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Freedom of Contract in Employment Relationships

Summary of Doctoral Dissertation

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1. Subject of the dissertation

The concept of freedom of contract can basically be defined in two ways: in civil law and in constitutional law.¹ In civil law, the principle of freedom of contract means the recognition of private autonomy in contractual relationships, which means that parties in an equal legal relationship are free to shape their legal relationship as they see fit.² Based on this principle, the parties have a high degree of freedom in shaping their legal relationship.³ Accordingly, Act V of 2013 on the Civil Code (hereinafter: Civil Code) provides for the general principle of dispositivity, according to which the parties may depart from the provisions relating to their rights and obligations with mutual consent.⁴

Unlike civil law, in constitutional law, freedom of contract is an institution whose enforcement depends on state intervention.⁵ According to the Constitutional Court's practice, freedom of contract is an essential element of a market economy, but it does not qualify as a fundamental right.⁶ Consequently, the essential content of freedom of contract may also be restricted if there are constitutional grounds for such a restriction. This condition is met if there is a "reasonable" cause for the restriction.⁷ Restrictions on this principle for reasonable cause typically arise in contracts between parties in (socially) unequal positions, such as in employment relationships. For these asymmetrical legal relationships, which are also characteristic of employment relationships, intervention by the legislator in the contractual relationship between the parties is justified.⁸

The principle of freedom of contract in civil law – as recognition of private autonomy – is based on the equal status of the parties and their voluntary, uninfluenced contractual will. At the same time, the application of this principle is significantly influenced by (economic and structural) inequalities between the contracting parties, which provides grounds for state intervention in this type of contractual relationship. Considering the above, unlike civil law

¹ Drinóczi, Tímea: A szerződési szabadság – alkotmányjogi nézőpontból. *Cég és jog*, 4. évf., 2002/9. p. 18. [hereinafter: Drinóczi (2002)].

² Török, Éva: *A szerződés létrehozásának alapkérdései*. HVG-ORAC, Budapest, 2013. p. 14.

³ Béky, Ágnes Enikő: Interpreting freedom of contract in modern civil law. *Debreceni Jogi Műhely*, 4. évf., 2007/4. <https://ojs.lib.unideb.hu/DJM/article/view/6391/5991>.

⁴ Section 6:59 of the Civil Code.

⁵ Drinóczi (2002), p. 18.

⁶ See, for example: Decision 7/2006 (II. 22.) AB IV. 1.2.; Decision 3298/2014 (XI. 11.) AB III. 29.

⁷ Drinóczi (2002), p. 18.

⁸ Lenkovics, Barnabás: Szerződési szabadság – alkotmányos nézőpontból. In: Király Miklós – Gyertyánfy Péter (szerk.): *Liber Amicorum: studia Gy. Boytha dedicata: ünnepi dolgozatok Boytha György tiszteletére*. ELTE ÁJK Polgári Jogi Tanszék, Budapest, 2004. p. 252.

contractual relationships, in employment relationships, relative dispositivity is the principle that "fundamentally defines the general framework of contractual freedom."⁹ The (primary) reason for this is that the employment relationship is characterised by the employer's superior position. As a result of this imbalance, one of the main objectives of labour law is to intervene in the contractual relationship between the parties, to protect the weaker party and certain social goals and interests.¹⁰ In view of the protective function of labour law, the "favourability principle" has a long tradition in the legislative and judicial practise of Western European countries.¹¹ Following the change of regime, this principle became the organising principle of the hierarchy of sources of labour law in Hungary and other Central and Eastern European countries (such as the Visegrád countries).¹² In Hungarian labour law, the favourability principle is laid down in Act I of 2012 on the Labour Code (hereinafter: Labour Code), which states that "unless otherwise provided for by law, the employment contract may derogate from the provisions of Part Two and from employment regulations to the benefit of the employee."¹³

Although the favourability principle prevails in the relationship between employment contracts and the employment regulations, one of the main objectives of the Labour Code is to increase the regulatory role of employment contracts, as the legislator wishes to bring labour law closer to civil law in the spirit of "flexibilisation."¹⁴ To achieve this legal policy objective, the scope of legal provisions from which the parties may deviate by agreement, even to the detriment of the employee, has been expanded in the current Labor Code compared to Act XXII of 1992 on the Labour Code (hereinafter: 1992 Labour Code). Dispositive regulation was particularly noticeable in the "atypical situation" caused by the

⁹ Berke, Gyula: Gondolatok a magánautonómia és a kollektív autonómia munkajogi problémájához. In: Ábrahám, Márta – Berke, Gyula – Tálné Molnár Erika (szerk.): *Exemplis discimus: Emlékkötet Radnay József születésének 95. évfordulójára*. Kúria – Pázmány Press, Budapest, 2022. pp. 50. [hereinafter: Berke (2022)].

¹⁰ Davidov, Guy: Articulating Labour Law's Goals: Why and How. *European Labour Law Journal*, Vol. 3., 2012/2. p. 150.

¹¹ Kiss, György: A munkajog szabályozásának dilemmái. *Miskolci Jogi Szemle*, 12. évf., 2017/2. különszám. p. 268. [hereinafter: Kiss (2017)].

¹² Gyulavári, Tamás – Menegatti, Emanuele: Who Regulates Employment? Trends in the Hierarchy of Labour Law Sources. *International Journal of Comparative Labour Law and Industrial Relations*, Vol. 38., 2022/1. p. 46. [hereinafter: Gyulavári – Menegatti (2022)].

¹³ Subsection (1) of Section 43 of Labour Code.

¹⁴ Gyulavári, Tamás: Munkajogi jogforrások. In: Gyulavári, Tamás (szerk.): *Munkajog. Ötödik, átdolgozott kiadás*. ELTE Eötvös Kiadó, Budapest, 2020. p. 51.

COVID-19 pandemic, during which the legislator allowed the parties to agree to deviate from any provision of the Labour Code.¹⁵

Therefore, it can be concluded that freedom of contract is more limited in labour law than in civil law, as its general limits are determined by the favourability principle. However, at the same time, there are special regulations for certain atypical forms of work that deviate from the general principle of relative dispositivity,¹⁶ as well as legislative intentions to expand individual autonomy in "typical" employment relationships. However, several dilemmas arise in connection with the convergence of labour law with civil law¹⁷ and the increasing regulatory role of employment contracts. These dilemmas can be examined, on the one hand, from a legal-dogmatic perspective, focusing on specific (labour) law regulations and, on the other hand, considering certain contractual theories. The employment contract establishes a legal relationship whose content is shaped and influenced not only by legal norms but also by numerous "extra-legal" factors. Thus, given its personal, confidential and long-term nature, the employment relationship "transcends" the framework of traditional private law obligations.

2. Structure of the dissertation, research methods and objectives

The aim of the dissertation is to examine the enforcement of freedom of contract in employment relationships, focusing primarily on the regulatory role of individual-level agreements. Issues and dilemmas relating to collective agreements are only analysed insofar as they are directly relevant to individual contractual autonomy.

The aim of the first chapter is to present various aspects of freedom of contract. In this context, the assessment of freedom of contract from a civil law and constitutional law perspective, its significance in a market economy and the question of constitutional restriction on this principle will be analysed. The chapter also aims to explore the dogmatic

¹⁵ Kun, Attila: Munkajogi elvi kérdések: a felek (munkáltató és munkavállaló) egyéni megállapodásainak mozgásteréről. *Glossa Iuridica*, 7. évf., 2020/különszám. pp. 145-146 [hereinafter: Kun (2020)].

¹⁶ The Labour Code applies a "lex specialis" regulatory framework that deviates from the principle of favourability in relation to two atypical employment relationships. One such case is the employment relationships with public employers, where the legislator allows only limited contractual freedom for the parties (Section 205 of the Labour Code). In this regard, the other atypical form of employment is the employment relationship of an executive employee, where almost complete contractual freedom applies [Subsection (1) of Section 209 of the Labour Code].

¹⁷ The approximation of labour law to civil law is further reflected in the fact that Section 31 of the Labour Code prescribes the application of certain provisions of the Civil Code relating to standard contract terms.

and theoretical reasons, based on relevant (constitutional) court decisions and leading foreign and domestic legal literature, that make it necessary to restrict the principle of freedom of contract to a certain extent in employment relationships.

The second chapter examines the historical models of Hungarian labour law from the perspective of enforcement of contractual freedom between the parties, using the legal history method. This section analyses the "laissez faire, laissez passer" era characteristic of the mid-19th century, the subsequent period of initial state intervention and the period of socialist labour law, the latter being the period when labour law emerged as an independent branch of law in Hungary.

The third chapter analyses the legal system of Hungarian labour law following the change of regime from the perspective of the favourability principle, focusing primarily on the regulatory role of employment contracts. This topic can be divided into two main sections. The first section provides an overview of the first, "contra legem" manifestation of this principle in domestic judicial practice and the regulatory method of the 1992 Labor Code. The second section examines the application of the favourability principle in the current labour law system, considering the method of interpreting the favourability principle (as defined in the Labour Code) and the general principle of "good morals" as a limitation on the favourability principle.

The aim of the fourth chapter is to examine theoretical and practical dilemmas related to the expansion of individual autonomy. Based on international empirical research, this chapter provides an overview of the legal policy reasons that, in line with the concept of "flexicurity", aim to expand contractual freedom in domestic labour law. The chapter also aims to examine the main provisions of the Labour Code that are in force, from which the parties' agreement may deviate even to the detriment of the employee. In this context, the aim of the research is to examine what uncertainties of interpretation and practical "risks" arise in relation to contractual deviations from the analysed legal provisions in light of the legal literature's recommendations on "waivability."

The fifth chapter provides an international overview using the comparative method. Within this framework, the labour law system of Germany (as a Western European country) will be examined from the perspective of the favourability principle and compared with Hungarian domestic regulations. Within this framework, the German labour law system, its main organising principles and the possible methods for assessing favourability developed by German legal literature and judicial practice, as well as their application in German judicial practice, will be analysed. This chapter also aims to analyse the labour law systems of the

Visegrád countries in terms of the favourability principle. Within this framework, the types of labour law sources in these "post-socialist" states, their relationship to each other and the place and regulatory role of the employment contract in these systems will be examined. In this regard, the main research question is whether, as in Hungary, there is a legal policy intention to extend individual autonomy in these countries.

Chapter six aims to examine the two atypical employment relationships that are exceptions to the general rule of the favourability principle. In this context, it analyses the special "ius cogens" provisions on employment relationships with public employers and special "dispositive" rules on executive employees (managers). This chapter also explores the theoretical and practical dilemmas and legal-dogmatic contradictions related to the absolute dispositivity allowed by the legislator in Hungarian labour law due to the COVID-19 pandemic.

The seventh chapter deals with a specific form of employment contract and analyses some contractual theories concerning the specific interpretation of the employment contract and the employment relationship. On this topic, the chapter aims to explore some of the dogmatic contradictions and dilemmas related to the interpretation of the employment contract as a standard contract term (hereinafter: ASZF). It also aims to examine the regulatory role of the employment contract and contractual freedom in light of "psychological contract", "relational contract" and "personal employment contract" theories, focusing on the relevant labour law aspects.

3. Summary of main findings

3.1. Dogmatic and theoretical reasons for restricting freedom of contract in employment relationships

In contrast to contractual relations governed by civil law, the general framework of contractual freedom in employment relationships is determined by the favourability principle rather than the dispositivity principle.¹⁸ The primary reason for restricting freedom of contract in employment relationships is that the employment relationship is characterised by the superior position of the employer, meaning that the parties have different bargaining power when it comes to determining the terms of the employment relationship.

¹⁸ Berke (2022), p. 50.

Consequently, the employee's "freedom of contract" typically extends only to accepting the contractual terms unilaterally established by the employer, without any real influence over their content.¹⁹ Given the above, one of the main objectives of labour law is to balance the inequality of bargaining power between the parties by placing contractual freedom within a legal framework.²⁰

Therefore, restrictions on freedom of contract in employment relationships can primarily be justified by the hierarchical relationship and the different bargaining positions. At the same time, despite the asymmetrical relationship, it is conceivable that an employee may genuinely and freely want to waive some labour right to achieve certain short-term goals. However, legal literature, such as by Guy Davidov, emphasises that even if the employee is sincere and genuinely willing, in most cases it is necessary to guarantee the principle of "non-waivability", i.e., the prohibition of "opt-out". In this regard, the reasons for restricting contractual freedom are based on certain paternalistic arguments, whose aim is for the legislator to protect employees (and others) from the irrational, negative consequences of their decisions (in the long term).²¹ Beyond the individual protection needs of employees, certain public interest and macroeconomic considerations also restrict contractual freedom.²²

3.2. The historical development of the favourability principle and its application in current Hungarian labour law

One of the essential characteristics of labour law is that it attempts to balance the inequality between the parties to an employment relationship by restricting contractual freedom within a legal framework.²³ Considering the above, the favourability principle prevails in (domestic) labour law, according to which the employment contract may derogate from employment regulations to the employee's benefit.²⁴ At the same time, the favourability

¹⁹ Davidov, Guy: *A Purposive Approach to Labour Law*. Oxford University Press, Oxford, 2016. pp. 52-54.

²⁰ Lehoczkyné Kollonay, Csilla: Génmanipulált újszülött – Új munkatörvény az autoriter és neoliberális munkajogi rendszerek határán. In: Kun Attila (szerk.): *Az új Munka Törvénykönyve dilemmái című tudományos konferencia utókiadványa: KRE ÁJK 2011. december 13.* Károli Gáspár Református Egyetem Állam- és Jogtudományi Kar, Budapest, 2013. p. 31 [hereinafter: Lehoczkyné (2013)].

²¹ Davidov, Guy: Non-waivability in Labour Law. *Oxford Journal of Legal Studies*, Vol. 40., 2020/3. p. 482 [hereinafter: Davidov (2020)].

²² Jarjabka, Tünde: Az állam regulatív funkcióinak változása az új Mt.-ben. *Magyar Munkajog E-Folyóirat*, 2015/1. p. 96 [hereinafter: Jarjabka (2015)].

²³ Kenderes, György: *A munkaszerződés hazai szabályozásának alapkérdései*. Novotni Alapítvány, Miskolc, 2007. p. 123.

²⁴ Kun (2020), p. 148.

principle was only developed in Hungarian labour law through a long process of legal development and became the main organising principle in the relationship between the agreement of the parties and the employment regulations.

Prior to World War II, employment relations were regulated in a fragmented manner within the framework of private law, and the (few) laws governing employment were mainly dispositive in nature.²⁵ Of the types of contracts that existed at the time, the "service contract" was closest to today's employment contract, although contemporary legal literature and practice considered it to be a purely private law contract.²⁶ During this period, there were no detailed, specific legal provisions governing collective agreements. Instead, they were considered *sui generis* contractual agreements governed by general principles of private law.²⁷

After the end of World War II, labour law began to be "removed from the framework of private law."²⁸ From 1945 to 1951, the main factor in labour law regulation was a comprehensive collective agreement system, under which the majority of labour law provisions were laid down in collective agreements, in addition to legislation.²⁹ During this period, the number of cogent and relative dispositive legal norms also increased.³⁰ The civil democratic development came to an end in 1948, and cogent regulations in line with socialist ideology became the norm.³¹ Cogency characterised the two "socialist" labour law codes, namely Decree-Law No. 7 of 1951 on the Labour Code and Act II of 1967 on the Labour Code (hereinafter: 1967 Labour Code). During this period, the labour codes – with few exceptions – defined the content of employment relationships in a cogent manner. Thus, apart from its effect of establishing an employment relationship, the employment contract had no further practical significance, as it could not deviate from the labour codes, even in favour of the employee.³²

²⁵ Kun, Attila: A magyar munkajog kezdetei és helyzete 1945 és 1949 között. *Acta Universitatis Szegediensis Acta Juridica et Politica, Publicationes Doctorandorum Juridicorum, Tomus IV., Fasciculus 11.* Szeged, 2004. pp. 350, 355-356 [hereinafter: Kun (2004)].

²⁶ Berke (2022), p. 33.

²⁷ Kun (2004), p. 368.

²⁸ Ibid. p. 359.

²⁹ Hágelmayer, István: *A kollektív szerződés alapkérdései.* Akadémiai Kiadó, Budapest, 1979. p. 134.

³⁰ Nagy, László: Munkajog. *Jogtudományi Közlöny*, 3. évf., 1948/19-20. p. 348.

³¹ Kun (2004), p. 350.

³² Gyulavári, Tamás: The Hungarian Experiment to Promote Collective Bargaining: Farewell to 'Principle of Favour'. In: Gyulavári, Tamás – Menegatti, Emanuele (eds.): *The Sources of Labour Law.* Kluwer Law International B.V., The Netherlands, 2020. pp. 246-247 [hereinafter: Gyulavári (2020)].

Following the change of regime, a system of labour law sources was established that adapted to the changed circumstances and was based primarily on the contractual autonomy of the (collective) parties. During this process, the favourability principle gradually gained recognition, initially in judicial practice and later at the legislative level. Following the change of regime, the favourability principle was first mentioned in Hungarian labour law in 1991, in Resolution No. 147 of the Supreme Court (hereinafter: Resolution), in relation to legislation and collective agreements. Even though the 1967 Labour Code did not provide for any possibility of deviation in relation to severance pay, the Supreme Court – in line with the market economy environment – established that collective agreements could regulate this matter if they laid down rules that were more favourable to employees. The Resolution also stated that the more favourable nature of the provision shall be assessed by the comparison of all provisions, instead of comparing every single rule separately and individually.³³

The 1992 Labour Code introduced fundamental changes to the legal hierarchy of Hungarian labour law sources, with the aim of establishing regulations in line with market economy conditions. In this system, the legislator sought only to establish certain guarantees of employment, and primarily intended collective agreements to establish rules that were more favourable to employees than the "minimum standards" declared in the 1992 Labor Code.³⁴ In accordance with this concept, the 1992 Labour Code established the general principle of relative dispositivity with regard to both collective agreements and agreements between the parties. The 1992 Labour Code stipulated that collective agreements and agreements between the parties may deviate from Part Three of the 1992 Labour Code in favour of the employee. It also stipulated that the agreement between the parties may deviate from the collective agreement to the benefit of the employee.³⁵

However, the objectives of the 1992 Labour Code, such as private law-based regulation with vivid collective bargaining, were only partially realised. Collective agreements remained insignificant instruments in the regulation of employment relationships. One reason for this

³³ Berke, Gyula: Adalékok a munkavállaló javára való eltérés kérdéséhez. In: Pál, Lajos – Petrovics, Zoltán (szerk.): *Visegrád 16.0. A XVI. Magyar Munkajogi Konferencia szerkesztett előadásai*. Wolters Kluwer, Budapest, 2019. pp. 111-112 [hereinafter: Berke (2019)].

³⁴ Balogh, Áron Péter: *A kollektív szerződés, mint magánjogi jogintézmény. Doktori értekezés*. Debreceni Egyetem Marton Géza Állam- és Jogtudományok Doktori iskola, Debrecen, 2021. p. 32.

³⁵ Subsection (3) of Section 13 of the 1992 Labour Code; Subsection (4) of Section 76 of the 1992 Labour Code.

was the general principle of relative dispositivity.³⁶ To ensure broader collective autonomy than before, the legislator has defined the general nature of the rules of the Labour Code (Parts Two and Three) as dispositive in relation to collective agreements.³⁷ Regarding the regulatory role of the employment contract, the Labour Code established the rule that the employment contract may deviate from Part Two of the Labour Code and other employment regulations in favour of the employee, and that only legislation may create exceptions to this rule. The Labour Code further stipulates that "derogations shall be adjudged by comparative assessment of related regulations."³⁸

Since the entry into force of the 1992 Labour Code, the favourability principle has been the main guiding principle governing the regulatory role of employment contracts. At the same time, based on judicial practise,³⁹ it can be established that this principle is limited by the general principle of good morals.⁴⁰ Based on this principle, if the employment contract deviates from the employment regulation in favour of the employee, but the content of the contract – due to its "excessive advantage" – clearly exceeds the moral limits set by good morals, i.e., it is clearly considered unfair and unacceptable by general social standards, the contract is invalid.⁴¹

3.3. Dilemmas related to the expansion of individual autonomy

The Labour Code reflects the concept of "flexicurity", which aims to modernise labour law in the 21st century, i.e., adaptation to the changed structure and characteristics of the economic environment and the partial dismantling of traditional, protective labour law regulations.⁴² The aim of the Labor Code is based on the legislative intention that the law should influence the supply and demand sides of the labour market, thereby promoting employment growth.⁴³ The legislator sought to achieve all these objectives by, among other

³⁶ Bill No. T/4786 on the Labour Code. Budapest, October 2011. General justification, point 2 (hereinafter: explanatory memorandum to the Labour Code).

³⁷ Subsection (2) of Section 277 of the Labour Code.

³⁸ Subsections (1) to (2) of Section 43 of the Labour Code, Subsection (5) of Section 277 of the Labour Code.

³⁹ See, for example: EH 2017.03.M3.; Mfv.10014/2022/9.

⁴⁰ Subsection (1) of Section 27 of the Labour Code

⁴¹ Kártyás, Gábor: Lehet-e túl előnyös egy munkaszerződés? *Magyar Munkajog E-Folyóirat*, 2019/1. pp. 1-2, 12.

⁴² Jarjabka (2015), p. 106.

⁴³ Laki, Mihály – Nacsa, Beáta – Neumann, László: *Az új Munka Törvénykönyvének hatása a munkavállalók és a munkáltatók közötti kapcsolatokra. Kutatási zárójelentés.* Magyar Tudományos Akadémia Közgazdaság- és Regionális Tudományi Kutatóközpont Közgazdaság-tudományi Intézet, Budapest, 2013. p. 3.

things, reforming the source system of labour law.⁴⁴ Regarding the legal policy background of these changes, the explanatory memorandum to the Labour Code highlights that the new Labour Code seeks to substantially enhance the role of so-called contract-based regulation.⁴⁵ Although this legal policy objective mainly aimed to expand collective autonomy, the scope of exceptional provisions in the Act, from which the parties may deviate even to the employee's detriment, has also been expanded.⁴⁶

Although the explanatory memorandum to the Labour Code does not provide a specific explanation as to the theoretical or dogmatic basis for increasing the regulatory role of employment contracts, according to legal literature, the legislator was guided by the assumption that increasing contractual freedom, i.e., bringing labour law closer to civil law, could (also) contribute to achieving the objectives sought by "flexibilising" labour law, namely increasing employment and economic efficiency. Flexible (in this context, dispositive) legal rules make it possible to reduce labour costs, thus making it attractive for employers to hire new employees, which in turn will create new jobs.⁴⁷

At the same time, the legislative assumption that expanding contractual freedom may contribute to achieving the economic policy objectives pursued through the flexibilisation of labour law cannot be clearly confirmed or refuted. The studies examined in the dissertation on the economic effects of labour law flexibilisation have reached divergent findings and conclusions. Moreover, these studies address the dilemma within the broader framework of "flexicurity", typically concentrating on the regulation of employment initiation and termination, as well as working time, rather than examining it from the perspective of contractual freedom. Furthermore, extending contractual freedom to the individual level raises several concerns, given the hierarchical relationships that are characteristic of employment relationships. One of the main objectives of labour law is to place contractual autonomy within a legal framework to protect employees. In view of this, Guy Davidov argues that, with few exceptions, the rights of employees enshrined in legislation must be "non-waivable". However, he notes that in certain cases there may be room for so-called "intermediate solutions" between "opt-out" and strict "non-waivability." However, any agreement that waives employee rights is only permissible under certain strict conditions ("conditional waivability"). These conditions serve to ensure that the employee's

⁴⁴ Gyulavári (2020), p. 249.

⁴⁵ Explanatory memorandum to the Labour Code, General justification, point 10.

⁴⁶ Kun (2020), p. 146.

⁴⁷ Gyulavári, Tamás – Kártyás, Gábor: *The Hungarian Flexicurity Pathway? New Labour Code after Twenty Years in the Market Economy*. Pázmány Press, Budapest, 2015. pp. 20-22.; Lehoczkyné (2013), p. 31.

decision is truly free, fully informed and reasonable (rational), and that any harm caused to others is minimal.⁴⁸

Regarding the expansion of individual autonomy, it can be observed that the Labour Code often fails to clearly define the boundaries (and justifications) of the "opened" contractual freedom concerning deviations from the statutory provisions examined in the dissertation.⁴⁹ As a result, considerable interpretative uncertainty and practical risk can be identified in this area. It can also be concluded that the guarantee rules concerning contractual deviations from statutory provisions do not comply with Guy Davidov's theoretical recommendations on "conditional waivability" in several respects.

3.4. The favourability principle in the labour law of Germany and the Visegrád states

In the labour law culture of Western European countries such as Germany, the favourability principle ("Günstigkeitsprinzip") has a long history and plays an important role in legislation and law enforcement. According to this principle, the agreement between the parties may deviate from a rule higher up in the German hierarchy of sources of labour law (thereby "overriding" the principle of hierarchy) if it contains provisions that are more favourable to the employee.⁵⁰ One of the most significant differences between German and Hungarian regulations is that, under German labour law, employment contracts may, as a rule, only deviate from collective agreements to the benefit of the employee. However, collective agreements may "open up" the possibility of derogations to the detriment of the employee in employment contracts ("Öffnungsklauseln").⁵¹ Contrary to this regulation, according to domestic labour law, only legislation may authorise the parties to deviate from collective agreements to the detriment of the employee.⁵²

Although the "Günstigkeitsvergleich" method has not been declared in German labour law, according to German legal literature and judicial practice, only the "Sachgruppenvergleich" method, i.e., the comparison of related provisions, can be used to assess favourability.⁵³

⁴⁸ Davidov (2020), pp. 496-497.

⁴⁹ The dissertation examines the following statutory provisions: the employee's obligation to provide the necessary working conditions; legal consequences for the employee's wrongful breach of duty; the regulatory scope of the parties' agreement concerning wage supplements; and voluntary overtime.

⁵⁰ Belling, Detlev: *Das Günstigkeitsprinzip im Arbeitsrecht. Band I*. Duncker und Humblot, Berlin, 1984. pp. 15-16.

⁵¹ Berke (2019), p. 129.

⁵² Subsection (1) of Section 43 of the Labour Code.

⁵³ Berke (2019), p. 130.

Furthermore, according to German legal literature and judicial practice, as in Hungary, when assessing whether a provision is more favourable, as a rule, the subjective interests of the employee should not be considered, but rather objective criteria should be applied. Furthermore, favourability must be assessed systematically over a longer period, rather than from a momentary perspective.⁵⁴

Unlike in Western European countries, the favourability principle could not be applied in the Visegrád countries from the end of World War II until the change of regime, as labour law during the socialist period was regulated almost entirely through mandatory (cogent) norms.⁵⁵ After 1989, these countries established a new system of labour law sources in line with market economy conditions, with the favourability principle as the main organising principle, following the Western European model.⁵⁶

The current Polish,⁵⁷ Slovak⁵⁸ and Czech⁵⁹ labour codes establish the favourability principle as the main rule in the hierarchy of sources of labour law at both the collective and individual levels. In these countries, unlike under Hungarian regulation, both individual agreements and collective agreements may, as a rule, deviate from the labour codes only in favour of the employee.⁶⁰ Although these codes also contain a limited number of dispositive rules regarding agreements between the parties, unlike in Hungary, labour law in Poland, Slovakia and the Czech Republic is not characterised by a legal policy aimed at expanding individual autonomy.⁶¹ Although efforts to make labour law more flexible can also be observed in these countries in other areas of labour law, on contractual autonomy, it can be concluded that Hungary's labour law provides the widest scope for freedom of contract at both the collective and individual levels, among the Visegrád countries. However, a common feature of the Visegrád countries is that, unlike Western European countries such as Germany, the coverage rate of collective agreements is considered low and collective agreements are

⁵⁴ Kun, Attila: A valódi munkaidő-szuverenitás nyomában. In: Bankó, Zoltán – Berke, Gyula – Pál, Lajos – Petrovics, Zoltán (szerk.): *Ünnepi tanulmányok Lőrincz György 70. születésnapja tiszteletére*. HVG-ORAC, Budapest, 2019. pp. 243-244.

⁵⁵ Trócsányi, László: *A munkajogviszony alapkérdései az európai szocialista országok jogában*. Közgazdasági és Jogi Könyvkiadó, Budapest, 1978. p. 173.

⁵⁶ Gyulavári – Menegatti (2022), p. 46.

⁵⁷ Labour Code of 26 June 1974 (hereinafter: Polish Labour Code).

⁵⁸ Labour Code Slovak Republic No. 311/2001 Coll. (hereinafter: Slovak Labour Code).

⁵⁹ Labour Code No. 262/2006 Coll. (hereinafter: Czech Labour Code).

⁶⁰ Section 1 of Article 18 of the Polish Labour Code, Sections 2 to 3 of Article 9 of the Polish Labour Code; Subsection (6) of Section 1 of the Slovak Labour Code; Section 4a of the Czech Labour Code.

⁶¹ This conclusion was reached, for example, by Tamás Gyulavári and Emanuele Menegatti, who in their comparative study of the labour law sources in Central and Eastern European countries highlight only Hungary in terms of the trend towards increasing contractual freedom [Gyulavári – Menegatti (2022), pp. 31-52.].

primarily concluded at the workplace level. Therefore, the content of the employment relationship is primarily determined by legislation in these countries.⁶²

3.5. Special areas of freedom of contract

Chapter XV of the Labour Code, titled "Special Provisions Relating to Employment Relationships According to Type", provides a "lex specialis" regulatory framework for two atypical forms of employment that are exceptions to the favourability principle.

In this regard, one "extreme case" is represented by the special "ius cogens" provisions on employment relationships with public employers. A general feature of these rules is that the scope of mandatory (cogent) rules is much broader than in a "typical" employment relationship regarding the statutory provisions on termination of employment and working time. The reason behind this is that the requirement of efficient management of public property and the effective performance of public functions necessitates the restriction of the contractual freedom in this type of employment relationship.⁶³

In this context, the other "extreme case" is represented by the special dispositive rules on executive employees (managers). According to the grammatical interpretation of the Labour Code, this type of legal relationship is characterised by almost complete dispositivity in terms of the parties' agreement, considering the stronger bargaining power of the executive.⁶⁴ At the same time, it can be said that, by applying different methods of legal interpretation, it is possible to establish additional legal provisions for the employment relationship of an executive employee. These are not classified as cogent by the Labour Code, but cannot be derogated from by means of the employment contract of the executive employee.⁶⁵

Within the framework of the "extreme limits" of contractual freedom, we can also include the extraordinary measures introduced during the COVID-19 pandemic, which fundamentally (but temporarily) transformed Hungarian labour law. In this "atypical situation", Government Decree 47/2020 (18 March) (hereinafter: Decree), in force between 19 March 2020 and 17 June 2020, effectively allowed the parties to agree to deviate from

⁶² Ibid. p. 45.

⁶³ Kozma, Anna: A köztulajdonban álló munkáltatóval fennálló munkaviszony. In: Kozma, Anna – Lőrincz, György – Pál, Lajos (szerk.: Petrovics, Zoltán): *A Munka Törvénykönyvének magyarázata. Második, aktualizált kiadás (Jogkódex, elektronikus kiadvány)*. HVG-ORAC, Budapest, 2024. [2306].

⁶⁴ Subsections (1) to (3) of Section 209 of the Labour Code.

⁶⁵ See, for example: Mfv.I.10.530/2017.; Mfv.I.10.574/2017.

any provision of the Labour Code.⁶⁶ The reason for the changes introduced by the Decree was to ensure compliance with the prohibitions and restrictions imposed for the duration of the state of emergency, so that the option of absolute dispositivity could only be applied for these purposes. At the same time, considering the theoretical and practical dilemmas related to the unlimited freedom of contract provided by the Decree, Attila Kun notes that the legislator should have precisely defined the provisions of the Labour Code from which it was possible to deviate to the detriment of the employee and from which it was not possible to deviate under any circumstances, such as provisions based on constitutional and international law.⁶⁷

3.6. Interpretation of the employment contract as ASZF and evaluation of the employment contract in light of the theories of the psychological contract, relational contract and personal employment contract

In modern economic life, a significant proportion of transactions are no longer concluded as a result of the classic bilateral bargaining process. Special legal forms and "techniques" have developed for concluding contracts. Of these forms, the use of ASZF is considered the most widespread.⁶⁸ The ASZF is a legal institution that has long been present in "classic" private law and is becoming increasingly widespread in the field of labour law as well.⁶⁹ Section 31 of the Labour Code prescribes the application of certain provisions of the Civil Code relating to ASZF; accordingly, if the conditions set forth therein are fulfilled, the employment contract (or parts thereof) shall be considered ASZF.⁷⁰ For contractual provisions qualifying as ASZF, the employee's contractual freedom is limited to either accepting or rejecting the clause unilaterally predetermined by the employer. The employee has no opportunity to influence its content.⁷¹

⁶⁶ Subsection (4) of Section 6 of the Decree.

⁶⁷ Kun (2020), p. 147.

⁶⁸ Vékás, Lajos: A szerződés megkötése és értelmezése. In: Wellmann György (szerk.): *Polgári Jog. Kommentár a gyakorlat számára, I. kötet (Jogkódex, elektronikus kiadvány)*. HVG-ORAC, Budapest, 2024. Commentary on Section 6:77 of the Civil Code.

⁶⁹ Nádas, György: Általános szerződési feltétel-e a kollektív szerződés? In: Hajnal Zsolt (szerk.): *A fogyasztóvédelmi jogról másképpen – előképek, közjogi és munkajogi vetületek*. Debreceni Egyetem Állam- és Jogtudományi Kar, Debrecen, 2019. p. 106.

⁷⁰ Gyulavári, Tamás – Kun, Attila: A munkáltatói szabályzat az új Munka Törvénykönyvében. *Magyar Jog*, 60. évf., 2013/9. p. 562.

⁷¹ Leszkoven, László: Az általános szerződési feltételek útján létrejövő szerződések. *Gazdaság és Jog*, 22. évf., 2014/10. p. 6.

Furthermore, due to the different regulatory methods and approaches of civil law and labour law, numerous questions and dogmatic contradictions arise in connection with the interpretation of employment contracts as ASZF, mainly about the possible legal consequences of ASZF that is considered unfair. The majority view in legal literature, such as by György Nádas and Ferenc Orosz, is that due to the specific nature of the employment relationship, it would be necessary to regulate this legal institution in the Labour Code as well. Within its framework, the Labour Code would regulate, among other things, the labour law "content" of unfair ASZF and its legal consequences.⁷²

In connection with contracts concluded in the context of the modern economy, new contractual theories emerged in the 20th and 21st centuries. These theories aim, among other things, at the specific interpretation, reform and transformation of employment contracts and employment relationships. The theories examined in the dissertation are psychological contract theory, relational contract theory and personal employment contract theory.

According to psychological contract theory, in addition to a legally binding employment contract, a so-called psychological contract is also established between the parties to the employment relationship. While the former is a legally binding contract in written form, the latter is a theoretical, abstract construct that contains the mutual and implicit expectations of the parties.⁷³ Therefore, the elements of the psychological contract are not part of the written employment contract, as they do not define rights or obligations. These expectations are not legally enforceable, meaning that neither their fulfilment nor their non-fulfilment carries direct legal consequences. The fulfilment of these expectations is based on trust. If this trust is lost, the fulfilment of the employment contract will be reduced to a minimum, and sooner or later the employment relationship will be terminated.⁷⁴ Therefore, the psychological contract falls into the category of "beyond the law", but in certain cases, especially when it is violated, it may have legal relevance. The psychological contract thus significantly influences the development of the employment relationship, and may, in certain cases, shape the content of the legally binding agreements concluded between the parties.

The essence of the relational contract theory is that a contract is in fact a specific form of cooperation. The main features of a relational contract are continuous cooperation, analysis of circumstances, renegotiation of terms and, if necessary, changing them by mutual consent

⁷² Nádas, György – Orosz, Ferenc: A szerződési szabadság megjelenése az általános szerződési feltétel mint egyoldalú jognyilatkozat kapcsán. *Munkajog*, 2024/2. p. 10.

⁷³ Robinson, Sandra L. – Rousseau, Denise M.: Violating the Psychological Contract: Not the Exception but the Norm. *Journal of Organizational Behavior*, Vol. 15., 1994/3. p. 246.

⁷⁴ Lőrincz, György: A munkaszerződés teljesítésének egyes kérdései. *Munkajog*, 2020/3. pp. 11-12.

to maintain the contract. Therefore, this theory is based not only on formal contractual terms but also on long-term mutual trust and cooperation between the parties. The connection between the employment contract and relational contract theory can be identified at several points, as the employment contract establishes a legal relationship that "goes beyond" the characteristics of a simple exchange-based "short-term contract".⁷⁵

At the same time, there are differing views in legal literature regarding the assessment of the relational contract nature of employment contracts. Several authors, such as György Kiss, consider the application of elements of relational contracts in employment contracts to be questionable due to the hierarchical relationship characteristic of employment relationships.⁷⁶ The employer, if it suits their interests, has every possibility to terminate the obligation. Therefore, the employment relationship is not characterised by the kind of mutual interest interdependence that would result in a reciprocal demand to maintain the contract. According to György Kiss, at least three conditions (requirements) must be met for employment contracts and employment relationships to better enforce the principle of contractuality than they do at present: the essential content of "implied terms" must derive from collective agreements; state control over the content of contracts; and state guarantees of the permanence of the employment relationship.⁷⁷ Restrictions on contractual freedom through the institutional framework of labour law are, therefore, necessary to maintain the balance of power between the parties to a long-term employment relationship and to ensure that the legal relationship develops based on mutual trust and cooperation. The subordination of employees requires their protection. One means of protection is the favourability principle.⁷⁸

The personal employment contract theory aims to completely "reform" the recent structures of legal relationships aimed at work. This theory goes beyond the binary and trichotomous regulation of work relationships and introduces the categories of "personal employment contract" and "personal work relations". This theory distinguishes between the following types of work: "secure work", "autonomous" or "freestanding work" and "precarious

⁷⁵ Kiss, György: *A foglalkoztatás rugalmassága és a munkavállalói jogállás védelme. Egy lehetséges megközelítés a munkaviszony tartalmának vizsgálatához*. Wolters Kluwer, Budapest, 2020. pp. 15-16, 229. [hereinafter: Kiss (2020)].

⁷⁶ Douglas Brodie also considers the applicability of relational contracts to employment relationships to be questionable due to the hierarchical relationship characteristic of employment relationships. [Brodie, Douglas: How Relational is the Employment Contract? *Industrial Law Journal*, Vol. 40., 2011/3. pp. 232-253.].

⁷⁷ Kiss (2020), pp. 278-279.

⁷⁸ Kiss, György: A munkaszerződés tartalmának összetettségéről. *Jogtudományi Közlöny*, 72. évf., 2017/3. pp. 109-110.

work".⁷⁹ However, the practical implementation of this theory would face numerous difficulties. In this regard, György Kiss emphasises that European legal systems are not yet ready to accept and apply this theory in practice. This is because the personal employment contract would encompass a wide range of significantly different work activities, and its practical implementation would require a more or less comprehensive transformation of all regulations related to the performance of work. In this context, labour law is of primary importance, as a new type of protection system must be established. This requires extending the applicability of certain labour law provisions to individuals who perform work personally but do not qualify as "de jure" employees.⁸⁰

4. List of publications

4.1. Publications related to the dissertation

- Tóth Kristóf: A hátrányos jogkövetkezmények jogintézményével kapcsolatos egyes dilemmák a magyar munkajogban. In: Bartkó Róbert (szerk.): *Doktori Műhelytanulmányok 2023*. Universitas-Győr Nonprofit Kft., Győr, 2023.
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⁷⁹ Jakab, Nóra: Munkavégzők a munkavégzési viszonyok rendszerében. *Jogtudományi Közöny*, 70. évf., 2015/9. pp. 422-424.

⁸⁰ Kiss, György: A munkavállalóhoz hasonló jogállású személy problematikája az Európai Unióban és a jogállás szabályozásának hiánya a Munka Törvénykönyvében. *Jogtudományi Közöny*, 68. évf., 2013/1. p. 13.

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- Tóth, Kristóf: Some labour law aspects of psychological contract theory. *Studia Iuris*, I. évf., 2024/1.

4.2. Other relevant publications

- Fodor T. Gábor – Tóth Kristóf: A magyar munkaidős szabályozás uniós megfeleléséről. In: Berki Erzsébet – Fodor T. Gábor – Meszmann T. Tibor (szerk.):

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- Székely Botond – Takács, Dóra – Tóth Kristóf: Beszámoló a "Pontignano XXXVII" Seminar of Comparative Labour Law című nemzetközi tudományos konferenciáról. *Külügyi Műhely* 2021/2.
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