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The Position of Labour Law in the Private Law System.

The Past, Present and Future of Estonian Labour Law

There is no reason to deny that the division of law into two larger branches – private and public law – is acknowledged and as a result, legal systems have been constructed on that basis. A place has to be provided for the most important branches of law in this classification. However, a classification need not always be final. Every classification includes elements which do not allow unambiguous deciding whether the notions belong to one or another category.

Such division of law is not problem-free, but it is largely a matter of agreement under which larger subject one or another branch of law should be treated.

One of the branches of law whose status within the domain of private and public law cannot be determined indisputably is labour law. Nobody doubts that law of obligations belongs to private law. There is also no doubt that administrative law is a part of public law. However, with labour law, the parties to a discussion are no longer sure whether this is private or public law. The problem is not new but once in a while, a question about the status and the regulation of labour law relations crops up.

Although in Estonian it has been resolved by legal and technical means that labour relations will not be regulated through law of obligations, the problem has remained undecided.

Private and Public Law in Labour Law

The development of labour law remains in a large part in the period when industrial production was introduced. The formation and development of factory legislation is regarded as the seed of the creation of labour law. Several authors have though claimed that the legal regulation of labour relations does not originate solely from the development of factory legislation but the modern labour law has several connections with Roman private law and the modern employment contract has, in fact, evolved as a result of the classification of contracts found in Roman law.[*1]

For the purposes of distinguishing between private and public law, analyses has always focused primarily on three different options, the first of which goes back to the ancient Roman times, whereas the other approaches are more modern. In some cases, approach motivated by interest as used by Roman jurists has been employed. The state is always interested in maintaining order in the relationships between people.

[1] For the historical development of labour law, see T. Mayer-Maly. Römische Grundlagen des modernen Arbeitsrechts. – Recht der Arbeit, 1967, No. 8/9, pp. 281–286; T. Mayer-Maly. Vorindustrielles Arbeitsrecht. Recht der Arbeit, 1975, No. 1, pp. 59–63; R. Trinker. M. Wolfer. Modernes Arbeitsrecht und seine Beziehungen zum Zivilrecht und seiner Geschichte. – Betriebs-Berater, 1986, No. 1, pp. 4–9.

Thus, one could claim that any legal regulation is public law as all provisions enforced by the state express in their final stage the state's clear interest in establishing particular rules in the respective field, the observance of which would ensure order in relationships between people.*[7] One may, however, proceed from the fact that interest for the regulation of which attempts are made, determines how and through which methods the relationships between people should be regulated.

The main question is whether the target of the attempts is, in a more limited manner, in the interests of a private person, or in the interests of the public (state). If the private interest is predominant, one may assert on the basis of Roman jurists' relevant viewpoint that the regulation concerned belongs to the domain of private law. However, when the emphasis is, above all, on the interests of the state, it is public law.

On the basis of the theory of the subject, the distinction between private and public law is, first and foremost, related to the question whether one of the parties to the relationship has the authorisation of the state authority. If one of the parties to the relationship has the authorisation of the state authority, the relationship belongs to the domain of public law. When the subject of the relationship lacks the authorisation of the state authority, the relationship is between private individuals and consequently the matter belongs to the realm of private law.

The third approach which supplements the theory of the subject claims that problem solving belongs to the field regulated by public law, when one of the subjects has the authorisation of the state authority and when it also exercises the authority. At the same time, one cannot overlook the fact that if a particular branch of law belongs to the domain of private or public law, the realisation of the relationship between the parties in that relationship is also predetermined – it is done either with regard to subordination or coordination. If the problem belongs to the domain of public law it is presumed that a relationship of power and subordination exists between the parties.

On the basis of these theories it is only generally possible to determine where a branch of law belongs. The classification does not provide a concrete basis for the classification. There are various situations, where one of the parties to the relationship does have the authorisation of the state authority, but the relationship nevertheless falls under private law. At the same time, there are situations, where there is a power and subordination relationship between the parties, but the branch belongs to the domain of private law.

Such classification into private and public law provides an opportunity to distinguish between the branches of law, above all, in case of classical branches of law such as civil law, criminal law and constitutional law. More problems arise, however, in the case of newer branches of law that have evolved recently whose status cannot be determined in a uniform manner due to that. Such newer branches of law include, for example, labour law, intellectual property law, commercial law, etc. In case of all these newer branches of law, both public and private law approaches have intermingled. Uniform classification of these branches of law is impossible and thus one may only talk about their tendency to fall within one or another branch of law.

Labour law is a unique branch of law in which various development stages can be clearly identified. Having commenced, above all, due to the fact that freedom of contract failed to guarantee to employees sufficient protection in their relationships with employers, labour law came to be increasingly related to public law, and starting from 1930–1940 it is considered public law.*[8] However, in 1950–1960, the private law component of labour law was more and more emphasised and one could not uniformly determine whether it related to public or private law. It is a rather wide-spread approach that due to embracing both public law and private law provisions, labour law is located somewhere in between.*[9]

However, at present one must admit that labour law is increasingly treated as judicial matter falling under the realm of private law.*[10] The private law status of labour law is not unequivocal because people are used to speaking of a special status of labour law in private law. The separate status of labour law in private law as a whole is conditioned both by internal and external characteristics. The external characteristics include, first and foremost, the existence of a separate code, a separate court system. The internal characteristics, in their turn, are related to the fact that besides private law provisions there are very many public law

7 Similar thereto is the standpoint of an Estonian jurist A.-T. Kliimann, who claimed that although a distinction was made between private and public law, the entire modern law was public law by nature. See Haldusõigus, haldusprotsessiõigus ja tööõigus. Koostanud vastavalt eksaminõutele P. Rängel (Administrative Law, Administrative Procedure Law and Labour Law. Compiled according to examination requirements by P. Rängel). Viljandi, 1934, p. 20.

8 See A. T. Kliimann. Õiguskord (Legal Order). Tartu: Akadeemilise Kooperatiivi kirjastus, 1939, p. 145; P. Rängel (Note 2), p. 75.

9 A. Hueck, H. C. Nipperdy. Lehrbuch des Arbeitsrechts. 7. Aufl., Berlin und Frankfurt am Main: Franz Vahlen GmbH, 1963, Bd. I, p. 4.

10 A. Söllner. Grundriss des Arbeitsrechts. 12. Aufl., Vahlen, 1998, p. 5; W. Dütz. Arbeitsrecht. 4. Aufl., München: C. H. Beck, 1999, p. 1; H. D. Schmid. P. Trenk-Hinterberger. Grundzüge des Arbeitsrechts. 2. Aufl., Vahlen, 1994, p. 3.

restrictions which do not allow the parties to an employment relationship to decide themselves on the working conditions that they choose to apply in that particular working relationship.

In determining the position of labour law in the legal system as a whole, three approaches are prevalent. According to one approach, labour law falls within civil law, constituting there a section of property law relationships.*[11] Another classification places labour law between public and private law without assigning thereto a more particular position in the classification of law. The third approach views labour law as a part of private law – however, it is a special area of private law.*[12] The general private law consists of contract law, law of property, inheritance law, family law and the general principles.

All the three approaches have also been reflected in Estonia. The prevalent approach is that labour law is a section of private law, but taking into account the essential role of public law provisions in regulating labour relations, labour law also possesses, on a considerable scale, public law characteristics.*[13]

Position of Labour Law in Estonian Private Law System

Classification of law into private and public law has not had a long history in the Republic of Estonia after it regained its independence. The classification of law into private and public law was recognised in the Republic of Estonia from 1918–1940.*[14] After the establishment of Soviet power, the former classification of law lost its meaning and the legal system was developed according to the concepts of the jurisprudence of Soviet Russia. After Estonia regained its independence, the classification into private law and public law has been adopted. As a result, the determination of the status of labour law is crucial.

The legal system applicable in Estonia in 1918–1940 had been, in a large part, taken over from the former Russian legal system. This arrangement was particularly valid with regard to labour law. Estonia did not enact its own labour acts at first. In regulating labour relations, the second part of the XI volume of the Russian collection of laws was used, which contained, *inter alia*, the Industrial Work Act that governed primarily the protection of workers employed in factories through public law means.*[15] The Baltic Private Law Act regulating the working conditions of particular workers was simultaneously in force in Estonia.*[16] Although the division of law into private law and public law was recognised already at that time, labour law was increasingly treated as public law according to Estonian jurists.*[17] By the middle of the thirties, one could perceive that labour law had largely become public law. The very agreement between the parties had been rendered relatively inconspicuous; the respective German law rendered labour law state-centred; in Soviet Russia, labour law was commonly public law because legislation provided for all important conditions in employment relationships and the parties did not have a chance to agree upon any other conditions.

The respective Estonian legislation did not regulate all working conditions in detail. In 1936, the Workers' Labour Relations Act was adopted, containing provisions for the conclusion of, amendments to and termination of employment contracts. In addition to that, a number of other acts existed, which provided to the parties to the employment relationship an opportunity to agree upon working conditions.

In 1940, the moulding of Estonian labour law ended and the respective legislation of the Russian Federation was introduced. As a result, development continued with an inclination that labour law was public law by nature, where the state protected the workers' interests, and the parties to employment contracts actually did not need to establish supplementary conditions.

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11 J. Baumann. Einführung in die Rechtswissenschaft – Rechtsystem und Rechtstechnik. 8. Aufl., München: C. H. Becksche, 1989, pp. 30–32; R. Narits. Õiguse entsüklopeedia (Encyclopaedia of Law). Avatud Eesti Fond, 1995, p. 25.

12 T. Mayer-Maly. Einführung in die Rechtswissenschaft. Springer, 1993, pp. 98–99.

13 G. Tavits. The Nature and Formation of Labour Law. – Juridica International. Law Review. University of Tartu, II, 1997, pp. 103–110.

14 This act was not considered sufficiently convincing. See P. Rängel (Note 2), p. 20.

15 Tööstulise töö seadus (Industrial Work Act). H. Evart; J. Põllupüü, 1926.

16 Svod" grazdanskikh uzakonenij gubernij pribaltijskikh" s" prodolzeniem" 1912–1914 i s" razyasneniyami. V 2 tomakh. Sostavitel' V. Bukovskij. Tom II soderzanij Pravo trebovanij. Riga, 1914. It is important to note here that the principle of subsidiariness was recognised according to the Baltic Private Law Code. The general conditions governing employment contracts proceeded from BPLC, but the specific provisions derived from the Industrial Work Act (Note 10), See p. 1819.

17 A.-T. Kliimann, p. 145.

Here it must be pointed out that in Soviet legal theory a standpoint prevailed that larger individual branches of law exist separately and classification of law into private and public law were not recognised. As a rule, labour law was viewed together with administrative law, not as a part of civil law, which actually constituted general private law. The clearest expression of the public law nature was the fact that although a employment contract may have been concluded with a worker, the recruitment of a worker was formalised on the basis of a letter of appointment. A labour relation was deemed to be established from the moment of formalising the letter of appointment.*[18]

In addition to that, the trade unions and negotiations between a trade union and the administration of a company carried a rather formal meaning. The administration is, however, a term mainly used in administrative law.

The existence of disciplinary punishments that the administration of the company might impose on a worker was a characteristic feature of labour relations, which clearly demonstrated the public nature of this branch of law. It was, to a large extent, an administrative procedure, the rules of which were specified rather precisely.

The public nature of labour law in the contemporary system was also caused by a shortage of employers. The state, state-owned enterprises or respective agencies were the only employers. The existence of private employers in this system was impossible. There were collective farms acting as cooperative associations that could also serve as employers, but these were not subject to general labour law regulation. Neither was it clearly determined in labour laws, whether the general principles of civil law extended to labour relations or not. However, particular principles of civil law had to be applied this way or the other, *e.g*. the principles of representation, definition of a legal person, etc. Despite that, labour law was not regarded as a part of civil law, even less as a part of law of obligations.

Another reason for the public nature of labour law at that time was the fact that the parties to an employment contract did not actually have anything to agree upon, as the working conditions had been regulated by laws or secondary legislation, and as a result, it was difficult to agree upon any other supplementary conditions.*[19]

The state of affairs changed after Estonia regained its independence. The division of law into public and private law was once again recognised. This gave rise to the necessity to clearly determine the position of labour law within that system. According to the development concept of labour law completed during that period, individual acts governing the respective areas of labour law were to be prepared first and after that stage, a separate independently existing labour code was to be developed.

Since 1992, a continuing process of renewing labour acts and abandoning of concepts characteristic of Soviet labour law has been in progress. All the most essential acts laying down the rights and obligations of the subjects involved in labour relations have been adopted.*[20]

The employment contract regulation is the most important section of labour law where the private law element is most clearly manifested. Here the parties can in fact agree on such conditions as they themselves see fit. Freedom of contract is one of the most significant characteristics featuring private autonomy of the parties. Just as in case of other contracts, so also in the case of employment contracts there is freedom of choice with whom and under what conditions a contract is concluded. However, it is obvious that absolute freedom of contract does not exist in labour relations. Freedom of contract is represented in labour relations only in a limited form. The provisions established by state are generally necessary for ensuring protection to employees in an employment relationship. This feature is one of the most important features on the basis of which labour law acquires an independent status in the legal system as a whole. These conditions have been established by the state and their violation imposes on the employer liability according to the respective public law provisions. However, the question whether all types of violations of requirements are followed by imposition of public law liability is an entirely different matter. Each type of violation of an employment relationship does not necessarily entail public law liability. Such liability may arise from labour laws.

In case of Estonian labour laws, one may detect a number of provisions characterised by public law nature. The existence of such provisions is caused, above all, by the fact that the economic conditions were

18 In fact, such provision also exists in the Labour Code of the Russian Federation at the moment. See § 18, Kommentarij k kodeksu zakonov o trude Rossiskoij federatsij po sostoyaniyu na 1 yuliya 1996 goda, Moskva: Prospekt, 1996.

19 A similar state of affairs is presently prevalent in public service, particularly in the legal regulation of the service relationships of officials. In public service, the conditions of service of officials have been prescribed by law and they cannot be generally disregarded.

20 I.-M. Orgo. Labour Law Reform in Re-independent Estonia. – Juridica International. Law Review. University of Tartu, I, 1996, pp. 99–108.

continually unstable during the first stage of labour law reforms and the regulation of all important working conditions by laws was unavoidable in order to ensure social protection of employees and this had to be ensured to a significant extent on the basis of public law provisions.

Public and Private Law in Applicable Labour Law

In case of the development of Estonian labour law to date, it must be kept in mind that a uniform labour code has not been compiled yet and various provisions concerning the field of labour relations have been regulated with individual acts.

What provisions in the applicable labour law could be classified as public law or private law provisions? It is impossible to determine it uniformly as there are many such provisions. In this case, a couple of aspects related to the existence of such provisions could be pointed out. According to § 28 (1) of the Republic of Estonia Employment Contracts Act, employers shall conclude an employment contract in a written form. If the employer violates the requirement of a written form of the employment contract, he or she shall be liable under public law provisions. On the basis of § 28 (3) of the Employment Contracts Act, employers shall bear administrative liability, if they fail to formalise the employment contract in writing. The failure to formalise an employment contract in writing shall not entail any consequences with regard to private law. If the employment contract is not formalised in writing, this does not mean that the contract is void. According to § 28 (2) of the Employment Contracts Act, an employment contract shall be considered concluded even when the employee is permitted to commence work. In such case, the employment contract shall be formalised subsequently with the terms that actually applied. If the employer even then fails to formalise the employment contract according to the prescribed procedure, the employer shall be liable for the failure to perform these conditions according to public law provisions.

Upon conclusion of an employment contract, the parties shall take into account that each employment contract contains mandatory conditions provided for by law. In addition to the mandatory conditions prescribed by law, the parties may agree upon any other conditions, provided that these do not aggravate the employee's position in comparison with the provisions provided by law.

The public law characteristics of the provisions of labour law lie in the fact that in many cases, a permission or consent of a labour inspector is required for performing particular acts. Thus, according to § 68 of the Employment Contracts Act, a permission of the labour inspector shall be obtained for establishing part-time working time or sending an employee on a holiday with partial pay. Unless such permission is obtained, the imposition of such conditions on employees shall be illegal.

In individual labour law, the private law principles have been pushed aside to a considerable extent in case of the termination of an employment contract. Termination of an employment contract on the initiative of the employer has always been the most complicated procedure for employees, because in this the employer's opportunity to take unilateral steps as well as the significance of the employer as the economically stronger party is most clearly evident. In order to prevent the arbitrary termination of employment contracts by the employer, the Employment Contracts Act provides for cases, when employment contracts cannot be terminated and also restrictions to be followed in the case of one or another basis for terminating the employment contract.

One of the distinctive features of termination of an employment contract due to the wrongful behaviour of the employer in Estonia is the fact that the employer has to prepare a document for imposing disciplinary punishment. The failure to formalise a document concerning disciplinary punishment or its incorrect formalisation may lead to unlawful termination of an employment contract. Formalisation and imposition of disciplinary punishments in Estonian legal order are characterised to a high degree by public law nature. These provisions are not dispositive. Neither the employee nor the employer can deviate from the provisions provided for by the Employees' Disciplinary Punishments Act, not even for the benefit of the employee. The situation is further complicated by the fact that even if the employee violated the duty of employment, whereas the employer violated the formal requirements for the procedure established for imposing a punishment, the court or labour dispute committee need not discuss the subject matter of the case but examine the compliance with the requirements for formalising a punishment. Unless these requirements are met, the termination of an employment contract may be deemed to be unlawful.

The distinction between private and public law in collective relations plays an important role. Two classes of conditions are distinguished with regard to collective agreement. The first are conditions under law of obligations, the others are normative conditions. The part under law of obligations presumes those provisions that are used for determining the relationships between the parties, how amendments are made

to the conditions of the contract and what the sanctions are, if one of the parties fails to adhere to the conditions of the contract concluded. The normative conditions are concerned with actual working conditions that the parties have agreed upon. The conclusion of a collective agreement is also an act under private law because, in the case of a collective agreement, one party first has to make a proposal for concluding an agreement, and when the other accepts the proposal, negotiations for the conclusion of a collective agreement will commence. A particular feature of a collective agreement is the fact that the agreement establishes legislative or regulatory provisions for third persons. Consequently, a more important status has already in advance been assigned to a collective agreement than to an individual employment contract.

In the case of a collective agreement, the public law nature is manifested in the fact that the parties have recourse to the Public Conciliator, if they fail to reach an agreement concerning the conditions of the collective agreement. Thus, it is in the interests of the state that obligation to refrain from striking is maintained between a body of employees and employers. The conclusion of an individual employment contract, however, does not foresee interference by the Public Conciliator. In case of an individual employment contract, the parties have more freedom and opportunities to conclude a contract. If the parties do not reach an agreement concerning the conditions of the contract, the other party cannot be forced to conclude the contract by means of strikes or other measures.

After Estonia regained its independence, there has been no discussion on what the position of labour law should be in the legal system as a whole, if it indeed should have a position at all. The main assertion has been that labour law belongs to private law and constitutes a separate branch of private law. To date, the contemporary analyses of Estonian labour law have not regarded this as public law. Consequently, there is no doubt that labour law in Estonia falls within the area of private law. The main problem in developing Estonian labour law lies in the question of whether labour law could be regulated with the law of obligations.

Discussion – Is Employment Contract a Contract Under Law of Obligations or Not?

In 1996, the second stage of the labour law reform commenced in Estonia, the main purpose of which was to develop a uniform labour code. In relation to the preparations for the labour code, the question of whether the general principles of labour relations, particularly the regulation concerning the employment contract, should be exercisable within the framework of contract law or the employment contract can be regulated outside the framework of contract law immediately emerged. Such formulation of the proposition for the Estonian labour law was new. Until that time, the view that employment contracts were not governed by civil law and that all the main rules in labour law had to be regulated by labour laws had dominated. People were accustomed to the fact that the regulation of labour relations was independent and that this regulation had nothing in common with the general principles of contract law. Although it was claimed that labour law was private law, the main assertion was that an employment contract was a contract in private law, but taking into account the aspect of social protection present in an employment relationship, it acquired a special position in the contract law system as a whole. Such discussion never lead to a clear-cut final solution. Although it is legally and technically possible to govern employment contracts both within the framework of law of obligations and with a separate labour code, the main questions of whether employment contracts were contracts under law of obligations and whether labour law can serve as a special area of law of obligations remains yet unsolved for Estonia.

It has been asserted in particular analyses that labour law is law of obligations and as a result, an employment contract also stands among the contracts subject to law of obligations.[*7] Thus, labour law does not serve as a separate area of law, but it is a branch of private law without having a special status in this system. In the case of this approach one cannot agree to a statement that labour law as a whole serves as a special area of law of obligations. This could be claimed only when we focus on the regulation of the employment contract. In addition to the regulation of employment contracts, there are several other areas that need to be regulated, whereas these areas have to be regulated by using provisions other than the special area of law of obligations. Thus, the provisions concerning the protection of employees are in a large part those that cannot be governed by law of obligations in full, *e.g.* working time and rest period, holiday, etc. So it is obvious that besides

7 W. Dütz. Arbeitsrecht. 4. Aufl., München: C. H. Beck, 1999, p. 1.

regulating employment contracts under law of obligations, the existence of other provisions – public law provisions above all – regulating the status of an employee in a work relationship as a whole is also unavoidable and necessary.*[8]

A question concerning the amendments to the main principles governing employment contracts as well as employment relationships emerged primarily in relation to the fact that at the time when preparations for the labour code commenced, preparations for drawing up the Law of Obligations Act were launched too. The main argument in regulating the principles of labour relations in one or another code is the desire for an integrated whole. On the one hand, positioning the main principles of labour law in the labour code shall ensure an integrated regulation of labour relations in one particular act. On the other hand, when subjecting the general principles of employment contracts and collective agreements to law of obligations, uniformity would be ensured in the contracts system, according to which all contracts, including employment contracts, would be governed by one act.

It is obvious that the employment contract is one of many contracts, and thus it is entirely justified that the general principles of contract law extend to employment contracts. As a result of historical development, the status of employment contracts with regard to private law is primarily determined by the fact that employment contracts derive from civil laws and are subject to the principles of freedom of contract and other principles arising from contract law. Thus, employment contracts are undeniably characterised by contractual nature. The institute of employment contracts in labour law as a whole plays an extremely important role. It is difficult to imagine a situation where labour relations would apply without the conclusion of an employment contract. A labour law relationship is not created unless an employment contract is concluded, and unless an employment contract is concluded, the guarantees provided for by labour laws will not extend to the person performing the works, without employment contracts we have no employees and neither can workers' organisations be founded.

The separation of the employment contracts regulation from the contractual regulation as a whole leads, due to its nature, to a situation where separate principles have to be developed in labour law for the conclusion of contracts, vitiation of contracts, resolving of issues related to representation and subjects, etc. The development of independent provisions for labour law is not reasonable, if substantial differences from the general contract regulation cannot exist in labour relations regulation. Although the employment contracts regulation falls within contract law, labour law cannot be considered as contract law for that reason only. It is here that the proliferation of public law provisions determining the different status of labour law in private law performs an essential role.

When speaking about the position of labour law in the public law system as a whole, one has to examine the position of other institutes of labour law. At this point, we can discuss the legal regulation of working time and rest period, holidays, collective agreement, settlement of collective labour disputes and salary. With regard to these institutes of labour law, one must also take into account that it is impossible to determine uniformly which of them are public law and which private law. In all these areas, provisions exist enforced by the state in order to ensure stability in labour relations. Thus, a number of rules inevitably relate to public law, *e.g.* national standard working time is eight hours per day, forty hours per week, the minimum length of holiday is 28 calendar days; if a person works full time, remuneration of the employee at least within the limits of minimum wage established by the state shall be guaranteed. The parties cannot disregard these provisions but are compelled to follow them.

At the same time, one must concede that not all provisions in labour law are imperative by nature. The parties to an employment relationship may deviate from the provisions for which the state has not provided a uniform regulation and here the parties to the labour relationship have an opportunity to exercise freedom of contract secured to them. Consequently, in the above-mentioned areas of labour relationships, the party in private law is represented and the parties to the labour relationship have an opportunity to establish by mutual agreement such working conditions as they consider necessary. At the same time, a more significant proportion of conditions are certainly established by collective agreement than by individual employment contract. A collective agreement allows establishment of working conditions for a larger number of employees and thus, the potential for agreement is more extensive and wider than it is in the case of an individual employment contract.

[8] According to the view of the German jurist D. Reuter, an employment relationship is a relationship under law of obligations in such cases where the objective of the performance of the contract is not working in a group of employees. See D. Reuter. Die Stellung des Arbeitsrechts in der Privatrechtsordnung. Joachim Jungius-Gesellschaft der Wissenschaften, Hamburg, 1989, pp. 30–31.

Subsections 6 (1) and (2) of the Collective Agreements Act[*9] set out a number of issues on which the parties may agree, but they may, in fact, agree on any issue if this can be done under law. Thus, the principle of freedom of contract applies to a collective agreement and proceeding from that, assignment within private law has been determined.

At present, Estonian labour law includes very many public law provisions. Nearly all essential conditions have been provided by law and if the parties lack excellent negotiation skills or cannot use them, it is also possible for the parties to conclude an employment contract by agreeing only on the work function. All the other working conditions emerge from the factual compliance with the employment contract as well as from law. In the light of such state of affairs it is understandable that the trade unions assert their unwillingness to support the regulation of labour relationships by means of law of obligations as this is accompanied by excessive liberalisation of labour relationships and deterioration of the condition of employees.

In order to determine the position of labour law in Estonian legal order the Constitution of the Republic of Estonia should also be analysed. The Constitution of Estonia does not enumerate precisely the existing branches of law but provides a set of principles without which one or another area of law cannot be constructed. The Constitution of Estonia does not contain a direct reference to whether labour law as a separate branch of law has to be developed, whether it exists and whether it can be constructed as a separate branch of law at all. When identifying the principles of labour law, an important position is taken by § 29 of the Constitution, on the basis of which the essential principles for the development of labour relationships are provided.

According to the Constitution, freedom to freely choose a place of work, sphere of activity and profession is secured to everyone. The conditions for exercising this freedom are prescribed by law. Consequently, also restrictions may be imposed on this freedom by law. Another important principle arising from the Constitution is the principle that working conditions are subject to state supervision. This principles gives rise to several questions for which the Constitution provides no answer. Does the above-mentioned provision mean that the state regulates all conditions necessary for employment relationships by establishing a new branch of law therefore in the form of labour law, or this is only a limited provision providing for the state an obligation to impose sanctions and public law restrictions with regard to using the working capacity of another person?

We are of the opinion that the above-mentioned provision of the Constitution must be interpreted on a wider scale. The state supervision over working conditions does not only mean that the state acquires an opportunity to impose sanctions and restrictions but it also means that the state must enforce a framework of rules for establishing working conditions. By means of these rules, the state regulates the behaviour of the parties who have entered an employment relationship. According to § 29 (1) of the Constitution, these conditions may only be established and applied by law. The requirement that working conditions be under the state supervision does not concern only those working conditions established by law, but the working conditions on which the parties, using their freedom of contract, have agreed are also subject to supervision. The state supervision is not exercised solely through appropriate actions of the legislative and executive power; it is exercised also through the respective activities of judicial power. In the course of a particular action, the court examines whether the conditions arising from law, employment contract or collective agreement have been complied with. In case of failure to comply with these conditions, an opportunity has been provided both to the court and labour inspectors to punish the person who failed to comply with the requirements.[*10] In such a case, the party on whom the punishment is imposed need not be the employer; it may also be the employee. The Code of Administrative Offences also proceeds from the grounds that the guilty party need not always be the employer.[*11]

Consequently, § 29 of the Constitution contains a requirement that the state must provide the necessary framework for establishing working conditions and at the same time, it must exercise supervision over the compliance with working conditions. In case of this provision, one cannot proceed in a limited manner only from occupational health and safety conditions, as the term "working conditions" covers all conditions necessary for working. Thus, the Constitution of Estonia contains an indirect obligation for the state to establish labour law.

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9 Kollektiivlepingu seadus (Collective Agreements Act) – Riigi Teataja (the State Gazette) I 1993, 20, 353; 2000, 57, 372.

10 Töölepingu seadus (Employment Contracts Act) § 38 – Riigi Teataja (the State Gazette) 1992, 15, 241; I 2000, 51, 327; Haldusõiguserikkumiste seadustik (Code of Administrative Offences) § 36 – Riigi Teataja (the State Gazette) 1992, 29, 296; I 2000, 55, 361.

11 Haldusõiguserikkumiste seadustik (Code of Administrative Offences) § 36^1.

Section 29 of the Constitution also secures free membership of employees and employers in associations and unions. The associations and unions of employees and employers may uphold their rights and lawful interests by means which are not prohibited by law. The conditions and procedure for the exercise of the right to strike are provided by law. The procedure for the settlement of labour disputes shall be provided by law.

Proceeding from the above-mentioned principles, the Constitution also defines the bases for developing collective labour relationships as well as for ensuring the settlement of labour disputes.

In relation with the intention to adopt the Law of Obligations Act in Estonia, a discussion has commenced about what the actual nature of the Estonian private law system should actually be and what should the position of employment contracts and labour law as a whole be in this system. The proposition derives from the question whether Estonia should proceed from a classical pandect system or the changes already occurred in the legal system should be taken into account. The classical pandect system involves five areas of law:

1) general principles of private law;
2) law of obligations;
3) law of property;
4) family law, and
5) law of succession.

Such a classical pandect system has been later accompanied by branches of law that can no longer be placed within the framework of the pandect system, but are still adjacent to the pandect system. The first more extensive branch emerging next to the pandect classification is commercial law. In Estonia, the complex of provisions typical of this legal system are included in the Commercial Code. It has been argued that recognition of commercial law as an independent branch of law outside law of obligations marked abandonment of the private law system consisting of five units.*[12] Labour law, including conditions of employment contracts and laws governing the procedure for the conclusion thereof, has been pointed out as another essential branch. Although the general bases for concluding employment contracts derive from civil codes, they have gradually withdrawn from the general private law in the course of time. In addition to them, there are several other classifications of law, which cannot be included in the five-unit pandect system. The new branches of private law are referred to as the special areas of private law.*[13] Such a change has been considered to be an important structural transformation in the European private law – several new branches have been added to the former five branches of law.

From the perspective of the legal system in Estonia, the debate concerns making of distinction between law of obligations and contract law. There is a contract of obligations which serves as one of the subcategories of contracts. The notion of the contract, however, does not fit in the contract of obligations because the notion of the contract is wider. This assertion aims, *inter alia*, at pointing out that employment contracts and *e.g.* leases are not contracts of obligation. It has been claimed that presently a massive number of various private law contracts exist, upon the conclusion of which the category of obligations does not have any significant importance. As such an approach has been followed further, the understanding of the nature of employment contract has altered. If contracts of obligations and employment contracts are subcategories of contract law, it means, among other things, that a part of employment contract is governed by contract law, whereas the other part of the contract by labour law. There is, however, no relation to law of obligation. The binding effect of law of obligations is different in the case of private law. Law of obligations does not comprise other special branches of private law. It falls partly under contract law. Proceeding from this, it has been concluded that the worst option for Estonia would be the attempt to restore a pandect system covering the entire regulation of contracts in private law or even all the branches of material private law – that is, labour law, lease law, etc.*[14] The use of law of obligations should be discontinued and the general approach to contract law should be introduced.*[15] Finding a resolution to the relationship of contract law and the acts regulating material private law is considered a question of principles. What provisions governing employment contracts should be included in contract law, what in the acts under contract law? Is it possible to assemble all provisions governing employment contracts in labour laws, on condition that one proceeds from the general provisions of contract law provided in the general principles section of

12 U. Mereste. Missugune peaks olema Eesti eraõiguse süsteem (What should be the Estonian Private Law System Be Like)? – Riigikogu toimetised, 2000, No. 1, pp. 1–21.

13 T. Mayer-Maly (Note 7), pp. 98–99.

14 U. Mereste, pp. 16–17.

15 *Ibid*., p. 17.

contract law in the case of labour laws.*[16] The abandoning of implementation of pandect law of obligations would put an end to the necessity to answer such troublesome questions as "In what aspect is employment contract a contract under law of obligations?", "Who is the debtor, who is the creditor in employment contracts?" etc., to which it is impossible to provide absolutely reasonable and unambiguous answers that are in conformity with the legal conscience of people.*[17]

This treatment involves some more disputable standpoints to which one cannot agree without reservations. The assertion that new branches have emerged beside private law, which cannot be located within the former private law system can be regarded as correct. The number of such branches may increase in the future, but this does not render the connection with the general private law nonexistent and provides no grounds for claiming that they should be separated from private law. It is disputable whether employment contracts are contracts under law of obligations or not and there will most probably be upholders for both views. The discussion about what contracts under law of obligations are does not possess any significant meaning because the question is rather how people have used to refer to such thing in a national legal order. The question is, in fact, whether the renaming of law of obligations as contract law or vice versa involves any changes with regard to the contents of the provisions that are to be used when regulating contracts.*[18]

What are the actual consequences inflicted upon labour law in this discussion? Irrespective of the name that will denote the law regulating contracts, the outcome for labour law will be the same – it will remain a branch of private law and employment contracts will be a part of contracts and as such, they can be regarded as contracts under law of obligation. Nobody will obviously argue against the fact that the provisions contained in the general private law have to be taken into account in employment contracts in one way or another. The establishment of the pandect system will not impair the position of labour law in the private law system as a whole, and neither will it cause confusion in developing labour relations. In the case of employment relationships and employment contracts, above all, it is not essential to provide reasons for the validity of the principles of civil law, but it must be proven that these principles are not valid with regard to employment contracts. Consequently, the fact whether the law regulating contracts is referred to as contract law or law of obligations does not affect the position of employment contracts and labour law in the legal system as a whole.

Future of Estonian Labour Law

It is necessary to change and update the Estonian labour law and labour law acts. As in Estonia the majority of the acts regulating labour relations have been adopted in 1992–1994, they are obsolete to date and need significant improvement. On the one hand, this is caused by changes in economy and the development of the legal system. On the other hand, the integration of Estonia into the European Union is also important.

The general trends of development in labour law cannot be left aside concerning the development of the Estonian labour law either. Although labour law is a part of private law and labour relationships are based on contracts, the development of labour law on the level of an individual entails more and more provisions of mandatory nature from which the parties cannot digress. The increase in the importance of such provisions can also be felt on the supranational level.*[19]

The last decades have also seen the increase in the significance of the issue of the equal treatment of men and women imposing restrictions on employers upon conclusion of employment contracts. Nevertheless, one may perceive that more emphasis is laid on the collective level. An important part is played here by the relevant provisions of the European Union representing actually collective agreements to which an overall mandatory status has been assigned by the directive.*[20] Thus, the opportunity to regulate contracts decreases on the individual level and increases on the collective level. The increase in the impact of the

16 *Ibid*.

17 U. Mereste, pp. 17–18.

18 There may be several names, *e.g*. there is *Schuldrecht* in Germany, but Switzerland and the former Soviet Union have, *e.g.* Obligationenrecht and obyazatel"stvennoye pravo.

19 See *e.g*. the European Union directives on collective redundancies No. 98/59/EC; on protection of employees in the event of the insolvency of their employer No. 80/987, amended by directive 87/164/ EEC; on the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses No. 77/187/EEC, amended by directive No. 98/50 EC.

20 See *e.g*. directive No. 97/81/EC on part-time work.

contractual regulation on the collective level also means that the regulation by the state has to decrease, whereas the volition of the parties and freedom of contract on the collective level gain momentum.

In Estonia, it is also essential to take into account the increase in the significance of collective agreements and collective negotiations. To the greater extent the labour relations are regulated on the collective level, the less significant is the necessity for regulating labour relations on the individual level. That, in its turn, decreases the opportunity to negotiate on the individual level – after the working conditions have been regulated on the collective level, there is no need for supplementary regulation on the individual level. Insofar as a considerable level of regulation has been achieved on the collective level, it is important that the regulation on the level of acts provide sufficient guarantees to employees, be those provisions in public or private law.

Irrespective of the relationship between public and private law in the future, labour law will continue to be a special area of private law. Employment contracts undoubtedly serve as the basis for the establishment of labour relationships. The fact whether the contract is concluded in a written form or not is not crucial. Even if the contract is not concluded in writing, the contract shall be deemed to be concluded, if the employer is permitted to commence work. Freedom of contract, consideration of the persons' volition upon the establishment and development of employment relationships will be essential.

The private law approach will continue to exist in other areas of labour law, such as working time, holiday, wages, occupational health and safety, etc. These areas express most clearly employers' obligation to attend to the health and welfare of employees. The latter duty directly arises from the employment contract regulation.*[21]

Regulation of employment contract and labour relations under law of obligations or outside it is not a legal and political decision. Rather, it is a question of legislative technique. However, the question whether employment contracts should be bound to the principles of contracts under law of obligations or whether employment contracts and the regulation of labour relations should be excluded therefrom is a legal and political issue.

When providing an answer to this question, it has to be taken into account that the European Union experts have provided for the separation of labour law and the inclusion of labour relationships and protection in labour relations against the risks under civil law as one way to develop labour law.*[22] One reason for such approach has been the fact that until this moment, labour law has been largely shaped by production methods characteristic of the Ford period. In the current economic condition, these production methods are no longer effectual. Labour relationships have become more unstable, the number of employees holding part-time positions has increased, the proportion of women in the workforce as a whole has experienced an increase.

Proceeding from the above-mentioned, it is evident that Estonia also has to take into account that consideration of the principles of contract law when regulating labour relationships is unavoidable. The transformation of the current system must give rise to flexibility in labour relations, but it must, by no means, cause the deterioration of the protection of employees.

21 See Töölepingu seadus (Employment Contracts Act) § 49 (4) according to which employers are required to secure working conditions to employees. See also F. Bydlinsky. System und Prinzipien des Privatrechts. Springer, 1996, pp. 539–540.

22 Transformation of Labour and Future of Labour Law in Europe. Final report, European Commission, June 1999, p. 90.