour law involves further complications, however. In some countries the legal norm dominates, perhaps for historical reasons, over the contractual sources of labour law.[73] In others the role of statutory norms is limited, despite the fact that recently the passage of labour law legislation has accelerated even where there was little sign of such an effort before.[74] In contrast, in the public policy area of labour law, the legal norm plays a decisive, almost exclusive, role in so far as it lays down the cornerstones of employment policy by means of cogent provisions. The comparative analysis focuses mainly on the dogmatics of labour law and the relationship between the legal norm, but the analysis of Hungarian labour law (in the Second Part of this study), the politics of labour law and the role of the legal norm are also discussed.

Regarding the dogmatic part of labour law, the role of legal norms needs to be examined from two perspectives. One is the structure of the regulation itself, i.e. how codification or the lack of it affects the impact of legal norms on the employment relationship. The second is the classification of the content of each norm, also in terms of its impact on the employment relationship.

What does codification or the lack thereof mean in terms of the development and status of labour law?

As far as the structure of the regulation is concerned, there is no uniform picture in the Western European continental countries, as the codification of labour contract law *(Arbeitsvertragsrecht)* has not taken place in several countries, and a uniform, codified collective labour law is not to be found

73 See Miranda Boto, José María (2020): Spain: A Lasting Struggle about the Boundaries of Statutory Law and Collective Bargaining. In Gyulavári, Tamás – Menegatti, Emanuele (eds.): *The Sources of Labour Law.* Alphen aan den Rijn: Kluwer Law International, 319.

74 A good example of this is English labour law where, after decades of collective laissez-faire, there has been no attempt to intervene in the market, basically to stimulate the economy. Doherty, Michael – Mangan, David (2020): The Informing Ethos behind the Sources of Labour Law. In Gyulavári, Tamás – Menegatti, Emanuele (eds.): *The Sources of Labour Law.* Alphen aan den Rijn: Kluwer Law International, 369–388; Davies, Paul – Freedland, Mark (1983): *Kahn-Freund's Labour and the Law*. London: Stevens & Sons, 526–639.

everywhere.[75] The reasons for the predominantly uncodified nature of labour contract law can be traced back to the origin of labour law, described above. I characterised this area of law as having been created initially almost without any specific regulations relating to it. This situation is well reflected in the compilation content of the aforementioned *Code du Travail*. [76] In German law – despite the authorisation of the Bundestag – the codification of labour law and even the creation of a labour contract law did not succeed.[77]

In this comparison, attention is certainly drawn to Spanish labour law, where the legal norm and legislation have a significant weight.[78] This is largely due to the historical reasons already mentioned, since centralised regulation was dominant during the Francoist period, a situation – at least in terms of regulation – has not changed significantly ever since. The most important Spanish labour law is the *Estatuto de los Trabajadores* (the Workers' Statute, hereinafter: 'the ET'), which was originally adopted in 1980.[79] The ET covers the basic legal institutions of both individual (contract of

75 The Austrian *Arbeitsverfassungsgesetz* can perhaps be considered a formal exception to the latter. *Bundesgesetz vom 14. Dezember 1973 betreffend die Arbeitsverfassung (Arbeitsverfassungsgesetz – ArbVG)*. For the unified regulation of labour law see the analysis of the Code du Travail and the Estatuto de los Trabajadores below.

76 PÉLISSIER et al. 2006: 81.

77 However, there were several promising attempts, and drafts were also created, which for various reasons did not make it to the Bundestag. The first draft was completed in 1969 (Herschel's draft): *Entwurf eines Arbeitsgesetzbuches – Allgemeines Arbeitsvertragsgesetz*. Among the unofficial drafts, the document made public on the occasion of the *Hannover Juristentag* stands out. See *Verhandlungen des neunundfünfzigsten Deutschen Juristentages. Hannover.* München: Verlag C. H. Beck. The third substantive draft was born in 2006. See HENSSLER, Martin – PREIS, Ulrich (2006): *Diskussionsentwurf eines Arbeitsvertragsgesetzes (ArbVG)*. Gütersloch: Bertelsmann Stiftung; see also DÜWELL, Franz Josef et al. eds. (2008): *Beschäftigungsfördernd? Sozialverträglich? Zukunftsfähig? Ein Entwurf für ein Arbeitsvertragsgesetz.* Erfurt: Friedrich–Ebert–Stiftung.

78 See about this in GIRÓN, Jesús Martínez et al. (2006): *Derecho del Trabajo.* Netbiblo, 19–23.

79 Text in force: "Real Decreto Legislativo 2/2015, de 23 de octubre (empleo y seguridad social), por el que se aprueba el texto refundido de la ley del Estatuto de los Trabajadores" («BOE» núm. 255, de 24 de octubre de 2015).

employment, employment relationship) and collective labour law.[80] From this point of view, as the most complete source of Spanish labour law, it can be regarded as a codified body of norms, despite the fact that many other norms also guide Spanish labour law.

The role of legal norms in Italian labour law is quite specific, since the core of the legislation is contained in the *Codice Civile.*[81] Senatori's assessment of the role and influence of the Codice Civile is remarkable. According to him, this code "had once been the pivotal element of the legal system of labour law", with regard to both its substantive provisions and those that shape the hierarchy between the different sources. However, it now has a complementary role, mainly because of the many specific rules that have been created over the last five decades or so.[82] This assessment is unquestionably correct in so far as the labour and employment legislation which has since come into force has covered almost all the areas governed by the Codice Civile, whereas the Code has not been substantially amended.[83] According to the scope of the legal norms, they are rather stratified, multi-level, but it is essential that the state has almost exclusive authority to settle labour and social affairs. With regard to the content of the special norms, it must

80 See for details CRUZ VILLALON, Jésus et al. (2016): *Comentarios al Estatuto de los Trabajadores.* Valladolid: Lex Nova.

81 See SENATORI, Iacopo (2020): The Precarious Balance among Hierarchy, Coordination and Competition in the Italian System of Labour Law Sources. In GYULAVÁRI, Tamás – MENEGATTI, Emanuele (eds.): *The Sources of Labour Law.* Alphen aan den Rijn: Kluwer Law International, 261–279.

82 SENATORI 2020: 262.

83 See these rules, among others, in CARINCI, Franco (2007): Diritto privato e diritto del lavoro: uno sguardo dal ponte. *Biblioteca '20 Maggio',* (1), 278–359; GHERA, Edoardo et al. (2023): *Diritto del lavoro.* Torino: G. Giappichelli, 1–27. Some of these rules are: la legge 15 luglio 1966, n. 604 – on the principle of causality of termination; la legge 20 maggio 1970, n. 300 – Statuto dei lavoratori – on the protection of employee rights; il D.Lgs. 6 settembre 2001 n. 368 – on the fixed-term contract of employment; D.Lgs. 10 settembre 2003 n. 276 – on the temporary agency work; la legge 28 giugno 2012 n. 92 – about the casual work; Legge 10 dicembre 2014 – the so-called Jobs Act; D.Lgs. 4 marzo 2015 n. 23 – on reintegration in the event of unlawful termination; D.Lgs. 15 giugno 2015 n. 81. – on the review and termination of contracts for the performance of other types of work (project work), etc.

be stressed that the intention was to regulate the certain flexible forms of employment outside of the provisions of the Codice Civile. In addition to this subject area, many norms with a social content are also included in these rules.

In the common law system, codified labour law does not exist, at least in the sense that it can be interpreted in continental European legal terms.[84] However, legislation plays a significant role in English labour law today, but its function is complementary, because collective agreements play a primary role in protecting individual employees.[85] Nevertheless, in areas where the protection of workers needs to be an absolute priority (health and safety, the status of women and children, wage-fixing machinery for particularly vulnerable employees), legislation is decisive. This is also an indication of the main substantive characteristic of the other norms, namely their predominantly complementary-dispersive nature. But, this formula is far from simple. The accession of Great Britain to the European Community opened up new dimensions for legislation. An example of this is the *Fairness at Work Recommendation* issued by the Ministry of Trade and Industry in May 1998.[86] The document sets out the most important individual and collective rights that employers and social partners must take into account in the context of employment and collective bargaining. During the subsequent period in the U.K., the most important laws of employment policy and labour law were created in the spirit of this recommendation.

This was followed by some rather turbulent years in English politics, which had a profound effect on the state of employment and labour law. The Labour Government that replaced the Thatcher Government did not make any change in her conservative employment policy. Today's employment policy was launched in 2021 by the Green Paper, the New Deal for Working

[84] The sources of labour law are classified differently, according to the approach taken, into either *formal* and *voluntary*, or *statutory* and *voluntary* sources. DEAKIN–MORRIS 2005: 52–99.

[85] DEAKIN–MORRIS 2005: 56.

[86] Ministry of Trade and Industry: Fairness at Work, White Paper Cm 3968. See a detailed analysis of this in LOURIE, Julia (1998): Fairness at Work Cm 3968. *House of Commons Library Research Paper,* 98/99, 17 November 1998.

People. Although burdened with certain compromises, the Employment Rights Act 2025 was the result of this policy.[87] The purpose of the Act is to create new industrial relations, make work attractive and thus promote productivity and economic growth. To this end, several previous acts were repealed or significantly amended.

As far as the function of the legal norm in labour law in the former socialist countries is concerned, the assessment of the situation cannot be separated from the period before the change of system and from some of its legacy. Labour law was codified in full everywhere, as if to demonstrate the separation of labour law from civil law, starting from the fact that labour force is not a commodity and therefore not part of the market. The idea of codification and more or less its structure has basically been preserved in the labour law of these countries. Of course, there are exceptions, where separate laws regulate individual and collective labour law.[88] Polish labour law is being regulated in a specific way. The law, which was established in 1974, has undergone a number of amendments, and after the change of regime there was every chance of establishing a strong system of collective contractual source system. Efforts were made to establish this, for example, two draft laws were prepared in 2002 and 2016: one for individual labour law and the

[87] About this Act see the Employment Rights Act 2025. Economic Analysis, January 2026, published by the U.K. Government, Department for Business and Trade.

[88] See the Slovenian labour law regulatory system. The Employment Relationship Act regulates the relations of individual labour law (Official Gazette of the Republic of Slovenia, No. 21/201). In addition, the following laws exist: Employee Participation in Management Act (Official Gazette of the Republic of Slovenia, No. 42/0), Collective Agreements Act (Official Gazette of the Republic of Slovenia, No. 43/06). Labour law also includes laws belonging to the public law system, such as, for example the Minimum Wage Act (Official Gazette of the Republic of Slovenia, No. 43/06) and the Health and Safety at Work Act (Official Gazette of the Republic of Slovenia, No. 43/2011, ZVZD-1). Senčur Peček, Darja (2017): The Scope of Labour Law Protection in Slovenia or Who Are Employers Obliged to Grant the Labour Law Protection to. *Hungarian Labour Law E-Journal,* (2), 16–29.

other for collective labour law.[89] However, it shared the fate of the similar Hungarian idea, failing largely due to the resistance of the trade unions. But, the Polish labour code is still 'incomplete', since of the elements of collective labour law only the collective agreement is regulated, while trade unions,[90] employers' organisations[91] and the settlement of collective disputes[92] are regulated separately by law.[93] Apart from the two countries mentioned, the other former socialist countries are also characterised by a predominance of legal norms, mainly because of detailed and comprehensive legislation. Consequently, the role of collective agreements is limited.[94]

In my opinion, there are several reasons for this phenomenon in these countries. The new labour law was born in a process of drastic economic change, which was accompanied by a significant economic downturn. Therefore, a certain degree of state intervention could even be justified. Among other reasons, the network of collective agreements did not develop after the change, and the resulting vacuum had to be filled with some kind

[89] See Pisarczyk, Łukasz (2020): Collective Bargaining in the Shadow of Legislation: Labour Law Sources in Poland. In Gyulavári, Tamás – Menegatti, Emanuele (eds.): *The Sources of Labour Law.* Alphen aan den Rijn: Kluwer Law International, 284; Mitrus, Leszek (2013): Relationship between Statutory Law, Collective Agreement and Employment Contract: Case of Poland. In Kiss, György (ed.): *Recent Developments in Labour Law.* Budapest: Akadémiai Kiadó, 63–76.

[90] Journal of Laws 2001, No. 79.

[91] Journal of Laws 1991, No. 55.

[92] Journal of Laws 1991, No. 55.

[93] Mitrus 2013: 67–68.

[94] Pisarczyk 2020: 281–298. Franca talks about the marginalisation of contractual sources of law. See Franca, Valentina (2024): *Collective Bargaining Development in Slovenia in the Context of the Adequate Minimum Wage Directive (Art. 4).* Warsaw: Institute of Public Affairs Social Policy Programme. See a similar assessment in Sredkova, Krassimira (2023): EU Law and Problems of the Codification of the Bulgarian Labour Legislation. *Z Problematyki Prawa Pracy i Polityki Socjalnej,* 21(4), 1–19. For criticism of the new chapter on social dialogue in the Romanian Labour Code see Vallasek, Magdolna (2020): A kollektív munkaszerződés szabályozásának problémái Romániában [Issues Concerning the Regulation of Collective Agreements in Romania]. *Erdélyi Jogélet,* 3(4), 217–227; Dimitriu, Raluca (2011): Romanian Labour Legislation in a Time of Change. *European Labour Law Journal,* 2(2), 173–181.

of regulation. It can be observed that, in the absence of sufficient tradition, it was very difficult to develop a culture of negotiation, and where tripartite organisations were formed, it was mostly at the instigation of the state. We can also say that the fate of collective contractual sources depends on the intentions of the government of the day. Thus, one cannot be surprised by the preponderance of the legal norm.

Nevertheless, there is no direct correlation between the structure of the regulation and the impact of legal norms. In the former socialist countries, the trade unions insisted on codified legislation because they believed that it would give more attention to the protection of employees. However, it is also observed that some specific laws are more effective in regulating a given area. The impact of legal norms depends much more on their concrete content. It is therefore from this perspective that legal norms should be classified.

Difficulties in classifying labour law norms according to their content

The subject matter of legal norms can be grouped according to whether they relate to the protection of the employee's legal status or limit the scope of the parties' agreement. It must be emphasised that distinguishing between these is quite difficult, since from the point of view of absolute contractual freedom, any external influence represents a limitation of the parties' free agreement. In modern labour law, however, it is perhaps now possible to distinguish between norms that serve social, existential protection interests and norms that aim to create fair working conditions – fair contract terms.

The norms belonging to the former category, i.e. those protecting the legal status of employees, can also be divided into two groups. One group comprises the set of cogent public law norms which mainly regulate occupational safety and health and safety performance conditions. Another group provides the essence of labour law, which is the set of legal status protection rules. The protection of the employee's legal status *(Bestandschutz)* ensures the possibility of continuity in the employment relationship.[95] Typically, this includes rules on protection against termination (dismissal), which differ significantly from the logic of termination of private law contracts.[96] I use this example because the laws on protection against dismissal also limit the contractual autonomy of the parties – primarily the employer's – but its importance nowadays is much more than that. It can also be said that it has become an autonomous instrument for the protection of the employee's legal status. It should be added that the protection of the employee's legal status is also governed by a number of rules which would be difficult to apply in the traditional area of the private law contract.[97] A typical example of this is one of the key institutions of labour law, the requirement of equal treatment. Since this issue will be dealt with in more detail in the Second Part of this study in the context of Hungarian labour law, I shall confine myself here to a few remarks. The requirement of equal treatment, in addition to being an important means of protecting the legal status of employees, also represents perhaps the most important limitation on contractual freedom. This requirement also deducts the restriction of freedom of choosing a contractual partner. Therefore, it is worth drawing attention here to the dangers of conflating the requirement of equal treatment with the prohibition of discrimination.[98]

95 For the protection of the legal status of employee, see in particular in German labour law Kloeper, Michael (1970): *Grundrechte als Entstehenssicherung und Bestandsschutz.* München: Verlag C. H. Beck; Coen, Martin (1979): *Das Recht auf Arbeit und der Bestandsschutz des gekündigten Arbeitsverhältnisses.* Köln: Bund Verlag; Oetker, Hartmut (1997): Arbeitsrechtlicher Bestandsschutz und Grundrechtsordnung. *Recht der Arbeit,* 50(1), 9–21; Rügemer, Philipp (2009): *Allgemeiner Bestandsschutz und Arbeitsmarkt.* Hamburg: Verlag Kovaç.

96 See about this in Waas, Bernd ed. (2023): *Restatement of Labour Law in Europe. Volume III. Dismissal Protection. A Handbook.* München: Verlag C. H. Beck – Oxford: Hart Publishing – Baden-Baden: Nomos.

97 Von Scholten, Ingo (2004): *Diskriminierungsschutz im Privatrecht?* Köln: Carl Heymanns Verlag.

98 See this in detail in Part Two, Chapter V of this book on pages 416–432.

Perhaps the most sensitive area of labour law is the group of legal norms that intervene in some way with the formulation of the content of a contract of employment or employment relationship. These norms may be dispositive, allow for deviations, and primarily apply to the subjects of collective agreements. In many cases, these norms encourage the parties to shape their legal relationship in a certain direction.[99] However, labour law may also contain mandatory/cogent provisions that define certain elements of a contract of employment or employment relationship in a manner that does not allow for any deviation. As I have said, these standards are difficult to classify and are often categorised on the basis of legal policy rather than dogmatic considerations. Furthermore, some of these norms clearly protect the legal status of employees, while others restrict the contractual freedom of the parties for other economic or social considerations. A good example of the former is the regulation of various termination or dismissal prohibitions for certain groups of employees. The latter refers to the determination of supplementary remunerations and its amount in accordance with cogent norms – as is found in the Hungarian labour law.

Intermediate conclusions

What, then, is the substance of the legal norm and state intervention in labour law? It would be difficult to give a precise answer to this question without taking into account the complexity of the legal nature of labour law. Namely, on the one hand, labour law is part of the private law system, the basic institution of which is the contract. On the other hand, however, the imbalance of the parties to the employment relationship – beyond the fact that the basic framework of the agreements must be drawn up along the lines of a normative regulatory principle – requires the protective intervention of the legislator. But, in my opinion, this does not constitute a justifiable reason for restricting the contractual autonomy of the parties to such an extent

99 See also Doherty–Mangan 2020: 369–379; Davies–Freedland 1983: 526–639.

that it would render the contract meaningless, whether at the individual or collective level. If this happens, labour law as a whole will become an instrument of public law, of a higher authority which, in addition to eliminating private autonomy by unduly restricting labour market relations, may render the economy as a whole static and uncompetitive. Nevertheless, it must also be taken into account that the legal norm must reflect the public interest, which is clearly superior to private interests. The legal norm must therefore create and maintain an extremely sensitive balance. And at this point we return again to the importance of the legislator's perception, on which, among other things, the development of the proportions within labour law and the efficiency of employment depends.

BACK TO THE BASIC QUESTION: WHAT IS THE PURPOSE OF LABOUR LAW? – SUMMARY BASED ON A SYNTHESIS OF THE FUNCTION OF THE DIFFERENT SOURCES AND COHESION OF LABOUR LAW

At the beginning of this chapter, I referred to the pitfalls of the one-sided approach to labour law bearing in mind the fact that, in general, the purpose of 'labour law' cannot be formulated at such an abstract level that it becomes uninterpretable and inapplicable in practice. While maintaining this position, I would nevertheless argue that the purpose of labour law cannot be defined in isolation, or only by highlighting and overemphasising certain characteristics, periods and circumstances. This is not to say that in certain cases some special circumstances did not determine the direction and function of labour law in a single direction. Nevertheless, I believe that it would be a serious mistake to highlight one of the many functions of labour law and make it appear as if it were the sole purpose of labour law.

The hypothesis that labour law is part of a private law system requires further explanation. Thus, above all, it should be emphasised that the impact of labour law on the economy cannot be called into question, just as the social function of civil law cannot be neglected either.[100] However, the economic and social functions of these two areas of law differ significantly. In this context, I refer again to Rieble's statement on the disproportionate risk-taking of legal transactions and the contractual control of subordination in employment law, which has been analysed earlier. He asserted that "managing the unequal distribution of risks in contracts is not the primary task of labour law: this should be solved by private law. The contractual control *(Vertragskontrolle)* known in labour law does not mean anything special in comparison. However, the management of ('market-related') economic dependence, on the other hand, is the task of commercial law *(Wirtschaftsrecht)*."[101] In addition to discussing the dogmatic identity of contractual control, Rieble refers to the different substantive characteristics of this institution that are manifested in different branches of law. The study of Preis explains that labour law contract control goes beyond the content of general civil law contract control in that it has to respond to contractual compliance with the specific requirements of protection from labour law.[102]

What are these 'additional' protection requirements and what do they derive from? Their starting point is the relationship between the subjects of civil law relationships and the employment relationship, and the difference in legal status between them. In civil law, it is generally accepted that the legislature regulates the parties' fundamental property and personal relationships on the basis of the principles of independence and equality. In this regard, I refer again to Flume's position on the equalisation of inequalities

[100] See especially from German private law MENGER, Anton (1890): *Das bürgerliche Recht und die besitzlosen Volksklassen.* Tübingen: Laupp; GIERKE, Otto (1889): *Die soziale Aufgabe des Privatrechts.* Berlin: Verlag von Julius Springer; SCHMID, Walter (1989): *Zur sozialen Wirklichkeit des Vertrages.* Berlin: Duncker & Humblot; REPGEN, Tilman (2001): *Die soziale Aufgabe des Privatrechts. Eine Grundfrage in Wissenschaft und Kodifikation am Ende des 19. Jahrhunderts.* Tübingen: Mohr Siebeck; WENDLAND, Matthias (2019): *Vertragsfreiheit und Vertragsgerechtigkeit.* Tübingen: Mohr Siebeck. In the French literature BRUNEAU, Laurent (2005): *Contribution á l'étude des fondements de la protection du contractant.* Toulouse: Université des Sciences Sociales de Toulouse.

[101] RIEBLE 1998: 340–341.

[102] PREIS, Ulrich (1993): *Grundfragen der Vertragsgestaltung im Arbeitsrecht.* Neuwied: Luchterhand, 216.

in private law transactions by the market.[103] In labour law, however, it is doubtful whether it would be sufficient to ensure the general conditions of competition on the part of the weaker party in order to enforce private autonomy based on the interpretation of the traditional non-interference function of economic fundamental rights, i.e. through the general market mechanism. Therefore, it is obvious that one of the pillars of the purpose of labour law is to restore the contractual balance that has been upset in the employment relationship.

The legislator also contributes to such 'automatic' equalisation by market conditions, because civil law also has the means to protect the weaker party in this relationship.[104] In the Hungarian legal literature, Vékás perceives the process by which social policy considerations were gradually validated in the private law system. It is important that these institutions, while restricting the contractual freedom of the parties in certain areas, aim precisely to save one of the cornerstones of private autonomy, the freedom of contract.[105]

It must be acknowledged that labour law operates within economic processes and market conditions, even though, in order to protect employees it must have a protection system that ensures the maintenance of the legal status of employees, yet it cannot be separated from market conditions. This also means that labour law must take into account not only the protection of the legal status of employees, but also the economic interests of employers within the employment relationship. Accordingly, the purpose of labour law is to maintain the substantive balance of a contractual employment relationship by establishing that its sources of law are in the proper proportions. In other words, it must create a balance between economic and social fundamental rights in such a way that the right of self-determination of both parties is guaranteed.

103 Flume 1979: 10.

104 See the legal provisions on consumer protection, tenant protection, etc. It can be stated that the emergence of general contractual terms and conditions is also a certain way of state intervention.

105 Vékás, Lajos (2006): Egyenlő bánásmód polgári jogi viszonyokban? [Equal Treatment in Civil Law Relations?] *Jogtudományi Közlöny,* 61(10), 355–364.

The core element of this argument is the balance of legal sources, but we can also say its cohesion or correlative relationship. This is necessary because the legal nature and purposes of elements of sources of labour law are different. The purpose of the contract of employment – like any other contract – is to ensure the performance specified in the agreement. However, the performance of the service provider has a peculiarity, namely, it must perform in accordance with the other's right to concretisation. Nevertheless, this subordination of performance should not result in 'contractual vulnerability'. In this context, it seems at first sight to be clear that the purpose of the collective agreement is to eliminate or at least to reduce the inequalities existing between the parties at the individual level. It is beyond dispute that this was the original purpose of the collective agreement, which remains to this day. In other words, this is the so-called 'pseudo-regulatory function' of the collective agreement. However, since collective agreements are also concluded at a level higher than that of the employer, this type of agreement has already exceeded its original purpose. Thus, collective agreement can influence the state's economic policy, employment policy, wage policy, and even the legislative protocol in certain areas (see the system of social dialogue). Obviously, all of these would descend into 'legal-anarchy' or be futile experiments without the appearance of state authority. Thus, the legal norm must ensure a balance between economic requirements and social needs – under the given circumstances. Whatever the circumstances, the state must act according to the requirements of the rule of law. This means, among other things, that – since labour law is part of private autonomy[106] – it must also respect the role of other sources of labour law.[107]

106 RICHARDI 1973; RICHARDI 1988: 221–255.

107 In this study, I will not deal with the relationship between the Québec clause and labour law. However, I cannot ignore the reference to this whenever Hungarian labour law is also discussed. See about this topic in GLENN, H. Patrick (2005): La Disposition préliminaire du *Code civil du Québec,* le droit commun et les principes généraux du droit. *Les Cahiers de droit,* 46(1–2), 339–352.

Chapter III

CHALLENGES AND RESPONSES – THE CURRENT STATE OF LABOUR LAW AND POSSIBLE TRENDS

Subjective assessment

CHANGES AND IMPACTS OF THE ECONOMIC AND SOCIAL ENVIRONMENT OF LABOUR LAW

As I indicated in the introduction to this study, from time to time, the idea appears in the literature that labour law has come to a crossroads, is in crisis, and the like. I am of the firm opinion that labour law is not currently in crisis, but rather undergoing change, as it always has throughout its history. So the emergence of labour law was thus paved by a revolution that replaced the previous economic and social system. This was the first industrial revolution, and this process was completed during the second industrial revolution. Even in these relatively short periods of time, it underwent significant transformations, from contractual liberalism to the legal structure that still characterises traditional labour law today, namely the correlative unity of individual and collective labour law.

Labour law – like any other field of law in general – involves a contrast between the static and the dynamic, i.e. it is affected by the temporary tensions arising from the inherent inertia of law. An example of this is the great economic, conceptual and even ideological change in attitudes that has begun in recent decades and continues today, characterised by a shift from the idea of the welfare state towards the so-called workfare state.[1] This change in perception, apart from influencing the assessment of labour market processes and impacts, has changed the fundamental public law rules of labour policy, which also affects labour relations, alliances and agreements. Peck sensitively compares the institutional divergences resulting from the differences in approach between welfarism and workfarism. It is obvious that a fundamental element of workfarism is the conscious incorporation of *self-responsibility, self-care, self-help* into the labour market and thus into the working society. It may seem that self-care has to be imposed on society from the outside, especially in opposition to the welfare economy approach. This statement is absolutely true in so far as the idea of the welfare state is often identified with the concept and institutional framework of the social state. Here is an example of 'imposition'. One of the pillars of the welfare state is solidarity, which was already formulated as a requirement after the Second World War. However, the finding of Neumann's programmatic study is apt, according to which solidarity and identity of interests do not exist in society by themselves, and – following Rousseau's theory – must be imposed.[2]

The changed circumstances of our times are particularly sensitive to fundamental rights and the possibilities for exercising them. A fundamental condition for the exercise of subjective rights is that the person concerned is in a suitable legal position. In this context, the current situation is well characterised by Isensee's assessment written in 1980: "The welfare state

1 See among others Keleher, Patrick J. Jr. (1990): Workfare: Servitude or Success Formula? *Employee Responsibilities and Rights Journal,* 3(2), 91–110; Standing, Guy (1990): The Road to Workfare: Alternative to Welfare or Threat to Occupation? *International Labour Review,* 129(6), 677–691; Peck, Jamie (1999): From Welfare to Workfare: Costs, Consequences and Contradictions. *Industrial Law Journal (JUTA),* 20(4), 808–844; McDonald, Catherine – Marston, Greg (2005): Workfare as Welfare: Governing Unemployment in the Advanced Liberal State. *Critical Social Policy,* 25(3), 374–401; Paz-Fuchs, Amir – Eleveld, Anja (2016): Workfare Revisited. *Industrial Law Journal,* 45(1), 29–59.

2 Neumann, Franz (1951): Das Arbeitsrecht in der modernen Gesellschaft. *Recht der Arbeit,* 4(1), 3.

is the doom of today's industrialized society. Social efficiency is vital."[3] What characteristics do changed circumstances require of citizens, and what indicators can be used to describe the change in circumstances? The current level of development of the economy and technology confronts citizens with requirements that are the antitheses of the welfare, social-caring state. In this respect, the assessments of Isensee and Esping-Andersen are almost identical. One is individualism, which opposes all uniformity, but at the same time demands the support of unity, the other is private initiative, which rejects the idea of a caring state. This includes the requirement of reliability, which relieves the legislator of many burdens, transparency, which is already based on some kind of planning. Finally, the plurality of personality, i.e. the ability to display several positions, should be mentioned, and the reasonableness, which prompts consideration when calculating expenses.[4]

What are the (relatively new) factors that gave priority to the requirements indicated? In my opinion, two factors determine our days, our work, our possibilities and at the same time our limitations. One is the much-vaunted globalisation, the other is the all-encompassing digitalisation.

As far as globalisation is concerned, I would like to emphasise that globalisation is not the cause, but rather the buttress of the idea of the workfare state and the development of the corresponding legal institutional system. Nevertheless, its impact is so great that one of the main topics of today's labour law is the analysis of globalisation and the response to the challenge

3 "Der Sozialstaat ist Schicksal der heutigen Industriegesellschaft. Die soziale Wirksamkeit ist vital." ISENSEE, Josef (1980): Verfassung ohne soziale Grundrechte. *Der Staat,* 19(3), 375.

4 ISENSEE 1980: 376–378; ESPING-ANDERSEN, Gøsta (2002): *Why We Need a New Welfare State.* Oxford: Oxford University Press. Regarding the social state see RÖSNER, Hans Jürgen (1997): Beschäftigungspolitische Implikationen des Globalisierungsphänomenens als Herausforderung für den Sozialstaat. In HAUSER, Richard (ed.): *Reform des Sozialstaats.* Berlin: Duncker & Humblot, 1–43.

of the global economy.[5] Instead of a one-sentence definition, many authors approach this concept as a question, analysing what globalisation offers more than previous stages of development. This is the path followed by Christine Kaufmann, who sees globalisation not only as a network of economic processes, but also as a social and political driving force capable of changing the existing world order.[6] Of course, globalisation naturally includes the economy as a growth-generating activity, but it is the handling of the means of connectivity on a larger scale that brings about a time–space distancing of thinking, planning and implementation that has never been seen before.[7] Here I will not address the almost inevitable tensions that arise between the concept of the nation state as a framework and the phenomenon of globalisation.[8]

A more relevant question is whether the law is capable of regulating the globalisation that characterises economic processes. More specifically: is it possible to develop a globalised regulatory system of labour or employment law? For example, can a unified collective bargaining framework ever be established?[9] Undoubtedly, the outlines of such a "regulation" are emerging, but they do not originate from the legislator, as far as the traditional interpretation of legislation is concerned. These principles are often created by the dominant players in economic life, and the internal

[5] Just a few examples: Baethge, Martin et al. (1994): *Regulierung und Restrukturierung der Arbeit in den Spannungsfeldern von Globalisierung und Dezentralisierung.* Erlangen–Göttingen: DFG-SPP; Davies, Anne C. L. (2004): *Perspectives on Labour Law.* Cambridge: Cambridge University Press; Countouris, Nicola (2007): *The Changing Law of the Employment Relationship.* Aldershot: Ashgate; Blanpain, Roger et al. (2012): *The Global Workplace. International and Comparative Employment Law.* New York: Aspen Publishing.

[6] Kaufmann, Christine (2007): *Globalisation and Labour Rights. The Conflict between Core Labour Rights and International Economic Law.* Oxford – Portland, Oregon: Hart Publishing, 6.

[7] Giddens, Anthony (1990): *The Consequences of Modernity.* Stanford: Stanford University Press, 14.

[8] See more on this in Kaufmann 2007: 243–294.

[9] For an attempt to create a European collective contract see Eichhorst, Werner et al. (2011): Cross-Border Collective Bargaining and Transnational Social Dialogue. *IZA Research Report,* (38).

standards of multinational enterprises are based on them. These principles and standards then compete with the traditional legislative principles and standards of large regions.[10]

Another question about globalisation concerns how novel it is, or to what extent it is a purely contemporary phenomenon. Examining the major developmental nodes in economic history, it is clear that in every age there have been conglomerates of various sizes, which have grown from loose clusters into a coherent whole, influencing their environment. For a process to have a global impact, one more factor was needed, namely a certain level of technological development. This technological breakthrough was digitalisation, a concept that at first sight seems simple: its general meaning is that a process, action, quantity, etc. is processed by a computer for a variety of purposes. The literature on digitalisation is extremely diverse, so I will not even attempt to list examples here. At the same time it is necessary to remark that the link between globalisation and digitalisation seems obvious, but the literature discussing it paints a bleak picture.[11] Hart also takes this relationship for granted, but he argues that the world economy, production, manufacturing, financial and other infrastructures have undergone

10 Compa, Lance – Hinchliffe-Darricarrère, Tashia (1995): Enforcing International Labour Rights through Corporate Codes and Conduct. *Columbia Journal of Transnational Law,* 33, 663–689; Carson, A. Scott et al. (2008): *Codes of Conduct in the Private Sector. A Review of the Academic Literature from 1987 to 2007.* Toronto, Ontario: Canadian Centre for Ethics and Corporate Policy; Jenkins, Rhys (2001): Corporate Codes of Conduct. Self-Regulation in a Global Economy. *United Nations Research Institute for Social Development, Technology, Business and Society Programme Paper,* (2). In the Hungarian literature see Kun, Attila (2009): *A multinacionális vállalatok szociális felelőssége* [Social Responsibility of Multinational Companies]. Budapest: AdLibrum; Kun, Attila (2006): A munkajog „privatizálása"? Vállalatvezetési kódexek, magatartási szabályzatok a multinacionális vállalatoknál [The 'Privatisation' of Labour Law? Corporate Governance Codes, Codes of Conduct in Multinational Companies]. *Miskolci Jogi Szemle,* 1(1), 51–72.

11 Hanson, C. Elisabeth (2008): *The Information Revolution and World Politics.* Lanham: Rowman & Littlefield; Dieter, Ernst (2005): The New Mobility of Knowledge: Digital Information Systems and Global Flagship Networks. In Latham, Robert – Sassen, Saskia (eds.): *Digital Formations. IT and New Architectures in the Global Realm.* Princeton: Princeton University Press, 89–114.

integration processes that have sufficiently prepared the environment for the effects that digitalisation can bring.[12]

These effects can be felt in almost all areas of life, but in this study, I will only deal with the effects on labour law. As regards the organisational framework of labour law, it is the employer's organisational scheme which has changed. This is important because traditional labour law cannot be imagined without the 'company', to which the legal institutions of the workplace, working hours, contracts of employment, the employer's instructions, etc., and collective labour law (collective agreements, company constitutional law, *Betriebsverfassung*) are attached.[13] The concept of the employee has been transformed by the effects of digitalisation, in that all the indicators used to characterise an employee have become increasingly blurred and uncertain.[14]

This change in the subjects of the employment relationship has naturally brought with it a change in the content of that relationship. The previously characteristic demarcation of rights and duties has changed, such as the transformation of the role of management and its supervision of the performance of work, which has also called into question the essential content of the employment relationship, and the nature of subordination between employer and employee. Going forward, the changes almost go beyond the framework of traditional labour law, and it seems that routine responses

12 Hart, Jeffrey A. (2010): *Globalization and Digitalization.* Paper prepared for delivery at the annual meeting of the International Studies Association, New York, 13–18 February 2009.

13 For the essence of the 'firm' see Coase, Ronald H. (1937): The Nature of the Firm. *Economica,* 4(16), 386–405.

14 See the erosion of the various tests used to define an employee. Arthurs 2013: 585–604; Muhl, J. Charles (2002): What Is an Employee? The Answer Depends on the Federal Law. *Monthly Labor Review,* 125(1), 3–11; Davidov, Guy (2017b): Subordination vs Domination: Exploring the Differences. *International Journal of Comparative Labour Law and Industrial Relations,* 33(3), 365–389. See the early integration theory. Molitor, Erich (1925): *Das Wesen des Arbeitsvertrages.* Leipzig: Deichert; Nikisch, Arthur (1960): Die Eingliederung und ihre Bedeutung für das Arbeitsrecht. *Recht der Arbeit,* 13(1), 1–5.

are not enough. In this regard, I am referring to the difficulties of managing the various new types of work and the legal statuses associated with them.

By comparison: the tensions arising from fixed-term or part-time employment may have perhaps be alleviated by the corrective effect of the prohibition of discrimination,[15] (although this too proved increasingly difficult). But, the spread of temporary agency work required a strong compromise, even opportunism.[16] Apart from the fact that this employment structure soon lost the original function suggested in its name,[17] and went from being a subsidiary, atypical form of employment to an almost equal alternative to typical employment – and thus a huge industry; its essence can be described with the term 'triangular employment relationship'.[18] One of these legal relationships is established between the agency and the jobseeker, based on a specific contract of employment. The peculiarity of this contract is that it is personified in the same way as a normal employment contract, although the actual employment relationship between the parties is almost nominal. The main purpose of this contract is to transfer the workforce to a third person, which is acknowledged by the employee. The other contract – between the agency (as the 'employer') and the so-called 'user

15 The EU directives on part-time and fixed-term employment can ultimately be regarded as anti-discrimination rules. See Council Directive 97/81/EC – the Framework Agreement on part-time working concluded by UNICE, CEEP and the ETUC (trade unions); Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP.

16 Moore, Mack A. (1965): The Temporary Help Service Industry: Historical Development, Operation and Scope. *Industrial and Labor Relations Review*, 18(4), 554–569; Hatton, Erin (2011): *The Temp Economy. From Kelly Girls to Permatemps in Postwar America.* Philadelphia, Pennsylvania: Temple University Press; De Stefano, Valerio (2009): *Smuggling-in Flexibility: Temporary Work Contracts and the "Implicit Threat" Mechanism. Reflections on a New European Path.* Geneve: International Labour Organization; Bartkiw, Timothy J. (2013): *Labour Law and Triangular Employment Growth.* Paper for Presentation at the Inaugural Labour Law Research Network Conference, Pompeu Fabra University, Barcelona, Spain, 1–15 June 2013; Vosko, Leah F. (1997): Legitimizing the Triangular Employment Relationship: Emerging International Labour Standards from a Comparative Perspective. *Comparative Labor Law & Policy Journal,* 19(1), 65–67.

17 Its original name is the Temporary Help Service or Temporary Help Firm (in the USA).

18 Hatton 2011: 11.

enterprise' is simply a commercial contract.[19] The subject of this contract is the service provided by the workforce and as such it is depersonalised – in contrast to the content of a contract of employment. If the content of this service contract alone is considered, the legal status of the user enterprise is simply that of a contractual party to a commercial contract.

Why did this type of arrangement represent a break in the edifice of traditional labour law? It is because the legal relationship and the nature of the legal relationships are not established in such schemes by means of an interpretation of the labour law, but instead a civil legal relationship appears *expressis verbis* alongside the employment relationship. In other words, two qualitatively different legal relationships must somehow be assigned to each other.

And at this point, we reached the next challenge, namely the interpretation of the surreal concept of dependent self-employed and its related legal status. In my view, the greatest problem facing labour law today is that it seeks to impose its traditional institutions on this emergent phenomenon, in other words, traditional labour law is expanding into an area where it cannot succeed. This discrepancy is caused by the emergence of a strata of working persons whose legal status is not compatible with the corresponding market transaction possibilities. These people cannot be labelled bogus contractors, nor is it appropriate to refer to a sham employment relationship. Instead, they are in a purely civil legal relationship, which at the stage of its fulfilment is not subject to the market mechanisms characteristic of private legal relationships. The uncertainty surrounding these statuses is well-reflected in their names: *arbeitnehmerähnliche Person, economically dependent worker, or simply worker, travailleurs indépendants,* etc.

The expression *dependent self-employed* can also be considered to be a generally accepted terminology, but it differs from the previous terms in one important regard. While the first four terms hint at the employee's legal status in the background, self-employed clearly refers to an independent contractor whose legal status – if it can be referred to in this way at all – suggests some

[19] Vosko 1997: 65–67.

kind of civil law relationship.[20] Apart from the fact that this approach indicates that the conceptual derivation from the status of employee is not exclusive – see the German concept of the *unternehmerähnliche Person* from the 1970s[21] – it contains, despite its inherent logical inconsistency, fewer discrepancies in terms of legal status than taking the employee as the starting point. Apart from the detailed explanation of this huge topic, it must be emphasised that if labour law wants to do something with this concept, it must definitely take into account that this working group does not have a legal status expressing its own entity.

And to all this comes the most popular topic of our days, working with the help of digital platforms. So-called platform work raises a number of questions, not least because the concept of the platform itself needs to be clarified. The digital platform, as a set of technological developments, is suitable to form the basis for any process or activity, or for the development of newer applications.[22] For this reason the platform offers extremely diverse, rapid and efficient technological solutions to various problems, and is consequently different from its environment. The platform is therefore not a legal concept, but a technological concept. However, as they can be used for the organisation of a diverse range of activities, they are relevant to the current regulatory system of work. For this reason, the link between the platform and work forms an extremely complex network consisting of heterogeneous elements. Consequently, it would be quite difficult to give some kind of homogeneous response to the questions raised by the so-called platform work.

20 Williams–Lapeyre 2017: 13–14; Thörnquist, Annette (2015): False Self-Employment and Other Precarious Forms of Employment in the 'Grey Area' of the Labour Market. *International Journal of Comparative Labour Law and Industrial Relations,* 31(4), 411–429.

21 Lieb 1976: 207–233.

22 Ruonan et al. 2015.

WHAT POSSIBLE RESPONSES CAN LABOUR LAW PROVIDE TO TODAY'S CHALLENGES?

The economic and the consequent social changes described above require responses from all aspects of labour law. In this context, the phrase 'all aspects of labour law' is essential, because one single answer cannot be given. The answers, or more precisely the possible solutions, depend on the nature of the employment and the work, the technology used, the sizes and traditions used in the particular employment sector, etc. The first responses have already been born, and they support the previously described, i.e. they are diverse, even if there seems to be some kind of mainstream delineation. In my view, the reactions of labour law to the contemporary developments in technology and society are characterised by the following trends.

The first, and nowadays a growing effort, is the preservation of traditional labour law institutions, as it were, and their transfer and application to new forms of work and employment. This trend is also not uniform, as it involves a number of concessions and compromises, characterised by different active labour policies and flexicurity solutions, at the same time, it is fundamentally conservative, as it relies on the adaptation of elements of traditional labour law. The second tendency is almost the opposite of the first, in that it proclaims almost total freedom for the new types of work, which can annul almost all the institutions of traditional labour law. The third approach, which is in its infancy, is the effort to create a new, complex employment law *(Beschäftigungsrecht),* which would include both traditional labour law and law addressing other forms of employment. The main features of each trend are briefly described below.

Efforts to preserve traditional labour law – The expansion of labour law, opportunities and pitfalls

First of all, it is necessary to clarify what is meant by the concept of 'traditional labour law'. Traditional labour law and the traditional employment relationship are characterised by two significant features. One is the subordination between the subjects of the employment relationship and the other is the long-term character of the employment relationship. The distinction between the subordination characteristic of labour law and the economic dependence that otherwise permeates civil law transactions in a network-like, interdependent way is sometimes so vague that subordination as a differentia specifica of the employment relationship becomes obscured. But the difference is quite significant. There can be many reasons for the 'dependency of independents' in commercial legal transactions. Thus, it may happen that someone, as a (even informal) member of a larger economic network, undertakes certain restrictions in the hope of obtaining some economic, economic-political, tactical or even strategic advantage. It is possible that the contract determines a certain dependence on the structure, as for example in case of franchise-type obligations.[23] The essence of subordination, which characterises the employment relationship, however, lies in the fact that the employee cannot participate in economic circulation due to his legal status. And therefore it is irrelevant to call this subordination a personal dependence, an economic subordination.[24]

23 The uniform solutions resulting from the franchise obligation, the strict adherence to the organisational, technological, etc. requirements caused uncertainty in the qualification of the obligation and in the assessment of the legal status of the 'franchisor' and the 'franchisee'. The uniform solutions arising from the franchise agreement and the organisational, technological, etc. requirements are strict. See KAUFMANN, David J. et al. (2015): A Franchisor is Not the Employer of Its Franchisees or Their Employees. *Franchise Law Journal,* 34(4), 439–502.

24 On the theory of persönliche Abhängigkeit and its regulation see "Das Arbeitsrecht umfaßt ein sachliches und persönliches Element. Das sachliche Element ist die abhängige Arbeit. Das persönliche Element bilden die Arbeitnehmer." SINZHEIMER 1927: 7–9; BGB § 611a: "Durch den Arbeitsvertrag wird der Arbeitnehmer im Dienste eines anderen zur Leistung weisungsgebundener, fremdbestimmter Arbeit in persönlicher Abhängigkeit verpflichtet." For the managerial prerogative based on the long-term investment of the employer (entrepreneur, investor) and the subordination associated with it, see FREEDLAND, Mark (2016): General Introduction – Aims, Rationale, and Methodology. In BOGG, Alan et al. (eds.): *The Contract of Employment.* Oxford: Oxford University Press, 4; DAVIES–FREEDLAND 1983: 17. On incomplete contracts see HART–MOORE 2007: 182–186.

Nevertheless, the blurring between the separability of subordination in labour law and economic dependence which is often reciprocal in private law is reflected in Maschmann's argument. He states that personal subordination is in fact an unfortunate formulation of what is known as externally determined work *(fremdbestimmte Arbeit)*.[25] In this context it is only tangential to note that another previous indicator of the employment relationship, integration, is also fading away and is sometimes even merged into the concept of cooperation.[26]

The long-term character of the employment relationship evolved as a result of a longer process of development.[27] Long-term relationships assumed different functions that can be detected in respect of transactions of goods and of transactions affecting the personality of the parties (in German labour law the *personenrechtliches Dauerschuldverhältnis*).[28] Employment relationships should be regarded as distinctive compared to other kinds of long-term contracts. In this context, Freedland's statement is also significant with regard to the promises inherent in employment relationships and consequently their two levels of content regarding the present and the future. The substance of the latter is "the promises to employ and be employed".[29]

[25] Maschmann, Frank (2001): *Arbeitsverträge und Verträge mit Selbständigen. Rechtliche Qualifizierung von Dienstleistungsverhältnissen als Abgrenzungs- und Einordnungsproblem.* Berlin: Duncker & Humblot, 59.

[26] About the so-called *Eingliedungstheorie* see Gamillscheg, Franz et al. eds. (1988): *Sozialpartnerschaft in der Bewährung. Festschrift für Karl Molitor zum 60. Geburtstag.* München: Verlag C. H. Beck, 133–157; Nikisch 1960: 1–5; Deakin–Morris 2005: 162.

[27] While the *locatio conductio operarum* was mostly concerned with day-to-day work, this structure was transformed with the emergence of manufacturing and the change in the organisation and technology of services and products. Dernburg, Heinrich (1900): *Pandekten 2. Obligationsrecht.* Berlin: Müller, 301–302; Deakin–Wilkinson 2005: 75; Brodie, Douglas (2008): *The Contract of Employment*. Edinburgh: Thomson – W. Green, 49; Deakin, Simon (2007): Does the 'Personal Employment Contract' Provide a Basis for the Reunification of Employment Law? *Industrial Law Journal,* 36(1), 71–76.

[28] Gierke, Otto (1914): Dauernde Schuldverhältnisse. In Gierke, Otto et al. (eds.): *Jehrings Jahrbücher für die Dogmatik des bürgerlichen Rechts.* Jena: Verlag von Gustav Fischer, 355–411. A more recent analysis see in Doralt, Walter (2018): *Langzeitverträge.* Tübingen: Mohr Siebeck.

[29] Freedland 2003: 88–92.

Just as the indicators of classic subordination eroded, the long-term character of the employment relationship lost its weight, which in turn threatened the stability of the employee's legal status. *Just-in-time* and the various *lean management* approaches have often been accompanied by *just-in-time employment* practices that either took care of worker protection or did not take this aspect into account at all.[30]

The danger of the disintegration of traditional labour law became clear when the breakdown of the labour law infrastructure also called into question the legal status of the subjects of the employment relationship. The reference point for the labour law response is the two subjects of the employment relationship, the employer and the employee, and the institutional system associated with these legal positions. The law of the European Community played a significant role in the development of the concept of employee. However, the purposive conceptualisation of the legal status of the employee does not necessarily contribute to the development of the objective content of this concept. One of the reasons for the creation of the concept of employee in Community law was to ensure the free movement of employees within the Community. The other reason was to enforce the prohibition of discrimination. Both are important, although the importance of the former has decreased due to the legal status of EU citizenship.

The essence of the employee concept is well epitomised by the *Lawrie-Blum case.*[31] The problems with the use of the Lawrie-Blum formula began when the Court started applying this doctrine to cases that had nothing to do with either free movement or discrimination. Two glaring examples

[30] Jackson, Paul R. – Martin, Robin (1996): Impact of Just-in-time on Job Content, Employee Attitudes and Well-being: A Longitudinal Study. *Ergonomics,* 39(1), 1–16; Marsden, David ed. (2011): *Employment in the Lean Years. Policy and Prospects for the Next Decade.* Oxford: Oxford University Press.

[31] Case 66/85 *Deborah Lawrie-Blum v. Baden Württemberg* [1986] ECR 02121. The European Court of Justice has previously held that the concept of the worker falls within the scope of Community law. See Case 75/63 *Mrs. M. K. H. Hoekstra (née Unger) v. Bestuur Bedrijvereiniging voor Detailhandel en Ambachten* [1963] ECR 177.

of this are the *Kunsten case* and the *Balkaya case*.[32] This solution has been sharply criticised in several respects. On the one hand, the criteria of the concept of employee formulated by the Lawrie-Blum formula have become difficult to interpret,[33] and on the other hand, the inconsistent extension of the concept has rendered the whole approach to labour law irrelevant.[34] In addition to the fact that the Lawrie-Blum formula "with a little help in interpretation" is suitable for anyone who personally performs work for someone else to be classified as an employee, the expansive application of the concept creates enormous disruption in the regulation of the economy,[35] as well as in the development of differentiated protection systems for workers (working persons).[36] Finally, this solution is increasingly out of step with

32 Case 413/13 *FNV Kunsten Informatie en Media v. Staat der Nederlanden* [2014] ECLI:EU:C:2014:2411; Case 229/14 *Ender Balkaya v. Kiesel Abbruch- und Recycling Technik GmbH* [2015] EU:C:2015:455. As an antecedent of the Kunsten case see C 67/96 *Albany International BV v. Stichting Bedrijfspensioenfonds Textielindustrie* [1999] ECLI:EU:C:1999:430.

33 Nogler, Luca (2010): Rethinking the *Lawrie-Blum* Doctrine of Subordination: A Critical Analysis Prompted by Recent Development in Italian Employment Law. *International Journal of Comparative Labour Law and Industrial Relations,* 26(1), 83–101.

34 Rebhahn, Robert (2012): Die Arbeitnehmerbegriffe des Unionsrecht in der modernen Judikatur in des EUGH. *Europäische Zeitschrift für Arbeitsrecht: EuZA,* 5(1), 3–34; Kiss, György (2025a): The Possibilities and Limits of Labour Law – Some Remarks on the Expansion of Labour Law. In Athanasiou, Lia et al. (eds.): *Labour and Law. Passing across 21st Century. Liber Amicorum Costas Papadimitriu.* Athens: Nomiki Bibliothiki, 618–645.

35 Regarding the *Balkaya case,* the discrepancy between EU law and German law arose in the context of collective redundancies in relation to the legal status of member of the board directors of a limited company. See Kündigungschutzgesetz (Act on Protection against Dismissal) § 17(5): "Als Arbeitnehmer im Sinne dieser Vorschrift gelten nicht […] Geschäftsführer, Betriebsleiter und ähnliche leitende Personen, soweit diese zur selbständigen Einstellung oder Entlassung von Arbeitnehmern berechtigt sind" [For the purposes of this provision, employees shall not be deemed to be […] managing directors, plant managers and similar executive persons, in so far as they are entitled to independently hire or dismiss employees].

36 Supiot 2011; Antonmattei, Paul-Henri – Sciberras, Jean-Christophe (2008): *Le travailleur économiquement dépendant: quelle protection?* Rapport à M. le Ministre du Travail, des Relations sociales, de la Famille et de la Solidarité. Novembre 2008.

the practice and requirements of collective agreements that are emerging today (see below).

We can witness the thoughtless expansion of labour law in one more area. More precisely, the application of traditional labour law to changed circumstances and relationships represents a certain degree of expansion of labour law. While, on the one hand, the EU case law seeks to expand the concept of employee almost endlessly, another approach calls for the introduction of the functional concept of employer.[37] In my opinion, identifying the behaviour of one party (the recipient of the service/performance) in a given legal transaction with the behaviour expected in the legal status of the employer is not only meaningless but also dangerous. Some of the "employer's functions" indicated by Prassl[38] can be related to any commercial activity and consequently the rights related to them can be exercised not only in the legal status of an employer.[39] The statement that "employment law needs to build on the identification of different employer functions, and embrace an openly functional concept of the employer, where the exercise of one or more employer functions triggers the concomitant regulatory responsibilities – regardless of the underlying contractual arrangement(s)" is unacceptable.[40]

Regarding the expansion of labour law, it can be concluded that the reaction of labour law to the changes is understandable, but it can hardly be considered a satisfactory solution. The framework and methods of employment and work have been constantly expanding for several decades, and this process should encourage new solutions, not the adaptation of

37 Prassl, Jeremias (2015): *The Concept of the Employer.* Oxford: Oxford University Press; Prassl–Risak 2016: 619–651.

38 Prassl 2015: 31–38; 149–193; Prassl–Risak 2016: 642–646.

39 I consider this to be the "inception and termination of the contract, the receiving of service and its results". Regarding the provision of work (if this means the organisation of work) and its compensation, it most likely refers to a contract of employment, but if the 'organisation' is omitted, this is not exclusive either. Finally, the managing of the enterprises (related to external or internal market) is a natural part of any business.

40 Prassl–Risak 2016: 645–646.

old methods. This is not only a legal policy requirement, but also a legal doctrinal requirement, as the liability and risk-bearing relationships are fundamentally transforming.

Full freedom of contract types expressing work versus the legal status-based approach

One of the characteristic features of the discussed changes is that legal relationships and, accordingly, legal positions appear that go beyond the framework of traditional labour law. However, *de facto* overlaps, tensions and discrepancies can be observed between the different legal statuses. The most significant of these lies behind the vague concept of dependent self-employed. As already mentioned, she/he is actually a 'self-employed', in her/his legal transactions an individual independent contractor. However this independent contractor does not have the possibility to *de facto* participate in the economic/commercial legal transactions, and one of the symptoms of this is that it provides services exclusively or predominantly to one business partner. The contradiction between the legal status and the corresponding lack of freedom of legal transaction manifests itself in the fact that those whose legal status would not justify this need protection.

Returning to the expansion of labour law, this effort is understandable, because the difference between the legal status of the employee and the 'dependent self-employed' cannot in itself provide a basis for abandoning the protection of the latter. The question is, of course, what kind of protection this should be. Of course, at the level of abstraction, it is easy to argue that the legal status of the legal entity concerned should be adequately protected.

The basis for the protection of the employee's legal status is the need for social protection *(Sozialbedürftigkeit)*. This basis obviously does not arise with respect to the subjects of private law. What kind of 'protection' and whose 'protection' can we talk about in private law? We can only say that protection itself is the system of institutions that ensure the enforcement of private law principles. Somewhat simplified: ensuring the market mechanisms within which the parties can exercise their rights and fulfil their obligations. This obviously cannot be applied to the relations of the dependent self-employed given as an example, but the entire range of labour law protection is also contrary to her/his private law status. Her/his protection can be determined in the light of the close economic dependence resulting from the *de facto* status. Consequently, it is necessary to analyse the *de facto* status of the *personal employment contract, arbeitnehmerähnliche Person, économique dependent travallieur,* and accordingly determine a certain level of protection and develop its elements. I would like to emphasise that this protection is not legal status protection by nature, because this working group – as I mentioned – does not have a legal status expressing its own entity.

Would this mean the end of the dual structure of employment? I would be very careful with the answer. I was merely stating that this working group should assess their conditions of performance, and I was not stating that a new type of contract would be created, let alone that a new area of 'law of employment' would be born. However, all these problems are analysed in detail in the next section.

OPPORTUNITIES FOR THE CREATION OF A NEW EMPLOYMENT LAW

Structurally, this topic should not be discussed separately, as it can be understood as one of the current efforts of labour law. Furthermore, I concluded the previous section with the remark that I did not propose the emergence of a new 'law of employment' at all. At the same time, there are initiatives to synthesise the fragmented, contradictory solutions. And these initiatives are still extremely important for the future, even if we are currently only witnessing the first steps.

In addition to the dual structure of employment legal relations, which is considered self-evident, the need to develop a three-pole legal structure arises more and more often. In this concept, or rather in the concept initiative, two poles are clear, namely, one is the traditional employment relationship, the other is the civil law relationship expressing personal work. However, the third pole is uncertain in several aspects. Even the starting point is uncertain.

The question is whether it is only a new type of contract or whether it is a new area of law that provides the legal infrastructure for this new contract? That is, in the latter case, the dogma of contract validity and the liability system, risk bearing rules, the rights and obligations of the contracting parties will be regulated in detail, but will collective rights and their relationship to other areas of law also be clarified? The problem is far from simple, as is shown by the fact that, despite the urgent voices, not even the outlines of such a legal area seem to be developing, nor is there any exact proposal for the content of this new type of contract.

But there are also other questions. Who exactly should this new contract or even new legal area apply to? The idea of creating a contractual structure with plural legal status was essentially flagged when the category of *dependent self-employed* emerged. This is ultimately useful, because it draws attention to certain irresolvable contradictions. Because, while it is possible to treat the otherwise rather vague category of dependent self-employed as a homogenous group based on certain criteria, this is not possible in the case of work carried out with the intervention of the platform. The so-called 'platform work' is extremely diverse and cannot be condensed into a single type of legal relationship. Since platform work involves genuine employment relationship and different civil law relationships – we can talk about temporary agency work, intermediary agency activities, etc. – the qualification depends on the content of the contract, the actual method of performance, and the priority of the relations between the parties. Thus, it would be an exaggerated and even a fatal simplification to apply such a uniform 'third area of law' to work carried out with the involvement of the platform.

Before I explain my concerns about the three-pole legal structure in more detail, let me give examples of similar experiments from the past and from other areas of law. As far as the past is concerned, I must refer again to the debate on the separation of labour law and civil law and, in this context, the autonomy of labour law. This debate did not stop after Sinzheimer's work, but continued to flare up even after the Second World War.[41] A detailed dogmatic analysis of the relationship between labour law and civil law was comprehensively carried out by Bydlinski.[42] Without going into detail, I refer to his substantive findings. In his view, it is not possible to speak in general terms about the autonomy of labour law and its regulation within the framework of civil law, because without analysing the details – the so-called 'flat-rate' starting point – it is not possible to demonstrate the principles and the corresponding legal technical requirements that lead to a clear answer to the question.[43] The fundamental question is whether labour law can be presented to the jurisprudence as a branch of the legal system. The answer to the first approach is clear, since labour law has a specific subject which does not appear in other systems. And this is the dependent work that has already been examined from several perspectives. On the other hand, he also articulates his doubts, in so far as he highlights the points that link labour law to civil law and public law. His final conclusion is that the independence of labour law is quite relative. In his view, it would be impossible to develop and regulate a completely autonomous system of contracting, representation, performance, licensing, etc. in labour law. It follows from all of this that only proposals that do not create unjustified competition between the two areas can be supported. Thus, according to his view, the original regulation should be included in the ABGB, and the codification of labour law, as if it were secondary, should be based on it.[44]

[41] Thus, in Austria, the Austrian Trade Union Federation (ÖGB) developed a strong activity, as a result of which the Ministry of Social Affairs prepared a draft for the partial codification of individual and collective labour law. The collective labour legislation entered into force in 1974 after several substantial revisions by the social partners *(Arbeitsverfassungsgesetz),* but no substantial changes have taken place since the publication of the draft prepared by the committee led by Strasser and affecting all sub-areas of individual labour law.

[42] Bydlinski, Franz (1969): *Arbeitsrechtskodifikation und allgemeines Zivilrecht.* Wien – New York: Springer.

[43] Bydlinski 1969: 11.

[44] Bydlinski 1969: 174–178. See also Floretta, Hans (1967): *Probleme der Kodifikation des österreichischen Arbeitsrechts.* Wien: Manz Verlag; Mayer-Maly, Theo (1961): Arbeitsrecht und Privatrechtsordnung. *Juristenzeitung,* 16(7), 205–209.

In this context, I refer once again to Richardi's precise distinction between dogmatic and codification autonomy.[45]

A good example from the field of private law is the discussion about the so-called relational contract and the interpretation of relational contract law. This problem should be mentioned here because the application of the principles of the relational contract also arose in the context of the contract of employment, directly in the form of a question as to whether the contract of employment can be considered a relational contract.[46] Again, without going into details, a relational contract is a theory for long-term incomplete contracts, the essence of which is that the parties agree to modify the terms of the contract according to changing circumstances in order to avoid the termination of the contract.[47] In this construction, the central role is played by *the presentiation of the future and futurising of the present* formula.[48]

45 "Although labour law is an expression of private autonomy – like traditional private law – it does not fall within the scope of the legality of the codification of civil law. The reason for this is that labour law as a whole, including private law (contractual) norms, has developed into an independent field of law, which in the constitutional system has independent legislative authority besides or beyond civil law." RICHARDI 2000a: § 1 RdNr. 30.

46 BIRD, Robert C. (2005): Employment as a Relational Contract. *University of Pennsylvania Journal of Business Law,* 8(1), 149–217; BRODIE, Douglas (2011): How Relational is the Employment Contract? *Industrial Law Journal,* 40(3), 232–253.

47 MACNEIL, Ian Roderick (1978): Contracts: Adjustment of Long-Term Economic Relations under Classical, Neoclassical, and Relational Contract Law. *Northwestern University Law Review,* 72(6), 854–906; MACNEIL, Ian Roderick (1978–1979): Essays on the Nature of Contracts. *North Carolina Central Law Journal,* 10(2), 159–200; POSNER, Eric A. (2000): A Theory of Contract Law under Conditions of Radical Judicial Error. *Northwestern University Law Review,* 94(3) Special Issue, 749–774.

48 The archaic term presentiate in this context means: "To make or render present in place or time; to cause to be perceived or realized as present." To 'futurise' the present: the English language uses many terms, such as planning, forecasting, promising, but in Macneil's view only the now obsolete word presentiate is known. In his view this is the best way to describe the identity of these two processes, i.e. the representation of the future in the place of the present, or in time. MACNEIL 1973–1974: 800.

Later, I will analyse in detail the relationship between the relational contract and the contract of employment in relation to the role of the contract of employment in Hungarian labour law, but here I will revive the discussion on the development of the relational contract law. The basis of the criticism of the idea of relational contract law was the question of whether the law in which the relational contract could develop could exist at all. At first sight, it seems that the question itself is unnecessary, since relational contract law pervades legislation to such an extent that it is not particularly difficult to list examples. Nevertheless, in this respect, Macneil's argument raises at least a few doubts. In support of relational contract law, he relies on the institutions of labour law, stating that: "All of these are relational contract law." Macneil's thoughts on this are also not indifferent from the point of view of labour law. In his view, the strength of the parties' common behaviour determines whether a particular contract or relationship survives. The legal environment can reinforce this behaviour, it can force the parties to think together, but the decisive factor is the content of the contract.[49] Regarding the chances of a possibly independent relational contract law, it should also be pointed out that relational contracts are not only found in the field of economy and trade. Good examples of this are family law and matrimonial property law.[50]

In the relationship between relational contract and the law of relational contract, Eisenberg's criticism is relevant also because it adequately reflects the dilemmas that may arise in the relationship between labour law and employment law (in a broad sense), *Arbeitsrecht–Beschäftigungsrecht.*[51] The essence of his argument is that the relational contract is a reflection of the classical transactional contract. The legal order cannot sustain a contractual system based mainly on axioms, because the basic elements of a contractual system are not self-evident but require economic, legal and

49 Macneil, Ian Roderick (2000): Relational Contract Theory: Challenges and Queries. *Northwestern University Law Review,* 94(3) Special Issue, 899.

50 Leckey, Robert (2002): Relational Contract and Other Models of Marriage. *Osgoode Hall Law Journal,* 40(1), 1–47.

51 Eisenberg, Melvin A. (2000): Why There Is No Law of Relational Contract. *Northwestern University Law Review,* 94(3) Special Issue, 805–821.

social, and not least empirical evidence to substantiate them. Furthermore, the many attempts to define the relational contract – and the failure of some of them – are noteworthy because the definition seems at first sight to be obvious. However, on closer examination, almost all the uncertain, vague categories emerge, and it is not possible to build an entire legal infrastructure on such a conceptual basis.[52]

To what extent are these doubts reflected in terms of labour law – employment law? The chances of creating a new legal area should be considered on the basis of the following criteria: The first is the economic, societal requirement and social need. Secondly, is it necessary and possible to replace the legal relationships expressing work performed personally for another party with a new area of law, and if so, what is the reason for this? Thirdly, what new *sui generis* features can the new area of law offer?

As far as the economic side is concerned, globalisation and digitalisation really demand fast and flexible solutions. Attempts to legislate this have been observed in several countries, but it seems that the regulation of traditional legal relationships has been able to resist change. Furthermore, so far, no argument has been raised that would require the transformation of an entire legal infrastructure. At least not at the level of the individual contract, but it is possible that the current discrepancy between collective agreements in working conditions and competition law may require a major reordering, but perhaps even this does not justify the emergence of a new branch of law. With regard to the societal side, here I primarily prioritise the expectations of the consumer, because it has a significant stimulating effect. Society is used to quick and efficient solutions and is not particularly interested in legal dogmatic doubts. However, in my opinion, this demand refers to the improvement and development of procedures, rather than the creation of a new branch of law.

Societal aspects are undoubtedly important, so the crisis atmosphere, the identification of subordination with vulnerability, etc. have come to the fore in the jurisprudence dealing with the topic. In this context, I would like to emphasise once again that a contract does not in itself put

[52] Eisenberg 2000: 808–813.

anyone in a vulnerable position. But if the legal system does not define the principles and conditions of a fair contract and does not have control over the agreement, this will happen, but I do not think any new area of law will cure it on its own.

Finally, what new dogmatic characteristics can a new field of law have that would justify its independence? Let Davidov's assessment of the criteria for distinguishing between employee and worker serve without further comment. He rightly asks the question in connection with the case law of English law[53] of how it is possible in practice to distinguish between the concepts of 'employee' and 'worker' if they are characterised by the same criteria and only differences in intensity can be detected?[54] And once again here is the reference to Langille's question regarding the classification between the new employment law and traditional labour law: "If labour law is a subset of employment law, what is employment law a subset of?"[55]

53 See among others *Byrne Brothers (Formwork) Ltd v. Baird* [2002] ICR 667, [2002] IRLR 96 (EAT).

54 Namely, the legal concept suggests that the difference between 'employee' and 'worker' may lie in the degree of dependence on the employer despite their similar legal status. Davidov, Guy (2015): Who Is a Worker? *Industrial Law Journal,* 34(1), 61.

55 Langille 2020: 582–604.

PART TWO

THE STATE OF LABOUR LAW IN HUNGARY

Chapter I

THE DEVELOPMENT OF HUNGARIAN LABOUR LAW AND THE MAIN STAGES OF ITS EVOLUTION UNTIL THE ECONOMIC AND POLITICAL CHANGE OF REGIME

THE ORIGIN OF HUNGARIAN LABOUR LAW IN THE LIGHT OF TRADITIONAL CONTINENTAL EUROPEAN PATTERNS – THE IMPORTANCE OF ATTEMPTS AT CODIFICATION OF PRIVATE LAW FOR THE DEVELOPMENT OF LABOUR LAW

The beginnings

The development of Hungarian labour law, especially before World War II, was determined by two factors. The first was the sharp differentiation of working/employment relations, and the fragmented regulation that faithfully reflected this. The second was the absence of a civil code, as a result of which there was hardly any private law model for the development of the emerging labour law. The conditions after 1849 were generally characterised by the dominance of feudal 'status' relationships, despite the fact that the first acts dealing with labour law in a broader sense were passed in the 1840s.[1] These pieces of legislation contained early references to the use of a free labour force through contracts. Following the failure of the Revolution of 1848, the Imperial and Royal Governorate, in order to regulate trade and industrial relations, reorganised the conditions of trade, commerce and industry, enforcing the principles of religious and national equality and free

1 See Act XV of 1840 on merchants and Act XVII of 1840 on the status of manufacturers.

competition, retaining the aforementioned acts from the 1840s.[2] During this period, the draft Austrian (Industrial) Act, which did not enter into force but which was applied in practice, had a particularly strong impact.

The Austrian Commercial Act of 1862 and the Industrial Acts of 1872 and 1884 were the main factors that shaped the development of modern labour law in the Hungarian economy as a whole.[3] The latter in particular can be considered to be of epochal significance, since despite the fact that its content was basically in accord with the spirit of contractual liberalism, it also sought to establish a *status quo* that ensured a certain degree of stabilisation.[4] As far as individual employment was concerned, the personal scope of the law extended to apprentices, assistants and, by applying the rules for the latter, factory workers. The "relationship between the parties" itself was freely negotiated, and "the contract, unless otherwise agreed by the parties, shall become binding only after a probationary period of 1 week".[5] However, the aforementioned freedom of contract was not unlimited.[6] The Act contains the following provisions regarding one of the most essential elements of this limitation: "A work order must be posted in the workshops, which must include the following: a) the various grades and occupations of the workers,

[2] See Ress, Imre (2022): *A neoabszolutizmus és a provizórium kronológiája a Magyar Korona országaiban 1849–1867. Intézmény-, kultúr-, politika- és kormányzattörténet* [The Chronology of Neo-absolutism and Provisory Rule in the Countries of the Hungarian Crown 1849–1867. Institutional, Cultural, Political and Governmental History]. Budapest–Szófia: A magyar–bolgár történész vegyes bizottság kiadványai, 42.

[3] Act VIII of 1872 and Act XVII of 1884.

[4] One of the institutionalised forms of this was the Industrial Council, whose "purpose was to maintain order and consensus among the craftsmen; to support the ordered functioning of the industrial authority among the craftsmen, to promote the interests of craftsmen and to encourage them to progress". Act XVII of 1884, Section 126. In addition to having an impact on individual employment relationships, the significance of the importance of the industrial association can be evaluated primarily from the point of view of the subsequent development of collective labour law, as long as it was able to build a continuous relationship with the employer and the industrial authority, i.e. its presence could not be annulled.

[5] Act XVII of 1884, Section 88.

[6] See in detail Vincenti, Gusztáv (1942): *A munka magánjoga* [The Private Law of Work]. Budapest: Grill Károly Könyvkiadóvállalata, 65–67.

indicating the method of employment of women and children, taking into account their physical strength and the latter's school obligations [...]."[7]

Vincenti poses the question of whether the 'employment (service)' contract has mandatory content, or whether "the validity of contract depends on whether the parties agree on certain issues – which belong to the essence of the contract – and if so, what are these questions?".[8] In his view, the approach which holds that the service contract should be completely free in terms of its content cannot be supported because "the quality of the work (service) to be performed by the employee must be agreed between the parties, at least in general terms".[9] Consequently, a valid contract cannot be created if the employee commits himself to work, but the nature of the work has not been agreed upon. Vincenti also notes that "a contract could only be concluded in this way if there were a dispositive rule that dictates the type of work to be performed even in the absence of an agreement between the parties; however, there is no such rule".[10] It follows from the general principles that there must be an 'agreement of will' between the parties as to the nature of the service.

This detail is worth highlighting because neither the Industrial Act nor the later private law (civil code) draft laws contained a contractual obligation of this type.[11] A contract may also be described as – in modern terminology – an absolutely incomplete contract, in so far as only the will of the parties would determine the freedom or limits of its content; referring to Roman private law, it would be classified as *operas suas locare.* In this context, Meszlény emphasised that to avoid this, a legal rule is needed

7 Act XVII of 1884, Section 113.
8 VINCENTI 1942: 68.
9 VINCENTI 1942: 68.
10 VINCENTI 1942: 69.
11 See Section 1600 of the draft Hungarian General Civil Code and Section 1550 of the Hungarian Private Code.

which does not define the content of the contract, but the content of the legal relationship at the stage of performance of the contract.[12]

In summary, it can be stated that during this period, the labour law situation of those employed in industry and commerce essentially corresponded to the usual conditions in Western Europe.

In contrast, the provisions on those working in agriculture contained many feudal features. Citing it as a forerunner of the legislation regulating the conditions of agricultural workers,[13] Lőrincz describes Act IX of 1840 on the Field Police, which in practice regulated the enforcement of the contract during the contract period and which could return workers who had left (escaped) their job to his place of work and could also oblige them to pay compensation.[14] A significant piece of legislation in this regard was the first Maid Act, although this name is not entirely accurate, since this Act was actually the first comprehensive legislation on agricultural workers.[15] This legislation is noteworthy because, in addition to the contractual, private law

12 The specificity of this legislation lies in the fact that it applies not only to employment, but also covers, where appropriate, an entire field of industrial or commercial activity, including its organisational, public law, substantive and procedural legal aspects. For the evaluation of some specific performances see MESZLÉNY, Artúr (1901): *Magánjog-politikai tanulmányok: Különös tekintettel a Magyar Általános Polgári Törvénykönyv tervezetére* [Private Law Policy Studies: With Special Regard to the Draft Hungarian General Civil Code]. Budapest: Politzer Zsigmond és Fia Kiadása, 194–195.

13 Act XIII of 1876 on the regulation of the relationship between the servant and the farmer, on farm labourers and day labourers (first servants'/maid act); Act II of 1898 on the regulation of the legal relationship between employers and farm labourers; Act XLV of 1907 on the regulation of the legal relationship between the farmer and the farm labourer (second servants'/maid act).

14 LŐRINCZ, Ernő (1974): *A munkaviszonyok szabályozása Magyarországon a kapitalizmus kezdeteitől az első világháború végéig 1840–1918* [The Regulation of Labour Relations in Hungary from the Beginning of Capitalism to the End of the First World War 1840–1918]. Budapest: Akadémiai Kiadó, 37.

15 LŐRINCZ 1974: 37. In contrast to the second maid act, its personal scope extended both to maids (outside and domestic or otherwise indoor maids) and to field workers. This is true even though the regulatory model was that of the landlord–maid relationship, and the characteristics of agricultural wage labour in the later sense had not yet been outlined.

relationship between the master and the maid, a certain patriarchal bond is also apparent, especially with regard to domestic maids. The law regulating the legal relationship between agricultural workers is formally based on the contract, but gives the employer a number of historical prerogatives when it come to the apportionment of rights and obligations and, in particular, the enforcement of the method of performance.[16]

Thus, two tendencies can be discerned in the development of labour law in Hungary after 1849. On the one hand, elements reflecting the status relations typical of feudal society were preserved, while at the same time the legal relationship became increasingly based on private law. The efforts in the latter area, however, were rather half-hearted. This was primarily because the economic, social and political environment did not provide a sufficient basis for such a legal transformation, which is well exemplified by the hesitation and uncertainty surrounding the creation of the civil code and the foundation of private law legal relations.

Drafts of civil code – Influences by private law, public law and politics on a barely existing labour law

In several of his works, Lajos Vékás discussed the relationship between public law and private law, and the determining role of the adaptation of private law to align with public law, with particular reference to Zsigmond Kemény.[17] Vékás analyses in detail the 'adventurous history' of the stages

16 See Act II of 1898, Section 37.

17 See among others Vékás, Lajos (2001a): Egy új polgári törvénykönyv történelmi időszerűségéről [On the Historical Timeliness of a New Civil Code]. *Magyar Tudomány,* 46(12), 1396; Vékás, Lajos (2001b): *Az új polgári törvénykönyv elméleti előkérdései* [Theoretical Preliminary Questions of the New Civil Code]. Budapest: HVG-ORAC, 136–168; Vékás, Lajos (2014): A magánjogi kodifikációk néhány tanulságáról [Some Lessons from Private Law Codifications]. In Csehi, Zoltán et al. (eds): *(L)ex Cathedra et Praxis. Ünnepi kötet Lábady Tamás 70. születésnapja alkalmából* [(L)ex Cathedra et Praxis. Festive Studies in Honour of Tamás Lábady's 70th Birthday]. Budapest: Pázmány Press, 257–266; Vékás, Lajos (2015): Adalékok a Polgári Törvénykönyv történeti és összehasonlító jogi értékeléséhez [Contribution to a Historical and Comparative Legal

of codification of Hungarian civil law. It can be said that the discrepancy between the environment of public law and the requirements of market conditions has come to the fore in almost every era.

It was not different when the draft of the first code was born. Despite the fact that during the legislative session of 1848, the legislator announced the preparation of a civil code,[18] the first product of this great endeavour was not made public until half a century later.[19] The Twelfth Title of Part Four of the Draft of Hungarian General Civil Code 'Employment contracts; Awarding fees' regulated contracts of service and contracts for service, contracts of brokerage and the awarding of fees. It is important to distinguish the contract of employment, as the umbrella category of a group of contracts aimed at work, from the so-called management commitment (mandate)[20] and from the lease, the regulation of which is limited to the lease of things.[21] In case of employment contracts, the service contract is a contract whereby "one party (the employee) undertakes to perform a service in the household,

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Assessment of the Civil Code]. In Keserű, Barna Arnold – Kőhidi, Ákos (eds.): *Tanulmányok a 65 éves Lenkovics Barnabás tiszteletére* [Studies in Honour of Barnabás Lenkovics, 65]. Budapest–Győr: Eötvös József Könyv- és Lapkiadó Bt. – Széchenyi István Egyetem Deák Ferenc Állam- és Jogtudományi Kar, 564–574; Vékás, Lajos (2023): A magánjog kihívásai. Történeti visszapillantás és mérleg [Challenges of Private Law. Historical Review and Assessment]. *Magyar Jog*, 70(7–8), 389–399.

18 See Act XV of 1848 on the abolition of aviticity Section 1: "The ministry shall draft a civil code based on the complete and total abolition of aviticity, and shall submit this draft code to the next session of the National Assembly."

19 Sándor Erdélyi, then Minister of Justice, was commissioned to prepare the draft of the Hungarian General Civil Code in October 1895. The committee set up for this purpose began work in January 1896 and the draft was completed in July 1900. For the period between 1848 and the birth of the Draft see among others Vékás, Lajos (2011a): Az osztrák Polgári Törvénykönyv hatása a magyar magánjog fejlődésére [The Influence of the Austrian Civil Code on the Development of Hungarian Private Law]. In Rácz, Lajos (ed.): *A német–osztrák jogterület klasszikus magánjogi kodifikációi* [Classical Codifications of Private Law in the German–Austrian Legal Area]. Budapest: Martin Opitz, 21–33.

20 Draft Title Thirteenth.

21 Draft Title Fourteenth.

farm or business of the other and the other party (the employer) undertakes to pay the agreed wages".[22]

The draft protects the "permanently employed employee", and further provides for the right to rest – without specifying the amount of rest time or the length of working hours. Remarkable elements of the legislation are the provision on the employer's duty of care in the event of an accident or illness to the employee, even if it is not the result of the service.[23] It is also significant that the employee could not waive certain rights contained in the draft, and that any agreement "which modifies the rules of those Articles to his detriment is void".[24] The heterogeneous nature of the service relationships created by this contract is reflected in the dismissal system, which was forced to establish differentiated rules, some of which take into account the performance of the day labourer, while others apply only to industrial workers. It can be shown that, despite certain employee protection institutions, the draft regulated the relationship of the parties in accordance with the contemporary approach to private law, i.e. the legislator did not intend to separate private labour law from civil law.

The next in the series of drafts was issued only after World War I. The Private Law Code of Hungary was submitted to the House of Representatives in 1928 (hereinafter: Proposal).[25] In its structure and subject matter, the rules on 'relationships of work' are similar to those in the previous draft. According to the concept of a contract of service, "one party – the employee – undertakes to perform services for another in the course of his household, farm, business or other breadwinning/gainful occupation, and the other party – the employer – undertakes to pay the agreed consideration – the wages".

If a person undertakes to perform 'other kinds of services' for a consideration, he or she is only covered by a contract of service if the parties

22 Draft Section 1600.

23 Draft Section 1604.

24 Draft Section 1612.

25 See on this VÉKÁS, Lajos (2011b): Történeti visszapillantás a magyar magánjog kodifikációjára [A Historical Review of the Codification of Hungarian Private Law]. *Jogtudományi Közlöny,* 66(5), 267–268.

entered into it with such an intention. This intention is supported by the presumption that the wages were fixed in accordance with time.[26] These provisions deserve attention because it can be interpreted as a first attempt to distinguish between contracts of service and other similar contracts (e.g. *freier Dienstvertrag*). However, this assumption requires some explanation. Namely, neither the Draft nor the Proposal contains an explicit provision on the employer's general right to control and instruct. The employer's instructions are regulated in a manner that is unusual in the context of the contract of service, but nevertheless respectable. According to Section 1563, Subsection 2 of the Proposal "if the service is to be performed in his (the employer's – K. Gy.) premises or according to his instructions or under his supervision, the employer must, as far as possible, avoid everything that could damage the employee's morals or good reputation during the performance of the service and adversely affect him or her". This provision is included in the section on the protection of the employee's personality, which suggests that in case of services of this nature, a relationship has developed between the parties that does not exist in other types of work performed personally for the other party.

The Proposal dealt separately with the employee's right to wages[27] and the rights ensuring the protection of wages and the employee's personality.[28] In accordance with wage protection, the Proposal stated that wages must be paid even if there is no specific provision for this, provided that the circumstances do not suggest that the employee undertook the services free of charge. If neither an agreement nor an official tariff determines the amount of the wage, it shall be adjusted in accordance with local custom.

It can be concluded that the content of the legal relationship created by the contract of service was not determined by whether the legal text of the contract contained the subordination of the employee or not. But, if we compare this employment relationship with that of an entrepreneurship of so-called fiduciary relationships (mandate), a difference emerges between the legal relationships of non-independent and independent work.

26 Proposal Section 1550.

27 Proposal Section 1552– 558.

28 Proposal Section 1559–1569.

Entrepreneurial activity presupposes the infrastructure necessary for the performance of the work, and the regulation manages the relationship between the parties (entrepreneur and principal) involved in the economic transaction. It is somewhat more difficult to establish the actual criteria for the typical fiduciary obligation, i.e. the mandate. By accepting an assignment, the agent undertakes to perform the task entrusted to him in accordance with the principal's wishes and in the principal's best interests.[29] There is no doubt that the agent had considerable freedom in terms of complying with or deviating from the principal's instructions. In this context, two provisions should be noted. One is Section 1619 in the Proposal. According to this provision, "the agent may deviate from the principal's instructions in handling the matter if, in view of the circumstances, it can be assumed that the principal, knowing the facts, would approve of the deviation". The other provision was found in the Draft Section 1662, Subsection 2 discussed above (this rule was omitted from the Proposal). Under this provision "if the contract is for the performance of professional duties requiring higher academic qualifications or specialised knowledge, the trustee shall take into account the instructions of the principal only in so far as this is compatible with his profession and the nature of the duties". This formula could be interpreted today as meaning that the agent is not obliged to comply with inappropriate, unprofessional instructions.

A peculiar attempt to create a 'class-based' civil code

Among the drafts and proposals, it seems appropriate to present a rather unusual experiment, not least because it faithfully reflects the complex social conditions of the era. This was the draft of a civil code by Péter Ágoston.[30] Although he did not consider his draft to be 'socialist private law', but clearly a 'class-based private law',[31] one of its guiding principles was that "it would

29 Proposal Section 1616, Subsection 1.

30 Ágoston, Péter (1916): A polgári törvénykönyv tervezete [Draft Civil Code]. *Munkásügyi Szemle,* 7(8–15).

31 Ágoston 1916: 400.

be necessary that as a man, the owner should have a duty".[32] Regarding the incorporation of a law for the protection of "weaker", propertyless and uneducated workers in a civil code, Ágoston argued: "There is no doubt that the Draft (draft of the Commission proposal – K. Gy.) does not consider work and property/wealth to be equal rights today. If it did, it would manifest itself in the fact that I would at least be more involved in the work […]. If the regulation of the legal relations of the weaker were completely excluded from the Civil Code, we could at least hope that the Labour Code that is to be established would contain all the provisions that are indispensable for the protection of the weak against the strong. But no such Code is going to be introduced in the House."[33]

The principle of class-based private law is explicitly expressed in the system and rules of this law of contracts/obligations. Ágoston's starting point is that if "there are social classes, they must be taken into account".[34] He divided the contracts themselves into two parts, 'interclass contracts' and 'equal contracts'. According to Section 776 of Ágoston's draft: "Contracts in which the parties belong to the same social class are called equal, (while) those in which the parties belong to different social layers are called interclass". In addition to the pitfalls of placing the categories of "class" and "layer" in a legal-dogmatic context, the distinction in the draft also had contractual-institutional implications. These were made explicit in the text as follows: "People belonging to the lower classes are under the special protection of the law. This protection is manifested in the fact that for all their transactions with a higher social class, until proven otherwise, they are presumed to have been under duress" (Section 754). "Legal consequences which the declarant could not have foreseen are not applicable" (Section 778). "An interclass contract must always be interpreted as favouring the economically weaker party" (Section 822, Subsection 2). "Where parties of different wealth and education are in conflict, the declaration of the party who is learned in the law shall be taken literally according to the ascertainable intention of the party who is weaker in knowledge of the law"

32 Ágoston 1916: 224.

33 Ágoston 1916: 224–226.

34 Ágoston 1916: 403.

(Section 822, Subsection 4). "In the case of an interclass contract, there is an essential error: 1. if the livelihood of the person living by his labour is in any way endangered by the contract; 2. if the contract creates a substantially different condition from that which the lower class might have expected" (Section 827). The strong social content of the regulation of the interclass contract is also evident in the method of determining wages, the minimum amount of which should be "enough to support and raise the worker, his wife and two children" (Section 1141).

In this respect, perhaps the most important element of Ágoston's draft is the incorporation of collective contract rules into the law of obligations, while drawing up a hierarchy of different levels of collective contracts and describing the relationship between collective contracts and contracts of service (Sections 1134–1148). Despite the fact that its ideas are sometimes surprising and its wording unusual to contemporary readers, it dealt with all the problems that characterise labour law in this area today. Ágoston's draft, apart from its political exaggeration and language that sometimes shows emotive intensity, contains some elements that are worth considering. He also seems to have recognised the contradictions in his work, and this is reflected in the following thought: "In the eyes of dogmatic jurists, it may be repugnant to look for the means of reconciling social differences here in the private law area. However, the reason for this is only that it is unusual."[35]

Disputes on the drafts of the Civil Code and their indirect(?) effect on the codification of labour law – The dispute between Perneczky and Meznerics

The discussions surrounding the drafting of the Civil Code had an influence on the efforts to codify labour law. I am chiefly referring here to the dispute between Béla Perneczky and Iván Meznerics in the journal *Gazdasági Jog* [Economic Law] in 1943.[36] Perneczky approached the problem through an analysis of the segmentation of the legal system. He argued for

[35] ÁGOSTON 1916: 403.

[36] See *Gazdasági Jog* [Economic Law] 1943(6–7).

a substantive segmentation of the legal system alongside the traditional logical division. He emphasised that there is a growing trend toward mixing legal regulation, whereby the legislator settles certain life situations using both private law and public law instruments. This is referred to as the "spirit of professional law", and "those laws of different types that jointly regulate a larger part of life are usually called mixed professional law".[37] In his view, the independence of labour law as an independent area of legal study 'follows naturally' which leads him to take the existence of a uniform labour code for granted without any specific reasoning. His explanation, however, goes beyond jurisprudence when he states that his scholarly objective is also a political desire. The efforts and legislative achievements of National Socialist German and corporate Italian law obviously played a role in this.[38]

Perneczky discusses several issues in connection with the independent labour code; first of all, he wonders what the actual subject of this law would be. His response is based on the need for protection and on the fact that human work is a service that requires special protection. His explanation reflects the German approach to the employment relationship – as a 'personal–community' relationship – which distinguishes this relationship from private law obligations of the exchange type. Despite the fact that this argument is still present with regard to the legal relationship of service (employment), there is a certain confusion in the scientific classification of his time, since the same types of obligations are not necessarily grouped under the employment relationship.[39] However, it is important to point out that the scope of "main life relationships" regulated by labour law includes "trade association law" and the collective labour agreement.[40] In his view,

37 Perneczky, Béla (1943): A munka törvénykönyve [The Labour Code]. *Gazdasági Jog,* (6), 582.

38 See Siebert, Wolfgang (1941): *Das Recht der Arbeit.* Berlin: Deutscher Rechtsverlag; Musso, Stefano (2016): Lavoro e sindacato nell'economia fascista. In Neri Serneri, Simone (ed.): *1914–1945. L'Italia nella guerra europea dei trent'anni.* Roma: Viella, 273–286.

39 Perneczky 1943: 587–588; see also Vincenti 1942: 45.

40 These are the following: "The service, the employer's duty of protection and care, and the method of collective bargaining in relation to trade unions" Perneczky 1943: 588.

the 'official' establishment of working conditions must compete with the collective agreement. This is a very important social and legal policy issue.

Another unavoidable problem of the independent labour code was the code's relationship with the "private law code that is being prepared". In this context, Perneczky was once again on shaky ground when he asks whether "from an employment law point of view, is the type of contract called a service contract appropriate, or is a specific contract of employment necessary?".[41] Perneczky could not find clear justification for a *sui generis* contract of employment, so he also prefers to accept the contract of service in the proposed Hungarian Private Law Code,[42] which "states that the object of the contract type is the marketing of human work to be performed under the authority of another person, for a limited period of time in advance and at most for a specified period of time".[43] While Perneczky considers the concept of contract of service in the Hungarian Private Law Code to be acceptable, this raises the question of whether it would be justified to revise the chapter on this subject in order to make it a general part of all contracts of service rather than a special type of contracts of employment. Here, Perneczky is referring to legislation that regulates different types of work in a dispersed way. However, he leaves open the question of whether these rules should actually appear in a civil law code or in an independent labour code.

As a result, Perneczky did not conclusively delineate the relationship between a possible labour code and a civil code. At the same time, he took a position on the issue of the inclusion of the collective agreement in the labour code, emphasising that if the desire is for it to be a "generally usable method of concluding a contract", then its regulation in the labour code should be reconsidered, even by referring to the nature of the collective agreement as a source of law.[44]

Perneczky's view was not immune to the influence of the dominant dogmatic and legal political currents of the age, and the parallel between

41 Perneczky 1943: 589.

42 Perneczky 1943: 590.

43 Perneczky 1943: 590.

44 Perneczky 1943: 592.

property rights and service relationships even reveals the legacy of *locatio conductio.* However, his argumentation made an original contribution to defining the character of the relationship between contract of employment and employment relationship. The fact that the doctrinal contours of the relationship between the Labour Code and the Civil Code were not entirely clear was not primarily his fault. The impetus to draw up an autonomous labour code was essentially based on social considerations, just as the leading conceptions of our time are not known for their dogmatic foundations.

Perneczky's view was diametrically opposed by Iván Meznerics. His reasoning was strongly influenced by the spirit of the age and by its dominant legislative achievements – especially the labour codes of the so-called 'dictatorial states' – but he nevertheless concluded that "regulation by an autonomous code is not justified at this time".[45] According to his reasoning, the very fact that legal regulations relate to a living relationship or a certain group of them increases their "quantity or significance – either as a result of changes in socio-economic conditions or as a result of worldwide or political changes" – which indicates the importance and recognition of these relationships. However, this alone is not sufficient justification for separate legislation.

In his conception, an autonomous labour code appears as a kind of compilation containing both private and public law rules and a mixture of the two would "represent a break with the existing principles of law systematisation".[46] He regards this as dangerous, despite the fact that "even jurisprudence and the philosophy of law" have not yet decided on the logical basis and precise criteria of the public–private law distinction. Political, scientific and practical considerations may support the argument in favour of an autonomous labour code, and the most important aspirations of the age are influenced by social and political considerations, but even this did not influence the general acceptance of the codification of an independent

[45] Meznerics, Iván (1943): A munkajogi kodifikáció kérdéséhez [On the Issue of Labour Law Codification]. *Gazdasági Jog,* (6), 597.

[46] Meznerics 1943: 600.

labour law.[47] In his concluding assessment, Meznerics therefore rejects "the regulation of labour law or the general principles and institutions of labour law" within a separate system, i.e. a code, "for the time being".

The dispute on the dichotomy of the law – Public law and private law

The differing opinions of Perneczky and Meznerics are, at first glance, proof of a systematic problem, and basically concern the principle and practical questions of the segmentation of the legal system. Since the existence or rejection of an autonomous labour code goes beyond questions of the form of the jurisprudential systematisation, it is worth briefly touching here on the problems of the segmentation of the legal system from another perspective.

The debate surrounding the dichotomy between public law and private law is by no means new in Hungarian academic literature. The basic argument of Arthur Balogh's thesis is that "the opposition between public law and private law, as between legislation containing quite unusual decrees and norms, is an ancient procedure in scholarship, without the contradiction of a didactic sharp separation being justified, at least in such a crude form".[48] He notes that such a rigid, sharp contrast endangers understanding of this area of law as a whole, making it impossible, because it ignores the interaction between these two large fields of law.

Undoubtedly, one of the most significant milestones in the discussion of public law versus private law was the debate that unfolded in connection with Gyula Moór's study. In his dissertation, 'The Problem of the Division of

47 Meznerics refers here to the German Gesetz der nationalen Arbeit and the Italian Carta del Lavoro, which are not considered labour codes. Perhaps the Soviet Labour Code from 1922 comes closest to this idea. Meznerics 1943: 603–604.

48 Balogh, Arthur (1897): A közjog és a magánjogok kapcsolata. Államtudomány és jogtudomány [The Relationship between Public Law and Private Law. Political Science and Jurisprudence]. *Jogtudományi Közlöny,* 32(38), 297–299.

the Legal System',[49] Moór explained that the maxim of Roman law which defined public law as being in the service of the public interest and private law as being in the service of the private interest had become almost useless as time progressed. Taking into consideration the overlaps between private law and public law, their influence on each other, the primacy of one over the other, and the latter's determination of the relationship between the state and the law, he concludes that a rigid distinction between "the law of the state" and "the law of private individuals" is not justified because the law as a whole ultimately concerns "the right of private individuals", and the nature of these rights changes when the state treats these transactions and organisations as corporations under public law, integrates them into its own organisation, and authorises them to take state action.[50]

In a discussion of Moór's study, László Buza explained that the criteria and symptoms that could be used to distinguish between public and private law with certainty cannot be applied in general. State action and private action are not always governed by the same legislation, "which must be regarded as a rule of public law owing to the stronger and more decisive nature of state action".[51] In response to this, Moór noted that the law of the state and the law of private individuals are simply two differing approaches to the same legal matter.

In this context, the thoughts of Móric Tomcsányi cannot be ignored.[52] He sees the interests served by the law as the cornerstone of the problem and, in a nuanced definition of the public interest, analyses not only the rights of the state deriving from its supremacy but also – based on a moral approach, among other things – the state's duties, and points out that certain state and public law duties also originate from the public interest. Tomcsányi concluded that "the public interest is a collective interest resulting from the synthesis of various interests, which may, where appropriate, conflict

[49] Moór, Gyula (1932): *A jogrendszer tagozódásának problémái* [The Problem of the Division of the Legal System]. Budapest: Magyar Tudományos Akadémia.

[50] Moór 1932: 15.

[51] Moór 1932: 15.

[52] Tomcsányi, Móric (1943): *Magyarország közjoga* [Public Law of Hungary]. Budapest: Királyi Magyar Egyetemi Nyomda.

with the particular private interests of some". The following statement is also relevant from the point of view of the systematic position of labour law: "The public interest in a broader sense is also present when it is only the interest of individuals, although this interest is of existential importance and the individual is not able to ensure its protection by himself."[53] However, it remains an open question as to when the legislator intends a particular interest to be considered a public interest. This is a problem of legal policy. One of Tomcsányi's most important conclusions was that, "the effort to unify public law and private law is therefore a fruitless effort, which both theoretically and practically only leads to difficulties".[54]

This could be taken to imply that, on the basis of his argument, the possibility of a separate labour law code is ruled out. At the same time, together with several other authors, he refers on several occasions to the diversity of state action, and also to the fact that the state appears alongside various other interests in the formation of legal relations that are typically not public authorities, although it is also true that this behaviour does not necessarily entail a separate codification. The public law versus private law problem appears elsewhere in Tomcsányi's work,[55] where he explains that while it is not possible to classify a legal relationship as both public and private law, "it is possible for otherwise separate public and private law elements to interact and be interrelated. However, this is a completely different phenomenon."[56] As an example, he cites the situation in the "field of public administration" where an individual can only achieve a certain aspect of his private life through the public intervention of the public authority. This, however, obviously does not include the dependency on subordination of private law, which he also mentions and which can also lead to a situation where the individual can only exercise the freedom of action resulting from his private legal status through state, legislative or administrative intervention.

53 TOMCSÁNYI 1943: 40.

54 TOMCSÁNYI 1943: 42.

55 TOMCSÁNYI, Móric (1944): *Közjog – magánjog* [Public Law – Private Law]. Budapest: A Magyar Tudományos Akadémia Kiadványa.

56 TOMCSÁNYI 1944: 12.

Returning to the reasons for the difference of opinion between Perneczky and Meznerics, it is necessary to refer again to Meznerics's views on a possible 'administrative labour law code'.[57] Under such an arrangement, the contract of service, or more precisely the service relationship, would not necessarily have been given an independent legal status, and such an approach might even have weakened the chances of this.

Intermediate conclusions

The period of codification of private law discussed above, and the development of a new private law in general, had an ambivalent effect on the development of labour law. The obvious endeavour of the era was the establishment of a Hungarian private law with independent entity, which of course retained the positive elements of the great European codification of private law. Both the Draft and the Proposal formed a contractual system into which the contract of service was integrated. In addition to following the prevailing approach and conceptual framework of the time, the Proposal contained provisions specifically designed to protect the legal status of employees. We could also say that the legal doctrine of the contract of service met the requirements of the time, and the Proposal included several legal and social policy measures.[58]

57 For several reasons, it is necessary to refer to Act XXI of 1937 on the regulation of certain issues of the employment relationship. In my opinion, this is the first legislation that represents state intervention in the field of employment relations. It cannot be called a code of labour administration, since it basically contains not administrative, but public law provisions limiting private autonomy. In Perneczky's words, these rules were part of the 'worker protection of private law'. This act did not represent any opening towards the unification of labour law. In this context, however, it is worth pointing out that there were certain unification, or at least partial unification efforts. In 1929, the Ministry of Trade drafted an act on the employment relationship of private officials and merchant assistants, but it was not submitted to parliament (it was the so-called Dezső Papp's draft). Vincenti 1942: 27.

58 See provisions on the termination of the service contract in addition to the negotiated. Proposal Section 1570–1579.

In view of all this, the aim of codifying labour law independently and of establishing a labour law with own entity seemed to be an almost impossible task. In the battle of arguments and counterarguments, the dogmatic foundation of separation was not clear, and political circumstances did not point in this direction. Nevertheless, these efforts have highlighted the problems that are currently straining labour law.

THE SEPARATION OF LABOUR LAW – BUT FROM WHAT? REPRESENTING AN INDEPENDENT LABOUR LAW: CODES IN SOCIALISM OF VARYING INTENSITY

Sparks of the traditional development of labour law in a short transition period – From 1945 to the 'year of the turn'

In 1945 Hungary faced rather complicated political and chaotic economic conditions. The period from 1945 to the adoption of the first Labour Code cannot be regarded as homogeneous either. The Labour Code,[59] which entered into force in 1951, sanctified a situation that could not have been foreseen with complete certainty in 1945–1946. In the context of our topic, the country's early orientation is indicated by Act XIX of 1946, which repealed certain rules that violated the individual freedom, equality of rights and human dignity of workers. The reasoning of this act states: "In the system of free wage labour, the 'fourth labour system', which is still in its infancy and therefore cannot yet be summarised, seeks to balance the economic power relations that in reality bind the worker's legal freedom and continue to allow his exploitation."[60] It is clear from the reasoning of the act

[59] Legislative Decree 7 of 1951.

[60] The first three labour systems are the slave labour system, the feudal labour system and the legally free wage labour system. "In the system of free wage labour, the fourth system of labour seeks to balance the economic power relations which in reality bind the legal freedom of the worker and continue to allow his exploitation, and which is still in its infancy, and therefore its characteristics cannot yet be summarised." Reasoning Act XIX of 1946.

that even in the period of the free wage labour system, there were laws in Hungary that reflected the feudal economic and political system. These rules were repealed by this act. In the context of the settlement of employment relations, certain discrepancies can be observed where the traditional term is used to refer to the early legislation, namely the 'contract of service'.[61] For the purposes of the regulation, the scope of the regulation – apart from certain exceptions – "extends to all workers employed under contracts of service by private law".[62]

Some overlaps can also be observed in the jurisprudence, in so far as some authors tried to depart from the roots and approaches of classical private law in the establishment of the new labour law, but it can be seen from some studies on the topic that they did not succeed in presenting a dogmatically new construction at this time. The dilemmas and the way forward are well reflected in a study of the principles of labour law by Dezső Nagy published in April 1948.[63] The author approaches the principles of labour law from the point of view of the conflicts of interest of the parties of other private law relationships. He explains that the situation of the parties in the 'opposite interest position' of the employment relationship is different from the position of the parties in other private law relationships, because in the employment relationship it is not only individuals who have conflicting interests, but whole classes of society which regard each other accordingly.[64] In his opinion, this is the reason why weaker parties in service relationships set up organisations, in contrast to the behaviour of parties with a weaker legal position in economic transactions. However, difficulties arise in defining the concept of 'class' – which, by the way, was not elaborated in detail by Péter Ágoston in his Draft Civil Code – whose

61 See ME Decree 9700/1945 (X. 21.) on the regulation of certain issues of the employment relationship.

62 See FARKAS, József (1952): *Munkajogunk fejlődése a felszabadulástól a Munka Törvénykönyvéig* [The Development of Our Labour Law from Liberation to the Labour Code]. Budapest: Jogi és Államigazgatási Könyv- és Folyóiratkiadó, 15–20.

63 NAGY, Dezső Jr. (1948): A munkajog alapelvei [Principles of Labour Law]. *Jogtudományi Közlöny,* 3(7–8), 74–80.

64 NAGY 1948: 75.

existence is "best proved by its activities and actions".[65] As regards the employment relationship, and labour law as a whole, Dezső Nagy states that statutory law does not yet regard "a social class as a legal institution" i.e. as a community it would recognise. Nevertheless, "every sociologically trained lawyer" must objectively state that "the grouping of workers and employers into a class in each branch of production, (and) their desperate struggle for the interests of their class in the social and political spheres, highlights their legal relations from the scope of individualistic private law". It is not debtor and creditor who confront each other here, but classes based on their own self-consciousness.[66]

The author is right in saying that, compared with *ad hoc* transactions, a contract of employment is entered into by a worker for the purpose of supporting himself and his family perhaps only once in his life, and that this contract determines his whole life and thus makes him aware of his class position.[67] At this point Dezső Nagy accepts the phraseology of Péter Ágoston, in so far as he believes that it is not sufficient to classify labour law simply as a specialised law ('professional law'), since labour law also has social functions, and thus labour law is 'private law between classes'.[68] Consequently, the focus of labour law increasingly shifts away from the sphere of private law and approaches that of public law. This also means that cogency will be the ruling principle of the legal material and the 'dispositive right of the parties' will be reduced to a narrower circle.

Nagy's study refers to the shifts in emphasis resulting from the new 'interclass' nature of labour law, such as the role of the trade unions' collective agreements and the works constitution, and deals in detail with the central issue of labour law – wages. However, beyond the social-, class- and politically-based approaches to labour law, the work does not contain dogmatic

65 Nagy 1948: 75, referring to Rézler, Gyula (1948): *Bevezetés a szociológiába* [Introduction to Sociology]. Budapest: Gergely R. Rt. Kiadása, 178. On the concept of class, see also in this context Justus, Pál (1945): *A szocializmus útja* [The Path of Socialism]. Budapest: Népszava Kiadó, 49.

66 Nagy 1948: 75.

67 Nagy 1948: 75.

68 Nagy 1948: 76.

analysis to explore the nature of the legal institutions. Nevertheless, the Marxian reference reveals much about the state of law and the cultural level of society at the time. Regarding the personal character of the employment relationship, the author notes that as labour law moves towards socialism "the subordination of workers will be preserved (sic!), of course with a reduction of the rights granted to them in the works constitution".[69] However, the most interesting item in the study is a reference to a possible labour code. Dezső Nagy argues that "the regulation of labour law can only happen with a comprehensive code".[70]

There are references to such a mysterious code elsewhere. The idea of creating a labour code was first proposed by the Tildy Government. That government's programme was presented in the National Assembly on 30 November 1945, and mentioned, among other tasks of the Minister of Justice, "the establishment and systematisation of labour law". With regard to the Ministry of Industry, the government programme commits to the preparation of a new code on industry, which would aim to "regulate labour law and the obligation to work".[71] Later, in December 1945, the Ministry of Industry sent a letter to the National Centre of Hungarian Free Trade Unions about the establishment of a committee to prepare the Labour Code.[72] A particularly interesting feature of the letter is a reference it makes to the voluminous rough draft prepared by a committee of university professors on behalf of the Minister of Industry at the time. In the letter (of December 1945), the Minister of Industry states that "I intend to carry out further work on the basis of this draft. However, before the revision of the draft can begin, it is necessary to define the guidelines for the revision. For this purpose, I would like to organise a committee and provide representation to the

69 Nagy 1948: 80.
70 Nagy 1948: 76.
71 Kiss, Péter et al. (2004): *Magyar kormányprogramok 1867–2002.* I.–II. [Hungarian Government Programmes. Volumes I–II]. Budapest: Magyar Hivatalos Közlönykiadó.
72 Budapest, 19 December 1945. From the Minister's Decree: Antal Szakasits, Ministerial Head of Department, SZKL 1. fond 6/132. ő. e.

Trade Union Council."[73] Up to 1948, we can find numerous conspicuous references to this draft.[74]

The most detailed information about the draft was provided by Antal Szakasits in 1948 in the journal *Gazdaság.*[75] The first sentence of his study is remarkable: "During the last three years there has been a lot of talk about the labour code without anyone, apart from the initiators and insiders, being convinced that the code is being seriously prepared, although the real situation is that the work has been going on for almost three years and if we take a closer look at the question, we can see that a ready result could not have been expected until now."[76]

One might even conclude from the introductory lines of his essay that the law being drafted is little more than a mere compilation, as if the legislator's aim was to systematise the many scattered regulations that had been created since 1945. In fact, there have been more to it than that, as the author also refers to a change in the prevailing economic and, not least, political circumstances. The general overview of the proposal basically defines the principles of the code on a private law basis[77] and emphasises

73 Budapest, 19 December 1945. From the Minister's Decree: Antal Szakasits, Ministerial Head of Department, SZKL 1. fond 6/132. ő. e.

74 See, among others, Cenner, Gyula (1948): A munka büntetőjogi védelméről [On the Criminal Law Protection of Work]. *Jogtudományi Közlöny,* 3(1), 4–6; Szabó, László (1947): A munkajogi Kódex [The Code of Labour Law]. *Gazdaság,* 2(24), 690–693; Mikos, Ferenc (1947): A munka törvénykönyve elé [On the Labour Code]. *Jogtudományi Közlöny,* 2(1), 18–20; Bánóczi, Dénes (1946): A munka törvénykönyve [The Labour Code]. *Gazdaság,* 1(1), 124–126; Bánóczi, Dénes (1947a): Hároméves terv és a munkajog [Three-year Plan and Labour Law]. *Gazdaság,* 2(18), 803–807; Brachfeld, Dezső (1948): A munkaszerződés fogalmának kérdéséhez [On the Concept of the Contract of Employment]. *Jogtudományi Közlöny,* 3(6), 171–174.

75 Szakasits, Antal (1948): A munkajog egységes szabályozása [Uniform Regulation of Labour Law]. *Gazdaság,* 3(15), 905–908.

76 Szakasits 1948: 905.

77 "Labour law reinforces the general principle of law that the exercise of rights and the performance of duties must be carried out in good faith and in accordance with fairness and that the law does not provide protection against abuse of rights and malicious exploitation of the parties to the work is reinforced."

that "work serves the universal good of the nation and is legally protected in the public interest".

The scope of the code is remarkable because it also sets out the essential conceptual element of the employment relationship, namely performance in accordance with the other party's (employer's) order. Szakasits refers to the part of the code that deals with the employment contract/relationship as the private labour law rules,[78] which in their structure hardly differ from the structure of today's codes. The next major section of the proposal relates to the "administrative protection of the worker", covering job placement, wage systems, the rules for the official determination of wages, working hours, the protection of the physical integrity and health of workers' lives, the protection of children, adolescents and women, special rules for industrial and trade apprentices, internal working rules and the labour registry.[79] The author particularly emphasises the institution of labour justice and its substantive and procedural provisions.

An analysis of this period would not be complete without a description of the evolution of the treatment of the collective agreement.[80] The role of collective agreements was even enhanced because, despite the efforts made at this time, the Labour Code was not adopted, while at the same time the stabilisation of the economic situation required some level of uniform regulation, and finally there was no clear dominant political force – at least on the surface – that could have possessed power of legislation in this area. The conclusion of collective agreements was urgently needed from the point of view of labour law, primarily to stabilise wages, so it is no coincidence that the wage committees, which were established in 1945, played a major role in the enforcement of collective agreements.

78 Szakasits 1948: 906–907.

79 Szakasits 1948: 907.

80 See, for example, Kun, Attila (2004): A magyar munkajog kezdetei és helyzete 1945 és 1949 között [The Beginnings and Situation of Hungarian Labour Law between 1945 and 1949]. *Acta Universitatis Szegediensis: Acta Juridica et Politica Publicationes Doctorandorum Juridicorum,* 4(1–15), 368–371; Farkas 1952: 26–31; Hágelmayer, Istvánné (1979): *A kollektív szerződés alapkérdései* [The Basic Issues of a Collective Agreement]. Budapest: Akadémiai Kiadó, 101–114.

In this study I will not analyse in detail the specific rules relevant to this topic, merely noting that the state tried to make collective agreements as general as possible, in other words, to give them the character of legislation, and hence to absolutise as far as possible their extended scope and transformative power. This ambition deserves attention for two reasons. On the one hand, this is because of the much-discussed dual legal nature of the collective agreement, and on the other hand, unfortunately, because it served as the basis for the subsequent deformation of the institution of the collective agreement and deterioration into a simple political tool.

The dilemmas of the era can be clearly traced in the jurisprudential debates about the purpose and legal nature of the collective agreement, which were similar to discussions related to the assessment of the labour code. In 1946, Béla Perneczky, in his examination of the regulation on collective labour agreements, took a private law approach to the legal nature of collective agreements.[81] The cornerstone of his analysis is the so-called "far-reaching" (transformative and complementary) power of the "labour rules" of collective labour agreements. In his view, in the absence of specific legislation, "the labour regulations do not have a far-reaching transformative effect, because the collective labour agreement is a binding legal transaction".[82] Due to the nature of such agreements, they only create legal effects in relation to the parties bound by them, which belong to the general law of contract law.

However, the relevant decree is cogent in terms of wages in the direction of collective agreements, thus contracts of service that are contrary to it are invalid in this part. Nevertheless, Perneczky points out that there is no obstacle to concluding collective agreements that do not fall under the scope of the decree, as the parties to the contract of service "can inaugurate them as conditions of their service relationship not only with express consent, but also with implied/latent behaviour".[83] He also analyses the

[81] PERNECZKY, Béla (1946): A kollektív munkaszerződést szabályozó 490/1946 M. E. sz. rendeletről [On ME Decree 490/1946 Regulating Collective Labour Contracts]. *Jogtudományi Közlöny,* 1(3), 84–87.

[82] PERNECZKY 1946: 84.

[83] PERNECZKY 1946: 85.

legal nature of the so-called "loyalty to work rules" – which is in fact, in today's parlance, an institution called "peace duty". Referring to Szladits he calls this not a promise of service or a guarantee of quality, but "a duty of loyalty to the work code [...] that those whose interests do not correspond to the work code may demand intervention".[84] Perneczky concludes by expressing the hope that the regulation will "greatly support and promote a more developed network of collective labour agreements, in which the autonomous regulation of working conditions will be established".[85]

On 23 May 1947, the Labour Law Section of the Hungarian Lawyers' Association held a high-level academic seminar on the legal nature of collective contracts. The central element of Sándor Túry's introductory lecture was the 'far-reaching effect' of collective employment contracts, referring to the contemporary judicial practice, which approaches this problem in the context of the so-called 'closed-type obligation' *(zártfajú kötelem)*. The essence of this is that if "someone has entered into closed-type transactions with different persons, but who cannot be fully satisfied with such a closed-type commitment, he or she brings together, on the basis of risk sharing, persons who, according to the individualistic approach, have no legal relationship with each other".[86]

In this context, State Secretary Géza Pap criticised the term 'contract' as "implying a legal instrument regulating the mutual subjective legal relationship of the contracting parties", whereas this institution "establishes an objective law, a binding legal rule within the framework of the state legal order".[87] Salamon Beck directly launched a 'scientific claim' against labour law based on the general private law, referring to the dangers of the proliferation of "unaccepted" obligations.[88]

84 Perneczky 1946: 86.

85 Perneczky 1946: 87.

86 A kollektív munkaszerződés jogi természete [The Legal Nature of the Collective Labour Contract] (1948). *Jogászegyleti Szemle,* 2(1–2), 132.

87 A kollektív munkaszerződés jogi természete [The Legal Nature of the Collective Labour Contract] (1948). *Jogászegyleti Szemle,* 2(1–2), 135.

88 A kollektív munkaszerződés jogi természete [The Legal Nature of the Collective Labour Contract] (1948). *Jogászegyleti Szemle,* 2(1–2), 135–137.

According to Miklós Világhy's starting point, a contract and a legal source are not mutually exclusive concepts,[89] referring to an excellent study by Gyula Moór.[90] In that sense, the *lex contractus* refers to the similarity between a contract governed by private law and an act, according to which "there is no qualitative difference between the two, but only a quantitative one [...] on the basis that the legal force of each act is greater or lesser in terms of its effect and scope than that of the others".[91] Instead of dissecting the legal nature of the collective labour agreement, Világhy emphasises that this institution can be interpreted in relation to the law, the decree, the regulation and the custom on the one hand, and to the simple private law contract on the other hand, within the hierarchy of the various legal acts. However, he does not share the view developed in German legal literature regarding the splitting of the content of the collective labour agreement into normative and contractual parts, because this institution is a unit, which is a new phenomenon in the world of law, and which thus requires a new doctrine.[92]

Noteworthy is the comment by Béla Gallia, retired president of the Curia, who approaches the legal nature of collective labour agreements through the legal institution of avoidance, thus distinguishing them from purely private law service contracts.[93] Other participants in the debate

89 A kollektív munkaszerződés jogi természete [The Legal Nature of the Collective Labour Contract] (1948). *Jogászegyleti Szemle,* 2(1–2), 137.

90 Moór, Gyula (1938): A magánjogi jogügylet mint jogforrás [The Transaction of Private Law as a Legal Source). In Balás, P. Elemér et al.: *Emlékkönyv Dr. Szladits Károly tanári működésének harmincadik évfordulójára* [Memorial Book for the Thirtieth Anniversary of Dr Károly Szladits's Teaching Career]. Budapest: Grill Károly Könyvkiadóvállalata, 32–39.

91 A kollektív munkaszerződés jogi természete [The Legal Nature of the Collective Labour Contract] (1948). *Jogászegyleti Szemle,* 2(1–2), 137.

92 A kollektív munkaszerződés jogi természete [The Legal Nature of the Collective Labour Contract] (1948). *Jogászegyleti Szemle,* 2(1–2), 138.

93 A kollektív munkaszerződés jogi természete [The Legal Nature of the Collective Labour Contract] (1948). *Jogászegyleti Szemle,* 2(1–2), 140–142.

also criticised theories aimed at splitting the content of collective labour contracts.[94]

The debate is heartening to read even today, because despite the fact that everyone recognised the tension that had developed between the individualistic dogmatics of private law and the collective labour agreement, no one left the path of the private law approach, which even the state's authorisation of the transformative power of collective agreements did not change either. The difficulty of the assessment, however, is illustrated by the fact that many argue in favour of the legal rule/legal norm nature of collective agreements. Thus, in his study, which draws upon a considerable literature, Dezső Nagy Jr. classifies the collective contract rather as a legal norm on the basis of an analysis of Decree 8.620/1946 M. E., with certain reservations.[95]

The period under consideration was a time of scholarly pathfinding for the development of Hungarian labour law after 1945, which sought to draw as much as possible from the classical private law roots despite the constantly changing legislative environment. It can be argued that, had it not been for the radical political change brought about by the turning-point year of 1948, there would have been a realistic chance of establishing the kind of labour law system that had characterised the development of European bourgeois states since the second half of the 1950s.

The creation of the 'new labour law'

However, the political orientation of the country and the development of law went on two different paths, and this determined the fate of labour law. As early as 1948, the absolutisation and distortion of central control could

94 Andor Glückstahl, Attorney, University Professor, László Szilágyi, Secretary of the Chamber of Commerce and Industry and Andor Weltner, Attorney.

95 NAGY, Dezső Jr. (1947): A kollektív szerződés mint munkajogi kútfő [Collective Contract as a Source of Labour Law]. *Jogtudományi Közlöny,* 2(7), 214–219. See also BÁNÓCZI, Dénes (1947b): Szerződés vagy jogszabály [Contract or Legal Norm]. *Gazdaság,* 2(12), 526–528.

be observed. The aspirations in the background, aiming at the elimination of the 'democratic charade', and the introduction of dictatorship (ostensibly of the proletariat) were becoming increasingly explicit.[96] The economic consequence of the political change was the so-called 'great nationalisation',[97] the legal impact of which was manifested for the time being in the fact that institutions that had been operating until then remained unchanged only in name, but their functions changed in all their elements.[98] Decisions were taken in that year to standardise pay levels, to centralise performance standards and to extend the authority of the National Wage Setting Committee.[99]

It was during this period that the foundations of what Kornai calls the classical socialist system were laid.[100] The ideology of irrational central planning is well reflected in a statement by Aleksandrov, a representative of soviet-socialist labour law, that "it would be contrary to socialist planning if, for example, the regulation of the remuneration of labour were to be fixed on the basis of the assessment of individual economic managers and the agreements made with individual employees".[101] Within two years, not only the determination of the content (statics) of the employment relationship was not subject to the autonomous agreement of the parties, but also its dynamics, i.e. the creation, modification and termination of the legal relationship.[102] It is no exaggeration to say that exerting control over the workers within the company in this way represented a concretisation

96 For other aspects on this see BANDY, Alex (2010): *Chocolate and Chess. Unlocking Lakatos.* Budapest: Akadémiai Kiadó.

97 See FARKAS 1952: 60–74.

98 KISS, György (1995a): *A piac és az emberi tényező* [The Market and the Human Factor]. Budapest: Balassi Kiadó, 34–38.

99 See, among others, Government Decree 8.480/1948 on Collective Agreements, the National Wage Setting Committee and Government Decree 2.369/1948 on the guarantee of a uniform wage level.

100 KORNAI, János (1993): *A szocialista rendszer* [The Socialist System]. Budapest: Heti Világgazdaság Kiadó, 58–62.

101 ALEKSZANDROV, Nikolai Georgij (1953): *A szovjet munkajog* [The Soviet Labour Law]. Budapest: Jogi és Államigazgatási Könyv- és Folyóiratkiadó, 179–181.

102 See also MT Decree 1/1950 (I. 8.) on discretionary change of employment.

of their legal status, 'tying them down', as if in preparation for the content of the socialist labour code that would soon appear.

The gutting of individual employment law also entailed abandoning the legal nature of the contract of employment and the employment relationship. It could also be argued that, due to various ideologically and politically motivated interventions and considerations, the contractuality of labour law was eliminated. Of course, collective labour law was also subject to this process. Perhaps the most significant change can be observed with regard to collective agreements. The system of collective agreements became merely formal in nature, since only highly centralised collective agreements were of substantive importance. In addition, one of the essential features of the collective agreement, relative dispositivity, was also eliminated. Thereafter, it was completely unnecessary to discuss the legal nature of the collective agreement.

Unfortunately, change could also be observed in the jurisprudence. On 15 December 1950, Károly Szladits gave a lecture at the Second Division of the Hungarian Academy of Sciences entitled *The Collective Contract.*[103] At the end of his strongly 'anti-class' speech, Szladits cited the Soviet model of collective bargaining, the aim of which is "to ensure the fulfilment and over-fulfilment of the plan, to increase productivity and to further improve the situation of workers". Collective agreements do not cover any elements that are regulated by labour legislation, such as wages, working hours and leave.[104] In the end, the collective agreement is nothing more than a means of implementing part of the plan, i.e. a definition of tasks. At the end of his address, Szladits noted that the new collective agreement is a contract in the legal sense, because the obligations undertaken in it can be enforced: "Usually through state administration, but it is conceivable that it can also be done through the courts."[105]

Taking labour law out of its natural context had unforeseeable consequences. This became particularly evident in the second half of the 1960s,

[103] Szladits, Károly (1950): *A kollektív szerződés* [The Collective Contract]. Budapest: A Magyar Tudományos Akadémia II. osztályán 1950. dec. 15-én tartott előadás.

[104] Szladits 1950: 57.

[105] Szladits 1950: 59–60.

when the economic impetus of the "new economic mechanism" could have represented a chance to restore contractually-based labour law, but the first cold political winds made this impossible.[106] In the meantime, however, certain events happened in Hungarian legal life that are difficult to explain. From the point of view of our topic, the creation of the first *Civil Code* was the most important. This act was created under special circumstances from two points of view.[107] On the one hand, the period before 1945 was characterised by heterogeneous economic, social and political conditions. Mádl points out that after the war the country inherited a private law system "with both feudal, classical capitalist and modern monopoly capitalist and fascist legislative elements".[108] On the other hand, the preparatory work for the first Civil Code started just after 1948 the – 'year of the turn' – a period when the political power relations of the period created the dictatorship of the proletariat, the "great nationalisation" took place, i.e. the vast majority of means of production became "socially" owned, and the role of the market was almost entirely supplanted by state intervention, planning and control.

Mádl characterises this environment – in 1960 – by saying that the creation of the civil code was not only timely, but downright necessary, since "civil law is a method of state management" and, on the other hand, 'socialist principles' demand written law.[109] Behind the mandatory formula was obviously the fact that it was not possible to return to "the judicial (common) law prior to 1 May 1960", as market and commodity relations had not yet disappeared.[110] In this context, Imre Szabó's critical comment on the ministerial justification of the law is instructive, which stated: "Certainly many institutions, many rules of conduct will remain in the Code even after

[106] See about this reform in NYERS, Rezső (1988): Visszapillantás az 1968-as reformra [Looking Back on the 1968 Reform]. *Valóság,* 31(8), 9–25.

[107] MÁDL, Ferenc (1960): Magyarország első polgári törvénykönyve – az 1959. évi IV. törvény – a polgári jogi kodifikáció történetének tükrében [Hungary's First Civil Code – Act IV of 1959 – In the Light of the History of Civil Law Codification]. *A Magyar Tudományos Akadémia Társadalmi-Történeti Tudományok Osztályának Közleményei,* 10(1–2), 3–88.

[108] MÁDL 1960: 74.

[109] MÁDL 1960: 75–76.

[110] VÉKÁS 2001a: 1401.

the complete construction of socialism, as they are included in it today; however, the Code itself is by its nature a code of a specific period, the Code of the *construction* of socialism."[111]

The First Civil Code thus ensured the possible operation of legal transactions even in an era when all the conditions for such transactions were lacking.[112] From the point of view of our topic, it is important that the structure of the socialist civil code changed substantially compared to what had been happening previously. One of the most spectacular areas of change was the exclusion of the contract of employment, contract of service from the scope of the law of obligations. This involved not only the abandonment of a legal relationship by the Civil Code, but for a long time it determined the place of labour law in the legal system and the 'legal nature' of labour law. This fundamental change was explained in many ways by contemporary jurisprudence.

Gyula Eörsi, analysing the debate on the Code, criticised the approach "based on the old-fashioned principle of the separation of private and public law. The most prominent example of this is the demand voiced in many places that the civil code should include family law and labour law, just like the old private law".[113] Eörsi draws attention to the fact that both these areas of law had already been codified at that time,[114] and there is a reason for this, so these theoretical suggestions are not correct. He states that socialist civil law is the legal branch of the commodity relationship, the commodity form, even if it includes some 'other peripheral institutions' in its scope of regulation. As a result, in addition to family law, the labour law regulating employment relationships became a separate branch of law, because "the employment relationship today does not mean the sale of the labour force, but participation in the production of the people's democratic

111 Szabó, Imre (1959): Új polgári törvénykönyvünkről [On Our New Civil Code]. *Magyar Tudomány,* 4(11), 581.

112 Vékás 2015: 564–574; Vékás, Lajos (2013): Az új Polgári Törvénykönyvről [On the New Civil Code]. *Jogtudományi Közlöny,* 68(5), 225–242.

113 Eörsi, Gyula (1958): A Polgári Törvénykönyv Tervezetének vitájához [On the Debate Concerning the Draft Civil Code]. *Jogtudományi Közlöny,* 13(1–2), 3.

114 Regarding family law see Act IV of 1952 on marriage, the family and guardianship.

national economy, and the large number of new legal institutions, which are completely foreign, are also adapted to this either from the old private law or from our new civil law".[115]

In his work referred to above, Imre Szabó also notes the breakdown of the old private law system. Some parts of the old private law were in the process of "leaving it and becoming independent", including labour law. Employment relationships are no longer commodity relations, and the contract of employment is no longer 'open to negotiation', "because the employer (no longer the capitalist employer) cannot freely determine the terms of employment in accordance with the conditions of the labour market".[116] Finally, Miklós Világhy's assessment is worth considering. He argues that private ownership of the means of production necessarily implies inequality between those who own the means of production and those who are excluded from it. However, the purchase, specifically the purchase of labour force – the contract – requires equality. "Inequality in property – equality in contract", is "the fundamental contradiction that bourgeois ideology, including legal ideology, had to and must constantly resolve".[117]

The Labour Code (hereinafter: Legislative Decree, LD), which had already been established in 1951, was fully in line with the political environment outlined above.[118] The legislator completely eliminated market effects and thus the influence of the parties on the formation of the legal relations between them. The abandonment of the principle of private autonomy can be traced not only to the determination of the content of the legal relationship, but also to the establishment, modification or termination of the legal relationship. Regarding the creation of an employment relationship, the LD did not stipulate the obligation to conclude a contract, but stated that it was in the vital interest of citizens to have an employment relationship,

[115] Eörsi 1958: 3–4.

[116] Szabó 1959: 576.

[117] Világhy, Miklós (1955): A Magyar Népköztársaság polgári törvénykönyvének rendszeréről [On the System of the Civil Code of the Hungarian People's Republic]. *Jogtudományi Közlöny,* 10(8), 472.

[118] Legislative Decree (hereinafter: LD) 7 of 1951 on the Labour Code.

since without it, not only was their financial position reduced, but also their everyday mobility became restricted.

The 'company' was not only a labour organisation, but also performed certain administrative functions of an authority nature.[119] Although the rules for concluding a contract had to be applied to amend the employment relationship, the legislator is silent about the institution itself. Elsewhere, however, it discusses relocation under the heading of 'labour force management',[120] which was not a contractual change by mutual agreement but a typical measure taken in that period, involving the unilateral relocation of a worker in the interests of the national economy. Rigid barriers stood in the way of an employee's desire to terminate his employment relationship. According to Andor Weltner, "by the establishment of the employment relationship, the requirement of the general obligation to work is realised, concretised and transformed into the obligation to maintain work discipline: the employee [...] may terminate the employment relationship only in the cases defined by our labour law".[121]

In practice, this meant that once the employment relationship had been entered into, the right to freely choose a new job became impossible, and the employee was tied to a particular segment. Under the relevant provision, an employee could in theory terminate an employment relationship of indefinite duration by giving notice if, in view of his family circumstances, health, other personal circumstances or for other reasons, he had an important interest in taking up employment in another locality or another company, but in practice this required the consent of the company director "in order to ensure continuity of production".[122]

When it came to collective agreements, there was simply nothing for the parties to agree on, as the collective agreement could only cover obligations related to the implementation of the national economic plan. Typically for this period, the fixing of the wage rates in the collective agreement was not

119 Kornai 1993: 248–249.

120 See Chapter XV of the LD.

121 Weltner, Andor (1958): *A magyar munkajog* [The Hungarian Labour Law]. Budapest: Tankönyvkiadó, 70.

122 LD Section 30 (1)(c) and (2).

actually a mutual agreement either, but merely a way of communicating the centrally decided regulation.[123] The collective agreement was replaced by the so-called company work order/guide, which was classified as a specific source of labour law, in so far as it determined the content of the employment relationship. Finally, it is worth noting that socialist labour law was accompanied throughout by the "legislative" power of trade unions, which Weltner classified as public authority decisions(!).[124]

The Legislative Decree was supplemented – or in fact, amended – in 1953.[125] The Hungarian Working People's Party (Magyar Dolgozók Pártja) issued a resolution in June 1953 containing criticisms of the lack of collective leadership and the violation of democracy in the country. Despite the fact that the resolution actually reflected the internal political crisis of the ruling elite by repealing some unrealistic provisions, the 1953 amendment did not substantially change the content of the previous decree in concept. The intensity of central intervention in the field of individual labour law was eased somewhat, and the rules for the modification and termination of the employment relationship changed, but these were also based on social policy considerations rather than on the intention of strengthening the individual parties' (the workers') right to self-determination. With regard to collective labour law, the regulation of trade unions in the code was formally a new phenomenon. This could be seen as a step forward, but without real freedom of association, the legislation preserved the existing level of trade union rights. In other words, only those rights existed which were recognised by the legislator, so the scope for action of the unions was dependent on the state. The largely formal nature of the rights of the unions is well reflected in the so-called 'forced' nature of trade union representation. The situation of the collective agreement at this time is well characterised by Hágelmayer, who points out that, while the institution of the collective

123 See HÁGELMAYER 1979: 121.

124 WELTNER, Andor (1951): A magyar munkajog forrásai [Sources of Hungarian Labour Law]. *Jogtudományi Közlöny,* 6(11), 682.

125 See Legislative Decree 25 of 1953 amending and supplementing Legislative Decree 7 of 1951 on the Labour Code.

agreement was in constant motion between 1945 and 1951, after that no change was experienced until 1967.[126]

To characterise the period preceding the so-called 'new economic mechanism' (1967), it is necessary to refer to the 1964 amendment of the LD.[127] This amendment was the product of a very cautious economic and perhaps political process of opening up. The amendment ended up being unjustifiably modest, one might say unconceptual, which was a reflection of a sharp debate within the Hungarian Socialist Workers' Party (Magyar Szocialista Munkáspárt, MSZMP). In the leadership of the party there was a concept of introducing a so-called dualist system of worker representation. This envisaged, in addition to the trade unions, a representative body elected by the workers within the companies. However, this idea was not substantially implemented.

The basic features of the new socialist labour law can be summarised as follows. After the 'year of the turn', the state sought to abolish all autonomous initiatives and legal institutions or to bring them under strong state control. The whole 'infrastructure' of labour law fell victim to this, in so far as the state-owned company was not just an employer but an organ of the state, and the director acted as an agent of the state. The withdrawal of the labour force from commodity market relations had the consequence that contracts – contracts of employment, or collective agreements – lost their former function, and contractual relations were present in the public law and public authority environment only in a formal way. Labour law had thus fully become an essential field for political intervention.

AN UNFINISHED REFORM, NEW IRRATIONALITIES, THE COLLAPSE OF THE LEGAL STRUCTURE

Kornai identified four reasons for the changes that began to start slowly in the mid-sixties: the accumulation of economic difficulties, the discontent

126 Hágelmayer 1979: 120–121.

127 Legislative Decree 29 of 1964 on the regulation of certain issues relating to employment relationships.

of the population, the disillusionment of the power elite, and the processes occurring in the surrounding socialist countries as 'external examples'.[128] The stalling of the reform process is well illustrated by Rezső Nyers's assessment that both the party that initiated the reform and the reform itself proved to be too weak to make a breakthrough.[129]

Nevertheless, one of the tangible results of this attempted breakthrough was Act II of 1967 (hereinafter: LC), which preserved the political concept of work and employment for about a quarter of a century. Formally, the LC had two tasks, decentralisation and the simplification of regulation. The first was supposed to increase the independence of companies, while the second – related to this – would have emphasised the double centre of gravity of the law and company-level regulation, thus reducing the regulation-level of legislation.[130] The objective of the regulation rested on shaky ground, not least because the large corporate mergers of the 1960s made it doubtful whether the autonomy of companies could be enhanced. Although the 1967 Corporate Act did indeed attempt to increase the market autonomy of companies,[131] the management and internal structure of companies hardly changed in practice.

Concessions in civil and financial law in the external legal relations of companies did not change the labour law situation significantly. The LC was intended to remedy this, and it did indeed bring more significant changes compared to the previous legislation. It eliminated the irrational elements of the contractual relationship, which meant that the worker was no longer bound to a particular place. However, the instability of the economy was increased by the huge workforce fluctuations it underwent,

[128] Kornai 1993: 402–406.

[129] Nyers 1988: 22.

[130] Nagy, László (1985): *A munkajogi szabályozás rendszere* [The System of Labour Law Regulation]. Budapest: Manuscript, 4.

[131] Eörsi, Gyula (1968): *A gazdaságirányítás új rendszerére való áttérés jogáról* [On the Right to Transition to a New System of Economic Management]. Budapest: Közgazdasági és Jogi Könyvkiadó, 33–34.

which the legislative decrees tried to reduce.[132] The centrally established wage system continued to constrain the expression of the will of the parties in shaping the content of the employment relationship. The reasoning was that "workers with the same experience and performance in each occupation should receive the same basic wage rate throughout the country, regardless of the industry, company, cooperative or private sector in which they work".[133] It is perhaps not necessary to spell out in detail what such a centralised determination of distribution and accumulation meant from a market economy point of view.

Paradoxically, the individual autonomy of the subjects of the employment relationship was also hindered by the unrealistic – and of course, largely formal – powers of the employee representative bodies. The implementing decree of the LC stipulated that the consent of the trade union was required, among other things, for the establishment of the "employee's basic personal wage". In summary, it can be said that the contract of employment only established the legal relationship, but had little chance of determining its content in practice.

Of course, the central cogent regulation also assigned a formal role to the collective agreement. The original intention of the legislator was that a collective agreement would have established – within the scope and framework defined by legislation – the rules regarding the rights and obligations of the company and the employees, as well as the principles guiding their implementation. Even in this period, the debates on the legal nature of collective bargaining were unable to move beyond the 'legal norm

[132] See among others Decree 17/1979 on certain aspects of employment relationships. According to this: "The employee's basic personal wage at the time of employment and for a period of one year thereafter may not exceed the lower limit of the statutory basic wage for his/her job (pay grade) if he/she enters into at least three employment relationships in the year preceding his/her employment and terminates his/her previous employment relationships by notice of termination" Section 55, Subsection 1.

[133] Arany, Jánosné et al. (1978): *A Munka Törvénykönyve kommentárja* [Commentary on the Labour Code]. Volume I. Budapest: Közgazdasági és Jogi Könyvkiadó, 612–613.

versus contract' dilemma,[134] although the real problem was that the parties still had nothing to negotiate about and agree on.[135]

Finally, it is important to stress the already mentioned unrealistic expansion of trade union rights, which collapsed spectacularly after about two decades. The LC introduced trade unions into the workplace, unlike the previous legislation, and gave them "influence" rights over the employer that, if they had been taken seriously, would have completely exhausted the employer's powers.[136] As controversial as the Code was when it came into force in 1967, the employment system and labour legislation did not collapse as long as political power provided some stability. But the half-solutions of the LC, the misinterpreted collective labour law could only exist in an economy without real markets and competition, and self-determination was only in a political system that was formally determined from above.

However, at the beginning of the 1980s it became clear that a centrally managed economy financed from non-market sources was not viable. The first cracks in the closed, monolithic labour law system corresponding to the economic policy of the time were brought about by the first cautious opening towards market conditions and its rather ungraceful legal regulation. In 1981, provisions came into force that defined the legal framework for small businesses under new conditions,[137] and it soon became clear that these forms of employment were an alternative to employment under

[134] For a critical summary of the debate see HÁGELMAYER 1979: 302–342. See also in particular ROMÁN, László: (1970): *A szervezeti jellegű belső szabályzatok természete különös tekintettel a kollektív szerződésre* [The Nature of Organisational Internal Regulations with Special Regard to the Collective Agreement]. Studia Iuridica Auctoritate Universitatis Pécs Publicata, 67.

[135] See the guidelines of the Minister of Labour and the Presidency of the National Council of Trade Unions on the conclusion of collective agreements in companies in KISS 1995a: 52.

[136] See among others ROMÁN, László (1974): A szakszervezeti vétójog néhány problémája [Some Problems with Trade Union Veto Rights). *Szakszervezeti Szemle,* 13(2), 70–84.

[137] See MT Decree 28/1981 (IX. 9.) on economic working communities. The decree was the implementation of Decree 15 of 1981 on economic communities, which authorised the Council of Ministers to lay down provisions for economic communities that differed from the provisions of the Civil Code governing civil law companies.

labour law.[138] Many highly skilled workers have left the employment relationship, left their jobs, left the 'company'. This movement also caused political tensions, since these employees were outside any organisational framework (company, cooperative, trade union) where their behaviour and activities could be controlled. It is therefore no coincidence that the financial condition of these enterprises has been gradually worsened and the administrative burdens have been increased.

The system of labour law was further disrupted by the rather unfortunate amendment of the governance and management of state-owned companies/enterprises.[139] The law emphasised that the state enterprise is the economic-organisational unit of society, the economic enterprise of the state, and its assets are owned by the state. However, it manages these assets and the workforce employed by it independently. As far as the types of corporate governance were concerned, there was the company under the general management of the director, under the supervision of the state administration, and the company managed by the company council or the workers' assembly. The State exercises legal supervision over them, and the Council of Ministers is empowered to change their legal status. As far as the solution led by the company council is concerned, functional confusion soon developed regarding the task of the company council and the division of employer rights between the director and the company council.[140] It is true that the employer's authority over the director was exercised by the company council, but the consent of the founding body was necessary for his election and dismissal. It is typical that the labour law did not have anything to do with the institution of the company council either.

[138] On these, see among others, Síklaky, István (1984): *Belső vállalkozás* [Internal Enterprise]. Budapest: Ipargazdasági Intézet.

[139] See Legislative Decree 22 of 1984 amending Act VI of 1977 on State-Owned Companies.

[140] For an assessment see Kiss, György (1986): *Az új vállalatirányítási és vállalatvezetési formákra való áttérés általános tapasztalatai a dél-dunántúli tagvállalatoknál. A Magyar Kereskedelmi Kamara részére készített felmérés* [General Experiences of the Transition to New Forms of Corporate Governance and Management in the Member Companies of the South Danube Region. Survey for the Hungarian Chamber of Commerce]. Pécs: Manuscript.

A commentary simply discussed it under the chapter "Worker Participation in the Management of the Company". Similar anomalies occurred in the operation of companies run by "workers' assemblies".[141]

The change in the economic and political environment was best signalled by the emergence of the Companies Act.[142] Despite the fact that the reasoning of the Act emphasised "the creation of a mixed economy based on the primacy of socialist ownership", the Companies Act definitively ended the legal monopoly of the 'socialist state enterprise'. There is no doubt that the company law mixed the economic and labour-related representation of employees' interests, and thus contained a number of labour-related elements – unnecessarily – but these anomalies have subsequently lost their relevance.

Economic changes forced legal changes, soon followed by legislation that signalled the foreseeable collapse of the political system. From the point of view of my topic, I highlight two of them, one of them is Act II of 1989 on the right of association, the other is Act VII of 1989 on strikes. The former enabled the emergence of a plurality of social organisations, which resulted in the dissolution of the monolithic trade union or trade union federation.

At the same time, several trade unions were formed in the workplaces, which caused great confusion regarding the exercise of the trade union rights established for a single trade union. Since the representativeness of trade unions was an unknown concept in this period, the Ministry of Labour stated in an information sheet that some trade union rights could only be exercised jointly, while others could be exercised separately.[143] As regards the most powerful trade union right, the so-called veto right (right to object) each trade union could exercise this right independently, however the right to consent *(Mitbestimmung)* could only be exercised jointly. No particular explanation is needed to see that between 1989 and 1992, the internal functioning of the employers' organisations was completely arbitrary

141 Radnay, József ed. (1987): *Munkajogi kézikönyv* [Labour Law Handbook]. Budapest: Közgazdasági és Jogi Könyvkiadó, 66.

142 Act VI of 1988 on Business Companies.

143 See the information sheet 8115/1989 (Mü. K. 17.) on the exercise of trade union rights.

and chaotic. The compulsion to create the strike law was an admission of the collapse of the pseudo-corporate system of socialist labour relations.[144]

To summarise the last period of the socialist economic and political system in terms of the development of labour law, the following can be said. The political decision-maker obviously perceived the disintegration of the basic pillars of the system, but his response was to cosmeticise the traditional institutions. Thus, in 1988, the National Interest Conciliation Council was established, which, according to its statutes adopted in 1991, defined itself as a "national forum for continuous tripartite interest conciliation". At the same time, the rights established by the definition of the Council's tasks and goals also raised the question of the legitimacy of the Council. In fact, in its statutes, the Council asserted rights that limited the powers of the Parliament and the Government as stipulated in the constitution.[145]

The result of this general chaotic situation was that, under the labour law rules in force at the time, employment was simply unintelligible under labour law. This situation persisted until July 1992, when the first Labour Code came into force after the change of regime. Given the economic and political circumstances – rather late.

[144] It should be noted that before the law came into force, the strike itself was already a known phenomenon in Hungary. Typically, the first strikes were not organised in the context of a specific employer measure, but were mostly of an economic policy or directly political nature. The first miners' strikes, for example, were in favour of a central, i.e. state, increase in the price of coal, which workers hoped would lead to an increase in certain benefits. Absurdly, there was also a case where employees went on strike against the central dismissal of the director of a state-owned company under state administration supervision.

[145] See Decision 124/2008 (X. 14.) AB (Constitutional Court ruling); Kiss, György (2009): A legitimáció hiánya és az „egyetértési" jog természete [Lack of Legitimacy and the Legal Nature of the Right to 'Consent'). *Fundamentum,* 13(2), 89–112.

Chapter II

THE ECONOMIC AND EMPLOYMENT POLICY BACKGROUND OF CURRENT HUNGARIAN LABOUR LAW

INTRODUCTION

The current Hungarian labour law regulation system has been and is still being criticised a lot. Their content depends primarily on which social partner is the source of the evaluation and criticism. Employers obviously highlight the excessive state intervention, the strong restriction of much-vaunted contractual freedom, but more than once they express their dissatisfaction with the inconsistency of the regulation. And on the part of the employees, there is often talk of the loss of so-called acquired rights, the reduction of workers' rights, the emptying out of advocacy activities.

As far as scientific assessments are concerned, they are not exempt from certain approach prejudices. If we look at the critical comments that do not directly convey interests, but analyse the situation of the legislation and labour law as a whole from a legal-dogmatic or legal-institutional point of view, in many cases we come across comparisons and references to a certain 'model value' solution with regard to some legal institutions. This is particularly characteristic of some scientific analyses. In such cases, it seems as if Hungarian labour law is being taken out of the social and economic environment in which it operates, in which it exerts its influence and which affects it. This 'floating' situation is reinforced by the European Union's labour law, legislation and, in particular, the practice of the European Court of Justice which creates a concept above the Member States with regard to many legal concepts and orders them to be applied in the law of the Member States. This effort should create a certain homogeneity in the European labour law context, but experience shows that it is more likely to generate tensions.

What factors therefore influence the current Hungarian labour law? In my opinion, the following should be taken into account. The first determining factor is the change of the economic system and the second is the change of the political order. The ranking is deliberate, and it is no coincidence that the economy comes first. As we have seen in the previous chapters, the economic reform efforts of the 1960s could not succeed because the monolithic political establishment was still so strong that it did not allow for the consistent development of these reform ideas, which the reformers themselves considered feasible only within the socialist political system. But, from the second half of the 1980s, this political system became insecure precisely because of the necessity to transform the economy, and it no longer represented such a strong background that could have prevented this process.

Below, I present in more detail the economic-organisational changes that dismantled the institutions of the uncompetitive economy and ultimately invalidated the ownership relationships that fundamentally influence employment and the corporate-employer frameworks that embody them. First, we must address the fundamental change in ownership structures, namely privatisation. In the longer term, this process was more than just a transformation of ownership structures. The power relations created by privatisation determined the future of Hungary's economic structure. This economic structure demanded an appropriate economic policy, which also determined the direction of the employment policy. All of this had a combined effect on the labour law regulatory system that developed later.

And in this context, I must draw attention to a serious discrepancy between the legislator's intention and economic realities. The economic situation of the transitional period has been examined in detail by international and domestic economics, and analyses from different perspectives have come to the conclusion that the internal structure of the Hungarian economy, its international embeddedness – despite several excellent examples – was not ready for a relatively fluent transition to a capitalist market economy. It is characteristic that during this period there was no uniform privatisation concept either, i.e. the change of ownership also took place in several stages, along different ideas.

However, the Labour Code (hereinafter first LC, after the change of regime: FLC), which came into force in 1992, already reflected the introduction of market economy labour law.[1] Regarding our topic, it should be emphasised that the legislator tried to create some kind of cohesion of labour law sources, but this effort had neither economic nor political background. Nevertheless, the complete transformation of property relations not only put the 'private labour law' in a difficult situation, but also the 'public labour law', which was embodied in the employment policy rules. It is noteworthy that the active and passive instruments of employment policy have been subject to almost constant change, which has not served the stability of the labour market.

In addition to economic policy and, as a consequence, employment policy, the third factor which determined the position of labour law after the change of regime was the new, unknown law itself. Although the precedents of a contract- and market-based labour law emerged in the period between the two world wars, but in the half century after 1945, the legal system reformed on the Soviet model put an end to this. Moreover, the Hungarian legislator was pressed by the start of EU accession negotiations and the obligation to revise labour law almost the day after the Labour Code entered into force in July 1992. It is no exaggeration to say that the 1992 FLC was created without precedents and experience.

The transformation of ownership relations, the state of the economic structure and the compulsions that occur during the creation of a new legal content, as well as – in my opinion – wrong ideas implemented with certain considerations can be felt also in the fabric of the current Hungarian labour law. In the following, I shall examine these factors, by no means aiming for completeness, but with the intention of providing a basis for subsequent legal analysis.

1 Act XXII of 1992 on the Labour Code.

SOME KEY EPISODES OF ECONOMIC POLICY

The great adventure of the regime change: Privatisation, its impact on employment

In the previous chapter, I discussed the emergence of small enterprises and the transformation of the corporate structure in connection with the final stages of the socialist economic system. In this work, I do not present in detail the process by which this internal organisational change in legal status, without a change in ownership, turned into actual privatisation, but rather I explore the labour law aspects of the change in ownership.

In this process, Act XIII of 1989 on the Transformation of Business Organisations and Companies (hereinafter: TA [Transformation Act]), which can rightly be regarded as an organic continuation of the CA (Company Act), played an important role.[2] Sárközy classifies this law as a technical law because it regulates the process of transformation, "and the essence of the transformation is that there is a universal legal succession not only from the point of view of civil law, but also from the point of view of the other branches of law involved (individual and collective labour law, tax law, public administration law, etc.) during the change in the form of a legal person".[3]

The TA has brought to light a problem which is by no means unprecedented in Hungarian law but which has been dormant for some time, namely the legal regulation of the transformation and succession of an employer – more precisely – the change in the person of the employer – or the lack thereof.[4] The date can be said to be critical from the point of

[2] SÁRKÖZY, Tamás (1989): Átalakulási törvény – mint a gazdasági társaságoktól szóló törvény szerves folytatása [Transformation Act – As an Integral Continuation of the Companies Act]. *Jogtudományi Közlöny,* 44(4), 233–239.

[3] SÁRKÖZY, Tamás (2009a): *A korai privatizációtól a késői vagyontörvényig* [From Early Privatisation to Late Property Law]. Budapest: HVG-ORAC, 46.

[4] In Hungarian literature, see in detail BERKE, Gyula (2006): *Jogutódlás a munkáltató személyében. A munkáltató személyében bekövetkező változás az európai és magyar munkajogban* [Succession in the Person of the Employer. Changes in the Person of the Employer in European and Hungarian Labour Law]. Pécs: PhD Dissertation, manuscript.

view of labour law, because the old labour code, created in 1967, was still in force, and Hungary had not yet started the accession negotiations with the European Economic Community, where the regulations of this legal institution were already known;[5] in the end, the TA did not contain provisions on the labour law aspects of legal succession. We also note that these early privatisation processes, but also the later periods, did not deal with the issue of employment, or at least it was never at the forefront of privatisation.[6]

The lack of regulation, the neglect of the problem led to serious consequences, despite the fact that in the early period of privatisation, the transformation itself did not cause a significant reduction in the number of employees, since the companies taken over by the new owners had to be operated, had to show significant economic results, but in any case, in such a large-scale economic transformation, the complete lack of protection of workers was obvious. Although this was spectacularly manifested in the lack of legal regulation, the reasons are to be found in the costs of the transformation. Sárközy points out that privatisation is a process with high costs, and that some of its various elements have to be financed.[7] Among these costs, not to be underestimated, are the costs associated with the 'movement' (reassignment) of employees, namely the direct and indirect compensation costs incurred in the event of transfers, reductions in working time and collective redundancies. This is important despite the fact that a significant part of the loss of about one and a half million jobs during the system change can be attributed to the period before privatisation, because the situation did not improve after the temporary stability in the early nineties.[8]

[5] See Council Directive 77/187/EEC of 14 February 1977 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses. OJ L 1977/61, 26.

[6] Laky, Teréz et al. (1999): *A privatizáció foglalkoztatási hatásai* [Effects of Privatisation on Employment]. Budapest: Állami Privatizációs Vagyonügynökség, 40, 55–56, 79.

[7] Sárközy 2009a: 71–74.

[8] Laky et al. 1999: 40.

This situation was not improved by the emergence of the State Property Agency,[9] which originally also did not have the task of including employment in the privatisation requirements. Nevertheless, some tentative initiatives to retain employment have emerged. A modest example of this is Government Decree 119/1991 (IX. 12.) on employee participation in connection with the transformation of state-owned enterprises and the privatisation of state property. Pursuant to this – referring to the LC of 1967 – when the state company is being transformed, the head of the company (company council, assembly of delegates) must inform the employees at least 15 days before submitting the transformation plan to the State Property Agency. The information should cover all matters which, on the basis of the restructuring plan, affect the employment, wage and salary, social benefits, working conditions and training of the employees, the future utilisation of the company's social and welfare institutions, and fall under the scope of the collective agreement in force.

Furthermore, when a state-owned enterprise is privatised, the head of the enterprise (enterprise council, delegation) must inform the employees – among others – of the more important consequences of the negotiations related to the privatisation of the enterprise affecting the economic and social interests of the employees. It is significant that the State Property Agency was also subject to such an obligation to provide information to employees. This information should have included the employees' options for ownership. In connection with this decree, it should be noted that the shaping of the privatisation process itself belonged to the discretion of the State Property Agency, without any particular influence on the part of the employees' representatives, and that participation at the level of the undertaking was exhausted in the right to information.

As a further step, the Decision of Parliament (OGY) 71/1992 (XI. 6.) on the 1992 Asset Policy Guidelines should be evaluated. The general asset policy goal of the Guidelines was to strengthen economic conditions based on private property, to operate state property effectively, and to speed up its

9 Act VII of 1990 on the State Property Agency and the Administration and Use of its Property.

reasonable demolition. Among the sub-goals indicated in addition to the general goal, the more effective enforcement of employment policy – job preservation, job creation – and employee social aspects were already included.

The date of publication of the Decision of Parliament is 6 November 1992. This is interesting because the first Labour Code after the regime change came into force on 1 July 1992, however, the Code did not yet provide for the employment consequences of a change in the employer's identity.[10] But, on 26 November 1992, the Supreme Court issued its highly significant Collegium Resolution 154 (hereinafter: Resolution).[11] According to the Resolution, "the ceasing (change) of the employer by legal succession does not lead to the termination of the employment relationship, but in this case the employment relationship – in the absence of an amendment based on agreement – remains unchanged between the legal successor employer and the employee". In such a case, "the employment relationship established with the predecessor remains unchanged with the legal successor, and the time spent in that employment relationship must be taken into account together, in particular with regard to the period of notice and severance pay".[12] In the most important part of the Resolution, it states that, from the point of view of its application, not only universal legal succession should be

10 LC Section 85/A–85/B was incorporated by Act LI of 1997 Section 9.

11 See its analysis in Berke 2006: 210–220; Kiss, György (1995b): A Legfelsőbb Bíróság MK 154. számú állásfoglalása a munkavállalók jogainak a vállalatok, üzemek és üzemrészek tulajdonosváltozása esetén történő megóvásáról szóló 77/187 (EGK) számú Irányelv tükrében [Supreme Court Resolution MK 154 in the Light of Directive 77/187 (EEC) on the Protection of Employees' Rights in the Event of Transfers of Ownership of Undertakings, Businesses or Parts of Undertakings or Businesses]. *Jogtudományi Közlöny,* 50(10), 437–451; Radnay, József (2004a): Üzemutódlás a Legfelsőbb Bíróság gyakorlatában [Business Succession in the Practice of the Supreme Court]. In Neumann, László – Prugberger, Tamás (eds.): *A munkáltatói jogutódlás esete* [The Case of Employer Succession]. Miskolc: Novotni Alapítvány a Magánjog Fejlesztéséért; Radnay, József (2004b): A munkajogi jogutódlás kérdései [Issues of Employer Succession]. *Gazdaság és Jog,* 12(2), 17–22.

12 Resolution Reasoning.

considered legal succession,[13] but also the acquisition of the establishment, shop or workplace by agreement, where the transferee exercises the rights of the transferor (in particular, the transfer of rights by the employer to the whole or to a specific part of the establishment/business, such as the sale, exchange, lease, rental of profits or entry into a company by way of transfer of assets, by continuing to employ the worker in an effective manner).

It can be said that judicial lawmaking thus anticipated legislation by some five years. This is an invaluable result, even if the Resolution – as the judicial interpretation of the Directive – was necessarily created with limited content, as it could not replace the definition of those content elements, the creation of which would have been the exclusive task of the legislator.[14] In connection with Resolution 154 of the Supreme Court, Resolution 147 should be mentioned, which was settled by the severance pay in connection with the change in the employer's person.[15]

From the point of view of the impact of privatisation on labour law, the employee share ownership programme cannot be ignored. The idea of employee ownership (worker property[16]) came to the fore in the period immediately preceding the change of political system, in parallel with the transformation of state property and thus property relations. Moreover, some of its initiatives can be found in the aforementioned corporate internal entrepreneurship structures, as well as in corporate governance and corporate management reforms.[17]

13 For example, Article 339 (1) of the CA, in accordance with Article 8 (1) of Act XIII of 1989 (TA), which has since been repealed, Article 26 (3) of Act LIII of 1992 and Article 38 (1) of Act LIV of 1992.

14 Kiss 1995a: 150.

15 Resolution 147. The rules on severance pay laid down in Act XLVIII of 1991 before the entry into force of the new Labour Code do not preclude a more favourable arrangement in the collective agreement. For an analysis see Berke 2006: 213–216.

16 Makó, Csaba (1989): A munkástulajdon dilemmái [The Dilemmas of Worker Property]. *Gazdaság,* 23(1), 76–93.

17 For a summary see Boda, Dorottya – Neumann, László (1998): A munkavállalói tulajdon története [The History of Employee Ownership]. *Társadalmi Szemle,* 53(8–9), 58–61.

The debate over employee property was ideological, political and economic at the same time. The possible introduction of the construction brought to the surface the advantages and disadvantages associated with it. The former were characterised by a stronger commitment, greater efficiency, while the latter by an insistence on maintaining the employment structure and raising wages.[18] As far as the economic and property segments of employee ownership are concerned, the aforementioned Asset Policy Guidelines provided the political and legal legitimacy for the solution on the basis of which the property/asset certification regulation was adopted.[19] These free-of-charge asset certificates were issued to the employees by the state-owned company at the expense of taxable profit. The aim was obviously to create more motivation by providing a financial incentive. Incidentally, the CA (1988) already introduced the concept of 'employee share'. Pursuant to this, in accordance with the provisions of the rules of statute of the company employee shares that can be obtained free of charge or at a discounted price may also be issued. Such shares could only be issued from the joint-stock company's assets in excess of the share capital, with the simultaneous increase of the share capital, up to a maximum of 10% of the raised share capital.[20] Thus, it was essential that the owners of employees' shares have exercised the same shareholder rights as other shareholders.

These initiatives suggest that some sort of political consensus has emerged on employee ownership. However, there was no mention of this during this period, and the assessment of the various efforts towards employee ownership was quite ambivalent even later.[21] The debates surrounding the various employee share programme (hereinafter: ESP) concepts

[18] Boda, Dorottya (2005): *A munkavállalói tulajdonban lévő szervezetek gazdálkodása és tulajdonosi érdekképviselete* [Management and Representation of Employee-owned Organisations]. PhD Dissertation. Budapest: Corvinus University of Budapest, 41.

[19] MT Decree 94/1988 (XII. 22.) on the property/asset certification.

[20] CA Section 244, Subsection 1.

[21] The intensity or even decline of political support can perhaps not be shown so much along the lines of individual ideologies, but rather along the lines of the current economic situation. This is also important because it explains why the employee part-ownership programme did not significantly influence the decision-making mechanism of the companies and why it did not leave a mark on labour law regulations.

only appeared in the second line of debates for a relatively long time, and a discussion on the draft law only took place in 1992.[22] The reasoning of this Act emphasises that the legislator does not abolish the former employee ownership possibilities but complements them with a new form.

The essence of this is that ownership rights are exercised by a special organisation. Thus, the assets acquired by the organisation become the property of the organisation, which transfers them to the ownership of the participants in accordance with the conditions laid down in this Act and its statute. The position and weight of the ESP organisation within the company is indicated by the fact that, among other conditions, the company's general meeting (meeting of members) must consent to the establishment of the organisation. In its assessment of the ESP Act, Boda correctly states that the Act does not deal with changes in the internal relations of the company, nor with the possible relations between the actual management of the company and the ESP, nor with the relations between employee owners and employee representatives. "The obligation to provide information is imposed on all participants, but there is no indication of how the expected benefits and disadvantages should be shared between the different actors."[23] She also notes that the regulation of all this would not even have been a matter of this Act, and also refers to the provision of the possibility of tripartite control in accordance with the original concept.

Interrupting the presentation of the process of employee ownership at this point, it is appropriate to return to the events of privatisation. In the 1990s, the first station for privatisation laws was the so-called 'Small Privatisation Act'.[24] This was, moreover, a continuation of the so-called 'operation by contract' *(szerződéses üzemeltetés)* – the particular kind of outsourcing – in

22 Act XLIV of 1992 on the Employee Ownership Programme.

23 Boda 2005: 41–42.

24 See Act LXXIV of 1990 on the privatisation (sale, utilisation) of the assets of state enterprises engaged in retail trade, catering and consumer services. The mentioned term was used by Sárközy 2009a: 118–121.

this circle.[25] The (first) Privatisation Act of 1992 (hereinafter: FPA) can be considered the second stage.[26] This Act ultimately introduced a rather centralised transformation and controlled privatisation.

As regards the labour law aspects of the process, the FPA Section 38 also contains questions of succession. Accordingly, the legal successor company is entitled to the rights and burdened with the obligations that the legal predecessor was entitled to or burdened with based on the collective agreement concluded with the employees. In the course of the transformation, the management of the company was under an extensive obligation to inform and consult the employees' interest organisations. And there was another very important provision, which later became very controversial, namely: with regard to the utilisation of assets serving welfare or social purposes, the consent of the employee interest representation bodies was necessary.[27] The State assets were also to be sold to the employees at a preferential rate set out in the Asset Policy Guidelines and in accordance with the rules set out in the ESP Act.

The 1995 amendment to the 1992 ESP, which was burdened with subjectivities and controlled from above, can in fact be considered the first privatisation law to state for the first time that "the privatisation means the transfer of state-owned company shares in the framework of a sale and purchase contract".[28] Sárközy emphasises that this Act "clearly considered rapid and large-scale privatisation a state goal".[29] The legal status of the privatisation organisation regulated in the Act, the contractual structure and process of privatisation, the definition of the scope of state 'entrepreneurial

25 On the disturbances and contradictions of this process see Béhm, Imre et al. (1991): *Privatizáció a gyakorlatban. Kereskedelem, szolgáltatás, vendéglátás* [Privatisation in Practice. Trade, Services, Hospitality]. Budapest: Mentor Kiadó.

26 Act LIV of 1992 on the sale, utilisation and protection of property temporarily owned by the state.

27 This was similar to the legal institution of *Mitbestimmung* as known in German law.

28 Mihályi, Péter (2010): *A magyar privatizáció enciklopédiája* [The Encyclopedia of Hungarian Privatisation]. Budapest: Pannon Egyetemi Kiadó, MTA Közgazdaságtudományi Intézet, Volume I, 309; ESP Section 27, Subsection 2.

29 Sárközy 2009a: 151.

assets' covered by the law all suggested that privatisation would be completed within a relatively short time after the law came into force.[30]

A separate chapter of the ESP is devoted to the protection of the interests of the employee, which, according to the usual nature of the matter, means an obligation to provide information and request opinions from the Public Privatisation and Asset Management Company or the estate agent it has appointed. The law regulates in detail the institution of management and employee buy-outs and the benefits of employee ownership. The essence of the former is that the tender for the takeover may be submitted by an economic or civil law company set up jointly by the managers and the employees.[31] Finally, the law states that state-owned shares in companies can be acquired by the company's employees in an organised way through the Employee Share Ownership Programme (ESOP).

The organisation of privatisation and the structure of privatisation and state property remained unchanged until 2007. The Act on State Property,[32] which came into force in 2007, aims to establish a new, modern system for the management of state property after privatisation has been completed. In addition to the transformation of ownership relations, this Act fundamentally defined the ownership, management and concrete management structure of the Hungarian economy.[33] The evaluation of the law is not the subject of this study, because it has no specific connection to labour law. But the subsequent economic policy decisions ultimately affected employment policy and the state of labour law, irrespective of the privatisation and the ownership structure of enterprises.

Before reviewing the key points of economic policy decisions after privatisation has been completed, let us take a look at the employment and

30 Mihályi notes that Sárközy and his colleagues put this date at about 1998. MIHÁLYI 2010: 311.

31 ESP Section 58, Subsection 2.

32 Act CVI of 2007 on State Property.

33 For its assessment, see among others, SÁRKÖZY, Tamás (2009b): Az állami vagyonról szóló törvényről – egy helyes gondolat hibás megvalósítása [On the Law on State Property – A Wrong Implementation of a Good Idea]. *Gazdaság és Jog,* 17(3), 3–7; MIHÁLYI 2010: 510–528; SÁRKÖZY 2009a: 242–267.

labour law impact of privatisation. For a long time, it was widely believed that the employment shock of the process of economic-political change – the loss of approximately one and a half million jobs – was the consequence of privatisation. Undoubtedly this had an impact on employment, but it was not the root of the problem. The collapse of the socialist absorption market, the obsolete structure of the economy and the collapse of financing sealed the fate of the reigning employment policy even before the privatisation process began. This policy proclaimed full employment, but at the same time unemployment 'inside the gate' caused more and more tension. Privatisation alone could not have been the cause of mass job losses, because a significant part of the enterprises did not fall under the scope of privatisation.[34] In addition, the small enterprise system, which was introduced at the beginning of the 1980s, was able to retain the workforce in this period. I will not discuss here the reasons and circumstances of the introduction of the bankruptcy act[35] and the wage guarantee fund act,[36] I will only note that these regulations helped the transition to a market economy, their creation was essential, but to call privatisation the wave of bankruptcies of businesses is a strong exaggeration. At the same time it should be noted that in the process of privatisation, the requirements of the managing bodies included employment only at the declaration level.[37]

Two more employment, respectively employment policy aspects of privatisation should be mentioned. One is the way in which its regulation is developed, and in this context the importance of employee, or more precisely, trade union participation.[38] Obviously, changing the 'operator' of the workplace could not be indifferent to the employees. The fact that employment was only of secondary importance in the process of privatisation caused tension in itself. This was enhanced by the fact that the demands of the trade unions, which were otherwise different from each

34 Laky et al. 1999: 8–10.

35 Act XLIX of 1991 on Bankruptcy and Liquidation Proceedings.

36 Act LXVI of 1994 Act on the Wage Guarantee Fund.

37 A good example of this is the aforementioned Property Policy Guidelines of 1992.

38 Neumann, László (1991): Privatizáció, munkavállalók, szakszervezetek [Privatisation, Employees, Trade Unions]. *Társadalmi Szemle,* 46(10), 41–51.

other, were not enforced during the privatisation process. In this context, the assessment that the government sought to maintain the involvement of interest representatives at the level of the employers' organisation and that the involvement was expressed in the information rather than in the agreement is appropriate.[39]

Secondly, it is necessary to mention the so-called employment clause contained in part of the privatisation contracts. The scope of these contracts, their classification by company, has been explored in their relevant research,[40] so in this study I will only deal with the effects of these clauses on employment. The privatisation contract – i.e. contract for transfer of share, respectively contract for share of business – was concluded between the state asset management and the buyer operating the company. These employment clauses contained certain job retention and other social requirements. The requirement to retain the workforce was impersonalised, i.e. it did not concern specific employees. If the buyer did not comply with these requirements, he owed certain financial compensation, usually to the state asset management body, but there was a clause that stipulated payment obligations for employees dismissed in excess of the specified number of employees. Research also revealed that some contract clauses obliged the buyer to place or retrain workers at its own expense.[41] This was important to ensure that a breach of the buyer's obligations would not lead to the privatisation agreement becoming invalid. It can be said that the requirements changed more than once, and became the subject of (political) negotiations, since the main purpose of privatisation was to run the business.[42] It is clear from the above that the privatisation contract and the employment clause did not directly affect contracts of employment, or more precisely, that the termination of the employment of a specific employee was not rendered invalid because the buyer did not comply with this clause.

[39] Laky et al. 1999: 92–100.

[40] Laky et al. 1999: 104–121; Mihályi 2010: Volume 1, 315–321, 719–731, 757, 797; Volume 2, 31, 71–73, 78–80.

[41] Laky et al. 1999: 113–118.

[42] See Mihályi 2010: especially Volume 2, 78–80.

As regards the impact of privatisation on employment, while it has undoubtedly reshaped the labour market, this necessary process must be evaluated as embedded in the change of economic-political system as a whole. The socialist, top-down employment system began to collapse even before privatisation, and the first signs of mass unemployment can be attributed even earlier. The effect of privatisation was rather to change the demands placed on the workforce, creating a new production, service and organisational culture that workers had to adopt quickly. In the following, we examine how the economic and employment policy developed after the period of privatisation.

Economic policies[43]

Fluctuating economic policies in the period up to 2010

I will deal with economic policy developments after the end(?) of privatisation only in those segments where they had an impact on employment policy and, indirectly, on the labour law regulatory system. However, we have to start the economic policy overview with the evaluation of privatisation, because the political and economic policy debates that took place during the process had an impact on later periods as well. The still debated question of whether privatisation was slow or rushed is perhaps not too relevant, because the change of regime itself has eroded the economic mechanisms of the past.[44] The structural transformation of industry, the ever-increasing displacement of low-quality labour from the labour market, and the radical decrease in the number of people employed in agriculture were all processes that had precedents.

[43] The use of the plural – referring to the pursuit of essentially different directions – is inspired by Péter Ákos Bod. See Bod, Péter Ákos (2014): *Nem szokványos gazdaság-politikák – évtizedek óta* [Unconventional Economic Policies – For Decades]. Budapest: Akadémiai Kiadó.

[44] See about this issue in detail in Mihályi 2010: Volume 1, 128.

Bod's position is acceptable that, in addition to the structure (concentration and centralisation), productivity was the biggest problem.[45] During the course of privatisation, the former large socialist companies took many measures to improve productivity, which was reflected in the outsourcing and associated reductions of jobs,[46] but it was very difficult to demonstrate any tangible results. The privatisation process resulted in a dual economic system, despite the significant structural change compared to the previous state of the economy. This is characterised by the existence of a capital-intensive sector, mostly owned by multinational companies,[47] and in parallel, the Hungarian privately owned sector.[48] As for the second sector, Karsai notes that the number of enterprises in Hungary is quite high, but most of them were established either for tax reasons or as forced enterprises.[49] It is also characteristic that although the development of small and medium-sized enterprises was considered a priority goal at the level of political revelations, a real rural development policy was not given substance, and the efficiency of these enterprises was significantly degraded by low wage level.[50]

In the process of changing the system, policy makers in the first period wanted to transform the country's future in the spirit of the social market economy.[51] In this context, I refer again to Richardi's formulation, in so far as the social state of law is not merely a matter of constitutional declaration, but

45 Bod, Péter Ákos (2019): A magyar gazdaságpolitika 1989 és 2019 között [Hungarian Economic Policy between 1989 and 2019]. *Gazdaság és Pénzügy,* 6(1), 22–23.

46 Mihályi gives an example of this. See Mihályi 2010: Volume 1, 131.

47 See Vértesy, László (2018): *A multinacionális vállalatok szerepe a gazdaságban és a munkaerőpiacon* [The Role of Multinational Companies in the Economy and the Labour Market]. Budapest: MPRA Paper No. 90262.

48 Bod 2019: 29–30. (Finally, there was a third sector, namely the remaining state-owned enterprises, with a very mixed composition.)

49 Karsai, Gábor (1999): *A magyar gazdaság folyamatai, 1990–98* [Trends in the Hungarian Economy, 1990–98], 15.

50 Karsai 1999: 21; Bod 2019: 31.

51 See in detail Bod, Péter Ákos (1994): A félig ismert és félreismert szociális piacgazdaság [The Half-known and Misunderstood Social Market Economy]. *Valóság,* 34(5), 1–14; Bod 2014: 121–133.

expresses the purpose of the State, as if defining its objectives.[52] Interpreting this for the social market economy, it can be said that the social market economy has certain conditions. Simplified, a social market economy, like any market economy, needs to be funded, it needs to be able to operate first of all with capital, and secondly with intention. However, it can be said that the circumstances of the regime change were not conducive to the practical implementation of the social market economy, and instead of a welfare state, society was faced with a so-called transformation crisis.[53] It was not long before the shock therapy came in 1995, with the so-called Bokros package.[54] Muraközi points out that "the main merit of the programme was that it combined traditional, orthodox stabilisation elements with growth-enhancing measures".[55] There is no doubt that the stabilisation programme was economically successful, but it was considered to be a starting point.[56] As the sense of danger eased, the willingness of politicians to give increased. Obviously, this was especially encouraged by the wind of the upcoming elections. From the autumn of 1997, the fiscal policy was gradually relaxed again, and the aspect of balance was once again in the background. At first

52 RICHARDI, Reinhard (2000c): Grundgesetz und Gesetzgebung. In RICHARDI, Reinhard – WLOTZKE, Otfried (eds.): *Münchener Handbuch zum Arbeitsrecht.* München: Verlag C. H. Beck, § 9 RdNr. 9.

53 MURAKÖZI, László (2004): *Már megint egy rendszerváltás. Történelmi tanulságok és tanulatlanságok* [Yet Another Regime Change. Historical Lessons and Lessons not Learned]. Debrecen: Debreceni Egyetem Közgazdaságtudományi Kar, 68.

54 About the Bokros package see NÉMETH, György (1998): Bokrostól Bokrosig [From Bokros to Bokros]. *Valóság,* 41(6), 3–31; CSIGÓ, Péter (1997): A Bokros-csomag jelentősége a politikai diskurzusban [The Significance of the Bokros Package in Political Discourse]. *Politikatudományi Szemle,* 3(4), 27–56.

55 "The essence of the targeted turnaround is to put the Hungarian economy on an export-led path, instead of growth driven by domestic demand, decisively based on the priority of the increase in private and community consumption, which for known reasons sooner or later leads to the disruption of the external balance. Recognising that the Hungarian economy's long-term, sustainable development and equilibrium path can only be based on export-led growth." MURAKÖZI 2004: 91.

56 MURAKÖZI 2004: 97.

slowly, and later at an accelerating pace, "the budget began to deteriorate, and then the balance of payments as well".[57]

As a result, the first Orbán Government, formed in 1998, tried to restore the balance by cutting back public investment and halting certain infrastructure developments. Although the Hungarian economy had become increasingly open, it was vulnerable due to its size and the global slowdown in growth following the turn of the millennium confirmed this. One of the government's responses (also) to this process was re-nationalisation.[58] Voszka refers to Viktor Orbán's statement published in *Magyar Nemzet* in 2009, according to which "a national economy is weak and vulnerable without domestically controlled (owned) strategic sector".[59] The question is what this meant in terms of the evolution of the economic structure. The re-nationalisation and the almost necessarily accompanying (internal) redistribution[60] did not fundamentally change the structure of the economy up to that point, but it did mean that sales and ownership reorganisation through certain detours, freed from certain restrictions,[61] determined the future orientation of the economic actors. In the first half of this government cycle, the positive processes of the Bokros package still had an effect, so inflation and unemployment decreased, and the budget situation seemed to stabilise.[62] However, the strong intervention of the state, the expansion accompanying the aforementioned re-nationalisation, and the circumvention

57 Muraközi 2004: 104.

58 See Voszka, Éva (2013): Államosítás, privatizáció, államosítás [Nationalisation, Privatisation, Nationalisation]. *Közgazdasági Szemle,* 40(12), 1290–1291; Mihályi, Péter (2025): *Privatizáció és államosítás Magyarországon III. Régmúlt, közelmúlt, jelen idő* [Privatisation and Nationalisation in Hungary III. Old Past, Recent Past, Recent Time]. Budapest: Akadémiai Kiadó.

59 Voszka 2013: 1291.

60 Voszka, Éva (2001): Privatizáció helyett újraelosztás. Az állami vagyon sorsa 1998 és 2001 között [Redistribution Instead of Privatisation. The Fate of Public Assets between 1998 and 2001]. *Közgazdasági Szemle,* 48(9), 726–744.

61 Voszka 2001: 741–742.

62 Tóth, Zsuzsanna (2017): A magyar gazdaságpolitika elmúlt 25 éve – gazdaságtörténeti áttekintés a konvergencia szempontjából [The Last 25 Years of Hungarian Economic Policy – An Outline of Economic History with a View to Convergence]. *Közép-Európai Közlemények,* 10(3), 124.

of privatisation procedures caused uncertainty among investors and the so-called twin deficit reappeared.

The early part of the period 2002–2010 was characterised by the government's expansionary, consumption-increasing economic policy, but as this was not covered by the budget, the balance continued to deteriorate.[63] Baksay and Palotai state that the deficit is primarily due to the indebtedness of the state and the fact that the financing was not aimed at investments, but at consumption.[64] The attempts at adjustment in 2006 (and later) have produced results, but they entailed significant sacrifices, which ultimately resulted in the downfall of this economic policy and the government.

The promise of the great transformation

Following the 2010 elections, the economic policy measures of the new government were preceded by great anticipation. The economic policy of the past about one and a half decades has been subject to numerous analyses which have produced rather ambivalent result. Almost everyone agrees that a drastic change was needed after the period 2002–2008, mainly to tackle the unsustainability of debt and budget deficits. At the same time, the slow growth that characterised the economy in the first half of the previous period had been brought back.

However, opinions are already divided on the classification of the measures taken. Some analysts agree with almost all of the economic, economic policy and political measures taken at that time, and consider this "economic policy model" to be the key to catching up.[65] Others doubt the effectiveness of the measures and even view the governmental system

63 Baksay, Gegely – Palotai, Dániel (2017): Válságkezelés és gazdasági reformok Magyarországon, 2010–2016 [Crisis Management and Economic Reforms in Hungary, 2010–2016]. *Közgazdasági Szemle,* 64(7–8), 698–699.

64 Baksay–Palotai 2017: 700.

65 See György, László – Veres, József (2016): 2010 utáni magyar gazdaságpolitikai modell [Hungarian Economic Policy Model after 2010]. *Pénzügyi Szemle,* 61(3), 367–388.

itself as an obstacle to economic development.[66] In this paper, we will not attempt to provide even a sketchy analysis of the economic policy of this period, but rather focus on presenting those elements that were decisive in terms of employment policy and labour law regulation.

The highly anticipated programme began with the announcement of the 29-point economic action plan, which was ultimately embodied in Act XC of 2010 on the enactment and amendment of certain economic and financial acts. This legislation is about many things, covering unrelated or loosely related subjects. Nevertheless, the focus is on rethinking some of the tax rules, in particular with regard to special taxes, and on regulating the functioning of budgetary bodies. This legislation reflects the desire for financial stability and the reduction of administrative burdens, but the idea of economic policy as a whole remains in the background.

To explore this, a brief overview of the "Széll Kálmán Plan" and the "Next Step. Széll Kálmán Plan 2.0" is required. The first document is subtitled "Teaming Up Against Debt". In this context, the government intends to implement "a plan aimed at both reducing public debt and restructuring the areas of economic and social life that are poorly organised and therefore cause the re-generation of public debt, and at the same time helping to kick-start rapid economic growth".[67] In this regard, the following sentence is remarkable: "The structure of Hungarian society, the operation of the state, the system of state institutions, the structure of the labour market, and the conditions of the entrepreneurial environment have been reproducing public debt for decades. The country's complete reorganisation and a series of structural transformations are needed to change this, and this purpose is served by the Széll Kálmán Plan."[68]

Obviously, it follows that the new government does not simply want to create a new economic policy, but to transform the (political) fabric of the whole country. This is a very ambitious idea, and it is therefore surprising that

66 Gulácsi, Gábor – Kerényi, Ádám (2024): A magyar gazdaság felzárkózása és pozícióvesztése az Európai Unióban [The Catching Up and Loss of Position of the Hungarian Economy in the European Union]. *Külgazdaság*, 53(5–6), 40–75.

67 Széll Kálmán Plan, 10–11.

68 Széll Kálmán Plan 12.

a significant proportion of the Plan is the part of the introduction of public work. It is clear from this that one of the defining elements of the concept is the construction of a so-called work-based society or economy. However, the Workfare State already mentioned earlier is much more complex than being able to handle it by strengthening public work. Some elements of this are contained in this document, others in the Széll Kálmán Plan 2.0 and the Hungarian Work Plan, which is part of the Széll Kálmán Plan. As for the document under discussion, the restructuring of pensions, education and healthcare – all linked to debt – deserves attention. The essence of the work-based society is expressed by the Fundamental Law in its chapter 'Freedom and Responsibility'. Citizens' responsibility will appear in the paradigm of 'work instead of aid'.

Of course, public work can help to remedy or at least alleviate many problems. This is also indicated by the plan when, referring to the government programme, "Roma and unskilled workers should be provided opportunities for public work in the construction industry and agriculture. Public works can be used to mobilise a wide range of people for purposes that create new value (e.g. building dams, afforestation, building municipal rental housing)."[69] However, it is already doubtful whether a traditional industry can solve the fundamental problems of today's economy, especially if its technology is average.[70]

I have highlighted the public works part of the Széll Kálmán Plan because it illustrates the government's approach to solving economic policy and budgetary problems. The quick, mass solution of accepting institutions that offer immediate returns and do not require overly complex organisation is also reflected elsewhere in the documents. Thus, the vocational training system serves to create jobs directly and to provide young people with a specific qualification at the start of their careers. We may ask what is wrong with this. Nothing in itself, of course, but two comments are necessary.

69 Széll Kálmán Plan 15.

70 On this see the "Next Step" argument below: "In several Western European countries, we have seen in the years preceding the crisis, that the construction industry alone is able to move an entire economy into a mobility, which is worth exploiting in Hungary as well". Széll Kálmán Plan 2.0, 15.

One is that this requires a thoughtful vocational training strategy, which requires a long-term, well-planed economic policy that precisely identifies the break-out points. The second concerns the content of the training: namely, what added value will the prospective employee be able to produce? A policy of rapid returns is also found in the involving of foreign capital. There is no doubt that recent foreign investment and innovative clusters have improved the employment situation in certain regions and have also brought some technological leaps forward, but this has not meant that the roots of innovation have moved to Hungary.

The Hungarian economy is undoubtedly an open economy, so it would also have the opportunity to develop its relations towards other economic policy. However, it seems that this work-based economy, the public education system oriented towards it, the narrowing and top-down defining of the much-expressed break-out points is creating and preserving an economy with limited innovation and low added value.[71]

SOME THOUGHTS ABOUT CHANGES IN EMPLOYMENT POLICY

Employment policy, with some simplification, is to control one of the segments of the general market, namely, the labour market. In other words, to influence the supply and demand side of the labour market, ensuring a balance where appropriate, in such a way that as few people as possible are excluded from the labour market. As mentioned above, employment policy basically depends on economic policy, its orientation and tools are determined by the general political and economic policy approach of the given political decision-maker. László Gyula's assessment of the analysis of the national employment policy is accurate. In his opinion it would be easy to say that 30 years have passed, we started here and we ended up there, and all of this is clear from the data. However, the situation is much

71 Bod emphasises that so-called 'unconventional' decisions are difficult to plan. Bod 2014: 185. See criticism of the public procurement system, the operation of private capital funds in Gulácsi–Kerényi 2024: 68.

more complicated than that, and more difficult to assess. Although the perception is certainly subjective, we have always had very strong prime ministers who wanted to implement their own ideas in employment policy, of course, always different from the previous one.[72] He is also right that we started very deep and the actual employment policy has developed in the process of regime change.[73] On this point, I must again refer to the discrepancy between labour law legislation in the narrower sense, namely the Labour Code (first introduced after the change of regime in 1992), and economic and social realities.

Despite the fact that in the socialist economy, fixed wage and headcount management and fixed (bound) personnel policy were planned at every level of employment,[74] and thus the phenomenon of unemployment was conceptually excluded, the underlying tensions of the actual processes could not be ignored. By the end of the 1980s, however, it became clear that artificially maintained full employment was an illusion if domestic production was to become internationally competitive, at least in the long term, while foreign market losses were having a drastic impact in some areas. In response to the forced mass layoffs in 1986, the government introduced a rather strange compensation scheme.[75] If the employee has not been able to find a job within six months, he/she has received a so-called

72 LÁSZLÓ, Gyula (2022): *A magyar foglalkoztatáspolitika 30 éve: 1990–2000. Dokumentumok, politikák, stratégiák, adatsorok* [30 Years of Hungarian Employment Policy: 1990–2000. Documents, Policies, Strategies, Data Series]. Pécs: Pécsi Tudományegyetem Közgazdaságtudományi Kar Vezetés- és Szervezéstudományi Intézet, 5.

73 LÁSZLÓ 2022: 5.

74 In this planning system, not only was the salary and the number of staff planned, but it also included education, including vocational training and higher education. See KISS, György (2005): *Munkajog* [Labour Law]. Budapest: Osiris, 589.

75 In the event of the liquidation of the 'business organisation', or if the employer terminated the employment of an employee in connection with the operation of the employer, if the so-called "organised accommodation" of the employee concerned could not be provided and the employee undertook the obligations laid down by law, the employer was obliged to extend the notice period for a maximum of six months with the prior consent of the competent county employment authority. During this period the employee had to be exempted from work, but was not allowed to establish an employment relationship, to

jobseeker's allowance.[76] Finally, in 1989, the institution was renamed unemployment benefit.[77] It was during this period that the Employment Fund was created and the first active labour market instruments appeared, such as the resettlement loan, the entrepreneurship grant and the business loan for new entrants and start-ups. In this context, it should be stressed that these measures – formally before the political regime change(!) – were no different from those applied in market economies.

In 1991 – still before the FLC was drafted – the Employment Act (hereinafter: EA) was adopted on the basis of a broad social dialogue.[78] According to the Reasoning of the EA, "the socio-economic crisis that has been developed and worsened in recent decades will continue in the coming years. One of the certainly predictable consequences of this will be an increase in unemployment. The overcoming of the crisis will be accompanied by the establishment of a modern social market economy. The need for a social market economy is not an end in itself; in fact, it is the main source of the solutions which can be expected to put an end to the crisis". László highlights the main principles of the EA: the priority of the labour market, the duty of cooperation of labour market actors, the duty of active participation and financing, the principle of equal treatment and the priority of active employment policy measures.[79] Perhaps the most important feature of the employment policy of the time was the multi-level reconciliation of interests, in which the county labour councils occupied a prominent place.[80]

The employment policy after the change of system is characterised by the fact that the EA has been amended some 80 times. This also indicates that priorities have changed almost continuously, but one trend can be

engage in other gainful employment or to cooperate with the employment agency. The average earnings paid by the employer were reimbursed to the employer from the state budget. See MT Decree 26/1986 (VII. 16.) and MT Decree 28/1986 (VII. 16.).

76 See Radnay 1987: 231.

77 See MT Decree 114/1988 (XII. 31.).

78 Act IV of 1991 on the Promotion of Employment and Unemployment Benefit.

79 László 2022: 11–12.

80 Tóth, Ferenc (1997): *A regionális foglalkoztatási érdekegyeztetés* [The Regional Employment Interest Reconciliation]. Budapest: Országos Munkaügyi Tanács.

observed, namely employment policy has become increasingly a means of achieving economic objectives rather than a means of serving social needs. The first breakthrough in the efforts to establish the welfare state was already apparent in the mid-1990s, when employment policy no longer necessarily played a decisive role. Later, this appears even more pronounced, which is well reflected in the content of the 1999 employment policy guidelines.[81] In practice, the complex objectives set out in the Directive are essentially a picture of an economy-oriented employment policy, in which the State intends to play a more active role than before. This change is illustrated by the 1999 amendment to the EA.[82] The Act extends the possibility of public benefit employment and amends the provisions of the Employment Act governing the period of payment of unemployment benefits. The maximum period for payment of unemployment benefit is fixed at nine months instead of the previous twelve months. Another sign of the change in concept was the merger of the Ministry of Labour into the Ministry of Economy.

It is quite difficult to evaluate the employment policy of the period 2002–2010. Hungary had to comply with EU employment policy requirements in many areas, but economic growth appeared as a priority. This was compounded by the financial economic crisis that peaked in 2008, which overturned the government's previous vision. As a general characterisation, it can be concluded that previously built institutions (e.g. social dialogue) have worked somewhat, but professional and political efforts were quite distant from each other.[83]

As I mentioned in the assessment of the economic policy of the period from 2010, the programme went far beyond the transformation of the economy and was no different in the field of employment policy. Chapter 6 of the New Széchenyi Plan issued in 2010 contained a summary of the new employment programme. The Plan explains the 'different' development

[81] Government Decision 1166/1998 (XII. 30.) on the 1999 employment policy guidelines. See its analysis in László 2022: 28–30.

[82] Act CXXII of 1999 Amending Certain Labour and Social Acts.

[83] László 2022: 52; László, Gyula (2009): A foglalkoztatáspolitika befejezetlen paradigmája [The Incomplete Paradigm of Social Policy]. *Munkaügyi Szemle,* 40(2), 45–52.

direction from the European one, inter alia, by the structural problems of the Hungarian labour market. The founding idea of the employment policy to be developed lies in the following: "If we look at the employment rates by education level, it is clear in which segment of employment Hungary is lagging the most behind. This is clearly the case for the low-skilled, where the EU employment rate is almost twice that of Hungary. A very important difference is that, on average in the EU, there is not such a large employment gap between people with different levels of education as there is in Hungary. The fact that a large proportion of low-skilled people are excluded from the labour market is due to both supply and demand reasons, and therefore intervention is needed on both sides to improve the situation."[84] Consequently, support for 'competitive knowledge' means that low-qualified people should primarily enter the labour market.

In general, the motto of the employment policy formulated in the New Széchenyi Plan could be the goal of creating as many new tax-paying jobs as possible. Two elements deserve special attention in connection with the new Széchenyi plan. One is the New Work Plan issued under the Széll Kálmán Plan and the other is the CVI Act of 2011, amending the laws on public works and other laws related to public works. As regards the programme of measures of the New Labour Plan, the flexibility requirement under the heading 'Regulation to Promote Employment', which the new Labour Code was (should have been) to implement, will be discussed in detail below. Here, it is sufficient to discuss two agenda items, namely the thesis of 'public work instead of social aid' and the restructuring of the framework for reconciliation of interests.

Public employment/work has a generally negative connotation and is usually associated with unemployment, meaning employment outside the labour market for some disadvantaged groups.[85] However, public work and public employment originally served to implement some important state or local (municipal) public tasks, basically with the replacement of

[84] Új Széchenyi Terv [New Széchenyi Plan] 2010: 267.

[85] See Csoba, Judit (2010): „Segély helyett munka." A közfoglalkoztatás formái és sajátosságai ["Work Instead of Aid." Forms and Characteristics of Public Employment]. *Szociológiai Szemle,* 20(1), 26.

certain costs.[86] Another specific feature of this mode of employment, in accordance with its original purpose, was the exclusion of market operators.[87] When the EA was amended in 1994, the 'Support for Public Benefit Work' came into law. The reasoning behind the legislation reveals a lot about the underlying processes, because despite all the improvements in the indicators, the reduction of the benefit period means that the number of unemployed people leaving the benefit system earlier is increasing, and the number of long-term unemployed is growing. Although the income support provided under the Social Act provides a temporary livelihood for the most vulnerable, it is necessary to find ways of reintegrating them into the labour market. Obviously, the legislator's wishes for those employed in this way to return to the labour market as soon as possible depends basically on two main factors. One is the condition of the demand side of the labour market, the other is the labour market quality and ability of those employed in public work. The former, as we have seen, depends on the economy and economic policy, but the latter can be relatively accurately determined by certain indicators.[88]

Numerous data supports that the conversion or return of public workers to the labour market is at least doubtful, but the content of some of the legislation even suggests that this may not have been the primary goal.

Well, public employment – to say the least – is one of the central elements of the Hungarian Work Plan. This approach to employment policy was codified in the above-mentioned Act. According to the reasoning of this Act, the aim is to create employment opportunities for employees of active age who are able to work, but who are excluded from the labour market. The

86 Csoba 2010: 27. See about this issue, for example, in Siklóssy, László (1931): A Fővárosi Közmunkák Tanácsa története. Hogyan épült Budapest? 1870–1930 [History of the Budapest Public Works Council. How Budapest Was Built? 1870–1930]. Budapest: Fővárosi Közmunkák Tanácsa.

87 Csoba 2010: 36. She refers to the EA Section 16 in this context.

88 On this see among others Köllő, János (2009): *A pálya szélén. Iskolázatlan munkanélküliek a posztszocialista gazdaságban* [On the Sidelines. Unskilled Unemployed in the Post-socialist Economy]. Budapest: Osiris, 44–58, 84–126; Halmos, Csaba (1999): A közmunka múltja, jelene és jövője [The Past, Present and Future of Public Work]. *Munkaügyi Szemle,* 43(1), 12–17.

Act amends the EA and Act III of 1993 on Social Benefits, furthermore the Labour Code. A drastic example of the "work instead of aid" principle is the setting of a maximum duration of the jobseeker's allowance at 90 days and the maximisation of the amount of benefit a family can receive from non-working income. The rationale for these rules is to ensure that subsidies do not have an incentive effect against work. Finally, the non-labour market nature of public work is also reflected in a *sui generis* 'public employment relationship'.

As for the transformation of social dialogue, the debates on interest reconciliation did not start in 2010. In 2008, the Constitutional Court annulled the provision of the Labour Code according to which the Government decides with the consent of the Interest Reconciliation Council – inter alia – on the amount of the mandatory minimum wage.[89] The essence of the decision is that the power of this Council limits the legislative legitimacy, and, accordingly the right of consent has been abolished, effectively eliminating the possibility of a joint decision-making mechanism. After 2010, taking this into account, a new body was established in accordance with the Constitutional Court's ruling – by a separate Act. This is the National Economic and Social Council.[90] This formation had and has two characteristics. One is that its members are not merely employer and employee representatives, and it is only a consultative, proposing and advisory body.

INTERMEDIATE CONCLUSIONS

The economic and economic policy environment of Hungarian labour law is far from simple. One of the important major tasks of the years following the change of system was the replacement of the former so-called socialist legal system based on a non-market economy with a private law, commercial law and, last but not least, a labour law system that corresponded to market conditions. At the beginning, the transformation of the ownership system,

89 See Decision 124/2008 (X. 14.) AB (Constitutional Court ruling). The relevant provision of the LC is Article 17(2)(b). For a detailed analysis see Kiss 2009: 89–112.

90 Act XCIII of 2011 on the National Economic and Social Council.

privatisation, posed a major challenge, which transformed the entire structure of society and, it must be added, divided it significantly. The First Labour Code (FLC) was born in this process of social transformation, which was in flux and could hardly be called stable, relatively late compared to other economic and public law acts serving the transformation.

As it is presented in the following chapters, the FLC seemed to have an ostensibly liberal outlook, emphasising the importance of private autonomy. However, in the absence of appropriate partners, particularly in the area of collective labour law, a significant degree of state intervention could still be traced in the functioning of many institutions. Nevertheless, the bigger problem was that employment policy did not receive adequate attention and regulation during the privatisation process and in the period that followed, and employee interest groups did not have sufficient capacity to assert their interests. Undoubtedly, in the face of a volatile economic situation and a near-bankruptcy situation of the state, this is somewhat understandable.

In economic policy, but especially in employment and social policy, the change of government of 2010, which introduced a rather centralised economic and economic management system, was a significant turnaround. The direction of social policy is marked by the slogan of a 'work-based' society, and public work have become an important element of employment policy. The Second Labour Code (hereinafter: SLC) came into force in 2012, primarily based on legal policy considerations and in the absence of any legislative compulsion.

Chapter III

PURPOSE AND OPERATION OF THE CONTRACT OF EMPLOYMENT IN THE HUNGARIAN LABOUR LAW

INTRODUCTION

In the light of the previously defined purpose of labour law, we analyse the operation of the legal institutions of Hungarian labour law. Following the structure of the comparative part of this study, we first examine the place, purpose and actual operation of the contract of employment within the framework of Hungarian labour law. According to our starting point, labour law is a contractual branch of law, the legal field of private autonomy, and its basic legal instrument is the contract of employment. Without a contract of employment, that is, without individual autonomy, collective autonomy cannot be imagined, which is why it is appropriate to begin this examination with the contract of employment.

As a first step in this analysis, first and foremost, it must be made clear that the contract of employment is a contract. This finding may seem trivial in other parts of the world, but it may not be superfluous to state this basic systemic fact. In presenting the history of Hungarian labour law, I referred to the formal existence of the contract of employment, to the fact that this 'contract' had practically no role in the formation/shaping of the legal relationship.[1]

Clarifying the nature of the contract of employment in Hungarian labour law is important for two reasons. One of them is related to the abstraction level of the examination of legal institutions. If the investigation is generally performed at the level of legal declarations, it is clear that the contract of

[1] This is well illustrated by a study on employment contracts from 1959. See Garancsy, Gabriella (1959): A munkaszerződés mellőzhetetlen tartalmának érvényesülése [Enforcement of the Indispensable Content of the Contract of Employment]. *Jogtudományi Közlöny,* 14(4), 163–174.

employment has an element that is usually typical of the contract. This statement is also important because it can be proven that labour law is part of the private law system. If the analysis of the legal institutions is now to be continued at the level of the contract, it is necessary to take into account the context in which the contract of employment applies and operates, and to identify the specific features which – within the general framework of the contract(!) – constitute the *differentia specifica* of the contract of employment.

And in connection with the latter, there is another reason why it is necessary to emphasise the contractual nature of the contract of employment. Namely, the essence of the contract is contractual freedom. This phenomenon has been subject to many interpretations and misunderstandings throughout its history. Perhaps it is because of this that today, for various reasons, attempts are being made to restrict it.[2] Péter Cserne pointed out that "contractual freedom is an ideologically burdened concept capable of triggering intense political passions".[3] In relation to the function of freedom of contract, Vékás emphasises that this freedom is not an end in itself, "it is through it that the right of self-determination in the market is realised".[4] Before examining the restriction of contractual leave on the basis of 'usual' arguments, the content of this freedom must be determined. This freedom generally includes the freedom to conclude a contract and to choose the contracting partner, as well as the freedom to determine the content of the contract.[5]

Why should freedom of contract and its restrictions be given special importance in labour law? The main reason for this lies in the essence of the

2 See Vékás, Lajos (1999): A szerződési szabadság alkotmányos korlátai [Constitutional Limits of Contractual Freedom]. *Jogtudományi Közlöny,* 54(2), 53–60; Vékás 2006: 355–364.

3 Cserne, Péter (2006): Szerződéses szabadság és paternalizmus: adalékok a szerződési jog közgazdasági elemzéséhez [Contractual Freedom and Paternalism: Contribution to the Economic Analysis of Contract Law]. *Századvég,* 11(41), 47–78.

4 Vékás 2006: 356.

5 Vékás refers to several influential studies on contractual freedom and its limitations. The topic itself permeates the entire field of contract law. Therefore, I do not deal with contractual freedom in this study in general, but I emphasise the segments that are inevitable for the contract of employment. Vékás 2006: 356.

contract itself. There are many ways to approach the contract. However, they have one thing in common, namely, that the contract is somehow expressing freedom. This can be identified with private autonomy and freedom of will, and today we can even say that a contract is a form of free communication. Lomfeld's wording suggests consciousness: *ein Vertrag ist Freiheit.*[6] This also means that free subjects conclude the contract of their own free will.[7] Freedom is an invaluable value in itself, and its expression in the contract is the driving force of our society. Vékás emphasises that "the restriction of any element of contractual freedom may only be imposed in a socially very justified case, and the restriction of any of these elements does not in itself necessarily and completely exhaust the freedom of contract".[8] It is also important to note that the intervention is necessary precisely in order to maintain the stability guaranteed by contractual freedom.

In civil law, the reason of 'usual' restriction of certain elements of contractual freedom although emphasised in different details, are all found in the consideration of the security offered by the contract. In labour law, the scope of contractual freedom and its limits are viewed somewhat differently. The first such difference occurs in the framework of freedom to conclude a contract, namely the freedom to choose the type of contract *versus* contractual type-constraint. This will be relevant later. A contract of employment is a special type of incomplete contract characterised by the fact that the recipient of the service determines the manner in which the service is to be performed. As I have already pointed out, the origin and content of the subordination between the parties is a subject of eternal debate, and I have established that the various forms of inequality between the parties (economic, personal, risk, etc.) do not appear in the direct content of the contract, i.e. the contract of employment itself does not create subordination. Thus, the legal effect of that contract, the employment relationship, does not in itself imply subordination by reason of the aforementioned nature of the contract.

6 Lomfield, Bertram (2015): *Die Gründe des Vertrages.* Tübingen: Mohr Siebeck, 80.

7 Lomfield 2015: 82–92.

8 Vékás 2006: 356.

The basis of the freedom of contract – namely the equal quality of the parties' will – is upset when the legal order is unable or unwilling to correct the overturned balance. At the same time, this intervention can be of such an extent that creates a pseudo equality, that it entails an unjustified restriction of the will of the parties by excluding a significant part of the market. This also warns that the restriction of contractual freedom in labour law cannot be unlimited, but also indicates that it can be more far-reaching than in the case of traditional private law contracts. Consequently, the first, specific restriction of contractual freedom can be formulated as follows: the parties are free to choose the type of contract, but if the performance of the contract concluded qualifies as employment on the basis of the tests mostly defined by judicial lawmaking and jurisprudence, the contract concluded will be considered a contract of employment.

In labour law, another significant restriction may even apply to the choice of contractual partner. One of the essential elements of labour law is the principle or requirement of equal treatment, which is fraught with contradictions. If we look only at the European development of the requirement of equal treatment, it can be shown that this requirement is in the crossfire of interests and is based on considerations of legal policy rather than legal doctrine.[9]

Finally, a significant restriction of contractual freedom is to intervene in the content of the contract of employment. This is usually done indirectly, namely by regulating a segment of the performance of the contract, such as working time. However, at the same time, the rights and obligations of the parties are sometimes set out directly, such as in the case of an employment duty.

In the light of the foregoing, it is not an incidental matter to determine the place of a contract of employment in the legal order. In other words, what possibilities does the contract of employment have to shape the content of

9 See among others Muir, Elise (2019): The Essence of the Fundamental Right to Equal Treatment: Back to the Origins. *German Law Journal,* 20(6), 817–839; Barnard 2012: 253–499; Meenan, Helen ed. (2007): *Equality Law in an Enlarged European Union. Understanding the Article 13 Directives.* Cambridge: Cambridge University Press; Hanau, Peter et al. (2002): *Handbuch des europäischen Arbeits- und Sozialrechts.* München: Verlag C. H. Beck, 541–619.

the employment relationship, compared with the spectrum of shaping of private law contracts in general? Thus, in this context, the following areas should be considered. The first is the problem of freedom of choice of the type of contract to perform a work, i.e. the problem of freedom of choice of type of contract versus constraint on the type of contract. In addition to its theoretical and dogmatic significance, this raises practical questions such as the invalidity of the contract of employment, its convertibility towards other contracts. Namely, the long-term nature of the employment relationship and, depending on this, the risk tolerance of the employer and the social needs of the employee must be taken into account.

THE PLACE OF THE CONTRACT OF EMPLOYMENT IN THE SYSTEM OF CONTRACTS OF PRIVATE LAW UNDER THE HUNGARIAN LAW

The starting point: The development of 'labour law regulation of a private law nature'[10]

The First Labour Code (hereinafter: FLC) was born in 1992, rather late in the process of changing the economic and political system. It is necessary to highlight a number of points in the general reasoning of the code. The legislator emphasises that "the management of human resources, labour, is increasingly emerging as a factor of production and that, as a consequence, the labour market is gradually becoming part of the economic market, operating according to its principles and rules [...]. This change should also be taken into account in labour law legislation: it is necessary to break with the regulatory logic of the past. Market-conform regulation results in the current administrative regulation to be replaced by a 'labour law regulation of a private law nature' that is more appropriate to the specifics of the employment relationship."[11] This also means that State intervention

10 In Hungarian: "magánjogias munkajog". Reasoning of Act XXII of 1992 on the Labour Code.

11 General Reasoning 1.

must be strongly withdrawn, and that a coherent legal regulation of the subjects of the employment relationship can be limited to the definition of the elements of the guarantee content of the employment relationship, to the designation of the so-called 'minimum standards'. What the latter meant and what its consequences were, I will discuss in detail later. I am merely examining what the 'private law' regulatory nature meant as regards the place of the contract of employment in the legal system. In this text, there is no indication that the contract of employment is governed by the Civil Code (hereinafter: CC),[12] nor is there any suggestion that the rules of the CC may be applied to the FLC by virtue of any general clause. The wording cited in the Reasoning 'merely' meant that the approach and orientation of labour law would change, at least according to the legislator's declared intention.

However, the relationship between labour law and civil law could not be swept under the carpet for two reasons. One is that there were antecedents, even before the change of regime, especially in judicial practice. The other is that there are private law institutions which – if we recognise that labour law is part of the private law order – are so-called 'branch of law-neutral'.

The first, original (promulgated) text of the code itself mentions civil law and some rules of the CC in a few places.[13] As far as judicial practice before the regime change is concerned, we find some thoughtful decisions.

12 At this time, Act IV of 1959 on the Civil Code was in force.

13 Thus, Section 3, Subsection 4 of the FLC provides for the application of the rules of civil law to an agreement between an employer and an employee the content of which obliges the employee to refrain, after the termination of the employment relationship, from behaviour which would jeopardise the legitimate economic interests of his former employer. Pursuant to Section 159 of the FLC, the interest specified in the civil law rules shall be paid in the event of late payment of wages. According to Section 193, the manager is liable to the employer for damage caused by his managerial activity in accordance with the rules of civil law. As of the last status before the repeal of the FLC, this scope had not changed substantially. In this context, it is only interesting to mention Section 193/O, Subsection 1 of the FLC, which provided that if the temporary employee causes damage to the user employer in the course of his employment, the rules of liability for damage caused by employees shall apply. This liability was regulated in CC Section 348, Subsection 1.

Some of the cases involved violation of rights relating to the employee's personality. In several decisions, the Supreme Court has stated that "the enforcement of a claim against an employer arising from violation of rights relating to the employee's personality in the employment relationship must be brought before a (general) court".[14]

Special attention is deserved by a decision made in 1981 relating to the assignment of an employer's claim arising from an employment relationship to another party.[15] In that case, in the course of the liquidation of a company, the plaintiff agreed to take over the claims of the 'predecessor' employer under an 'assignment and assumption debt agreement'. (According to the agreement, the claims of the predecessor were given the 'successor' plaintiff, which took over the obligations of the 'predecessor' for the same amount.) The Supreme Court stated that, under Section 63, Subsection 1 of the LC,[16] an employment/labour dispute is a dispute between a worker/employee and his employer concerning the rights and obligations arising from the employment relationship. "There is no doubt that this provision does not exclude in general the launch of a labour dispute from the parties' successor. However, a claim arising from the transfer of a claim by way of a civil law contract (assignment) cannot be pursued in an employment dispute even if the transferred claim otherwise arises from an employment relationship." And according to the last part of the reasoning: "The employer's legal status cannot be transferred and cannot be assigned by civil law contract. In this case, the plaintiff did not have an employer for the defendants (employees) and did not acquire this legal status due to the assignment." In this respect, "the claim arising from the assignment may be brought before a civil court of general jurisdiction and in compliance with the rules of civil law on

14 BH 1975: 153. With similar content BH 1988: 333; BH 1988: 469. According to the judgements, the person whose rights relating to personality has been violated may also claim damages under the liability rules of civil law, as provided for in Section 84, Subsection 1 e) of the CC.

15 BH 1981: 125. It should be noted that at that time there was not, nor could there have been, any provision on the consequences of a change in the employer's status under the labour law.

16 Act II of 1967 on the Labour Code.

assignment, in accordance with the content and scope of the rights of the assignor under the provisions of the Labour Code".[17] These cases indicate that it is clearly not a question of procedural competence but of the classification, admission or closure of certain general private law institutions. Finally, I have to note that the dispute arising from the determination of the conditions for the acquisition and transfer of employees' shares in 1992 was a particular problem.[18]

In connection with the FLC, more and more groups of cases have been raised by the need for reference to civil law and to the application of the rules of the CC. These cases can be grouped as follows (reference is made only to the most important ones). One significant group of cases is decisions relating to changes in the person of the employer (transfer of business), basically referring to the already mentioned Collegium Resolution 154.[19] Another category of cases concerned the classification contracts for the performance of work. In this context many groups of cases concerned the contractual freedom of the parties, the assessment of which is still controversial in Hungarian labour law.[20] Another point of connection is the decision in which the difference between a fixed term and a conditional clause caused confusion. The question was whether, if the parties linked the termination of the employment relationship to the fulfilment of a condition, this condition was unlawful (under the applicable law) or not.[21] The qualification of a contract in which the employer and employee have the same subject

17 Reasoning of Decision BH 1981: 125.

18 BH 1992: 773.

19 See among others BH 1993: 708; BH 1993: 709; BH 1993: 771; BH 1994: 111; BH 1994: 290; BH 1994: 403; BH 1994: 455; BH 1994: 571; BH 1995: 62; BH 1995: 189; BH 1995: 375; BH 1995: 434. These cases were analysed by Berke 2006.

20 BH 1995: 69; BH 2001: 300 (a dispute concerning the classification of a university degree); BH 2002: 504; BH 2003: 386; BH 2003: 432; BH 2003: 517; BH 2004: 255; BH 2005: 156; BH 2006: 92; BH 2007: 384 (delimitation of the contract of employment of attorneys and the cooperation agreement between them); BH 2008: 167; BH 2008: 198; BH 2010: 340 (adhesion lawsuits); BH 2011: 114 (legal status of housekeepers).

21 BH 2000: 369. In this regard, it should be noted that the FLC did not contain any prohibitive provisions such as SLC Section 19, Subsection 1.

position was also raised.[22] The debate surrounding the invalidity, or more precisely the nullity of contracts remained one of the most controversial issues in the relationship between civil and labour law, focusing on the free choice of the type of contract *versus* constraint on the type of contract.[23]

Some decisions from this period refer explicitly to the relevant provision of the CC. A brief description of these is necessary because it demonstrates that it was not possible to develop an autonomous, quasi-independent contractual dogmatic approach to labour law. Thus, for example, in a dispute concerning the formal requirements of an agreement relating to an employment contract (concerning the use of a vehicle owned by the employee for official purposes and remuneration) in a dispute concerning formal requirements, the Supreme Court ruled that "the formal requirements for legal statements relating to employment and the consequences of their absence are regulated by the Labour Code".

In 1998, a decision was made that provided general guidance. The Supreme Court stated: "A specific provision of the Civil Code may be applied on the basis of the principle of similarity if the Labour Code does not contain rule on the matter in question and the application of the civil law rule does not lead to a result contrary to the principles governing the employment relationship."[24] This general observation has been of great significance in later times. In another case – a dispute concerning a non-competition agreement between an employer and an employee – the Supreme Court, also referring to the Civil Code, explained that the risk inherent in a non-competition agreement does not allow either party to rely ex post on a circumstance that was not taken into account when the agreement was concluded in order to obtain relief.[25] Remarkable is the

22 BH 2004: 332. This problem may have arisen because under the Company Act in force at the time, the company's leadership position could be also filed on the basis of contract of employment. This solution has caused confusion in so-called one-person companies.

23 BH 2012: 157.

24 BH 1998: 506.

25 At this time, the FLC. Section 3, Subsection 4 expressly provided that the provisions of the Civil Code governed the non-competition agreement. The provision cited the previous CC Section 207, Subsection 1.

qualification of the acknowledgement of debt in violation of the labour law rule, which, according to the Supreme Court "can be determined by applying the rules of labour law and civil law together".[26] Finally, the Supreme Court has reiterated on several occasions the principle formulated in 1998 that if a particular issue is not covered by the FLC, the CC can be applied if they do not violate the principles of labour law.[27]

An attempt to create a latent sui generis contract of employment in the current Labour Code?

A review of these earlier cases is instructive, as the FLC itself did not expressly grant such powers to the courts. The debate on the application of the provisions of the CC continued during the drafting of the Second Labour Code.[28] The General Reasoning of the Code emphasises that "in the absence of an explicit rule to this effect in the current Labour Code, the Hungarian judicial practice has established the legal doctrine that the rules (and principles) of civil law apply in labour law, unless the rule of labour law provides otherwise and the application of the civil law does not conflict with the fundamental principles of labour law". The legislator, based on this earlier judicial lawmaking, maintains a solution that civil law rules constitute the 'underlying law' of the SLC. This means that the legislator considers labour law a part of private law, "but changes the methodology for applying civil law rules".[29]

After this introduction, however, the argumentation of the Reasoning is somewhat surprising. According to the legislator, this change consists in the fact that in Part One of the Act, in the General Provisions, the SLC establishes general rules on the conduct of the parties and the specific

[26] BH 2005: 77.

[27] EBH 2000: 258; BH 2001: 363; BH 2007: 271. In one case, the Supreme Court stated that the civil law rules can be applied according to a binding period in the case of termination of employment relationship by mutual agreement (BH 2001: 363).

[28] Act I of 2012 on the Labour Code.

[29] General Reasoning 5.

labour law rules on legal declarations/statements and invalidity and its consequences, thus partially avoiding the application of the rules of the Civil Code. "On the other hand, the change is reflected in the fact that the law specifies exactly which civil law rules are intended to be applied to each labour law institution and which civil law rules are restricted."[30]

Therefore, it is necessary to examine both the employment legislation relating to legal declarations and the legal position of the contract of employment, in particular as regards the contractual nature of the contract of employment, and Section 31 of the SLC, which lists the provisions of the CC that are applicable to labour law's 'legal declarations'. As far as legal declarations are concerned, the first part of the SLC devotes three chapters to this issue ('legal statements', 'delivery of legal statements', 'invalidity'). According to the reasoning, the agreements of the parties (typically the collective agreement and the contract of employment) and, in exceptional cases, the unilateral legal declaration of the parties play a much more prominent role in establishing employment rights and obligations as before. The Reasoning does not explain what this more significant role entails, merely states that the FLC contained only basic provisions relating to the form, delivery and invalidity of legal declarations, therefore, the case law necessarily established the principle that the Civil Code provision may be applied in matters not regulated by the Labour Code, provided that it does not violate the principles of labour law. However, according to the legislator, this solution "does not provide a definite point of reference for practice" as the so-called 'principles of labour law' do not allow for a clear answer to the specific issues (e.g. the existence and duration of the obligation to make an offer, the possibility of employee representation). Therefore, the aforementioned Chapter of the SLC contains the basic rules for 'legal declarations'.

If we look at the relevant provisions in this Chapter of the SLC (agreement, the unilateral legal declarations, the unilateral declaration without legal effect, commitment, internal guide of employer and condition), we find ourselves faced with quite a few interpretation problems. There is no doubt

30 General Reasoning 5.

that this chapter contains some specificities of labour law, but this does not justify the creation of a separate chapter on legal declaration of labour law. I will not analyse the issues of form and delivery of legal declaration in the SLC, but some remarks are necessary on the legal institution of 'Invalidity', regulated in Chapter IV of Part One.

And finally, one more comment, which is significant in this study when analysing collective agreements. It appears that the regulations governing legal declarations – despite the emphasis placed on the importance of collective agreements in the Reasoning – only cover individual legal declarations. This also means that, due to the lack of regulation, collective agreements in Hungarian labour law have no contractual dogmatic basis.

But before we turn to this complex issue, we need to examine how SLC Section 31 determines the place and contractual nature of the contract of employment.

How does SLC Section 31 place contract of employment within the private law contract system?

General observations

The placement of a contract of employment in the system of contract law is not a purely theoretical consideration, but also has a practical significance. In my opinion, the designation of the place of the contract of employment determines the dogmatics of this contract. In this regard, there are few options available. These options do not merely determine the assessment of the employment contract, but also determine the legislator's perception of labour law as a whole. These options were formulated very precisely by Richardi in his work entitled *Arbeitsrecht als Sonderprivatrecht oder Teil des allgemeinen Zivilrechts.*[31] In the context of that finding, I would emphasise

[31] RICHARDI, Reinhard (2000d): Arbeitsrecht als Sonderprivatrecht oder Teil des allgemeinen Zivilrechts. In KÖBLER, Gerhard (ed.): *Europas universale rechtsordnungspolitische Aufgabe im Recht des dritten Jahrtausends. Festschrift für Alfred Söllner zum 70. Geburtstag.* München: Verlag C. H. Beck, 957–972.

once again that that classification does not affect the independency of the labour code in terms of codification.[32]

If the legislator merges labour law into the general civil law, it does not have much to do with the legal institution of the contract of employment, but it is necessary to develop the system of norms ensuring balance between parties and to allow the exercise of collective autonomy, also for this purpose. If the legislator wishes to create a *sui generis* or a *quasi sui generis* labour law, it will not be exempted from the latter tasks, but it must also develop an independent institutional system for the contract of employment.

I am convinced that there is no third option. That is, there is no half-way solution, or if there is, such creation causes serious disturbances. Unfortunately, the reason for the deficiencies and conceptual ambiguities related to the regulation of the contract of employment is to be found in Section 31 of the SLC. The introduction of this provision suggests that the CC provision listed in this rule generally applies to legal statements under labour law, while its scope of application is clearly limited to contracts of employment. So the collective agreements and all unilateral legal declarations are excluded from its scope.

Nevertheless, it is appropriate to refer briefly to that list in order to consider whether the use of the general applicability clause – at least as regards the contract of employment – would not have been more justified than the solution in force. I am going to go ahead and say that in my opinion the vast majority of the listed provisions could have been taken over by a general clause, and the SLC regulation should have been restricted only to the necessary cases. But in the current regulation, we may encounter unnecessary duplication or overlap, as in the case of representation. In some cases, the lack of adoption of the CC rules is a mystery, as in the case of the general concept of contract[33] or contractual guarantees (confirmation of contract) for example earnest money, contractual penalty, forfeiture clause.[34] Below, in relation to Section 31 of the SLC, I would like to draw attention to a few pitfalls that could have been avoided by applying a general clause.

32 See Richardi 2000a: § 1 RdNr. 30.

33 CC Section 6:58.

34 CC Section 6:185 – 6:190.

The dangers of itemised listing and matching

First, I would like to highlight that the lack of adoption of CC Section 6:59 seems problematic. This provision, under the heading of 'freedom of contract', states that the parties are free to conclude a contract and to choose the other contracting party. Furthermore, the parties are free to determine the content of the contract. They may derogate from the rules of the contracts concerning the rights and obligations of the parties by consensus, if this law does not prohibit derogation.

It is worth examining what the omission of freedom of contract from the SLC means, and what it might have meant to adopt the rule containing the most important private law principle, or indeed how it could have been adopted in the SLC. The SLC's silence[35] may send the message that a contract of employment is an agreement to which the most important principle of the contract does not apply. Obviously, this assessment does not generally apply to labour law as one of the appearances of private law. But what would have happened if the principle had been accepted in the SLC?

It is clear that freedom of contract does not fully apply in labour law, as formulated in the CC. There are a number of significant restrictions in this area. One of these is the aforementioned principle of equal treatment, which is one of the fundamental principles of employment policy and has thus become a fundamental element of labour law policy.[36] The requirement of

[35] This fundamental provision of the CC is not superseded by SLC Section 14, which states that "the agreement governed by this Act shall be concluded by mutual and unanimous legal declaration of the parties".

[36] The purpose of this study is not to analyse the implementation of equal treatment in labour law and its, in our view, misinterpreted extension. However, we would like to point out that the private law literature also reacts to the principle of equal treatment, formulating a precise distinction between the requirement of equal treatment and the prohibition of discrimination which infringes dignity and is therefore incompatible with the principle of equal treatment. See in the Hungarian literature Vékás 2006. Here is a quote from the study: "In the area of private law, the requirement of equal treatment is not simply the opposite of the prohibition of discrimination and it is by no means an enforceable maxim. Imposing such a general requirement, or even establishing discrimination, is in stark contrast to the principle of private autonomy and contractual freedom in the

equal treatment in labour law represents a limit to the freedom of choosing a contractual partner under certain conditions and circumstances. For this reason, as for the application of the principle of contractual freedom in the SLC, this would have been possible only by adopting the general rules of civil law in the framework of a clause, defining in the SLC the restrictive exceptions that characterise only labour law.[37] In my opinion, only such a solution would have been suitable for making a misinterpreted legal policy endeavour presentable to legal dogmatics.

The application of the rules of the CC by way of a general clause is supported by Section 6:60 of the CC, which is also 'omitted', and which deals with the content of the contract as defined by law (CC). Under Subsection 1 of this provision "if certain content items of the contract are prescribed mandatory by law, the contract shall enter into effect with such mandatory items included". Subsection 2 states that "if the contents of an existing contract are to be amended pursuant to a newly adopted legislation, and the amended content of the contract is against the relevant lawful interests of any of the parties, the party so affected shall be entitled to request the court to amend the contract, or shall be entitled to withdraw from the contract".

This section also raises several problems. There are arguments both for and against the application of this provision in labour law. As regards the argument in favour of the application of the rule in labour law, it should be pointed out that, whereas in private law the content of the contract is defined by law only in exceptional cases, in labour law – in addition to the necessary substantive, indispensable elements of the contract of employment – the content of employment relationship is formed by many cogent norms and so demonstrate the opposite. Furthermore, the content of the employment

vast majority of private law relationships, and is therefore conceptually excluded. The exception is the employment relationship, where the prohibition of discrimination is widely accepted, above all because of the specific importance and usually limited nature of the work and the workplace." VÉKÁS 2006: 363.

37 Undoubtedly, in making this statement I am going against the European Union's policy on equal treatment, in particular Council Directive 86/613/EEC of 11 December 1986 on the application of the principle of equal treatment between men and women engaged in an activity, including agriculture, in a self-employed capacity, and on the protection of self-employed women during pregnancy and motherhood.

relationship can also often be changed by legal norm. The change set out in Section 6:60, Subsection 2 of the CC can also be interpreted in labour law to mean that the content of the contract of employment concluded before the legislation came into force is invalid and is considered null and void (without conditions – see below). According to another interpretation, unconditional nullity cannot arise either, since a cogent norm changes the content of the contract, which will remain in force with its new content.

In my view, if the contract of employment is examined at the abstraction level of the 'contract', the application of CC Section 6:60, Subsection 2 is justified. However, for the purpose of arguing against the application of the rule, the relative separation of the contract of employment and the employment relationship must be regarded as a point of reference and, referring to Richardi's statement quoted earlier, namely, the expression of private autonomy in employment law does not fall within the scope of civil law.[38] But, such a solution – namely the exclusion of this provision – also means that a party who suffers significant detriment as a result of the changed content of the contract has no remedy or means of redress. In other words, the will of the legislator is an absolute priority against the autonomy of the parties, and at most a constitutional examination can be imagined against the legal norm concerned. As far as possible remedies are concerned, in labour law, the institution of constructive dismissal against changes in the content of the contract of employment, or more precisely the employment relationship, is known in some cases in Hungarian law as well.[39] However, it is unlikely that this institution could be applied to such cases. In conclusion, although the provision in question is typically a rule of civil law, it would have been appropriate to give the courts at least a minimum margin of manoeuvre in labour law.

38 Richardi 2000a: § 1 RdNr. 30.

39 See Section 40 in the SLC. Under this provision: "The provisions contained in Section 70 and Section 77 shall apply *mutatis mutandis* if the employee terminates his employment relationship by giving notice because the transfer of employment upon the transfer of enterprise involves a substantial change in working conditions to the detriment of the employee, and in consequence maintaining the employment relationship would entail unreasonable disadvantage or would be impossible."

In this context, it should also be noted that until the SLC came into force, the court intervention was unknown in the Hungarian labour law after the change of regime. It is precisely for this reason that it is incomprehensible that the SLC orders the application of CC Section 6:63, Subsection 3 for unclear reasons. Accordingly, "if the contract is concluded, but the parties have not clearly defined the amount of consideration, or if the market price has been stipulated as the price, the average price prevailing on the date of performance in the market regarded as the place of performance shall be paid". The CC Grand Commentary justified this rule by referring to numerous disputes that had arisen in civil law in connection with this issue.[40] However, these disputes did not relate to the content of the contract of employment, and since SLC Section 45, Subsection 1 includes the employee's basic salary among the necessary, indispensable elements of the contract of employment, thus, the reference to the CC rule is meaningless. Just to note in parentheses that, with such a solution, the adoption of CC Section 6:63, Subsection 5 would have been worth considering. According to this: "Under the contract the parties shall be bound by any usage which they have agreed on in prior business dealings and by any practice they have established between themselves. Furthermore, the parties shall be bound by a usage which would be considered generally applicable and widely known in the given sector by parties to similar contracts, unless such usages and practices are likely to conflict with contract terms which have been previously negotiated between the parties."

In the following, I do not wish to go into the random nature of the transposition of the CC provisions in SLC Section 31, nor the inconsistencies of the reception, but merely to point out the striking omission of

40 "Judicature has sought to 'save', as far as possible, at least those contracts where the consideration could be accurately established ex post by means of the contract or the relevant official price. For example, according to a Court of Appeal decision, a price can be considered to be fixed even if its amount can be calculated on the basis of the contract (or, in the case of an official price, the official price) at the time of performance." BDT 2009; 1980. VÉKÁS, Lajos – GÁRDOS, Péter ed. (2021): Nagykommentár a Polgári Törvénykönyvről szóló 2013. évi V. törvényhez [Grand Commentary to Act V of 2013 on the Civil Code]. Budapest: Wolters Kluwer, 1122.

the institutions that guarantee the contracts – as was referred above – and the application without criticism of the general terms and conditions, which I will examine later. To summarise the SLC rule under discussion, the argument that the current solution serves legal certainty is at least questionable. Since the SLC came into force, only a few cases have arisen in court practice in which the question of the combined interpretation of the SLC and the CC or the application of the CC rules has come to the fore. These mainly relate to compensation for damages and the interruption of the limitation period.[41] Despite the fact that insoluble interpretation contradictions have not recently been raised, unnecessary parallel references can still be found.

My analysis is not finished either, and many problems are still open to me. However, I believe that the legislator should have decided where to place the contract of employment within the contractual system of private law. As I mentioned, there are not that many solutions. The contract of employment either shares the fate of private law contracts, with certain exceptions, or is an independent *sui generis* type of contract. The Hungarian legislator attempted to place the contract of employment somewhere between the two, which in effect meant that it was placed nowhere. With regard to what has been described, it should be pointed out that the solution used in the SLC, without repeating the content objections, has been flawed in principle. As the Reasoning of the SLC states, the Code does not establish separate, independent rules on the contractual system of labour law. I would add that this would be almost impossible anyway. But the highlighting and enumeration of a few rules by SLC Section 31, which are otherwise only applicable to the agreement, and predominantly to the contract of employment, lack the legal doctrinal basis.

[41] BH 2019: 118; BH 2020: 340; BH 2021: 83; BH 2022: 131.

The place of the contract of employment in the system of contracts of private law – In the light of invalidity

One of the essential elements of contractual freedom is the choice of the type of contract. For this reason, the starting point of the following analysis is the interpretation of freedom of choice of type of contract *versus* (relative) constraint on the type of contract. In the case of personal work performed for others, this may be a contract for work *(Werkvertrag)*, contract of commission *(Mandat)*, contract of agency, etc. and contract of employment *(Arbeitsvertrag)*. The basis for this distinction in this content is that traditional private law contracts do not contain – with the exception of certain rules necessarily linked to the specificities of their content – rules limiting the contractual autonomy of one of the parties, as is the case with contract of employment. It should also be emphasised that while the provisions relating to civil law contracts only regulate the main features of the contract in question, labour law norms set out the necessary and indispensable elements of a contract of employment.

What does this mean for the validity and invalidity of contracts? This problem needs to be approached from several perspectives, projected onto the contract of employment. The reason for this is that the aforementioned Section 31 of the SLC requires the application of several provisions of the CC, but provides an independent invalidity system for the contract of employment. For this reason, firstly, it is necessary to map out the structure of the two invalidity systems.

In the CC, invalidity is the generic concept of which there are two types: nullity and avoidability. The SLC follows the invalidity system of the CC, similarly to the previous Labour Code. This seems obvious at first sight, but in the Hungarian literature there is a view that strongly doubts this solution. Román László – based on the structure of labour law before the change of regime – pointed out that in labour law the specific concept and regulation of invalidity, especially of the invalidity of the contract of employment, has not been developed.[42] Román further explained that one of the characteristics of regulating the invalidity of the contract of employment is that it relies entirely on civil law in respect of errors of will (defect of consent), adopting the 'interest structure' of the two basic situations of invalidity. In his other work, he emphasised that invalidity is above the branches of law and as such it is not sufficient to restrict the concept of invalidity to a single legal act, namely to a contract.[43]

Agreeing with Román's observation, I assess the invalidity rule in the SLC in force on the basis that validity and invalidity are a legal-theoretical category pair, and with respect to the contract of employment, I take as a reference point the fact that the contract of employment is one type of a contract.[44] However, with regard to the assessment of invalidity over certain branches of law, it is obvious that the nature of the legal act in question will determine the assessment of invalidity, its facts and its consequences.[45] This is also true with regard to labour law, as there are other legal declarations besides the contract of employment.

Before reviewing the rather one-sided regulation of the SLC's actually complex invalidity system, it is necessary to draw attention to a significant difference between the invalidity system applicable to the contracts of the CC and the invalidity system regarding the contract of employment in the SLC. This difference is a consequence of the so-called indirect type constraint that exists between civil law contracts expressing work performance and the contract of employment. Under SLC Section 27, Subsection 2 "the

42 Such a regulation has never been implemented in Hungarian labour law. Román, László (1989): *Munkajog. (Elméleti alapvetés)* [Labour Law. (Theoretical Foundation)]. Budapest: Tankönyvkiadó, 210.

43 Román, László (1977): *A munkáltatói utasítás érvényessége és hatályossága* [Validity and Effectiveness of Employer Instructions]. Budapest: Akadémiai Kiadó, 15. See also Auer, Ádám (2024): *A jogszabályba ütköző szerződések semmis(s)ége* [Nullity (Nothingness) of Contracts that Violate the Legal Norm]. Budapest: HUN-REN – TKJT, 16–18.

44 As regards the latter, I refer to Román's statement that there is no difference between the socialist and the bourgeois contract of employment as regards the concept of invalidity. This thesis can also be applied to the relationship between the contract of employment and the private contract in general. Román 1977: 9.

45 Román 1977: 11.

sham agreement shall be null and void, and if such agreement is intended to disguise another agreement, it shall be judged on the basis of the disguised agreement". In its contents the same is present in CC Section 6:92, Subsection 2. But, the essential difference lies behind the wording of CC Section 6:88, Subsection 2. For the purpose of this Section, if an annulled contract is in conformity with the validity requirements of another contract, this latter contract shall be valid, unless that is in contradiction with the presumed intention of the parties.

What is the essence of the difference between the two systems? Namely, in the framework of the CC regulations, 'the other contract' remains in the CC (invalidity) system. However, SLC Section 27, Subsection 2 provides for the invalidity of agreements that do not originally fall within the scope of the SLC (e.g. contract of employment / work contract or mandate). In this case, this contract, which falls under another branch of law, becomes a contract of employment.[46]

However, the problem is far more complex. According to SLC Section 27, Subsection 1, an agreement is null and void if it is contrary to a 'rules-governed employment relationship' or if it is created by circumventing a rules-governed employment relationship, or if it is manifestly contrary to morality. This content is regulated under the 'illegal contract' heading in Section 6:95 of the CC with reasonable deviation: "Any contract which is incompatible with the law or that was concluded by circumventing the law shall be null and void, unless the relevant legislation stipulates another legal consequence. If the relevant legislation stipulates another legal consequence in connection with a contract, it shall be null and void nonetheless where this is specifically declared by law, or if the purpose of the law is to prohibit the legal effect pursued by the contract." Furthermore, Section 6:96 of the CC declares contracts that are "manifestly contrary to good morals" null and void, while Section 6:97 of the CC declares "usurious" contracts null and void, finally Section 6:98 regulates a grossly unfair difference between the service and the consideration as an avoidable contractual fact.

46 The reverse case is quite rare, although there have been examples. See BH 2003: 213.

What is the structural similarity of the SLC invalidity regulation with the CC and what is the reason for the differences? Finally, the question is whether the special invalidity chapter in the SLC merely indicates technical derogations, or whether a substantive difference can be detected between a contract governed by private law and a contract of employment?

It is reasonable to begin with the difference that answers a number of substantive questions. The starting point is that Part One, Chapter IV of the SLC deals with the invalidity of the agreement. The term 'agreement' is broader than the concept of 'contract of employment', which is a specific type of agreement with specific content.[47] In the text intended to regulate invalidity – apart from the fact that the agreement and the contract are sometimes mixed[48] – there are only a few tangible sentences for the unilateral legal declaration.[49] In this chapter of the SLC, the legislator does not deal with the invalidity of the other legal declarations. This solution is objectionable because the content of the employment relationship is determined by other legal declarations besides the contract of employment. This is typically a unilateral statement/declaration by the employer. This may be an individual legal statement affecting a specific employee (individual instructions) or an instruction contained in internal regulations, which, in terms of its legal nature is considered a normative instruction in this context. (I am not concerned with the employee's unilateral legal declarations.) Furthermore, the neglect of the regulation of the invalidity of the employer's internal regulations is also striking because the legislator does not list the employer's internal regulations in Section 13 of the SLC as "rules governing the employment relationship".[50] Consequently, the validity or invalidity of these legal statements should have been regulated somewhere. The

47 Under Section 14 of the SLC: "An agreement governed by this Act shall be concluded by mutual and unanimous legal declaration of the parties."

48 For example in Section 28, Subsection 2.

49 See Section 15, Subsection 2: Thus, inter alia, the provision that the rules governing the agreement are to be applied *mutatis mutandis* to the unilateral declaration is uninterpretable. Section 29, Subsection 4–5.

50 Section 13: For the purposes of this Act, "rules governing the employment relationship" shall mean legislation, collective agreements and works agreements, and the binding decisions of the conciliation committee adopted according to Section 293.

individual employer management is regulated in Part One, Chapter VIII of the SLC, namely the provision dealing with the refusal to comply with the direction (Section 54).

Two comments are required for this provision. The first note is related to the placement of the rule. In this context, Román's clear statement on the nature of employment management as a 'volitional act' is important in response to those who reduce employer management to an 'ordinary/common performance act'.[51] Consequently, the invalidity of the employer's instructions should not have been regulated in the context of the performance of the employment relationship. The second note relates to the content of regulation. Section 54 is nothing more than a rather incomplete regulation of the facts and legal consequences of the invalidity of an employer's instruction. Although the primary purpose of this study is not to provide an analysis of the employer's unilateral legal declaration, but it must be pointed out that if the legislator in the SLC had dedicated a separate chapter to the invalidity of legal declarations, it would have been justified to take into account all relevant legal declarations from the point of view of the employment relationship. In this context, it should also be emphasised that the legal consequences of the invalidity of individual employer instructions cannot be automatically adapted to cases of invalidity of the employer's internal regulations.

Returning to regulating the invalidity of the contract of employment, the Reasoning of the SLC does not contain any explanation as to why it adopts the invalidity structure of the CC. Nevertheless, if we start from the general legal nature of the contract of employment, this solution is not objectionable. But, there may be another division that is theoretically justifiable and has been considered in practice. In this scheme the generic concept remains the invalidity, which has two types such as the unconditional invalidity – which is governed by the concept of nullity in both the CC and the SLC – and conditional invalidity, which currently falls under the concept of avoidability. In addition to these, there would be a new concept of nullity *(the non-existent*

51 Román 1977: 23–33. In this context, I refer to the content of SLC Section 15, Subsection 5, which deals with statements made during the performance of the agreement that do not constitute legal declarations.

transaction), which means that it is not simply a matter of some defect in the legal declaration, but that the legal declaration did not even come into being. This differentiation may be particularly important in terms of contract of employment and civil law contracts of personal work for others.[52] The theoretical basis for such a categorisation is freedom of choice of the type of contract *versus* constraint on the type of contract in the relation of private and labour law. In this context, the *non-existent transaction* only refers to the existence of the contract of employment – as such. The contract of employment differs from contracts governed by civil law relating to personal work performed for others not primarily in terms of the content of the contract, but in that only the legal effect of the contract of employment, i.e. the employment relationship, is subject to mandatory norms that do not generally appear in civil law contracts.

Of course, the two are related to each other. The number and content of cogent norms also determine the possibility of shaping the contract of employment, i.e. it prevents the parties' private autonomy. This statement can be confirmed by a comparison of the contract of employment, contract for employment (contract for work) and personal service contract (mandate, contract of commission). It should also be noted in advance that there is a significant difference between the contract for work *(Werkvertrag)* and contract of commission *(Mandat)* in this comparison, but that the aim here is precisely to determine the relative separation of the contract of employment by reference to the identity which can be demonstrated in respect of contracts governed by private law. This comparison is, of course, made at a lower level of abstraction – within the category of contracts – mentioned several times in our study.

52 László Román uses the terms unconditional and conditional invalidity in his analysis of invalidity, referring to the objective nature of the former, while in the case of the latter some act is required to establish invalidity. This may be an avoidance – typically in case of contracts – or refusal, as in the case of an employer's direction. Román illustrates the difference between nullity (non-existent) and invalidity when analysing the employer's direction, emphasising that a 'non-existent declaration' is not in fact a category of invalidity. See Román 1977: 52; Román 1972: 278–279.

In accordance with SLC Section 42, Subsection 2, under a contract of employment "the employee is required to work as instructed by the employer, the employer is required to provide work for the employee and to pay wages". The consequence of this provision is the content of Section 45, Subsection 1. In this Section, under the heading "Contents of the Contract of Employment", both cogent and dispositive rules are to be found. Thus, the parties of the contract of employment must agree on the basic salary and the function of the job (job description). They are the so-called necessary elements, or indispensable components of a contract of employment. If the parties do not agree on these or on one of them, the contract of employment is not created *(contractus non existent).*

Before analysing the content of these provisions in detail, it is necessary to examine how the definition of the concept of a contract of employment differs from the content of a contract for employment/work and a contract of commission. Here I do not examine the problem of the distinction between the contract for work and the contract of commission, but a brief discussion is necessary because it highlights the essence of the difference between the contract of employment and these civil law contracts.

The CC covers the so-called 'types of works contracts' and the 'types of personal service contracts', defines their basic types and regulates the subtypes. As far as the types of works contracts are concerned, this approach is important because there are many subspecies of this contract, and some of which are subject to cogent provisions (such are the rules concerning construction-technical planning and construction works).[53] According to the legislator's intention – under one of the editing principles set out in the CC Concept[54] – the general rules of the contract for work were to be made suitable for the dispositive legal regulation of commercial business relationships, in particular the legal relationships of large-scale investments

53 Vékás–Gárdos 2021: 1450.

54 See *Az új polgári törvénykönyv koncepciója. A Szerkesztőbizottság nevében a Kodifikációs Főbizottság elé terjeszti Vékás Lajos egyetemi tanár, a Főbizottság elnöke* [The Concept of the New Civil Code. On Behalf of the Editorial Committee, Submitted to the Main Codification Committee by Lajos Vékás, University Professor and Chair of the Main Committee]. Budapest, 145.

(of construction).[55] Therefore, the CC defines only the concept and the main rules of each sub-type of this contract at the abstraction level of the CC, while the detailed rules, where necessary, are contained in related provisions of public law. Thus, the general rules of the contract for work are governed by all kinds of this contract, regardless of the specificity of the service (activity).[56]

Pursuant to CC 6:238, under a 'works contract' the contractor undertakes to perform activities to achieve the result agreed upon (hereinafter: "opus") and the customer undertakes to accept delivery of and pay the contracted fees for such works. This can also be expressed as the parties agreeing on an activity that aims to achieve any result, opus. The Grand Commentary of the CC emphasises that "the general rules of a contract for work first and foremost determine the essence of the type of this contract".[57] It also points out that the CC does not use the expression 'work', because this terminus is primarily a category of labour law, whereas civil law uses the expression 'activity'. The CC thus highlights two essential features of the contract for work, namely it is an 'activity' obligation and its purpose is to achieve a result.

A similar approach can be found in the regulation of the contract of commission, where the CC defines the possible subject of this contract as broadly as possible.[58] The Grand Commentary of the CC refers to the Ministerial Reasoning of the CC of 1959, according to which legal relationships which cannot be classified as other types of agency relationships and which do not fall within the scope of employment relationships are regarded as relationships of commission. This wording also reflects that it is easier to distinguish between a contract for work – a so-called performance

55 Vékás–Gárdos 2021: 1450. This is also in line with the reasoning of the CC, which explains the change in the law compared to the previous law by the fact that, in addition to the CC's rules on contracts for work, the rules of certain types of these contracts are governed by public law rules in a manner that does not allow for derogation.

56 Vékás–Gárdos 2021: 1449.

57 Vékás–Gárdos 2021: 1450.

58 Vékás–Gárdos 2021: 1529.

obligation – and an employment relationship than between a contract of commission and employment relationship. In my view, the formal distinction is made more difficult by the fact that the current CC Section 6:272 does not define the term 'entrusted matter/case' in the definition of the entrustment contract but rather the 'entrusted task' as the duty of the entrusted person. Although the Grand Commentary of the CC considers this difference to be merely a change in the wording to make it more appropriate, noting that the two terms have the same meaning.[59]

What does all this mean in terms of our original question, i.e. the place of contract of employment in the system of private contracts and the doctrine of validity of a labour law? And at this point, it is appropriate to compare the difference in regulation between the service provided in the contract for work and contract of commission (the content of this contract) and the necessary, indispensable elements of the content of contract of employment. In other words, the difference between the elements that are essential for the existence of a contract of employment and the elements that determine the type of civil law contracts expressing the performance of work must be explored.

I shall not go here into detail on the problem of the distinction between a contract for work and contract of commission, but a brief discussion is necessary because it highlights the essence of the difference between the contract of employment and these private law contracts.

Nevertheless, the Grand Commentary of the CC notes that the delimitation of these contracts and the determination of the criteria for the distinction often seem to be arbitrary. It is undoubtedly true that the classification has been largely designed by practice so that it is no coincidence that the performance of certain activities is 'usually' or 'typically' related to the one or the other contract. Jurisprudence also highlights several different factors as the basis for the delimitation, and the case law considers the different liability structures of the contractor and the principal as the

[59] Vékás–Gárdos 2021: 1529.

starting point.[60] If you look at the regulatory structure of the basic types of the two contracts, besides the similarities, there are differences that stem from the immanent divergence between the two activities. Thus, the liability relationships are indeed different, and there are also shifts between the rights and obligations of the parties.

At the same time, elements that can easily be transformed from one obligation into another, such as 'success fees', are also noteworthy. It is also characteristic that the historical tradition of the contract of commission (mandate) in some cases facilitates its perception as a free transaction, while in the case of the contract for work this is an exception. Finally, it should be noted that the fiduciary nature of the contract of commission is not as strong in the current CC as it was in the previous CC.

So, how do the necessary, essential, indispensable elements of a contract of employment differ from the characteristic elements of the two types of civil law contracts? As was emphasised above, the necessary, indispensable content conditions laid down in SLC Section 45, Subsection 1 are a consequence of the content of Section 42, Subsection 2. According to this, under a contract of employment, the employee is obliged to perform work under the direction of the employer, and the employer is obliged to employ the employee and pay him a salary. Due to the provision defining the necessary, indispensable content of the contract of employment by cogent norms, it is much more difficult to confuse the employment relationship with a relationship for work or with a relationship of commission than it is between two private law relationships. I mean that it is not excluded, but

60 See Kemenes, István (2007): A vállalkozási és a megbízási szerződés elhatárolási kérdéseiről, különös tekintettel az eredményorientált („sikerdíjas") szerződésekre I.–II. [On the Distinction between Contract for Work and Contract of Commission, with Particular Regard to Result-oriented ('Success Fee') Contracts I–II]. *Céghírnök,* 17(1–2), 12–14, 7–9; Hajzer, László (2019): A gondossági kötelmek és az eredménykötelmek elhatárolásáról [On the Distinction between Contracts of Care and Contracts of Result]. *Magyar Jog,* 66(5), 257–261. See also Harmathy, Attila (1988): A vállalkozási szerződés alapkérdéseiről [On the Basic Questions of the Contract for Work]. *Magyar Jog,* 35(3–4), 380–403.

much more difficult. In this regard, my hypothesis is that all personal work activities performed for other parties can be expressed in a contract of employment and can be performed within the framework of an employment relationship. Regardless of this assessment, certain activities may reasonably be the subject of a contract of employment and employment relationship. Furthermore, a considerable part of the activities which can be performed personally for another can be expressed both by a contract of employment and contract for work and, in particular contract of commission. This is clearly observed for some types of work and employment using newer technologies. Finally, not all activities can be described by a contract of employment and cannot be carried out in a 'labour relationship' that is actually established under contract for work or contract of commission.

In my view, the following conclusions can be drawn from the above with regard to the place of the contract of employment in the system of the analysis of the legal institution of validity and invalidity. If the contract of employment is examined at the level of abstraction of the 'contract', as described above, it is obvious that the validity construction of the CC for contracts can be adopted. When focusing on the difference in content of the contract of employment, and its legal effects, the content of employment relationship, it is at least worth considering introducing beside the nullity of the contract of employment – as a concept used to describe a non-existent transaction – the elaboration of the unconditional (absolute) and conditional (avoidable) invalidity of the contract of employment.

Such a solution has both theoretical and practical significance. From a theoretical perspective, this would mean that although the contract of employment is part of the general contractual system, but due to its specific characteristics – also within the general framework of the validity–invalidity system – it has a particular invalidity structure precisely because of the relative contractual type constraint. This would clarify the classification of personal work performed for another party and the legal consequences of such classification. The practical advantages of such a solution can also be demonstrated. I refer to the fact that the Curia of Hungary has dealt with the possibility of such or a similar solution. This is apparent from the

Summary Opinion (hereinafter: SO) of the Curia's 'Case Law Analysis Group' entitled *Invalidity in Employment Relationships.*[61]

Section 31 of the SLC also takes into account the invalidity of the employment contract, because the list omits elements which are generally considered grounds for the invalidity of civil law contracts. These include the aforementioned usurious contract or a contract containing the grossly unfair difference between service and the consideration. There are numerous reasons why the legislator does not apply these civil law provisions to the contract of employment. However, I will not analyse this issue in the context of determining the place of the contract of employment, as this problem has several ramifications, which is also related to the issue of the invalidity of the employment contract as a contract concluded with general contractual conditions, as well as the invalidity of the collective agreement.

[61] Unfortunately, however, the SO noted that the activity of the Case Law Analysis Group is limited to the validity and invalidity of legal declarations relating to individual employment relationships, and therefore the investigation does not cover collective labour declarations of collective labour law entities. That is, it did not examine the issue of the validity of the collective agreement. The analysis did not address the institution of non-competition agreements and study contracts, or only to the extent that the issue of the invalidity of such agreements was specifically raised. The SO referred to Section 29, Subsection 4 of the SLC, which states that "in the event of the invalidity of a unilateral legal declaration, no rights or obligations arise from that legal declaration" – whatever that means. The Case Law Analysis Group did not examine the refusal to comply with the employer's instructions – even though the SO itself interprets the provision as a valid fact and its legal consequences – nor did it examine the invalidity of the adverse legal consequences regulated in SLC Section 56. It is therefore clear that the Curia took a rather narrow view of the issue of invalidity. In conclusion, despite the fact that the SO addresses almost all regulatory discrepancies, due to its function, it did not go beyond, nor could it go beyond the SLC solution. See the Cséffán study attached to the SO in this context. Cséffán, József (2020): *Az érvénytelenség szabályozása a munkajogban (Áttekintés)* [Regulation of Invalidity in Labour Law (Overview)]. Budapest: Kúria Jogeset Elemző Csoport.

THE CONTRACT OF EMPLOYMENT AS A FACTOR IN SHAPING THE CONTENT OF THE EMPLOYMENT RELATIONSHIP

Introduction

In the following, it is necessary to examine how a contract of employment embedded in the SLC and having the characteristics described above is able to shape the relationship between the parties in the period after the conclusion of the contract, i.e. the content of the employment relationship. In general, contracts of employment are intended to ensure that the parties can exercise their rights and fulfil their obligations in accordance with the contract, taking into account the interests of the recipient of the service and in accordance with the situation of the working person. In the case of an employment contract, an important aspect of protecting the interests of the recipient of the service is that the method of providing the service is determined in accordance with their wishes. In the case of a service provider, their interests are protected by maintaining a balance in the employment relationship.

Several questions may arise regarding this approach. First of all, what should be the structure of the employment contract in order to fulfil this dual purpose? Secondly, what kind of legal source is required for the contract of employment?

According to my hypothesis, despite the fact that the employment relationship is characterised by subordination, the numerous cogent legal norms fundamentally determine and dispositive norms at least influence the capacity and possibility of the contract of employment to shape a legal relationship. In other words, the quality of the contractual existence – the formative role of the contract of employment in labour law – i.e. the existence of individual autonomy – is what gives the entire labour law regulatory system its character. The formative function of the employment contract is further shaped by an external factor, namely the collective agreement.

The impact of these legal institutions on the contract of employment will be discussed in the following sections. However, it is important to note that these factors can only strengthen or weaken what is 'hidden in' the contract of employment. These internal factors arise from two characteristics of the contract of employment. And these are: the long-term character of this contract, and the imbalance of the parties. From these factors, the employment contract contains the following hidden possibilities, advantages or even disadvantages. In my opinion, the employment contract is fundamentally an incomplete contract. The obvious reason for this is the abstract determination of the service. In addition, it depends on the external factors mentioned above what the parties agree on or are able to agree on. The latter formulation also means that the potential content of the contract of employment, its vitality, strength and scope for manoeuvre in shaping the legal relationship cannot be independent of what the above- mentioned external factors allow.

I also argue that the contract of employment carries the characteristics of a relational contract. This stems from the long-term nature of the contract of employment, which ensures stability for the parties' legal status and the continuation of the legal relationship. Whether this option can be exercised in the contract of employment depends to a large extent on external legal circumstances. Such a solution offers the contracting parties considerable flexibility and can ensure a new, higher level of relations.

Finally, we cannot ignore the methods of concluding contracts that have developed in recent years, which have also affected the contract of employment. Therefore, it must be examined whether the contract of employment can be interpreted as a contract concluded with general contractual terms and conditions.

Why highlight these three areas? The reason for this is that the specific nature of the contract of employment makes it possible to most effectively shape the content of a long-term employment relationship, i.e. it is best able to express the contractuality.

The contract of employment as incomplete contract – In general and in the Hungarian labour law

The general significance of incomplete contracts and implied terms in contract law

Although the second part of this study deals with Hungarian labour law institutions, I am compelled to conduct a brief comparative analysis in order to draw certain conclusions. As an introduction, it should be emphasised that the above-mentioned contractual characteristics play a significant role primarily in economic and commercial transactions.[62] In this area, it is typical for long-term contracts with a more complex content that, in addition to the express terms of the parties, a number of implied terms also influence the development of the content of contracts. These contracts are classified as incomplete contracts which often have the characteristics of a relational contract (see below). One feature of incomplete contracts is the simultaneous presence of different types of contract terms. The coexistence of so-called express terms and implied terms, their relationship to each other, has been the source of many problems, has given rise to serious theoretical debates, and is also a lesson for the judicature.

The main question is why and how the incomplete contract can develop at all.[63] The root of the problem is common in both commercial law and labour law, even though its impact is different for several reasons. This is the nature of the contract and the regulations that apply to it.

[62] See on the relationship between incomplete contracts and relational contracts, as well as the subject matter of contracts and the cohesion of incomplete contracts, among others, BAKER, Scott – KRAWIEC, Kimberley D. (2006): Incomplete Contracts in a Complete Contract World. *Florida State University Law Review,* 33(3), 725–755; POSNER, A. Eric (2003): Economic Analysis of Contract Law after Three Decades: Success or Failure? *The Yale Law Journal,* 112(4), 829–880; GOETZ, J. Charles – SCOTT, E. Robert (1981): Principles of Relational Contracts. *Virginia Law Review,* 67(6), 1089–1150.

[63] See HART, Oliver – MOORE, John (1998): Foundations of Incomplete Contracts. *NBER Working Papers,* (6726); HALONEN-AKATWIJUKA, Maija – HART, Oliver D. (2013): More is Less: Why Parties May Deliberately Write Incomplete Contracts. *NBER Working Papers,* (19001).

As far as the origin of the regulation is concerned, at least in English contract law, the starting point is that agreements were in no way considered to be strictly discrete, transactional agreements.[64] These contracts – even the simpler ones – have been developed in the course of time, alongside new parallel requirements which have been constantly emerging.[65] The essence of understanding incomplete contracts lies in implied terms. In general, it can be concluded, that the presence of the implied terms depends on the nature of the specific contract or type of contract and its regulatory environment. It may happen that a specific contract may be considered incomplete, but whether this will actually be the case depends on the nature of the legislation. The incomplete contract and the implied terms that are the essence of this contract, raise fundamental problems of interpretation.[66] Implied terms can result from several factors. According to Peel's classification, some of these conditions may relate to facts which, although not expressly referred to by the parties, may be inferred from the circumstances of their implied acceptance. A further group of implied terms is incorporated into the contract by the implied acceptance of certain dispositive rules. Finally, there is a group of these terms that are based on certain customs.[67]

With regard to the nature of the contract, it should be emphasised that not all contracts can be classified as incomplete. The reason for this is the safety

[64] "Paradoxically, contracts are both never complete and always complete." BAKER–KRAWIEC 2006: 725. See more in AUSTEN-BAKER 2011: 12.

[65] Incomplete contract and its relationship with the express and implied terms cannot be understood without interpreting the intertwining of the substantive and procedural institutions of common contract law. This study is not concerned with a detailed discussion of the institution of debt, covenant and assumpsit. At this point, all that needs to be said is that the emergence of assumpsit in the context of implied terms is important because it established the prevailing approach that the conclusion of a contract in itself constitutes a promise to perform. AMES, James B. (1888): The History of Assumpsit. *Harvard Law Review,* 2(2), 53–69; SIMPSON 1987: 199–200. See in connection with the assumpsit the *Lagerwall v. Wilkinson, Henderson & Clarke Ltd.* (1899) 80 L.T. 55 and the *Turner v. Sawdon & Co.* (1901) 2 K.B. 653, HC cases. See further in the Hungarian literature VÉKÁS 1977: in particular 52.

[66] See in detail on this KÖTZ, Heinz (2015): *Europäisches Vertragsrecht.* Tübingen: Mohr Siebeck, 132–157; PEEL 2011: 2–078 ff, 6–032 ff.

[67] PEEL 2011: 6–048, 6–130.

of the legal transaction. Thus, in cases where the rights and obligations of the parties and the conditions for performance can be defined with sufficient precision, and the nature and duration of the contract make it possible to determine the fate of those conditions in a foreseeable manner, the parties should draw up the content of the contract accordingly. Such contracts generally can be called discrete transactional contracts, the content of which binds the parties and if circumstances change, either the contract must be modified or, if this is not possible, the contract must be terminated. However, there are agreements whose terms cannot be objectively defined in detail in the longer term or the parties do not wish to confine themselves to such a set of binding conditions.[68] In this contract, implied terms are more emphasised than the express terms. The former is either expressly stated in the contract or is a notice/caveat which is obvious and reasonable to the other party. As mentioned, in contrast, implied terms are not included in the contract, in most cases the parties do not want to make it part of the contract, but they want to bring it into the contract later on due to changes in circumstances. However, this has certain requirements. Those terms and conditions, in general, shall be consistent with the original purpose of the contract, be reasonable and fair, contribute to the viability of the contract and be clear.

The role of implied terms in a contract of employment

What is the role of incomplete contracts in a contract of employment? As highlighted, an incomplete contract is usually linked to long-term legal relationships, and the employment relationship is a long-term relationship,

[68] As I have already mentioned, there are many reasons for this. The parties may enter into such an agreement for economic reasons, with the aim of strengthening mutual trust and reducing risks as much as possible. For a summary see Tirole, Jean (1999): Incomplete Contracts: Where Do We Stand? *Econometrica,* 67(4), 741–781; Grobecker 1999; Fongoni, Marco et al. (2025): Why Wages Don't Fall in Jobs with Incomplete Contracts. *Management Science,* 71(8), 6319–6339; Collins, Hugh (2016): Implied Terms in the Contract of Employment. In Bogg, Alan et al. (eds.): *The Contract of Employment.* Oxford: Oxford University Press, 474–481.

the content of which is determined by subordination. In this context, it should be emphasised again that the essence of an incomplete contract is the simultaneous presence of express and implied terms. Furthermore, the presence, scope and effect of implied terms depend on the kind of regulation.[69] Their status is determined by the level of regulation of labour law as a whole, namely whether the contract of employment is covered by separate, sometimes codified legislation or is generally subject to the general rules applicable to private law contracts; there are significant differences between common contract law and European continental contract law.

These differences should be clarified with a few examples. One example is the differentiated assessment of the employer duty to provide employment. The change in the assessment of this obligation, i.e. how it gradually evolved from a so-called 'default rule' to a 'mandatory rule', clearly illustrates how contract of employment adapts to its economic and social environment.

As the law of the contract of employment in English law was for a long time exclusively governed by common law, there was accordingly no significant difference between the contract of employment and other synallagmatic contracts. Under common law, the main duties of the content of the employment relationship are the payment of remuneration for work by the employer and the performance of work with due diligence by the

[69] This determines, among other things, the ratio between the two types of implied terms, namely mandatory and default rules. Default rules are a summary of the rules from which the parties may depart in their contract or in any legally relevant agreement. It is the opposite of mandatory rules, from which the parties may not depart even if their agreement is subsequently amended. See about this in Riley, Andrew (2000): Designing Default Rules in Contract Law: Consent, Conventionalism, and Efficiency. *Oxford Journal of Legal Studies,* 20(3), 367–390.

employee.[70] There are several dimensions to this assessment. On the one hand, the employer can escape from the employment relationship at any time without any particular consequence, and on the other hand, the employee has no means of enforcing continued employment. It is true that the English case law and literature previously contained numerous indicators for determining the content of an employment relationship, but these did not represent any significant difference between employment contracts and other contracts and did not provide an explanation as to why the employer would be subject to the duty of employment.[71] For this reason English law has rejected the existence of such a duty as a general rule, but from early times there were a number of exceptions. More than a hundred years ago, the problem of the duty to provide work arose in two cases, and not coincidentally in connection with the obligation to pay wages.[72] The question was whether, if an employee is paid piece rate, the employer is under an obligation to pay wages and to what extent is obliged to provide the employee with work to maintain a certain level of earnings. As is generally the case with piece rate or other performance paid employees, the court held that the employer is not obliged to provide the employee with work – even in case of workers on commission(!) – but that the employee

70 The problem of the duty to provide employment – particularly in the case of the master–servant relationship – arose as to whether the master was obliged to provide work for the duration of the period for which she/he paid wages. If the employer fails to fulfil its main obligation, i.e. to pay the remuneration for the work, the employee can terminate the contract without notice. This solution between equal partners in the market may be acceptable because of the balancing effect of the market, with reference to Flume's argument. See Flume 1979: 10. It is clear, however, that among the subjects of the employment relationship, this assessment is conducive to the employer's escape from the labour relationship described by Lord Davey: "An employer may refuse to employ [an individual] for the most mistaken, capricious, malicious or morally reprehensible motives that can be conceived, but the workman has no right of action against him." See *Allen v. Food* [1898] AC 1, 172.

71 See among other things, as indicator of the personal work performance, the integration test, the assessment of an economic reality, the multiple obligation test, etc. Deakin–Morris 2005: 142–160.

72 See *Lagerwall v. Wilkinson, Henderson & Clarke Ltd.* (1899) 80 L.T. 55 and *Turner v. Sawdon & Co.* (1901) 2 K.B. 653, HC cases.

must be allowed to take his fate into his own hands and leave his employer "to avoid the contempt that comes with doing nothing".[73]

However, this situation was becoming less and less sustainable, not only because the doctrine of 'payment of agreed wages only' had become self-evident for those employed on a performance wage, but also because more and more occupations and professions had emerged in which continuous employment had become a priority, and no longer only in the context of a wage-based livelihood. In principle, two groups of cases can be identified which have led to a gradual breakthrough of the original approach. One group included workers whose work involved publicity as an essential element, such as performers and, increasingly, television personalities. While this group of workers has drawn attention to the important fact that there can be employment contracts which include an implied term of employment, i.e. the obligation to work, the real breakthrough has been the recognition of the right to employment of a group of employees who are not in this – relatively specific – occupation. In the 1970s, in the case of *Langston v. Amalgamated Union of Engineering Workers*[74] – referring to the 1940 case of *Collier v. Referee*[75] – Lord Denning's reasoning included the followings: "That was said 33 years ago. Things have altered much since then [...]. Therefore, I think that the employee should have the opportunity of doing the work he is capable of when it is available and he is ready and willing to do it." The key idea behind the reasoning is as follows: "A skilled man takes pride in his work. He does not do it merely to earn money. He does it so as to make his contributions to the well-being of all. He does it so as to keep himself busy, and not idle. To use his skill, and to improve it. To have the satisfaction which comes of a task well done."[76] This argument is both fascinating and moving.

73 "Avoid the reproach of idleness." The judgement is quoted by DESMOND, Helen – ANTILL, David (1998): *Employment Law.* London: Sweet & Maxwell, 5.

74 *Langston v. Amalgamated Union of Engineering Workers* (1974) I.C.R. 180 at 190, CA.

75 *Collier v. Sunday Referee Publishing Co. Ltd.* (1940) 2 K.B. 647, CA.

76 See KISS, György (2010): *Alapjogok kollíziója a munkajogban* [Collision of Fundamental Rights in Labour Law]. Pécs: Justis, 294; BEALE 2017: 40–100.

Nevertheless, it cannot be inferred from that decision that the obligation to provide work is an inherent, self-evident part of the terms of the contract of employment, i.e. it is not yet certain that it qualifies as mandatory rules – as implied terms. In the second *Langston case,*[77] the National Industrial Relation Court gave a rather ambivalent interpretation in this context, explaining that the employee does not generally have a right to employment, but is entitled to be paid for the time he or she has spent in performing his or her duties, or as agreed in the contract. In this case, the acting court also stated that the kind of 'right to work' is much more part of a public policy than a contractual order.

The treatment of the obligation of employment *(Beschäftigungspflicht)* in German law differs completely from the approach described above. Section 611a, Subsection 2 in the BGB *(Bürgerliches Gesetzbuch)* does not refer to the employer's duty to provide employment. The basis for classifying that duty is the first sentence of Article 2 of the *Grundgesetz,* which provides that everyone has the right to the free development of his personality.[78] In German law, it is clear that freedom of work is one of the means of achieving this. The basic institution – the *Dienstvertrag* and, much later, the *Arbeitsvertrag* – is, however, found in the BGB. According to the BGB, the employment duty/obligation was unknown in German law until the years before the Second World War, and the prevailing view was that the employer was free to dispose of an employee's labour force within certain limits. In this regard, the evolution of the recognition of duty of employment has been somewhat similar to the process known in English law. This obligation was imposed on the employer only by express agreement or by the specific nature of the work.[79] Section 611a of the BGB, inserted in 2017, contains the concept of a contract of employment, and Subsection 1 of this provision takes particular care to emphasise the dependency *(persönliche Abhängigkeit)*

77 *Langston v. Amalgamated Union of Engineering Workers* (No. 2) (1974) I.C.R. 510.

78 "Jeder hat das Recht auf die freie Entfaltung seiner Persönlichkeit, soweit er nicht die Rechte anderer verletzt und nicht gegen die verfassungsmäßige Ordnung oder das Sittengesetz verstößt."

79 This circle included from the beginning the so-called Bühnen Engagementvertrag. See Schaub, Günther (2002): *Arbeitsrechts-Handbuch*. München: Verlag C. H. Beck, 1188.

and even to define certain indicators of it, but Subsection 2 only states the following in relation to the employer's obligation: "Der Arbeitgeber ist zur Zahlung der vereinbarten Vergütung verpflichtet." Consequently, the employer's obligation to provide employment cannot be directly derived from the BGB and the terms and conditions contained in the contract of employment.

This employment obligation has been recognised by the judicature. The Federal Labour Court *(Bundesarbeitsgericht)* first made a decision in 1955 that the employer, if there is indisputable employment relationship between the parties, is obliged to employ employment. The court derived this assessment from the protection of the general right to personality.[80] According to the judgement, an employee's activity is to be assessed not only in terms of its economic value but also in terms of how it performs her/his duties. This also means that the employer must consider what the work means to the employee *(Achtungsanspruch)*.[81] In the court's view, the employment relationship is not only a type of exchange, but also a legal relationship of a personal-community nature *(personenrechtliches Gemeinschaftsverhältnis)*. The employer therefore has a duty of care *(Treuepflicht)*, which must include the protection of the employee's personality. Work is also an expression of the dignity of the employee, whose protection is also one of the employer's tasks. The court explained that the failure to provide the employee with work and the mere payment of consideration under the employment relationship is harmful to society as a whole and to the employee, who is also a valuable member of the 'work community'. In the court's view, it is precisely the non-employment that requires some extraordinary circumstances.[82]

80 BAG AP 2 zu § 611 BGB – *Beschäftigungspflicht.*

81 This can be derived from the second sentence of Article 1 of the *Grundgesetz*. Namely: "Sie [Menschenwürde – K. Gy.] zu achten und schützen is Verpflichtung aller staatlichen Gewalt."

82 See Blomeyer, Wolfgang (2000): Beschäftigungspflicht des Arbeitnehmers. In Richardi, Reinhard – Wlotztke, Ottfried (eds.): *Münchener Handbuch zum Arbeitsrecht.* München: Verlag C. H. Beck, Band I, § 95 RdNr. 9.

This judgement of the *Bundesarbeitsgericht* referred set the direction for the judicature.[83] Hanau's approach to the employment obligation is remarkable. He argues that the employer has a certain 'takeover obligation' *(Annahmepflicht)* towards the employee at the time of the conclusion of the contract of employment, similar to the obligation of a buyer or customer in the case of a sales contract or an entrepreneur in the case of a contract of employment. He derives from this the employer's obligation to employ, which is the employer's duty as a debtor and not simply as a creditor.[84]

Finally, I will refer to the assessment of French law, which is unique in that there is no legal definition of the contract of employment, and thus this contract contains a number of implied terms, which are contained in various clauses. One of these is the clause of employment – *la clause de garantie d'emploi.*[85] It is true that the obligation to provide work is not unlimited in French law either, and there are a number of situations in which the employer is exempt from that obligation. In this case, the employee is, as a general rule, entitled to compensation under the rules of creditor's delay.[86] However, the limitation of the duty to provide work is neither arbitrary nor subject to the employer's discretion, but is determined by the long-standing practice of judicature and by circumstances and limits which are, however, sometimes quite broad. For example, the notion of 'economic difficulties' is quite broad, but it cannot be considered to be shoreless.[87]

The different interpretations of the employer's obligation to employ as implied terms and the gradual transformation of their assessment clearly demonstrate the importance of implied terms in shaping the content of employment relationship. Again, I am referring to the fact that the assessment and acceptance of implied terms depends on a number of different

83 See among others BAG AP 1 zu SchwBeschG (1962); BAG AP 44 zu Art. 9 GG – *Arbeitskampf* (1972); BAG AP 4 zu § 611 *Beschäftigungspflicht* (1977). Later on BAG – 5 AZR 462/14 and 5 AZR 225/14.

84 Hanau, Peter (1986): Die Weiterbeschäftigung des BAG – Unerlaubte Rechtsfortbildung im Rückfall? *Zeitschrift für Wirtschaftsrecht und Insolvenzrecht,* 8(3), 1–18.

85 Coeuret, Alain et al. (2013): *Droit du travail.* Paris: Dalloz, 253.

86 Bossu, Bernard et al. (2011): *Droit du travail.* Paris: L.G.D.J. – Montchrestien, 102–104.

87 See Cass. soc., 30 mai 2000, SCEA, n 2552, purvoi, n 97-43.191. Cited by Bossu et al. 2011: 103.

circumstances, and there is no uniform, universal interpretation. This can be clearly demonstrated in other areas of the employment relationship. An excellent example of this is the *Malik v. Bank of Credit and Commerce International S.A. (in compulsory liquidation)* case.[88] In this case – in addition to being unlawful dismissal by the employer's bank – the later employment of former employees became almost impossible due to the bank's previous activities (money laundering). In the context of employees' claim for compensation, the court examined whether the employer's duty of trust and confidence included conduct that did not involve a subsequent adverse assessment of its employees. According to the decision, such an obligation is included in the contract of employment. Of course, it is a different matter to what extent there is a causal link between the employer's conduct and the disadvantage suffered by the employees, and to what extent the future disadvantage was foreseeable, etc.

In addition to this case, the jurisprudence has classified a number of other employer behaviours as implied terms.[89] These duties are nowadays general, unquestioned, and some of them are enshrined in legal norms. Thus, it is appropriate to briefly address the obligation to provide adequate working conditions, or more precisely, the scope of this obligation. Among others, it is generally true that, for example, it does not belong to the duties within the contract to provide a place of housing.[90] However, there is no doubt that the factual situations are very varied and that this requirement may even be considered to be implied terms on the basis of the content and the circumstances of the contract.[91]

The meaning of the incomplete nature of the employment contract and the significance of the implied terms must also be examined from

88 *Malik v. Bank of Credit and Commerce International S.A.* [1998] A.C. 20. Analysed by Austen-Baker 2011: 57.

89 For example, the employer must refrain from making the employee engage in any unlawful conduct, the employer must provide a reference of the employee's activities at the employee's request, the employer must not in any way endanger the employee's health or physical safety, etc.

90 See Beale 2012: 13–016–13–018.

91 Beale 2012: 13–016–13–018; Austen-Baker 2011: 68–74.

another perspective. Our starting point is the long-term character of the contract of employment, in the already quoted Freedland interpretation: "The promises to employ and be employed."[92] Consequently, at the time of the conclusion of the contract, especially at the indefinite period, the circumstances that can shape the future conditions of the employment contract cannot be foreseeable. From this point of view, the contract of employment thus conforms to the traditional formula of an incomplete contract. In addition, the contract of employment may be considered an incomplete contract consistent with reason, because the definition of the service is abstract, the concrete method of performance, which is also one of the terms of the contract, is determined by the will of the employer in such a way that at a given moment it is not certain that the circumstances and reasons for his decision tomorrow can be seen.

And here there is a significance of the above-mentioned requirements for implied terms, which must also be the limits of the arbitrariness of the employer or what we might call overreach. Namely, an incomplete contract can have both advantages and disadvantages for one or the other party. Efforts to achieve balance may also eliminate deficiencies in the contract of employment if external intervention restricts the private law autonomy of the contracting parties. Thanks to this as well, the role of incomplete contracts and thus the significance of implied terms have changed in the world of contract of employment in recent times. With regard to common contract law, Collins points out that oral employment contracts have been replaced by written or prepared contracts. These contracts and draft contracts specify in relative detail the nature of the work, job tasks, remuneration, working hours, other benefits and mutual duties. As a result, the role of implied terms in filling gaps and the employer's ability to unilaterally shape the content of employment relationship has been reduced.[93]

Nevertheless, attention should be drawn to the advantages and opportunities offered by incomplete contracts. This type of contract can generally also be described as a relational contract. The relational contract is discussed in more detail below. It is only necessary to note here that the relational

[92] Freedland 2003: 88–92.

[93] Collins 2016: 490–491.

contract is of unique importance in terms of the maintenance of the legal relationship and the security of legal transactions. In labour law, the reality of the relational contract is more complicated in that the employment relationship is characterised by subordination. Thus, the requirements of the implied terms must basically comply with the principles of the relational contract during the exercise of the employer's unilateral right of shaping the terms and conditions.

Can a contract of employment be considered an incomplete contract under Hungarian labour law?

All this must be considered within the legal context of Hungarian contract of employment, taking into account the embeddedness of this contract in the legal system, which profoundly influences the private autonomy of the parties. Previously, I consciously dealt in detail with the place of labour law in the Hungarian legal system and the evaluation of the contract of employment within the contractual system of private law. It is no coincidence that this issue has been increasingly brought to the fore during the preparatory work for the SLC in force and the CC, not only because the two codes were born almost simultaneously. In my approach, the separation of the contract of employment from the contractual system of private law is a step backward and one of the causes of the existence of a closed, inflexible, 'top-down' directed labour law system. I examine the incomplete contract nature of the contract of employment in Hungarian labour law from this perspective.

In Hungarian labour law, the incomplete nature of the contract of employment is primarily affected by the number and nature of the legal norms. I will discuss the role and impact of legal norms in detail in Chapter V of Part II of this study. In this Chapter, it is necessary to review in general terms the extent to which the contract of employment is complete or incomplete in the Hungarian labour law.

At first sight, the contract of employment seems to be an abstract way of defining the service and, therefore, an incomplete contract by virtue of the employer's right to concretise it. As a result, the contract of employment could formally meet also the requirements of a so-called relational contract.[94] However, the fate of the contract of employment is determined by the ratio of mandatory and dispositive norms.

First, the content of the employment relationship itself must be examined. Section 42, Subsection 2 defines this in relative detail. Under this provision "the employee is required to work as instructed by the employer, the employer is required to provide work for the employee and to pay wages". Consequently, the employer's obligation to provide employment does not arise as an implied term; rather, it is one of the employer's main obligation as an express term.

Implied terms can only be interpreted within the framework of general rules of conduct on both the employer and employee sides. Thus, above all, the subject of judicial consideration is Section 6, Subsection 3. Under this provision "employers shall take into account the interests of employees under the principle of equitable assessment; where the mode of performance is defined by unilateral act, it shall be done so as not to cause unreasonable disadvantage to the employee affected". This rule is ultimately nothing more than the assessment of proportionality in labour law.[95] Unfortunately, no such case has yet been examined by the courts in connection with the determination of performance. When interpreting implied terms, the limits of the mutual obligation to provide information regulated in Section 6, Subsection 4 may be considered. Under this provision, "the parties falling within the scope of this Act shall inform each other concerning all facts, information and circumstances, and any changes therein, which are considered essential from the point of view of employment relationships and exercising rights and discharging obligations as defined in this Act". This provision requires a particularly careful interpretation because it can easily conflict with Section 10, Subsection 1. According to the latter provision, "the employer may require an employee to make a statement or to disclose personal data such that is deemed necessary for the conclusion,

94 This is supported by common law literature, linking it to the fact that a contract of employment is also a relational contract. See the last point in this Chapter.

95 This provision was incorporated into the SLC based on Section 313 of the German Civil Code (BGB).

fulfilment or cessation (termination) of the employment relationship or for the enforcement of claims arising out of this Act". However, none of this may infringe upon the dignity or personal rights of the employee. This requirement is related to Section 9, Subsection 2, which states that "the rights relating to the personality of employees may be restricted if deemed strictly necessary for reasons directly related to the intended purpose of the employment relationship and if proportionate for achieving its objective".

The legal definition of the content of the contract of employment, the determination of main obligations and rights in the employment relationship, leaves little room for the influence of implied terms in terms of the 'initial content' of this contract itself. Therefore, it must be examined what possibilities exist for the application of implied terms during performance. First and foremost, it should be emphasised that the scope of implied terms is limited by the number and direction of express terms. In this context, the starting point is Section 43, Subsection 1 of the SLC, which is remarkable in terms of the incomplete nature of the contract of employment. Under this provision "unless otherwise provided for by law, the contract of employment may derogate from the provisions of Part Two and from the rules-governed employment relationship to the benefit of the employee". In other words, the SLC and the collective agreement contain so-called minimum standards, which, as a general rule, may only be deviated from in the contract of employment if the conditions are more favourable to the employee. The reference to a collective agreement as a rules-governed employment relationship requires some explanation because a collective agreement may derogate from the legal norm, in principle to the benefit and detriment of the employee – under Section 277, Subsection 2. It is true that in terms of the contract of employment, the collective agreement does also appear as minimal standard in the context of SLC Section 43, Subsection 1.

These two provisions significantly limit the autonomy of the parties and thus narrow down the opportunity of possible implied terms, or even their existence at all. In addition, Section 43, Subsection 2 contains a specific rule of interpretation, according to which "such differences shall be assessed on the basis of a comparative evaluation of the interrelated (interconnected) provisions". The reasoning of the SLC states that this rule – in line with the case law – excludes the application of the so-called 'raisin principle', but also does not allow the possibility to establish the favourable nature of the derogation in the interest of the employee, in the overall context of the contract of employment, for the benefit of the employee.[96] The term 'interrelated provisions' means rules or elements of an agreement having the same purpose. The reasoning also gives an example in relation to severance pay and notice period.[97] The commentary literature has adopted this narrow interpretation of the reasoning without any specific substantive explanation. Thus, according to one commentary, the relevant provision means that "generally, the rule or contractual clause belonging to a certain legal institution must be compared to each other".[98] In addition to the fact that 'in general' may suggest that a broader interpretation than that given in the reasoning is conceivable, but we do not actually find an example of this.

However, with regard to the three factors mentioned above that are important for the functioning of the contract of employment – namely, an incomplete contract, a relation contract and a contract containing general terms and conditions – a broader interpretation of Section 43, Subsection 2 would be decisive. Because, neither SLC Section 43, Subsection 2, nor the Reasoning and nor commentary literature express the prevention of the raisin principle, but rather contain unjustified restrictions. For example, this could be the introduction of a moratorium of dismissals on the grounds of the economic situation of the employer, in exchange for reduction of benefits or working time. And at this point, a contractual control institution, based on the fundamental principle and defence mechanism of labour law could come into play, but which is unknown in this context in the Hungarian

96 With this provision, the legislator wanted to prevent this so-called principle of unlimited selective preferential treatment (*Rosinentheorie* in the German commercial law). On the role and rejection of the so-called Rosinentheorie in labour law, see BELLING, Detlev (1983): *Das Günstigkeitsprinzip im Arbeitsrecht.* Berlin: Duncker & Humblot, 169–171.

97 "For example, if it is disputed whether severance pay under the law or under the employment contract is applicable in a given case, this cannot be determined on its own, but must be determined by comparing, for example, the provisions or agreements relating to the notice period." Reasoning to SLC Section 43, Subsection 2.

98 KARDKOVÁCS, Kolos ed. (2012): *Az új Munka Törvénykönyvének magyarázata* [Explanation of the New Labour Code]. Budapest: HVG-ORAC, 94.

labour law. In other words, in accordance with the purpose of the contract of employment, precisely in order to maintain the employment relationship, the parties should be given greater scope to shape the content of the contract.

Related to this rule, or more precisely to this approach is the second sentence of SLC Section 19, Subsection 1. Under this provision "any condition that would alter the employment relationship to the disadvantage of employees, (or that would bring about the termination of the employment relationship) may not be applied". When this provision is combined with the content of Section 43, Subsection 2, it is easy to see that the SLC gives the parties a narrow margin of manoeuvre in shaping and interpreting the content of the employment relationship. The rule in Section 19, Subsection 1 appears to be fair and serves the interests of the employee, but there may be circumstances where an unforeseen uncertain event (condition) occurs that makes it impossible to maintain the employment relationship, and thus compulsory solutions can only cause tension.

The limited scope for the parties to shape the terms and conditions of employment is even more striking in light of the mandatory provisions of the SLC, which do not allow for any derogation. Some of the important cogent (non-derogation) rules are as follows. The first two provisions are repeated here for the sake of completeness. Firstly, it should be mentioned that Section 43, which is the basis for the limited scope of shaping the terms and conditions, i.e. the rule discussed above, which does not allow for a broader comparison of the provisions of the SLC or contractual clauses to that effect. Secondly, cogent norm stipulates the employer's duty to provide the employment, which rule thus renders unnecessary any debate concerning the existence of an obligation to employ and makes it one of the main elements of the content of an employment relationship. This provision needs to be mentioned here because of the related Section 147, Subsection 1. Under this rule, "in the event of the employer's failure to provide employment as contracted (downtime), the employee shall be entitled to his base wage, unless it is due to unavoidable external reasons". This provision is not cogent, but the parties may only derogate from it in a manner that is more favourable to the employee.

Thirdly, from the point of view of our topic, Section 58 is relevant, which states that the parties can amend the contract of employment by mutual agreement. This rule is clear, especially in the light of the affirmative provision that the rules on the conclusion of the contract of employment apply *mutatis mutandis* to its amendment. The question, however, is what exactly can be classified as 'mutual consent'. Does this include the employer's right to unilaterally modify certain conditions under specific circumstances based on a preliminary clause-like agreement, or can only the traditional individual contract amendment mechanism be considered? This distinction is very important for the link between the relational contract and the contract of employment to be discussed later.[99] The legislature's answer to this question is ambivalent, since the first sentence of Section 19, Subsection 1 allows that "the parties may render the conclusion, amendment or termination of the agreement contingent upon certain future, uncertain events (conditions)" but as described above, no condition may be imposed which would modify the employment relationship to the detriment of the employee. Although this study does not analyse in detail the internal contradictions of this provision, with particular regard to Section 43, Subsection 2 already examined, a few comments are necessary. Namely, the contractual authorisation to modify contractual terms and conditions, even of a normative nature, is one of the key elements of the relational contract nature of the contract of employment.

However, other provisions suggest that solutions characteristic of relational contracts have not attracted the interest of Hungarian legislators. This is reflected in Section 53, which states that "the employer shall be entitled to temporarily reassign their employees to jobs and workplaces other than what is contained in the contract of employment, or to another employer". The duration of such employment is quite short (may not exceed a total of forty-four working days or three hundred and fifty-two scheduled hours during a calendar year), although collective agreements may derogate from this. But, a further question is what scope for manoeuvre the collective

99 See in particular MENTZEL, Thomas (2003): *Die Änderung von Arbeitsbedingungen kraft Direktionsrecht oder im Wege vorab konsentierter Änderungsverträge. Zur Frage der Anerkennung und Kontrolle eines „erweiterten" Weisungsrechts.* Hamburg: Verlag Kovač.

agreement has in this regard. The question concerns two areas. One is the degree to which the time constraint has been lifted. According to court practice, the limit is relatively broad, but it cannot exceed the temporary nature of such employment.[100] It seems that the legislator is aware of the specific characteristics of the contract of employment, but the inconsistent incorporation of labour law regulations within private law and the narrowing of the autonomy of the contractual parties does not allow the opportunities offered by incomplete contract. However, it must be observed that, in order for the possibilities offered by an incomplete contract to be realised an important condition must be met – particularly in case of a contract of employment – namely the state of equilibrium of the parties, which in labour law should be ensured by collective agreements at the level of autonomy.

Fourthly, the also cogent provisions in Section 63, Subsection 1 and Section 64 are mentioned, which list the circumstances in which employment may cease and be terminated. It is a strictly closed regulatory system. The parties may not create further cessation or termination facts or reasons. This system does not include the possibility of cessation or termination due to the occurrence of an uncertain future event. It can be said that the Hungarian legislation has developed an intact system with regard to the termination of employment relationships, which at first sight serves to protect employees. But, this assessment does not apply to dismissals by employers for economic reasons, against which employees are almost completely unprotected.[101] The reason for this is not fundamentally rooted in the structure or character of the contract of employment, but rather in

[100] See about this in BH 2006: 300. Under this decision, the provision of the collective agreement regulating the maximum duration of the transfer as unlimited is null and void. When determining the duration of such employment, its temporary nature must be taken into account. Although the referenced decision was made while the FLC was still in force, it is applicable today.

[101] See Kiss, György (2025b): A jogforrások komplexitása és hiányának következményei a munkajogban. A munkajogviszony megszüntetése a munkáltató érdekkörében fennálló okok miatt [The Complexity of Legal Sources and the Consequences of Their Absence in Labour Law. Termination of Employment Relationship for Reasons within the Employer's Sphere of Interest]. *Állam- és Jogtudomány,* 66(2), 33–57.

the imbalance of the sources of the Hungarian labour law, which in this case takes almost exclusively economic considerations into account.[102]

Finally, fifthly, it is necessary to talk about the intertwining of the regulations on working hours and wages. The legislation on working time contains, in appropriate places, cogent provisions, but attention should be drawn to a provision on wages which is characteristic of the attitude of the whole of the legislation on employment. It could also be said that the regulations governing working time cannot be separated structurally from the provisions governing wages. Apart from the fact that wage regulation is overly complicated and casuistic, the most important rule for our purposes is found in Section 136, Subsection 2. Under this rule, "the basic salary of the employee must be defined in time" – that is, the base salary must be specified in this way in the contract of employment. This applies even if the employee is remunerated on the basis of performance.

The reason for this solution is that the basic wage (or basic hourly wage) is the basis for the calculation of a number of institutions, such as the highly diversified wage supplement. This solution virtually eliminates all flexibility and adaptability. In my opinion, the legislator recognised the disadvantages of inflexibility and smuggled a rather dangerous provision into the cogent norms. Section 139, Subsection 2 states that "unless otherwise agreed, the amount of wage supplement is calculated based on the employee's base wage for one hour". This provision means the following in more detail. The legislator specifies the circumstances that serve as the basis for individual wage supplements – these are generally related to overtime – and also determines the method of calculation, namely as a certain percentage of the basic hourly wage. The parties may not deviate from these percentages to the detriment of the employee. For example, overtime worked in excess of the daily working hours is 50% of the basic hourly wage. However, they can agree that the aforementioned 50% does not relate to the basic hourly wage, but only to 70% of it, for example.

So the question is: how incomplete is the contract of employment in the environment of Hungarian legislation? In this context, another relevant

102 For a comparative analysis of this topic see Waas 2023.

question is to what extent can a contract of employment shape the content of an employment relationship? These questions are also well-founded because previously – with the exception of the interpretation of the general rules of conduct – it was mainly possible to analyse the interpretation and orientation of the express terms under the pretext of exploring the implied terms.

Contrary to the political narrative which emphasised that the SLC is the most flexible labour code in the world, the influence of the contract of employment is limited.[103] Nevertheless, it should be emphasised that this is not a bad thing. But, in the Hungarian labour law, in areas, where the legislator allows a two-way derogation, the derogation is usually granted to the detriment of the employee, without any compensation, because of the lack of effective equality of position (see the state of Hungarian collective labour law in the next Chapter). And at this point, we are still only talking about express terms.

Consequently, based on experience, the term flexibility has a rather negative connotation in Hungarian labour law. The misunderstood desire for stability in the previous regulation undoubtedly contributes to this, but at present it is more likely to give rise to the feeling that there is no adequate cohesion of the sources of labour law, which could provide a chance for a balance between the different interests. Thus, the legislator provides for cogent rules on matters which would fall within the sphere of agreement of the parties. Contrary to the Hungarian perception, flexibility does not mean that working conditions can only be changed to the detriment of the employee, nor does it mean that the termination of employment becomes easier for the employer. Ensuring flexibility means using different methods of agreement for the exercise of the rights and fulfilment of the obligations arising from the employment relationship, precisely in order to preserve the possible maintenance and stability of the employment relationship.

103 See the Hungarian Work Plan discussed in the previous Chapter. *Széll Kálmán Terv. Magyar Munka Terv* [Széll Kálmán Plan. Hungarian Work Plan] (19 May 2011). "The government's goal is to make the Hungarian labour market one of the most flexible in Europe. To this end, it is necessary to develop modern labour law regulations by drafting a new Labour Code", 4.

In summary, it can be stated that the contract of employment is only formally considered to be an incomplete contract in the current Hungarian labour law regulatory environment and is therefore unable to take advantage of any benefits that may arise from it. In my opinion, there is simply no room for the incorporation of implied terms in Hungarian labour law, and there is no adequate legal infrastructure to monitor its operation. It is perhaps no exaggeration to say that 'admittance' of implied terms into labour law would cause more trouble than legal certainty under the current circumstances.

Unfortunately, this has a negative impact on maintaining the stability of employment relationships. Namely, there are several types of agreement techniques available to maintain employment relationship and ensure its stability. One of these is the practical implementation of the theory of relational contracts in labour law.

The contract of employment as a relational contract

On relational contracts in general – Overview

Before discussing the connection between relational contracts, relational contract theory and contracts of employment – with particular regard to the situation of Hungarian labour law – we must briefly touch upon the emergence of relational contracts as a new phenomenon in the historical development of contract. The contract as such is not a static institution, although changes to its content and concept have been interpreted and assessed as a crisis, or even the death of the contract.[104] Nevertheless, analyses show that the content of the agreement generally met the economic requirements and social needs of the time.

The starting point of the analysis is the question of what constitutes the basis of the contractual system. The answer is clear: the contractual system

[104] Atiyah, Patrick (1979): *The Rise and Fall of Freedom of Contract.* Oxford: Clarendon Press; Gilmore, Grant (1974): *The Death of Contract.* Columbus: Ohio State University; Jamin, Christophe – Mazeaud, Denis (2003): *La nouvelle crise du contrat.* Paris: Dalloz.

cannot be interpreted without the freedom of contract.[105] As previously mentioned, the early period of freedom of contract is the so-called classical contract, which was the perfect mapping of a fundamentally self-regulating market and society. The classical contract in the age of *laissez faire laissez passer* appears in Macneil's system in the form of the so-called discrete transactional contract, which is overwhelmingly true.[106] However, there was a contract, a *labour contract, employment contract* which developed on the basis of the *master and servant relationship* discussed above, and which was capable of breaking through the boundaries of the discrete transactional contract in several respects.[107]

What characterised it as discrete transactional contract? The *laissez faire laissez passer* as the economic and social environment of the contract was decisive in that this system developed a contract aimed at an immediate profit, i.e. the unconditional execution of the obligations laid down in the contract. This contract was intended solely to promote a market society and the exploration of resources was essentially confined to the planning set out in the contract. In addition to the fact that Macneil clearly identifies the classic contract with the isolated, short-term contract based on quick profit, he precisely defines the factors that disrupted this type of contract.

At the same time, the promise itself played a role in this, which, in his words, is communication in the present for a mutual commitment in the future.[108] Nevertheless, this type of contract does not require complicated participation by the parties, the communication is relatively simple and the subject matter is limited. The subject matter of the contract is fairly specific and does not require ongoing review due to its usual nature (simple

[105] Canaris, Claus-Wilhelm (1997): *Die Bedeutung der iustitia distributiva in deutschem Vertragsrecht.* München: Verlag der Bayerischen Akademie der Wissenschaften ommission bei der C. H. Beck, 138; Gray, Charles M. (1980–1981): The Age of Classical Contract Law. *Yale Law Journal,* 90(1), 216–246; Rosenberg, Anat (2013): Contract's Meaning and the Histories of Classical Contract Law. *McGill Law Journal,* 59(1), 165–207. In the Hungarian literature see in particular Vékás 2006: 355–364.

[106] Macneil 1978: 854–906.

[107] Gray 1980–1981: 239.

[108] Macneil 1978: 859.

exchange transaction), furthermore, it can be easily monetised, etc.[109] The direct consequence of this contract is that the parties do not resolve their conflicts by negotiation within the contract (iron out), but usually by court, which at that time did not serve to maintain the contract at all. In most cases, this was because it was not in the interest of the parties, or rather of one of the parties.

However, tensions subsequently arose between the design tailored to the specific legal transaction and the requirement for flexibility.[110] Behind the demand for flexibility, the classic contract system was undergoing a transformation, which had an impact on the content of promises and the handling of conflicts. The claims in conflicts also changed, and the willingness to maintain legal transactions became increasingly important. However, this has already happened in other economic and social contexts and alongside the growing need to meet social needs. Mass production, the structure of the manufacturing industry, was no longer based on a short-term, one-off relationship of exchange. In Macneil's conception of the contract, the main motive for the change in the content of the contract is the *relation,* which expresses the essence of the contract in cooperation. For him, a contract is a specific way of cooperation.[111] His study published in this field is also noteworthy because it does not examine the social elements of certain contracts, but explores the common features of all contracts that differ in their quality, or more precisely the joint contractual conduct of the parties.[112]

Macneil defines five significant elements of the relational contract, such as the cooperation between the parties, the exchange in economic terms, the mutual planning of the future, the consideration of possible external sanctions, and the social control and management of contracts. In his view, labour law may be the basis for a new type of contract, as it is a "full repository

109 Macneil 1978: 856–857.

110 Macneil 1978: 873–880.

111 Macneil, Ian Roderick (1968): Whither Contracts? *Journal of Legal Education,* 21(4), 407.

112 Macneil 1968: 404.

of continuous cooperation in this branch of law".[113] He refers to Blau,[114] in so far as this continuous cooperation is not merely motivated by economic exchange, but by a specific social exchange process between employer and employee that determines their contractual behaviour.

What enabled, or partly necessitated a change in the contract and the concept of the contract? In economic life, capital, investment concentrations and the development of large production, service and distribution conglomerates required greater contractual and transactional certainty. In this process, the need for the stability of legal transactions intensified, and the parties sought to avoid the collapse of contracts and relationships. In this context, it should be noted that the changes affected the economy and, as a result, relational contract theory was basically concerned with the field of economics, but it soon went beyond the law of a given contract and grew into a general contract theory. This theory has also appeared in matrimonial property law and labour law. One reason for this was the increasing importance of personality in contractual relations, in addition to the prompt exchange feature, and the long-term nature of contracts. Together, these factors have led the parties to adopt solutions which, in order to maintain the contract, have, by means of continuous cooperation and constant monitoring of external circumstances, and in many cases at the expense of compromises, shaped and modified the terms of the contract. This presupposed a mutual will and also modulated the content of the promise in so far as it presupposed a prior determination to respond to future changes.[115]

113 Macneil 1968: 406.

114 Blau, Peter Michael (1964): *Exchange and Power in Social Life.* New York: Wiley.

115 Macneil 1973–1974: 800–804. The expressions "presentiating the future" and "futurizing the present" play a central role in Macneil's theory. Presentiation is an archaic term and means in this context "to make or render present in place or time; to cause to be perceived or realized as present". The English language uses a number of words to describe "futurizing" the present, such as planning, forecasting and promising, but he thinks that only the word "presentiate", which is no longer really used, truly captures the two processes, which is showing the future in the present place or time. These expressions also reflect the fact that, from today's perspective, people increasingly live in the future,

Can a contract of employment be considered a relational contract? – Overview

In other words: can relational contract theory really be applied to a contract of employment? The mechanism of the relational contract presupposes certain parity, a state of equilibrium between the parties, which is the only way to justify a compromise reached by renegotiating the terms. In labour law, however, the imparity of the parties is of decisive importance, and this cannot be ignored when interpreting it in the context of labour law. Another important point from the perspective of labour law is the resolution of discrepancies between ownership and the mechanism for shaping contractual terms. There is no doubt that the impact of property rights on contractual relations is inevitable from an analytical perspective. This can be seen in Barnett's analysis, who, in addition to the ideas of freedom of contract, examined the possibilities of freedom from contractual solutions in the context of relational contract.[116] This means that techniques that are quite different from the original contract mechanisms are reinforced.

These have been given special importance in labour law. The shaping of the content of the labour relationship and the change of the framework of the performance are typically part of the employer's right of management. This employer right is not unlimited, if only because, according to the prevailing view, it is based on contractual authorisation. In this regard, however, a distinction must be made between amending the contract and shaping the terms and conditions within the framework of the contract. There are elements in the contract of employment that are accurately recorded by the parties, mostly with the intention of not changing them with the unilateral will of the employer. Typically, salary and even working hours can be considered such elements. The subtle distinction in French labour law between *contrat commutatif versus contrat aléatoire* is a good example of this difference, which was analysed earlier. (The so-called *contrat*

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and the facts of the present are in reality nothing more than a psychological processing of the past. MACNEIL 1973–1974: 800.

116 BARNETT, Randy E. (1992): Conflicting Visions: A Critique of Ian Macneil's Relational Theory of Contract. *Virginia Law Review,* 78(5), 1175–1206.

commutatif expresses complete equivalence between the parties, namely the parties undertake to give the other an advantage equivalent to the one they receive.[117] In contrast, a *contrat aléatoire* arises if the parties agree that future uncertain events may affect the advantages and disadvantages. In other words, they are calculated by reversing the value used under the *contrat commutatif.*)[118]

In this context, returning to the question already asked before, to which category can the contract of employment be classified? The answer is far from simple. If the phase of the conclusion of the contract of employment is considered a point of reference, this contract expresses the equivalence between the parties because the employee receives consideration for the performance of a specific service. However, this contract generates a long-term legal relationship, and this already entails the possibility of uncertainties, and thus of a reversal of equivalence. And at this point, it is not only important what scope the employer's unilateral right to shape the terms and conditions covers, but also how the employer obtains this entitlement. The question can also be posed as to whether there can be an 'extended interpretation' of the flexible unilateral shaping of employment relationships based on contracts.[119] The question can also be formulated as follows: can the employer's unilateral right to shape the contractual terms and conditions, as a theoretical, abstract contractual right, take on any concrete agreement?

This complex problem is excellently illustrated by Mentzel's aforementioned study.[120] The three factors of force in the employment relationship,

117 CC Article 1108: "Le contrat est commutatif lorsque chacune des parties s'engage à procurer à l'autre un avantage qui est regardé comme l'équivalent de celui qu'elle reçoit."

118 CC Article 1108: "Il est aléatoire lorsque les parties acceptent de faire dépendre les effets du contrat, quant aux avantages et aux pertes qui en résulteront, d'un événement incertain."

119 See about this in Kiss, György (2020): *A foglalkoztatás rugalmassága és a munkavállalói jogállás védelme (Egy lehetséges megközelítés a munkajogviszony tartalmának vizsgálatához)* [Employment Flexibility and Protection of Employees' Legal Status (A Possible Approach to Examining the Content of Employment Relationships)]. Budapest: Wolters Kluwer, 139–141, 193–228.

120 Mentzel 2003.

namely the protection of the worker's legal status, the employer's power to shape the contractual terms and conditions and – in certain cases – the compulsion or rather the inducement to terminate the employment relationship, cannot be examined solely by the traditional or familiar institutions of labour law. Before answering the question posed above, it is important to emphasise that these factors can only be addressed together. Thus, the latent promise of employment in Freedland's theory, as already mentioned on several occasions, cannot be examined in isolation without the other two factors. The analysis should therefore be extended to two dimensions. One direction is to link the promise of employment as a factor of stability with the empowerment to shape (stable flexibility) and to link with the (final?) possibility of termination of the legal relationship. The other direction is the possibility of assessing the future impact of the indicated connection on the present – that is, on the duration of the legal relationship – in Macneil's words: can the *futurizing of the present* be realised in case of employment relationships?

In my opinion, the appropriate purposive approach is the protection of the legal status of employee. A good example of this in French labour law is the relationship between the content of many clauses that shape the conditions for contract of employment. One of the most important of these is the *clause de garantie d'emploi,* which is regarded as a pledge of the stability of the employment relationship.[121] The significance of this clause is given by a clause of almost opposite content, the *clause de mobilité.*[122] The two are linked in terms of the flexibility of the terms of the employment relationship and the certainty of the employee's status, which is generally one of the main characteristics of the relational contract in other fields. Finally, it should be noted that all the clauses in the employment contract are embedded in the principle of good faith and fair dealing, which on the one hand limits the employer's unilateral ability to act, and on the other hand

[121] COEURET et al. 2013: 253.

[122] See CLAVEL-FAUQUENOT, Marie-Françoise et al. (2010): Clauses du contrat de travail. *Liaisons sociales numéros juridiques,* (15557), 7–79; ANTONMATTEI 2009.

establishes the security of the employee's legal position and the stability of the employment relationship.[123]

Again, the question arises as to what the descriptions mean in general for a contract of employment which creates a legal relationship in which the inequality between the parties is decisive. If we look at the possibilities at a general level, the starting point is the incomplete nature of the subject matter of this contract and its long-term nature. These two factors can induce cooperation between the parties, continuous communication and planning to maintain the legal relationship between them in changing circumstances, even under conditions that have changed from their original state. This type of cooperative behaviour requires special contract-forming techniques. Some of these relate to the interpretation of the contract, others to the various ways of resolving conflicts.[124]

What special solution lies behind the so-called extended shaping (instruction) right *(erweitertes Weisungsrecht)*? The *antizipierter Änderungsvertrag,* known in German law, was not originally accepted. In the analysis of the special contractuality of the contract of employment it was presented how German lawmaking strongly rejected this solution in the beginning.[125] It was also shown how, after sufficient refinement, this theory gained acceptance in the praxis. In this case, it is possible and even necessary to check the content of the preliminary agreement *(antizipierter Änderungsvertrag)*. This can prevent the content of individual contracts of employment from being emptied out, and subsequent changes from being made for the unilateral benefit of one party, only to the advantage of the employer. In addition to the authorisation of a unilateral shaping right, such an agreement must contain elements that ensure the previous balance, even under the conditions altered to the original content and that can provide compensation.

[123] Savatier, Jean (1991): Les garanties contractuelles de stabilité d'emploi. *Droit Social,* 1(5), 413–417; Gaudu, Françoise (1991): Fidelité et rupture. *Droit Social,* 1(5), 419–423; Petit, François (2000): Sur les clauses de garantie d'emploi. *Droit Social,* 10(1), 80–84.

[124] Posner 2000: 749–774; Goetz–Scott 1981: 1095–1111; Schwartz, Alan (1992): Relational Contracts in the Courts: An Analysis of Incomplete Agreements and Judicial Strategies. *The Journal of Legal Studies,* 21(2), 273–278.

[125] BAG Urt. v. 28.5.1997; BAG AP Nr. 6 zu § 2 KSchG 1984. See Wank 1990: 37.

Despite the fact that Macneil and others would almost take the contract of employment for granted as a relational contract, there are many doubts in the literature about this. Let this be supported by two examples. In his 2005 study, Bird concludes that *employment* falls into the category of relational contract.[126] However, he concludes that the contractual practice of labour law largely ignores this essential feature of employment relationship, since it is handled as any other contractual obligation. He argues that labour law should take into account at least three factors when assessing an employment relationship. The first is the theory of the so-called psychological contract,[127] the second is the latest achievements in the internal organisation of enterprises, and the third is the organisational culture of work (in his terminology, sources of relational contract norms). Despite all doubts and contradictions, Bird is convinced that employment has characteristics that classify the contract of employment as a relational contract.

Brodie examines the relationship between relational contracts and employment based on English common contract law.[128] According to his starting point, personal work is one of the central elements of a person's identity, self-esteem and emotional feeling. Despite the uniform treatment of contracts under the common contract law, new social and economic realities affecting the content of contract of employment need to be recognised. It is no accident that the House of Lords ruled in *Johnson v. Unisys* that the contract of employment is relational.[129]

There is no doubt that mutual trust, good faith and the strengthening of the requirement of fairness in employment relationships have gradually

[126] BIRD 2005: 149–217.

[127] See for details of this, inter alia, in ROUSSEAU, Denise M. (1995): *Psychological Contracts in Organizations. Understanding Written and Unwritten Agreements.* Thousand Oaks: SAGE Publications; ROUSSEAU, Denise M. (1989): Psychological and Implied Contracts in Organizations. *Employee Responsibilities and Rights Journal,* 2(2), 121–139; DI MATTEO, Larry et al. (2011): Justice, Employment, and the Psychological Contract. *Oregon Law Review,* 90(2), 449–524.

[128] BRODIE, Douglas (2001): Mutual Trust and the Values of the Employment Contract. *Industrial Law Journal,* 30(1), 84–100.

[129] The argument of Lord Hoffmann in the case *Johnson v. Unisys* [2003] 1 AC 518.

shaped the position of the practice[130] with regard to the employer's room for manoeuvre. However, with regard to this decision, Brodie notes that this does not at all suggest the contract of employment as equal to the partnership contract. Brodie refers to Kahn-Freund's assertion that "the relation between an employer and an isolated employee or worker is typically a relation between a bearer of power and one who is not a bearer of power".[131] Kahn-Freund also points out that one of the great virtues of common law is that it does not allow for abuse of power. Indeed, it is not uncommon in commercial contracts for judicial lawmaking to declare an agreement void where there is a manifest imbalance between the parties.[132]

However, in labour law, the situation is quite different, since the employee is not even in the virtual competitive situation which would enable her or him to enter the market. It can also be observed that, while the lawfulness of supply and demand, of exchange surplus in the field of market competition are generally recognised by law, in labour law their acceptance faces extraordinary obstacles.[133] Therefore, Brodie emphasises that the strong personal character of labour law is undeniable, but because of the disproportionate responsibility and risk sharing between the parties and the imparity, values are the most vulnerable and exposed to abuse that Macneil considers to be significant elements of relational contract. It is their conviction that the many types of relational contracts should not be traced

[130] This is not unique to the English common contract law. Brodie refers to a famous decision of the Federal Court of Australia. This decision includes the following statement: "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." *State of South Australia v. McDonald* [2009] SASC 219, para. 231.

[131] DAVIES–FREEDLAND 1983: 17–18.

[132] The following case was a good example of this: *Schroeder v. McCaulay* [1974] 1 WLR 1308. In this case, the young songwriter received the desired royalty from the publisher, citing that this was the usual formula in the profession. This argument has not been confirmed by the court. In the example of the present case, the unfairness arose in a transaction specifically relating to economic transactions, where the restriction of free competition is traditionally low, but the discretionary use of advantages in this area must also be justified.

[133] BRODIE 2011: 243.

back to the fact that the contract is relational in general, but to the specific attributes of each contract. This is no different in the case of a contract of employment or employment relationship.[134] It is clear that the position of the contract of employment may be lighter as regards the classification of the relational contract in so far as an important part of the fabric of labour law is the collective agreement as a contractual source of law – where it has developed. The role of collective agreement in this respect will be discussed in detail in the next Chapter.

Assessment of a contract of employment as a relational contract in Hungarian labour law

In the previous points, I tried to prove that the Hungarian labour law environment in fact prevents the parties from taking advantage of the flexibility conferred by the nature of the incomplete contract. In the next point, I will discuss how the private law institution of the general contractual terms and conditions can only be applied to the contract of employment with serious reservations. In my opinion, therefore, the Hungarian system of contract of employment is rather rigid and closed to the practical application of the idea of relational contract. This statement can be supported by the following. The proof will be relatively short, since the incomplete contract and the relational contract are, so to speak, mutually dependent, and the absence of the former necessarily affects the existence of the latter.

Firstly, SLC Section 45, Subsection 1 specifies the necessary, indispensable elements of the content of contract of employment. In this way, the SLC determines the place of the contract of employment, i.e. the quality

[134] In 2016, Brodie will once again explore the relationship between relational contract and contract of employment. BRODIE, Douglas (2016b): Relational Contracts. In BOGG, Alan et al. (eds.): *The Contract of Employment.* Oxford: Oxford University Press, 145–166. In this study, he focuses on the delimitation of long-term contract in general and relational contract. His analysis is that whereas the long-term contains conditions that can be measured and limited in some way, the relational is rather the expression of a complex system of relationships that can become unstable in certain situations.

of the content of the employment contract in terms of legal norms and collective agreements. In addition to the mandatory content of the contract of employment, Section 51 of the SLC is also important, as it defines the rights and duties of the parties with cogent norms.

Secondly, with regard to the shaping of working conditions, the SLC does not take sufficient account of the long-term nature of the employment relationship and, with this, the economic interests of the employer and the employee's need for stability of legal status. To avoid misunderstandings, the SLC solution can also be interpreted as using the traditional means of amending the contract, which is generally applicable to the contract as a unanimous mutual declaration of intent by the parties. Namely, according to SLC Section 58, Subsection 1, parties shall be entitled to amend the contracts of employment by mutual consent. Of course, this provision is correct, but the legislator provides very limited opportunities for flexible adjustment of employment conditions. Referring to what has been described above regarding relational contracts, it appears that Hungarian legislators did not intend to deviate from customary contractual techniques.

Thirdly, Section 53 – in this context correctly – although permits employment other than that provided for in a contract of employment, but within very narrow framework and sense. This narrow-minded approach relates both the time limit, the conditions that can be discussed and the lack of the appropriate procedures. From the point of view of our topic, SLC Section 53 can be characterised as neither an amendment to the contract of employment, nor a change in terms and conditions of employment (performance). However, it was not always this way. In this context, I refer to FLC Section 150, which, in a rather vague legal environment, provided for the following. According to Subsection 1, "by agreement between employers without any valuable consideration, an employee may be required to work at another employer if his/her employer is temporarily unable to provide employment as contracted due to technical reasons arising out of or in connection with its operations". Under Subsection 2, "if the employer temporarily reduces the working time stipulated in the employment contract of an employee on account of economic reasons, the employee shall be entitled to his/

her personal base wage for such time lost, unless provisions pertaining to labour relations provide otherwise".

I have cited this provision not as an example to be followed, but as a deterrent. This rule did not include any special compensation, and at that time, no substantive control of such a change was considered. Incidentally, it is worth paying attention to the use of the term of this provision, which simply refers to 'working for another employer' or 'reduced working time' without specifying any specific legal basis (not factual reason, but legal cause).

Fourthly, added to all this is the aforementioned Section 19 of the SLC, which provides that "any condition that would alter the employment relationship to the disadvantage of employees [...] may not be applied". As I analysed earlier, this provision in itself is not objectionable, however, compared to the content of SLC Section 43, which is quite contradictory and narrow in terms of deviation, there is little room left for the contract of employment to flexibly shape the content of the employment relationship.

I have described all these variations and asked these questions in order to indicate that classifying a contract of employment as a relational contract is by no means a simple matter. Such classification presupposes the embedding of the contract of employment into the contractual system of private law and for which the random adaptation of a few private law legal institutions is not sufficient. Consequently, linking employment contracts and relational contracts is not a reality in Hungarian labour law.

The question then arises as to how the contract of employment can fulfil its general purpose, namely to take into account the interests of the recipient of the service and the situation of the employee, and whether it can ensure that the parties can exercise their rights and fulfil their duties in accordance with the contract. In other words, to what extent can the contract of employment be capable of securely shaping the content of employment relationship. To answer this question, the contract of employment must be analysed in the context of additional circumstances. Namely, can a contract of employment be considered a contract concluded under general terms and conditions? Why exactly should this element be examined? Basically, because the applicability or rejection of this indicator shows the place of the contract of employment in the contractual system. Namely, the contract of employment may be subject to the protection and control system generally applicable to contracts, or it may be governed by an independent, separate institutional system. But, as I mentioned, a halfway solution between the two is inconceivable.

The contract of employment as contract concluded with general/standard contract(ual) terms and conditions

General correlations – Introduction

The contract of employment is characterised in Anglo-Saxon and a significant part of the continental European academic literature as a typically incomplete contract, which is increasingly concluded along general contract terms and conditions.[135] In the previous sections, I have tried to prove that the relative dispositivity approach of the SLC in relation to the contract of employment and the 'rules-governed employment relationship', as well as the numerous cogent norms in the Code contradict the incomplete nature of the contract of employment. It is therefore questionable whether – in the context of Hungarian labour law regulation – it makes any sense to classify a contract of employment as a contract concluded with general/standard contract terms and conditions.

Nevertheless, the SLC is counting on this possibility because Section 31 requires CC Sections 6:77 and 6:78 to apply. Those provisions define the concept of a general contract term and how that term becomes the content of the contract. Sections 6:80 and 6:81 also apply, which deal with the collision between contract term and general contract term and the collision between

[135] BRAVERMAN, Harry (1974): *Labor and Monopoly Capital. The Degradation of Work in the Twentieth Century.* New York: Monthly Review Press, 25th Anniversary Edition, 54; PANKHURST, Kate (1988): *Work Effort under the Incomplete Contract of Employment.* Cambridge: New Hall, 5–8; MAZEAUD 2008: 323–324; PÉLISSIER, Jean (2004): Clauses informatives et clauses contractuelles du contrat de travail. *Revue de Jurisprudence Sociale,* (1), 1–4; GROBECKER 1999.

general contract terms with each other. However, the SLC does not order the application of CC Section 6:79, which provides for the consumer's additional claim into contractual content. A similar logic applies to the adoption of the concept of unfair general contract terms, in so far as the unfair contract term in a consumer contract is omitted, as well as the adoption of the provision on actions in the public interest.[136] It is also important to note that in the event of unfair general terms and conditions being invalid, the SLC does not apply the CC, but rather labour law regulations.

Before analysing the solution of the SLC, it is necessary to briefly review the problems induced by contracts concluded by the general contractual terms and conditions, with particular regard to Hungarian law. The contract concluded with general contractual terms and conditions is one of the outcomes of the mass trade associated with mass production. Not only the mechanism of contracting has been transformed, but the content of the contract has also changed.[137] What positional rearrangement has occurred that has enabled the procedural and substantive reorganisation of the contract and necessitated its justification? The decisive factor for a particular type of contract was the overpower of one the parties. This was reflected in the organisational structure of the entity, which made it possible to develop market strategies and even to stimulate the market (stimulation of demand and supply, creation of larger organisational systems, cartels). All this soon resulted in the fact that the principles of traditional private law – above all, contractual equality and freedom of disposition – were overturned, and the almost complete retreat of the state could not be achieved as originally intended. This transformation inevitably included the contract using live labour as its object, under whatever name it existed (master and servant, Dienstmiethe, contrat de louage, etc.). The security of economic transactions has also led the legislature and the market players to give unilaterally drawn up contractual clauses a certain degree of convergence, to lay down their procedural rules and, in particular, the essential content requirements of

136 CC Section 6:103 – 6:105.

137 See in detail in the Hungarian literature Takács, Péter (1987): *A szabványszerződések* [Standard Contracts]. Budapest: Akadémiai Kiadó.

the contract. In Takács's formulation, there had to be a standardisation of the conditions.[138]

However, this step meant that these conditions had to be checked independently of the specific contractual content that could be examined in a given specific dispute. This also meant "that the validity of the rules designed to overcome unilateral enforceable interests could not be made dependent solely on the intention of the contracting party to bring proceedings in respect of the application of general contractual clauses on a societal scale".[139] Not yet examining what institutions and mechanisms were established to monitor this, it should be emphasised that this step was considered to be a serious intervention in the contractual autonomy of the parties. This is reminded by Vékás, when he notes that "the private law perception and management of contracts with the general terms and conditions is one of the greatest challenges in the 20th century".[140]

At this point, perhaps the most problematic aspect of our topic in terms of general terms and conditions is the distinction between the terms used in simple general or standard contracts and those used in consumer contracts.[141] This difference also determines the method of control of the general contractual terms and conditions. This issue must also be addressed in this study because it is not irrelevant when assessing a contract of employment as a consumer contract (see below). It can generally be observed that the standardisation of terms and conditions established in standard contracts that do not qualify as consumer contracts, or established unilaterally, and the imposition of certain restrictions were necessary primarily in order to ensure the security of economic transactions, guarantee economic competition and prevent certain abuses. Vékás notes that in case of simple standard contracts, the application of such conditions is "very often not

138 Takács 1987: 12.

139 Takács 1987: 90.

140 Vékás, Lajos (2000a): Javaslat az általános szerződési feltételek Ptk.-beli szabályozásának kijavítására [Proposal for a Correction to the CC Regulation on Contractual General Terms and Conditions]. *Jogtudományi Közlöny,* 55(12), 485.

141 We could even say that this duality is a modified version of the dichotomy between commercial law and civil law.

dependent on the parties' market position and otherwise contractual weight".[142] In his view, taking into account the balanced interests of the parties and "providing an unjustified advantage or unfair terms" may occur because it is not worthwhile for the party who drafted it or for the parties simply to discuss the terms of the contract in detail, to analyse the risks, often because it would involve excessive costs, loss of time, etc. However, the mass appearance of such economic rational considerations can cover market equilibrium adjustments, lead to cartelisation, and distort the actual or required position of the economic actors. For this reason, it is important to note that, in Rieble's words, the review of such general terms and conditions essentially concerns the treatment of unequal risk sharing in contracts,[143] i.e. to restore the equalisation role of the contract.[144] In summary, "the general rules of standard contracts also serve the transparency of the market and the emergence of a level of competition".[145]

Therefore, the assessment of general terms and conditions used in consumer contracts or other contracts differs. Above all, however, the question is what the 'consumer contract' means – as such. This concept can be accessed through the concept of "consumer" itself. Péter Szabó refers to the fact that the category of the consumer was primarily an economic and then a sociological concept, and that it became the subject of research from different aspects of these disciplines.[146] A good example of this is the importance of consumption theories in economics,[147] and analysis of

142 Vékás 2000a: 491. See also Vékás 2001b: 100–103.

143 Rieble 1998: 327–357.

144 Vékás 2001b: 102.

145 Vékás 2001b: 102.

146 Szabó, Péter (2017): A fogyasztó fogalma és a fogyasztói szerződés értékelésének egyes kérdései az Európai Unió Bíróságának néhány újabb döntése tükrében [The Concept of the Consumer and Certain Aspects of the Assessment of Consumer Contracts in the Light of Some Recent Decisions of the Court of Justice of the European Union]. *Európai Jog,* 17(1), 1.

147 See among others Kyrk, Hazel (1923): *A Theory of Consumption.* Boston – New York: Houghton Mifflin Company.

consumer behaviours in the science of sociology.[148] The political significance of the consumer, whether in a socialist, non-market economy, or any other manifestation of a market economy, should not be underestimated.

In this study, I deal with this concept strictly from a legal point of view, advising that this narrowing does not reduce the uncertainty about the phenomenon of the consumer. The CC sets out the following definition in its interpretative provisions: 'consumer' shall mean any natural person acting for purposes which are outside his trade, business or profession.[149] This concept – besides narrowing the subject to the natural person – thus does not in itself convey anything about the quality of life of the consumer, and can therefore only be interpreted in certain contexts. This is what Vékás refers to when analysing the problems of the abstract concept of consumer in private law.[150] These are also to be recalled in this study because similar problems arise in the abstract conceptual definition of the worker in labour law. Each of these questions arises in the context of what justifies the consumer being afforded so-called additional protection. The first problem to be solved is the definition of the personal circle of the consumer, which may be broad or narrower, i.e. only natural persons or other legal entities may fall under this concept. This is followed by

148 For various aspects of consumer behaviour, see among others Clopton, Stephen W. et al. (2001): Salesperson Characteristics Affecting Consumer Complaint Responses. *Journal of Consumer Behaviour,* 1(2), 124–139; Buttle, Francis – Burton, Jamie (2002): Does Service Failure Influence Customer Loyalty? *Journal of Consumer Behaviour,* 1(3), 217–227; Lim, Weng M. et al. (2022): Evolution and Trends in Consumer Behaviour: Insights from Journal of Consumer Behaviour. *Journal of Consumer Behaviour,* 22(1), 217–232; Erensoy, Aysu et al. (2024): Consumer Behavior in Immersive Virtual Reality Retail Environments: A Systematic Literature Review Using the Stimuli–Organisms–Responses (S–O–R) Model. *Journal of Consumer Behaviour,* 23(6), 2781–2811.

149 CC Section 8:1, Subsection 1:3.

150 Vékás, Lajos (2008): *Parerga. Dolgozatok az új Polgári Törvénykönyv tervezetéhez* [Parerga. Contributions to the Draft of the New Civil Code]. Budapest: HVG-ORAC, 90–114.

an analysis of the environment, under what circumstances, and what type of transaction can be used and interpreted as the subject of the consumer. The next task – which seems obvious at first sight – is to define the concept of the consumer based on objective criteria. More specifically, this means that if a person is the subject of a specific transaction and has certain legal characteristics, he enjoys the additional protection of the consumer, irrespective of any subjective factors. This requirement is understandable, on the one hand, since it avoids many uncertainties of interpretation and abuses, but it also raises the question whether there are also persons who are covered by the protection umbrella who do not need such protection at all. The objective approach to the concept of consumer has another feature, namely that the knowledge of the other party as to whether or not the person contracting with it is a consumer, is irrelevant.[151]

Instead of going into further details, I highlight one criterion which is relevant from the point of view of labour law, namely the link between employer and consumer legal status. This is the negative formulation of the consumer, which I referred to when I touched on the CC provision. In contrast, the other party to whom the CC confers the status 'business party' (in the original Hungarian version: entrepreneur – *vállalkozó*) shall mean any person acting for purposes which are inside his trade, business or profession.[152] Contracts in which the consumer enjoys that additional protection and in which the contractual terms unilaterally determined are subject to stricter controls than in case of simple standard contracts should be defined using the concept of the consumer and the counterparty – entrepreneur, trader (business party). On this basis which concrete contracts are considered so-called 'consumer contracts'? In domestic law, the former CC

[151] VÉKÁS 2008: 102.

[152] For criticism of this designation see VÉKÁS 2008: 108–109. According to Vékás, since the term 'entrepreneur' is 'reserved' in Hungarian law, he recommends using the term 'trader' to refer to the consumer's partner.

Section 685(e) contained a provision on the concept of consumer contract.[153] The current CC ignores the one-sentence definition of 'consumer contract' but uses the term 'consumer' in many places, where the contract can be of this nature and attaches the appropriate legal consequences.[154] This solution is appropriate, especially for the consumer, general terms and conditions used in consumer contracts, and ultimately the long history of implementation of the entire consumer protection system into the CC.[155]

Some preliminary considerations regarding the application of general contractual terms and conditions to the contract of employment – Brief comparative overview

The application of general contractual terms and conditions in labour law or contract of employment is far from clear. This can be explained, on the one hand, by concerns regarding the general acceptance of the institution itself, on the other hand by differing legal cultures, and thirdly by differing interpretations of the relationship between labour law and private law. This can be illustrated by the following examples.

In German law, general terms and conditions (*Allgemeine Geschäftsbedingungen* – AGB) are governed by the BGB Sections 305–310. Prior to the modernisation of contract law, this was governed by a separate law.[156]

[153] Under the previous CC Section 685(e): "'Consumer contract' shall mean any contract concluded by a consumer and a person acting within the scope of his economic or professional activities; in the application of the provisions of this Act pertaining to guarantee and warranty, a consumer contract shall be construed as any contract the object of which is a movable property (consumer goods) with the exception of electricity, water and gas sold in tanks or bottles or in any other measured quantity, articles sold under judicial execution or some other regulatory procedure, and used articles sold by auction in which the consumer is also allowed to participate."

[154] See Section 5:90; 6:131; 6:157, Subsection 2–3; 6:158; 6:159, Subsection 2a; 6:168; 6:219; 6:220; 6:254, Subsection 2; 6:430; 6:444, etc.

[155] See Vékás 2000a: 486.

[156] See *Das Gesetz zur Regelung des Rechts der Allgemeinen Geschäftsbedingungen (AGB-Gesetz).* Date of entry into force 1 April 1977. Date of repeal 1 January 2002.

ABG-Gesetz Section 23, Subsection 1 excluded the contract of employment from its material scope, i.e. the application of the general contractual terms and conditions in the field of labour law could not be considered. Later on, this position became more and more 'soft' in practice, and behind the debates – true to one of the original aims of the *AGB-Gesetz* – lay the dilemma of whether or not the employee was a consumer and the contract of employment a consumer contract. (I will return to this issue at the end of this section in relation to Hungarian regulation and interpretation.) According to the BGB, the application of general contract terms and conditions is possible with regard to contract of employment,[157] taking into account the specific characteristics of labour law, but the application does not cover collective agreements. With regard to the application of general contract terms and conditions to contracts of employment, the BGB treats the contract of employment as consumer contracts.[158] As for the exclusion of the collective agreement from the material scope, the BGB's official reasoning also refers to the high value attached to collective autonomy *(Tarifautonomie).* This is clearly demonstrated by Article 9 of the *Grundgesetz,* which establishes the direct effect of fundamental rights with regard to the freedom of association *(Vereinigungsfreiheit).*[159]

As regards the consumer contract nature of the contract of employment, the academic literature is rather divided on this issue. This debate, which took place in 2002 and was of 'exceptional intensity', is reported by Däubler.[160]

[157] BGB Section 310, Subsection 4.

[158] See Däubler, Wolfgang et al. eds. (2021): *AGB-Kontrolle im Arbeitsrecht. Kommentar zu den §§ 305 bis 310 BGB.* München: Verlag Franz Vahlen, 443–449.

[159] See Maunz, Theodor – Dürig, Günther (1993): *Grundgesetz. Kommentar.* München: Verlag C. H. Beck, zu Art 9 III RdNr. 171. Many consider this special constitutional protection to be a prohibition of normative control over the content of the collective agreement. However, such an approach is akin to conflating freedom of association and the ability to conclude collective agreements. Freedom of association means the creation, termination of coalitions, participating in it or absent from them, while the content control of the contract examines the content requirements of an agreement in relation to the legal system as a whole. Therefore, there can be no legal agreement that restricts freedom of association.

[160] Däubler et al. 2021: 23–26.

One of the key documents of the discussion was the *Karlsruher Forum* of 2002, which analysed the modernisation of the law of contracts.[161] The academic debate has divided German private lawyers and labour lawyers, and we can find outstanding representatives of German private law science among the opposite positions.[162] It appears that the issue has been settled in practice by a decision of the BAG (Federal Labour Court) in 2005.[163] Shortly thereafter, the *Bundesverfassungsgericht* (Federal Constitutional Court) also ruled on this issue.[164]

The exclusion of collective agreements from the general contractual terms and conditions is also ambivalent. Namely, the provisions of Section 310, Subsection 4 of the BGB also require clarification. According to the prevailing interpretation, the control of the content of the general contract terms and conditions does not apply to the collective agreement as a whole. However, if the employment contract refers to a certain provision of the collective agreement as having been incorporated into the contract of employment *(arbeitsvertragliche Bezugnahmeklausel),* a control of this provision of the collective agreement is possible with regard to the content of contract of employment. In this regard, one more factor must be noted. In German law, collective agreements are considered contracts despite their normative content. This also means that the general rules governing contracts apply to the assessment of the validity of collective agreements.[165] Incidentally, collective agreements, works agreements *(Betriebsvereinbarung)* and service agreements *(Dienstvereinbarung)* are considered legal provisions pursuant to Section 307, Subsection 1 of the BGB *(Inhaltskontrolle).*[166]

161 Lorenz, Egon ed. (2003): *Karlsruher Forum 2002. Schuldrechtsmodernisierung.* Karlsruhe: Verlag Versicherungswirtschaft, 205.

162 See more about this in Schulze, Reiner – Schulte-Nölke, Hans eds. (2001): *Die Schuldrechtsreform vor dem Hintergrund des Gemeinschaftsrechts.* Tübingen: Mohr Siebeck.

163 BAG 25.5.2005, 5 AZR 572/04, NZA 2005 1111–1115.

164 BverfG 23.11.2006, 1 BvR 1909/06 (Die Verfassungsbeschwerde betrifft die Wirksamkeit und Auslegung einer vom Arbeitgeber vorformulierten Vereinbarung von Arbeit auf Abruf).

165 See Däubler 2006: 86–88; 125–13; 207.

166 BGB Section 310, Subsection 4.

In French law, the implementation of the general contractual terms and conditions into labour law is highly controversial. The reason why this theme is repeatedly highlighted in the literature is that clauses which give the employer the power to shape the performance of an employment relationship are playing an increasingly important role.[167] The Code de Consommation (hereinafter: CdC), which entered into force in 1990, Article L 121-2, 121-4 define the cases of deceptive commercial practices *(pratiques commerciales trompeuses)*. Article L 132-1 of the CdC defines the scope of these activities, but they do not concern labour law, contract of employment or the status of the employee. Throughout those provisions, the general concept of 'entrepreneur' and 'consumer' is used or referred to. König emphasises that, according to French consumer protection regulations, not only pre-established conditions can be reviewed, which means that all consumer contracts can be reviewed based on Article L. 132-1 of the CdC.[168] This statement is important because, in addition to the fact that the contract of employment is not included in the provision referred to, the Code does not specify the concept of the entrepreneur or the consumer in this context, but leaves it to the legal literature and case law. Legal literature defines both the concepts of entrepreneur and consumer in accordance with the directive, while legal practice tends to use more abstract, general, yet functional concepts.

Neither legal practice nor legal scholarship deals extensively with the question of whether consumer protection extends to contract of employment. It seems to be a well-established position in French private law that

[167] See for example WAQUET, Philippe (1996): La modification du contrat de travail et le changement des conditions de travail. *Revue de Jurisprudence Sociale,* (12), 791–798; WAQUET, Philippe (2007): Variations sur le thème de la modification du contrat de travail. *Le Droit Ouvrier,* 88(4), 175–181; PÉLISSIER, Jean (2005a): Pour un droit des clauses du contrat de travail. *Revue de Jurisprudence Sociale,* (7), 499–502; OLIVIER, Jean Michael (2011): *L'économie générale du contrat de travail.* Paris: Université Paris II Pantheon-Assas; KATZ, Tamar (2005): La détermination de la rémunération variable: la part de l'unilatéral, du négocié et du juge. *Le Droit Ouvrier,* 86(4), 151–160; PÉLISSIER, Jean (2005b): La determination des éléments des contrat de travail. *Le Droit Ouvrier,* 86(3), 92–97.

[168] KÖNIG 2010: 33–38.

consumer protection law and labour law are two entirely separate fields and that there is no overlap between them in this context. The protection of the employee against the employer's unilateral right of formation is therefore fundamentally a question of labour law, and one of the most important rules in this respect is the Code du Travail Article L 1121-1. This means that no one may restrict the rights and freedoms of individuals or groups in a way that is not justified by the nature of the task and is disproportionate to the achievement of the objective. If restrictions are imposed, they must be proportionate to the objective pursued.[169] This provision, which lays down general requirements, is important because the precise concept of a contract of employment is not defined in French labour law, as has been mentioned above, and the limitation of the employer's power is therefore primarily achieved by laying down general requirements.[170] The requirements set out in the CT apply in all cases where the employer wishes to shape the terms of performance on the basis of a clause.

The other provision referred to in the control of the terms of the contract of employment is Article L 1222-1. According to this, the employment contract must be fulfilled in accordance with the principle of good faith and fair dealing.[171] Based on this, both parties are required to take into account the interests of the other party during the performance. This requirement is obviously of particular importance in the context of the employer's power to shape the terms and conditions. Some consider that the two provisions of the CT cited are suitable for controlling the content of a contract of employment.[172] Others, along with the judicature, emphasise that it would be only difficult to revise the content of the contract of employment on the

169 Code du travail Article L 1121-1: "Nul ne peut apporter aux droits des personnes et aux libertés individuelles et collectives de restrictions qui ne seraient pas justifiées par la nature de la tâche à accomplir ni proportionnées au but recherché."

170 These are essentially constitutional rights, such as freedom of occupation, freedom of choice of workplace, right to privacy, etc. König 2010: 114. See on the limitation of the employer's power Pélissier et al. 2006: 961–974.

171 Code du travail Article L 1222-1: "Le contrat de travail est exécuté de bonne foi."

172 Pélissier 2005a: 499–502.

basis of general requirements. It should also be noted that the CT imposes fairly strict limits on internal regulations issued by employers.[173]

As far as the conditions contained in the collective agreement are concerned, their examination did not come to the fore in the context discussed. This is due, among other things, to a system of representativeness established by centralised methods, a unity of collective agreements similar to the German law *(Tarifeinheit)* and the strong incorporation of collective bargaining clauses into the content of contracts of employment.[174]

Regarding the complex relationship between general contractual terms and labour law, the following can be noted with regard to English law. The Directive on unfair terms in consumer contracts[175] was first transposed into English law in 1994 by *The Unfair Terms in Consumer Contracts Regulations.* The appendix to the regulations expressly included a provision excluding contracts of employment from the scope of the regulations.[176] Consequently, the problems arising from unfair contractual terms in contract of employment must be remedied by means of labour law, more specifically of general contract law.[177] This position persisted for a long time, which is somewhat surprising because *The Unfair Terms in Consumer Contracts Regulations* 1999 no longer included the express exclusion of the contract of employment. The position of the basic approach, however, remained unchanged. According to the prevailing view, despite the fact that the purpose of the amendment was to align more fully with the substantive legal provisions of the directive, this does not mean that the scope of application of the rule should be extended to the employment contract.

173 Code du travail Article L 1321: "Le règlement intérieur: Contenau et condition de validité."

174 See about all of this in Pélissier et al. 2006: 925–934; Krieger 1991.

175 Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts.

176 Appendix I Schedule 1: "Contracts and particular terms excluded from the scope of these regulations. These Regulations do not apply to: (a) any contract relating to employment […]".

177 These problems originate from unfair conditions affecting the employment relationship, or "possibly" from the collective agreement. See Peel 2011: 303.

However, in English law, rules on unfair contract terms that were not individually negotiated existed well before the Directive was adopted and the Unfair Terms in Consumer Contracts Regulations were enacted, namely, this is the *Unfair Contract Terms Act* from 1977. In analysing the relationship between the Regulations and the Act, Peel emphasises that the two norms operate side by side, as it were, independently of each other, and as a consequence it is possible that certain conditions are valid under the Regulations but not under the Act.[178] Contrary to its title, the Act does not actually regulate unfair contract terms in general, but only clauses that exclude or limit the liability of the contracting party.

Nevertheless, the question also arises in relation to the Act as to whether its provisions are applicable to contracts of employment or to the parties of contracts of employment. In this respect, the judicature takes as a starting point Article 12 of the Act, which defines the concept of consumer for the purposes of the application of the Act.[179] In the case of *Julian Bridgen v. American Express Bank Ltd.* [2000] IRLR 94, the court found that the Act extended the concept of consumer to employees, albeit somewhat artificially.[180] Accordingly, it ordered the provisions of the Act to be applied to the clause in the contract of employment under which an employer may dismiss an employee without a disciplinary procedure during the first two years of employment. But, due to the narrow scope of the law, the court did not consider this clause invalid, as it did not qualify as a clause excluding or

[178] Peel 2011: 289.

[179] Unfair Contract Terms Act 1977 Article 12: "Dealing as a consumer." (1) A party to a contract "deals as consumer" in relation to another party if: (a) he neither makes the contract in the course of a business nor holds himself out as doing so; and (b) the other party does make the contract in the course of a business; and (c) in the case of a contract governed by the law of sale of goods or hire-purchase, or by Section 7 of this Act, the goods passing under or in pursuance of the contract are of a type ordinarily supplied for private use or consumption.

[180] See König 2010: 25.

limiting the employer's liability under Article 3(2) of the Act.[181] Nevertheless, it seems that the judicature tends to classify the worker as a consumer when controlling contractual conditions. The relatively broad interpretation is made possible by Article 3(1) mentioned above.

It can be also be observed that a complex interpretation of the facts determines whether the Unfair Contract Terms Act can be applied or not. A good example of this is the case of *Peninsula Business Services Ltd. v. Mr J Sweeney* [2004] IRLR 94. In this case, the decision was made in relation to general contract terms and conditions that differed significantly from general contractual practice and the provisions applicable to contracts, based on the approach that the employee is a consumer. In contrast, in *Keen v. Commerzbank AG* [2007] ICR 623, the court ruled that in case of a bonus dependent on the employer's discretion, the employee did not have the legal status of a consumer in this context. In this case, the court granted the employer significantly greater decision-making and condition-setting powers than are generally granted to entrepreneurs of consumer contracts.[182]

Contradictory judgments and judgements interpreting the Act from different perspectives led to the Act becoming the subject of heated debate. Since the formulation of Article 3(1) of the Act, many things have changed in the labour market, and many experts point out that the position of the employee has become extremely vulnerable and would be important to find an exact answer to the question of the protection of employee with regard to the employer's power to shape an employment relationship.[183] Others

[181] Unfair Contract Terms Act 1977 Article 3: "Liability arising in contract." (1) This section applies as between contracting parties where one of them deals as consumer or on the other's written standard terms of business. (2) As against that party, the other cannot by reference to any contract term: (a) when himself in breach of contract, exclude or restrict any liability of his in respect of the breach; or (b) claim to be entitled: (i) to render a contractual performance substantially different from that which was reasonably expected of him, or (ii) in respect of the whole or any part of his contractual obligation, to render no performance at all, except in so far as (in any of the cases mentioned above in this subsection) the contract term satisfies the requirement of reasonableness.

[182] Analysed by König 2010: 25–26.

[183] Watson, Loraine (1995): Employees and the Unfair Contract Terms Act. *Industrial Law Journal,* 24(4), 323–336.

criticise the Act for failing to define the meaning of several concepts. One of these unclear concepts is the 'standard form contract', which is extremely important not only in consumer protection but also in the employment, because of the Implied Term, which has been mentioned several times. Collins emphasises that unilateral setting of conditions in many cases – including employment – is not made under market circumstances and cannot create a realistic competitive situation for the other party. Under these situations, legislative intervention could serve precisely to stimulate competition and reduce the disadvantages resulting from lack of competition.[184] From this critical approach, Collins analyses the regulatory proposal published in 2005.[185] He stated that the Law Commission's review of the legislation on unfair contract terms proposes draft legislation that provides for separate treatment of standard from contracts of employment.[186] It is worth quoting from the Commission's reasoning. The Commission emphasises: "In the Consultation Paper we noted not only that some courts have treated the employee as a consumer but also that employment contracts share some features with business contracts. We asked whether employment contracts should be included in our regime as business contracts, consumer contracts or in a category of their own. Over the course of the project we consulted a number of specialists in the field of employment law. We were persuaded that there are already sufficient controls over employment contracts in general. There is therefore no need to extend to employees the proposed consumer protections. However, it is important that exclusions and limitations of liability in written standard terms of employment should be subject to controls. Following that consultation process, we decided to treat employment contracts as a separate category."[187]

[184] Collins, Hugh (2007): Legal Responses to the Standard Form Contract of Employment. *Industrial Law Journal,* 36(1), 11.

[185] The Law Commission and the Scottish Law Commission (LAW COM. No. 292) (SCOT. LAW COM. No. 199). Unfair Terms in Contracts. Report on a reference under Section 3(1)(e) of the Law Commissions Act 1965. See in this context the Law Commissions' 2002 Joint Consultation Paper, Unfair Tems Contracts (Law Commission Consultation Paper No. 166, Scottish Law Commission Discussion Paper No. 119.

[186] Collins 2007: 16.

[187] The Law Commission and the Scottish Law Commission, 12.

It seems that this position has not changed over time, at least that is what the Consumer Rights Act of 2015 shows.[188] Section 61 of the Act defines the concept of unfair terms. First of all, it fixes the objective scope of the concept (What contracts and notices are covered by this Part?). According to the regulation: "This Part applies to a contract between a trader and a consumer. This does not include a contract of employment or apprenticeship."

Is the application of general contractual terms and conditions self-evident in the Hungarian labour law?

After this brief comparison, the question arises whether the legislator's solution is justified with regard to the application of general contractual clauses in employment law. The starting point is the concept of the general contractual terms and conditions itself. Under Section 6:77, Subsection 1 of the CC "standard contract terms mean contract terms which have been unilaterally drafted in advance by one of the parties for several transactions involving different parties, and which have not been individually negotiated by the parties". In the first part of this concept, the decisive factor is that this condition was drawn up by the user (the person applying the conditions) for the purpose of concluding several contracts. Consequently, we can exclude from this scope a condition unilaterally established before the conclusion of the contract, which was merely motivated by the conclusion of a single contract of employment. It is nothing more than a simple offer.

According to CC Section 6:78, Subsection 1: "Contract terms which have not been individually negotiated shall become part of a contract only if they have previously been made available to the other party for perusal before the conclusion of the contract, and if the other party has accepted those terms." While this may seem obvious, the formula is not as simple as it might first appear in labour law. Namely, in Hungarian labour law, the

188 In its second part, this Act partially fulfilled the aforementioned Commission's offer, in so far as it attempted to incorporate the conditions of the Unfair Contract Terms Act of 1977 and the Unfair Terms in Consumer Contracts Regulations of 1999 into a unified system.

explicit 'agreement part' of the contract of employment is often limited to the necessary, indispensable elements already mentioned, i.e. the basic salary and the job (title). That is, the employee must be aware of and accept these. These predetermined conditions must inevitably become part of the employment contract, as without them the employment contract would not exist. Whether or not the setting of wages is considered to be fair is another question which will be addressed later.

Since the content of the contract of employment and the employment relationship do not coincide, first and foremost, it must be examined which elements of the general contractual terms and conditions the employee must be made aware of before the contract is concluded in order for them to become part of the contract of employment. This analysis is performed in two steps. First, we draw attention to one of the key elements of the mechanism for concluding a contract of employment, namely the employer's duty to provide information. Secondly, it must be examined what kind of legal statements can be considered general contractual terms and conditions. Due to its complexity, the latter will be discussed in a separate section below.

In relation to both areas, and in general, the next issue to be examined in the series of concerns about the application of general contractual terms and conditions in labour law concerns unfair general contractual terms and conditions. This problem is also much more complex in labour law than it might appear at first sight. Nevertheless, the issue itself has been dealt with by two relatively simple approaches. One of them compares the provisions of SLC Section 31 and CC Section 6:102 showing that while the SLC does order the application of CC 6:102, it does not specifically provide for this possibility of avoidance of unfair contractual terms.[189] The authors of the cited study suggest that the SLC does not deal with CC Section 6:103, Subsection 3, i.e. in Hungarian labour law the contract of employment is not considered a consumer contract and the employee is not in the position of

[189] NÁDAS, György – OROSZ, Ferenc (2024): A szerződési szabadság megjelenése az általános szerződési feltétel mint egyoldalú jognyilatkozat kapcsán [The Emergence of Contractual Freedom in the Context of General Contractual Terms and Conditions as a Unilateral Declaration]. *Munkajog*, 8(2), 1.

the consumer.[190] This problem is discussed in more detail below. According to their argument, the recognition of the employee as a consumer may be justified by the fact that he is the 'weaker party' *vis-à-vis* the employer, just as the consumer is vis-à-vis the entrepreneur in economic transactions. Thus, not only the right to avoidance would be entitled to unfair terms, but these conditions would be null and void.

The other approach has been developed by practice and is based more on the actual legal context. As a result, invalidity is not based on general contractual terms and conditions, but is determined by the court on the basis of other specific grounds for invalidity specified in the SLC.[191] In other words, in the majority of the cases brought in this context, the unfairness of the general terms and conditions of the contract did not need to be invoked because the terms and conditions set by the employer were contrary to the legal norm. This practice raises further problems, because there is a difference of the validity–invalidity system between the CC and SLC. That, the SLC orders the application of a civil law institution whose legal consequences are governed not by the rules of civil law but by the rules of labour law. In addition, the labour law validity–invalidity system is incomplete, which is important in labour law because of the possible complexity of legal statements that can be considered general contractual terms and conditions.

It should be added that, under the approaches indicated, it should also be examined whether the problem of unfair general contractual terms and conditions can arise at all in labour law, and if so, how and by what legal declarations.

190 Nádas–Orosz 2024: 2.

191 Kulisity, Mária (2023): Tisztességtelen általános szerződési feltételek a munkajogban [Unfair General Terms and Conditions in Labour Law]. In Auer, Ádám et al. (eds.): *Ünnepi tanulmányok Kiss György 70. születésnapjára. Clara pacta, boni amici* [Festive Studies in Honour of György Kiss's 70th Birthday. Clara pacta, boni amici]. Budapest: Wolters Kluwer, 387.

On the contradiction between Section 46(1) of the SLC and Section 6:78 of the CC

Regarding the first issue, if we recognise that the contract of employment is a contract that can be concluded under general contract conditions, SLC Section 46 plays a significant role in terms of the conditions established by the employer. This Section 46, Subsection 1 regulates the employer's duty to provide written information. It is clear from the list of items to be notified that some of these are not included in the contract of employment but may, in some way, determine the content of the employment relationship.[192] These may include the concrete (or specific) place of work; the tasks involved in the job (job description); the duration of the daily working hours; the days of the week into which the working hours can be scheduled; the possible start and end times of the daily working hours according to the shift; the possible duration of the overtime hours; the specific nature of the employer's activity; the way in which wages are accounted; the frequency of the payment of wages; the day of payment.

It should be noted, that domestic regulation is an almost mechanical implementation of the relevant EU Directive,[193] but the content of Section 46, Subsection 1 should be assessed in the SLC's regulatory environment. Thus, for example, it may be important to determine the place of work, because in the absence of an agreement to the contrary, workplace shall mean the place where the job is usually performed.[194] This is an essential circumstance from the point of view of performance. With regard to the tasks within the scope of the job, I refer to what was said earlier, namely that the specific tasks and the work to be done within this framework at a given

192 See details on this in Kiss, György (2014): Foglalkoztatás gazdasági válság idején – a munkajogban rejlő lehetőségek a munkajogviszony tartalmának alakítására (jogdogmatikai alapok és jogpolitikai indokok) [Employment in Times of Economic Crisis – The Opportunities in Labour Law to Shape the Content of Labour Law (Legal Dogmatical Basis and Legal Policy Reasons)]. *Állam- és Jogtudomány,* 55(1), 36–76.

193 Directive (EU) 2019/1152 of the European Parliament and of the Council of 20 June 2019 on transparent and predictable working conditions in the European Union.

194 SLC Section 45, Subsection 3.

time are determined by the employer. Can a job description be considered a general contractual condition? Several facts must be distinguished in this regard. First, if the job description consists of only one task and the job title in the contract of employment reflects the employee's duties, no specific information is required under Section 46, Subsection 1. However, it may happen that the job description includes a number of complex tasks, which are usually determined by the employer without the involvement of the employee concerned. The problem may arise if the tasks specified in the job description do not correspond to general expectations, customs and the image formed of the job. Nowadays, there are many different types of jobs within an organisation, as well as employers operating without a traditional organisation, with a wide variety of concrete tasks. There is a certain contradiction in the fact that, in practice, employees sign a contract of employment based on the job title, while the job duties or tasks are considered *de facto* general contractual terms and conditions. But would it also be considered as such *de jure*? This depends on several factors, including the timing of the information, which will be discussed in detail later. Here, I am merely referring to the serious contradiction between the first sentence of SLC Section 46, Subsection 1 and CC Section 6:78, Subsection 1.

Other facts falling within the scope of Section 46, Subsection 1 are also relevant for the purposes of the general contract terms and conditions despite the fact that the SLC shall provide them with relatively detailed regulations. In this context, an important provision is SLC Section 96, Subsection 1. Under this provision "the rules relating to work schedules (working time arrangement) shall be laid down by the employer, of which the employee shall be informed in accordance with Section 18". Section 18 of the SLC states that "the provisions on legal statements shall apply where the obligation to provide information is prescribed by employment regulations upon either of the parties. According to this rule – unless otherwise provided for in the rules governing the employment relationship – information shall be provided at a time and in a manner to permit the exercise of rights and the fulfilment of obligations." Furthermore, "information shall be considered provided if published by means considered customary, and commonly known in the area". This provision is also noteworthy in that it highlights the problem of what type of legal statement actually conveys the conditions specified by the employer. Should this information be provided under Section 18 of the SLC or Section 46, Subsection 1?[195]

Due to the necessary and indispensable elements of the contract of employment and the contradictions arising from SLC Section 46, Subsection 1, it is advisable to examine the employer's interests in the formulation of general terms and conditions, as well as the employer's room for manoeuvre in this regard. Pursuant to CC Section 6:78 "contract terms which have not been individually negotiated shall become part of a contract only if they have previously been made available to the other party for perusal before the conclusion of the contract, and if the other party has accepted those terms". I will discuss the contradiction between the time difference regulated in SLC Section 46 and CC Section 6:78 below, but first let us look at a content-related issue.

In this context, the relationship between legal norms and contract of employment is important. Since SLC Section 43, Subsection 1 provides for the possibility of derogating from the provisions of Part Two of the Code and from the rules governing the employment relationship in favour of the employee – unless otherwise provided by law – mapped areas should be defined where the employer's mobility in the formulation of general terms and conditions allows to derogate from the 'minimum standards' in the legislation to the detriment of employees. As I mentioned earlier, there are few such rules, but there are undoubtedly some important ones among them.[196] This also means that there are few areas where employers would

195 I would like to emphasise that this problem arises when concluding a contract of employment. Changes to the work schedule are regulated in a reassuring manner by SLC Section 97, Subsections 4–5.

196 According to the SLC, there is dispositivity in the relationship between the legal norm and the contract of employment in the following areas. Under Section 51, Subsection 2(b) the employer shall be liable to provide for their employees the necessary working conditions, unless there is an agreement to the contrary; according to Section 122, Subsection 3 – unless otherwise agreed – vacation shall be allocated to contain at least fourteen consecutive days once in a calendar year, where the employee is exempted from the requirement of availability and from work duty: Section 127, Subsection 3 regulates that – in the absence of an agreement to the contrary – maternity leave shall

have an interest in setting unilateral contractual terms that would give them a clear advantage. Of course, this statement can only be evaluated based on the general interpretation of SLC Section 43, Subsection 1. Namely in practice, the possibility of deviation mentioned in the note may also cause a serious disadvantage for employees.

Returning to the discrepancy between the SLC's regulation of the timing of the employer's duty to provide information and the content of CC Section 6:78, it can be concluded that the information provided under SLC Section 46 is not suitable for incorporation into the contract of employment in accordance with the requirements of the general terms and conditions. The other issue is that SLC Section 46 itself also carries problems, because it is a provision without legal consequences.

Furthermore, the employer's interest in applying the general contractual terms and conditions cannot be assessed solely on the basis of the conditions that it can unilaterally establish. Because, the content of the employment relationship is not determined solely by these conditions. Consequently, it is necessary to examine which legal statements in labour law can be considered general terms and conditions. In this regard, collective agreements are of particular importance. In other words, can a collective agreement be considered a general contractual term and condition? Since in accordance with SLC Section 274, Subsection 2 "in the absence of any provision to the contrary, in the collective agreement derogations are allowed from the

be allocated so as to allow that not more than four weeks falls before the expected time of birth. Section 139, Subsection 2 provides that – unless otherwise agreed – the amount of wage supplement is calculated based on the employee's base wage for one hour. Under Section 155, Subsection 1 – in the absence of an agreement to the contrary – the wages of employees shall be retrospectively accounted at least once a month. Section 156, Subsection 1(b) regulates that in the case of an irregular work schedule and if wages are paid by the hour, the employer shall account and pay the employee's wages based on the number of working days under the standard work pattern for the month and the daily working time, unless there is an agreement to the contrary. And finally, Section 159, Subsection 1 also allows for derogation from the law in the case of cash payment of wages. In my view, unfair contract terms can only be interpreted in principle in this context, since the relative dispositive norms – which only allow derogation in favour of the employee – effectively exclude this.

provisions of Part Two and Part Three", the collective agreement may even encourage the employer to conclude a collective agreement containing terms that are disadvantageous to the employee compared to the legal norm. However, answering this question is extremely complex and raises a number of legal dogmatic and legal policy issues (see below for details). And here again we see the contradiction between SLC Section 46 and CC Section 6:78 regarding information and awareness, as SLC Section 46, Subsection 3 stipulates that the employer may inform the employee of certain conditions by referring to the rules governing the employment relationship.

Which legal statements can be considered general terms and conditions in relation to a contract of employment?

Of course, CC Section 6:77 does not provide for the form in which the general terms and conditions are to appear. The general contractual terms and conditions can be found in two legal forms in labour law – alongside the traditional general contractual offer. One is the employer's so-called internal rules (guides); the other is the collective agreement. It is appropriate to examine both in this respect.

On internal regulations as general contractual terms and conditions. For a long time, employer regulations were neglected by Hungarian labour law, and in the period before the change of regime these regulations were treated under the umbrella term 'company regulations', often as 'rules-governed employment relationship'.[197] Accordingly, these regulations were in practice internal, company-level implemented provisions of the law, and had little to do with contractuality. We can see a nuanced approach to this situation in László Román's study.[198] In his work, the author attempted to distinguish employer regulations from the collective agreement of the time trying to determine the legal nature of the latter. After the change of regime, the term 'rules-governed employment relationship' did not include the internal rules

197 Bogyay, Géza (1983): *Vállalati munkajogi kézikönyv* [Handbook of Company Labour Law]. Budapest: Közgazdasági és Jogi Könyvkiadó, 36–60.

198 Román 1970: 67.

of the employer, and the legislator seems to have forgotten about them, despite the fact that more and more of these types of regulations are being developed today, which have a significant impact on the functioning of the employment organisations and the quality of employment. Section 17 of the SLC merely states that unilateral legal declarations and unilateral commitments may also be made by the employer in the form of unilaterally established internal rules or unilaterally established practice (together 'employer regulations').

Commentaries deal with the legal nature of employer regulations in the context of SLC Section 17. One of the commentaries classifies these rules as specific unilateral declarations, the importance of which can be measured in the nature of the contract of employment as a blanket contract.[199] The employer tries to fill the gaps left by the contract of employment with these rules. However, these rules have no role where "the factor of non-individual contractual regulation of the employment relationship is the collective agreement".[200] Namely, employer regulations and collective agreements differ in their legal nature, with only their normative character – which varies in type and degree – showing some common features. The commentary refers to the employer regulations as normative instructions, and as such, unlike collective agreements, their scope is strictly limited by the legal norm. The classifications of these rules according to their content is important from the perspective of our topic. Beyond purely organisational regulations, there are normative instructions that contain obligations for employees or a group of employees within the framework of the contract of employment, while another group only identifies the employer as a recipient and can be classified as unilateral commitment in accordance with SLC Section 16.

This latter provision is interesting because under Section 16, Subsection 2 a commitment may be amended to the beneficiary's detriment, or may be terminated with immediate effect in the event of subsequent major changes in the circumstances of the person making the commitment whereby carrying out the commitment is no longer possible or it would result in unreasonable

199 Bankó, Zoltán et al. (2019): *Nagykommentár a Munka Törvénykönyvéhez* [Grand Commentary to the Labour Code]. Budapest: Wolters Kluwer, 116.

200 Bankó et al. 2019: 116.

hardship. In this context, the above commentary notes that this provision is consistent with the provision of CC Section 6:591, Subsection 1 in so far as a commitment to perform a one-time contribution can be validly withdrawn prior to performance if the performance of the contract can no longer be expected due to significant changes that have occurred in the obligor's circumstances since he undertook the obligation. Subsection 2 provides that the obligor shall, at any time, be entitled to withdraw a commitment to make regular contributions for an indefinite period of time. Subsection 3 also sets out: "If the commitment is withdrawn, a contribution that has already been made cannot be reclaimed." The commentary notes that the SLC does not regulate these facts, although in practice the employer does not undertake a one-time commitment, but, for example, performs a monthly benefit.[201] In this context, labour law jurisprudence has taken the position that if the employer by virtue of unilateral legal declarations performs a duty without specific concrete or circumscribed condition or time limit, the content of this duty entered into by means of that unilateral legal declaration subsequently becomes, as it were, part of the contract and, consequently, cannot be unilaterally amended or withdrawn by the employer.

This solution requires the following note. The reference to the CC is questionable in that the CC's cited rules apply to public commitment. The reasoning for SLC Section 16 emphasises that a unilateral commitment is one of the specific forms of a unilateral legal declaration from which an obligation arises *(kötelemfakasztó).* If a unilateral commitment is to be interpreted in this sense as a legal declaration addressed to a specific recipient (person), Section 15, Subsection 4 does indeed apply, namely that a unilateral legal declaration takes effect by notification to the person to whom it is addressed and, unless otherwise provided by the law, can only be modified or withdrawn with the consent of the recipient. However, in case of a normative unilateral undertaking, Section 16, Subsection 2 permits, so to speak, an amendment to be imposed on the person entitled, or a termination with immediate effect, if there has been a substantial change in the circumstances of the declaration of entitlement since the

201 Bankó et al. 2019: 114.

communication, which would make it impossible to fulfil the obligation or would involve disproportionate harm. According to the reasoning, the aim of the legislator was to mitigate the 'unfair practice' established by the above-mentioned case law. The reasoning also emphasises that Subsection 2 cannot be interpreted extensively. Consequently, "the obligor may only modify or terminate his declaration prospectively, which implies that he cannot claim back the service he has already provided. For the same reason, a party's claim which arose prior to the date of amendment or termination expressly in respect of the commitment shall not be extinguished. For example, in the case of termination of a unilateral declaration of a bonus assignment, the employee can prove that he has performed additional work which he would not have performed and would not have been obliged to perform in the absence of the commitment."[202]

In summary, the following conclusions can be drawn with regard to employer regulations. The classification of internal rules according to their specific content shows a varied picture. They may relate to elements of remuneration for work other than the basic salary, the setting of performance requirements, etc. Another typical area of internal rules is the definition of working time, such as the working schedule itself. Internal rules may provide for rules of conduct, social benefits, allowances, etc. As a result of the above, I do not consider the conclusion to be correct that "employer regulations cannot be validly subject to general contract terms and conditions because it cannot be considered a bilateral agreement". The proponent of this view argues that "it is possible for derogation from employer regulations to be negotiated and agreed by the parties orally".[203]

Other authors take a more nuanced approach to the internal rules as possible general contract terms and conditions.[204] The authors of the cited study emphasise that "it would be particularly appropriate for the general contract terms and conditions (e.g. employer regulations) to become part

202 Reasoning on Section 16.

203 Kulisity 2023: 386.

204 Gyulavári, Tamás – Kun, Attila (s. a.): *A munkáltatói szabályzat az új Munka Törvénykönyvében* [Employer Regulations in the New Labour Code]. Budapest: Manuscript.

of a contract only if the party (employer) using it has enabled the other party to become acquainted with its content prior to the conclusion of the contract, to be informed in advance of the essential elements of its content, and if it is expressly or by reference to it *(facta concludentia)*.[205] This desired requirement is significantly more stringent than that required by SLC Section 17, Subsection 2. Under this provision, the employer's internal rule shall be considered delivered if published by means considered customary, and commonly known in the area. In my view, Section 17, Subsection 2 did not formulate this rule on the basis that the employer's internal rules should function as general contract terms and conditions without any further preconditions.

According to the interpretation of Nádas and Orosz, employer regulations occupy a special place in the labour law regulatory system, located on the border of law and non-law, although not sources of law, but their legal relevance is indispensable, they are in fact 'soft law' tools, 'quasi sources'.[206] Apart from the fact that this interpretation raises the question of rethinking the SLC's concept of 'rules-governed employment relationship' and possibly a rethinking of the maintenance of this institution itself, the authors consider that "the placement of the internal rules in the code, the reference of the SLC to the CC, makes it clear that the provisions of unilateral legal declarations in the employment relationship can also be general contract terms and conditions or can be considered unfair in certain cases".[207] In this study I referred to the provision of SLC Section 17, Subsection 2 regarding the communication of internal regulations that is not in line with the CC's rules of general contract terms and conditions. In this context I have to repeat my opinion that the legislator of labour law did not draft this rule with the intention that the internal rules should be considered general contract terms and conditions without any further precondition.

Finally, I refer again to SLC Section 46, namely the employer's duty to provide information. The legal consequences of failing to comply with this obligation under the relevant directive and Hungarian law is another

[205] Gyulavári–Kun s. a.: 14.

[206] Nádas–Orosz 2024: 7.

[207] Nádas–Orosz 2024: 7.

matter. I will return to this issue later. As I indicated above, another problem is the timing of the fulfilment of the obligation to provide information. Under Section 46, Subsection 1 "the employer shall inform the employee in writing within seven days at the latest from the date of commencement of the employment relationship". It is clear that this provision was not included in the SLC with the intention that the issue of compliance with the general terms and conditions would arise at some point. Why is it necessary to discuss the employer's internal regulations together with the obligation regulated in SLC Section 46? The reason for this is that, according to Section 46, Subsection 2, the employer may provide information on certain essential matters by referring to the rules governing the employment relationship. It is true that internal regulations do not have to be assessed as rules governing the employment relationship but in practice, reference to them is common. Under Section 6:78 of the CC "contract terms which have not been individually negotiated shall become part of a contract only if they have previously been made available to the other party for perusal before the conclusion of the contract, and if the other party has accepted those terms".

It is therefore clear that there are several contradictions between the provisions of the SLC and the CC. First and foremost, because according to the legal nature of internal regulations, they are collective instructions, and thus their issuer orders something and therefore they cannot be classified as general contractual terms and conditions. Secondly, SLC Section 46 stipulates that employers have a duty to provide information about certain conditions that become part of the employment relationship. Thirdly, the time bands of the CC and SLC cannot be reconciled. This brings us to the intermediate conclusion that a specific labour law institution, which at first sight appears to offer the possibility of qualifying general contractual terms and conditions, causes more confusion than it offers solutions. The picture is not made any clearer by an analysis of the collective agreement in this regard.

On collective agreements as general contractual terms and conditions. In addition to the internal regulations, it is appropriate to examine whether the collective agreement can be general contractual terms and conditions.

This examination is necessary for the following reasons. The collective agreement is a contractual source with its normative content in labour law, which today fundamentally influences not only individual labour law, but also the development of labour law as a whole. A collective agreement, just like a contract of employment, operates within a specific legal framework. As I indicated in my comparative historical analysis, the development of the institution of the collective agreement, its incorporation into the contractual system of private law, and the economic and legal policy assessment of the collective agreement vary considerably from country to country. This is also reflected in the evolution of the capability to conclude of the collective agreement, the scope of the collective agreement and the hierarchy of collective agreements among themselves. Despite all these differences, the European Union has a certain tendency towards uniformity, encouraged by the free movement of employees and the existence of cross-border collective agreements. In this study, the role of collective agreements in domestic labour law must also be examined in light of international influences, but the analysis must be carried out in the context of the Hungarian legal environment. Attention must also be paid to domestic economic and legal policy conditions.

The analysis of the collective agreement as a legal institution containing general contractual terms and conditions must be divided into two parts. First, it is necessary to analyse whether the collective agreement has characteristics which make it compatible with the abstract concept of general contract terms and conditions. If the answer is in the affirmative, it is necessary to answer the question whether, in the context of a collective agreement and a contract of employment, it makes any sense to analyse the nature of general contract terms and conditions of a collective agreement. The latter issue is indeed necessary, since the collective agreement is an independent institution compared to the contract of employment and, as a standalone factor, has a significant impact on the content of the employment relationship. Since the purpose of collective agreements is discussed in detail in the following Chapter, we will only analyse the relationship between collective agreements and general contract terms and conditions here.

Our starting point is once again the concept of general contract terms and conditions. Under Section 6:77, Subsection 1 of the CC "standard contract terms mean contract terms which have been unilaterally drafted in advance by one of the parties for several transactions involving different parties, and which have not been individually negotiated by the parties". At first sight, this concept raises more doubts about the nature of collective agreements as general contractual terms than it does arguments in their favour. The first question in this regard is who is the one of the parties who sets out the conditions of the collective agreement 'unilaterally'. And, this is the second question: what does the 'one-sided' definition mean in this context?

Although collective agreements are contracts in legal terms, their purpose is essentially determined by their normative legal nature. The dual legal nature of collective agreements poses considerable challenges for legislation, judicature and jurisprudence alike.[208] Due to its contractual nature, a collective agreement is established by agreement between two parties, one of which may be considered the representative of the employees. This could also lead to the interpretation that the linking of the collective agreement to the general terms and conditions is conceptually excluded. But the formula is more complicated than that. The normativity of collective agreements can best be described by their transformative effect (see below) and their extension effect. This means that the collective agreement also determines the employment relationship of employees who are not members of the trade union (employee interest representation organisation) that concluded the collective agreement, or who are not members of any such organisation. In addition, the collective agreement also determines the future employment relationship of employees who were not in an employment relationship with the employer at the time the collective agreement was concluded. The situation is further complicated by the fact that in many countries the collective agreement system differs fundamentally from the Hungarian structure, which means that sectoral and occupational/professional collective agreements are of primary importance. The transformative effect

[208] See in this context KISS, György (2023b): A kollektív szerződés magánjogi természetének megítéléséről [On the Assessment of the Private Law Nature of Collective Agreement]. *Közjogi Szemle,* 16(4), 85–92.

(scope) of a collective agreement means that, in addition to the explicit content of the contract of employment, the collective agreement is capable of transforming the content of the employment relationship.

Behind collective agreements – in so far as they can be interpreted as agreements containing general terms and conditions – lies the problem of the conflict between individual and collective autonomy. In this regard, the starting point is that the legal basis for the employment relationship is the employment contract, not the collective agreement. However, this simple fact can take many forms. The contract of employment as a legal basis of employment relationship appears directly even where the legal norm also determines the mandatory content of the contract of employment, as for example in Hungarian labour law. Furthermore, it may happen that the collective agreement itself contains all the 'contractual' elements of the employment relationship which thereby become the content of the contract of employment because the employee became aware and accepted these terms and conditions before the conclusion of the contract of employment.

Before examining this problem in the context of the regulation and sources of Hungarian labour law, it is necessary to make a comment on the above. In this context, it must be emphasised that apart from the role of collective agreements in balancing interests in labour law, the problem discussed may have arisen for almost the same reasons as in the transaction of commercial law. Mass employment and standardisation of conditions were also inevitable in labour law. Furthermore, in addition to being one of the essential social policy achievements of modern labour law, the network of collective agreements soon had a detectable economic impact. It can also be said that the collective agreement has, in some respect, relatively autonomous network of interests, which while expressing the interests of individual employees, is partly different from them.

The original question is whether collective agreements can be considered general contract terms and conditions in Hungarian labour law, and if the answer is affirmative, whether this approach makes sense in practice. A combined assessment of the SLC and CC is required to answer this question. Section 276 of the SLC defines the parties of the collective agreement. Accordingly "collective agreements can be concluded by employers and employer interest groups with the authorisation of their members, as well as by trade unions or trade union federations”. It can be observed that the legislator only mentions authorisation of members – i.e. those represented – in the case of employer interest representatives. The legislator does not speak of the process of preparing the collective agreement, which is obviously the internal matter of the parties concluding the collective contract.

I have previously raised the question of who is the ‘business party’ (one of the parties) who ‘unilaterally’ determines the terms of the collective agreement. In the case of a collective agreement, the normative part of this agreement is applied by the employer, i.e. one of the parties to the collective agreement. Thus, the person who applies the terms and conditions contained in the collective agreement is not completely the same as the creator of a collective agreement. However, that circumstance is diluted from the point of view of the employee concerned, in particular if he is not a member of the trade union which concludes the collective agreement or of any trade union, or if he did not have an employment relationship with the employer concerned when the collective agreement was concluded.

The nature of general contract terms and conditions of a collective agreement appears to be confirmed by Section 279 of the SLC which states that “the effect of the provisions of the collective agreement governing employment relationships shall apply to all employees employed by the employer”. Strictly from the employee’s point of view, a collective agreement is a legal declaration whose content has not been drawn up by the employee, which has been clearly drafted for the purpose of concluding several contracts of employment and the terms of which have not been individually negotiated. However, with regard to general contractual terms and conditions, it is not incidental that contract terms that have not been individually negotiated shall become part of a “contract only if they have previously been made available to the other party for perusal before the conclusion of the contract, and if the other party has accepted those terms”.[209] This requirement is also

[209] CC Section 6:78, Subsection 1. And here I refer again to the discrepancy that may arise when Section 46 and the general contractual terms and conditions are combined. The employer may fulfil its obligation to provide information by referring to the collective agreement.

important from the point of view of classifying collective agreements as general contractual terms and conditions. In this regard, a single question can be phrased in two ways. What happens if the conditions laid down in the collective agreement have not been discussed individually with the employee before the conclusion of the contract of employment? To put this question another way: Does the normative nature of collective agreements also mean that they automatically are considered general contractual terms and conditions? If the answer is yes, CC Section 6:78 must also apply to collective agreements. If the answer is no, the collective agreement becomes part of the contract of employment without any further conditions, solely on the basis of the SLC. In this case, further examination is unnecessary, as the application of the collective agreement and the mechanism for its application are prescribed by legal norm.

However, the formula is not that simple. Thinking further about the possibilities, in the context of CC Section 6:78, it is worthwhile to take a look at the typical contract of employment formula, according to which "the provisions of the collective agreement in force at any time shall apply to the matters not covered here". Does this agreement formula comply with the CC requirement referred to? Or, are the terms of the collective agreement incorporated into the contract of employment simply by complying with the rules of the SLC alone?

In this context, reference should be made to FLC Section 38, Subsection 2 and 3. Accordingly, employers were obliged to provide assistance to employees for gaining access to the collective agreement. Furthermore, employers were obliged to supply a copy of the collective agreement to each employee whose job function involves the application of the provisions of such agreement, as well as to the members of the works council and the officials of the local trade union branch. I have given these examples because it is obvious that the answer to the question is by no means clear, and we can say that there is more doubt about classifying the collective agreement as general contract terms and conditions.

Another reason for doubt is the extension of the scope of collective agreements and their relative transformative power. The extending scope is important because it can be interpreted as replacing the requirement that general contract terms and conditions become part of the contract of employment. Although the SLC provides for the personal scope of collective agreements, if we examine the extension of scope together with the transformative power/effect, it is clear that the legislator also provides for the material scope of collective agreements. It is another question whether the parties may deviate from certain content elements of collective agreement in the contract of employment or not.

And this last sentence leads us to our second question – even though we did not give a clear answer to the first one. Namely, does it make sense in Hungarian labour law to classify the content of collective agreements as general contractual terms and conditions? Paradoxically, answering this question may bring us closer to answering the first question and understanding the problem as a whole. As an introduction, I refer again to the German legislation. Section 310, Subsection 1 of the BGB takes the collective agreement out of the content control *(allgemeine Vertragskongrolle)*. The theoretical justification for this is the aforementioned *Tarifhoheit.* More specific is the wording of the legislation that classifies the collective contract in this context as the same as the legal norm.[210] I would like to emphasise once again that this classification is only valid in this context. Incidentally, according to its legal nature, a collective agreement is a contract, and the general rules governing contracts apply to the examination of the validity of its content.[211] The Hungarian SLC defines the collective agreement as a rules-governed employment relationship, which may suggest that it is not correct to regard it as a legal statement that automatically establishes general contractual terms and conditions. However, this does not mean that the problem is solved.

The general contractual terms and conditions nature of collective agreements is further undermined by one circumstance. Namely, how can the CC's rule on unfair contract terms be interpreted in this context? It appears that the provisions of Section 6:102 of the CC would only be applicable to collective agreements on the basis of very artificial and strained

210 Section 310, Subsection 4: "Tarifverträge, Betriebs- und Dienstvereinbarungen stehen Rechtsvorschriften im Sinne von § 307 Abs. 3 gleich."

211 Nevertheless, for the various interpretations see Däubler 2006.

reasoning. According to Subsection 1, "a standard contract term shall be considered unfair if, contrary to the requirement of good faith and fair dealing, it causes a significant and unjustified imbalance in contractual rights and obligations to the detriment of the party entering into a contract with the person imposing such contract term". Does the content of a collective agreement that exploits the possibilities offered by dispositivity and contains deviations from the norm that are favourable to the employer constitute a breach of the requirements of good faith and fair dealing? From this point of view, it is reasonable to take into account Subsection 2, which states that "the unfair nature of a standard contract term shall be assessed, taking into account the nature of the services for which the contract was concluded and by referring, at the time of the conclusion of the contract, to all the circumstances leading to the conclusion of the contract and to all the other terms of the contract or of another contract on which it is dependent". That provision is of particular importance because the content of the collective agreement is drawn up with the participation of the trade union representing the interests of the employees, and although the individual employees did not intervene in the definition of the content, that circumstance cannot be disregarded. Moreover, does such a collective agreement implement the provision of CC Section 6:102 that it creates a significant and unjustified imbalance in the contractual rights and obligations to the detriment of the contracting party (by the contracting party meaning the employee)? And finally, another thought-provoking provision that casts doubt on the classification of collective agreements as general terms and conditions. Under Section 6:102, Subsection 4 of the CC "the standard contract terms defined by legislation, or established in accordance with the provisions of the relevant legislation shall not be deemed unfair".

Therefore, even if we accept in principle that a collective agreement is general contractual terms and conditions, this assessment itself does not provide a solution in cases where unfair contractual terms are involved in this context. It can also be said that there is no general validity–invalidity system of collective agreements in Hungarian labour law. In summary, it can be concluded that accepting the collective contract as general contract terms and conditions would cause a fundamental disturbance in the Hungarian labour law, which already entails a number of unresolved problems.

Is the contract of employment a consumer contract?

One further issue needs to be discussed with regard to the application of general contract terms and conditions in labour law. Namely, is the employee considered a consumer, and is the contract of employment a consumer contract? This problem arises for different reasons in each legal system, where the application of the general contract terms and conditions to the labour law is recognised at all. In this respect, I have to refer again to German law, where the BGB treats the employee as a consumer, but the academic literature is nevertheless rather divided on this issue.[212]

Without going into detail, we will ask what justifies the highlighting of this problem in Hungarian labour law. As early as 2018, György Nádas, in the title of his study on the applicability of general contract terms and conditions in labour law, directly formulated the question: Is the employee a consumer?[213] In his view, "the rules on consumer protection in civil law are related to the rules on protection which promote a balance between labour law, i.e. protective measures are not far removed from civil law thinking".[214] After also criticising the solution of Section 31 of the SLC,

[212] See Däubler et al. 2021: 23–26; Lorenz 2003: 205; BAG 25.5.2005, 5 AZR 572/04, NZA 2005 1111–1115; BverfG 23.11.2006, 1 BvR 1909/06 (Die Verfassungsbeschwerde betrifft die Wirksamkeit und Auslegung einer vom Arbeitgeber vorformulierten Vereinbarung von Arbeit auf Abruf).

[213] Nádas, György (2018): Általános szerződési feltételek a munkajogban, fogyasztó-e a munkavállaló? [General Contractual Terms and Conditions in Labour Law, Is the Employee a Consumer?] In Szikora, Veronika – Árva, Zsuzsanna (eds.): *A fogyasztók védelmének új irányai és kihívásai a XXI. században* [New Directions and Challenges for Consumer Protection in the 21st Century]. Debrecen: Debreceni Egyetem Állam- és Jogtudományi Kar, 313–327.

[214] Nádas 2018: 315. Similarly Jakab, Nóra (2015): A munkajog és polgári jog kapcsolata a jogpolitika tükrében [The Relationship between Labour Law and Civil Law in the Context of Legal Policy]. *Magyar Jog,* 62(1), 18–19.

namely the highlighting of certain rules of civil law and their fragmented application in the SLC, he approaches the problem by analysing certain legal declarations which can be classified as general contract terms and conditions. Nádas also examines the classification of the normative part of the collective agreement as general contract terms and conditions and does not seem to consider the system of labour law protection against pre-established conditions to be sufficient. This is indicated by the following statement: "The new Labour Code does not take into account the fact that many companies, especially larger economic entities, conclude employment contracts using blanket contracts commonly employed in economic life, which are similar to the blanket contracts used by companies providing economic or financial insurance services on an industrial or commercial basis for their lay partners, the consumers."[215]

Nádas's position is later expressed more clearly with regard to the consumer status of employees.[216] He contends that the SLC does not regard the employee as a consumer and the contract of employment as a consumer contract. This is reflected in the wording of Section 31 of the SLC, which does not require the application of the rules of CC Section 6:103, or 6:105.[217] In his view, this would be necessary because, if the general contract terms and conditions are unfair to the employee as a consumer, "this is not a ground for contestation but a ground for nullity, which is significant in that there is no time limit for invoking it".[218]

Nádas's criticism and argumentation raise a number of issues. I summarise my position below. First, I examine the relationship between the legal status of the employee – which expresses his or her activity – and the legal status of the consumer. I shall then attempt to explore what the invalidity system of the SLC and the CC means for the assessment of unfair contractual terms.

[215] Nádas 2018: 320. The author refers to Jakab, Nóra – Prugberger, Tamás (2014): Ellentétek és kapcsolatok a magyar munkajogi, és polgári jogi szabályozás között [Contrasts and Connections between Hungarian Labour Law and Civil Law Regulations]. *Jogtudományi Közlöny,* 69(10), 477–485.

[216] Nádas–Orosz 2024: 1–10.

[217] Nádas–Orosz 2024: 3.

[218] Nádas–Orosz 2024: 3.

Lastly, it is necessary to examine whether there is an 'interest to be protected' in labour law, which controls not only the content of a certain contract of employment but also the system of preconditions which establishes it – with particular regard to the consumer's entity.

As far as the first question is concerned, the employee's activity consists in performing work for another party in return for consideration, with the manner of performance being determined within the framework of the agreement by the other party, i.e. the recipient of the service, the employer. Pursuant to CC Section 8:1, point 3, "'consumer' shall mean any natural person acting for purposes which are outside his trade, business or profession". Just as a reminder, under Section 685 d of the former CC, "'consumer' shall mean any person who is a party to a contract concluded for reasons other than economic or professional activities". In this context, it is appropriate to refer again to the concept of German law. Section 13 of the BGB provides the following definition: "A consumer is any natural person who enters into a legal transaction for purposes that are predominantly neither commercial nor related to their independent professional or business activity."[219] In addition to the fact that the current CC differs in content from the previous CC wording, in my opinion the difference between German and Hungarian law is particularly significant. This is supported by the fact that, under German law, the above concept of consumer can be considered applicable without any particular reservations to the activities of an employee, since he or she does not engage in commercial or business activities and is therefore not a self-employed person. However, they also point out that there is some uncertainty in that wording, since it refers to an activity aimed at obtaining a product or a service in the traditional sense of 'consumer'.[220] Nevertheless, according to the prevailing view, this does

[219] "Verbraucher ist jede natürliche Person, die ein Rechtsgeschäft zu Zwecken abschließt, die überwiegend weder ihrer gewerblichen noch ihrer selbständigen beruflichen Tätigkeit zugerechnet werden können."

[220] DEINERT, Olaf (2008): Fünf Jahre AGB-Kontrolle im Arbeitsrecht. *Arbeitsrecht im Betrieb,* 29(10), 217–224; JUNKER, Abbo (2009): Grundlegende Weichenstellungen der AGB-Kontrolle von Arbeitsverträgen. In BAUER, Jobst-Hubertus et al. (eds.): *Festschrift für Herbert Bruchner zum 70. Geburtstag.* München: Verlag C. H. Beck, 369–384.

not cause any inconsistency between the text of the law and its everyday interpretation of this concept. It is argued by many that the legislature has the power to regulate the use of words within a reasonable framework. It can also do so because it does not thereby restrict that activity or designation to a specific legal transaction.[221] This statement led to a change in concept, the essence of which is that the separation of consumer and employee protection institutions, which previously belonged to two different systems, is no longer tenable today.[222] Therefore, the idea that consumer and employee protection belonged to different systems may have been true in the past, but it is no longer valid since the law changed in 2000 and 2001.

Why has no such change been made to Hungarian labour law? Apart from the time difference between the entry into force of the SLC and the current CC, the reasons are mainly due to the cautiousness and uncertainty of the labour legislation. The relationship between the SLC and the CC at the regulatory level is not at all reassuring and completed, as I wrote earlier at the beginning of this chapter. There is no doubt that the wording of CC Section 8:1, point 3 does not necessarily encourage labour law legislators to refer to it as a reference point with regard to the consumer status of employees. It may even suggest that the employee is not currently considered a consumer. Further uncertainty is caused by the fact that the invalidity systems of the SLC and CC are only identical at the highest level of abstraction, differing in certain facts and details.

In relation to this question, it is appropriate to analyse the definitions contained in Directive 2011/83/EU of the European Parliament and of the Council. According to this, 'consumer' means any natural person who, in contracts covered by this Directive, "is acting for purposes which are outside his trade, business, craft or profession". Teleological, but we could also say that with a forced, artificial interpretation, even employees could be classified as consumers, but it is not difficult to see that the Directive is not about labour law. This is expressed in point 8 of the preamble to the Directive, which states: "The regulatory aspects to be harmonised should only concern contracts concluded between traders and consumers. Therefore, this Directive should

221 Däubler et al. 2021: 25.

222 Däubler et al. 2021: 26.

not affect national law in the area of contracts relating to employment, contracts relating to succession rights, contracts relating to family law and contracts relating to the incorporation and organisation of companies or partnership agreements". When analysing the different texts referred to and taking into account the purpose and content of the legislation referred to, the placement of the contract of employment, especially the relationship between the contract of employment and the CC, shows that the employee's activities fall far short of the traditional concept of a consumer, but that it nonetheless requires some kind of protection.

For the time being, let us disregard what the protection should be or what it should look like, and start from the fact that the Hungarian legislator in Section 31 of the SLC refers to Sections 6:77 and 6:78 and 6:103, but omits Sections 6:79 and 6:103. As a result, if the contract of employment is classified as a contract with general contract terms and conditions, the employee may exercise the right to avoid, but not in accordance with the provisions of civil law but by labour law regulation. This means that the provisions of Section 28 of the SLC apply instead of Section 6:89 of the CC. Thus, the right to avoid is not one year from the date of conclusion of the contract, but thirty days, but this short period is also linked to completely different situations than the conclusion of the contract.[223] Simply because the labour law invalidity system did not actually take into account the possibility of applying the general contract terms and conditions and the consequences.

Before giving the final answer, it is at least necessary to estimate that there is a legal and employment policy interest that would treat the employee as a consumer in Hungarian labour law, along with all its legal consequences. In order for this question to arise at all, the regulation of general contractual terms and conditions would have to be amended in Hungarian labour law. The half-constructed, almost thrown-away, random reference did not solve anything. In my view, the current employment policy and labour law

[223] Under Section 28, Subsection 7: "The time limit for bringing action for avoidance shall be thirty days, commencing upon recognition of the error or upon cessation of duress. The statute of limitations shall apply mutatis mutandis to the time limit for bringing action for avoidance, with the exception that the right to avoidance shall terminate after six months."

regulation is not geared to providing the employee with the protection that comes with being a consumer, and this is in fact independent of whether the employee is formally called a consumer or not. However, it has to be emphasised why it is important to devote so much time to the incomplete nature of the employment contract and why it is necessary to deal in detail with the relationship between the employment contract and the relational contract, as well as the general terms and conditions. The reason for this is that the contract of employment is a long-term contract concluded between 'non-equivalent' parties which has to use specific means to maintain the balance between the parties in order to maintain contractuality.

In this structure, the three factors examined have their own roles and significance. A contract of employment as an incomplete contract can ensure flexibility, but it can also easily lead to one party having too much power. A contract of employment as a relational contract can ensure priority for maintaining the employment relationship through cooperation between the parties based on mutual trust and consideration of each other's interests. Finally, a contract of employment as a contract concluded under general contractual terms and conditions may ensure general control over the contract of employment.

INTERMEDIATE CONCLUSIONS

The determining starting point of this study is that labour law is an area of contract law. The fundamental legal institution of labour law is the contract of employment, which is part of the general private law contractual system. Consequently, a contract of employment is also covered by the freedom of contract, the restriction of which is justified only to the extent that the contract of employment serves its purpose. Since subordination between the parties is a significant element of the employment relationship, the imbalance of power that may arise from this can be counteracted by the balancing function of the collective agreement and the considered intervention of legal norms.

As far as the contract of employment is concerned, it is an incomplete contract by its nature, creating a continuous legal relationship, suitable for establishing cooperation that complies with the principles of relational contracts and is capable of accommodating the additional requirements associated with the application of general terms and conditions. However, this requires the legislator to decide where the employment contract fits into this legal system. It may be decided that contract of employment is a part of the private law system, sharing the same legal entity, with the necessary exceptions. It may also be decided that a contract of employment is a *sui generis* contract within private law. In this case, however, the specific doctrine of the contract of employment must be worked out and the points of connection with the general contract system and the areas of deviation must be determined.

The Hungarian labour law in force has not made any decisions but has left the contract of employment somewhere in the middle. In this chapter, I have attempted to present the anomalies that inevitably arise from this situation. The end result is that the contract of employment cannot fulfil its purpose, is not flexible, has no scope for cooperation, and lacks a comprehensive content control mechanism.

Chapter IV

PURPOSE AND OPERATION OF THE COLLECTIVE AGREEMENT IN THE HUNGARIAN LABOUR LAW

INTRODUCTION

In exploring the purpose of the collective agreement and its enforcement in the regulatory environment of Hungarian labour law, I follow the line of reasoning presented in this study so far. In accordance with my previously stated opinion, my starting point is that the *differentia specifica* of the labour law system is the collective agreement as a normative contractual source. As a result, the collective agreement is the most important part of the source of labour law, serving as a link between contract of employment and the legal norm. The significance of this is given by the following factors. Labour law is a 'contractual' law, and the basis of employment relationship is the contract of employment.

The contract of employment is basically governed by the general principles and rules of the contract, but cannot be ignored that the contract of employment is not concluded between 'homogenous' parties. By virtue of her/his status, the employee is not involved in economic transactions in which the employer is a part due to its other legal status. This imbalance can be equalised or at least make it acceptable at the level of the safe transaction processing in two ways. One is state intervention through legislation and the other is the enforcement of collective autonomy, the most important institution of which is the collective agreement. State intervention must be limited, essentially protective in nature, and may only regulate elements that are normally subject to autonomous agreement between the parties to the employment relationship, where this is particularly justified. At first sight, this seems obvious, but it is rather difficult to distinguish between legal norms that explicitly protect the legal status of employees and those that restrict contractual freedom for other economic and social reasons (see the next Chapter).

The dual legal nature of the collective agreement, as described above, makes it suitable for fulfilling its fundamental purpose, namely ensure a balance between the parties. In addition to the contractual and normative nature of the collective agreement, attention must be drawn to an obvious feature, which is often neglected, despite being self-evident. And this is collectivity. As a result, collective agreements have gone beyond the employer level, with agreements being concluded at sectoral and, in some cases, national professional levels. Thus, this special source of labour law, beyond its limited labour law purposes, can also affect the economic and social policy of a certain region or the country.

The highly complex structure of the collective agreement, its specific legal nature, the different levels of agreements, the distinction between legitimacy and representativeness, and the conflict of individual and collective autonomy make it quite difficult to manage this institution. The collective agreement cannot be investigated only from the perspective of legal dogmatics, and its existence, purpose and function also requires a legal policy analysis. If this does not happen, the ability to enter into a collective agreement, the content of it, its legal nature, its scope, its validity, etc., cannot be understood. In the following, both the legal dogmatic and the legal policy analysis are carried out on the basis of the Hungarian labour law environment. The first stage of the study explores the emergence and acceptance of the collective agreement in Hungarian labour law after the change of regime.

THE COLLECTIVE AGREEMENT IN THE HUNGARIAN LABOUR LAW AFTER THE CHANGE OF REGIME

Considering the development of Hungarian labour law in the decade before the change of regime, it can be concluded that despite all efforts, the concept of collective labour law and thus its institutional system failed to take root. It may therefore seem surprising to outside observers that after the change of regime, the institutionalised dual, rather complex system of collective labour law was created. The comparative analysis of the system of collective labour law is beyond the scope of this study,[1] so I will only highlight points of relevance from the point of view of Hungarian labour law. Perhaps the most important statement in this regard may be that there is no unified, so-called model solution; each system is based on its own economic, social foundations, legal traditions, taking into account, among other things, the balance of power between social partners.

Examining the domestic solution, it is not difficult to discover some kind of 'softened' adoption of the German structure of collective labour law. The strongest driving force of social partnership in German labour law is the recognition of freedom of association and so-called *Tarifautonomie.*[2] The right of coalition based on the freedom of association means that, in addition to the rights already acquired by one community, another community has a fundamental right to use certain legal procedures. The freedom to form coalitions is not an end in itself, it is intended for collective bargaining, which, however, cannot always be secured by peaceful negotiations, which is why this part of collective labour law is associated with the term legal confrontation.[3] Of course, acknowledgement of such an opportunity in the development of general law is a certain fracture, because it is a basic function of all legal orders to prevent the return to violence.[4]

The structure of collective labour law also confirms that it is not sufficient to use only one legal instrument to maintain a balance of power and thus

1 See among others more recently TER HAAR, Beryl – KUN, Attila eds. (2021): *EU Collective Labour Law.* Cheltenham: Edward Elgar.

2 GAMILLSCHEG, Franz (1982): Tarifverträge über die Organisation der Betriebsverfassung. In HERSCHEL, Wilhelm – HANAU, Peter (eds.): *Festschrift für Wilhelm Herschel zum 85. Geburtstag.* München: Verlag C. H. Beck, 156–158.

3 See details here PICKER, Eduard (1988): *Die Regelung „der Arbeits- und Wirtschaftsbedingungen" – Vertragsprinzip oder Kampfprinzip?* Köln: Carl Heymanss Verlag, 23–28; MAIR, Andreas (2008): *Arbeitskampf und Arbeitsvertrag. Zum Verhältnis von kollektivem Kampf und individualrechtlicher Bindung.* Wien – New York: Springer.

4 PICKER 1988.

meet employees' protection needs.[5] For this reason in German law in addition to the so-called *koalitions-tarifliches System* the institutional system of *Betriebsverfassungsrecht* was established.[6] The legal institution of *Betriebsverfassung (Betriebsrat, works council)* is not an organisation based on voluntary coalition freedom, but, where appropriate, a specific system of employee representation, that is independent of coalitions or established alongside them, as appropriate. Consequently, their purpose is not to influence the future development of working conditions by coalition-based – or even 'combative' – means, but rather to influence employers' decisions within the framework of the law and through legal means.[7] This applies to the employer's decisions on economic, personnel and social matters, and it is important to note that the further a decision is from the institutions of direct management, the stronger the rights of the most important institution of *Betriebsverfassung,* the works council, become.[8] The essential feature of a dual-structured collective labour law is, at least in principle, to divide the two functions. This is supported by many international documents.[9] In practice, this sometimes suffers from fracture, some functions becoming blurred, but this does not cause any fundamental malfunction.

What could have motivated the Hungarian legislator's decision to opt for the outlined dual model of collective labour law? The reasoning of the FLC highlights "the importance of the conciliation of interests in addition to the collective agreement of the parties, where special emphasis should be placed onto the techniques of conflicts prevention and conciliation of interests [...].

5 Richardi, Reinhard – Reuter, Dieter (1989): *J. von Staudingers Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen.* (Staudinger–Richardi 1989, Vorbem. zu § 611). Berlin: J. Schweitzer Verlag – Walter de Gruyter, RdNr. 832–834.

6 Von Hoyningen-Huene, Gerrick (1993): Betriebsverfassungsrecht. In Richardi, Reinhard – Wlotzke, Otfried (eds.): *Münchener Handbuch zum Arbeitsrecht. Band III.* München: Verlag C. H. Beck, 740–857; Fitting, Karl (2004): *Betriebsverfassungsgesetz.* München: Verlag Franz Vahlen.

7 Richardi, Reinhard (1974): Arbeitsrecht und Zivilrecht. *Zeitschrift für Arbeitsrecht,* 5(1), 9–11.

8 Richardi–Reuter 1989: RdNr. 832–834.

9 See particularly Convention 98. Right to Organise and Collective Bargaining Convention, 1949.

In this context, so-called 'participation' forums for employees can play an important role". In line with advanced market economies, "employee participation rights should be consistently separated from forms of representation and protection of interests based on the rights of association". This separation, however, did not succeed, could not succeed. While the German and, despite some differences, somewhat similar Austrian[10] dual collective labour law model had economic and legal policy reasons, in Hungarian labour law this construct was intended to solve the awkward problem of the ability to conclude collective agreements. Namely, in the period following the change of regime, it would have been inappropriate to demand that Hungarian trade unions comply with the competency requirements for concluding collective agreements that were common in West European countries. During this period, the assets, membership of unions, or so-called pressure, could not be considered a realistic reference point.

Therefore, the legislator resorted to a special solution. Section 32 of the FLC merely states that the trade union which is independent of the other party in respect of its interest, representation activities shall be entitled to conclude a collective agreement. This provision does not itself reveal anything about the capacity to conclude collective agreement. Section 33 regulated this in detail, but only in the case of collective agreements concluded at employer level. This rule is cogent in terms of both its content and the order of possibilities. Subsection 1 stated that "one collective agreement may be concluded with an employer". According to this provision, the trade union whose candidates have obtained more than half of the votes cast in the works council elections is entitled to conclude a collective agreement with the employer. In connection with this solution, attention must be drawn to a serious contradiction at the beginning of the analysis.

Apart from the fact that the institutional system of employee participation rights and the so-called coalition bargaining system should not be confused

[10] Floretta, Hans – Strasser, Rudolf (1988): *Arbeitsverfassungsgesetz.* Wien: Manz Verlag; Floretta, Hans – Spielbücher, Karl – Strasser, Rudolf (1990): *Arbeitsrecht II. Kollektives Arbeitsrecht.* Wien: Manz Verlag; Brameshuber, Elisabeth – Tomandl, Theodor eds. (2024): *ArbVG. Arbeitsverfassungsgesetz.* Wien: Verlag Österreich.

with each other in principle, the whole trouble of the Hungarian solution was well reflected in Section 49 of the FLC. This section regulated the nomination of candidates for works council elections. According to Subsection 3, a trade union with representation at the employer "may independently nominate a candidate from among its members". Under Subsection 4, "a candidate may be nominated by at least 10% of the employees eligible to vote or at least by fifty employees eligible to vote". The structure and order of the paragraphs reveal much about the legislator's intentions. It is not so difficult to discover that the trade union's *raison d'être* was to have works council elections, and that their candidates get the most votes, because only this would guarantee them the ability to conclude collective agreements. Without going into detail, it can be said that this created some kind of latent personal union between the trade union and the works council, which has repeatedly caused functional confusion in the relationship between the trade union and the works council.

At the same time, the legislator had to take into account trade union pluralism, which had to be addressed in some way when determining the capacity to conclude collective agreements. In this regard, the legislator has imposed a so-called coalition constraint in order to create tariff unity *(Tarifeinheit)*. According to Section 33, Subsection 3, if more than one trade union has representation at an employer, the collective agreement may be concluded jointly by all trade unions. The condition for this is that the candidates of these trade unions must jointly obtain more than half of the votes cast in the works council election. If it is still not possible to conclude a collective agreement, those trade unions whose candidates individually obtained 10% of the votes cast in the works council elections and together obtained more than half of the votes cast may conclude a collective agreement.[11] Finally, if this does not produce results, of the several trade unions, only the trade union whose candidates have obtained more than 65% of the votes cast in the works council elections may conclude a collective agreement with the employer. The legislator also took into account that there

11 FLC Section 33, Subsection 4.

would be no trade union that would meet the above requirements. In this case, it stipulates that collective bargaining negotiations may be conducted, but the outcome must be approved by the employees through a vote.

Despite artificially created criteria for ability to conclude collective agreements, the system/network of collective agreements has not been developed. The 1999 amendment to the FLC sought to change this situation, according to which, if there is no trade union representing employees at the employer, the employer and the works council may agree on matters falling within the normative part of the collective agreement.[12] Accordingly, the works council may agree with the employer on all matters concerning the rights and obligations arising from the employment relationship, the manner in which they are exercised or fulfilled and the rules of procedure applicable to them. There was only one exception to this rule, namely that the employer and the works council might not agree on wages. Because the most important element of the normative part of the collective agreement is obviously the agreement on tariff wages, wage increases, which, in the dualistic structure of collective labour law, is the responsibility of the trade union, simply because in this model the trade union has the tools that make it a genuine negotiating partner – under appropriate conditions. The reason for this amendment was clear. In 1999, the content and nature of the regulation of the FLC changed significantly. The essence of this was that, instead of the relative dispositivity previously established in FLC Section 13 (see below) the legislator created a number of bilateral dispositive rules, with particular regard to the regulation of working time. These derogations could have been included in collective agreements, but they were missing from the vast majority of employers.

This solution was flawed in several respects, even under certain circumstances. First and foremost, because the blurring of the elements of collective labour law made it likely that where there were no trade unions, no works councils would be formed either. On the other hand, these agreements were mostly formal, since the works council could not resort to any means

12 The FLC was amended by Act LVI of 1999.

of pressure, such as a strike, by which it could have achieved compliance with the agreement in the longer term or a modification of the agreement in favour of the employees.

What did all this mean for the place of the collective agreement in the system of sources of labour law? The answer lies in the position of the collective agreement with the contract of employment and the legal norm. Under Section 13, Subsection 3 of the FLC, a collective agreement may deviate from the rules contained in Part Three (Employment Relations) of the Act, provided that it provides for more favourable rules for the employee. As I mentioned earlier, according to the FLC's reasoning, the withdrawal of state intervention means that the legal norm only regulates the so-called minimum standards of working conditions, and favourable conditions will be settled by the parties in their collective agreements. This starting point is such a fatal mistake that it still defines the legal source system of labour law. In other words, to this day, the collective contractual source element of Hungarian labour law has not developed. Unfortunately, the legislator's assumption failed to take economic and social realities into account. As a result of the change of regime, the trade unions collapsed, their assets were divided, they were not in a position to force the employers to enter into a collective agreement. The employers of the Hungarian economy under privatisation did not see any reason for concluding the collective agreement under the terms and conditions of the FLC.

In summary, it can be said that the legislator established the FLC collective bargaining system without any particular legal tradition or foundations, and this has been welcomed by the participants with a certain degree of enthusiasm. The trade unions expected the legislator – the relevant government – to strengthen collective agreements, although employers did not openly oppose, but most of the collective agreements contained meaningless content. Even this barely functioning system has caused some tension, precisely where the different levels of collective agreements have appeared. According to Section 41 of the FLC, a collective agreement of narrower scope shall only deviate from one with a broader scope in so far as it contains more favourable regulations for the employees. In some areas – for example in the energy sector – sector-level collective agreements covering several employers have also been concluded.[13] In addition, employers in the sector also had the opportunity to conclude collective agreements. These companies were state-owned prior to privatisation, and the application of more favourable conditions for employees in terms of wages also had an impact on the state budget. As privatisation also affected some segments of the energy sector during this period, the lack of bilateral dispositivity of collective agreements in one employer was quite sensitive to the efficiency of the sector and caused certain wage tensions. Nevertheless, the legislator has attempted to keep this system alive on several occasions, as have various institutions. The establishment of the Sectoral Dialogue Committees in 2009 and the regulation of collective agreements that can be concluded in these committees can be considered such an experiment.[14] In these committees, sectoral trade unions could conclude collective agreements with employers' representative bodies according to a rather complicated system.[15] It would be a mistake to underestimate their importance and to regard the legislator's efforts to strengthen the system of collective relationships as unnecessary. As the country had a left-wing government for twelve years in the period before 2010, the lack of these aspirations would have been unacceptable on ideological grounds. In any event, the regression of the legal norm, the decline in state intervention can be assessed primarily in relation to the situation prior to the change of regime, rather than in relation to the conditions of a market economy based on competition.

[13] This does not include collective agreements extended by administrative decisions, that did not matter anyway. See FLC Section 34–36.

[14] Act LXXIV of 2009 on the Sectoral Dialogue Committees. See also Act XXXVIII of 2009 on amendments to laws concerning the requirement for ordered labour relations and other measures necessary from a labour perspective. See a more recent assessment in PETROVICS, Zoltán (2017): Az ágazati párbeszéd bizottságok és az Ágazati Részvételt Megállapító Bizottság [Sectoral Dialogue Committees and the Committee Determining the Sectoral Participation]. *Munkajog*, 1(1), 72–73; LÁSZLÓ, Gyula – SIPOS, Norbert (2023): *Társadalmi párbeszéd, avagy a munkaügyi kapcsolatok makroszintje. Funkciók és szereplők, európai modellek és a hazai munkaügyi kapcsolatok makroszintje* [Social Dialogue, or the Macro Level of Labour Relationships. Functions and Actors, European Models and Macro Levels of Domestic Labour Relations]. Budapest: Akadémiai Kiadó.

[15] Section 14–18 of Act LXXIV of 2009 on the Sectoral Dialogue Committees.

THE COLLECTIVE AGREEMENT IN THE CURRENT HUNGARIAN LABOUR LAW – GENERAL OVERVIEW

There was no legislative compulsion to create the SLC, despite the fact that some of the institutions of labour law did not operate, or only functioned formally due to several dogmatic and legal policy errors of the FLC. However, during its existence, the FLC has undergone a number of changes in order to meet economic requirements and social needs for about two decades. The change of government in 2010 also meant a change of ideological, economic and employment policy on the part of the government, and the new labour code, to be created as part of the Széll Kálmán Plan, wanted to promote the flexibility of employment. However, the question inevitably arises as to how flexible employment and, accordingly, labour law regulation has become.[16] This question is justified if only because the change in political attitude has moved toward strong centralisation in almost all areas of public life, which is also clearly reflected in the structural organisation of the SLC. It may seem like a formal change that collective labour law is located at the end of the law, but it is already a clear indication that while the works council was given detailed and largely unnecessary, casuistic regulation, the legislator has only recorded the norms necessary for the institution of the collective agreement. Beyond the fact that this solution unambiguously expressed the legislative intent, failure to comply with the provisions subsequently caused numerous legal dogmatical problems and tensions.

Perhaps the greatest contradiction in labour law legislation is that the SLC has made the most significant change compared to the previous law precisely in opening up the possibilities for collective agreements in that it has allowed collective agreements to deviate from legal norms in both directions. The SLC's reasoning in this regard emphasises that the previous

[16] See this in other respects in Gyulavári, Tamás – Kártyás, Gábor (2015): Az új Munka Törvénykönyve – A világ legrugalmasabb munkajogi szabályozása? [The New Labour Code – The World's Most Flexible Labour Law Regulation?] In Horváth, István (ed.): *Tisztelgés: Ünnepi tanulmányok Dr. Hágelmayer Istvánné születésnapjára* [Tribute: Festive Studies on the Birthday of Dr. Istvánné Hágelmayer]. Budapest: ELTE Eötvös Kiadó, 127–146.

legislation – relative dispositivity, i.e. a solution that generally allows for deviations from the law only in favour of the employee – had an adverse effect on the autonomous regulation of the labour market. The reasoning also notes that the SLC does not lay down minimum requirements from which collective agreements may only deviate in favour of employees, but rather defines standards that guarantee the interests of the parties, primarily those of employees, from which collective agreements may deviate in favour of employees, but also to their detriment. The SLC strives to maintain a balance between the parties with collective agreements being an essential tool for this purpose.[17] It can be stated without exaggeration – especially considering the events that have transpired since the SLC came into force – that the legislator did not in fact have such an intention. However, assuming that such an intention did exist, it was rather belated and failed to take into account the realities, namely the almost complete absence of the conditions necessary for the conclusion and effective operation of collective agreements.

It follows from the foregoing that, in order to determine the purpose of a collective agreement in domestic labour law, it is necessary first of all to determine its place in the sources of labour law. I will carry out this test in two steps. First, I will examine how collective agreements fit into the SLC. Based on this, I will then analyse the possibilities and limitations of collective agreements.

THE COLLECTIVE AGREEMENT IN THE SYSTEM OF THE SLC

At the beginning of the process of creating the SLC, the question arose of whether to apply a unified labour code versus more different labour acts. The latter was supported by the argument that an independent act on collective labour law would highlight the importance of this area of labour law, would not disappear by the other institutions of labour law, and thus could have a stronger impact on the individual labour relationship. This argument

17 Reasoning, Introductory text for the Chapter of Collective Agreement (Chapter XXII).

was rejected by the trade unions in particular, who considered that their rights were being undermined by such a solution and considered it a step backwards. Those who argued for the unified code argued for the traditions of labour law so far, saying that "nowadays the single code is a value to be retained". It soon became clear that the political decision-maker who had commissioned the expert proposal did not prefer the drafting of two separate laws either. During the course of the work it became clear also that the legislator intended the collective labour law to have at most a formal role, which was expressed in the already mentioned structure of the SLC. What does this mean for the collective agreement?

In a slight simplification, the SLC can be described as a specific 'Act on Contract of Employment' governing individual labour law, which limits the contract of employment – the autonomy of the parties – by a number of cogent legal norms (see this in the next Chapter). According to Berke, the SLC "undoubtedly has the shortcoming that it does not clearly (specifically) define the application of civil law in collective labour law, especially in the law of collective agreements. As a result, the question inevitably arises as to whether the rules of civil law are (in particular) applicable to collective agreements".[18] He refers to the legal practice prior to the entry into force of the SLC, in so far as – in the absence of a provision to that effect in the FLC – it established the principle that, in relation to the application of civil law rules, "if a civil law principle or norm is not contrary to the principles of labour law, it shall apply in labour law". According to his interpretation, this principle of labour law should continue to apply to collective agreements even after the SLC enters into force, one reason being that the SLC does not contain any provisions referring to this matter. Furthermore, "although the collective agreement has normative content, it (also) carries the characteristics of contract-based obligations, and, as such, is an agreement referred to in Part I, Chapter II of the SLC and in Section 14 of the SLC".[19]

In my view, the qualification of the situation is not that simple. Not only because the legislator's reference to the application of the CC rules is contradictory, even random, as I have explained in the previous chapter of

[18] Bankó et al. 2019: 759.

[19] Bankó et al. 2019: 760.

this study in the context of contract of employment. It is also important to note that the content of Chapter II of Part I of the SLC does not provide clear guidance on its material scope. In this context, it is appropriate to refer to SLC Section 14. Under this provision, "the agreement governed by this Act shall be concluded by mutual and consistent legal declarations of the parties". The reasoning emphasises that the act considers the mutual and unanimous declaration of the parties a typical and general legal form of legal rights and obligations related to employment relationship.

This wording could even suggest that Section 14 of the SLC automatically considers collective agreements to be subject to its provisions. In this context, it is necessary to refer to the concept of 'obligation' *(kötelem)* and 'contract' of the CC. Under Section 6:1 of the CC "obligation means a commitment to perform a service and an entitlement to demand performance of a service". The CC's reasoning emphasises that the legislator defines the essence of the 'obligation', expressing that the 'obligation' is a broader category than the contract. 'Obligation' is a collective term for civil law relationships of a relative nature that give rise to an 'obligation' to perform a service and a right to demand the performance of that service. According to Section 6:58 of the CC "a contract is concluded upon the mutual and congruent expression of the parties", i.e. an agreement intended to give rise to obligations to perform services and to entitlements to demand services. Although the CC uses the term 'agreement', it does so in a general sense, as a synonym for contract, and does not assign a specific concept to it.

Nevertheless, if one analyses the institutions set out in Chapter II and IV of Part One of the SLC (legal statement, invalidity), as well as the Reasoning for the Act, the reader gets a rather ambivalent impression. Although Section 14 appears to cover all agreements, whether individual or collective, an examination of the certain institutions suggests that this section actually applies to individual agreements. Perhaps the most obvious example of this is the regulation of the legal institution of invalidity.[20] Based on the comparison of the SLC's already analysed Section 31 and the rules for the invalidity of legal declarations, it can be concluded that there

20 SLC Section 27–30.

is no comprehensive validity or invalidity doctrine in terms of collective agreement in Hungarian labour law.

The following conclusion can be drawn in connection with the situation of the collective agreement in the SLC. The legislator intended a significant role to collective agreement at the level of legal propaganda and regulated the relationship between legal norm and collective agreement accordingly. More specifically, this meant that the legislator had abandoned the deviation with the principle of relative dispositivity, i.e. the application of deviations exclusively in favour of the employee. This has sparked widespread criticism of the legislator,[21] but in fact, this is not what deserves criticism. Namely, the legal nature and content of the SLC has not changed substantially from the previous Code (FLC), and the legislator currently regulates in detail a number of areas that are subject to agreement between the parties. Furthermore, the rules governing collective agreement, the placement of the collective agreement in the SLC, and the legal practice related to it, reflects that it is quite an alien body in Hungarian labour law. We could also say that although perhaps the most important legal institution of modern labour law appears in the SLC, but if we try to explore its content and functioning in more depth, we often feel that it is in a vacuum.

COLLECTIVE AGREEMENT AS A NORMATIVE CONTRACTUAL SOURCE OF LABOUR LAW – OPPORTUNITIES AND LIMITS

In order to be able to fulfil its function as a source of labour law, a collective agreement must be provided with an appropriate room for manoeuvre or, in other words, the collective autonomy must be ensured. This is possible in two ways: on the one hand in relation to the contract of employment, and on the other hand, in relation to the legal norm. The first characterises the

21 GYULAVÁRI, Tamás (2020): The Hungarian Experiment to Promote Collective Bargaining: Farewell to 'Principle of Favour'. In GYULAVÁRI, Tamás – MENEGATTI, Emanuele (eds.): *The Sources of Labour Law.* Alphen aan den Rijn: Kluwer Law International, 245–260.

relationship between individual and collective autonomy. In this regard, it can generally be observed that individual autonomy takes priority, which means that contract of employment can – as a rule – be concluded only with terms and conditions more favourable than the collective agreement. Without going into detail in this chapter, it can be stated that the principle is correct because the basic institution of a labour law is the individual contract of employment. However, at the same time, collective autonomy has gained importance, especially in today's practice, so much so that it sometimes seems to replace the individual autonomy, the collective will replace the individual contractual freedom. Therefore, it is important to define the precise purpose of collective autonomy, so that the collective agreement does not exert its effects regardless of the will of the individuals who make up the employee side, or even contrary to it. Several examples can be cited to support this endeavour, including the rollback of the *closed-shop* system,[22] the use of various techniques of tariff capacity *(Tariffähigkeit),*[23] or even the possibility of a content review of collective contracts, which means collective minority protection[24] and handling the collective agreement as a general contractual clause.[25] This system of relationships should also be examined within the framework of this chapter, looking at a contrary point of view compared to the previous Chapter.

However, the character of the normative contractual source of labour law of the collective agreement is determined by its relation to the legal norm. The question is what the change in 2012 really meant. Although in Section 277(2) of the SLC, the legislator stated that "in the absence of a contrary provision, the collective agreement may deviate from the

[22] Dunn, Stephen – Gennard, John (1984): *The Closed Shop in British Industry.* London: Palgrave Macmillan; Hanson, Charles et al. (1981): *The Closed Shop. A Comparative Study in Public Policy and Trade Union Security in Britain, the USA, and West Germany.* New York: St. Martin Press; Deards, Elspeth (2002): Closed Shop Versus One Stop Shop: The Battle Goes On. *European Law Review,* 27(5), 618–627.

[23] See Chapter II, Part I of this study for a presentation of the German *Tariffähigkeit,* the French *collective bargaining capacity levels* and the English *recognition of trade union institutions*.

[24] See in this chapter BVerfGE 146, 71 – Tarifeinheitsgesetz.

[25] See a summary in Hungarian literature in Kiss 2020: 252–265.

provisions of Parts II and III of the Act", but did this change the nature and content of the collective agreement and increase the scope for manoeuvre? I argue that all those who criticise the abandonment of the application of the principle of more favourable terms and conditions ignore the fact that the enforcement of Section 277, Subsection 2 depends on the nature of legal norms. The provision that allows collective agreements to deviate relatively (relative dispositivity) from legal norms is not directly a means of satisfying social needs. Collective partners need to have a balance that is essentially a solution to economic requirements, which also indirectly takes into consideration social needs. I considered it necessary to note this because, from this approach, it seems truly unrealistic and even a bit absurd to solve the FLC in terms of relative dispositive deviation.

Nevertheless, the most important question is to what extent legal norms ensure the enforcement of collective autonomy in current Hungarian labour law. Gyulavári and Kártyás's questions regarding the SLC – [(really) the world's most flexible labour law?] – suggest a lot.[26] In their study, they explore the dilemmas and problems of flexibility versus cogent regulation by comparing trade unions and works councils, collective agreements and works agreements, and presenting some of the most important legal institutions in labour law. Since I will examine the purpose of the legal norm in detail in the next chapter, I will highlight here the essential segment of the analysis that influences the possibilities of collective agreements. Of course, the topic of the next chapter is closely related to this, since the possibilities of collective agreements depend on the extent to which legal norms go beyond the limits of direct employee protection and encroach on the contractual autonomy of the parties. The latter is a very sensitive and complex issue. As described above, the restriction of contractual autonomy is also of a protective nature, specifically serving the interests of the weaker party, and such intervention becomes distorted when it no longer relates to protection, but rather when the legislator shapes the conditions for performance based on other considerations. It should be added that no such intervention can be categorically considered negative. The justification,

[26] Gyulavári–Kártyás 2015: 127–142.

nature and depth of intervention in each area are fundamentally dependent on the social environment, namely it is possible that, in the absence of a strong intervention, the balance of the parties becomes illusory. In my opinion, this is typically the case with the much-criticised Hungarian wage regulations.

As regards the relationship between the legal norm and the collective agreement concerned, the SLC contains a number of cogent[27] and relative dispositive[28] norms. These norms can be grouped in several aspects. Some of the cogent provisions define concepts,[29] or regulate the fundamental elements of the employment relationship (rights and obligations).[30] Others define a closed system for the termination and cessation of employment relationships.[31] Among the cogent provisions, those concerning wages are of particular importance. Although the definition of the method of basic

27 The SLC cogent norms are the following: Sections 42–44, 44/A; Section 45, Subsections 1–4; Section 52, Subsection 4; Section 53, Subsection 4; Section 54, Subsection 1; Section 56, Subsections 2 and 6; Section 58; Section 63, Subsection 1; Section 64; Section 82, Subsection 1; Section 87; Section 96, Subsection 2; Section 122, Subsection 5; Section 124; Section 126, Subsection 4; Section 127, Subsections 1–2 and 4; Section 136, Subsections 1–2; Section 137, Subsection 3; Section 138, Subsections 1–5; Section 139, Subsection 1; Section 154; Section 159, Subsections 5–6; Sections 161–163; Section 192; Section 195, Subsections 2–3; Section 196; Section 198; Sections 200–207; Section 212; Sections 214–216; Section 217, Subsection 1; Section 218, Subsections 1–2 and Subsection 4 a, b; Section 228, Subsection 3; Section 229, Subsection 3.

28 The collective agreement may only deviate from the following SLC standards in favour of the employee: Sections 36–40; Section 55, Subsection 1; Sections 59–61; Section 63, Subsections 2–4; Sections 64–68; Sections 71–76; Section 79; Section 81; Section 83; Section 86; Sections 88–93; Section 95; Section 96, Subsection 2; Section 97, Subsection 1; Section 99; Sections 101–108; Section 109, Subsections 2–3; Section 111; Sections 113–121; Section 122, Subsection 5; Section 123, Subsections 5–6; Section 126, Subsections 1–3 and 5; Section 127, Subsection 5; Sections 128–133; Section 135, Subsection 3 second sentence; Section 136, Subsection 3; Section 138, Subsection 6; Section 160; Section 164; Section 191; Section 218, Subsection 4; Section 220, Subsections 2–3; Section 227, Subsection 2 a, b; Section 228, Subsection 2; Section 229, Subsection 1.

29 Sections 42–44 the concept of contract of employment.

30 Section 52, Subsection 4; Section 53, Subsection 4; Section 54, Subsection 1; Section 56, Subsections 2 and 6.

31 Section 63, Subsection 1; Section 64.

pay, the detailed regulation of the conditions of performance charging and performance requirements could be part of the agreement between the parties, but in addition to current domestic power relations, a lack of regulation in this area would lead to serious abuses and the exclusive exercise of excessive power by employers. Furthermore, as I mentioned in the previous chapter, the application of content control *(Inhaltskontrolle)* within the framework of general terms and conditions is rather uncertain – in fact, it is unclear whether it can be applied at all in labour law.

The content of the rules allowing deviations only in favour of the employee is also instructive. These norms essentially allow for deviations in favour of employees' interests with regard to the termination of employment relationships, so collective agreements can extend restrictions and prohibitions on termination,[32] may develop more favourable conditions in the process of collective redundancy and also provide for deviation in the event of unlawful termination of the employment relationship by an employer. Despite the fact that norms ensuring complete dispositivity are of primary importance in the area of working time regulation (see below), there is a strikingly high number of rules allowing for relative dispositivity. The same cannot be said, however, about the provisions on wages, which are linked to a specific type of working time (i.e. overtime).

So what are the areas where the collective agreement has a free space for a 'collective tactics' by full dispositive deviations? As a preliminary point, it should be noted that, despite the number of cogent and relative dispositive norms, the great flexibility mentioned in the reasoning of the SLC is only a limited feature of the collective agreement. Of course, where the interest of the economy or the employer enjoys a priority, dispositivity is provided. In some institutions, the legislator explicitly emphasised the role of the collective agreement. Such is Section 50, Subsection 4 (on the length of the probationary period) or Section 84, Subsection 3 (on the reference period) and Section 135, Subsection 4 (on the length

[32] In this context, it should be noted that the right to terminate cannot be excluded in general/entirely.

of overtime). In other situations, the legislator's silence may indicate the role of the collective agreement. Typically, this is considered to be a legal institution of severance pay, which may even be excluded in a collective agreement. Furthermore, it follows from the comparison of Section 53 and 57 that, under a collective agreement, work other than that covered by a contract of employment may also be ordered for a longer period of time as defined by the SLC.[33]

These cases are also relevant because they raise the question of whether, in cases where a two-way derogation is granted, where the collective agreement provides for derogations to the detriment of the employee – without any compensation in other areas – the content of the collective agreement can be reviewed. In other words, is it even possible to examine unfair terms and conditions? Can we even talk about this in case of collective agreements? To this end, the latest dilemmas arising from the legal nature of collective agreements must be analysed.

THE LEGAL NATURE OF COLLECTIVE AGREEMENTS – CONTRADICTIONS IN A CONTRACT WITH NORMATIVE CONTENT

The complex legal nature of a collective agreement and the division of their content into contractual and normative parts are nowadays beyond dispute. However, this does not mean that there are no disputes over interpretation in this regard. These are analysed in the following order: the parties of the collective agreement; the legal nature of the capacity to conclude collective agreements; the static nature of the ability to conclude collective agreements (its status at the time of conclusion) *versus* the possibility of change and its legal consequences; the distinction between the contractual and normative parts of collective agreements and their interactions.

33 In this connection see the aforementioned case: BH 2006: 300.

The parties of the collective agreement

This apparently simple concept cannot be examined in 'isolated generality', but must be integrated into the social, economic and legal context in which it operates. There was no other solution in Hungarian law before and immediately after the change of regime other than the conclusion of the collective contract by the employer and the trade union. In Hungarian labour law, the ability to conclude collective agreements is still traditionally linked to two legal statuses, namely the employer's and the employee's legal status. I am consciously approaching this problem from the phenomenon of the legal status, because the definition of the parties of the collective agreement has caused some confusion on the employer side, and the restriction of the collective bargaining ability to the status of employee has been causing increasing tension worldwide since the emergence of new methods of employment and work.

The legal personality of the employer is unproblematic in case of collective agreements concluded at the employer's level; one could say that the employer is the natural, self-evident subject of the collective agreement. The situation is somewhat more complicated when it comes to defining the concept of a so-called 'employer representative organisation'. In the present circumstances, Act XCIII of 2011 on the National Economic and Social Council and its reasoning provide some guidance on this issue. The Act, recognising the role of economic and social dialogue, establishes the National Economic and Social Council to discuss national economic and social policy strategies, to promote consensus between different interest groups in society, taking into account the experience of other Member States of the European Union and the fundamental principles of the Treaty on the Functioning of the European Union. It is essentially an advisory, consultative and opinion-giving body and also participates in the preparation of certain legislation. The members of these are the employer representative organisations. According to the reasoning of the Act, organisations entitled to represent the interests of employers (and employees) have official certification that the legal conditions for their participation are met. After the expiry of the validity of the official certificates, the interest groups themselves shall review whether the conditions laid down by law continue to be met and shall inform the Council thereof. It should be emphasised that this official certificate only entitles the holder to participate in the Council and does not affect the ability to conclude collective agreements. The reasoning to the act lists the employer representative organisations that are members of the council during the given period.[34] It is important to note that there may be other employer associations besides those listed above, and SLC Section 276 provides for the collective agreement capacity of those not listed above and not participating in the Council. In this regard, it should be noted that demonstrating employer quality is an essential part of the tasks of these organisations. That is, it is not enough to express the quality of entrepreneurial, producer and service provider aspects. In addition to economic policy decisions, the Council also discusses employment policy and wage issues.[35] This is important because neglecting employer quality can easily lead to legitimacy and entity problems during negotiations to conclude a collective agreement.

However, the purpose of these Sectoral Dialogue Committees was not only to strengthen social dialogue but also the legislator formed the category of collective contracts concluded by the parties within the framework of these committees. The construction itself was extremely complex, made even more so by the rules governing collective agreements concluded in the

34 These are as follows: Agrár Munkaadói Szövetség (Agricultural Employers' Association), Általános Fogyasztási Szövetkezetek és Kereskedelmi Társaságok Országos Szövetsége (National Association of General Consumer Cooperatives and Commercial Companies), Ipartestületek Országos Szövetsége (National Association of Industrial Guilds), Kereskedők és Vendéglátók Országos Érdekképviseleti Szövetsége (National Association of Traders and Hospitalities Representatives), Magyar Iparszövetség (Hungarian Industrial Association), Mezőgazdasági Szövetkezők és Termelők Országos Szövetsége (National Association of Agricultural Cooperatives and Producers), Munkaadók és Gyáriparosok Országos Szövetsége (National Association of Employers and Manufacturers), Stratégiai és Közszolgáltató Társaságok Országos Szövetsége (National Association of Strategic and Utility Companies), Vállalkozók és Munkáltatók Országos Szövetsége (National Association of Entrepreneurs and Employers).

35 See SLC Section 153 on determining the minimum wage.

Sectoral Dialogue Committee.[36] With regard to this regulation, this study merely notes that the collective contract concluded within this framework may extend to the sector as a whole by public administrative procedure.[37]

The other side belongs to the employees, more precisely to the employee representative organisations, the trade unions. And here comes into play the legal qualification of working persons similar to the employee's legal status, and organisations they have established, with particular regard to the collision between competition law and collective contract law. This problem is very complex, and even a brief overview would exceed the scope of this study, so I will only refer to the most important points. The first such phenomenon is the erosion of the contract of employment beginning in the 1970s.[38] There has been an 'outsourcing of labour law', caused by the breakdown of traditional economic structures and changes in production and service methods.

For labour law, the breaking point is marked by the emergence of a large group of working persons, whose legal status and actual position in the legal transactions are not in line with each other.[39] They are in a private law relationship on the basis of a civil law contract, but are not able to participate effectively in economic transactions, their actual position being similar to that of an employee. As mentioned earlier, the heterogeneity of their name is also indicated by this uncertainty: *arbeitnehmerähnliche Person, economically dependent worker,* or simply *worker, travailleurs indépendants,*

36 See Act LXXIV of 2009 on the Sectoral Dialogue Committees, Section 14.

37 The extension of collective agreements by administrative decision was previously regulated in the FLC. In reality, this institution never played a role in the history of Hungarian labour law.

38 Thus, the uniform structure of traditional labour law has clearly been fragmented by the new forms of employment which have emerged in recent decades, as the labour market has also diversified. This is well illustrated by a conference held by the Austrian Association of Labour Law and Social Law (1987) entitled *Flucht aus dem Arbeitsrecht* [Escape from Labour Law], but doubts about the unity of labour law had been raised earlier. See Firlei 1987: 271–289, 411–422. Also see Part One Chapter I of this study for more details about this topic.

39 For more details see the following references in Hungarian literature: Kiss 2023a: 261–268.

lavoro parasubordinato, etc.[40] This posed a major challenge for labour law, primarily because labour legislation[41] – where it already existed – as well as the judicature[42] and a researcher of labour law[43] interpreted the new situation on the basis of traditional labour law institutions, in other words,

40 See Kiss 2025a: 618–645.

41 See in the German law the *Tarifvertragsgesetz §12a Arbeitnehmerähnliche Personen.* In Great Britain the Employment Rights Act (1996) Section 230. ff. See also the Wage Act (1986), the Employment Relations Act (1996), the National Minimum Wage Act (1986) etc. In the French law see Part VII of the Code du Travail: *Septième Partie: Dispositions particulières á certaines professions et activités.* In Italy see among others the so-called 'project work': *D.Lgs. 10 settembre 2003, n. 276: Attuazione delle deleghe in materia di occupazione e mercato del lavoro, di cui alla legge 14 febbraio 2003, n. 30; Titolo VII Capo I Lavoro a progetto e lavoro occasionale Art. 61–69. Legge 10 dicembre 2014, n. 183.* See also *D.Lgs. 15 giugno 2015, n. 81. Disciplina organica dei contratti di lavoro e revisione della normativa in tema di mansioni, a norma dell'articolo 1, comma 7, della legge 10 dicembre 2014, n. 183.*

42 In this context, I would like to draw attention to the contradictions inherent in two decisions of the European Court of Justice. One is the *Kunsten case* [Case 413/13 *FNV Kunsten Informatie en Media v. Staat der Nederlanden,* ECLI:EU:C:2014:2411]. The decision exemplifies the mechanical application of a generally proven test for a fact that conceptually excludes proper interpretation. The other is the *Balkaya case* [Case 229/14 *Ender Balkaya v. Kiesel Abbruch- und Recycling Technik GmbH,* ECLI:EU:C:2015:455]. In this case, the Court established the legal status of the employee in circumstances that had nothing to do with ensuring the protection of the employee. Regarding the latter case, see Lunk, Stefan – Hildebrand, Inga (2016): GmbH-Geschäftsführer und Massenentlassungen – Konsequenzen der Balkaya-Entscheidung des EuGH für Geschäftsführer, Arbeitnehmer und Gesellschafter. *Neue Zeitschrift für Arbeitsrecht,* 33(4), 129–135.

43 See about this, among others, in Aloisi, Antonio (2020): 'Time Is Running Out' The Yodel Order and Its Implications for Platform Work in the EU. *Italian Labour Law e-Journal,* 13(2), 67–87; *Frankfurter Erklärung zu plattformbasierter Arbeit. Vorschläge für Plattformbetreiber, Kunden, politische Entscheidungsträger, Beschäftigte und Arbeitnehmer-organisationen* (2016). Kopenhagen, Frankfurt, Seattle, Stockholm, Wien, Washington; Prassl–Risak 2016: 619–651; Hiessl, Christina (2021): *Case Law on the Classification of Platform Workers: Cross-European Comparative Analysis and Tentative Conclusions.* (Report prepared for the European Commission, Directorate DG Employment, Social Affairs and Inclusion, Unit B.2 – Working Conditions, within the framework of the European Centre of Expertise in the Field of Labour Law, Employment and Labour Market Policies).

the prevailing view could be characterised by an expansion of labour law.[44] This situation was further complicated by work related to the involvement of so-called platforms, which were immediately hit by labour law.[45]

As far as collective agreements are concerned, this creates tension in the labour law of EU Member States, especially with regard to Article 101 TFEU and collective agreements concluded by different organisations representing the above-mentioned working persons. Many representatives of science of labour law argue for the complete expansion of labour law and the legitimacy of collective agreements in this area as well,[46] but without taking into account the essential content of collective agreements. Unfortunately, the EU also focuses on the discrepancy between competition law and the legal institution of the collective agreement, and only within this framework does it try to propose a solution – so far with little results.[47] Namely, it must be taken into account that the transformative power and the extensive effect of a collective agreement can be interpreted only within the framework of labour law, in relation to the legal status of employees. The problem raised here does not affect Hungarian labour law for the time being, because the domestic legislation has rigidly rejected the regulation of the legal status of

44 For criticism of this approach, see among others Antonmattei–Sciberras 2008: 1–2; Perulli, Adalberto (2015b): Un Jobs Act per il lavoro autonomo: verso una nuova disciplina della dipendenza economica? *Working Paper CSDLE "Massimo D'Antona". IT,* (235), 6; Rebhahn 2012: 3–34; Deakin 2007: 71–76.

45 See a summary in Kiss, György (2024): A vélelmezett munkajogviszony, a vélelmezett munkajog [The Presumed Labour Relationship, the Presumed Labour Law]. *Munkajog,* 8(3), 1–7.

46 See among others Gyulavári, Tamás – Kártyás, Gábor (2022): Why Collective Bargaining Is a 'Must' for Platform Workers and How to Achieve It? In Miranda Boto, José María – Brameshuber, Elisabeth (eds.): *Collective Bargaining and the Gig Economy. A Traditional Tool for New Business Models.* Oxford: Hart Publishing, 99–116.

47 See the *Guidelines on the Application of Union Competition Law to Collective Agreements Regarding the Working Conditions of Solo Self-Employed Persons* (2022/C 374/02, Official Journal of the European Union).

working persons similar to the legal status of an employee;[48] however, the settlement of this issue in Hungarian labour law will also be unavoidable. In summary, Hungarian labour law insists on the traditional legal status of the parties to the collective agreement, i.e. only the employer's legal status and the organisations representing it (also) and the trade unions representing the classical employee's legal status can be considered parties. The future will decide how long this legislative position, which is otherwise consistent with the closed, intact nature of Hungarian labour law, can be maintained.

The capacity to conclude a collective agreement – Legal nature, regulation and dilemmas

When we think about contractual capacity in general, legal policy elements tend to take a back seat, and it seems that the essence of this institution can be revealed primarily through legal dogmatic analysis. As a contract, a collective agreement is part of the private law system, and in this context, there appears to be no qualitative difference between general contractual capacity and the capacity to conclude collective agreements. However, the collective agreement is more than a traditional contract in that it is not an expression of individual autonomy but one of collective autonomy. This feature means, inter alia, the following. The collective agreement means an expression of some collective will, that is, we assume a collective behind this institution.

Nevertheless, the 'collective will' is different from the uniform will of a collective. This situation is further complicated by the fact that the collective contract is not directly concluded by the collective, as such, but by some representative body. As a representative body, it is a direct representative, and it acts on behalf of the collective. However, the collective

48 Kiss, György (2013): A munkavállalóhoz hasonló jogállású személy problematikája az Európai Unióban és e jogállás szabályozásának hiánya a Munka Törvénykönyvében [The Issue of Persons with Legal Status Similar to that of Employees in the European Union and the Lack of Regulation of this Legal Status in the Hungarian Labour Code]. *Jogtudományi Közlöny,* 68(1), 1–14.

is not a legal category, this category must be interpreted in some way or made 'legal' somehow by the concept of representation. Since, according to Hungarian labour law, trade unions can conclude collective agreements, the traditional question arises as to whom the trade union represents? Not at the level of generality, of political phraseology, but specifically in the creation of this legal transaction. However, before exploring the essence of this question, let us return to the importance of the distinction between contractual capacity and the capacity to conclude a collective agreement.

Obviously, the capacity to conclude a collective agreement basically raises a number of problems essentially on the employee side. Under Section 276 of the SLC, the union has the right to enter into collective agreements on behalf of employees. Trade unions operate as an association and have a legal capacity. And from that point on, we are separated from the logic of the contractual capacity of private law. Contractual capacity is a form of capacity to act, which may be linked to certain conditions. Such a condition is found in SLC Section 34, Subsections 2–3 in relation to the employee's ability to conclude a contract of employment. Section 276, Subsection 2 (a) and (b) also impose conditions on the capacity to enter into collective contract. This condition is that a certain percentage of the members of the trade union must have an employment relationship with the employer with whom the trade union wishes to conclude a collective contract. I will return to the question of when this condition is relevant below. It can be seen that the legislator refers to a narrower circle of representation, namely the members of the trade union concluding the collective contract, and it can be assumed that there are also employees who are not members of that trade union or of any other trade union. This is relevant because the first sentence of Section 276, Subsection 5 of the SLC states that an employer may enter into one collective contract. Furthermore, the collective contract affects all contracts of employment, including those which have been concluded after its conclusion (transformative force, extensive scope). And at this point, the difference between general contractual capacity and the capacity to conclude collective agreements comes to the fore. While the former does not provide for the possibility of concluding a normative contract, the latter constitutes precisely that authorisation. SLC Section 276, Subsection 2 (a) and (b) can be evaluated on several aspects – 10% of the members have an employment relationship – which means that the union is represented by a minimal minority to agree on the content of the collective contract. According to another approach – taking into account the domestic realities – this low threshold is necessary in order to have a trade union that can have this condition and make a negotiating offer that cannot be rejected according to Section 276, Subsection 7.

Section 276, Subsection 6 provides that the average statistical number of employees for the half-year period before the date of conclusion of the contract shall be taken into consideration when assessing the condition described. This also means that the condition relates to the status of the number of members in relation to the period prior to the conclusion of the collective contract, as compared to the date of the conclusion of the collective contract. This in itself would not cause any confusion, but the legislator must also take into account, or should have taken into account, that this condition is not constant due to possible changes in the balance of power (power relations). The problem is complicated by SLC Section 276, Subsections 4–5.[49] It follows from those provisions that, in order to ensure the greatest possible representativeness of trade unions, the legislature imposes a kind of 'coalition constraint' where several trade unions have the capacity to conclude collective agreements. This also means that in such cases, the exclusion of any trade union with the capacity to conclude collective agreements would have the effect of nullity.[50] In this context, I refer again to FLC Section 33, Subsection 5, which allowed even in such a case for a single union to conclude a collective agreement, even with almost unrealistically high subsidies (with 65% support).[51]

49 Section 276, Subsection 4: The trade unions with entitlement to conclude a collective agreement under Subsection 2 may do so collectively. Subsection 5: An employer may enter into one collective agreement.

50 Bankó et al. 2019: 763.

51 FLC Section 33, Subsection 5: If the conditions for having the representative trade unions to conclude a collective agreement jointly are not fulfilled, the trade union whose candidates jointly received more than 65% of the votes in the works council ballot shall be entitled to conclude the collective agreement.

At this point, I will refrain from answering the question of what justified maintaining the coalition constraint in light of previous experience. Instead, I am looking at the solution chosen by the legislator in the event that the status quo at the time of the conclusion of the collective agreement changes later. This change could be multifaceted. It is possible that the trade union which has been involved in the conclusion of a collective agreement may later lose its collective contracting ability.[52] However, there may be cases where a trade union which does not participate in the collective bargaining process subsequently acquires the capacity to enter into a collective bargaining agreement.[53] This can even be characterised as the opposite of the previous situation of 'eternal membership', namely, a state of 'eternal exclusion'.

As for the first situation described, the Curia of Hungary dealt with this problem in 2018.[54] The Curia found that the trade union concerned (the plaintiff) could not legitimately be excluded from amending the collective agreement. In its opinion "the applicant correctly referred to the fact that Article 276 (2) (a) of the Labour Code contains only a provision concerning the conclusion of the collective agreement that binds the right to sign to the 10% number". However, unless otherwise provided by law, this cannot be interpreted as precluding the party entitled to conclude the contract from amending it on account of the limitation in the number of employment relationships.

52 See about this in Nemeskéri-Kutlán, Endre (2019): „Örökös tagság?" avagy a kollektív szerződés kötésére vonatkozó szervezeti jogosultság anomáliáinak feloldhatósága a jogalkotás által ["Eternal Membership" or the Possibility of Resolving Anomalies in Organisational Capability to Conclude a Collective Agreement through Legislation]. In Bankó, Zoltán et al. (eds.): *Ünnepi tanulmányok Lőrincz György 70. születésnapja tiszteletére* [Festive Studies in Honour of György Lőrincz's 70th Birthday]. Budapest: HVG-ORAC, 292–298.

53 See more about this in Kiss 2023b: 85–92.

54 EBH 2018. M.6. (Kúria Mfv.I.10.869/2016). The case is somewhat complicated by the fact that in 2010, when the collective agreement was concluded, the claimant trade union's capacity to conclude collective agreements was determined on the basis of the FLC, whereas at the time of the amendment of the collective agreement – from which it was excluded – the SLC was already in force.

The most interesting point in the Curia's argument is that "the party who concluded the contract is entitled to amend it [in the absence of a labour law rule, Section 240, Subsection 1 of Act IV of 1959 on the Civil Code applies]". Apart from the approach referred to in the CC provision, whether based on the FLC or the SLC, which is often incomprehensible for the judicature, the essence of the decision is that the Curia has identified the capacity to conclude collective agreements with the capacity to conclude contracts under civil law, without taking account of the function of the collective agreement as a contractual source of law. In my opinion, the mechanical adoption of the provision referred to in the previous CC blurred the essential difference between the traditional private law contract and the collective agreement/contract. This would not be acceptable even if the collective agreement is a contract – at the level of the genus concept of a 'contract'. I note only in brackets that, on such a basis – with a little exaggeration – the Curia could also have referred to the previous CC Section 241, according to which "the court may amend the contract if, as a result of circumstances arising after the conclusion of the contract in the long-term relationship between the parties, it infringes the essential legitimate interests of one of the parties". This example illustrates that the essence of a trade union's capacity to enter into collective agreements cannot be revealed at the level of a general abstraction of the contract, by a purely legal dogmatic approach. However, the approach of the Curia also reveals something else. Namely, that the place and regulation of collective agreements was not properly addressed in any code, it is incomplete, as if the legislator could not decide which aspect of collective agreements to emphasise.

This is also evident in the second situation. In this case, the trade union became entitled to conclude a collective agreement after the conclusion of the collective agreement, which did not yet meet the conditions prescribed by law at the time of conclusion. The legislator addressed this problem in Section 276, Subsection 8. According to this, "any trade union (trade union federation) which, following the conclusion of the collective agreement, meets the conditions laid down in Subsection 2 shall be entitled to initiate amendments to the collective agreement and to participate in negotiations on such amendments with the right to be consulted". This provision has been criticised in detail by Gyula Berke.[55] In his analysis, he refers to the preparation of the 2015 amendment to the SLC, one of the proposals of which would have made it possible to state that "the trade union which had acquired the capacity to conclude collective agreements would have joined the collective agreement as a party by means of a unilateral legal declaration. This would also have meant that the trade union would have had all the elements of the status of a 'party', (of collective contract) including the right to terminate the contract."[56] In this context, it is another question how the right of termination of a single trade union fits in with the current regulation to conclude collective agreements.

This fact was the subject of the decision of the Constitutional Court 22/2023 (X. 4.), in which he stated that SLC Section 276, Subsection 8 'right to consultation' was unconstitutional, violated Article XV(1) of the Fundamental Law,[57] and therefore annulled it. Following the decision, SLC Section 276, Subsection 8 remains in force with the following text: "Any trade union (trade union federation) that meets the requirements set out in Subsection (2) after the collective agreement is concluded shall be able to request an amendment of the collective agreement, and to participate in the negotiations relating to the amendment." In my view, the reasoning of the Constitutional Court is correct in several respects, but the decision does not resolve anything, more precisely, it makes the solution the task of the legislator, even if it does not say so expressis verbis.[58]

The Constitutional Court examined whether the distinction between trade unions with the capacity to conclude collective agreements in terms of participation in the decision on the proposal to amend the collective agreement was reasonable and therefore constitutionally justified.[59] Furthermore, the Constitutional Court took into account the dual legal nature of the collective agreement. Accordingly, it concluded that SLC Section 276,

55 Bankó et al. 2019: 762–765.

56 Bankó et al. 2019: 763–764.

57 Section XV(1) of the Fundamental Law: "Everyone shall be equal before the law. Every person shall have legal capacity."

58 For a detailed analysis of the decision see Kiss 2023b: 85–92.

59 Decision 22/2023 (X. 4.) AB point 38.

Subsection 8 – exclusion of a trade union which is not a party to the collective agreement from taking a decision to amend the collective agreement – is linked to the contractual nature of the collective agreement, in so far as it protects the will of the contracting parties against interference by third parties who are not party to the agreement.[60] However, the Constitutional Court also found that the distinction based on the date of acquisition of the collective bargaining capacity referred to in the application could not be assessed solely on the basis of the binding nature of the contract.[61] Consequently, a collective agreement is "not a static construct, but can and must adapt flexibly to changing circumstances and to the interests of the parties and the employees concerned".[62] Since the Constitutional Court considers the changes in circumstances, in the balance of power, such as employee interests, he found that Section 276, Subsection 8 of the Labour Code protects only the contractual nature of the collective agreement and does not take into account the specificities of the normative part. Thus, "this regulatory solution does not satisfy the requirement of reasonableness of the distinction in the case of normal legal practice".[63]

The question now is, what has this decision resulted in? To put it more bluntly, what did the Constitutional Court say at all? There is no doubt that, following the decision of the Constitutional Court, a trade union which has acquired the capacity to enter into a collective agreement under Section 276, Subsection 8 has greater powers than before the decision, namely: "They can participate fully in the process of amending the collective agreement on the initiative of anyone, instead of having the right to consult."[64] This limited 'half-party' legal status is necessary to be analysed more deeply. As regards the amendment concerned, although the SLC does not provide for the amendment of the collective agreement, but this process can only mean that the agreement can be changed by the mutual consent of all parties. However, it may be the case that the collective agreement is not amended despite the

[60] Decision 22/2023 (X. 4.) AB point 44.
[61] Decision 22/2023 (X. 4.) AB point 46.
[62] Decision 22/2023 (X. 4.) AB point 51.
[63] Decision 22/2023 (X. 4.) AB point 51.
[64] Decision 22/2023 (X. 4.) AB point 59.

initiative of a trade union which has subsequently acquired the capacity to enter into a collective agreement. This possibility deserves attention because it is questionable whether the second sentence of Section 280, Subsection 1 applies in this case. As mentioned above, pursuant to this provision "a collective agreement that was concluded by more than one trade union may be terminated by either of those trade unions". This rule raises several problems. Above all, a question of interpretation: does this rule mean that only trade unions that have actually concluded collective agreements, or also trade unions that have subsequently acquired the capacity to conclude agreements, are subject to the order? The formula is further complicated by the fact that Section 283, point a) allows for derogations from this provision. The question is: what exactly does this derogation mean?

Let us approach the problem through the last question. The derogation is based on the agreement between the parties to the collective agreement, so that it is not only the trade unions that have to agree to it.[65] Such an agreement may include that only one trade union, several trade unions, or all trade unions can jointly terminate the collective agreement. However, the basic problem lies in the content of the first question, to which Section 283, point a) does not provide an answer. Does the Constitutional Court's ruling that a trade union which later acquires collective bargaining capacity can only initiate and participate in negotiations to amend the collective agreement provide a solution? Does this clearly exclude the right to terminate the collective agreement? How can the content of Section 283, point a) be understood at all? Following the Constitutional Court ruling?

And at this point, the legal dogmatic consequences and legal policy considerations related to the capacity to conclude collective contract must be sharply separated again. In the case mentioned above, the Constitutional Court has chosen the so-called mosaic method of annulling the legislation. This method of abolition leaves in the wording of the SLC the explicit legal basis for the participation of trade unions that have subsequently become representative. This trade union may participate with full authority in a certain process, namely the initiation of the amendment and the ongoing

[65] Bankó et al. 2019: 780–781.

negotiations, but this process does not constitute a substantial possibility of influencing or even changing the collective agreement. Furthermore, that does not even mean that the others are willing to engage in such negotiations. It is perhaps not difficult to read from the decision of the Constitutional Court a very cautious approach to the changeability of the existing status quo. Although the legal basis for participation exists, the scope for action is limited, and the rest is up to the legislator. It is a fact that the Constitutional Court is not a legislator but a guardian of the Constitution.[66] It is a question of the circumstances in which the legislator is willing to extend this limited competence, and what aspects are given priority. The answer to these questions may be fundamentally based on legal policy considerations, but it also raises legal dogmatic problems, namely the dilemma of the validity of the collective agreement rendering the substantive provisions meaningless.

The normative and the contractual part of the collective agreement – Overlaps

SLC Section 277 follows the traditional division of the content of the collective agreement, i.e. it distinguishes the normative and contractual part. Under Section 277, Subsection 1, point a) the scope of collective agreements may cover rights and obligations arising out of or in connection with employment relationships. Under point b) the scope of collective agreements may cover conduct of the parties relating to the conclusion, implementation and termination of the collective agreement, and the exercise of their rights and obligations. At first sight, the separation of the normative and the contractual part does not seem to pose a problem, but this assessment was somewhat clouded by a case in which the fate of

66 Referring to Kelsen's famous expression. Kelsen, Hans (2008): *Wer soll der Hüter der Verfassung sein? Abhandlungen zur Theorie der Verfassungsgerichtsbarkeit in der pluralistischen, parlamentarischen Demokratie.* Tübingen: Mohr Siebeck.

the terms of a collective agreement had to be decided on the occasion of a change in the employer's identity (business transfer).[67]

In the case in question, based on the interpretation of Article 3(3) of Directive 2001/23/EC,[68] the employees requested that the new employer take over the cafeteria scheme operated by the transferor. In the application, the employees sought to assert their claim by reference to SLC Section 282, Subsection 1. According to this rule "in the case of transfer of employment upon the transfer of enterprise the receiving employer is required to maintain the working conditions specified in the collective agreement covering the employment relationship existing at the time of transfer for a period of one year after the date of transfer". The lawsuits show that under the collective agreement concluded by the transferring employer and the trade union, the employer operates a cafeteria system. It is important that the conditions and rules of participation in this system are determined by the employer. In that regard, Berke emphasises that, by its legal nature, the 'employer's code' (guide) constitutes a unilateral employer's commitment (legal declaration), the maintenance of which is, moreover, the duty of the employer to whom it is addressed. He also emphasises that, in this case, employees sought to assert their claim by express reference to Section 282, i.e. on the basis of

[67] Mfv.II.10.123/2024/5. Analyses in detail in Berke, Gyula (2025): A kollektív szerződés jogintézménye az újabb bírói gyakorlatban [The Legal Institution of Collective Agreements in Recent Case Law]. In Jarjabka, Ákos et al. (eds.): *Fél évszázad a gazdaságtan szolgálatában. Tiszteletkötet Dr. László Gyula Tanár úr 80. születésnapja alkalmából* [Half a Century at the Service of Economics. Tribute Volume on the Occasion of the 80th Birthday of Professor Gyula László]. Pécs: Pécsi Tudományegyetem Közgazdaságtudományi Kar, 55–68. In analysing the case, Berke draws attention to the clauses, namely the difference between contractual and normative clauses, in relation to the content of the collective agreement.

[68] Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses. According to the referenced Article, "following the transfer, the transferee shall continue to observe the terms and conditions agreed in any collective agreement on the same terms applicable to the transferor under that agreement, until the date of termination or expiry of the collective agreement or the entry into force or application of another collective agreement".

the contractual obligation of the transferee to maintain the terms of the contract of employment.[69]

Contrary to the decisions of the lower courts, the Curia shared the view of the transferee employer that "a collective agreement condition which the transferee employer is obliged to maintain can only be a provision of the collective agreement in force at the time of the transfer of rights, against which the employee concerned by the transfer of rights can directly invoke the right to compensation". In other words, "working conditions means the collective contractual provision which relates to the rights and obligations arising from the employment relationship covered by the collective agreement".[70] The Curia agreed with the defendant's view that the collective contractual nature of the working conditions must therefore be interpreted restrictively. Since a collective agreement regulates rights and obligations arising from or related to employment relationship, rights and obligations that do not have their direct legal basis in the collective agreement cannot be considered rights or obligations arising from the collective agreement. Employer regulations cannot therefore be regarded as a provision of a collective agreement, and thus the employee's entitlement to them cannot be regarded as a condition of a collective agreement, even if the regulations were drawn up on the basis of a reference rule in the collective agreement.[71] The position is also accepted that the employees could not assert their claim on the basis of the relevant provision of the collective agreement of the transferring employer. This collective agreement provision could not give rise to any subjective right for employees to receive cafeteria benefits, as its normative content could only apply to the employer. The employees' claims could only have been created by the transferor employer's regulations.

Finally, the Curia stated that in the case in point, the provision of the collective agreement provided the transferor employer with a legal possibility to freely organise the cafeteria system. The transferor employer exercised this authority and issued Cafeteria Rules. In the present case, it cannot be argued that the legal basis for employees' rights is the collective agreement,

[69] Berke 2025: 65.

[70] Mfv.II.10.123/2024/5, point 34.

[71] Mfv.II.10.123/2024/5, point 35.

but rather that the existence of those rights is guaranteed by the Cafeteria Code.[72] It follows that the trade union which concludes the collective agreement would be entitled to demand the operation of the cafeteria system, or, failing that, at least the application of the sanction provided for (possibly) in the collective agreement, or to apply to the court for a declaration that the system is not operational. In substance, the relevant provision of the collective agreement is not normative in nature but falls within the so-called contractual provisions of the collective agreement. This cannot be claimed by employees, but only by the parties to the contract (could be claimed).[73] In Berke's opinion, the practical consequence of the decision of the Curia is that the general employer commitment contained in the collective agreement, from which no employee rights are directly carried out, does not belong to the normative part of the collective agreement,[74] but asks what legal consequences may arise in the event of a breach of contract in these cases and on what legal basis.

The dilemma concerning the enforcement of claims contained in the normative and contractual parts of the collective agreement was also raised in an earlier case.[75] In that case, the applicant trade union sought partial annulment of the amendment to the collective agreement. In the defendant employer's counterclaim, he challenged the legitimacy of the union in the lawsuit. It argued that the applicant is not covered by the personal scope of the normative part of the collective agreement and that the applicant has no right to bring an action for a declaration.[76] The employer also referred to Section 192, Subsection 3 of Act CXXX of 2016 on the Code of Civil Procedure (hereinafter: CCP), which provides: "A claim for declaring the existence or non-existence of a right or legal relationship may be submitted if the declaration requested is necessary for the protection of the plaintiff's rights against the defendant, and the plaintiff may not demand condemnation stemming from the nature of the legal relationship or because the

72 Mfv.II.10.123/2024/5, point 60.
73 Mfv.II.10.123/2024/5, point 61.
74 Berke 2025: 66.
75 Mfv.V.10.106/2024/5; Berke 2025: 66.
76 Mfv.V.10.106/2024/5, point 6.

liability has not yet expired, or due to some other reason. The court shall of its own motion examine compliance with said statutory requirements." In the view of the lower courts, the applicant trade union had standing to bring proceedings, "since the mere fact that one of the parties to the collective agreement at issue in the main proceedings was the applicant itself created a legal interest for it which deprived it of its right of action".[77] Nevertheless, it also stated that due to the absence of the conditions set out in Section 172, Subsection 3 of the CCP, the plaintiff was unable to specify the right whose protection against the defendant could have justified the filing of the action for a declaratory judgement.

The Curia reached a different conclusion. The basis of its decision was that "the right of enforceability (legitimation in proceedings) of the action relates to the substantive legal relationship between the party and the subject matter of the action, that is to say, whether the plaintiff is entitled to a right against the defendant which is enforced by the action".[78] The Curia emphasised that the content of the normative part of the collective agreement refers to agreements which regulate the rights and obligations arising in the employment relationship covered by the collective agreement, whereas the so-called contractual part refers to agreements which concern only the relationship between the parties to the collective agreement. Although the collective agreement is not a legislation (legal norm), but their normative nature means that they are 'rules-governed employment relationship' and normative contractual sources of labour law. It cannot therefore be considered that "the so-called normative clauses of a collective agreement do not constitute an agreement of a contractual nature".[79]

It is remarkable that in its argumentation the Curia refers to Section 14 of the SLC, which lays down the general concept of the agreement. However,

77 Mfv.V.10.106/2024/5, point 7.

78 Mfv.V.10.106/2024/5, point 19.

79 "These provisions also show a contractual nature, as they are agreements: express, clear and unanimous declarations of intent by the parties, which reflect the consensus of the parties and can only be changed by mutual contractual intent, and their termination is also governed by the rules of contract law (e.g. termination by mutual agreement, termination by notice)" Mfv.V.10.106/2024/5, point 22.

this rule and the reference to it raise several issues. This reference is particularly important because the employer argued in its counterclaim that the practice established with regard to the invalidity of civil law contracts cannot be applied to collective agreements, as collective agreements differ significantly from civil law contracts. In its opinion, the fact that the trade union was one of the contracting parties in the conclusion of the collective agreement does not mean that it has standing in the lawsuit to establish invalidity. According to its argument, claiming that the collective agreement as a whole is invalid actually means claiming that the contracting part is invalid, and if the contracting part is invalid, the normative part shares the same fate. However, such a solution would jeopardise the existence of the collective agreement.

In contrast, the Curia took the position that "a collective contract is still a contract even if it contains elements and provisions that do not regulate the relationship between the parties but are established by mutual and unanimous declaration of the parties. Accordingly, pursuant to SLC Section 27, Subsection 3 "the agreement may be invoked as null and void without any time limit". And then continues as follows: "The fact that the plaintiff was a contracting party creates a legal interest for him which establishes a right of action under SLC Section 293, Subsection 1".[80] There is no doubt that the provisions of the normative part have specific personal scope, but "this does not mean that the trade union qualifies as a third party and thus eliminates its legitimacy, even if, with the entry into force of the collective agreement, individual employees also acquire standing in court

[80] The Curia referred to an earlier decision in which a trade union without collective bargaining capacity had brought an action seeking a declaration that certain provisions of a collective agreement were null and void. In this case, the Curia stated that a trade union may challenge the validity of a collective agreement on the grounds that it proves that it was also entitled to conclude a collective agreement under the conditions laid down by law. It can be concluded from this finding of the Curia that if a trade union does not have the capacity to conclude a collective agreement or was not a party to the conclusion of the collective agreement, it is not entitled to initiate proceedings to declare its invalidity on its own initiative and cannot bring such an action; however, if it was a party to the agreement, it has standing to sue. (The case referred to: Kúria Mfv. II.10.124/2013/4.)

in certain respects".[81] The right to enter into a collective agreement as defined in Section 272, Subsection 1 of the SLC is the applicant's right as enshrined in law. An integral part of the protection of this right is that the trade union may, within the framework of the right to conclude contracts based on constitutional and statutory powers, assert its claim to invalidity of the agreement it has concluded before a court, without which its claim to legal protection would be seriously damaged. "In such case, the nature of the legal relationship, the law excludes the liability (retention) because such a claim can only be made by individual employees based on the rules established by the trade union."[82]

Although the specific facts of the listed cases are different, they draw attention to a common problem. Namely, the unity of the collective agreement, which is often undermined by the dual legal nature of collective agreements. In this context, I am briefly referring again to the debate that has arisen in the Hungarian jurisprudence regarding the division of the content of the collective agreement into two parts.[83] While acknowledging that the collective agreement is an autonomous entity and that the normative and the contractual part are not two separate entities, it should be emphasised that the decision on the change in the employer's identity and its evaluation highlight two essential outcomes. One is that, in this case, there were indeed procedural reasons why the employees were unable to assert their claims. The other problem, on the other hand, is more serious, one might say substantial. I agree with Berke's assessment that the Hungarian regulation is not complete with regard to the legal nature of the collective agreement, the failure to fulfil the different types of obligations arising from the collective agreement, and the legal consequences thereof.

81 Mfv.V.10.106/2024/5, point 27.

82 Mfv.V.10.106/2024/5, points 30–31.

83 See Miklós Világhy's comment in the debate on the collective labour contract. A kollektív munkaszerződés jogi természete [The Legal Nature of the Collective Labour Contract] (1948). *Jogászegyleti Szemle,* 2(1–2), 138.

THE PLACE OF COLLECTIVE AGREEMENTS IN HUNGARIAN LABOUR LAW – IN A BROADER CONTEXT

The general question is whether collective agreements are adequately regulated in the Hungarian legal system, and within that, in the labour law system. A collective agreement is a contractual normative legal source in a specific area of law, defined in Section 13 of the SLC as a 'rules-governed employment relationship'. This duality, namely the contractual basis and the normative effect, entails contradictions in legal dogmatics and legal policy. The contractual basis of this legal institution means that the contract is concluded in a certain moment by the mutual, corresponding declaration of will of the parties with a collective contract who have the ability to conclude a collective agreement. The purpose of the collective agreement is to establish and maintain the status quo in a certain relation – in Hungarian labour law generally at the employer level. More specifically, this means that collective agreements must ensure a functioning environment between the economic interests of employers and the social needs of employees. It can therefore be argued that the purpose of the collective agreement is to establish a specific long-term relationship which provides both stability and flexibility in the sense of standard predictability. We can even venture to say that collective agreements are a special type of relational contract, since the parties do not, as a rule, seek to disrupt the status quo established by the agreement or to terminate the agreement. If this does happen, the conflict may escalate further, since without a collective agreement, individual labour relations may become 'hollow', and only the legal norms of the relevant labour law regulations can provide protection against the subordination prevailing in labour law, in accordance with the intention of the legislator. The escalation of the conflict may also be reinforced by the fact that the trade union may have certain tools to enforce new agreements, such as the right to strike.

It can be concluded from this that the collective agreement is a very specific type of contract. It must be decided whether this is a *sui generis* legal institution (contract) or whether collective agreements share the fate of private law contracts. This is relevant, inter alia, from the point of view of the doctrine of the validity of the collective agreement, which is further complicated by the specific representative nature of the party to the collective agreement, the trade union. The contractual basis of the collective agreement may also have other consequences. The date of conclusion of the contract reflects a specific status quo, which may change significantly later. Here I do not deal with changes in the circumstances that influence the content of the agreement, as they have similar consequences for each long-term contract – apart from the above-mentioned labour law feature. However, the date of conclusion of the contract indicates not only the economic and social conditions affecting its content at a certain moment, but also the balance of power between the contracting parties at that moment, which may raise problems, particularly on the side of the employees. As we have already mentioned, SLC Section 276 appears to be simple, but it contains complex regulations with serious consequences. According to Section 276, Subsection 2, "the trade union shall be entitled to conclude a collective agreement if its membership of employees at the employer reaches 10%". Subsection 8 stipulates that "trade unions entitled to conclude collective agreements under Subsection 2 may do so collectively". Finally, the first sentence of Subsection 5 states that "an employer may enter into one collective agreement".

What consequences could arise from these provisions? The first area to be examined is the relatively low threshold for the requirement of collective bargaining ability on the employee side and the problem of representation of trade union members who do not meet this requirement and so-called outside employees. The second area, in the context of the previous one, is the assessment of the dual legal nature of collective agreements in relation to contract of employment, namely the validity or invalidity of collective agreements.

The collective agreement and 'minority protection'

In Hungarian labour law, the ability to enter into a collective contract, especially on the employee side, has always been uncertain and the current solution also provokes many criticisms.[84] These criticisms will be addressed at the end of this chapter when assessing the purpose of the collective agreement. The current rules, namely the 10% threshold mentioned above, besides being considered by many to be unrealistically low, also raise the problem of how this limited legitimacy is transmitted to those who are left out. Before analysing the consequences arising from domestic regulations, it should be noted that the problem appears not only in Hungarian labour law, but everywhere where the so-called tariff unit enjoys priority.

A good example of this is German law, namely Section 4a of the Tarifvertragsgesetz (hereinafter: TVG). In this comparison, it should be stressed, however, that the German legislation applies in an entirely different context to that in our home country. One reason for this is that, pursuant to Section 3 of the TVG, an employer may be bound by several collective agreements concluded by different trade unions at the same time.[85] Section 4a of the TVG provides that, in order to ensure that the norms of the collective agreement have a protective, distributive, calming and regulatory function, the conflict of collective agreements within the employer *(im Betrieb)*[86] must be avoided. *Tarifeinheit* based on the majority principle raises the problem of asserting the interests of minority trade unions, which was dealt with by the *Bundesverfassungsgericht* in 2017.[87] According to the decision, the second sentence of Section 4a, Subsection 2 of the TVG, in the version in force as

84 See a recent summary in GYULAVÁRI, Tamás – KÁRTYÁS, Gábor eds. (2023): *A kollektív szerződéses lefedettség csökkenése Magyarországon (2012–2023)* [Decrease in Collective Contractual Coverage in Hungary (2012–2023)]. Budapest: Friedrich–Ebert–Stiftung; GYULAVÁRI, Tamás – KÁRTYÁS, Gábor eds. (2024): *Árnyékjelentés a kollektív szerződés magyar szabályozásához. Javaslatok a 2022/2041/EU Irányelvben előírt akciótervhez* [Shadow Report on the Regulation of Collective Agreements in Hungary. Recommendations for the Action Plan Required by Directive 2022/2041/EU]. Budapest: Friedrich–Ebert–Stiftung.

85 TVG § 3 Tarifgebundenheit: (1) Tarifgebunden sind die Mitglieder der Tarifvertragsparteien und der Arbeitgeber, der selbst Partei des Tarifvertrags ist. (2) Rechtsnormen des Tarifvertrags über betriebliche und betriebsverfassungsrechtliche Fragen gelten für alle Betriebe, deren Arbeitgeber tarifgebunden ist.

86 In this study, I will not discuss the different binding force of the various types of norms in German collective agreements. See DÄUBLER 2006: § 4.

87 BVerfGE 146, 71 – Tarifeinheitsgesetz.

of 3 July 2015, is incompatible with Article 9, Paragraph 3 of the *Grundgesetz* in the absence of provisions ensuring that the interests of the occupational groups concerned are taken into account in the event that the collective agreement in force for them is replaced by a collective agreement concluded by the majority trade union. The *Bundesverfassungsgericht* recognises the legislature's power to resolve conflicts arising from collective agreements on the basis that Article 9, Paragraph 3 of the *Grundgesetz* "entitles the legislature in particular to adopt provisions governing the relationship between the opposing parties in collective agreements in order to ensure that the structural conditions for collective bargaining create a fair balance and thereby, in accordance with the presumption of correctness of collective agreements, appropriate economic and working conditions".[88]

It also states that, in the interests of collective bargaining autonomy, the legislator may not only adopt rules establishing parity.[89] However, this does not mean that the negotiating positions of minority trade unions – and their coalition positions in general – will be significantly weakened, which could also lead to the erosion of their coalition policies. Thus, where regulations protecting specific (minority) employment groups are lacking, the law must be amended.[90] The second sentence of Section 4a, Subsection 2 of the TVG was amended in 2018 to the effect that if, in resolving a collision of collective agreements – i.e. in ensuring the priority of the collective agreement concluded by the majority trade union – "the interests of the groups of employees covered by the not applicable collective agreement were not taken into account with sufficient seriousness and substance (ernsthaft und wirksam), the general rule does not apply".

Under Hungarian labour law, conflicts similar to those known in German law cannot arise in the case of collective agreements concluded at the employer level. Nevertheless, the minority protection issue mentioned above may also have other dimensions. Namely, trade unions that do not have capacity to conclude collective bargaining – and therefore their members – are completely excluded from the formal and informal processes

88 BVerfGE 146, 71, RdNr. 145.

89 BVerfGE 146, 71, RdNr. 148.

90 BVerfGE 146, 71, RdNr. 143.

of collective bargaining. The SLC does not contain any provision on the process for the conclusion of a collective agreement; Section 276, Subsection 7 merely states that entering into negotiations upon an offer for the conclusion of a collective agreement may not be refused. Section 278, which states that collective agreements may only be concluded in writing, and Section 279, Subsection 5, which stipulates that the collective agreement shall enter into effect when published, can be considered as rules of validity and scope. Consequently, the employer and the negotiating trade union shall develop the procedural principles and the conduct to be followed between themselves. The legislation in force does not impose an obligation to the employer or the trade union to involve the indicated outsiders and to consult them. Furthermore, there is nothing to suggest that the collective agreement should be drafted in such a way as to take into account the interests of those outside it.

At first sight, this problem appears to be only a theoretical abstraction and may even be a pseudo-problem. But, in the period after the change of regime, many trade unions were formed in several identical sectors, professions and their interests were not necessarily the same. The problem I have outlined does not arise between collective agreements and employees who are not covered by them, but between collective agreements and trade unions that do not have the ability to conclude collective agreements – as is the case in practice. It can be inferred from the SLC's rules and case law that there is no legal possibility for an outside trade union to influence, challenge or seek annulment of the content of the collective agreement.

A similar problem may arise in the case of a collective agreement concluded by several employers or the trade union federation – only in a slightly more complex context. Under the second sentence of Section 276, Subsection 1 b) of the SLC, a trade union association may also enter into a collective agreement with several employers or an employer representative organisation. Based on the second sentence of Section 276, Subsection 5, where the collective agreement is concluded by more than one employer, one employer may conclude a collective agreement, with scope for that employer, under authorisation given in such collective agreement. The third sentence states that the collective agreement concluded by several employers shall be construed to have a broader scope in the application of Subsection 4 of Section 277. (This latter rule makes sense in the case of a collective agreement concluded by an employer interest group in the event that one of the member employers of the interest representation concludes a collective agreement that applies to it.) Namely, pursuant to Section 277, Subsection 4, unless otherwise provided, a collective agreement with limited scope may deviate from a collective agreement with broader scope if it contains provisions that are more favourable to employees. This may also mean that external trade unions cannot intervene in the authorisation determining the method of deviation, which may be less favourable for certain employees than a collective agreement with a broader scope – even if this seems paradoxical at first sight.

These provisions seem to confirm that a protective institution should be introduced for these trade unions, but if we go beyond this theoretical statement and try to develop a concrete solution, we encounter an almost insurmountable problem. While the German regulation referred to effectively disregards the general principle of Tarifeinheit in cases where the interests of the minority trade union are disregarded by the majority, such a solution cannot be applied in Hungarian labour law due to the different regulatory environment. In the end, there would be only one *lex imperfecta* obligation for the parties concluding the collective contract.

This problem can be approached from another perspective. Beyond the fact that the 10% membership threshold raises questions about the irrationality of representation, it also makes it inevitable to answer the question of what interests a union that does not even achieve this low level of support is seeking to represent and protect. This question cannot remain unanswered, as the trade union representation body, namely one of the subjects of the labour law, is intended to represent the employee. This approach leads to an examination of the situation of trade union support and, consequently, of the collective bargaining coverage, to explore the possible causes, which I will do in the next section.

I have addressed the problem of collective agreement and minority protection to illustrate the specific situation and operation of the collective agreement in the Hungarian labour law regulatory environment. Since the change of regime, one of the pronounced goals of both FLC and SLC is to strengthen the private law nature of labour law and to ensure the role of the collective agreement and the contractual source function in labour law. This legal policy objective has not been achieved, and an analysis of the history and background of the regulation even raises the suspicion that this intention faded after the change of government in 2010. In addition to the legal policy discrepancies, there are also certain legal dogmatic concerns about the aforementioned legislation. Thus, the dual legal nature of collective agreements, the place of this legal institution in the SLC system, and the ambiguities in the interpretation of Chapters Two and Four of Part One of the SLC raise the question of whether collective agreements have their own theory of validity and invalidity, or whether the provisions of the SLC relating to legal declarations in general can be applied to collective agreements.

The doctrine of the validity or invalidity of a collective agreement – And its absence

This problem is also complex. A starting point is SLC Section 14, which provides that "contracts concluded under this Act constitute the outcome of an agreement resting on mutual consent of the parties". As we have seen, as interpreted by the case law, the concept of agreement ('contract') also covers the collective agreement.[91] SLC Section 27 regulates the nullity of the agreement. In the decision referred to in the note (Mfv.V.10.106/2024/5), the Curia in that regard agrees with the opinion of the Court of First Instance that Section 6:108, Subsection 2 of the CC cannot be applied to cases falling within the scope of the SLC, since the SLC's rules on nullity do not contain a provision which would allow a declaration of nullity to be made without the party also claiming the application of the consequences of nullity.[92] However, as we have seen, this does not preclude the applicant trade union

[91] It is necessary to return to the aforementioned decision of the Supreme Court, Mfv.V.10.106/2024/5.

[92] Mfv.V.10.106/2024/5, point 27.

from bringing proceedings, except for claims that are excluded due to the nature of the legal relationship. In other words, this means that there is a legal institution (validity–invalidity) that is general, spanning legal branches, with different legal consequences.

This in itself would not cause any trouble, nevertheless, the problem is more serious, since under Section 31 of the SLC not only the legal consequences of invalidity but also a significant part of the rules of the CC on nullity and invalidity are not applicable. The fundamental question, however, is: nullity of what? And at this point, we are entangled in the SLC's Section 14 assessment many times. Furthermore, if we examine the reasons for the invalidity of the SLC, almost all agreements that infringe upon any rules-governed employment or that are entered into by way of circumvention of regulations can be adapted to collective agreements.

Almost all of them, but there are some that raise certain concerns. Thus, for example, the issue of contracts that are obviously contrary to good morals must be examined separately in the context of collective agreements. As discussed, this problem also arose in connection with the interpretation of the collective agreement as general contractual terms and conditions. Nothing demonstrates the complexity of this area better than the fact that each of its elements requires separate dogmatic analysis and must be compared with specific, precisely definable legal institutions that can be more easily integrated into the given legal system.[93] Thus, the nature of the 'good moral' must be formulated,[94] exploring the origin and adapting to each specific legal institution. This exploratory work obviously makes the comparison of 'lawlessness' and 'immorality' unavoidable. An explanation should be given as to the way in which the term 'contradiction to good

93 Menyhárd, Attila (2004): *A jóerkölcsbe ütköző szerződések* [Contracts Contrary to Good Morals]. Budapest: Gondolat, 9–14.

94 Menyhárd 2004: 86–100; Deli, Gergely (2013): *A jó erkölcsökről* [On Good Morals]. Budapest: Medium.

morals' appears, namely the existence and nature of general clauses.[95] Last but not least, the categories of cases which the case law has classified as contracts contrary to morality should be presented.

As far as labour law is concerned, contracts obviously contrary to good morals occurred in a number of cases.[96] Some of these were subsequently deemed to be in conflict with specific legislation through state regulation. What has not changed, however, is the incorporation of the disproportion between service and remuneration into labour law, or more precisely, the lack thereof, or at least the uncertain assessment of this institution. But the question for our topic is whether all these requirements can be transferred to the level of collective agreements. In principle, it would be conceivable to have a collective agreement that is contrary to good morals, whether to the benefit or detriment of employees. It is also conceivable that a specific collective agreement may confer unfair competitive advantages on a certain undertaking. A contract that is contrary to good morals can only be considered to relate to the content of a collective agreement if the generally accepted general clause of 'good morals' can be interpreted in some way in this context.

However, this requires at least two reference points. One is society's clear, obvious value system, its assessment of certain areas of social coexistence, behaviours and processes. The other is some kind of legal norm

95 Deli, Gergely (2009a): Érték és valóság határán – A jóerkölcs kezdetei I [On the Boundary between Value and Reality – The Origins of Good Morals I]. *Jog–Állam–Politika,* 1(2), 55–79; Deli, Gergely (2009b): Érték és valóság határai. A jóerkölcs története II [The Boundaries of Value and Reality – The History of Good Morals II]. *Jog–Állam–Politika,* 1(3),108–131; Siklósi, Iván (2014): *A nemlétező, érvénytelen és hatálytalan jogügyletek elméleti és dogmatikai kérdései a római jogban és a modern jogokban* [Theoretical and Dogmatic Issues of Non-existent, Invalid and Ineffective Legal Transactions in Roman Law and Modern Legal Systems]. Budapest: ELTE Eötvös Kiadó.

96 Mihalics, Klaudia (2020): A jó erkölcsbe ütköző szerződések munkajogi gyakorlata [Labour Law Practice Regarding Contracts that Violate Good Morals]. *Pécsi Munkajogi Közlemények,* (1–2), 50–80; Kártyás, Gábor (2019): Lehet-e túl előnyös egy munkaszerződés? A jóerkölcsbe ütköző megállapodás a munkajogban [Can a Contract of Employment Be too Beneficial? Agreement against Good Morals in Labour Law]. *Magyar Munkajog E-folyóirat,* (1), 1–13.

applicable to the given area, which may be clause-like, but which guides and influences society's values.[97] A good example of this in German law is the relationship between the *Tarifvertrag* and the *Gute Sitte.* The starting point is that a collective agreement is a contract, and consequently all the principles and rules that apply to a contract in general apply to it. There is in particular Section 138 of the German Civil Code *(BGB),* which lays down the nullity of a contract which is contrary to good morals.[98] In this context, Däubler emphasises that this provision is sometimes erroneously described as a so-called *zweiseitig zwingend Norm,* whereas it must always be regarded as a disadvantage to the employee.[99] It is also important that the so-called *Sittenwidrigkeitskontrolle,* in the case of collective agreements, encompasses all the areas that may arise in any contract, of course, given the characteristics of the collective agreement. The control therefore generally applies to working conditions as well as to the setting of wages. With regard to the latter, certain points of reference are of great importance. One is the so-called *Tarifreferenz,* which serves as a basis for comparison, the other is BGB § 612.[100]

97 Deli 2013: 9, 150–151.

98 BGB § 138 Sittenwidriges Rechtsgeschäft; Wucher: (1) Ein Rechtsgeschäft, das gegen die guten Sitten verstößt, ist nichtig. (2) Nichtig ist insbesondere ein Rechtsgeschäft, durch das jemand unter Ausbeutung der Zwangslage, der Unerfahrenheit, des Mangels an Urteilsvermögen oder der erheblichen Willensschwäche eines anderen sich oder einem Dritten für eine Leistung Vermögensvorteile versprechen oder gewähren lässt, die in einem auffälligen Missverhältnis zu der Leistung stehen.

99 Däubler 2006: 131.

100 BGB § 612 Vergütung: (1) Eine Vergütung gilt als stillschweigend vereinbart, wenn die Dienstleistung den Umständen nach nur gegen eine Vergütung zu erwarten ist. (2) Ist die Höhe der Vergütung nicht bestimmt, so ist bei dem Bestehen einer Taxe die taxmäßige Vergütung, in Ermangelung einer Taxe die übliche Vergütung als vereinbart anzusehen. See LAG Berlin-Brandenburg – Az.: 6 Sa 1343/14 6 Sa 1953/14 – Urteil vom 09.01.2015. Under this decision: A contract of employment stipulating a monthly remuneration of €100.00 for 50 hours per month is unconscionable and therefore void pursuant to Section 138(1) of the German Civil Code (BGB). The agreed wage of €2.00 per hour is, given the usual remuneration of €6.00 per hour paid in the economic area, grossly disproportionate to the work performed by the employee in return.

All of these are relevant because, although a collective agreement is a declared contract in Hungarian law, but the legal consequences of this assessment are not consistently prevailed. Thus, at least it is doubtful whether the content of the collective agreement can be under some general validity (nullity) control in the Hungarian legal system. Similar concerns arise with regard to the apparent disproportion between the service and the remuneration not to mention the fact that SLC Section 31 does not require the application of the relevant CC Section 6:98.[101] Or, in this connection, do we say that in labour law we rely on the general value of society in an area that the legislator does not order to be applied in labour law? In addition to nullity, the analysis of the avoidance is to examine the doctrine of the collective agreement. If we look at Section 28 of the SLC, it is clear that these facts are essentially ordered by the legislator to be applied to individual agreements, mainly the contract of employment. The position and function of the collective agreement in Hungarian law is quite uncertain, and it seems that this is mainly due to the method and content of regulation. This means that, for legal doctrinal or rather legislative reasons, collective agreements cannot fulfil their purpose under Hungarian labour law, or can only do so to a very limited extent. It is clear, however, that there are other reasons for the rules that have been established, which are essentially outside the narrower legal considerations. I am going to outline these in the next point.

THE SOCIAL AND LEGAL POLICY BACKGROUND OF THE 'RESTING' STATE OF THE COLLECTIVE AGREEMENT

According to Berki's study, numerous factors determine the number and content of collective agreements in a country.[102] Among these, she puts first place the legal environment of the collective agreement, which determines,

[101] CC 6:98 Gross disparity of value.

[102] Berki, Erzsébet (2023): A kollektív szerződés Magyarországon 2012–2023 [Collective Agreements in Hungary 2012–2023]. In Gyulavári, Tamás – Kártyás, Gábor (eds.): *A kollektív szerződéses lefedettség csökkenése Magyarországon (2012–2023)*

or at least significantly influences the number and content of collective agreements.[103] This statement is true in that the legal environment can indeed determine the effectiveness of collective agreements in the labour law legal source system, but in broader contexts, the formation of the legal environment is often the effect of other factors. This seems to be implied in Berki's study as well, as she first analyses for example the background problem of trade union organisation.

The number of organised employees is important for two reasons. The first is that under Hungarian labour law, only trade unions can enter into collective agreements, so for them, membership means legitimacy. More importantly, the ability to persuade the other party to enter into a collective agreement, the much-vaunted ability to exert pressure, which is essentially not a legal category but a question of power, depends on the balance of power between the two parties. After the change of regime, for reasons already mentioned, the influence and prestige of trade unions decreased significantly which was greatly exacerbated by a drastic decline in membership. According to Berki's research, the organisation of nearly 20% in 2001, compared to the total number of employees, fell to just over 7% by 2020. With such employee organisation (support), it is debatable whether the 10% threshold specified in the SLC is high or low, but the function of the collective agreement is determined by genuine support, i.e. representativeness.

The number of trade unions may also be important for the efficiency of collective agreements.[104] It is quite difficult to determine this with any degree of accuracy; only estimates are available, but even these do not allow for any in-depth conclusions to be drawn, as the records do not necessarily include membership numbers.[105] It is also difficult to assess the impact of collective agreements, despite the fact that detailed rules on the notification

[Decrease in Collective Contractual Coverage in Hungary (2012–2023)]. Budapest: Friedrich–Ebert–Stiftung, 5–18.

103 Berki 2023: 5.

104 See Szabó, Imre Szilárd (2022): *A szakszervezetek jogállása a magyar munkajogban* [The Legal Status of Trade Unions in Hungarian Labour Law]. Budapest: Novissima, 143–145.

105 Szabó 2022: 153–155.

and registration of collective agreements are laid down in legal norms.[106] The fundamental problem with this register is that changes following the conclusion of collective agreements can hardly be followed – i.e. its status is uncertain – simply because in many cases they are not updated, headcount data is not regularly updated, and the content of collective agreements is largely unknown.

Berki's study contains important data on the spread (prevalence) of collective agreements, the so-called 'coverage' condition. The number of collective agreements covering one employer did not change significantly between 2010 and 2022, and the same is true for the number of employees.[107] The number of collective agreements covering more than one employer is also relatively stable, despite a significant decrease in 2022.[108] Berki points out that the number of collective agreements and the number of employees are fundamentally dependent on the specific characteristics of each sector. Structural changes in some sectors, especially in the fields of public education and health, have not been favourable to the spread of collective agreements and to the effectiveness of labour relations.[109] Finally, I would like to point out that the content of collective agreements is also assessed differently. It is a peculiar solution that in Hungarian law the collective agreement and the wage agreement are practically separated from each other. While the latter

[106] See FMM Decree 2/2004 (I. 15.) on the detailed rules for the notification and registration of collective agreements.

[107] There are around a thousand collective agreements, covering around half a million employees. BERKI 2023: 12–13.

[108] The number of collective agreements generally hovered around 80, but in 2022 there were only 64. The number of employees was around 200,000. BERKI 2023: 14.

[109] This problem belongs to the category of issues concerning the maintainer versus the employer, which primarily affected the former public sector. The maintainer's status as an employer is disputed in many cases. BERKI 2023: 10. It is also unprecedented that, since the introduction of the so-called healthcare service legal relationship (2020), no collective agreements can be concluded, and indeed, collective agreements in force at the time of the reform were terminated by a government decree. See Government Decree 530/2020 (XI. 28.) on certain issues relating to the legal status of healthcare workers and persons working in healthcare.

are obviously affecting the situation of employees, elements outside this (wage) agreement seem to be of marginal importance.

As far as employers' attitudes toward collective agreements are concerned, the picture is quite ambivalent. It can be observed that the majority of the legal successors of the large, formerly so-called 'socialist state-owned companies' have collective agreements.[110] Their content goes beyond the wage agreement and includes a number of important working conditions. There may be several reasons for the continued existence of these collective agreements. One reason is the size of these companies, which in many cases are of strategic importance to the national economy, resulting in a strong interest in maintaining ordered labour/industrial relations.[111] Many foreign companies operating in Hungary also have collective agreements in place. One reason for this is the application of the company's own domestic employment culture to Hungarian conditions. Nevertheless, the expected increase in the number of collective agreements, which was hoped for due to the regulation of full dispositivity, has not been met.

INTERMEDIATE CONCLUSIONS

In this Chapter, I have highlighted the processes and phenomena that determine the position of collective agreements in the Hungarian labour law system, without necessarily seeking to be exhaustive. It should be emphasised that the dilemmas of the current situation, the possible anomalies, did not develop overnight. Already in the first years after the change of regime, it was evident that the placement of the unprecedented legal institution, the definition of its role will not be a simple task. Even assuming the seriousness of the intention of the legislator to strengthen the source law nature of collective agreements, the economic and social movements of the initial period took a different direction and the fixing of relative dispositivity as a principle hindered for a long time the substantive

110 Concerning this issue see a specific analysis in Kiss 2025b: 33–57.

111 One example is the collective agreement of the Hungarian State Railways Company, which operates an internal labour market service.

incorporation of collective agreements among the factors shaping labour law. The efforts of the legislator are certainly noteworthy, but in the absence of a suitable basis – lack of employee organisation – the legislative structures introduced have proved to be complex and inapplicable. A good example of this is the institution of collective agreements concluded within the framework of the so-called Sectoral Dialogue Committees.

In general, there is a certain cyclicity in the orientation of Hungarian labour law, in the strengthening or weakening of certain institutions and actors. This can also be seen in the period following the change of government in 2010, whose economic policy does not serve the development of the already weak collective bargaining system. What does all this mean for the purpose of the collective agreement as previously defined? Since most collective agreements in Hungarian labour law are concluded at the employer level, the purpose of collective agreements can only be assessed in terms of their role in balancing power between the parties. In this respect, it can be stated that, despite the abolition of the principle of relative dispositivity, the scope of the collective agreement is relatively limited by the legal norms, so that it can be said that the autonomy of the collective almost exclusively depends on the will of the legislator. The 'contractuality' of the collective agreement is thus limited. As far as the purpose of the collective agreement is concerned, its impact on economic policy, employment policy, or even social policy, this effect is negligible in Hungary. It has been observed in the past also that the elevation of collective autonomy to a higher level was not the result of spontaneous development from below, but was formed according to the intention of the legislator, the political decision-maker. The lack of a contractual network of collective agreements is still a consequence of this political structure today.

Chapter V

PURPOSE AND EFFECT OF THE LEGAL NORM IN SHAPING OF EMPLOYMENT IN HUNGARY

INTRODUCTION – SCOPE OF NORMS TO BE EXAMINED

It is necessary to clarify the scope of the relevant norms at the beginning of this investigation. In other words, it must be decided whether the analysis should cover legal norms affecting employment in general or only those affecting labour law. The answer is by no means simple, because even though we focus on labour law in the narrower sense, we cannot ignore those regulations that do not directly concern labour law but clearly have an impact on this area. The legal norms discussed in this chapter can also be grouped in a different way. Thus, there are laws that specifically concern private law or public law. Based on another perspective, it is conceivable to distinguish between norms that shape employment relationships (affecting individual and collective labour law) and those that do not. All classifications are acceptable at a general level of abstraction, but if we attempt to categorise certain norms into specific groups, we may encounter overlaps in content that cast doubt on the validity of our initial assumptions.

Therefore, I have selected and grouped the laws to be examined in this chapter based primarily on the subject and purpose of this research. The research tries to explore the legal basis of employment, including the fundamentals of labour law. As I write in the introduction to this work, the concept of employment goes beyond the traditional framework of 'employment as giving work and employment as getting work' – i.e. the framework of traditional labour law. Consequently, the problems raised by new forms of employment, or rather the lack thereof, cannot be ignored. The private labour law is strongly influenced by the EU normative framework, which has recently been strengthened by new legislation. Despite the fact that their impact cannot yet be accurately measured,[1] and even their content is still fluid,[2] it is necessary to address them. As far as the legal basis is concerned, the analysis would be rather one-sided if we were to ignore certain economic and societal norms that affect employment.

Based on these considerations, in this chapter I will examine the purpose and impact of norms affecting employment in the following categories. First, I shall review the central element of employment, namely labour law regulations. This group includes both private law and public law norms, or, according to another classification, dispositive and cogent (mandatory) norms. For easier structural transparency, I analyse the norms affecting private law in the SLC cross-section. Each legal institution is examined in relation to the economic entity of the employer, the norms that maintain the legal superiority of the legal relationship and the norms that ensure the stability (legal status) of the employment relationship of the employee. In connection with these rules, our hypothesis is that their intervention in the autonomy of the parties takes place in accordance with the particularities of labour law and the employment relationship, and within appropriate limits, with the aim of restoring the much-discussed imbalance. This category also includes rules that have been or will be incorporated into Hungarian labour law as a result of European Union efforts, and some of which significantly alter the situation of parties' autonomy. Lastly, it is necessary to consider the provisions of the legislation, which are intended to ensure compliance with the employment rules, preferably by means of public law.[3]

1 I consider the platform directive to be such. See Directive (EU) 2024/2831 of the European Parliament and of the Council of 23 October 2024 on improving working conditions in platform work (text with EEA relevance).

2 See Directive (EU) 2022/2041 of the European Parliament and of the Council of 19 October 2022 on adequate minimum wages in the European Union. In this context see furthermore C-19/23 Kingdom of Denmark v. European Parliament and Council of the European Union. ECLI:EU:C:2025:865.

3 See, among others, Act XXXVIII of 2009 on the amendment of laws concerning the requirements for ordered labour relations and other measures necessary from a labour perspective, as well as Government Decree 115/2021 (III. 10.) on the Activities of the Employment Supervisory Authority. This also includes Act CXXXV of 2020 on Employment Promotion Services and Subsidies, and on the Supervision of Employment.

In the second group of legal norms affecting private labour law, I classify those norms that affect the contractual autonomy of the parties outside of the content framework of legal status protection in the narrower sense. I would like to highlight one of these, which plays a special role in labour law. This is the principle of equal treatment and its reflection in labour law regulations.[4]

Private labour law is also rearranged by norms that, in some cases, were created independently of labour law, but with an impact on it, in order to enforce some other state interest. I consider the unjustified change in the legal status of certain groups of employees[5] and the restriction of the right to strike in certain cases on specific grounds to be examples of this.[6] I discuss these standards in the third group.

I am aware that the division I have created may be criticised from several perspectives. For example, it could be argued that I should analyse the norms that primarily influence the labour market and, through this, have an indirect impact on labour law. This may include employment regulations, various social welfare and support laws, benefits and subsidies provided to certain employees or potential employee groups, or even public works regulations. Similar considerations could be applied to the economy, the rules governing its various processes, support systems and priority rules, such as the emphasis on certain types of businesses, business sizes and activities. Furthermore, there is, of course, a close correlation between social security, the pension system and employment. However, I do not concern myself with these rules primarily because of the subject of my research, while acknowledging, of course, that under another approach, emphasising different elements, would bring other laws to the forefront of the investigation instead of those I have listed. However, I believe that a line

4 See Act CXXV of 2003 on Equal Treatment and the Promotion of Equal Opportunities.

5 See among others Act C of 2020 on Healthcare Service Legal Relationship; Act LII of 2023 on the new career path for teachers; and in connection with the so-called model change of universities, Act IX of 2021 on public interest asset management foundations performing public tasks.

6 In this regard, see Act VII of 1989 on strike and the above-mentioned Act LII of 2023 on the new career path for teachers.

must be drawn somewhere in the multitude of legal norms, also taking into account the possibility that my assessment may be considered subjective based on a different approach.

However, before analysing each group of provisions, it is necessary to examine the significance of the codification itself.

HUNGARIAN LABOUR LAW AS A CODIFIED AREA OF LAW: DOES IT HAVE SUBSTANTIVE OR FORMAL SIGNIFICANCE?

In my previous analysis of the purpose of legal norms, I pointed out that there is no single solution with regard to the codified, partially codified, or non-codified regulatory structure of labour law. It is clear that there are deep historical, legal-political and legal-dogmatic reasons for the various regulatory solutions. It is also natural that different solutions affect labour law as a whole in different ways. However, it seems that the nature, orientation and evaluation of labour law in the legal order is not fundamentally determined by codification or lack thereof, although it undoubtedly reflects extra-legal economic and social processes. Historical, political and ideological reasons can also be discovered behind the former codification efforts of the former socialist countries, and as we can see, these codes – formally – did not disappear, their content, of course, changed. Furthermore, there are completely different legal political and legal dogmatic reasons for the failure of the German codification, or even just the law on the contract of employment, and again the birth of the French *Code du Travail* is different.

What does codification mean in terms of the development and current state of Hungarian labour law? The analysis covers the effects on the following areas. The first is the place of labour law in the legal system, both in general and with regard to some of the most important labour law institutions. The second area of the analysis tries to reveal to what extent the codification contributed to the unity of labour law, to the establishment of a relative independent, intact field of labour law.

The place of labour law in the legal system based on the purpose of the Labour Code in force

It is reasonable to interpret SLC Section 1, which defines the purpose of this Act, from the perspective indicated in the title of this section. Under this provision: "This Act lays down the fundamental rules for decent work according to the principle of free enterprise and the freedom of employment, taking into account the economic and social interests of employers and employees alike." It is not worth reading any ideological explanations into this text; it is simply necessary to examine its content from a legal, contractual perspective. The legislator envisaged the possible resolution of the collision between two fundamental rights in a fundamental rights approach as the aim of the Code.[7] If we look at this sentence in the context of classic contract law – which is followed by a few principles taken from traditional private law – the debtor versus creditor relationship comes to mind. Of course, who qualifies as the debtor and who as the creditor in the performance structure of an employment contract is another question.[8] Without going any further in the analysis of the purpose of the SLC, it might be assumed that labour law is ultimately a branch of private law based on a customary private law contractual relationship.

However, further analysis is needed, starting with a more thorough examination of the subjects of the contract of employment, i.e. the legal status of the employer and the employee. SLC Section 42, Subsection 2, which has already been analysed from a different perspective, proves to be a suitable indicator, as it describes an employment contract in which the employee is obliged to fulfil his or her contractual obligations under the direction of the employer. The wording of the legislation is essentially a description of the content of the employment relationship. In this context,

7 See more about this in KISS 2010: 102–122.

8 See the reversal of legal statuses in relation to *locatio conductio operarum* and *operis.* MARTON, Géza (1963): *A római jog elemeinek tankönyve (Institutiók)* [Coursebook of the Elements of Roman Law (Institutions)]. Budapest: Tankönyvkiadó, 210. For the relationship between the service and the consideration for the service, see the reference to the interpretation of legal statuses in ROMÁN 1989: 37–41.

reference must again be made to BGB Section 611a, which characterises subordination directly as personal dependence. In so far as the myth behind that term appears to be a foreign phenomenon in the context of the BGB, Section 42, Subsection 2 of the SLC falls within its own legal context. Before justifying this statement, I would like to point out that the subordination that determines the content of the employment relationship indicates that the parties to the contract of employment have a homogeneous legal status only at the high abstraction level of the contract. However, when the contract of employment is compared with other (civil) contracts expressing only the performance of work, their legal status is not identical. The status of employer is only one expression of the legally relevant activity of one of the contracting parties, because in connection with this, and in some respects as a result of this, it is part of the private law legal transactions. The other contracting party, the employee, does not have this option *de jure* (and *de facto*) due to its legal status.[9]

It must be concluded from all of the foregoing that qualitative difference in status requires the protection of the legal status of the employee. And in terms of labour law as a whole, it is essential for the fulfilment of its purpose to consider the means by which this is achieved. The fundamental hypothesis of this study is that the optimal means of achieving this is through a balance of sources of labour law i.e. cohesion between contract of employments, collective agreements and legal norms. This does not mean, of course, that legal norms do not play a significant role in labour law, and it can also be said that there are areas of private law outside of labour law where state intervention is more forceful in order to protect the so-called weaker party. Vékás refers to this in his earlier mentioned study, but at the same time emphasises that this intervention, the restriction of certain segments of private autonomy and contractual freedom, cannot be an end in itself and cannot lead to the complete elimination of contractual freedom as a whole or even of certain elements thereof.[10]

9 This discrepancy is particularly striking in the *de facto* similarity and *de jure* difference between the scope of action of employees and so-called dependent self-employed persons. See in the Hungarian literature Kiss 2023a: 261–268.

10 Vékás 2006: 355–364.

For the time being, let us disregard those laws outside the SLC that affect the contractual autonomy of the parties and thus indirectly contribute to the assessment of the place of labour law in the legal system. To understand the existence and inner structure of the SLC, it is necessary to go back to the CC approach. It is reasonable recalling what was written in the Grand Commentary of the CC regarding the regulation of the business (contract for work) (or commission) contract. As I have indicated, the legislature sought to regulate the basic type of such contracts. In the case of the contract for work, the general rules of this contract had to be made suitable for the dispositive legal regulation of business commercial relations, in particular the legal relations of large-scale investments (construction projects).[11] The CC also regulates certain subtypes of the contract for work, but the detailed rules requiring the application of public law and mandatory norms are contained in other laws.

By adapting this solution to the SLC, it would have been conceivable to have a solution that regulates only the general, defining elements of the contract of employment in the Code and places the protection – mostly cogent – norms separately. However, I would not necessarily prefer this solution over the content of the current Code, as it is not this structural solution that determines the status and nature of labour law. The content of each norm is of greater significance, which I will discuss in the next section. However, a substantive comment is warranted regarding the difference between the two solutions. There are certain advantages to separating private law provisions relating to contracts from public law provisions relating to legal status protection. Namely, the contract – as such – has a unified dogmatic order, and this is not affected by the type of contract in question. This can be said in the case of relational contracts and direct transactional contracts. The same can be said in relation to contract of employment and traditional private law contracts. Consequently, all norms that fall outside the scope of classical contractual dogmatic solutions can be made independent, and other economic, social, or even legal policy considerations can be more easily enforced without abandoning the fundamental principles of

[11] Vékás–Gárdos 2021: 1450.

contractuality. In my opinion, such a solution complies with the principle of dynamic equilibrium.

Another indicator of the place of Hungarian labour law is SLC Section 31, which has also been analysed. It is clear that some reference to private law is inevitable in the current regulatory structure, and not only in the case of codified labour law, but in any solution that removes the contract of employment from the civil law regulatory structure of private law contracts. A good example of this is the attempts at a solution in the referenced German drafts of contract of employment *(Arbeitsvertragsgesetz)*.[12] In this regard, there are basically two solutions, namely, the rejection of the application of the civil code, in the case of a detailed labour contract law or codified code, or the clause-like application of the civil law contractual rules. The Hungarian legislature decided on an unacceptable solution, the pitfalls of which I have presented in the previous chapters. With this solution, the legislator left the two important pillars of the sources of labour law – such as the employment contract and the collective agreement – about halfway, although both are contracts at the upper abstract level of the contract, but in fact hybrid rules apply to them, which in some cases causes complete dogmatic confusion.

The regulation of the collective agreement plays a very important role in determining the place of labour law. In this area as well, we come across many different solutions, which, although they influence the perception of labour law in different ways, have in common that they all try to maintain and even strengthen the nature of collective agreements as a source of law. There is a solution where the institution of the collective agreement is regulated in the civil code as a type of contract of employment, which, however, is considered a legal source of labour law in addition to the legal norm.[13] Elsewhere, they are provided for in a separate law, including

12 See the draft by Wilhelm Heschel from 1969: *Entwurf eines Arbeitsgesetzbuches. Allgemeines Arbeitsvertragsgesetz,* furthermore the draft of the *Hannover Juristentag* from 1992; also see *Verhandlungen des neunundfünfzigsten Deutschen Juristentages. Hannover*. München: Verlag C. H. Beck; for the text of the draft see Henssler–Preis 2006.

13 See in the Italian CC *Libro Quinto Capo III. Del contratto collettivo di lavoro e delle norme equiparate.*

the most necessary provisions.[14] In French labour law, it is given special importance in the system of the CT and receives very detailed regulation.[15] I repeat that all of them have in common that the collective agreement is a full-fledged normative contractual source of labour law. Why is this important in the assessment of the place of the labour law? Because the institution of the collective agreement is nowhere 'hanging in the air'. Despite the fact that its legal and political weight far exceeds that of a simple private law contract, and in this context it is placed in a different dimension, the collective contract must also develop its own dogmatic base. There are two solutions here, similar to the placement of the contract of employment. Namely, the collective agreement shares the general dogmatic infrastructure of the contract, has the necessary different rules or has an autonomous dogmatics as a *sui generis* legal institution. However, the Hungarian legislator is silent on all this, and it seems that the collective agreement is included in the SLC, but it should not cause any problems, because there is simply no answer to the problems that may arise based on the Hungarian regulations. It also appears that the collective agreement is more important at the level of legal and political visibility, but its operation is rather limited. Perhaps it can be said without exaggeration that it is still a foreign body, an outsider in the Hungarian labour law system. I would like to reiterate that my statement is supported by the exhaustive, casuistic regulation of works councils, with which the legislator sought to raise the prestige of collective labour law to some extent.

Has codification contributed to the establishment of a uniform Hungarian labour law?

During the preparatory work of the SLC, the debate on the regulatory structure of labour law repeatedly emphasised that the codex form cannot be broken, since such a solution is considered a stable point and a value in

14 See the German *Tarifvertragsgesetz.*

15 See CT *Livre II: La négociation collective – Les conventions et accords collectifs de travail* (Articles L2211-1 à L2283-2).

today's fragmented regulatory system. Despite the fact that the question raised in the title is justified, that codification or lack of it does not in itself determine the direction of labour law, and that it may even be a vain dream to speak of the unity of labour law, labour law has long struggled to define its own place and create some kind of closed unity.

There are undoubtedly many arguments in favour of such an effort. Traditional labour law dogma and the corresponding legislation and judicature have remained almost unchanged for decades. However, new methods of employment and work have rendered many doctrines uncertain, to which labour law has responded primarily by expanding its own traditional institutions. Tensions and contradictions can be observed between the economic demands arising in practice, social needs and the alternative solutions offered by traditional labour law. So, there is also a need to rethink the unity of labour law so that the substance of the law does not fall apart. In this regard, there are two possible solutions: either a labour law subsystem that is similar to private law or even formed as part of it – naturally with the necessary deviations and special rules – or the development of a separate sui generis body of law. In my opinion, a compromise solution is not conceivable here either.

The nature of legal norms, the areas of intervention, duration and intensity play a significant role in this process. I have indicated earlier that two areas of intervention must be distinguished when examining legal norms, which is a difficult task. One is to limit the autonomy of the parties in order to protect the legal status of the parties. Of course, when analysing this area, almost everyone thinks of the protection of the employee's legal status, but at the same time, the purpose of labour law is to promote the employer's economic goals. The other area which is rather difficult to assess is that of self-interested intervention, which is not linked to labour law on reasonable grounds and which cannot be substantiated and which is at least not directly related to the interests of either party.

Related to the title of this section: what does this mean for codification? In my view, a codified body of law can help to create an integrated labour law. In this way, the above-mentioned sui generis labour law can be created, but also a labour law belonging to the private law system, but significantly different from it in some of its elements, can also be established. The Hungarian legislator has been hesitating between the two solutions since the change of regime. This has resulted in labour codes increasingly bringing to the fore the dogmatic problems of labour law. The essence of these is that the legislator has created an 'employment contract code' with the requirement to regulate the whole of labour law. Thus, despite all its positive features, the Hungarian codification of labour law contains a fragmented and difficult to manage labour law material, contrary to its purpose.

NORMATIVE INTERVENTION IN LINE WITH THE SPECIFICS OF THE EMPLOYMENT RELATIONSHIP – NORMATIVE MEANS OF PROTECTING THE LEGAL STATUS OF THE PARTIES

Perhaps it is surprising that under the category of legal status protection, I do not mean only the protection of employee status. However, since the basic institution of labour law is the contract, which as a general rule assumes several contracting parties, it is also necessary to interpret the legal status of the employer. However, it goes without saying that this does not mean the same level of protection and the same intensity of protection institutions. Nevertheless, in the absence of a comprehensive investigation, I would not simply follow the traditional method, as that would not bring us any closer to realising the complex purpose of labour law. Labour law has a dual purpose in that it must take into account both the economic interests of the employer and the social needs of the employee. This is particularly true for legal norm.

Norms governing the legal status of employers – Ensuring decision-making power and its limitations

As far as the economic interests of the employer are concerned, we analyse the norms that define the employer's legal position, ensure its contractual autonomy, or limit it in some area. The content of those norms is obviously based on the fact that the contract of employment creates a legal relationship which expresses subordination between the parties. This can also be interpreted to mean that elements restricting the employer's rights must be incorporated into legal relationships that support the employer's 'inherently more important' economic interests. The wording 'inherently more important economic interest' requires further explanation. That classification can be assessed only in the light of the fact that, unless the employer's economic leeway is adequately guaranteed by the rules of labour law, it is rather difficult to satisfy the part of the employee's social needs which is linked to his employment relationship and which may derive from it. Of course, the same applies to restrictions, since the predominance of the employer's decision-making power can lead to similar results.

Declaration and protection of the employer's legitimate economic interests as a general rule of conduct

The securing and, at the same time, limiting of employer power can be clearly traced in the general provisions of the SLC, particularly in the definition of general conduct requirements. In this part of the SLC, several provisions specifically address the employer's economic interests and their protection. One of highly controversial rules is SLC Section 8, which refers to the employer's economic interests by limiting the employee's behaviour. Thus, according to Subsection 1 "during the life of the employment relationship, employees shall not engage in any conduct by which to jeopardise the legitimate economic interests of the employer, unless so authorised by the relevant legislation". Subsection 2 provides that "employees may not engage in any conduct during or outside their paid working hours that – stemming from the employee's job or position in the employer's hierarchy – directly and factually has the potential to damage the employer's reputation, legitimate economic interest or the intended purpose of the employment relationship". Furthermore, under Section 9, Subsection 2 "the rights relating to personality of employees may be restricted if deemed strictly necessary for reasons directly related to the intended purpose of the employment relationship and if proportionate for achieving its objective". Finally according to Section 8, Subsection 3, an "employee may not exercise the right to express their opinion in a way that may lead to causing serious harm or damage to the employer's reputation or legitimate economic and organisational interests".

The inclusion of the described content in the SLC means that the protection of the economic interests of the employer is a general duty of the employee. Here, I will disregard those laws that authorise employees to perform acts that are contrary to the economic interests of their employers.[16] However, is it important to define what the legislator means by the legitimate economic interest of the employer? In my opinion, this concept can be interpreted in this context only in relation to the employment relationship. The employer may have entrepreneurial interests in many other areas that are not related to employment. However, it is important that this concept is general, and the legislator does not detail the behaviour to protect this interest, nor does it tie it to any specific fact.[17] Highlighting this point is important because the requirements formulated as such clauses must somehow be filled with concrete content. This problem arises in all provisions of this kind, including, for example, the requirement of fair consideration discussed below.[18] And the institutions of collective labour law, collective bargaining and the works council have – or should have – a major role to play in this.

16 See among others Act XXV of 2023 on complaints, reports in the public interest, and rules relating to the reporting of abuses.

17 In this regard, I refer to FLC Section 108, which linked the employee's efforts to establish a further employment relationship with the legitimate economic interest of the employer. Under this Section: "Employees shall notify their employers if establishing additional employment relationships or other relationships for the performance of work. In the absence of an agreement to the contrary, employers may prohibit the establishment of a relationship or may order the employee to terminate the additional employment relationship if such relationship stands in violation of Subsection 5 of Section 3." This Section regulated the protection of the legitimate economic interests of the employer.

18 SLC Section 6, Subsection 2.

The protection of the employee's economic interests also extends beyond the end of the employment relationship. The non-competition agreement regulated in SLC Section 228 is classified as such.

The narrow interpretation and concretisation of the employer's legitimate economic interests is particularly important in the case of limiting the employee's right to freedom of expression. The reason for this is that freedom of belief occupies a special place in the system of fundamental rights in several respects, since it is a deeply personal right, in other words an inviolable part of the inner world of person.[19] Freedom of belief and one of its manifestation, freedom of expression,[20] is also extremely complex in the relationship between the state and the individual, and the formula is perhaps even more complicated in the context of private contractual relations. An even more special feature of this is the employment contract, which results in a legal relationship in which the employee is *de jure* subordinate. According to Article IX, paragraph 1 of the Fundamental Law (Constitution): "Everyone shall have the right to freedom of expression." Under paragraph 4: "The right to freedom of expression may not be exercised with the aim of violating the human dignity of others". In several of its decisions, the Constitutional Court pointed out the 'foundational' nature ('anyajog') of the fundamental right to freedom of belief and expression of opinion. The Constitutional Court stated in its decision 4/1993 (II. 12.) that "everyone has the right to live according to their convictions".[21]

What does the restriction of this strong right mean in light of the legitimate economic interests of the employer? In this context, conflicts of fundamental rights may arise in a number of areas. This can be a conflict of interest between the employee's worldview, religion, and political beliefs

[19] See comprehensively BÄUMLIN, Richard et al. eds. (1970): *Das Grundrecht der Gewissensfreiheit. Die Rechtsformen der sozialen Sicherung und das allgemeine Verwaltungsrecht. Veröffentlichungen der Vereinigung der Deutschen Staatslehre.* Berlin: Walter de Gruyter. In the Hungarian literature regarding labour law see KISS 2010: 390–433.

[20] See KONZEN, Horst – RUPP, Hans Heinrich (1990): *Gewissenskonflikte im Arbeitsverhältnis.* Köln: Carl Heymanns Verlag, 171.

[21] See also Decision 30/1992 (V. 26.) AB.

and the character and nature of the employer[22] for which sophisticated multi-layered solutions exist in individual legal systems.[23] The resolution of collisions that may arise in different areas cannot be assessed by applying uniform schemes. Thus, for example, in case of restrictions related to worldview and religious beliefs, the Constitutional Court – similarly to solutions in other countries – took into account general secular and commercial customs, as well as the impact on the employer of changing the working order in a certain case.[24] In cases where an employee, but especially an employee representative body, expresses an opinion in connection with the employer's activities, special consideration must be given to the fact that the employee has the right to express himself in order to protect his own interests, and that this is the purpose of the representative body.[25] Before presenting the various criteria, methods and results for resolving collisions between different areas, as well as the specific legal consequences, it is worth considering another requirement related to SLC Section 8, namely the institution of fair consideration.

The requirement of fair consideration as a general rule of conduct

Perhaps the most important rule restricting the exercise of employer rights is SLC Section 6, Subsection 3, which emphasises the principle of fair consideration in employer decision-making. The basis of this provision is

[22] A good example of this is the interpretation of the German *Tendenzbetrieb.* See NOLL, Gerhard (2001): *Arbeitsrecht im Tendenzbetrieb. Ratgeber für Arbeitnehmer und deren Interessenvertretung.* Köln: Bund Verlag.

[23] See, for example, the *Civil Rights Act* in U.S. law, or the *Workplace Religious Freedom Act* of 2005. For a review of relevant cases see KISS 2010: 402–312. For an overview of the German legal approach see KISS 2010: 401–424.

[24] Decision 10/1993 (II. 27.) AB.

[25] For more details see BORS, Szilvia (2022): A véleménynyilvánítás szabadsága és egyes személyiségi jogok kollíziója a munkajogban [The Collision between Freedom of Expression and Certain Personal Rights in Labour Law]. *Jog–Állam–Politika,* 14(1), 225–226.

the employer's unilateral power to determine performance, which practically covers all periods and areas of performance.[26] This provision provides the general framework of the employer's decision-making behaviour, which he must take into account in all cases when he determines the behaviour of the employee or a group of employees. This provision seems clear only at first sight, in fact all its elements require explanation. Furthermore, the wording of that requirement has been violated by the introduction of a general clause, the application of a so-called 'open rule', which can also be a source of considerable uncertainty as to the legal consequences.[27]

The first factor to be examined is the clause-type regulation. The appearance of clauses is almost necessary in the general regulation or more specific orientation of certain conditions of the employment relationship. This is also due to the fact that the employment contract is essentially an incomplete contract, the definition of the service is abstract, the mode of performance is specified by the recipient of the service, the employer. Consequently, the clauses are suitable for a flexible approach to the performance of the employment relationship, filling the gap where there is no specific legal regulation.[28] However, clauses are, by their very nature, a source of uncertainty. The reasons for uncertainty may be as follows. The clause, as a general behavioural requirement in this case, is abstract in itself, refers to a specific phenomenon, process and typically covers a number of potential situations. However, since the fair consideration clause is also a behavioural requirement, a 'rules-governed employment relationship', the uncertainty arising from it cannot mean that the law does not have legal consequences. However, this requires some concretising action. This may be concretised

26 This is expressed in § 315 of the BGB. The rule is as follows: "Soll die Leistung durch einen der Vertragschließenden bestimmt werden, so ist im Zweifel anzunehmen, dass die Bestimmung nach billigem Ermessen zu treffen ist."

27 See about this among others in KUN, Attila (2017): A méltányos mérlegelés elve a magyar munkajogban – méltánytalanul mellőzve [The Principle of Fair Consideration in Hungarian Labour Law – Unfairly Ignored]. *Magyar Jog,* 64(12), 734–745; NÁDAS, György (2022): A méltányos mérlegelés elvének aktuális kérdései [Current Issues Relating to the Principle of Fair Consideration]. *Miskolci Jogi Szemle,* 17(2), 270–289.

28 KUN 2017: 735.

by the court, but it is conceivable that a collective agreement defines the parameters of each relevant situation.

The next factor to be analysed is the concept itself. What does 'fair consideration' mean? Fair consideration is basically an interpretative principle, but that does not mean that it does not have an objective basis. Almost all commentaries and literature on the subject emphasise that the starting point is the requirement of good faith and honesty, as well as mutual cooperation.[29] It is also important that this clause does not apply in cases where the rights and obligations and the manner of performance are objectively, precisely and in detail defined. Domestic regulation within the meaning of Section 6, Subsection 1 of the SLC declares that a "contract of employment shall be executed as it might normally be expected in the given circumstances, unless any legal provision exists to the contrary". Subsection 2 states that "in exercising rights and discharging obligations, the parties involved shall act in the manner consistent with the principle of good faith and fair dealing, they shall be required to cooperate with one another, and they shall not engage in any conduct to breach the rights or legitimate interests of the other party. The requirements of good faith and fair dealing shall be considered breached where a party's exercise of rights is contradictory to his previous actions which the other party had reason to rely on." These provisions represent the 'basic level' of the behaviour of the parties during the performance of the contract of employment.

Fair consideration requires the decision-maker to proceed on the basis of the contractual principle that the other party also has an obligation to perform the contract and may be presumed to be able and willing to do so. It follows that the employer must take into account, when making his decision, the circumstances which enable the employee concerned to perform her/his duties. In this broad sense, it includes objective circumstances outside the employee and subjective factors inherent in the employee.

The next conceptual element is the category of 'disproportionate harm'. The concepts of proportionality and disproportionality in the context of

29 See among others BRUDERMÜLLER, Gerd et al. eds. (2018): *Palandt Bürgerliches Gesetzbuch.* München: Verlag C. H. Beck, 542; TILLMANNS, Kerstin (2007): *Strukturfragen des Dienstvertrages.* Tübingen: Mohr Siebeck, 123–127.

injury can be interpreted strictly within the framework of the employment relationship. The *de iure* subordinate status of the employee means that the employer can make certain shifts in emphasis within the framework of a system of conditions during the unilaterally determining performance, and can shape the conditions within certain limits. Since the employer is the decision-maker, by the nature of the matter, the decision may cause harm to the addressee of the statement. Attila Kun refers to the reasoning of the SLC, according to which there can be a "disproportionate harm in the event that the failure of the employer's decision would cause the employer disproportionately greater damage, costs, or harm in general than what his action causes to the employee".[30] In my opinion, this general wording is justified because the SLC does not attach any criteria to certain condition-setting employer decisions, and even omits the phrase "in the interest of the company", etc.[31] Thus, the answer to the question of whether the requirement of fair consideration is a fact-dependent or independent category depends on the level of abstraction at which this requirement is examined. At the general level of requirements for the definition of performance, the fair consideration is not dependent on the facts; it applies to all decisions of the employer. If we analyse the individual actions, their object, the duties induced by the decision, and the legal consequences, the requirement of fair consideration seems to be fact-dependent, but this is basically incidental, or at least it should be. And at this point, we come to perhaps the most important area of this topic, namely the effectiveness of this regulation.

30 Kun 2017: 735. Reasoning to Section 6, Subsection 3.

31 In this context, I refer to FLC Section 105, Subsection 1 which provided that "for economic reasons the employer may order its employee to work temporarily at places other than the normal place of work (posting) on condition that the posted employee continues to work under the employer's direction and instructions". Furthermore see Section 134, Subsection 3, point a): "Vacation time shall be allocated in the year in which it is due [...]. Employers shall allocate vacation time before 31 March of the year following the year in question in the event of economic reasons of particular importance or any direct and consequential reason arising in connection with its operations, or before 30 June of the year following the year in question if so stipulated in the collective agreement."

The nature of clauses relating to general conduct requirements concerning the legal status of employers in light of legal consequences

As I alluded to in connection with Kun's analysis, one of the main criticisms of SLC Section 6, Subsection 3 is that the clause-like regulation is basically declarative in nature, contains many uncertainties, and does not entail any legal consequences by virtue of non-compliance with them. It cannot be ruled out that the clauses, due to their regulatory content and methods, are associated with uncertainty compared to traditional legislation, but the purpose of the clauses is certainly not to create *lex imperfecta* situations without legal consequences. Just as *incomplete contracts* were not created for their own purposes, and they do not exist without a purpose.

The purpose and nature of the operation of fair consideration can also be well traced in the application of Section 315 BGB to employment law.[32] The duty of the employee based on § 106 *Gewerbeordnung* and Section 315 BGB is subject to multiple controls. One of the essential internal controls, so to speak, is based on the duty of cooperation between the employer and the works council. According to Section 75, Subsection 1 of the *Betriebsverfassungsgesetz* "the employer and the works council must ensure that all persons working in the enterprise are treated according to the principles of law and fairness".[33] In addition, decisions made by fair consideration are subject to judicial review. More specifically, this means that if the employee does not comply with the employer's decision and files a complaint with the labour court, the court will examine the thoroughness of the requirement of fair consideration of the instruction and then whether the certain instruction

[32] See about this issue in detail in Hromadka, Wolfgang (1992): Änderung von Arbeitsbedingungen. *Recht der Arbeit,* 45(2), 234–265; Söllner 1966; Kornblum, Udo (1968): Die Rechtsnatur der Bestimmung der Leistung in den §§ 315–319 BGB. *Archiv für die Civilistische Praxis,* 168(2), 450–469; von Hoyningen-Huene, Gerrick (1978): *Die Billigkeit im Arbeitsrecht.* München: Verlag C. H. Beck.

[33] "Arbeitgeber und Betriebsrat haben darüber zu wachen, dass alle im Betrieb tätigen Personen nach den Grundsätzen von Recht und Billigkeit behandelt warden."

complies with this requirement or not.[34] In addition, it is essential that the boundaries of fair consideration are usually defined either in the works councils agreements or in the collective agreement. This is of particular importance precisely because it provides the employer with a basis for its decision. As far as the Hungarian regulations are concerned, it should be emphasised that the behavioural requirements set out in the general provisions are considered to be 'rules-governed employment relationships'. Consequently, if the employer's decision unreasonably limits the employee's personal rights, violates his human dignity, or does not meet the requirements of fair consideration, it is contrary to the rules governing the employment relationship. In other words, the employer's unilateral declaration of rights suffers from some kind of error. We could almost reflexively say that the employer's decision (instruction) is invalid. And at this point we have to return again to the SLC regulation of the validity and invalidity of legal declarations. Under the heading 'Invalidity', it only provides for the validity of the agreement, and in this context it only notes in Section 29, Subsection 4 that "in case of invalidity of the unilateral legal declaration, rights and obligations do not derive from this legal declaration".

As an introduction to the analysis of the invalidity of the discussed employer's decisions, reference should be made to SLC Section 15, Subsection 1, according to which "rights or obligations can only arise from a unilateral legal declaration in the case specified in the rules-governed employment relationships". Furthermore, according to Subsection 3, "the rules applicable to the agreement must be properly applied to the unilateral legal declaration" – whatever that means. From the point of view of our topic, SLC Section 54 entitled 'Refusal of Instructions' deserves attention. The content of this rule shall include the facts of the invalidity of the instruction. László Román dealt exhaustively with the validity and effectiveness of the employer's instruction in the Hungarian literature.[35] I have already presented his work and his position before. Román basically defines each group of facts by characterising the instructions, as well as determines the

[34] See BAG 10 AZR 330/16 – *Versetzung – unbillige Weisung – Verbindlichkeit für den Arbeitnehmer.*

[35] Román 1977.

possible reactions to the invalidity of the instruction.[36] In this context, he deals with the problem of distinguishing between refusal and avoidance.[37] According to his opinion, the refusal of the instruction 'by its very nature' is aimed at the invalidity of the instruction, while the avoidance can in principle also aim at the remedy. Román's demarcation explanations are also noteworthy because he draws attention to the importance of reflecting on the errors of unilateral acts, which make up the vast majority of labour law performance declarations. In summary, it can be concluded that in addition to employee reflection, the deployment of other institutions is also necessary. Before I explain that, let us look at the regulation of the SLC.

Under Section 54, Subsection 1 "employees shall refuse to carry out an instruction if it would result in direct and grave risk to the health of others or to the environment". According to Subsection 2, employees may refuse to carry out an instruction if it violates the regulations governed by employment regulations, or it would result in direct and grave risk to the life, physical integrity or health of the employee. This rule is objectionable from several respects, on the one hand, it is undifferentiated, on the other hand, it is incomplete, and on the third hand, it does not have a statutory – if you like – affirmative, employee protection – background. As far as undifferentiation is concerned, an instruction may have errors of several types and weights, and be grounds for invalidity. Thus, it may be possible to compel an employee to perform a task which is contrary to the rules governing employment. There may be a case where the employee, despite his conviction, is forced or threatened by the employer to perform a task which in itself does not conflict with the rules governing employment. If these facts are incorporated into the SLC's system of invalidity of agreements, the formula of nullity and avoidance is obtained. It is clear that the invalidity reactions of unilateral employer legal declarations cannot be replaced by the legal consequences of the validity of the agreements. There is no doubt, however, that this matter is not closed by practising refusal alone.

And here we come to the incompleteness of the content of SLC Section 54. Román introduces this problem with the following question: "Is it possible

36 Román 1977: 35–55.

37 Román 1977: 60–61.

to respond to the employer's instructions in the form of a legal remedy?"[38] His answer is quite differentiated and complicated, and it should be taken into account that he describes the labour law and labour organisation environment of the seventies, and his comparative example is derived from the analysis of the state administration directive of that era. In conclusion, he also expresses his doubts about remedial response notes, but his solution proposals, or rather sketches, are by no means superfluous.

This brings us to the so-called 'environmental' flaw of SLC Section 56, which I characterised as the lack of 'affirmative' rules. In the conditions at that time, Román calls for prevention, cooperation and influence mechanisms, such as internal, organisational legal remedies, for example the trade unions. Despite the fact that at that time these tools had little to do with the invalidation and legal remedies that can be built on the dogmatic basis of private law, 'similar type' tools can still be considered for the enforcement and qualification of requirements formulated in the form of clauses. With this, I only want to convey that these requirements do not exist in a vacuum, but the aforementioned cohesion of legal sources, the mechanisms of labour law, including the unity of individual and collective labour law, give meaning to these rules. Unfortunately, this is missing from Hungarian labour law, so traditional remedies must be used, which are not necessarily in line with this area, the procedures are long and their effectiveness is severely limited.

Some important norms that secure the legal status of employers and set out its limits

The starting point of the analysis is the employer's unilateral determination of performance, which is defined in point a) of the SLL Section 42, Subsection 1 as the employee is obliged to perform work under the direction of the employer. In this context, it should be noted that while not all of the general rules of conduct can be interpreted by judicature beyond the relations of performance see, for example, the requirement of fair consideration,

38 Román 1977: 63.

which is not applied when assessing the termination of the employment relationship[39] – in the following, I generally examine the norms that directly or indirectly affect the employer's position, both in the field of individual and collective labour law.

Determination of contractual conditions upon conclusion of the contract of employment and possibilities of shaping of the working conditions during the process of performance. In practice, the employer determines the content of the contract and the working conditions, while the employee's role is mostly limited to accepting the offer. In organisations where there is a collective agreement, the situation is obviously different, and the employer can only make an offer within the framework of the collective agreement when concluding a specific contract of employment. Incidentally, with regard to the conclusion of contract of employment, the employer's decision is subject only to those restrictions that essentially result from EU social requirements. I will discuss these in the context of protecting the legal status of employees.

However, one of them may still have a decisive impact on the employer's freedom of contract namely the EU minimum wage directive.[40] Although this study does not examine the content of this directive in detail, it is worth mentioning because it clearly illustrates the difference in approach between EU and Hungarian labour law. I consider this important despite the fact that the directive is not directly addressed to employers, but its implementation fundamentally affects their room for manoeuvre. Section 153 of the SLC empowers the Government to determine the amount of the mandatory minimum wage (and the guaranteed minimum wage), following consultations in the National Economic and Social Council by means of a decree. The legislation also establishes certain criteria for establishing the 'scope' of the mandatory minimum wage. It is therefore necessary to take into account "in particular, be determined based on the requirements prescribed for specific occupations, the indicators of the national labour

39 See Curia: The practice of terminations and terminations without notice. Summary Opinion of the Curia Legal Practice Analysis Group.

40 Directive (EU) 2022/2041 of the European Parliament and of the Council of 19 October 2022 on adequate minimum wages in the European Union.

market, the status of the national economy, and the unique requirements of certain economic sectors and geographical areas in terms of workforce". The amount must be reviewed every calendar year.

From the text, the Government is also authorised to establish in a decree the forum designated for the consultation of the mandatory minimum wage (and the guaranteed minimum wage) and the rules for the consultation. There is such a body, which was born precisely as a result of the Directive.[41] This body is the Permanent Consultation Forum of the Competition Sector and the Government (hereinafter: PCF). Despite the fact that the PCF is a 'merely consultative' organisation and the Government has 'only' an obligation to negotiate the indicators relating to determining the amount of the mandatory minimum wage, the procedure itself contains remarkable elements. Thus, in particular, the detailed explanation of the indicators defined in SLC Section 153, Subsection 3. Nevertheless, its requirements laid down in Articles 4 and 7 of the Directive should bring about a fundamental change in this mechanism, which is likely to have an impact on the setting of local wages.[42]

The employer's position in the process of concluding a contract of employment can therefore be considered quite strong. It is reasonable to examine what scope there is for shaping working conditions within the framework of the employment contract in comparison to this. In this regard, legal norms can be divided into two groups. One group includes norms that do not allow for any deviation from the original state, while the second group includes those that allow for the employer's unilateral right to change the conditions. The first category typically includes rules relating to wages, which do not allow for unilateral (temporary) changes to wages in the event of a change in conditions. The latter group includes

41 See Government Decree 308/2024 (X. 24.) on detailed rules for consultation on the mandatory minimum wage and the guaranteed minimum wage, as well as amendments to certain government decrees transposing Directive (EU) 2022/2041 of the European Parliament and of the Council of 19 October 2022 on adequate minimum wages in the European Union.

42 In connection with the further development of the content of the directive, I refer to C-19/23 *Kingdom of Denmark v. European Parliament.*

cases covered by Section 53 of the SLC concerning temporary employment other than a contract of employment. It should be noted that the legislator provides a relatively broad possibility for deviation through the collective agreement, even to the disadvantage of the employee, but due to the low coverage of the collective agreement, few employers can take advantage of this opportunity.

For the position occupied by the employer in the course of the performance, the provisions on working time shall be mentioned separately. The basic provision for the protection of the employer's legal status and economic interests is SLC Section 96, Subsection 1, according to which the employer determines the rules for the division of working time (the working time schedule). This right may be transferred to the employee in whole or in part (independent work schedule), but this does not change the nature of the right. Of course, there are a number of limitations to the way in which working hours are scheduled.[43] Remarkably strict rules apply to changes in working hours for economic reasons.[44] On the other hand, the employer has a relatively wide range of leeway with regard to the allocation of vacation time.

In the context of working time and the position of the employer, it can be stated that there are a number of cogent and even more relative dispositive provisions in accordance with the relevant directive. However, the employer's legal position is strong, as the legislator has sought to make the most of the Directive in order to safeguard economic interests. On the other hand, legislators have recently been attempting to push the boundaries with individual agreements whose voluntary nature and compliance with the directive are questionable, to say the least.[45]

[43] SLC Section 97, Subsections 1, 4.

[44] SLC Section 97, Subsection 5.

[45] See SLC Section 109, Subsection 2: "In addition to what is contained in Subsection 1, a maximum of one hundred and fifty hours of overtime work can be ordered in a given calendar year subject to agreement between the employee and the employer in writing (voluntary overtime). The employee may withdraw from the agreement at the end of the given calendar year."

As regards the qualification of the employer's legal position in the conclusion of the contract of employment and the determination of the method of performance, the strength of this position is ambivalent. The legislator does not give the employer any latitude, it refrains from creating any kind of at-will employment, but it has at the same time created a regulatory environment which does not impose any particular societal constraints on the pursuit of the economic interests of the employer. This can be verified primarily by analysing the other side, the provision of the employee's legal status. At the same time, there is no doubt that in collective agreements – in addition to the relative dispositive deviation – there is a great opportunity to shape the working conditions flexibly, even to the advantage of the employer, if there is a collective agreement.

Assessment of the legal status of the employer in light of the termination of the employment relationship. The termination of the employment relationship by the employer has an indirect effect on the employer's position. *De iure* termination of an employment relationship does not generally differ from the way of termination of private law relationships. If, on the other hand, the termination is evaluated as the fact that the contractual partner, who is in an economically weaker position and is in legal subordination, falls out of his legal status, on which his existential situation fundamentally depends, other factors must be taken into account in addition to legal dogmatic identity. This is also reflected in the decisions of the Constitutional Court concerning the non-unlawful failure of employers to give reasons for their dismissal.[46] The Constitutional Court explained in these cases that the contractual freedom of the parties has significantly increased during the shaping of the content of the employment relationship, the law does not specify a specific reason for termination, but in general states the right of mutually free termination, and does not even allow for this right to be waived by either the employee or the employer, or validly limited in

46 See among others Decision 44/B/1993 AB; Decision 11/2001 (IV. 12.) AB; Decision 4/1998 (III. 1.) AB; Decision 8/2011 (II. 18.) AB; Decision 29/2011 (IV. 7.) AB.

an agreement.[47] According to the Constitutional Court's point of view, the statutory limitation of the full and unlimited freedom of termination protecting the employee's interests is the employer's obligation to provide reasons and the framework definition of the grounds for termination. The conclusion can be drawn from all of this that the Court approaches the termination of the employment relationship by termination on the basis of private law, based on the principle of freedom of contract. In this context, this approach treats the contract of employment in the same way as other private law contracts and considers the content of employee protection to be virtually complete with the employer's obligation to give reasons for termination.

To this day, the practice related to employer termination is determined by Resolution 95 of the Labour College of the Supreme Court (hereinafter: Resolution).[48] The conclusion of the Resolution drawn from the legal certainty requirements derived from the relationship between fairness and dismissal prohibitions is relevant to our topic. According to the text still in force today, "the rules of the Labour Code prohibit, restrict or impose appropriate conditions on the employer's dismissal for the protection of the employee on the basis of social considerations and with due regard to equity. However, the Code does not allow the challenge of termination that does not contravene with the aforementioned prohibitive or restrictive rules on the basis of fairness aspects outside the scope outlined, because this would not be compatible with legal certainty. A lawful employer's termination cannot therefore be annulled solely on the basis of the fair circumstances of the case".[49]

This approach entails particular consequences when the termination of the employment relationship is based on a change in the economic circumstances of the employer. The Resolution emphasises that "examination

[47] At the time of this decision, SLC Section 65, Subsection 2 was not yet in force. The provision is as follows: "If so agreed by the parties, the employment relationship may not be terminated by notice for a period of up to one year from the date of commencement of the employment relationship."

[48] The resolution was published in the May 1977 issue of the Archive of Court Decisions.

[49] Resolution I, b).

of the reason for termination does not entitle the court to intervene in the decision of issues falling within the scope of the employer's management, which are outside the scope of the labour dispute". Thus, for example, it is not possible to examine whether the reorganisation that took place was expedient, or why the employer terminated the employment of the employee concerned, and why it did not terminate the employment of a colleague who occupied the same position.

Despite the fact that the Resolution was born in a different economic and political era, the essence and assessment of the so-called managerial prerogative has not changed much even today.[50] It can also be argued that the Hungarian approach of judicature is not fundamentally different from the general trend. It is quite another matter that this does not, and cannot, mean that the employer's termination of employment on grounds of economic necessity is not subject to restrictions or is not subject to certain controls. This may be a special procedure before dismissal, the so-called *pre-dismissal hearing*, or the institution of *Änderungskündigung*, as it is known in many countries. The influence of employee representatives, trade unions and works councils on the decision-making process and its impact on its content is of great importance, and the role of the collective agreement should be mentioned. Finally, in more than one country, the labour authorities are also involved in the process.[51]

Unfortunately, these institutions are largely unknown in Hungarian labour law, only a few collective agreements can be cited as examples, which contain the designation of termination limits, procedural rules, compensation, and even personnel plans and concepts.[52] All of this is related to the employer's legal status and the strength of its legal position, because in the SLC the legal consequences of the employer's unlawful termination have fundamentally changed compared to the FLC. Namely, the general obligation to continue employment fixed in the previous regulations was replaced by compensation as the main rule. Without going into detail, it

50 See in this comparative analysis Waas 2023.

51 Kiss 2025b: 33–57.

52 The collective agreement of the Hungarian State Railways (MÁV Zrt.) presents detailed provisions about the Labour Market Service operating within the company.

can be stated that the formula has been reversed. The change is particularly striking in light of the Constitutional Court's annulment of the original Section 100, Subsection 1 of the FLC, which had reinforced the previous approach.[53] The current regulation was subjected to critical analysis by several authors,[54] and the Court also revealed in detail the uncertainties

[53] Decision 4/1998 (III. 1.) AB. Pursuant to the repealed provision, "at the request of the employer, the court shall waive the reinstatement of the employee to his original position, provided that the employer pays the employee an amount equal to twice the severance pay due in the event of normal termination". The Constitutional Court explained, among other things: "The right to dispose of a lawsuit is therefore violated by the fact that the infringing employer may decide to exclude the gainful employee from continuing to work."

[54] See among others Petrovics, Zoltán (2015): A jogellenes munkaviszony-megszüntetés margójára [A Note on Unlawful Termination of Employment]. In Horváth, István (ed.): *Tisztelgés: Ünnepi tanulmányok Dr. Hágelmayer Istvánné születésnapjára* [Tribute: Festive Studies on the Birthday of Dr Istvánné Hágelmayer]. Budapest: ELTE Eötvös Kiadó, 367–380; Petrovics, Zoltán (2022): *A biztonság árnyékában. A munkajogviszony munkáltató általi megszüntetésével szembeni védelem alapkérdései és magyarországi története* [In the Shadow of Security. Basic Issues of Protection against the Termination of the Employment Relationship by the Employer and Its History in Hungary]. Budapest: ELTE Eötvös Kiadó; Bankó, Zoltán (2016): A munkajogviszony jogellenes megszüntetés szabályozásának elvi, nemzetközi, történeti aspektusai [International, Principled and Historical Aspects of the Regulation of Unlawful Termination of Employment]. In *Kúria Joggyakorlat-elemző Csoport: Összefoglaló vélemény. A munkaviszony jogellenes megszüntetése jogkövetkezményei.* Budapest: 2016. június 6., 3. sz. melléklet [Curia Legal Practice Analysis Group: Summary Opinion. Legal Consequences of Unlawful Termination of Employment, 6 June 2016, Appendix 3); Bankó, Zoltán (2015): A munkáltatói hatalom korlátai a munkajogviszony megszüntetése során – a felmondási tilalmak és korlátozások a magyar munkajogban [Limitations on the Employer's Power to Terminate the Employment Relationship – Prohibitions and Restrictions on Dismissal in Hungarian Labour Law). *Jura,* 21(2), 5–10; Kártyás, Gábor (2014): Munkaviszony helyreállítása jogellenes megszüntetés után [Reinstatement Following Unlawful Termination]. *Adó Online,* 31 July 2014; Lőrincz, György (s. a.): *A jogellenes munkaviszony megszüntetés szabályozásának dilemmái* [Dilemmas of Regulating Unlawful Termination of Employment]. Budapest: Manuscript.

and errors in certain elements of the provision.[55] The Curia's Summary Opinion shows that the current solution has a more serious impact on the behaviour of the employer and the worker and on the latter's future fate than the specific content of the change. According to the Curia, the illegality of the termination "does not have a penal sanction commensurate with the seriousness of the illegality".

The SLC has thus abandoned the application of the legal consequence of nullity for unlawful termination of employment and has instead introduced a limited system of compensation which does not have a particularly deterrent effect on the employer's intention. In agreement with the Curia's assessment, in my opinion, the amendment to the regulation of the employer's unlawful termination, especially with regard to termination due to a reason arising in the employer's interests, affects both the employer's and the employee's attitude to the unlawful termination. There is no doubt that the employer's position in the legal relationship has strengthened, since in the absence of the mentioned 'supporting' rules, the employer can more easily decide to terminate the employment relationship, which thus entails less risk for him.[56]

55 Kúria Joggyakorlat-elemző Csoport: *Összefoglaló Vélemény. A munkaviszony jogellenes megszüntetése jogkövetkezményei. 2016. március 9.* (A továbbiakban Összefoglaló Vélemény) [Curia Legal Practice Analysis Group. Summary Opinion. Legal Consequences of Unlawful Termination of Employment. 9 March 2016. (Hereinafter Summary Opinion)].

56 The radical decrease in the number of labour lawsuits, especially termination-related proceedings, also indirectly points to the change in the position and power relations of the parties, although this is a combined consequence of several factors. See Summary Opinion 56–61; PETRI, Dávid (2023): A munkaügyi perek számának csökkenése az adatok tükrében [The Decline in the Number of Labour Lawsuits in the Light of the Data]. In GYULAVÁRI, Tamás – KÁRTYÁS, Gábor (eds.): *A munkaügyi perek számának csökkenése Magyarországon: Okok és lehetséges megoldások* [The Decline in the Number of Labour Lawsuits in Hungary: Causes and Possible Solutions]. Budapest: Friedrich–Ebert–Stiftung, 6–17.

The situation of the employer's legal status in the light of collective labour law

In this section, the impact of two elements of collective labour law will be analysed. One is the influence of the collective agreement on the employer's possibilities and decision-making, and the other is the exploration of the role of 'company constitutional' law in the German law *(Betriebsverfassung)*. I shall not refer to the former in this part of the study, since I have already written in detail in the previous chapter about the limited role of the collective agreement as a contractual normative source of law in Hungarian labour law. This leaves us with the analysis of Chapter XX of Part Three of the SLC, which is no less instructive.

During the presentation of the development of Hungarian labour law following the change of regime, the reason for the formation of the dual structure of Hungarian collective labour law was discussed. As regards the effect of company constitutional law in labour law, it must be stressed once again that this is not an institution for the representation of employees in the classical sense, but an institution created by the legislator and with powers laid down by the legislator. The authority of the works council, or the participation bodies operating under other names, basically exerts its influence in three areas, such as influencing the economic, social and personnel decisions of the employer. The tools are differentiated. The relevant regulations respect the institution of the managerial prerogative, and with regard to the economic decisions of the employer, the authority of the bodies of the company constitutional law is the weakest. This usually consists of the right to information and the right to consultation. These bodies have much stronger participatory rights in relation to social and personnel decisions which are to be taken as a result of economic decisions, such as the right of opinion, which has serious legal consequences in some legal systems,[57] and even the so-called co-decision right *(Mitbestimmungsrecht)*. It can be stated without exaggeration that in certain issues – social benefits, the influence of the selection in the termination of the employment relationship

[57] See Section 102 in Betriebsverfassungsgesetz – Mitbestimmung bei Kündigungen.

(Auswahlrichtlinie) – the works council is an equal decision-making partner of the employer.

An overview of the domestic regulations convinces the reader that the legislator could not have intended to create a system capable of significantly influencing the employer's decision-making powers. Section 235, Subsection 1 of the SLC provides for cooperation between employees and the employer and the employer's participation in decision-making for the purpose of the regulation. Compared to this, the decisive part of this chapter regulates the election of the works council, and perhaps its most important provision is the institution of the works agreement replacing the collective agreement.[58] The employer's decision-making power may be influenced by the right of opinion provided for in Section 264, at most. In my opinion, the subjects covered by the 'employer's duty to request opinions' are essential, and if the legislator had seriously considered the role of employee participation, he would not have presented it as a *lex imperfecta* rule. Decisions that are the subject of the opinion are apostrophised by the legislator as "employer measures and regulations affecting a larger group of employees". These measures encompass all major employer decisions affecting the entire employment organisation. These include, among others the proposals for the employer's reorganisation, transformation, the conversion of a strategic business unit into an independent organisation; introducing production and investment programmes, new technologies, or upgrading existing ones; processing and protection of personal data of employees; implementation of technical means for the surveillance of employees; measures for compliance with occupational safety and health requirements, and for the prevention of accidents at work and occupational diseases; the introduction and/or amendment of new work organisation methods and performance requirements; plans relating to training and education; appropriation of job assistance related subsidies; drawing up proposals for the rehabilitation of employees with health impairment and persons with reduced ability to work; laying down working arrangements; setting the principles for the remuneration of work; measures for the protection of the environment

[58] Section 268.

relating to the employer's operations; measures implemented with a view to enforcing the principle of equal treatment and for the promotion of equal opportunities; coordinating family life and work; the employment of third-country nationals, if it reaches 5% of the number of employees employed by the employer, and upon reaching a further 5% increase.

Perhaps there is no need for a detailed explanation to show that these measures fundamentally affect the existential situation of employees, both in the present and in their future. Therefore, it can be argued that the method of regulation is not worthy of the seriousness of the matter.

Intermediate conclusions

In my opinion the employer's legal position, the possibilities of enforcing its economic interests are strong in the SLC. This is primarily due to the fact that the legislator does not provide sufficient counterbalance to the employer's decision-making power. Of course, there are limits with regard to certain decisions, which also have a fundamental legal basis, but overall, the legislator does not emphasise the importance of the cooperation of the parties, nor does it force the employer to behave in this way. One of the symptoms of this is the almost complete disinterest of collective labour law in this area. Another indicator of the employer's legal position can be the determination of the legal status of the employees in the employment relationship. This is analysed in the next point.

Norms governing the legal status of employee – Ensuring the stability of the employment relationship under conditions of subordination

There is no doubt that the legislator's task is not easy at all, since in a contractual but specific legal relationship, the social and existential interests of the employee must be protected in such a way that the principles of contractuality are not violated. It can also be said that the legislator must intervene in order to ensure the equilibrium which the market creates in economic transactions in the long term. In the following, I shall consider the provisions for the protection of the status of an employee in a similar way and structure to the analysis of the employer's status.

Fundamental rights, employee rights – Restriction of fundamental rights within the framework of general conduct requirements

One of the most controversial areas in the history of fundamental rights is the issue of the unity and differentiation of these rights.[59] The diversification of fundamental rights first arose in the relation between first and second generation fundamental rights, which can be interpreted somewhat simplified as the differentiation between economic and social fundamental rights.[60] Later, other doubts arose regarding the general interpretation of each of the fundamental rights and their appearance in labour law. A good example of this is the tension surrounding the early recognition of the right to association and the right to organise a trade union, or even the difference between the interpretation of freedom of expression in general and the exercise of it by employees. Some express the opinion that in certain areas, the labour law equivalents of general fundamental rights are being eroded, their interpretation is divergent, and their impact is weakening.[61]

59 In the Hungarian literature see Kiss 2010: 69–123.

60 Brunner, Georg (1971): *Die Problematik der sozialen Grundrechte.* Tübingen: Mohr Siebeck; Matscher, Franz ed. (1991): *Die Durchsetzung wirtschaftlicher und sozialer Grundrechte. Eine rechtsvergleichende Bestandsaufnam.* Kehl am Rhein – Arlington: N.P. Engel; Wedderburn of Charlton, Kenneth William (1993): Companies and Employees: Common Law or Social Dimension? *Law Quarterly Review,* (109), 247–278.

61 Bercusson, Brian (1999): Fundamental Social and Economic Rights in the European Community. In Cassese, Antonio et al. (eds.): *Human Rights and the European Community. Methods of Protection.* Baden-Baden: Nomos, 220–225; Compa, Lance – Diamond, Stephen eds. (1996): *Human Rights, Labor Rights, and International Trade.* Philadelphia: University of Pennsylvania Press; Fabricius, Fritz (1992): *Human Rights and European Politics. The Legal-Political Status of Workers in the European Community.* Oxford: Berg;

In my analysis, I start from the unity of fundamental rights and their uniform philosophical and dogmatic basis. In my opinion, all fundamental rights are based on the *a priori* category of human dignity. The recipients of fundamental rights are subjects of public law, which also means that the state–individual relationship has not changed in terms of the enforcement of fundamental rights, but the function of the state in ensuring the enforcement of individual fundamental rights has.[62] Further proof of the unified system of fundamental rights is that the same three criteria are required for all interests and values to become fundamental rights: fundamentality, universality and the ability to be presented as a legal norm.[63] However, a unified system of fundamental rights does not mean that all fundamental rights are identical. Moreover, a uniform system of fundamental rights necessarily entails a hierarchy of fundamental rights, without which the collision between fundamental rights could not be resolved. Has labour law, the employment relationship disrupted the unity of fundamental rights? Has it transformed or deformed the hierarchical system of fundamental rights? The answer is clearly no. Namely, the hierarchy of fundamental rights has not changed and the essential content of each fundamental right has not changed in quality. Within this hierarchy, however, legislation and the judicature have in some cases been pushed to the limit, precisely in order to maintain a sufficient and necessary equilibrium for legal transactions.

In view of all this, the labour law norms that ensure the legal status of the employee must be analysed, focusing on employee rights within the framework of the general conduct requirements of the SLC. In this framework, the most sensitive area is the coordination of the employee as a person, citizen, member of society and employee quality at the level of

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Leary, Virginia (1996): The Paradox of Workers' Rights as Human Rights. In Compa, Lance – Diamond, Stephen (eds.): *Human Rights, Labor Rights and International Trade.* Philadelphia: University of Pennsylvania Press, 22–47; Nickel, James W. (1986): Is There a Human Right to Employment? In Werhane, Patricia H. et al. (eds.): *Philosophical Issues in Human Rights.* New York: Random House, 249–259.

62 See Alexy's substile distinction regarding so-called *Leistungsrechte* and *Abwehrrechte.* Alexy, Robert (1996): *Theorie der Grundrechte.* Frankfurt am Main: Suhrkamp, 171–228.

63 Bercusson 1999: 199–201.

provision and collision of various basic rights. This is a sensitive area because the contract of employment is not a direct transactional contract, this contract establishes a long-term relationship, which means that a person is the recipient of various fundamental rights and obligations in the long term.

The first area of discussion is related to the duty to provide information and the right to request information. Under Section 6, Subsection 4 "the falling within the scope of this Act shall inform each other concerning all facts, information and circumstances, and any changes therein, which are considered essential from the point of view of employment relationships and exercising rights and discharging obligations as defined in this Act". This provision seems clear at first sight. SLC Section 10, Subsection 1 must be understood in connection with this. Under this provision "the employer may require an employee to make a statement or to disclose personal data such that is deemed necessary for the conclusion, fulfilment or cessation (termination) of the employment relationship or for the enforcement of claims arising out of this Act". Furthermore, Section 10, Subsection 4 states that "an employee may be requested to take a fitness test if one is prescribed by employment regulations, or if deemed necessary with a view to exercising rights and fulfilment of obligations in accordance with 'rules-governed employment relationship'." The two provisions are related to SLC Section 9, Subsection 2 in that "the employee's right to privacy may be restricted if the restriction is strictly necessary for reasons directly related to the purpose of the employment relationship and is proportionate to the achievement of the objective".

The discussion of these rules in one place is justified because they perfectly reflect the conflicting interests of the employer and the employee in a given situation; indeed, the limitation of basic rights and the enforcement of certain duties can also result in a violation of human dignity. Consider first the mutual duty to inform in Section 6, Subsection 4, also on the employee side, which can even be considered part of the general mutual cooperation duty (Section 6, Subsection 2). In connection with this, the question arises as to whether the employee is obliged to inform the employer of her pregnancy prior to the conclusion of the employment contract, in the event that this circumstance is irrelevant from the point of view of filling the position and the tasks to be performed. In general terms, can an employer in a similar situation ask an employee to provide information that affects human dignity? This question is important because, although the given situation or circumstance does not directly affect the conclusion or performance of the contract of employment, in the longer term it may be contrary to the employee's operational interests.

The answer can be derived indirectly from the history of the amendment of SLC Section 65, Subsection 5, the text of which was changed by the Constitutional Court. Namely, the termination of a pregnant employee – as there is a prohibition on termination due to this circumstance – can be revoked (or annulled) by the employer if the employee has informed him of this circumstance. The previous text – otherwise completely unrealistic – required information prior to termination.[64] It is clear from that decision that the restriction of fundamental rights in the employment relationship is possible only to the extent necessary – in accordance with the wording of Section 9, Subsection 2. We can also say that in all such and similar cases, the employee is a 'master of the case', i.e. the employer's economic interests take a back seat at a certain point.

The following provision concerns the employee's behaviour, with particular regard to the period outside working time. Under Section 8, Subsection 2 the "employee may not engage in any conduct during or outside their paid working hours that – stemming from the employee's job or position in the employer's hierarchy – directly and factually has the potential to damage the employer's reputation, legitimate economic interest or the intended purpose of the employment relationship". This is the area where the boundaries of work and privacy are blurred and this is the area where there is no room for 'blanket rules' or undifferentiated regulations. The provision can cover a wide range of behavioural facts. Tools, behaviour, clothing and even unusual lifestyles that symbolise freedom of expression may all be included. Both domestic and international practice require compliance with the constitutional conditions against the restriction of fundamental rights in these cases as well. In this context, it is not superfluous to recall

64 See Decision 17/2014 (V. 30.) AB.

a previous decision of the Constitutional Court. The Court explained when examining Section 39, Subsection 2 of the Act on the legal status of the public servants[65] that in order to protect the integrity of public life, the exercise of a public function may be accompanied by a certain restriction of the right to privacy and an overriding public interest may justify the law to intervene in the private sphere of those who exercise a public function with a content restrictive of the private sphere, but the restriction must comply with the constitutional requirements against the norms restricting the fundamental right. Consequently, it is not possible to impose a general behavioural restriction on the civil servants or on the employees in general, and on any behaviour in general. Such restriction is only unavoidable and proportionate if conduct unworthy of the legal relationship of public servants (or employment relationship) outside the workplace has a substantial and real, direct impact on the performance of the job of this position and if it also harms the interests of the employer. The wording of this Decision is in line with the content of the current SLC Section 6, Subsection 1. Under this provision, "contract of employment shall be executed as it might normally be expected in the given circumstances, unless any legal provision exists to the contrary". From my point of view, the employer also has a fundamental interest in specifying these requirements, since new and new requirements may arise and disappear from the scope of privacy. I am referring to the right to disconnect which in a broader sense means that there must be a period of time in the employee's life that is unavailable to the employer.

In summary, the general requirements of conduct, the norms which ensure the stability of the worker's legal status, can be said to exist, by virtue of their regulatory subject matter, essentially in the form of clauses. Each concretisation and detailing in regulation raises more and more interpretation problems and causes confusion. The stability of an employee's legal status can be ensured primarily by the control of the employer's internal regulations and by judicial lawmaking. Of course, collective labour law, and collective agreements in particular, would also have an important role to play here.

65 Act XXXIII of 1992 on the Legal Status of Public Servants.

Stability of the employee's legal status – The different kinds of contracts of employment and the employment relationship

In a broader sense, employment relationships are quite diversified, but if we stay only within the contract of employment, the heterogeneity is also striking. It can be observed that the conclusion of different types of contracts of employment is primarily done according to the will of the employer, his interests prevail, and it can be said that only in exceptional cases does the employee initiate – or can successfully initiate – the conclusion of an employment contract that deviates from the general rule. What does this mean in the SLC? Section 45, Subsection 2 and Subsection 4 define the content of the so-called typical contract of employment in so far as it creates an employment relationship of indefinite period and providing for general full-time employment in the absence of a different agreement.

Compared to this, more and more so-called atypical employment contracts and employment relationships are being created. What is the possible response of labour law to this phenomenon? The possible, or mostly given solution to the problem may bring to mind the dilemma raised at the beginning of this study, when defining the subject of the research: Which labour law are we examining? 'Labour law' in general, or the labour law applicable within the specific economic and social conditions of a certain era? Adapting this question to the contract of employment: In the context of which contract of employment do we examine the role of the legal norm in terms of the stability of the employee's legal status? In other words: At this level of abstraction, does it make sense to talk about a uniform, homogeneous contract of employment and employment relationship?

This problem began to emerge as the dogma of the contract of employment and regulation became more prominent, as atypical working methods became more prevalent. The first forms of these methods were essentially approached from the point of view of equal treatment in labour law. This is supported by the directive on fixed-term[66] and part-time employment.[67] As I mentioned at the beginning of this study, this method has become less applicable in the case of temporary agency employment.[68] In this part of my study, in the light of the regulation of the three indicated employment methods, I attempt to present the legislative attitude to the stability of the employee's legal status. The main reason why I restrict myself to these methods is that the SLC also focuses on them and does not deal at the moment with persons performing work with a status similar to that of an employee, and it only marginally affects the newer atypical methods of employment.[69] Nevertheless, I will cover these as well if necessary.

The starting point of traditional labour law is therefore generally to establish an employment relationship for an indefinite period and full-time employment.[70] This requirement is also expressed in EU law in the directives mentioned above. As regards fixed term employment, the length of the employment relationship and its indefinite versus definite duration are of fundamental importance from the point of view of the employee's existential situation. However, the employer may have several interests in choosing a flexible solution. The aim of the directive is to improve the quality of fixed-term employment by taking into account conflicting interests and applying the principle of non-discrimination, as well as establishing the framework for preventing abuses resulting from the use of consecutive,

66 Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP.

67 Council Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC. Annex: Framework agreement on part-time work.

68 Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on temporary agency work.

69 See Section 193 on the call for work, Section 194 on job sharing, Section 195 on employee sharing, Section 196 on teleworking, Section 198 on outworking, Section 201 on the simplified employment and occasional work relationships.

70 See this in comparison with Waas, Bernd – van Voss, Guus Heerma (2020): *Restatement of Labour Law in Europe. Volume II. Atypical Employment Relationships.* Oxford: Hart Publishing; Schlachter, Monika ed. (2014): *EU Labour Law.* Alphen aan den Rijn: Kluwer Law International.

fixed-term contracts of employment or employment relationships.[71] The Directive emphasises that, in terms of employment conditions, fixed-term workers should not be treated less favourably than comparable permanent workers merely because they have a fixed-term contract or employment relationship, unless the difference in treatment can be justified on an objective basis. Of course, the so-called *pro rata temporis* principle applies where appropriate.[72] In order to achieve the aforementioned goal, the Member States must introduce one or more of the following measures: the objective reasons supporting the renewal of this type of contract or employment relationship; the maximum total duration of consecutive fixed-term employment contracts or employment relationships; the number of renewals of such contracts or legal relationships.[73] It is also important that Member States, after consulting the social partners where necessary, determine the conditions under which fixed-term contracts of employment or employment relationships are considered to be successive or contracts or employment relationships are considered to be of indefinite duration.

Section 192 of the SLC provides for a fixed-term employment relationship. Neither the agreement of the parties nor the collective agreement may deviate from the provision, i.e. the regulation is cogent. This cogency makes no sense, since the collective agreement can be the institution that can ensure the creation of more favourable conditions for the employee in this case. The SLC does not provide for the reasons for the establishment of a fixed-term employment relationship, as well as for the extension or renewal of such a contract.

Nevertheless, one of the essential elements of the provision is the method of concluding such a contract. Pursuant to Section 192, Subsection 1, the duration of a fixed-term employment relationship must be determined by calendar or other appropriate means. In the latter case, the employer must also inform the employee of the expected duration of the employment relationship. This is important, inter alia, for the security of the

71 See Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP, Article 1.

72 Directive Article 4.

73 Directive Article 5.

employment relationship, since it provides additional safeguards for the application of the rule that the date of termination of the employment relationship may not depend solely on the will of the party, where the parties have not fixed the duration of the employment relationship on the basis of a calendar.

By the way, as regards the termination of a fixed-term employment relationship, the legislator chose a rather specific solution. The termination itself is linked to specific facts, and the employer is obliged to give reasons for termination.[74] It seems that this provision protects the legal status of the employee, attempts to improve his position and takes into account that the employee may have a well-founded hope of continuing the employment relationship for the duration agreed in the contract. This illusion is destroyed by Section 79, according to which the employer can terminate a fixed-term employment relationship with immediate effect, without justification, against the financial compensation specified in the law. Under Section 79, Subsection 2 in this case "the employee shall be entitled to absentee pay due for twelve months, or if the time remaining from the fixed period is less than one year, for the remaining time period".

This solution can be interpreted and criticised from several points of view,[75] here I will only draw attention to the aspects of protection of the legal status. I believe that the solution of the SLC is contrary to the purpose of the directive, and furthermore, it may put the employee, who is already at a disadvantage compared to the 'traditional employee' at the start, to an even more uncertain situation; I also consider that provision to be unreasonable from the point of view of the employer's economic risk and cost assessment. Compared to this, the fact that the legislator only accepted the proposal for determining the duration of the fixed period from the directive is dwarfed. According to Section 192, Subsection 2 "the duration of

74 Under Section 66, Subsection 8: "The employer shall be permitted to terminate a fixed-term employment relationship by notice: a) if undergoing liquidation or bankruptcy proceedings; or b) for reasons related to the employee's ability; or c) if maintaining the employment relationship is no longer possible due to unavoidable external reasons."

75 It should be noted that this solution is not new; a similar one was found in FLC Section 88, Subsection 2.

a fixed-term employment relationship may not exceed five years, including the duration of an extended relationship and that of another fixed-term employment relationship concluded within six months of the termination of the previous fixed-term employment relationship".

Finally, I would like to note that a very important provision was omitted from the current code, which, by the way, was the essence of the FLC regulation. According to FLC Section 79, Subsection 4 "where a fixed-term employment is renewed or extended between the same parties without any rightful interest attached on the part of the employer and the conclusion of the contract is aimed at compromising the rightful interests of the employee, the employment shall be deemed to be established for an indefinite duration".

The other neuralgic area is part-time employment, which in many cases is related to less important tasks or plays some kind of additional, supplementary role in the employer's organisation, and not least causes an existential and financial disadvantage to the employee concerned. Assessing and identifying the problems of part-time employment is much more complex than those of fixed-term employment. The reason for this is that, under certain circumstances, both parties may have an interest in this type of employment because of its 'flexible use of working time'. So we cannot say, as we tend to say in the case of a fixed-term employment relationship, that it is clearly disadvantageous for the employee. The difference can also be seen in the definition of the goal of the relevant directive, in which emphasis is placed on "facilitating the development of part-time employment on a voluntary basis and contributing to the flexible organisation of working time in a way that takes into account the needs of employers and employees".[76] Since there is usually less difference in the quality and nature of the activity between full-time and part-time employees than in the case of indefinite-term and fixed-term employment relationships, the requirement of non-discrimination is a highlight of the Directive. The SLC defines the concept of part-time through the concept of full-time. The legislator does not establish a special system of protection for part-time employees, who are subject to the general rules of labour law.

76 Directive Article 1, point b.

Nevertheless, concerning both fixed-term and part-time employees, attention should be drawn to a multi-level institutional system for the protection of their legal status. Pursuant to SLC Section 61, Subsection 1 – otherwise as a result of the transposition of EU directives[77] – the employer must provide information on full-time or part-time employment, remote working and indefinite-term employment. According to Subsection 2, the employee may – with the exception of the first six months of the employment relationship – request an amendment to the contract of employment based on the employer's information. Pursuant to Subsection 4, the employee (or the employee providing care) – with the exception of the first six months of the employment relationship – may, until the child reaches the age of eight, request a change in the place of work, a change in the work schedule, teleworking or part-time employment.

The aim of the employer's duty to inform is to reduce and convert atypical employment into a traditional, typical employment relationship. The purpose of the amendment at the request of the employee is to allow flexible use of working time according to the needs of the employee. One can agree with these efforts, however, the obligation to provide information and the employee's request in itself do not automatically mean a transformation in accordance with the employee's request, but can initiate a process of cooperation between the parties that can shape the nature of the employment relationship in accordance with the interests of both. Furthermore, the referenced provisions are by no means declarative in nature. If, based on the employer's offer, or the employee requests an amendment to the contract in view of the above circumstances, the employer is obliged to examine it and give a substantive answer within 15 days. In case of rejection of the employee's application, the employer is obliged to justify his decision. Section 61, Subsection 6 is remarkable, because it introduced an almost unique rule in Hungarian labour law. Namely, if the employer unlawfully

77 Directive (EU) 2019/1152 of the European Parliament and of the Council of 20 June 2019 on transparent and predictable working conditions in the European Union, and Directive (EU) 2019/1158 of the European Parliament and of the Council of 20 June 2019 on work–life balance for parents and carers and repealing Council Directive 2010/18/EU.

rejects the above requests or fails to issue the statement, the court will substitute the employer's statement of consent.

In this connection, above all, the question arises, for what consideration was a provision with such a content included in the SLC. Undoubtedly, Article 16 of Directive 2019/1152 requires the establishment of adequate protection. Under this Article, Member States shall ensure that workers, including those whose employment relationship has ended, have access to effective and impartial dispute resolution and a right to redress in case of infringements of their rights arising from this Directive. However, the Hungarian legislation chose a legal institution that is only applicable in Hungarian private law in exceptional cases, and not at all in labour law. The second question is as follows: Under what circumstances is an employer's statement of refusal considered unlawful, given that the employer makes the decision at his own discretion? Pursuant to the SLC, legal remedies can be used against any employer's decision, even against a decision made at the employer's discretion. Pursuant to SLC Section 285, Subsection 3, a claim against an employer's discretionary decision may be asserted if the employer has violated the rules governing the formation of its decision. This means that if the employer violates the requirement of equal treatment or any rights of personality of the employee by his decision, or exercised this right in a manner contrary to its intended purpose, the employee can take advantage of the possibility of legal redress. Nevertheless, I classify this provision as unprepared and a kind of stopgap measure. The solution of the discussed facts typically belongs to the field of cooperation. And in this regard, I can only repeat the importance of the role of collective labour law.

Finally, I refer to Section 61, Subsection 3, which does not give the employer any discretion. Under this provision "upon the employee's request, the employer is obliged to change the contract of employment so that the employee works part-time, equivalent to half of the usual full-time hours, until the child is four years old – in the case of an employee raising three or more children, until the child is six years old".[78]

[78] This provision was introduced into the SLC through Act CXXVI of 2019 amending certain laws related to the Family Protection Action Plan.

In summary, it can be stated that the aforementioned provisions are important for the protection of the employee's legal status and the stability of the employment relationship. Some of these were incorporated into Hungarian labour law as a result of EU law, while the other part is the result of a cost-cutting legal policy measure, the family protection action plan. In those cases where the employer has discretion to change the working conditions and the legal position of the employee, continuous cooperation is or should be necessary with the employees, and primarily with the employee's organisations. This is when the collective agreement can come into play, which can provide a framework for these processes and decisions, and the works council can have a strong influencing role in making specific decisions. The legislator himself thought of the former, since according to Section 62, a collective agreement can deviate from the provisions of Section 61 in favour of the employee. As far as the works council's ability to influence is concerned, we have seen that this institution has little influence on the employer's decisions in terms of the employer's authority, and the activities that can be carried out in the field of employee legal protection are also developing accordingly.

Finally, regarding the protection of the employee's legal status, it is necessary to briefly touch on the legal institution of temporary agency employment (hereinafter: TAW). Since at the beginning of this study I already discussed the process of the development of temporary employment, as well as the confusion this legal construction caused and causes in the dogmatic of labour law, here I will only draw attention to a few peculiarities of the Hungarian regulations. Nevertheless, by way of introduction, it can be stated that during the regulation of the TAW, the relevant directive was not on top of the situation either.[79] Perhaps the most important part of

79 Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on temporary agency work.

the directive is Article 5 on equal treatment.[80] In terms of Subsection 1 of this article: "The basic working and employment conditions of temporary agency workers shall be, for the duration of their assignment at a user undertaking, at least those that would apply if they had been recruited directly by that undertaking to occupy the same job." Kártyás discusses in detail the theoretical and practical problems posed by this approach.[81] So here it is sufficient to limit ourselves to the statement that such a starting point is completely contrary to the idea of temporary employment and is also incompatible with the legal structure of the TAW. Namely, the private law contract between the employer and the user enterprise simply has nothing to do with the requirement of equal treatment.

From the point of view of our topic, however, there is another important segment of temporary employment, which, in my opinion, goes well beyond the requirement of equal treatment, even though the problem is related to it. Namely, the consistent observance of equal treatment does question the meaning of the TAW in its current existence, but if this principle is not enforced, or only with a significantly softened content, it undermines the traditional legal status protection of non-temporary employers too.

As far as the Hungarian regulations are concerned, the legislator built many elements of the TAW on the model of a fixed-term employment relationship. This is referred to in Section 214, Subsection 2, according to which the duration of a loan may not exceed five years, including extended or repeated loans within six months of the termination of the previous loan, regardless of whether the loan was made based on an agreement with the same or another lender. This provision can practically mean that the person looking for a job and finding it only in this way must take a 'break' so that the new five-year period can start again. This suggestion may seem absurd,

80 See about this in KÁRTYÁS, Gábor (2023): A munkaerő-kölcsönzési irányelv értelmezése az Európai Unió Bírósága gyakorlatában és tanulságai a magyar munkajog számára II. rész [The Interpretation of the Temporary Employment Directive in the Practice of the Court of the European Union and Its Implications for Hungarian Labour Law. Part Two]. *Magyar Jog,* 70(10), 569–579.

81 KÁRTYÁS 2023: 572–573.

but since it is not simply an atypical but an alternative employment method, perhaps not so much.

In terms of equal treatment, the SLC follows the spirit of the Directive. According to Section 219, Subsection 3, point a), the provisions regarding the amount of wages and the requirement of equal treatment for other benefits must be applied from the one hundred and eighty-fourth day of employment with the borrower to the employee who is in an indefinite employment relationship established with the lender for the purpose of temporary employment and receives remuneration even in the absence of employment with the borrower. Compared to Section 147 of the SLC, this scheme means the payment of so-called 'downtime'.[82] Due to the content of the provision, the legislator – similarly to the approach of the directive – could probably have assumed that it is a natural part of the temporary employment process that the employer – for some unknown reason – hires people for an indefinite period of time for the purpose of temporary employment. Without qualifying this assumption, it is necessary to draw attention to the fact that the SLC defines additional, basically legal and political exceptions with regard to equal pay. Namely, a rule similar to the previous one applies, if the borrowed person is an employee covered by the Act on promoting the employment of young people starting their careers, the unemployed over the age of fifty, and those looking for work after caring for a child or a family member, as well as on scholarship employment,[83] or if she/he is employed by a company in which the majority owner is a local government or a public benefit organisation or a registered public benefit organisation in the framework of the TAW.

The safety of the legal status of the temporary employee is very adversely affected by the rules governing the termination of the legal relationship. In addition to the fact that the termination of the loan in the user undertaking – for any reason – is a matter within the employer's field of activity, the duration of the employment relationship during the last loan must be

82 Section 147, Subsection 1: If the employer fails to fulfil its employment obligation (downtime), the employee is entitled to their base salary, except in cases of unavoidable external circumstances.

83 See Act CXXIII of 2004.

taken into account when determining the right to severance pay. Finally, it should be noted that there is almost no collective labour law protection for employees employed under the TAW.

These examples are intended to illustrate the fact that in the Hungarian labour law we cannot speak of a homogeneous protection of employment rights. With this statement, I am not necessarily criticising the content of the Hungarian labour law norms, since behind the abstract category of uniform employee legal status there are many factors that induce differentiated regulation and differentiated legal status protection. With regard to several facts, it can be shown that it is impossible to create a regulation that goes beyond the necessarily existing inequality and creates some kind of artificial equality and unjustified protection. There are, of course, situations in which some fundamental or other interest – particularly one of legal policy – requires one of the parties to be the 'master of the case'. Termination prohibitions or the employer's duty to amend the already mentioned contract of employment are typically classified as such. In my opinion, in most cases, the much criticised clause-type regulation is better suited to the contractual basis of the employment relationship, the self-determination of the parties, and the desirable harmony of individual and collective autonomy than the cogent provisions operating as *lex imperfecta*. However, this will require first and foremost coordination with the institutions of collective labour law.

Intermediate conclusions

In summary, the following can be said about the labour law norms affecting the private labour law and more specifically the legal status of the subjects of the employment relationship. The legislator really tried to create a 'labour law regulation of a private law nature', but failed to take into account the peculiarity that labour law has a complex legal source system. As a result, the role of the collective agreement as a source of law must be replaced by the legal norm in several areas. With regard to the legal status of the parties, the SLC does not put obstacles in the way of the economic interests of the employer, which it treats essentially on the basis of a private law approach.

Of course, it is not the legal norm that should have a deterrent function in the first place, but rather the influence of collective labour law. The protection of the worker's legal status is also based on a private law approach, with the legislator only rarely resorting to a strict intervention. Ultimately, this is not necessarily critical either, if there were a collective labour law basis behind the employee's legal status.

It is important, however, that the parties' room for manoeuvre – and this applies to both the employer and the employee – depends primarily on the will of the legislator. This statement in itself can also be interpreted as the legislator doing his job, directing the activities of the contractual partners. However, I interpret this with the darker tone that a contractual legal relationship, the stability of which is given by the cohesion of its legal sources, basically operates according to the predominance of the legal norm.

A SPECIFIC FEATURE OF CONTRACTUAL RELATIONSHIPS – THE REQUIREMENT OF EQUAL TREATMENT

Some introductory thoughts

I have interpreted norms concerning equal treatment requirement as influencing the parties' situation and opportunities based on factors outside of their legal status. Where this requirement has appeared at the level of law, the regulation has sparked controversy and uncertainty almost everywhere, particularly with regard to private law contractual relationships. The development of the principle, or rather the requirement of equal treatment in the history of labour law is quite unique. It clearly illustrates the dilemmas, advances and setbacks in the EU's approach to the fight against discrimination. This development can be characterised by the fact that from the initial, so to speak, particular anti-discrimination, the EU has come to enshrine a general framework of equal treatment principle. Nevertheless Thüsing's assessment is correct even today: "Das Ziel ist klar, der Weg ist noch weit."[84] It should also be noted that the assessment and regulation of certain areas of anti-discrimination, as well as the reasons for them, are not uniform. A good example of this is the history of the creation of the *American Age Discrimination in Employment Act* (1967). The reason for the creation of this Act is to be found in the economic and social conditions of the time, when maintaining labour market equilibrium through so-called forced retirement – the primary cause of which was large-scale immigration – was not yet a priority.[85] In a different place, in another era, this solution was not feasible. In this regard, I am referring to the age-based discrimination rule of the EU anti-discrimination framework directive, as well as to numerous related EUCJ court decisions.[86]

Why is it difficult to transpose the principle of equal treatment into labour law? This problem is somewhat premised on the question of why equal treatment is difficult, if not impossible, to interpret in contractual relations in general. This problem – beyond the fact that a contract of employment is a contract – has another aspect of labour law, namely the Directive on the extension of the requirement of equal treatment to self-employed persons.

However, before dealing with these dilemmas, we must pay attention to the name itself: equal treatment and discrimination. Are these concepts identical or different in content? The wording of the EU directives is rather ambivalent, one might say misleading. Thus, Council Directive 75/117/EEC of 10 February 1975 Article 1 aims to achieve equal pay for men and women by eliminating discrimination. Council Directive 76/207/EEC of 9 February

[84] Thüsing, Georg (2001): Der Fortschritt des Diskriminierungsschutzes im Europäischen Arbeitsrecht. *Zeitschrift für Arbeitsrecht,* 22(3), 397–418.

[85] Hepple, Bob (2003): Age Discrimination in Employment: Implementing the Framework Directive 2000/78/EC. In Fredman, Sandra – Spencer, Sarah (eds.): *Age as an Equality Issue.* London: Sweet and Maxwell, 73–96.

[86] Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, Article 6. Justification of differences of treatment on grounds of age. See the cases *Domnica Petersen v. Berufungsausschuss für Zahnärzte für den Bezirk Westfalen-Lippe* [C-341/08]; *Werner Mangoldt v. Rüdiger Helm* [C-144/04]; *Félix Palacios de la Villa v. Cortefiel Servicios SA* [C-411/05]; *The Incorporated trustees of The National Council on Aging (Age Concern England) v. Secretary of State for Business, Enterprise and Regulatory Reform* [C-388/07].

1976 uses the term 'equal treatment' in its title.[87] According to Gyulavári's assessment, the Directive covers all situations in which Member States must enforce the principle of equal treatment.[88] Article 1 of this Directive also emphasises that the principles set out therein shall henceforth be referred to as the principle of equal treatment. However, if we examine the content of this principle, it becomes clear that equal treatment is synonymous with the prohibition of discrimination.[89] It seems that the two types of wording cover the same content. Directive 8/613/EEC contains a similar provision in Article 3.[90] Article 13(1) of the Treaty of Rome also contains the term 'discrimination'. Without going into further detail, I would like to refer to the aforementioned framework directive, Article 2(1) of which provides the following definition: For the purposes of this Directive, the "principle of equal treatment" shall mean that there shall be no direct or indirect discrimination whatsoever on any of the grounds referred to in Article 1.

In the domestic literature, Vékás characterises the attitude of the directives as follows: "It must be stated here that the European Community directives – contrary to their wording – actually prohibit discrimination and do not expect equal treatment in any way, even though the two concepts are apparently used as synonyms".[91] According to his point of view, however, the prohibition of discrimination and the principle of equal treatment do

[87] Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions.

[88] Gyulavári, Tamás (2001): A férfiak és a nők közötti egyenlő bánásmód a foglalkoztatásban [Equal Treatment of Men and Women in Employment]. In Kiss, György (ed.): *Az Európai Unió munkajoga* [Labour Law of the European Union]. Budapest: Osiris, 90.

[89] Council Directive 76/207/EEC Article 2. For the purposes of the following provisions, the principle of equal treatment shall mean that there shall be no discrimination whatsoever on grounds of sex either directly or indirectly by reference in particular to marital or family status.

[90] For the purposes of this Directive, the principle of equal treatment implies the absence of all discrimination on grounds of sex, either directly or indirectly, by reference in particular to marital or family status.

[91] Vékás 2006: 358.

not necessarily mean the same thing.[92] He also emphasises that "not even the prohibition of discrimination can be extended to all personality traits, but only to basic criteria on the basis of which the 'discriminated' person may develop a sense of social exclusion".[93]

The difference perceived by Vékás is by no means a problem of terminology. Let us start with the principle of equal treatment. Referring only to the theoretical debates arising from the difference between the a priori and a posteriori conceptions of human dignity, I would like to emphasise that, based on the former, human dignity gives rise to numerous rights and freedoms, among which it is very difficult to establish any kind of hierarchy. This also applies to freedom of contract and equal treatment. However, the question is whether it is a genuine collision or an apparent collision.[94] Furthermore, equal treatment can essentially be derived from the category of equality, which, as a moral and later political requirement, can be interpreted in several ways in law, and is therefore extremely uncertain as a legal category.[95] Equal treatment – can be said, due to its ideological origins – is not prone to differentiation. Discrimination – as its name suggests – is based on differentiation, i.e. it cannot be assessed in general terms, covering everything. What constitutes discrimination and in what context, depends on many factors. It depends on a certain age, a certain state

[92] In this context, see Menyhárd's opinion, who, referring to Trebilcock calls equal treatment the converse of discrimination. MENYHÁRD, Attila (2006): Diszkrimináció-tilalom és polgári jog [Prohibition of Discrimination and Civil Law]. *Polgári Jogi Kodifikáció,* 7(3), 10.

[93] VÉKÁS 2006: 358.

[94] According to Stern's definition, a genuine conflict of fundamental rights can be characterised by the fact that the holder of a fundamental right comes into conflict with another holder of the same fundamental right through the exercise of that right. STERN, Klaus (1984): *Staatsrecht der Bundesrepublik Deutschland. Band III.* München: Verlag C. H. Beck, 689. In contrast, an apparent conflict of fundamental rights can be characterised by the fact that, by exercising a given fundamental right, the holder of that right comes into conflict not with another holder of the same fundamental right, but with another constitutional right.

[95] HAVIGHURST 1961: 128–131.

of society, a certain reaction to certain situations, a certain characteristic, a certain sensitivity or immunity.[96]

And this is where the interpretation impossibility of equal treatment in contractual relations comes into play. Namely, the civil contractual autonomy is individual autonomy and collective relations play a primary role only exceptionally (see, for example, contracts concluded by general contractual terms and conditions). Therefore, in the vast majority of cases, there is no reference point for equal treatment. However, when reference points and the possibility of comparison appear – as in the case of so-called open legal transactions[97] – it is not the requirement of equal treatment, but the application of the prohibition of discrimination that applies. However, even in this case, it must be borne in mind that in civil contractual relations the parties are the masters of the contract and that only in certain cases and within certain limits can contractual discretion be impeded.[98]

It could even be said that in labour law, the identity versus differentiation of equal treatment and discrimination does not cause problems of the kind that we see in civil law contractual relationships. In my opinion, one has to face problems of this type and other types in the field of labour law. First: the contract of employment is also a contract, so it has to deal with the same discrepancies with regard to equal treatment and – without sharply separating the difference – discrimination as a civil law contract. Vékás – referring to Canaris – establishes the value neutrality of contractual freedom,[99] from which the conclusion can be drawn that at this level of abstraction there is the aforementioned apparent collision between contractual freedom and the requirement of equal treatment, since they exert their influence in different areas.

The contract of employment differs from the civil law contract in at least two aspects at a lower level of abstraction. One is the non-same quality of the

96 Vékás 2006: 358; Menyhárd 2006: 11.

97 In this context, Menyhárd shows how the text of Section 5 of Act CXXV of 2003 on equal treatment and the promotion of equal opportunities has changed in the course of domestic regulation. Menyhárd 2006: 9.

98 See the procedural aspects of this in von Scholten 2004.

99 Vékás 2006: 357.

parties, which acquires meaning after the phase of concluding the contract, namely, due to the legal status of one of the parties, the employee is not a party to further legal transactions arising from the employment relationship, i.e. he does not participate in economic transactions. On the other hand, the manner of performance is mainly based on the interests of the other party, the employer, and it is based on the will of the employer. However, the most significant difference from the point of view of discrimination is that, whereas civil law contractual relationships predominantly involve individual relationships, they are generally collective at the level of contract of employment. An exception is if the employer has one employee, but in this case, he does not enjoy complete immunity from the prohibition of discrimination, for example when publishing a job advertisement.

In summary, the prohibition of discrimination in labour law covers a number of public and private law elements, including areas which may not arise in civil law either because of the object of the service, the circumstances, the relationship between demand and supply, or the sensitivity or lack of sensitivity of society.

Interpretation and regulation of the prohibition of discrimination in Hungarian labour law

Hereinafter, I will use the term 'prohibition of discrimination' instead of the name of 'equal treatment' for the reasons outlined above. I am doing this despite the fact that the relevant Act (hereinafter: ETA) is entitled Equal Treatment and the Promotion of Equal Opportunities.[100] As can be read from Sections 8–9, the ETA clearly regulates the prohibition of discrimination. This is supported by the reasoning of the ETA. Under this text: "The requirement of equal treatment requires those obliged to refrain from any behaviour that results in direct or indirect discrimination, retaliation, harassment or illegal segregation against certain persons or certain groups of persons on the basis of their certain characteristics."[101]

[100] Act CXXV of 2003 on the Equal Treatment and the Promotion of Equal Opportunities.

[101] Reasoning point 4.

The ETA is an Act with a rather heterogeneous content, and as explained in the Reasoning, it "seeks to define in a general way the rights holders and obligors of equal treatment, as well as the content of the requirement of equal treatment, with regard to the legal system as a whole".[102]

Next, I will deal with the following more important areas within the framework of ETA's employment regulations. The first theme is the specific features of non-discrimination in employment. The second is the problem of the so-called justifiable non-equal treatment, while the third is the examination of the legal consequences.

Some features of prohibition of discrimination in employment at the regulatory level

I have previously stated, in accordance with the prevailing view, that the category of discrimination cannot be interpreted in a general way and that reference points are necessary. One of these is 'employment'. In many ways, this term is more than an employment contract, an employment relationship, or even labour law. Chapter III of the ETA regulates the application of the requirement of equal treatment in certain areas. The first subheading is 'Employment'. This concept can be approached from several points of view in the application of ETA. One is the 'contract' itself and, accordingly, the legal status of the parties.

Section 3 of the ETA provides, among the concepts it uses, the legal relationship of employment and other legal relationships related to work. The former covers the employment relationship and any relationship which involves any kind of dependent work under private or public law.[103] The latter includes personal work relationships for other parties. Thus, the ETA classifies here, among other things, "the legal relationship established on the basis of the contract of employment or contract of assignment, the legal relationship of membership of the cooperative", furthermore "the elements

[102] Reasoning point 5.

[103] Civil service, public service relationship, etc.

of the economic and civil law corporate activity involving personal participation aimed at working". The ETA incorporated this extension into domestic law primarily on the basis of Council Directive 86/613/EEC and Council Directive 2000/78/EC. There are basically two problems with this solution. One is related to the concept of self-employed, whose content and characteristics are unclear.[104] This conceptual lack of clarity can be classified as general, and each conceptual approach is particularly country-dependent. I emphasise this because, although in many cases a directive entrusts the interpretation of certain concepts to the law of the Member States, the concept of self-employment is so malleable that such a solution causes more confusion than it would be beneficial.

The other problem is specifically Hungarian, namely that there is no concept of self-employed in Hungarian law, and consequently no substantive or procedural rules apply to it. As I mentioned earlier in this study, during the preparation of the SLC, there was a draft to regulate the legal relationship and legal status protection of a person with a legal status similar to that of an employee, but this was rejected by the social partners. As a result, the ETA regulates various legal relationships and treats them in the same way as employment relationships based on the conceptual framework of the above-mentioned guidelines, which have no such content in Hungarian law. This is also the reason for the misunderstanding of the wording of the ETA. Because a legal relationship aimed at working is a genuine contract for work or assignment, which are not born out of compulsion, but some are genuine entrepreneurs, fulfil genuine economic transactions, actually participate in the economic transactions, have customers, clients.

In their case, the approach of the second aspect of 'employment' does not even arise, namely the applicability of some of the facts which may involve the possibility of discrimination as set out in Section 21 of the ETA. Thus, for example, the application of the prohibition of discrimination in the case

[104] See a summary of this in the domestic literature in GYULAVÁRI, Tamás (2014): *A szürke állomány. Gazdaságilag függő munkavégzés a munkaviszony és az önfoglalkoztatás határán* [The Gray Population. Economically Dependent Work on the Border between Employment and Self-employment]. Budapest: Pázmány Press, especially 61–68.

of termination of a genuine assignment. There is no doubt that there are hints in the law that the legislator may have thought of the self-employed when formulating certain criteria, but this does not dispel the conceptual uncertainty. The difficulties in interpreting the wording are not alleviated by ETA Section 5, point d). The legislator stipulates that 'the requirement of equal treatment' must be maintained with regard to the certain legal relationships. The requirement of equal treatment must be maintained by the employer in the case of the employment relationship, and by the person entitled to give instructions in the case of other legal relationships aimed at working. There is no doubt that both the customer and the principal can give instructions during the performance, however, these do not specify the performance, but are at most corrective in nature,[105] and the legal consequences of not complying with them do not fall under labour law, but under civil law. It can be assumed that, in this case too, the legislator was not referring to genuine contract of employment (work) or assignment, but rather to work performed by self-employed persons.

Finally, a misunderstanding must be cleared up. Namely, the foregoing does not mean that there is no place for a prohibition of discrimination in the case of actual civil law relationships. In this context, I refer to two provisions that have both private law and labour law aspects. Pursuant to Section 5, point a) of the ETA, the requirement of 'equal treatment' must be maintained with respect to the given legal relationship by those who make an offer to enter into a contract with unspecified persons or invite them to make an offer. According to CC Section 2:43 the following, in particular, shall be construed as violation of personality rights. Thus, if a person publishes an open call for work to be performed – whether on the basis of a contract of assignment or contract of employment – in so far as it discriminates against persons, he must expect legal consequences both in civil law and labour law.

105 See Román 1977: 51–58.

Interpretation of justifiable non-equal treatment in light of discrimination

Among the directives prohibiting discrimination, some – due to their subject matter – refer to situations and measures that do not constitute discrimination, and even regulate a situation that is called justifiable differentiation.[106] The reasons are wide-ranging; in the field of employment, the special character, task or nature of the employing organisation may make it necessary to exclude certain characteristics when establishing the legal relationship. An example of this is the aforementioned *Tendenzbetrieb* in the German law, but a similar differentiation can be found in the law of all countries. Of course, this does not mean that these institutions or employers would be free to interpret the indicated characteristics and, on the basis of this, to exclude persons from the given legal relationship, or from some procedure, or even from a benefit. It can be observed that legislation and jurisprudence strive to reveal the justification of objective, necessary and proportionate solutions. This means that an institutional character in itself does not induce automatic solutions, but in many cases, we also encounter nuanced decisions influenced by other factors.[107]

There are situations when the legislator 'excludes' certain facts from the prohibition of discrimination for some considerations of legal policy or more precisely, does not interpret them as such. An example of this is the 'equal treatment' part of the Directive on the TAW,[108] which makes it possible in practice to make a visible distinction between temporary agency workers

[106] For example, an employee may demand that the employer offer her or him work that does not conflict with her or his beliefs and does not place a disproportionate burden on the employer. Furthermore, not all jobs at such an employer fall into the category of jobs that would entail a restriction of a fundamental right.

[107] Generally, two factors are in conflict with each other. One is the so-called neutrality doctrine, the other is the need for differentiation based on some indicator. This tension often arises not in relation to the employer, but in relation to some characteristic of the employee. See in the American law *McGowan v. Maryland, 366 U.S. 420* (1961); *Braunfeld v. Brown, 366 U.S. 599* (1961) cases.

[108] See Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on temporary agency work, Article 5.

and employees employed with a contract of employment. Finally, there is the 'institutionalised', justifiable non-equal treatment. It should be added that the legislator did not institutionalise it spontaneously, without any compulsion, but – as in the case of temporary employment – the market forced this almost universal solution, as we have seen the opposite in the USA in the case of the *Age Discrimination Act.* From this reference, it is perhaps already clear that I consider discrimination based on age to be the most important kind of institutionalised justifiable non-equal treatment.

Before briefly touching upon the pitfalls of the relevant Hungarian regulations, it is necessary to make a few general remarks. The facts of discrimination and the circumstances and reasons of justifiable non-equal treatment shed light on several important background factors. One is the collision between human dignity and the principles underlying contractual relationships, where intervention in the 'contractuality' is only possible if the conduct of the parties or one of the parties violates personal rights. Consequently, it is not the requirement to ensure 'equal treatment' that should be emphasised, but rather the prohibition of discrimination as interpreted above. The other is the distinction between the prohibition of discrimination and objective, necessary and proportionate differentiation. This seems to be clear in general, however, it is quite difficult to take a stand on the issues of objectivity, necessity and proportionality with regard to certain groups of facts. Among other things, because these differentiations affect human dignity, as well as the indicators on which the prohibition of discrimination is based.

As regards Hungarian regulations, pursuant to ETA Section 7, Subsection 2, "unless otherwise provided for in this Act, conduct, measures, conditions, omissions, instructions or practices (hereinafter collectively referred to: 'provisions') shall not violate the requirement of equal treatment, which restricts the fundamental right of the disadvantaged party in order to enforce another fundamental right, in unavoidable cases, provided that the restriction is appropriate and proportionate to the objective pursued; and which, in cases not covered by the above, has reasonable grounds directly related to the legal relationship in question, based on objective consideration". The ETA's reasoning refers to the constitutional review system established by the Constitutional Court.[109] Objective consideration became the cornerstone of the indicated separation. This is clearly evident in the Constitutional Court's recent decisions.[110] Compared to this general criterion – also in general formulation – ETA Section 22, Subsection 1, point a) can be evaluated as a specific highlight. Pursuant to this, discrimination based on actual and decisive professional criteria that are justified by the nature of the work or working conditions, pursue a legitimate aim and are proportionate to that aim, does not constitute a breach of the requirement of equal treatment.

Finally, the requirement of proportionality deserves attention, namely an aspect of it, the so-called institution of *undue hardship*. This institution means that although the employer must do everything possible to avoid discrimination by infringing a protected characteristic of the employee, this reasonable accommodation must not result in an unreasonable, excessive burden in terms of the employer's business operations.[111] The concept of undue hardship primarily applies to relationships within the employer, but completely different interests come into play at the macro level, where public interest and private interest may conflict with each other.

In this respect too, the differentiation in treatment on grounds of age occupies a special place in the list of non-equal treatment that do not qualify as discrimination. I highlight this area because it is perhaps the best indicator of how the market, in our case the labour market, supply and demand, affects the contractual relationships, the interest structures. This area is also interesting because the legislator can strengthen or weaken the logic of the labour market with tools of a public law. Before describing the specific

[109] See Decision 35/1994 (VI. 24.) AB. In assessing the constitutionality of restrictions on the size and value of agricultural land, the Constitutional Court proceeded from the premise that discrimination or other restrictions between persons relating to rights other than fundamental rights can be found to be unconstitutional if the grievance is related to a fundamental right, ultimately the general personal right to human dignity, and the discrimination or restriction has no reasonable justification based on objective considerations, i.e. it is arbitrary.

[110] See Decision 10/2015 (V. 4.) AB; Decision 9/2016 (IV. 6.) AB; Decision 35/2017 (XII. 20.) AB; Decision 17/2022 (VIII. 1.) AB; Decision 1/2025 (II. 27.) AB.

[111] See for example *Trans World Airlines, Inc. v. Hardison, 432 U.S. 63* (1977).

features of the Hungarian legislation, it is necessary to recall the wording of the relevant directive. The general framework Directive Article 6 applies the following wording: "Justification of differences of treatment on grounds of age." According to this Article, "Member States may provide that differences of treatment on grounds of age shall not constitute discrimination, if, within the context of national law, they are objectively and reasonably justified by a legitimate aim, including legitimate employment policy, labour market and vocational training objectives, and if the means of achieving that aim are appropriate and necessary". From this approach, which may be considered conventional, I highlight the factors of 'employment policy, labour market and vocational training'. The importance of these was highlighted in the case of *Domnica Petersen,* already mentioned in another aspect.[112] This case is interesting because, when establishing certain quotas, the legislator did not refer to labour market aspects, but rather to avoid the risk resulting from the possible deterioration of the quality of activity in the elderly.[113] The problem arose from the fact that this approach was extended by the legislator solely to those dental practitioners who only had a contract with the social insurance fund, and the self-employed remained indifferent in this respect. In other words, the retirement was not explained by labour market reasons, although this was actually the case.

As for the Hungarian regulation, the formula is too simple. Pursuant to SLC Section 66, Subsection 1, the employer is not obliged to justify the cessation of an employment relationship of indefinite period by termination if the employee is considered retired.[114] I have already referred to the approach of the Constitutional Court in relation to termination of the employment relationship. In addition to the fact that the Court starts from the absolute

[112] *Domnica Petersen v. Berufungsausschuss für Zahnärzte für den Bezirk Westfalen–Lippe* [C-341/08].

[113] See in this connection the decision of the *Bundesverfassungsgericht* 1 BvR1941/06; BVerfGE 103, 172 – Altersgrenze für Kassenärzte.

[114] According to point g) of SLC Section 294, Subsection 1, in the application of the SLC, a retired employee who has reached the retirement age for old-age pension benefits and has the service time required to receive old-age pension (entitlement to old-age pension benefits), etc.

freedom of the right to terminate, and classifies the employer's obligation to provide reasons as an additional protection, it took the position that if the employee is entitled to benefits based on the employment relationship, the employer has the right to terminate the employment relationship. From that point onwards, the legal policy justification for greater safety at work was no longer valid.[115] This is also a possible approach, although the reference to international examples is only defensible until we look at the complex protection structure of termination systems.

However, it is not without reason that the issue of termination of employment and pension entitlement has been brought before the ECJ on a number of occasions. Behind the cases, there can be not only supply, income policy and labour market considerations. These cases also represent a change of legal status for the employee, which he does not want for any personal reason. It is clear that in these cases, market, economic policy and legal policy considerations have priority, however, in my opinion, this type of change of legal status would have been able to withstand greater protection for the employee and a more elegant solution than the current Hungarian regulations.

Legal consequences of violating the prohibition of discrimination

In this section, I will not go into detail about the procedures that can be used in the event of a violation of the prohibition of discrimination, and I will refrain from listing the possible legal consequences. My examination is confined to the specific nature of the possible legal consequences of discrimination in employment. ETA Section 17–17/D provides for generally applicable legal consequences due to the nature of the legislation. Possible legal consequences may include the termination of the infringing status, the future prohibition of the certification of the infringing conduct, the authority may order the publication of its final decision in the public interest,

115 Decision 44/B/1993 AB.

impose a fine and order the application of the legal consequences specified otherwise by law. In the latter context, the last point of this chapter deals with legislation concerning the requirements of so-called ordered employment relationships, which also deals with the legal consequences for an employer who breaches the prohibition of discrimination. It can be concluded at the outset that the penalties provided for by the ETA and the legislation on employment promotion services and subsidies and on employment supervision,[116] which replaced the former Labour Inspection Act, are of a public nature.[117]

However, the violation of the prohibition of discrimination, especially in the case of employment, affects the private sphere and personal rights. As I have mentioned, this is expressed in CC Section 2:43, according to which it is a violation of personality rights in particular to discriminate against a person. The CC defines the legal consequences that can be applied in case of violation of personal rights, as well as the general rules for asserting claims. In relation to the circumstances of the case, the affected person may demand a judicial determination that the violation has occurred, regardless of the blameworthiness of the violator's behaviour, the cessation of the infringement and the prohibition of the infringer from further infringement. She or he may also request that the infringer provide adequate compensation and ensure appropriate publicity at his own expense. Furthermore, she or he may request the termination of the prejudicial situation, the restoration of the state prior to the infringement and the destruction of the thing produced by the infringement or the removal of its infringing nature, it may be further requested that the infringer or his successors in law transfer the financial advantage achieved by the infringement to their benefit in accordance with the rules of unjust enrichment. In addition, the person concerned may claim damages for the non-material harm caused to him and, if he has suffered damage, compensation. As for the enforcement of the violation of personal rights, it also has public law implications. Pursuant to CC Section 2:54,

116 Act CXXXV of 2020 on Employment Promotion Services and Subsidies, and on the Supervision of Employment.

117 Act LXXV of 1995 on Labour Inspection.

Subsection 4, if the violation of personality rights infringes upon the public interest, the public prosecutor shall be entitled to bring action upon the victim's consent, and to invoke the sanctions independent of attributability.

In addition to public law sanctions and private law compensatory legal consequences, the question is whether the prohibition of discrimination affects the invalidity of the contract of employment in any way, whether this problem can even be considered at the level of legal consequences. In concrete terms, can a person who does not get a job due to some characteristic that can cause discrimination demand that a contract be concluded? In general, it can be said that the requirement of the obligation to enter into a contract is far from private law thinking, including labour law. There may be facts where the original status is restored, but this presupposes a prior legal status. This is classified as SLC Section 83, Subsection 1. According to this provision at the request of the employee, the court shall reinstate the employment relationship if the termination of the employment relationship violated the requirement of equal treatment. In this case, of course, there is no obligation to conclude a new contract, and this solution is an exception among the legal consequences of lawful termination.[118]

The conclusion can be drawn from all of this that the prohibition of discrimination can only be evaluated in the light of the certain reference points, and the same applies to the appropriate selection of legal consequences. In this connection, Vékás notes that the obligation to conclude a contract cannot be enforced because "such a legal consequence means an interference with private autonomy to such an extent that it has more harmful consequences than the disadvantage itself".[119] Other dogmatic and legal policy uncertainties arise in connection with compensation as a general solution. By omitting the details, I am referring to the various quotas, which can be used to achieve noble goals, but they cannot really cover all

118 See in this context: Labour court practice regarding violations of the requirement of equal treatment. Summary Opinion of the Curia Legal Practice Analysis Group.

119 Vékás 2006: 362.

the problems that arise in the private law aspects of the enforcement of the requirement of 'equal treatment' and the prohibition of discrimination.[120]

CHANGING THE LEGAL STATUS OF OCCUPATIONS AND WORKING GROUPS – EMPLOYMENT SECURITY, LEGAL STATUS SECURITY

Introductory thoughts

In my opinion, the long-term predictability of employment relationships is part of the general security of employment and the security of the legal status of working persons. This does not mean that, in justified cases, the legislator cannot decide that specific activities and occupations can only be performed within the framework of a specific legal relationship, or that it can decide to change it later. There are various reasons behind such a far-reaching decision. From this point of view, the evolution of the regulation of the Hungarian civil and public service – in the narrower and broader sense – is instructive. With regard to the former, the originally unified civil service (meaning the legal status of civil servants) disintegrated in a fairly short time after its creation, both in its internal structure and in its external homogeneity.[121] In the public sector, the issue of legal status security came to the forefront of debates when, for example, the legal status of an organisation changed due to the transfer of maintenance rights and thus the legal status of the employees.[122]

[120] See among others KOVÁCS, Kriszta (2009): Alkotmány és kvóta [Constitution and Quota]. *Miskolci Jogi Szemle,* 4(1), 5–29; Directive (EU) 2022/2381 of the European Parliament and of the Council of 23 November 2022 on improving the gender balance among directors of listed companies and related measures. (Text with EEA relevance.)

[121] See GYÖRGY, István (2019): Az életpályák szabályozásának összehasonlítása az egységesség és a differenciáltság szemszögéből [Comparison of the Regulation of Careers from the Perspective of Uniformity and Differentiation]. In KISS, György (ed.): *Közszolgálati életpályák jogi szabályozása* [Legal Regulation of Public Service Careers]. Budapest: Dialóg Campus, 95–110.

[122] See Act CXCV of 2011 on the State Budget, Section 11/A–11/F.

A decision of the Constitutional Court in 1995 is relevant in this regard.[123] In this decision, the Court stated the following: "The state has a fairly broad decision-making authority regarding what types of institutions it operates and how much of each type of institution it operates from the budget. This freedom of decision also includes the decision to finance the institution that has not been operating in this form from now on from the budget, or to find another form of operation and financing for the institution that has been financed from the budget so far." The change in the legal status of the employing organisation and thus the legal status of the employees by the law caused tension because the individual legal relationships had different contents, and after the change, the situation of the employees generally became less favourable in the long term. In this context, the Constitutional Court did not classify the procedure itself as unconstitutional, it emphasised the transferee's obligation to make an offer, and thus the possibility of continued employment, with the comment that "the existence of the institution, if not under the scope of the Civil Service Act, will remain".[124]

I considered this brief introduction to be justified because in this period an organisational and task outsourcing started, as well as a redistribution of certain powers, which was based on economic, financial, financing and legal policy reasons. Although the automatic transformation of the quality of the legal relationship by legislation was not considered unconstitutional, it caused quite a lot of tension. Similar processes are taking place today. Below, I will examine three areas of the so-called change of legal relationship: the healthcare service legal relationship, the legal relationship related to the

[123] Decision 55/1995 (IX. 15.) AB.

[124] Nevertheless, the Constitutional Court assessed unconstitutional and annulled the provision which determined that, in the event of the employee's rejection of the offer for continued employment, the employee would only be entitled to half of the severance pay.

teaching profession, and the so-called model change of the universities, and the situation induced by the related legal relationship.[125]

On the reasons for the change

There are many reasons for the creation of the mentioned constructions, of which the change of legal relationship of the employees is only one of the consequences. Despite the fact that it is not the subject of this study to explore all the legal policy reasons which have led to these changes, it is appropriate to address some of them because of the labour law implications. There is no doubt that, of the three areas I mentioned, the legislator had to face financing problems in two of them in a spectacular manner, and in one of them in a more subtle way, sometimes more strongly, sometimes less noticeably. This naturally affected the wages of those employed. It was also observed that in some areas the activities to be carried out could be carried out within a number of legal relationships,[126] and the legislator wished to standardise this in certain places. This is typically the case in healthcare, where the scope of the law covers only state and local government-owned healthcare providers.

Other reasons emerge in the field of public education. In public education, it is worth starting from changes in the administration of the area. In this regard, the Act on transferring to state maintenance of certain local government institutions performing the task of public education can be considered a milestone.[127] This centralisation resulted – after several amendments – in the creation of school districts and then school district

[125] It should be noted that, in addition to the changes in legal relations that I have just mentioned, many more areas have been or are being affected by these processes. See about this in Berke, Gyula (2021): A jogviszonyváltásról: a közösségi szolgáltatások átszervezésének munkajogi következményei [On the Change of Legal Relationship: Labour Law Consequences of the Reorganisation of Community Services]. *Pro Futuro,* 11(2), 81–103.

[126] See Act LXXXIV of 2003 on certain issues relating to the practice of healthcare.

[127] See Act CLXXXVIII of 2012.

centres. This structure, known as the institutional maintenance system, has a significant impact on the legal status of employees, its stability and the exercise of employer rights.

As regards the restructuring of higher education, this is part of a complex outsourcing system, namely the performance of certain public tasks, essentially state tasks, by public interest asset management foundations. According to the reasoning of the Act establishing this structure,[128] "public interest asset management foundations performing public tasks ensure the achievement of their public interest objectives, which are of paramount importance to society, in a form independent of the government of the day and governed by private law".

In this study, I will not discuss how successful such a construct could be in the domestic context, but I will merely attempt to insert it in certain general legal policy processes. There is no doubt that the current centralisation processes have eliminated many fragmented, uncoordinated operations and eliminated unjustified differences. However, in my opinion, centralisation has also led to standardisation, which is unjustified in several areas, including the legal status of employees. Nevertheless, in such a far-reaching transformation, it would have been useful to take into account the specific characteristics and structural pitfalls of employment regulations that have been in place since the change of regime.

The roots of the problem: The trichotomy of the regulation of employment relationships

In my opinion, the roots of the legal stability problems arising from the change in legal status can be found in the structure of Hungarian employment relationships following the change of regime. At one end of the regulatory scale was private labour law regulation based on market conditions, which was characterised by the FLC. The other end was represented by civil service

128 See Act IX of 2021 on public interest asset management foundations performing public tasks.

law, which was governed by the Act on the Legal Status of Public Servants.[129] A feature of the domestic regulatory structure is Act XXXIII of 1992 on the Legal Status of Public Servants (hereinafter: PSA), a piece of legislation situated roughly halfway between private labour law and public service law.[130] According to the reasoning to this Act, in modern societies, the state and local governments perform tasks that are essential for the proper coexistence of human communities. Thus, beyond public administration, the organisation of healthcare and public education, for example, became a state and local government responsibility. Accordingly, the scope of the PSA covers the legal relationship of public servants who are employed by state or local government budgetary agencies to perform public tasks.

The legal status of public servants is fundamentally influenced by the financing of employer bodies from the budget, and this financial dependence means, among other things, that the parties cannot be in a realistic bargaining position on most issues affecting their legal relationship, as the performance of tasks related to employment does not depend on the actual employer of the public servant, but on the decision of a public authority. Consequently, the structure of public service relationship actually involves three legal positions, or in other words three participants. As a result, the public servant legal relationship actually assumes three subjects. The de jure subject of the public servant relationship is the employer and the public servant, however, de facto subject is also the maintainer organisation. It is clear that in this structure the maintaining and financing organisation has a decisive influence on the content of the legal relationship. This influence can be seen spectacularly, for example, in the regulation of certain facts of the termination of the public service relationship. Pursuant to PSA Section 30, Subsection 1, point b) the employer may terminate the public servant legal relationship with a waiver if, as a result of the decision of the

[129] Act XXXIII of 1992.

[130] See more details about this in Horváth, István (2019): A közalkalmazotti jogviszony a közjog és a magánjog határán [The Public Servant Relationship on the Border between Public Law and Private Law]. In Kiss, György (ed.): *Közszolgálati életpályák jogi szabályozása* [Legal Regulation of Public Service Careers]. Budapest: Dialóg Campus, 271–288.

Parliament, the Government, the Minister or the local government affecting the employer – in particular, the reorganisation resulting from the change of tasks or the reduction of the budget support – it is not possible to further employ the public servant. This provision clearly indicates that decisions that fundamentally affect the existence of the public servant are in many cases beyond the employer's decision-making options, despite the fact that the legal declaration establishing and terminating the legal relationship must be made by the employer.

However, the PSA originally provided stronger legal protection for public servants than the FLC for employees. The establishing and content of the public servant relationship was much more similar to the legal status of civil servants. It can be said that the budgetary bodies that ensure the performance of the state tasks indicated in the law – as public law legal entities – have created a public law employment relationship. This greater protection, as well as the benefits and discounts provided by the PSA, gradually eroded, and the content of the legal relationship increasingly approached the content of the employment relationship. What has not changed is the difference in legal status between the two legal relationships. One is private law and the other is a public law legal relationship to this day. Nowadays, this latter tends to have more disadvantages than advantages. Berke explores in chronological order and item by item the amendments compared to the original state of the PSA, the deviations from the FLC, the public law, cogent elements of the provisions of the PSA and also those that have been left behind over time.[131]

From the point of view of the present topic, i.e. the comparability of the employment relationship and the public servant relationship in terms of equal treatment, one of the findings of the Constitutional Court decision referred to by Berke is important.[132] The Court found that employees and public servants do not form a homogeneous group, and consequently the

[131] Berke, Gyula (2019): A közszolgálat egysége és differenciáltsága jogforrástani szempontból [The Unity and Differentiation of the Public Service from the Point of View of Legal Sources]. In Kiss, György (ed.): *Közszolgálati életpályák jogi szabályozása* [Legal Regulation of Public Service Careers]. Budapest: Dialóg Campus, 63–94.

[132] Decision 3021/2017 (II. 17.) AB points 65–72.

objections that refer to comparability in order to establish equal treatment are not well founded. This assessment is interesting because in the case of the aforementioned change of legal relationship, "all that happens is that instead of a public employer, the employer becomes a private legal entity, or even without it, the legal relationship is transformed from a public servant employment legal relationship to simply an employment legal relationship or some other *sui generis* legal relationship". Of course, changes in the establishment and content of the legal relationship, in the exercise of the employer's rights is generally significant from the point of view of the security of the legal relationship of the employed. It follows from all this that the transformation, the method of changing the legal relationship is by no means incidental.

In this respect, the construction of the provision of PSA Section 25/A is remarkable.[133] This rule refers to a change in the person of the employer, when the employer's organisation is transferred to an employer covered by the FLC or an employer covered by the SLC. In this case, the civil service employment relationship shall cease on the date of transfer. If, based on the transferee employer's information, the public servant undertakes to continue working within the framework of an employment relationship, this legal relationship will continue, if not, the legal relationship will be terminated, and the transferor employer is obliged to pay the public employee severance pay. Also worth noting is PSA Section 25/A, Subsection 7, which provides for the transfer of the duty to provide public service to employers within the scope of FLC/SLC. In this case, the public servant legal relationship will also cease, and the employment will continue in the framework of the employment law relationship. Berke draws attention to the significant difference between Section 25/A, Subsection 1 and Subsection 7. While in case of Subsection 1, the transferee employer has an obligation to make an offer and the public employee has the option to choose, Subsection 7 simply says that "an employment relationship is established with the new employer". In this connection, Berke emphasises that in the latter case – in contrast to the facts of Section 25/A, Subsection 1 – the employment

[133] See about this issue in detail in Berke 2021: 84–91.

relationship is not established by the will of the parties, but by the law, i.e. the nature of the legal relationship changes automatically.[134]

Translating this situation into today's changes of legal status

What does all this mean in the three areas I have examined? Regarding the healthcare service legal relationship, Section 19, Subsection 2 of Act C of 2020 on Healthcare Service Legal Relationship provides for the following: "The legal relationship of the person concerned shall be transformed into a legal relationship of healthcare services according to this Act, on the basis of the provision of the healthcare service employment contract." Under Subsection 3, "the person concerned must be informed in writing of the change of legal relationship and the intended content of the contract of employment in the healthcare service, as required by the National Director General of Hospitals". The healthcare service employment contract had to be concluded by 28 February 2021, with it being applied from 1 March 2021. Subsection 4 stipulates that if a healthcare service employment contract is not concluded within the time limit set out above, the public servant's legal relationship with the healthcare service provider will be terminated on 1 March 2021. In this case, the affected public servant is entitled to the severance pay specified in this Act. It follows from all of this that the healthcare service legal relationship is established by means of a contract of employment. According to Section 2, Subsection 1, a 'healthcare service employment contract' contrary to this law is null and void. It is reasonable to look at the content of this legal relationship. Based on this, it can be said that it is basically a service relationship of a public law nature, established with a private law causa. In the end, this would not even be objectionable with regard to the nature of the activity, since the scope of the law extends to institutions maintained by the state and local governments, and the legislator has – as we have seen – a wide range of manoeuvres in terms of

[134] Berke 2021: 91. Despite the fact that Berke himself expresses doubts about this position and refers to the opposite position, it can be said that the content of Section 25, Subsection 7 is uncertain, especially when embedded in its own legal context.

shaping the content of the legal relationship. In this context, it is reasonable to take a closer look at the salary system. The salary system, typically of a public law nature, depends on the length of service and qualification, and is structured in the same way as we saw in the case of traditional public service legal relationships. This salary system is 'flexibly bound'. More specifically, this means that each salary grade includes a from–to range. The nature of the regulation is well reflected in Section 8, Subsection 12. Pursuant to this, the employer makes a proposal for the salary of the person in the healthcare service relationship within the salary grade based on the result of the qualification of the person in the healthcare service relationship. If the proposal is not accepted by the person in the healthcare service relationship, the employer will terminate the healthcare service contract.

Section 15 of the Act provides quite detailed provisions on labour relations. Accordingly, the Healthcare Service Conciliation Forum is set up with the participation of the Government, the national sectoral interest representation organisations and the negotiating group of the national employee interest representation organisations of healthcare service stakeholders, with the aim of reconciling the interests of healthcare service providers covered by the Act and of persons in legal relationships with healthcare services, settling disputes by negotiation and drawing up appropriate agreements, taking into account the principle of the safe provision of healthcare services. In this organisation, the Government consults with representatives of national trade union associations and national local government interest representation organisations. Pursuant to Subsection 7, the opinion of the board must be sought in relation to matters within its competence in the management of labour and personal benefits. However, the essence of collective labour relations is expressed in Subsection 10: a collective agreement cannot be concluded with healthcare providers covered by the Act.[135]

While the special public law legal relationship of those employed in state and local government-run healthcare institutions is established through

[135] See a summary in KÁRTYÁS, Gábor – HORVÁTH, István (2021): Látlelet: Az egészségügyi szolgálati jogviszonyról és a szabályozás kérdőjeleiről [Report: On the Healthcare Service Legal Relationship and Issues in Regulation]. *Munkajog,* 5(1), 12–15.

a contract of employment, the Act on the teaching career has created a rather messy situation. The first difficulty is immediately caused by the unclear wording of the scope of the Act. Pursuant to this, the scope of the Act "extends to employers operating in the field of public education, to those employed in the public education employment relationship". Furthermore, certain provisions of the Act on the exercise of employer's rights, change in the person of employer, collective redundancies and other provisions also apply to employees in other legal relationships. In this study, I do not undertake to evaluate the legislation as a whole, I only highlight some rules related to the job security of the employed.

Section 4, Subsection 1 of Act LII of 2023 on the New Career Path for Teachers lists the legal relationships that may be established for the performance of the task of an educator. These are the public education employment legal relationship, the church service legal relationship, and the hourly commission legal relationship. An employment relationship can only be established in a position that directly supports the educational work. The legal relationships listed first are established by appointment based on a tender. Contrary to the view that the legislature has created "a new type of employment relationship",[136] I consider that the legislature has created a purely public service relationship. However, the main problem with the legal status security provided by the new teacher career model is not primarily to be found in the nature of the new legal relationship, or in the way of transformation, but rather in the sharing of the employer's rights. Section 17 of the law is instructive, which practically places the employer's authority outside the institution, at the school district centre. It is not an exaggeration to say that the duties of the director of the institution are largely limited to the performance of administrative tasks instead of substantial employer duties.

And finally, in accordance with Section 22 of the Act on Public Interest Asset Management Foundations Performing Public Tasks, if a higher education activity has also been determined as a public task of the foundation,

[136] BÉRCES, Kamilla (2023): Az új pedagógus-életpálya [The New Teaching Career]. *Munkajog*, 7(4), 56. We should add that the author highlights several public law elements of this legal relationship.

it is carried out through the foundation's higher education institution. In this case, the foundation is the maintainer and owner of the higher education institution operating as a state-recognised university. This also means that the maintainer and the owner of the university cannot be different persons. According to the Reasoning of the Act, the legislator is establishing a new system of rules that is able to adapt to the rapid changes in social, economic and cultural life and at the same time to ensure the desired level of public service. In the latter context, the State, while respecting and protecting the private autonomy of public interest trusts and the free exercise of the fundamental rights guaranteed by the Fundamental Law, in particular the freedom of scientific research and artistic creation, supports this modern and unique form of public interest provision with the means at its disposal. The preamble to the Act emphasises the important role of public interest foundations in the creation of social value and their independence from the government as private law actors.

As for the change in the legal status related to transformation and model change, the prescribed solution is applying the mentioned Section 25/A, Subsection 7 of the PSA. In this connection, Berke emphasises that there is a significant difference between the original application of the PSA rule and its reference during the change of model of the universities, since in the latter case we cannot speak of a change of subjects.[137]

Intermediate conclusions

The transformation I briefly examined represents an extremely important change in Hungarian health administration, public education and higher education. In addition, as I mentioned, significant structural, administrative and management changes took place in other areas, such as research. The legal and political reasons for these changes are varied, but behind all of them a certain degree of centralisation, the strengthening of central control and the concentration of financing can be observed, even in the case of the

[137] BERKE 2021: 97.

formal outsourcing of certain assets. This analysis only covered changes in the legal status of the employee. In this respect, it can be observed that, despite the slightly different solutions, the employees were faced with a set of facts, their previous legal relationship had been terminated, transformed by law, with limited choice or even no choice. It seems that alongside the public interest and legal policy imperatives, the legal status security of the employed has been given a secondary role.

THE OPERATION OF THE NORMS FOR ENSURING THE MAINTENANCE OF THE PURPOSE OF LABOUR LAW – ON THE RULES AFFECTING THE REQUIREMENT OF ORDERED LABOUR RELATIONS

Introductory thoughts

In relation to the labour law purpose of legal norms, I examine legislation that establishes certain labour law requirements in a broader sense, or a whole system of requirements and compliance with which is linked to the achievement of certain economic, financing and tender opportunities, while violations of these requirements result in some form of sanction. This type of regulatory system raises many questions. It is primarily about the concept and the name. What does the term 'ordered labour relations' actually mean, and what is behind its content? The second is related to the justification and efficiency of this regulatory system. Finally, we have to find an answer to the question: Is there a general solution behind the broad, so-called global effort, or can we only speak of fragmented, isolated regulations that differ from country to country and economic policy?

The term 'ordered labour relations' can mean many things at once and is so vague that its meaning is almost incomprehensible. It is no coincidence that several authors write about the enforceability of labour law rules.[138] Furthermore, the problems of labour law compliance, integrity, and labour law audits are coming to the fore more and more often.[139] Ordered labour relations obviously imply that labour law norms, collective agreements and other collective contracts, (i.e. works council's agreements) as well as the contract of employment must be respected. These legal sources primarily regulate the rights and obligations of the subjects of labour law. However, there are also norms that are indirectly related to labour law. These, for example, establish requirements for legislation to involve social partners and promote social dialogue. A separate group of norms address the employment aspects of migration, seeking to reduce undeclared work. Differentiation of content is important because each group of norms has different legal implications. It is also important to consider what means of claim enforcement and legal remedies can be considered at all. Following from all of this, in my opinion, the answer to the first question is that ordered labour relations represent a general system of requirements, the primary importance of which is to prioritise the expectations that belong to the previously defined purpose of labour law, i.e. to ensure a balance between economic interests and social needs, but traditional labour law instruments, especially private labour law instruments, are not very suitable for their compliance.

I am aware that with this answer I have not yet said anything about its specific content. But I am not going to. I will summarise my reasons for

[138] Kun, Attila et al. (2023): Az egyéni munkajogi szabályok kikényszeríthetőségének általános kérdései [General Issues Concerning the Enforceability of Individual Labour Law Rules]. *Jura,* 29(2), 38–57; Kun, Attila (2023a): Érvényesülési és kikényszerítési deficitek a magyar munkajogban: problématérkép és egyes megoldási alternatívák [Compliance and Enforcement Deficits in Hungarian Labour Law: Problem Map and Some Alternative Solutions]. In Auer, Ádám et al. (eds.): *Ünnepi tanulmányok Kiss György 70. születésnapjára. Clara pacta, boni amici* [Festive Studies in Honour of György Kiss's 70th Birthday. Clara pacta, boni amici]. Budapest: Wolters Kluwer, 395–405.

[139] Szegedi, Krisztina – Mélypataki, Gábor (2016): A vállalati társadalmi felelősségvállalás (CSR) és a jog kapcsolata [The Relationship between Corporate Social Responsibility (CSR) and Law]. *Miskolci Jogi Szemle,* 11(1), 51–70.

abstaining below, but for now I would like to answer the second question. In particular, is such a regulatory system justified and if the answer is yes, when can we say that it is effective? I am convinced that such a public law guarantee is necessary. In this study, I have perhaps already mentioned too many times that labour law is a 'contractual' branch of law and, as such, is part of private law. However, this does not mean that the instruments of civil law are sufficient to resolve all labour law problems. Just as, for example, the prohibition of discrimination is of particular importance in labour law, the so-called ordered labour relations also have their place. As far as the efficiency of this institutional system is concerned, this problem is linked to the specific content of the institution. Namely, efficiency depends on the economic policy and social policy attitude of a certain environment. Ordered labour relations can be regulated with a somewhat softened or even emptied content, and it is also possible to develop regulations that are truly capable of creating a balance.

How global and how sporadic is the legal institution of ordered labour relations? It seems that the efforts of international organisations are moving in the same direction, namely to make this system of requirements as widespread as possible. The globalisation of content is already in doubt, so the effectiveness of this system of requirements is fluctuating. In the introduction of this study, I emphasised the importance of delimiting the subject of the research. With regard to ordered labour relations, it is also necessary to decide what kind of labour law we are examining: 'labour law' in general, or the labour law of a specific age, of a specific country, the development of which is influenced by many circumstances. I chose the latter, so below I will analyse the situation of ordered labour relations in Hungary.

The evolution of the regulation of ordered labour relations in Hungarian labour law

The story began in the mid-nineties, with the regulation of the labour inspection. Later, the idea of ordered labour relations arose in connection with public procurement,[140] then in 2006, the preamble of the Public Finances Act included this concept. The next milestone can be traced back to 2009, when the Act on the Amendment of Laws Concerning the Requirement of Ordered Labour Relations and other necessary measures from a labour point of view was passed. This legislation collected the acts that in some way affect the most diverse segments of labour relations and assigned certain legal consequences for their violation. Finally, the most significant step can be considered to be the year 2020 and 2021 when the Act on Employment Promotion Services and Subsidies, and on the Supervision of Employment[141] and the Government Decree on the Activities of the Employment Supervisory Authority[142] entered into force, which dedicates a separate chapter to this subject entitled 'Conditions of Ordered Labour Relations'. Each of the analyses and reports summarises the fact that in practice the efficiency of this institution has been somewhat softened, eroded. In this respect, the August 2011 report of the State Audit Office (hereinafter: SAO) on the evaluation of the labour and safety inspection system is very relevant.[143] There are several reasons for this softening. One of them is the impossibility of carrying out the tasks related to the verification of compliance with the requirements laid down in the various legislations, as indicated by the SAO Report.[144] The report refers to the inconsistency of the legislation, the differential appearance of individual requirements over time, the practice of failure to notify, as a result of which

140 Kun, Attila (2023b): „A munkaügyi bírságon túl", avagy a munkajogi jogsértések másodlagos szankciója: a rendezett munkaügyi kapcsolatok követelménye ["Beyond Labour Fines", or Secondary Sanctions for Labour Law Violations: The Requirement for Ordered Labour Relations]. In Boóc, Ádám – Pókecz Kovács, Attila (eds.): *65 Studia in Honorem Éva Jakab.* Budapest: Károli Gáspár Református Egyetem Állam- és Jogtudományi Kar, Patrocinium Kiadó, 187–194.

141 Act CXXXV of 2020.

142 Government Decree 115/2021 (III. 10.) on the Activities of the Employment Supervisory Authority.

143 Állami Számvevőszék (2011): Jelentés a munkaügyi és munkavédelmi ellenőrzés rendszerének értékeléséről. Iktatószám: V-2007-077/2010-2011, Témaszám: 981, Vizsgálat-azonosító szám: V0515, 19. (Hereinafter: SAO Report.)

144 SAO Report, 51.

the control authorities simply do not get the appropriate data. It should be pointed out that the registration and publication of the identity of the infringer can have a strong deterrent effect in relation to infringements. The power of this institution has also been reduced by the possibility for the infringer to request the authority to delete from its website, before the expiry of the period for disclosure, the information relating to the published and enforced decision, in the case of certain infringements, if a payment of a certain amount is made at the same time as the application is submitted.

This provision reveals another reason for the weakening of the institutional system. While the SAO Report highlighted that the measures intended by the legislature are unenforceable, the cited rule already directly reflects the legislature's intent to mitigate. My statement that such an important institutional system is being eroded is a very serious assessment, and therefore cannot be concluded at the level of generality. For this reason, in support of this assessment, it is necessary to examine each station in the evolution of ordered labour relations.

The Labour Inspection Act of 1996[145] was preceded by a relatively long discussion and negotiation. The intention of the legislator was to set up a comprehensive labour inspection system. This is reflected in the second paragraph of the preamble to the Act. The legislator created this legislation to reduce employment that does not meet the legal conditions, as well as to protect the rights of employees and their interest representative bodies. Pursuant to the original content of Section 3, Subsection 1, the labour inspection covered the formality of the conclusion of the contract of employment, the obligation to notify, compliance with the prohibition of discrimination for the protection of women and minors, compliance with the rules on working time and wages, and monitoring the termination of the employment relationship. A separate area was the employment of foreign workers, as well as the qualification of legal relationships for employment. It is relevant to our topic that the labour inspection covered the employer's obligation to comply with the rules ensuring the organisation of a trade union to protect the economic and social interests of employees, the rules

145 Act LXXV of 1996 on Labour Inspection.

on the protection and benefits of the employee holding an elected trade union position, the member of the works council and the labour protection representative, and finally the rules on the enforcement of the employer's obligations in connection with the measures objected to by the trade union. This text has been amended and updated several times, and the rules on the retention of collective labour law elements have been repealed.[146] The sanction system of the Labour Inspection Act was basically a fine and in certain cases it could prohibit further employment.

Certain carefully formulated expectations regarding working conditions first appeared in 2003 in the field of public procurement.[147] The 2009 Act on Ordered Labour Relations was significant in linking compliance with labour law rules in a broader sense and the availability of opportunities, subsidies and benefits to participate in certain areas of economic life.[148] This law amends the 1992 law on public finances,[149] the already mentioned law on public procurement, and the law on labour inspection. According to one of its essential provisions, the labour authority publishes on its website, based on data of the register maintained by it, information regarding employers who have committed certain legal violations specified in the Act on Public Finances, which are legally binding and enforceable, or – in the case of a judicial review of the administrative decision – have been subject to a labour fine by a court decision.[150] In addition to the above, this Act amended the Act on the Taxation System[151] and the Act on equal treatment. The essence of these changes was that the disclosure powers of individual public authorities, together with exceptions and restrictions, would collectively have a deterrent effect. These restrictions seem important. Thus I refer to

146 Act XXXVIII of 2009 on the Amendment of Laws Concerning the Requirement of Ordered Labour Relations and on other measures necessary from a labour point of view. See in particular Act CXCI of 2011 on the provision of benefits to persons whose working capacity has changed and amending certain acts.

147 See Act CXXIX of 2003 on Public Procurement, Sections 55, 72, 404, Subsection 3.

148 Act XXXVIII of 2009 on the Amendment of Laws Concerning the Requirement of Ordered Labour Relations and on other measures necessary from a labour point of view.

149 See Act XXXVIII of 1992 on Public Finances.

150 Section 8/C of Act LXXV of 1996 on Labour Inspection.

151 Act XCII of 2003 on the Taxation System.

Government Decree 368/2011 (XII. 31.) on the implementation of the Act on Public Finances, which, while regulating in detail the concept of conduct not in accordance with ordered labour relations, did so by referring to the individual laws already mentioned.[152]

The current status is defined in Act CXXXV of 2020 on Employment Promotion Services and Subsidies, and on the Supervision of Employment, and Government Decree 115/2021 (III. 10.) on the Activities of the Employment Supervisory Authority. The Decree sets out the requirements – in a somewhat similar way to the previous Labour Inspection Act – and then specifies the authorities that will check these conditions. Section 21 of the Decree provides for the public disclosure obligation of the public authorities, the period of publication and its cancellation. Finally, Section 22 of the Decree regulates the right of the employer, according to which, in case of certain violations, he can request the cancellation of the decision before the expiry of its deadline, against the payment of three times the amount of the fine.[153]

The connection between ordered labour relations and the economy is, in part, a new phenomenon, and certain elements of the institution are important in order to ensure the purpose of labour law. It can be observed that it is a truly global endeavour, it exists in many areas, and ensuring its effectiveness is also a factor that increases the value of employment and work. The question is: What interests prevail to ensure its effectiveness and what conflicting interests may arise? The starting point for answering this question is the structure of the institution, the legal consequences of violations and the effectiveness of enforcement. Certain elements of ordered labour relations really aim to achieve the desired state of equilibrium in labour law. The conditions that are formulated in the various legislations are

[152] See Government Decree 368/2011 (XII. 31.), Section 82.

[153] I refer to Decree 29/2025 (VII. 22.) of the Ministry of Agriculture related to the agricultural policy of the European Union, which provides for the introduction of the system of social conditionality. Pursuant to this, "in accordance with the current European Union regulations regarding the Common Agricultural Policy, the Member States of the European Union, including Hungary, must establish a system that provides for the application of proportionate administrative sanctions in the case of beneficiaries of certain subsidies granted under the Common Agricultural Policy who do not comply with the most basic employment and occupational health and safety rules".

partly immanent parts of labour law, stemming from contractuality and the correlation of individual and collective autonomy. The other part is the result of normative, public law intervention. In my opinion, the legal consequences can be characterised by two factors. These legal consequences are derivative, they have an indirect effect, i.e. they do not affect the employer's quality, but rather their economic and entrepreneurial legal status and opportunity. Furthermore, without exception, they are of a public law, one might say criminal, nature. Thus, it is not a question of a private law provision, such as a declaration of invalidity, but of a prohibition, a restriction and even a possible relaxation of the sanctions. Consequently, its effectiveness cannot be interpreted on a legal dogmatic basis, but depends on a legal-political, especially an economic-political approach.

INTERMEDIATE CONCLUSION

In this chapter, I have attempted to prove the role of legal norms in maintaining the balance required by labour law. This purpose of legal norms requires considerable manoeuvring on the part of the legislator. It is clear that the development of the regulatory environment of labour law depends fundamentally on the state's economic policy ideas and the corresponding employment policy. A group of legal norms shape the contractual autonomy of the parties, reducing it on the one hand and expanding it on the other, in order to keep the existing subordination in the content of the employment relationship within the framework of contractuality. These norms are to ensure that the nature of the contract of employment is respected and that the autonomy of the parties is safeguarded.

Another group of legal norms also aims to ensure the contractual autonomy of the parties, but their enforcement in contractual relationships is at least doubtful. The reason for this is that its institutional system has moral foundations, which have been primarily adopted by public law, and are alien to contracts and private law. In my opinion, it is wrong to impose the requirement of the so-called equal treatment in contractual relations, since this is a misinterpretation of the prohibition of discrimination. The prohibition of discrimination also applies within the framework of private law; this institution is by no means superfluous, even though the legal consequences of its violation are essentially of a public law nature. The importance of prohibiting discrimination is evident in labour law, where the position of the parties is determined by subordination. However, the application of the system of norms for the prohibition of discrimination must be precisely defined in order to ensure contractuality, and its material and personal scope must be appropriately designated.

The third group of legal norms interferes with the autonomy of the parties in a way that has nothing to do with ensuring the contractual autonomy of the parties and with the security of their legal status. In this chapter I have examined two groups of cases, one of which is specific to Hungarian legal intervention, while the other is the expression of a global effort. The first is to change the legal status of certain occupational groups, mainly due to legal-policy and political considerations. The other is the so-called ordered labour relations institution, which attaches certain economic legal consequences, advantages and disadvantages to the operation of enterprises. Examining these two systems of legal norms side by side in the Hungarian legal and political environment, it is obvious that they are rather out of line with the legal norms shaping the fate of the employment relationship. A unified concept behind the change in the legal status of each occupational group cannot be discovered. One of these is the standardisation of employment relationships in state and local government-run healthcare institutions, which, however, has consequences that are completely unrelated to this – see the prohibition of concluding a collective agreement. In the other case, there is an unrealistic centralisation, with the creation of a vague teacher–educator legal relationship and the emptying of the employer authority of educational institutions. Concerning the outsourcing of certain public tasks to private foundations performing public tasks, it is clear that the labour law consequences of this step are insignificant compared to the legislator's other intentions.

In summary, it can be stated that the role of legal norms in Hungarian labour law is apparently determined by two factors. One is the codified legal material itself. However, it should be pointed out that although codification gives labour law a distinctive character, it can also indicate its legal independence, but it is not the codification per se, but its content and the effect of other legal sources of labour law that are decisive. And that is where we get to the other factor, which is again divided into two parts. One is the uncertain placement and position of the contract of employment in the system of contracts, if the legislator did not seem to have decided to create an independent contract of employment and, accordingly, an employment relationship, or the contract of employment is a private law contract to which certain specific legal institutions are attached. The other factor is the lack of a collective contractual legal source, namely the irrelevance of the regulatory role of the collective agreement. As a consequence, the legislator has a wide margin of manoeuvre, able to enter into areas that the parties would have agreed to, and this is not necessarily favourable to the development of labour law.

CONCLUSION, ASSESSMENT, SUGGESTIONS

CONCLUSION

During its brief history, labour law has undergone a rather varied and sometimes tortuous development. The *locatio conductio,* as a starting point, still has its influence to this day. This is reflected not only in the fact that in certain institutions of labour law it has not been possible to get rid of the construction of rent, but also in the fact that the complexity of *locatio conductio* is revealed in the debate on the subject of independent labour law versus labour law as part of private law. This legacy was also reflected in the fact that the development of modern labour law actually began without the relevant legal material, but we can also say that it began without a serious intention to create such a legal material. And here we must point to a process that is still in effect today. There is no doubt that there have been several attempts to establish an independent, sovereign labour law. These were mainly based on political, social-policy and sociological considerations, but they were repeatedly blocked in the elaboration of the dogmatic system of the independent legal norm. This is well illustrated by the various attempts to codify labour law and contract of employment. Nowadays, it seems as if the teachings of Sinzheimer's school are reappearing in relation to the independence of labour law and the *sui generis* nature of contract of employment. Numerous studies and monographs have been published in this context, and countless conferences have been held on this topic. Many things have been written in these studies and many things have been said at conferences about labour law. Thus, the nature of the workforce, fundamental rights in labour law, changed economic conditions, economic policy and the effects of globalisation and new technologies have been analysed. However, one thing seems to be relegated to the background all the time, namely the definition, or even the outline, of the answer to the legal-dogmatic construction.

But is it even possible to talk about the necessity or possibility of developing some kind of new labour law? The answer cannot be limited to a simple yes or no. Namely, labour law has undergone huge changes during its history of development. The structure of labour law based on simple, individual rental contracts has changed. Today, labour law cannot be imagined without the correlative relationship between individual and collective labour law. This also meant that labour law developed its own, so to speak, unique system of sources of law. In the legal system, in addition to the normative legal source, labour law has the only normative-contractual legal source, namely through the regulatory function of collective agreements. In the process, the purpose of labour law has also changed. Whereas in the beginning labour law was clearly a law of protection of employees, today it plays a much greater role in creating and maintaining balance between economic requirements and social needs.

This may also indicate that labour law is developing along a path that could lead to the emergence of a new, autonomous branch of law. Instead of traditional *labour law, Arbeitsrecht, droit du travail,* a complex, comprehensive *personal employment law, Beschäftigungsrecht, droit à l'emploi* would be created. There are certain initial signs of this, as new forms have appeared at the contractual level, such as the *personal employment contract.* The question, however, is why there has been no spectacular progress, why, for example, *personal employment contracts* have not developed into *personal employment law?* The answer here is also complex. The legal system uses the structure and institutions of traditional labour law, a complete transformation would also affect the foundations of many branches of law, so for example civil law, tax law, the enforcement of certain fundamental rights, etc. would have to be reconsidered. Undoubtedly, in the shorter timeframe, this seems to be an almost impossible task to perform. However, in my opinion, such a change cannot be avoided in the perspective of the future.

I justify this statement with the following. The actual environment of work and employment has changed and diversified since the 1970s. Today, among others, two processes are transforming the world of work and employment: globalisation and digitalisation. A wide variety of activities has emerged, the ways in which the tasks can be carried out are almost endless, and it is clear that this also requires an adequate legal toolbox. Well, the response of labour law, at least in terms of the European trend, is quite one-sided. Labour law retains its traditional principles and legal institutions, while the infrastructure of work and employment has undergone a fundamental change.

It is no exaggeration to say that economic requirements and processes are shaping the state of labour law today, and in this situation, it would be particularly important to seek solutions that, in addition to economic priorities, ensure the protection of the flexible legal status of the parties, in particular of employees. It is clear that the global market demands a different level and structure of production, services and supply than before, but in which the place of the consumer, the user and the employee must be created. This is also important because, in general, the basic rights and the basic rights valid in labour law only apply to those who are in a certain position.

Globalisation and digitalisation are changing society's values regarding work; just as such changes in values have always existed throughout history. The idea of the *welfare state* has been replaced by the idea of the *workfare state,* and today we are witnessing another change, the conquest of the so-called *knowledge-based society.* These changes mean not just a new ideology, but a transformation of the whole fabric of society. This also means that employment must also take on new dimensions.

The title of this study includes the term 'effective employment'. As I have indicated, if the objective criterion of the purpose of labour law is to be found, then the efficiency of employment must also be compared exclusively to it. This ideal state is to ensure a balance between economic requirements and social needs. However, this balance can be interpreted in different ways, different priorities are involved, and thus the objectivity of employment efficiency also becomes subjective. Accordingly, the legal bases of 'effective' employment are also quite different, depending on the order of priorities set by the political decision-maker. More specifically, this also means what kind of economic policy the state develops, including what activities, aspirations, development directions or interest groups it prefers. More or less, employment policy also develops accordingly.

Globally, the trend is as follows. Countries that are willing to support innovative investments, strive to develop an innovation-driven economy, and enter the market with high value-added production or solvency, will gain a comparative advantage. This means that the employment legal instrument is sufficiently flexible, takes advantage of the sources of labour law and incorporates them into the legal system of private and public law institutions. The exception to this is, of course, where the state exercises influence in all areas of the economy and also determines the financial conditions for the most modern innovation. On the other hand, countries with less advanced technological systems, which focus on secondary supplier/assembler activities with little added value and essentially of a service-oriented nature, will gradually fall behind in an evolving global competition and orientation. In the legal instrument system of employment, this can easily result in state intervention becoming predominant, the cohesion of the legal source system of labour law being overturned, and labour law becoming a simple tool of some sort of state policy. Regarding the above, I note that these are general trends; of course there may be exceptions and temporary deviations, which, however, do not change the general direction of movement.

ASSESSMENT

The evaluation refers to the development and state of the Hungarian labour law on the basis of general trends. It may seem that the creation of the labour law system following the change of regime was unprecedented. This impression may have arisen because, for some forty years, there was no trace of the market economy typical of civil societies, or of the employment policies based on it; accordingly, socialist labour law had no connection whatsoever to contract-based labour law. Indeed, in the period before the Second World War – despite its many feudal features – we can find efforts that could have provided the basis for the development of a later labour law system based on private law. The so-called coalition period, which lasted until 1949, raised hopes for the development of civil society and a market economy. However, the much-discussed 'year of the turn' determined Hungary's political system and economic orientation for a long period of time.

During the economic and political regime change – I repeat, the order is conscious – the legislation underpinning the economic transformation and the political shift preceded the entry into force of the FLC. In my opinion, the FLC was characterised by overheated optimism, because it included all elements in the regulation that could characterise the labour law of countries with civil democratic order that have been functioning well for a long time. Moreover, the legislator chose a solution which he considered to be of model value and wished to build Hungarian labour law on its model. The only flaw of this solution was that such an idealised labour law system did not have an economic and social background. In addition to misunderstanding the principle of the application of more favourable conditions to the employee, the legislator assumed that after the change of regime, the system of collective agreements, which will form the backbone of the labour law legal resource system will be ready. The extent to which this was not a well-founded assumption was well reflected by the regulation of the capability to enter into collective agreements, which the legislator was forced to link with the results of the works council election.

Nevertheless, two aspirations of the FLC should be highlighted. One is the approximation of the labour law system to the principles and rules of civil law, the other is the creation of harmony between individual and collective labour law. As regards the former, the legislator was extremely cautious, this intention appearing more at the level of legal policy than in practice, although the courts showed a willingness to apply the principles and rules of civil law. The other effort was thwarted because the role of collective labour law was not satisfactory, or more precisely, it was not applied where it was needed. As a consequence of all this, the role of legal norms remained strong, and the idea of a 'labour law characterised by private law' could only be discovered in traces.

We would be unfair to this labour law regulation if we did not refer to the economic processes that ultimately determined the fate of labour law. In the process of privatisation, the restructuring accompanying ownership relations, it is not at all certain that the withdrawal of state intervention to the extent that was announced by the legislator would not have caused greater damage. The two decades that this regulation went through clearly reflected all the pitfalls of an economic and employment policy that was trying to find its way, but had a very hard time doing so.

The SLC, which entered into force in 2012, can be evaluated not by itself, but as part of a process of complete social, political and, at the same time, economic transformation. After the change of government, the creation of the Basic Law and the implementation of various economic and employment policy plans made the centralisation of the economy and the construction of the corresponding employment system clear. This change in the SLC was reflected in a rather controversial way. The world's most flexible labour code is in fact a labour contract law reinforced by public law elements, with collective law elements attached to it, but the effect of these is marginal, even in comparison with the former collective labour law. The significance of 'company constitutional law' *(Betriebsverfassung)* has been reduced to almost zero, and the incomplete regulation of the collective agreement does not cause spectacular disturbances in the system of labour relations because their functioning and impact are also negligible.

Unfortunately, the SLC bears almost all the contradictions of a possible labour law regulation. Regarding the contract of employment – as the basic institution of labour law – the legislator does not seem to have decided the place of this contract, it is invariably halfway between contract governed by civil law and a *sui generis* contract. In practice, this can be a problem because in some situations the rules of civil law must be applied, however, with regard to legal consequences, the legislator already orders the application of rules of labour law. The adoption of certain elements from civil law is justified, while others are not, and this – contrary to the argument of the legislator – does not serve legal certainty at all. The collective agreement is 'hanging in the air' as a necessary, mandatory element of regulation, but in reality, with such a regulatory content, it cannot fulfil its purpose as a normative-contractual source of law. Legal norms are not primarily a restriction of flexibility, but a partially justified, and mostly unjustified, restriction of the parties' autonomy.

However, the legislator seems to have done a great deal for flexibility, since it has dissolved the principle of relative dispositivity in the relationship between the legal norm and the collective agreement. However, this creates only a formal condition for flexibility, behind which no real interests or motivations can be detected, so that any criticism of this solution is superfluous. While in the case of the FLC it was possible to justify certain solutions of the law with the difficulties of the economic and social reorganisation that necessarily started with the change of regime, in the case of the SLC we did not discover such a background. A centralised, restrained law expressing the so-called work-based economy and employment was passed, which is nothing more than an easily manipulated legal policy tool.

SUGGESTIONS

Once again, suggestions should be based on an objective and subjective approach to efficiency. I emphasise this because it would be pointless to make attractive suggestions without any reality or chance of their implementation, because the economic policy and employment policy foundations and ideas behind labour law do not require such regulation. It is therefore clear that the effectiveness of appropriate employment must be supported by a legal regulatory system in line with a specific legal policy concept. As the author of this study is not a policy maker in economic and employment policy, he is only able to formulate suggestions or to model a number of options.

In developing the proposals, work has been done on the basis of two possible economic policy scenarios. According to the first, the current Hungarian economic policy concept will not change, and accordingly neither will the employment policy. The second scenario outlines the possibility of a top-down, fundamentally centralised and stimulated market economy being replaced by a so-called knowledge-based economy with a greater emphasis on innovation, which has an impact on economic policy decision-making mechanisms and allowing ample room for competition and autonomy for participants, both at the individual and collective levels. It could be justified to choose the two options separately and examine the compliance of the legal regulatory system one by one. The reason why I do not choose this solution is that there are fundamental elements that must be displayed in the process and content of the regulatory system in the case of both options. As regards the creation of the labour law rule system, the involvement of social partners is not only a gesture of the legislator, but is of fundamental importance in terms of a well-founded legislative decision. As unusual as it may seem, it is at the same time the key to preparing a flexible decision that includes multiple solutions. It enables the comparison of interests and the consideration of certain regional and sectoral specificities. Last but not least, it is suitable for strengthening the continuous relationship and trustful cooperation between the decision-maker and the partners.

I consider this mechanism absolutely necessary in case of both of the situations I mentioned.

The following fundamental requirement is the cohesion of labour law legal sources, which also means that the legislator must ensure that employment contracts, collective agreements and the legal norm are consistent with one another and fit into a coherent system. In this regard, the situation of the norm system corresponding to the two economic policy and employment policy concepts is already different. The current economic policy is more suited to a fundamentally incoherent system of sources of law than to a system that favours contractual autonomy. In this structure, the contract of employment establishes the employment relationship and has little effect on shaping its content. Although the contract of employment is formally close to private law contracts, it is static and inflexible in many of its institutions. As I explained in the chapter dealing with the contract of employment, in Hungarian labour law, this contract is basically not an incomplete contract, nor does it bear the hallmarks of a relational contract, and only with strong reservations can the contract of employment be considered a contract concluded with general contractual terms and conditions. In my opinion, despite everything, it would be possible to broaden the autonomy of the parties and establish some institutions that provide reasonable flexibility even within the current structure. That is my view of the removal of the restriction contained in Section 43, Subsection 2 of the SLC as regards the 'comparison of the interrelated provisions'. In parallel with this, legal status protection could be given more space in certain areas, especially with regard to the termination of the employment relationship. Finally, I would point out that the current regulatory approach cannot ignore the regulation of the legal status of working persons, which is similar to the legal status of employees. The fact that the legislator is not aware of it does not mean a solution, because according to the decisions of the courts, they are either classified as employees or genuine entrepreneurs, and in fact neither legal status fits them nor suits them in its entirety.

The contract of employment, in a different economic policy concept from the current one, is based on the autonomy of the parties, but even this would not make the contract of employment itself capable of shaping individual working conditions in a more flexible way. Basically, no, because these conditions are fairly standardised; on the other hand, the protection of the employee's legal status is perhaps even more important in the case of a more open contractual content. So what is the difference? Primarily, the application of the doctrine of promise to employ and be employed, as applied by Freedland, strengthens the nature of the employment contract as an incomplete contract, the solutions typical of the relational contract can become a reality, i.e. flexibility and legal status protection become coherent. In addition to such a construct, it may be worth considering the working out of the clauses of the contract of employment as a contract concluded with general contractual terms and conditions. It is clear that the regulation cannot ignore the settlement of the situation of working persons with a legal status similar to that of the employees. In such an economic policy concept based on competition, the contract of employment clearly shares the dogmatic system of private law contracts, naturally with the appropriate differences. As a result, SLC Section 31 becomes redundant, and it is only sufficient to refer to the application of CC rules as a clause.

The biggest difference between the two approaches to economic policy and employment policy may exist with regard to the contractual-normative sources of labour law. In my opinion, there is simply no place for collective agreements in the current legal and economic policy concept, especially with regard to the regulatory function of the agreements. Of course, the question inevitably arises as to what can be done at all in the current situation of support for trade unions to strengthen collective autonomy and to recognise the nature of the collective agreement as a source of law. It is clear that, even if there is a good intention in legal policy, it will take a very long time for collective autonomy to develop to the point where it begins to influence the content of the employment relationship – and indeed, employment policy itself.

A widespread misunderstanding about the collective agreement should be dispelled. Although the collective agreement is an effective means of ensuring the balance of the content of the employment relationship, thus, it was previously essentially intended to protect the legal status of employees. However, the collective agreement is also capable of embodying, in addition to the interests of individual employees and employers, specific collective interests which may not necessarily coincide with the fragmented interests of the represented. In addition to the fact that the collective agreement thus becomes a legal and political factor, due to the duality of its legal nature and the complexity of its purpose, it is essential to develop its exact legal dogmatic system. The starting point for this is that – despite the dominance of normativity – the collective agreement is a contract.

And finally, the nature and purpose of the legal norm is also different in the case of the two economic policies I mentioned. As we have seen, in the current regulatory system, the norms affecting labour law can be divided into several groups. In this summary, I will not go into those that directly affect the content of the employment relationship, but cannot be considered an intervention that automatically follows from the contractual nature (equal treatment or the prohibition of discrimination), as well as those that affect labour law due to other considerations of the legislator, regardless of the specifics of the employment contract or the employment relationship. As for the intervention that necessarily follows from the specifics of the contract of employment and the employment relationship, the position and place of the employment contract in the system of contracts is by no means incidental. In this respect, there is a close connection between the contract and the norm. If the legislature treats the employment contract as a *sui generis* contract, it has a wider margin of intervention in influencing the working conditions and to define the mandatory elements of contract. Such a solution undoubtedly suggests stability due to the static nature of the contract, but at the same time any significant change depends on the will of the legislator. In case of such a solution, one could say, there is always some reason to limit the contractual autonomy of the parties. However, if the employment contract is part of a general contract in private law, the legislator has fewer options for deviating from the general contractual principles. At the same time, this does not mean that there is no place for normative intervention within the framework of contractuality, in view of the position of the parties to the contract of employment. It seems to be a theoretical, conceptual difference, whereas the practical impact is immeasurable precisely because of the different economic and social policies.

In addition to the legal dogmatic difference, the autonomy of the parties, the flexibility of forming the legal relationship and, at the same time, the striving for consolidated protection of legal status are characteristic only of the latter, an employment system based on innovation and knowledge.

I am convinced that the Hungarian labour law regulatory system needs to move towards contractual autonomy, contractuality and the implementation of a new concept of perception of legal status through the cohesion of legal sources. If this does not happen, Hungary will share the fate of those whose opportunities have been stifled for an extended period, leaving them unable to achieve feasible development.

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This study analyses the enforcement of the principle of dynamic equilibrium in relation to the regulatory system of labour law. The starting point is the purpose of labour law, which is to maintain a balance between the enforcement of economic requirements and the addressing of social needs. This can be achieved through the cohesion of elements of a complex system of labour law, which differ in their legal nature and purpose. The equilibrium of this system is disrupted when a single element of the legal source – contract of employment, collective agreement or the legal norm – gain unjustifiable predominance.

After an introductory historical-comparative analysis, the study reveals the dogmatic and legal policy development of effective employment and its current situation in the light of the aforementioned purpose of labour law, based on the Hungarian experience.

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