Relationship between State Law, Collective Agreement and Individual Contract – case of Slovenia

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I. Introduction

This treatise of the relationships between state law, collective agreements on various levels and employment contracts, addressed some labour law fundamental issues and the provision of labour protection as its basic function. The legal labour status of an employee depends directly on or is determined by the relations between legal sources on one and the relationships between legal sources and employment contract on the other hand. For a proper understanding of individual segments of relationships between the treated phenomena, we shall first present a brief overview of the fundamental characteristics of the Slovenian labour law system, followed by an overview of the following issues: i) the method of ensuring minimum legally prescribed rights ii) the significance of labour protection for workers, iii) the free-will phenomenon of contractual parties to an employment contract and autonomy limitations of employers as the central mechanism for providing such protection and iv) the issues of disguised employment relationships and the manner of fighting them. At this point, I wish to particularly emphasise that my basic premise in the treatment of the above-mentioned institutes is labour protection and the provision of such circumstances which ensure every worker decent work and existence.

II. Legal Characteristics of the Slovenian Labour Law System

To better understand the issues discussed in this paper, particularly of the concept of free will in the context of disguised employment relationships in the republic of Slovenia, it is necessary to point out some basic legal-theoretical premises and characteristics of the national labour law system or the legal regulation thereof. The latter is not only important in disguised employment relationships with which the legal framework has already been set and the only remaining factor is they are correctly understood and effectively implemented. The role of the state in the labour legislation of the Republic of Slovenia should be accounted for also in de lege ferenda legal regulation of individual and collective employment relations.

The Slovenian labour law system rests on the pronounced role of the State in the regulation of the legal labour status of workers, since the Employment Relationships Act (Official Gazette of the Republic of Slovenia No. 42/02, 103/07; hereinafter referred to as the ERA) guarantees a minimum level of rights related to employment relations. The nature of labour legislation sources does encourage and permit signing collective agreements on the level of specific branch as well as in companies, but the autonomy of collective bargaining,[1] at

[1] Autonomy of collective bargaining refers to the idea, that the Parties themselves choose the content that is or will be the subject of collective bargaining. In this, they are not only bound by the institutes or rights and obligations, which are already subject to statutory regulation or other collective agreement, but are permitted to regulate in an original manner, a certain set of issues. In

least concerning the level of rights, is, in principle, rather limited by legislation. In principle, workers' rights may only be outlined more favourably than regulation in collective agreements, while the same can be stated for collective agreements at company's level in relation to branch collective agreements. Such hierarchical structure[2] of legal sources with the Constitution as the supreme legal act, laws and collective agreements as the central sources of legal regulation of status of employees, signifies that a considerable part of the heteronymous and autonomous legal regulation is of compulsory (cogent) nature. Consequently, the Slovenian system of individual employment is characterised by elements of public law. In spite of this, labour law as a legal branch would probably be easier to place within the realm of private law.[3] But one can indisputably claim that, applying Freedland's terminology,[4] the Slovenian legislation cultivates the so called »worker protective« model of employment contracts, while a high degree of inclusion of labour law sources in the employment contract also provides for favourable employee status. The autonomy of the contractual parties is namely limited, since employee rights can only be outlined in individual contracts more favourably as is stipulated by law, collective agreement or general act of the employer.[5] In the opposite case the provisions of the three above-stated legal

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accordance with the established legal standard in favorem laboratoris the contracting parties are frequently limited in determining the scope or level of individual rights. For more on the topic of autonomy of collective bargaining in the Republic of Slovenia c.f. also e.g.: Končar Polonca, O svobodi, prostovoljnosti in avtonomiji kolektivnega pogajanja, *Delavci in delodajalci*, Issue 2-3, 2006, p. 241–252 and Kresal Šoltes Katarina, Aktualna vprašanja avtonomije kolektivnega pogajanja v slovenski pravni ureditvi in praksi, *Delavci in delodajalci*, Issue 2-3, 2006, p. 253–269.

[2] National legal regulations of individual employment relationships and, therewith, the normative regulation of employee status may, just as in Slovenia, devote the central place in the legal sources systems to laws ensuring minimal employment relations related rights. Autonomous legal sources in principle (with possible exceptions) serve to the raising of levels of employee rights, and therewith, their protection. National legal systems in which the collective agreement serves as the central representative can prescribe and exclusive or central part to autonomous legal sources either on the level of individual branches or on company level. Certain legal systems (Germany) e.g. in principle does not cultivate company-level collective bargaining as much as at branch level which therefore represents the central location of collective bargaining.
On the other hand, there exist labour systems famous for their rather more explicit trend of labour law deregulation, which means that State regulatory action is decreased or limited to a minimum. In such systems, autonomous legal sources play the central normative role.

[3] To read about the division to public and private law, the placement of labour law among branches of private law, and on the place of other legal branches in one or the other legal sphere, c. f. Marijan Pavčnik, *Teorija prava*, GV založba/Pravna obzorja, Ljubljana, 2007, p. 586, 587. Pavčnik mentions the relations between subordinance and superiority of legal entities as an element of differentiation between public and private law. Public law is characterised by legal relations, in which the legal subjects are in a subordinate or superior position to one another, and with which the State as public authority appears as the carrier of subordination. On the other hand, private law is characterised by the relation adaptation of legal subjects. In Slovenian labour law, which is characterised by the subordinate relation of the employee toward the employer and the role of the State as a designer of cogent legal norms, public law traits are clearly visible, giving labour law special legal status. Placement of labour law in the sphere of public or private law is important from the aspect of intensity of the role states play in the forced regulation of the labour sphere. The more public law elements in labour law, in spite of labour law being considered as private law, the more legitimate the regulative authority of the state may be.

[4] See Freedland Mark, Kountouris Nikola, Towards a comparative theory of the contractual construction of personal work relations in Europe, *Industrial Law Journal*, Vol. 37, Issue 1, 2008, p. 49-74.

[5] As encapsulated in Article 7 of the *ERA*.

sources are used as integral contents of employment contracts (Article 30 of the *ERA*).

Another general characteristic of the Slovenian labour law system is the fact that labour law represents an independent legal branch,[6] and a consistently executed and implemented legal concept of contractual employment relation forms a fundamental bond with civil law. In spite of the fact that an employment contract is a contract of labour and not civil law, when it comes to issues concerning the signing, validity and cessation of employment contracts, a sensible subsidiary application of the general civil legal provisions is prescribed.[7] This means that in regard to issues, not regulated by the *ERA*, civil legislation is sensibly used.

III. Minimal level of employment rights

Guaranteeing a certain level of rights to employees represents an extremely relevant component of labour legislation. In the course of the historic development of labour law, the level of workers' rights rose through the development of civilisation and union movements, new rights appeared and means for their maintenance and practical implementation developed. Nowadays, numerous international documents remain valid, regulating employment-related rights on a universal level, simultaneously stipulating their appropriate and just scope.[8] States, contractual parties to the afore-mentioned documents, have transferred at least the same level of rights into national legislations or legal practices, with frequent examples of how, on national level, the level of rights is increasing. The manner of regulation and enforcement of employment rights differ from state to state, depending on the hierarchy system of legal sources and the determination of their mutual relations. In some countries, laws stipulating the minimum scope of rights represent the fundamental legal source, which may only be further increased through other state or autonomous legal sources. In some states legislation does not ensure warranty of the scope of rights and in which collective agreements for individual economic activities or industries represent the central legal source, while in others, the core employment rights are formulated and determined on company level.

In Slovenia, the systems of hierarchy and mutual relations of legal sources are multi-branched, but fairly clearly defined. Laws constitute the fundamental national legal source for determination of employment rights and their scope. In principle, the laws determine the minimal scope of rights which may only be expanded through autonomous legal sources, e.g. collective agreements, general employers' acts or contracts of employment. In continuation we as an example

[6] The majority of the European legal systems does not recognise labour law as a special legal branch and place it within the civil law framework. This may influence both the legal nature of an employment contract as well as the characterisation of some legal elements under the heading of public law. In such systems, employment contracts are more frequently defined as civil law agreements with the relations legal-labour norms between cogent and dispository, to the advantage of the latter.

[7] In accordance with Paragraph 1 of the Article 11 of the *ERA*.

[8] Minimal wages, working hours, rest, annual leave, education, etc. are subjects of the ILO conventions.

specify some rights, stipulated and evaluated first and foremost with the *ERA*. They are stated in view of the minimal level, which can, in principle, not legally sustainably be diminished with other legal sources or employment contracts:

The right to minimum wage – a wage which every full time employee is entitled to. It is regulated with a special act, the Minimum Wage Act (Official Gazette of the Republic of Slovenia, No. 13/2010); ,

The right to limited working hours – full working time in the scope of a maximum 40 hours per week and at least 36 hours per week (Article 142/2 of the *ERA*)

- Maximum overtime hours: 8 hours/week, 20hours/months, 170 (230)hours/year (Article 143/4 of the *ERA*),
- Maximum working hours per week in case of temporary reallocation or uneven working time schedule, 56 hours/week (Article 147/6 of the *ERA*),
- Limitation of working hours of employees working nights in a period of 4 (6) months to an average of a maximum of 8hours/day (Article 151/1 of the *ERA*),
- The right to rest in the course of working hours in the duration of 30 minutes on an 8-hour working day, which is included in the working hours (Article 154/1 of the *ERA*),
- The right to rest between two consecutive working days of at least 12 hours or 11 hours in the event of temporary reallocation or uneven working time schedule (Article 155 of the *ERA*),
- The right to weekly rest in the duration of at least 24 uninterrupted hours in a period of seven consecutive days (Article 156/1 of the *ERA*),
- The right to annual leave in the duration of at least 4 weeks (Article 159/1 of the *ERA*).

In a legal system in which laws represent the central legal source and determinant of employment rights in their minimal scope and in which the possibility of diminishing the said rights by means of other sources is in principle excluded, various mechanisms were developed for the purposes of observance of the prescribed scope of rights. The use of safeguards included in the law itself to prevent legally prescribed employment rights is a mechanism of this type. The provision stated in Paragraph 2 of Article 7 of the *ERA*, in accordance with which employment rights outlined in a contract of employment or collective agreement can only be more favourable for employees as legally prescribed.

Concern for the preservation of a certain scope of rights is also evident in Paragraph 3 of Article 8 of the ERA, referring to rights, regulated with general acts of employers, when it is permissible to regulate employment rights by such acts; regarding the scope of employment rights, the employer must comply with the law or the relevant collective agreement, by which he/she is bound to only determine employment rights more favourably that the law.

Furthermore, Article 30 of the *ERA* stipulates: »If a provision in a contract of employment conflicts with the general provisions concerning minimal rights and obligations of contractual parties prescribed by law, collective agreement or general employer act, the provisions of law, collective agreements or general employer acts partly prescribing the contents of the contract of employment as an integral part of such a contract, apply. «

Article 49 of the *ERA* is the last legal safeguard of the scope of employment rights. In accordance with the said article, an employee, regardless of any amendments of the law, collective agreement or general act of the employer keeps all the rights determined in his/her favour in the contract of employment.

The Collective Agreements Act (Official Gazette of the Republic of Slovenia, No. 43/06, hereinafter referred to as the CAA) ensures the level of employment rights in a similar manner, by stipulating the basic rule with the relation between collective agreements on different levels. Paragraph 1 of Article 5 of the CAA namely states that employers bound by the collective agreement agree on more favourable rights and working conditions for the employees when signing subordinate collective agreements. This for example means that the social partners need to account for the levels of rights determined in the collective agreement, which binds the employer on a higher – branch or industry level on signing subordinate collective agreements.

It is possible to claim, on observation of the five safeguards included in legal texts to ensure the observance of the scope of employment rights, that the relations either between various legal sources[9] or between them and the employment contract[10] are always subject of these norms. The effect of the prescribed mechanisms is in labour law doctrine referred to as legal standard »in favorem laboratoris**«.** This standard may be assessed as an exceptional contribution to the humanisation of labour law and the desire for social progress.

However *ERA* as well as *CAA* also allow for and envisage exceptions of withdrawal from the set rules in addition to the enactment of this legal standard. In Paragraph 3 of Article 7, the *ERA* permits certain itemised rights stipulated in it may be settled less favourably. This also refers to:

- The determination of other permissible instances for signing fixed term employment contracts and the provision that small employers may sign fixed term employment contracts regardless of limitations, meaning without allowing foe cases permitting signing contracts of this nature (Article 52). This can only be done with a collective agreement on branch level.
- The determination of a longer permissible period of added fixed time employment contracts (Article 53); this means that employers may sign with the same employee and for the same job one or several fixed term employment contracts, the duration of which would exceed two years;
- The determination of notice-periods of different length for small employers, the minimal duration of which is determined in the Act (Article 91). The length of notice-periods can only be altered with a collective agreement on a branch level;
- The determination of obligations of working a preparatory training period for those, who first commences working on a job, suitable to the type and level of their professional education and with the purpose of gaining expert knowledge for

[9] The relationship between the collective agreement and the law (Article 7/2 of the *ERA*), the relationship between the general employers' acts on one, and the law and collective agreements on the other hand (Article 8/3 of the *ERA*), the relationship between collective agreements on different levels (Article 5/1 of the *CAA*).

[10] The relation of employment contract to the law is referred to in Article 7/2 of the členu *ERA*, and the relation to all three types of legal sources in Articles 30 as well as 49 of the *ERA*.

independent work as outlined in the employment relationship (Article 120). In addition to the law, such obligation can also be determined in the collective agreement on a branch level;

- The determination of other exceptional, urgent and unforeseen cases, which, together with cases stated in the *ERA*, create the employees' obligation to work overtime (with collective agreements on a branch level), and the determination of a period in which the daily, weekly and monthly restrictions concerning employees working overtime, is accounted for as average restriction (Article 143);
- The determination of the period (from 4 to 6 months), in which the time limitation of daily working obligation of employers working nights (8 hours/a day), is considered as average limitation;
- The determination of a period (maximum of 6 months), in which for shift work in certain posts, with special types of work or special professions, daily and weekly rest is determined in its average minimal duration as prescribed by law;
- The determination of a period (up to 12 months), in which the maximum weekly working hours of temporarily re-allocated employees or uneven working time schedule (i.e. 56 hours/week), is considered average weekly working hours;
- The determination of other disciplinary sanctions e.g. financial penalties, waiver of perks etc., since the *ERA* only permits the issue of a caution (Article 175).

On the other hand, the *CAA* with Paragraph 2 of Article 5 permits, on conditions stipulated in the collective agreement on a wider level, the determination of rights and work conditions, different or less favourable for the employees. This is a rather unique, unusual and hence also disputable exception from legal standard in favorem laboratoris, since collective agreements are listed as autonomous legal sources. In spite of this, the sense of urgency of consensus of social partners on branch level nevertheless represents some sort of a safeguard, both in regard to decreasing the scope of rights as such as well as with the determination of actual rights the scope of which might be decreased.

IV. The Importance of entitlement to legal protection of employment rights

The Provision of legal protection of employment rights is the first and basic objective of labour law. It appeared and developed with the intent of protection of workers who carry out work for other persons, i.e. employers. In labour law the status of people who work for other persons (e.g. contractors) on a civil law contract the protection of employment rights is in principle not discussed. The objective of the provision of the protection of legal employment rights is in the intent of diminishing the explicit employee subordinance i.e. the tendency to balance the positions of contractual parties.

The entitlement of employees to legal protection of their employment rights is based on the position of parties of employment relationship. The subordination of employees to their employers is the key element of any employment relationship or characteristic of a contract of employment typical of employment relationship exclusively; therefore it also defines the latter. One is permitted to talk about employment relationships until the employees are subordinate to their employers on a personal and economic level. Personal subordinance is reflected in the employees' obligation to follow the employers' instructions and in their

position as being subject to employers' supervision, while the economic subordinance in its original sense is reflected in the explicit economic predominance of the employers. The latter own the capital, production means, etc. while employees only possess their working activity, which they offer to employers in exchange for remuneration. On substantiating the entitlement of employees to legal protection of employment rights, one must and may say that employees are entitled to such protection in exchange for their subordinate position. Last but not least, the subordinate position of employees is, according to Končar, a counterpoise to the fact, that employees with their activities do not bear any business risk.[11] The latter rests on the side of the employers. Thus the burden of business risk also contributes to the diminuation of explicit employee subordinance.

The deviation from the free will principle[12] represents an important and simultaneously efficient and necessary way to achieve a more balanced position of parties to an employment relationship, the deviation being more pronounced on the employers' part. Legal limitations of employers' autonomy ensures the employees (at least legally and formally speaking) a more suitable position in an employment relationship. The limitation of employers' autonomy is exemplified in numerous labour law issues, for example: i) the selection of contractual partner, ii) the determination of the contents of the contractual relationship, iii) the adherence to legally prescribed institutes and contractual types, iv) conforming with the demands for contracts in written form, as well as v) the manners of cessation of contractual relationship.

V. Limiting the autonomy of contractual parties as a factor of ensuring protection of employment rights

V.1. On the free will principle in general

Freedom of contractual parties or the free will principle normally applies in civil law regulation of contractual relationships. This means that parties able to conclude a binding legal business in accordance with positive law order may, within the set framework of autonomy, decide independently on the creation of the relationships per sé, on the other contractual party, on the cessation of contractual relationship, and, first and foremost on the contents of the actual relationship.[13] The freedom in the choice of institutes and the legally prescribed contractual types, concensuality in contract signing as well as the possibility of the parties to subject the contractual relationship to autonomous rules or even foreign legal order can be traced in theory within the scope of the free will principle.[14]

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[11] Končar in Employment relationships Act with commentary, GV Založba, Ljubljana, 2008, p. 38.
[12] Obligacijski zakonik- Code of Obligations (Official Gazette RS, No. 97/2007-UPB 1, hereinafter CO) in Article 3 among the fundamental principles also stipulates free regulation of obligation relationships.
[13] According to Strohsack Boris, *Obligacijska razmerja I*, tretja spremenjena in dopolnjena izdaja, Uradni list RS, Ljubljana, 1995, p. 51.
[14] Kranjc in Code of Obligations with commentary, Book 1, GV Založba, Ljubljana, 2003, p. 92.

In civil law, the role of the state in arranging legal business of this sort is minimal. This means that the state normally does not interfere with the regulation of contractual relations between individuals and the legal rules it nevertheless imposes are normally of a dispositive nature. Naturally, civil law also knows mandatory norms, but such a state is the consequence of equality of contractual partners as well as the basic principle of the Code of Obligations (official Gazette of the Republic of Slovenia, No. 97/07, officially revised text no.1; hereinafter CO).[15]

In the *CO* the issue of contractual freedom is regulated in the form of a basic principle in Article 3 under the heading Freedom of Regulation of obligation relationships, stating that contractual parties are free to regulate their obligation relationships, but cannot regulate them in contradiction with the national Constitution, mandatory provisions or with moral principles. This is where the formal framework within which the parties freely express their free will become evident. In addition to this, the autonomy of the parties is also limited by legal standards, further relativising it. Moral in its narrower sense,[16] conscientiousness and honesty, good business practices, due diligence and prohibition of abuse of rights[17] are such legal standards.

V.2. The principle of free will in labour law[18]

The situation differs in the field of employment relationships, even though they are of a contractual nature. This fact originates from the inequitable position of employees and employers, therefore the role of the state, which with its regulative urgently influences contractual freedom is greater and more important than in the field of civil law.

The field of labour law and employment relationships is globally, and with the implementation of the *ERA on* 1. January 2003, also in Slovenia, marked with the idea and concept of civil contractual law, so the consideration of contractual freedom in labour law is of exceptional importance. In discussing this phenomenon one must bear in mind that employment contracts are contracts of labour law and that the standardisation of individual areas is defined by its nature.[19] The nature of labour law, which also determines the characteristics of employment contracts is clearly outlined in Article 1 of the *ERA*, in which the

[15] Article 4 of the CO prescribes the principle of equality in obligation relationships.
[16] The term moral principles from Article 3 of the *CO* might be interpreted as a generic term, under which the afore-mentioned legal terms could be listed. Certain theoreticians (e.g. Cigoj Stojan, *Komentar obligacijskih razmerij, I-IV. Knjiga*, ČZ Uradni list SRS, Ljubljana, 1984-1986) treat all legal standards, to a certain extent based on the moral element under the term morality, while others (i.e. Zabel Bojan, Poslovna morala, dobri poslovni običaji in pogodbena disciplina, *Privreda i pravo*, Issue 3, 1967, p. 9-14) explicitly emphasize the difference between morality and good business practices. Because the old Law of Obligation Relationships, on which the previously-mentioned theoreticians developed their theories did not contain the term moral principles, this fact clearly justifies the use of such phrasing as a key tem. Hence the word morality in its narrow sense.
[17] On the influence of legal standards on freedom of contractual parties Kranjc Vesna, O pravnih standardih pogodbenega prava, *Pravnik*, Volume 51, Issue 9-10, 1996, p. 493–512.
[18] On the same topic, also cf. Tičar Luka, Pogodbena svoboda v delovnem pravu, *Pravnik*, Issue. 1-3, 2003, p. 173–182.
[19] Kranjc, 1996, p. 493.

lawmakers have set the objectives and principles of the law, which should be considered with due regard[20] in achieving these objectives. The following facts of labour law therefore justify the specific regulation of the autonomy of contractual parties – the employees and employers. In other words, they allow for a more pronounced role of the state as a lawmaker. The autonomy of contractual parties is limited in signing and cessation of employment contracts, and in the course of duration of the employment relationship, with the obligation to comply with the provisions of the *ERA* and other laws, ratified and published international agreements, other regulations, collective agreements and general employer acts (summarised from Article 7 of the *ERA*). This means that both the employees and the employers are also bound by civil law legal standards such as conscientiousness and honesty, good business practices, due diligence and prohibition of abuse of rights.

VI. Disguised Employment Relationship

The question of autonomy of contractual parties is of extreme importance in practice when treating disguised employment, as was established by the International Labour Organisation (ILO) in its several publications. The notion of disguised employment is based on evaluation of the influence of the will of the contractual parties to classify their legal relationship as a civil and not as an employment relationship.

It is a fact that Slovenian labour law, particularly the ERA formally establishes relatively good and sound foundations for determining employment relationships, even in events of concealment of their true legal nature. Its core consists of: i) a legal definition of employment relationship, ii) legal demand for written form of employment contracts, wherefrom the assumption of the existence of employment relationship arises,[21] iii) legal limitation of the autonomy of the contractual parties within the framework of which the prohibition of signing civil law contracts[22] if there exist elements of employment relationship is of crucial importance.

To provide the most concise and clear presentation of the complete context of disguised employment relationships in Slovenian labour law, I will present in the continuation the definition of employment relationships in which their most definitive elements necessary for the possibility of reference to the presumption of existence of employment relationships are outlined. The presentation will be followed by a discussion of the form of employment contracts, limited strictly to its role in treating disguised employment relationships that is in connection with the presumption of existence of employment relationships. The legal limitation of

[20] "The objectives of the Act are: the inclusion of employees in the work process, in view of ensuring consistent working practices and the prevention of unemployment, taking into account the workers' right to freedom of labour and dignity at work and protection or interests of workers in employment relationships" (Paragraph 2 of Article 1 of the *ERA*).

[21] Article 16 of the *ERA* stipulates that: "In the event of dispute about the existence of an employment relationship between an employee and employer, it is presumed that the employment relationship exists if elements of an employment relationship are present."

[22] Paragraph 2 of Article 11 stipulates: "If elements of an employment relationship exist in accordance with Article 4 and in connection with articles 20 and 52 of this Act, work activities may not be performed based on civil law contracts, except in cases, stipulated by the law."

autonomy of contractual parties will be the central part of the presentation of disguised employment relationships in the light of the principle of primacy of the facts, which represents the key obstacle to free definition of legal relationships on behalf of contractual parties. To demonstrate these limitations, I will also include the most relevant jurisprudence.

VI.1. Definition of an employment relationship in the ERA

Slovenia belongs to the group of countries in which the national legislation contains legal definition of employment relationship. With this the judgement of the existence of an employment relationship in situations, in which no written employment contract exists or the content of the employment relationship between the employee and employer is not clearly defined is considerably alleviated. The definition namely contains those characteristic elements which differentiate an employment relationship from a civil relationship.

Paragraph 1 of Article 4 of the *ERA* states that:

"An employment relationship is a relationship between an employee and employer in which the employee becomes voluntarily included in the employer's organised working process in which he/she in return for remuneration personally and uninterruptedly carries out work in accordance with the employer's instructions and under the employer's supervision."

Based on this definition, it is evident that four traditional definitive elements shape an employment relationship: personal work, remuneration, continuity and work in accordance with and under the supervision of the employer (personal subordinance). Here, I shall not direct attention to each individual element, since the contents of each are well known in theory.

Two additional items also contained in the stated definition should also be pointed out as important factors for the establishment of the existence of an employment relationship in the context of Slovenian legislation. The first is namely the "voluntary inclusion" of the employee in "the employer's organised working process." The voluntarity of the employee in fact means that the employee him-/herself decides to sign an employment contract with the employer of his/her own free will. As such, it is a necessary reflection of the constitutional right to freedom of labour, regulated and guaranteed in Article 49 of the Constitution of the Republic of Slovenia (Official Gazette of the Republic of Slovenia No. 33/1991, with amendments). Free choice of employment is one of the three elements of freedom of labour.[23]

From the perspective of uncovering disguised employment relationships, the inclusion into the organised working process – that is the judgement of whether or not an employment relationship exists - is even more prominent.Theoreticians are not of a uniform opinion regarding the inclusion as an independent element of an employment relationship. Rather frequently it is treated as a part[24] of personal

[23] The remaining two elements of labour freedom are also the prohibition of forced labour and the availability of every post to everyone and under the same conditions.

[24] In Italian law, employee inclusion is treated as an indicator of existence of employee personal subordination.

subordinance of an employee or even equated with it (Germany). Senčur Peček, also shares a similar opinion, stating that "the inclusion of an employee in the employer's working process in fact means his/her subordination to the employer's instructions regarding the place of performing working activities and other working conditions."[25] In my opinion, the terms of personal subordination exemplified in the observance of the employer's instructions and subordinance to the employer's supervision and inclusion in the contentual sense should not be treated as synonyms. The employee's inclusion in the working process, exemplified in his/her acceptance of the place or time of work as determined independently by the employer does not necessarily signify personal subordination of the employee. This simultaneously means that the organisational structure of the work process in itself bears no instructions to the employee. In my opinion, it is possible for the employee to be included in the working process of the employer without being personally subordinate to him/her. The latest claim, however, does not a priori mean that such a worker cannot partake in an employment relationship. A similer viewpoint also arises from the integration test, developed for the purposes of identification of dependent work in countries with the Anglo-saxon legal system. This test was even developed as an alternative to the test of control as a basic test of employee-subordinance, which clearly indicates to the possible existence of an employment relationship, at least in Anglo-saxon systems, even without the test of control and with greater emphasis on the phenomenon of integration or inclusion.

At treating employee inclusion in the working process of the employer, the meaning of the organisation of his/her working process is frequently neglected. In its definition Article 4 of the *ERA* particularly emphasises the latter. The Slovenian legal system regulating employment relationships (still) knows special general (organisational) employer's act, which must be adopted by every employer with 10 or more employees, and whose basic purpose is the establishment of organisational structure of the working process. With the act of staffing stucture/work the employer states the conditions to be satisfied by successful candidates for the occupation thereof and in this manner sets the foundations for the organisational structure of the working process.The preservation of the obligation on the part of employers to adopt a special general staffing act of statutory admission even after the adoption od ERA in 2002 is surely a particularity of the Slovenian system of individual employment relationships, while at the same time, means a significant contribution to the establishment of the organisation of work processes.

Given the fact that the concept of voluntary participation in the employer's organized working process consists of phenomena such as: volontarity, employee involvement and organisation of the process - each with its substantive value – it is possible to conclude that in assessing the existence of an employment relationship it carries the same weight as the other four traditional employment relationship definition elements. Finally its independence is also clearly indicated

[25] Senčur Peček Darja, *Delovnopravni položaj direktorjev*, doktorska disertacija, Pravna fakuleta v Ljubljani, Ljubljana, 2007, p. 227 and 228.

by the ILO Recommendation, No. 198, which lists the inclusion (integration) of the employee in the organisation[26] as an independent indicator.

VI.2. Form of employment contracts

The second factor of overcoming disguised employment relationships discernible from the *ERA* is the legal prescription of the form of employment contract. The written form of the employment contract first and foremost serves as proof of existence of employment relationship rather that the constituitivity for its creation.

In Article 15, the *ERA* stipulates that employment contracts are to be concluded in written form. It is a clear provision, listing the employment contract under formal express contracts. To guarantee the written form of employment contracts and achieve greater worker safety, the lawmakers imposed on the employer the obligation to hand to the employee three days before signing, a written sample of the employment contract, and the actual employment contract on the date of signing. The legalisation of handing sample employment contracts to candidates has a threefold function. In addition to the explicit role of the fact that the employment contract will be concluded in written form, one should also bear in mind the (at least theoretical) possibility for the employee to influence its contents. One can use this argument to reject the theory of the employment contract being a contract of accession or adhesion, since the employer alone always determines the contents of the employment contract. The employee is given the opportunity to propose amendments or include new information prior to signature of the contract, drawn up by the employer. Addittionally, the act of handing over a sample contract to the candidate shows the employer's intent to sign the employment contract. Since the introduction of *ERA* on 1 January 2003, the national labour legislation no longer operates with the so called decisions of selection. In this way, the selected candidate no longer receives from the employer any sort of written document attesting to his/her selection on completion of the selection process. The sample employment agreement therefore represents a written document whereby the employer has stated clearly his/her decision regarding candidate selection[27] and the intention to sign an employment contract.

Despite the fact that employment contracts are concluded in writing, the prescription stands, in light of employee protection, that, in case the parties have not signed a written contract of employment or in the event that not not all components of the employment contract referred to in Article 29/1 of the *ERA* are expressed in writing, this does not affect the existence and validity of the employment contract (Article 15 / 4 of the *ERA*). This means that the written form of the contract is not constitutive for the emergence of the employment relationship. This also means that the parties, only by merely avoiding to enter (or sign) an employment contract, do not avoid the existence of an employment relationship and the resultant legal consequences therefrom. It is precisely for situations of absence of a written employment contract or the willful signing of a

[26] Considering the inclusion in the organised working process of the employer as the definitive element also stems from the Employment relationships Act with commentary, 2008, p. 37.

[27] In staffing circles, letters of intent are increasingly frequently mentioned as documents morally binding the employers to conclude an employment contract with the recipient of such letter of intent.

civil law contract, that Article 16 of the *ERA* codifies the presumption of the existence of an employment relationship, if its elements exist.

VI.3. Limiting the autonomy of contractual parties

Above, the issue of free will of the contractual parties has already been mentioned. Individual segments of the behavior of employer before and in the course of the employment relationship in which the employer's autonomy is limited have been indicated. At this point, the discussion will be limited to the constraints (prohibition) of signing civil law contracts, that is, the obligation to conclude an employment contract,[28] if the specific circumstances so require. In connection with Article 7 of the *ERA*[29] Paragraph 2 of Article 11 contains a clear prohibition of work based on a civil law contract, if elements of an employment relationship exist.

In this way, protection of employment rights would be available to a greater circle of individuals, including persons formally working on civil law contracts, but in circumstances characteristic for employment relationship. The *ERA* therefore does not permit the contractual parties to deem their relationship as civil if the relationship in practice bears the elements of an employment relationship. Natural persons with or without self-employed status are permitted to work on a civil law contract, performing what is known as contractual work. The difference between the two therefore is not in the legal qualification of the contract, based on which they work (civil law contract), but in the legal status (legal organisation form) in which they appear as contractual parties. A self employed individual is considered (if he/she is an individual[30] sole trader) a business entity. Therefore civil law contracts signed by business entities are defined as commercial contracts in the *CO* (Paragraphs 2 and 3 of Article 13). The term self employed person is therewith not exhausted, since individuals practicing their profession independently and for financial reimbursement are also deemed self-employed. These include, for example freelance journalists, cultural and sports professionals, lawyers and others. These are economically active individuals whose work is not performed in their capacity as special legal form, i.e. as a sole proprietor under *the Companies Act-1*.

Regarding the fact that a civil law contract as a foundation for performing wok is deemed as illegal in Paragraph 2 of Article 11 of the *ERA*, I shall talk about both previously indicated groups of professionally active persons, i.e. the self employed as well as individuals, working on contract in the context of disguised employment relationship, that is also in limitation of autonomy of the contractual parties. The key characteristic of all persons working based on a civil

[28] The phrase »obligation to conclude a contract of employment« is not connected in terms of contents with any contrary duty. It is a requirement of the *ERA* that work can only be performed based on an employment contract in case definitive elements of an employment relationship exist.

[29] »In signing and termination of employment contracts and in the course of duration of the employment relationship, the employer and the employee are obliged to respect the provision of this and other acts, ratified and announced international contracts, other regulations, collective agreements and general acts of the employer.«

[30] In the Companies Act (Official Gazette of the republic of Slovenia, No. 42/06, 10/08, 68/08, hereinafter referred to as the *CA-1*) sole traders are defined as natural persons, exclusively pursuing their gainful occupation on the market (Paragraph 7 of Article 1).

law contract is or supposed to be their principal personal indepencence from the other contractual party. The lack of existence of this characteristic in a specific legal relationship is the central decisive factor in assessing the potential existence of an employment relationship.

VI.4. Case-law analysis on the existence of employment repationship

That the afore-mentioned and presented provisions of the *ERA* are intended for and applicable for transcending or prevention of disguised employment has also become evident in Slovenian case law. It is true indeed that in the majority of cases it took the consideration of the national Supreme Court to understand the legal framework in the previously presented manner. Hereinafter, we shall present in more detail one of the most illustrious Supreme Court decisions, which paved the way for further case-law.[31] The fact that the presented case-law treats student work in no way diminishes the importance of the decision for the correct understanding of the so called principle of primacy of facts. Student work may also represent a mechanism for avoidance of employment relationship, and is rather widespread in Slovenia. In the context of Paragraph 2 of Article 11 of the *ERA*, student work represents an illegal foundation for work in case it is used as a mechanism of disguising employment relationships.[32] The remaining two Supreme Court decisions, indicating to a similar (identical) court interpretation regarding the autonomy of contractual parties, treat the legal relationship of a self employed journalist and an author without the "self-employed" status.

VI.4.1. Autonomy of contractual parties in Slovenian case-law

In Decision VIII Ips 129/2006, the Supreme Court of the RS tried a case of disguising an employment relationship as student work. The plaintiff worked as a student for the national air carrier based on student work referrals for a period of over ten years. She held a systemised workpost, which, with temporal limitations, was legally permissible,[33] and was also promoted during that period. However, she was not granted all the classical rights workers in employment relationships are entitled to. In her complaint, the plaintiff sued in view of finding elements of a permanent employment relationship, claiming all rights to which she would be entitled as an employee in an employment relationship.

[31] The application of identical legal mechanisms to determine the existence of employment relationships and similar interpretations regarding the limitation of free will of contractual parties is also evident in other Supreme Court decisions, e.g. Decision VIII Ips 337/2006, dated from 15 January 2008, Decision VIII Ips 339/2006, dated from 25 October 2007, Decision VIII Ips 373/2006, dated from 4. December 2007.

[32] Students working on the foundation of a student work referral are legally not in an employment relationship. In spite that the ERA, similarly as children and secondary school students ensures a certain amount of protection. In accordance with Paragraph 7 of Article 214 of the ERA, the provisions preventing discrimination, equal treatment in regard to gender, working hours, breaks ans rest periods, on special protection of workers under 18 years of age, and on liability for damages.

[33] Until it was stricken by the 2007 amendment, Paragraph 2 of Article 216 of the ERA stipulated: »Students may also perform temporary or occasional work in accordance with the previous paragraph on a work post with individual employers, but not longer than for an uninterrupted period of 90 days in an individual calendar year.«

The plaintiff's claim was rejected in entirety by the trial court and the court of appeal, claiming that the statuses of worker and student are conceptually mutually exclusive, since a student could not simultaneously be a person in an employment relationship. [34] The second argument stated by the trial court and the court of appeal concerned the autonomy of the contractual parties. The courts expressed their respect for the contractual intention of the parties, who were unanimous in their cooperation on the basis of student work referrals. According to Article 15 of the CO and Article 11 of the *ERA* concluded that the plaintiff had worked for the defendant for many years, based on student work referrals, which pointed to an agreement between the parties for such an arrangement and not for the conclusion of an employment relationship. Accordingly, the court could not change the legal nature of the agreed legal relationship. The higher labour and social court added that labour law, particularly the presently applicable *ERA*, stipulates no sanctions or legal consequences for the performance of work outside the framework of the employment relationship. This suggests that even if the court finds that a particular activity bears signs of an employment relationship between the parties and a contract of employment had not been signed, the court could not decide for more than a legal offense on the part of the employer, since the *ERA* does not anticipate such cases.

The Supreme Court disagreed with the trial court and the court of appeal, and rejected both arguments for their decision due to the misapplication of substantive law. In trying the argument of the autonomy of the contractual parties on the nature of their legal relationship they were concordant with, cited unanimously by the trial court and the court of appeal, the Supreme Court clearly and openly embraced the above-stated the concept of the primacy of facts. In determining the existence of employment relationship in this particular case, the Supreme Court first stated the general conclusion that in disputes of this type the conceptual definition of the employment contract or elements thereof, signifying the differentiating factor in comparison with other contracts, is of central importance. Therefore, the court used, among others, Article 4 of the *ERA* (definition of an employment relationship), Article 11 of the *ERA* (use of general civil law rules) and Article 16 of the *ERA* (the presumption of the existence of an employment relationship). The provisions stated in these three articles represent the normative core not only for the determination of the existence of an employment relationship in atypical and marginal legal relationships, but also represent the core normative starting point of fight against inappropriate exploitation of employees. Not only must the latter work in accordance with and under the supervision of the employer, which is undisputable, but must also work in a legal form most suitable for the employer at a given moment. The legal form of employee engagement chosen in this manner by the employer signifies the

[34] This view may seem rather attractive, since we have all actually considered these two statuses as incompatible, mutually exclusive. We cannot, however, ignore the fact that this was a more or less lay assessment, its accuracy not verified in the regulations.
Since it is evident from the court verdict that this is a generally known fact, the court of firts instance and the court of appeals did not pay particular attention to these arguments. The mutual exclusivity of the terms supposedly originated from the old regulations from the field of employment relationships (the old ERA) and those parts of social security regulations, determining the health, retirement and disability insurance of students. The supreme court legitimately and justifiably rejected this argument, with which it found that the status of student and the status of worker are not incompatible in Slovenian legislation.

cheapest labour form for the employer, and the employee renounces numerous rights as arise from the framework of labour law or social security law, to which an employee ought to be entitled.

Accounting for the stated legal framework, the Supreme Court found that for the differentiation of occasional and temporary work involving students from the employment contract, the content and not the external form, frequently determined by the will of the parties to such a relationship is of crucial importance. In accordance with the opinion of the Supreme Court the external form is not decisive in the judgement of whether and when a legal relationship may be deemed an employment relationship. The court assessed the will of the contractual parties in the light of one of the elements of the employment relationship, evident from the definition thereof in Article 4 of the *ERA.* The free will of the aprties in this context matters in the sense of voluntary inclusion in the organised working process of the employer. Voluntarity is simultaneously also a basic value component of the constitutional right to free work, guaranteed and regulated by Article 49 of the Constitution of the Republic of Slovenia.

A similar standpoint of the Supreme Court regarding the autonomy of will of contractual parties is also evident in Decision VIII Ips 337/2006. The subject of legal proceedings in this case concerned the work of a freelance journalist who signed contracts on programme cooperation and contracts of rendering journalist services. The Supreme Court considered crucial the fact that in accordance with Paragraph 2 of Article 11 of the *ERA*, work may not be performed on the foundation of a civil law contract if elements of an employment relationship are present. Regarding this, the Supreme Court in principle did **not** find important the fact that the journalist entered the civil law contractual relationship as a self employed individual,[35]that is as an individual pursuing an independent journalistic career, entered in the register of freelance journalists. According to the decision of the court, the mere fact that the parties signed contracts of programme cooperation and contracts of rendering journalist services, which the plaintiff had signed as a freelance journalist in itself did not represent reason enough to decline the request for the determination of the existence of an employment relationship. The court did, however, mention as an important element the question of whether the plaintiff herself wished and willed for such a status and insisted on this type of contracts, or whether she, due to her subordinate status in a longer uninterrupted period of rendering professional services, merely consented to such status and perhaps even demanded alterations or a conclusion of an employment relationship.

I wish to mention as the third example of prohibition of work on the base of a signed civil law contract, in the event of presence of elements of an employment relationship, the verdict of the Supreme Court in Decision VIII Ips 339/2006. This case involved the contractual work based on the contract for copyrighted work for an individual who did not enter the contractual relationship as a self employed person with a registered activity. The case involved continued contractual work at

[35] In accordance with the Decree on the procedure and detailed criteria to acquire the status of independent journalist and for keeping records as public books (Official Gazette of the RS, No. 105/01) the status of independent journalist can also be granted to persons in an employment relationship, but not for more than part time.

a systemised work post within employer-determined working hours, and could be compared to the work of other colleagues in working on the same posts in regard to the employer's instructions, and amount of services rendered. The court also treated the concept of free will similarly to the other two cases. If the worker does not have the status of a self employed person, the determination of existence of an employment relationship is less problematic, since the decision is not marked with the characteristics of self employment, which in themselves perhaps to a certain extent deviate from the existence of an employment relationship.

Conclusion

If one summarises the concept of disguised employment relationships as is rounded up in the ILO publications, and if one, again in accordance with the ILO, puts it in the context of providing legal protection of workers rights, one in fact faces the Slovenian legal regulation of employment relationships and the practice in regard to determining the existence of an employment relationship, and the provision of legal protection of workers rights. For this reason only those legal institutes and provisions representing the normative foundations for the judgement of existence of employment relationships in case of doubt of its existence or doubt of the actual legal nature of a particular employment relaptionship have been singled out from labour law. In my opinion, the Slovenian labour law tackles this set of issues well. With a clear legal definition of the term employment relationship (Paragraph 1 of Article 4 ot the ERA), the legal presumption of its existence if the parties have not signed a written contract of employment (Article 16 of the ERA) and the prohibition of signing civil law agreements in the presence of elements of an employment relationship (Paragraph 2 of Article 11 of the ERA), the Slovenian labour law can be listed under those countries with clearly defined fundamental and most important questions pertaining to the protection of labour rights. The stated legal provisions namely directly describe the group of individuals entitled to legal protection of labour rights. Since without suitable law enforcement mechanisms even superb laws cannot be fully enforced the role of courts and with this the addition of their understanding and ruling in legislation have been added. Despite the assessment that labour law for determining the existence of an employment relationship is good, the interests of employers and employees, and, as a rule, the state regularly differ. Hence the role of the courts and case law is all the more important. Particularly the case law of the Supreme Court of the Republic of Slovenia represents exceptional progress in the fight for the provision of protection to those in need and the functioning of legal mechanisms in regard to the existence of employment relationships. In so doing, it openly accepts the internationally established principle of primacy of facts. The latter therefore certainly and to a significant extent defines the relations between the law, collective agreements and contracts of employment.