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**Labour Law Relations in Czech Republic
and Spain**

Diplomová práce

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Prohlášení

Prohlašuji, že jsem předkládanou diplomovou práci vypracovala samostatně za použití zdrojů a literatury v ní uvedených.

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Poděkování

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TABLE OF CONTENTS

Introduction	1
Chapter I: Legal Relations vs. Labour Relations in the Czech Republic and Spain	
I.1 Concepts and Definitions.....	2
I.2 Sources of Labour Law.....	4
I.2.1 Sources of Czech labour law	4
I.2.2 Sources of Spanish labour law.....	7
I.3 Basic Rights, Principles and Contractual Freedom	11
I.3.1 Basic rights, principles and contractual freedom in the Czech Republic	11
I.3.2 Basic rights, principles and contractual freedom in Spain	13
Chapter II: Types of Labour Relations in the Czech Republic and Spain	
II.1 Types and its division in the Czech Republic.....	16
II.2 Types and its division in Spain	18
Chapter III: Employment Relationship in the Czech Republic and in Spain	
III.1 Formation of Employment Relationship in the Czech Republic	223
III.1.1 Employment Relationship Participants in the Czech Republic.....	223
III.1.2 Employment Contract (Essentialia Negotii)	25
III.1.3 Other Agreements to the Employment Contract.....	27
III.2 Formation of Employment Relationship in Spain	28
III.2.1 Employment Relationship Participants in Spain.....	28
III.2.2 Employment Contract (Essentialia Negotii)	30
III.2.3 Other Agreements to the Employment Contract.....	32
III.3 Permanent and Temporary Employment Contracts.....	333
III.3.1 Permanent and Temporary Contracts in the Czech Republic	333
III.3.2 Permanent and Temporary Contracts in Spain	34
Chapter IV: Agreements on Work Performed Outside an Employment Relationship	
IV.1 Overview of the Czech Regulation.....	40
IV.2 Overview of the Spanish Regulation	42
Conclusion	43
Druhy pracovněprávních vztahů v České republice a ve Španělsku	46
List of Abbreviations	62
Bibliography	63
Summary.....	66

Introduction

Both Czech Republic and Spain had its history traversed by totalitarian regimes hampering the development of society by never ending regulations trying to tie down the nation in order to exercise control and to suppress any disagreement of individuals. No matter whether it was the totalitarian regime in Czechoslovakia or Franco's Spain, the bound atmosphere and paternalism were deployed everywhere. Therefore, conditions of employees were very well protected, not leaving to an employer any opportunity to arrange the work differently from the provisions of labour law. The gradual evolution of all types of human relations over time, the creation of the European Communities, greater cooperation, commencement of coordination and absorbing more and more European states led to the creation of democratic regimes. This happened sooner in Spain, in the mid-seventies. In 1978 the new Spanish Constitution was adopted promoting democratic values, right and duty to work, freedom to choose occupation, non discrimination, social safeguards etc.

Following this, the new Workers' Statute was enacted in 1980. The small changes were made sporadically until Spain joined the European Communities in 1986 at the same time as the Single European Act was adopted. Since then European institutions started to produce legislation faster, with a wider scope and higher standards that everyone had to keep up. The special laws and legislation concerning safety on the workplace or trade union freedom, infringements and penalties in the social order was enacted. Later in the 90's the employment contract was modified in connection with part time work, temporary working agencies or contractual arrangements to promote permanent employment contracts were put up. The latest significant law introduced was the Self-Employed Workers' Statute of 2007. The Spanish process of change started right after the democratic transformation. On the other hand, Czech Republic, after the Velvet Revolution in 1989, continued using the old Labour Code from 1965, however the new institutes found its way to new labour law very soon as well e.g. Law on Employment and Law on Collective Bargaining in 1991 or inclusion of non discrimination clauses. Ambition to join the European Union brought numerous changes of labour provisions due to harmonization of the industrial relations. Until the time had come the new Labour Code of 2006 was elaborated trying to change the whole conception of very limited contractual freedom, which was later fully completed thanks to the Czech Constitutional Court in 2008.

Both countries are now in closer relation than ever before, as members of the European Union, having the same basic rights and duties, observing uncountable directives and regulations, being under the same common European Court of Justice, trying to save the uniqueness in the progressive centralization. From this point, I am trying to introduce different industrial relations and basic legal systems in the Czech Republic and Spain. Regarding the latest labour law regulation, I will describe fundamental elements of both labour law types. The following pages cover topics such as types of labour relations, essential information about employment relationships, permanent and fixed term regulation, wide range of contract types, as is typical for Spanish regulation, and in the end, characterization of Czech agreements on work performed outside an employment relationship compared to similar Spanish contracts. Considering the fact that this paper is mainly intended for Czech readers better acquainted with the enactments of the labour law in the Czech Republic, I have elaborated more on the Spanish regulation.

Chapter I

Legal Relations vs. Labour Relations in the Czech Republic and Spain

I.1 Concepts and Definitions

Since the old times, where there were people there were relations, more precisely social relations. This could be understood as a logical or natural association between two or more individuals. I will focus on the legal type of social relations, nowadays, they are linked to every aspect of human life from the very beginning till the very end; nonetheless legal dimension reaches even prior to the birth and also beyond the death. How can we define a legal relation? It is basically any interpersonal relation regulated by law.

According to the Czech doctrine, legal relations originate in conformity with the objective law and arise between specific subjects; right holders and respective duty bearers. Rights and duties form the content of the relation. In the old Czech literature we can find the term *relationship* in the same sense as the term *relation*. However, the Czech Labour Code distinguishes these two concepts; the former is used only for

employment relationships whereas the latter is frequently used in all types of legal connections in the labour field.¹

Objective law always defines who and under what conditions can participate on labour-law relations. These relations consist of rights and duties created at will by some legal act (e.g. signing a contract) or they are based on mandatory provisions of labour law. These provisions cannot be excluded or changed by any agreement of the parties. Mandatory provisions are imposed by public authority as a sign of protective function of labour law.²

The Labour Code (Zákoník práce), Law 262/2006 Coll. in Section 1 defines the labour relations as arising in connection with the performance of dependent work between employees and their employers, those of collective nature, and legal relations before the formation of labour relations. Yet, there are many people who perform work as well but are not covered, partially or entirely by this Code because there is no employment relationship. Their specification is provided by Section 5 of the Labour Code. Public servants who perform state administration as a service provided by the Czech Republic, judicial trainees, public prosecutors, junior lawyers and employees all fall into this group. The above mentioned should be subject to the Labour Code if it is so expressly laid down there or in another Act.

The Spanish legal system falls within the European continental tradition of civil law. Therefore the basic definitions are very similar to those known in our country. Spanish doctrine gives us similar versions of the term „regal relation“ based on the theories of Hans Kelsen and Karl von Savigny summarized by professor De Castro y Bravo, to be the legal situation in which some people are respectively uniformly organized within the legal order by special legal principle.³

The theory also contains the same elements of the active subject who is the obliged party and passive subject who holds the rights; therefore I think further analysis would be quite redundant.

As for the labour relations, these activities are regulated not only by labour or civil but also by commercial law. The Workers' Statute in Art. 1 (Scope of Application) determines the category of relations that are covered by labour-law regulation. Labour

¹ See Boguszak J., Čapek J., Gerloch A., *Legal Theory (Teorie práva)*, EUROLEX Bohemia, Praha 2001, p.111

² See Galvas M. a kol., *Labour Law of Czech Republic (Pracovní právo České republiky)*, Masarykova Univerzita, Brno 2004, p.130

³ See De Castro y Bravo F., *Civil law of Spain (Derecho civil de España)*, Parte general I, 3rd edition, Madrid 1955, p. 616-628

law applies to the workers performing dependant work, which means to voluntarily provide their services, for remuneration at another person's costs and liability, under the authority and direction of another person called the employer (or entrepreneur).⁴

I.2 Sources of Labour Law

I.2.1 Sources of Czech labour law

It is essential to determine the sources of law, to find out what kind of authoritative statements we can apply and to know the rights and duties of subjects. This expression has a wide variety of meanings. I am referring to the material or formal sources of law, from which the latter is the usually discussed matter. Material source of law means the social circumstances that created the impulse followed by the need to regulate certain behaviour. Formal source, on the other hand, answers the question *where* we can find the binding provisions and regulations created or approved by state authorities whose observance is also granted by them. The most common source of continental law is legislation (statutes and delegated legislation); followed by customary law, case law or higher court decisions, international treaties and opinions of authors.

The official sources of Czech labour law are: statutes (constitutional laws, ordinary laws, government decrees and ministerial notifications), international treaties, collective agreements, company's internal rules and primary and secondary legislation of European Communities (hereinafter as "EC"). Court decisions are not official sources but have significance of persuasion for similar cases; that is why the reasoning behind the decision is considered to be the most important part.

In concrete, the main sources are the Constitution and constitutional laws such as Charter of Fundamental Rights and Freedoms.⁵ Among ordinary laws the most

⁴ The Workers' Statute (Estatuto de los trabajadores) Act No. 8/1980 passed on March 10, 1980

⁵ In the **Constitution** (Act No. 2/1993 Coll.) are not special provisions expressively dealing with labour law, it contains general rules of law, "state bind by law" principle, incorporates binding force of international law into the legal order through the Article 10 along with the prevalence of international treaties (that met certain conditions of adoption and ratification) in case that national law states different rules than the treaty. **The Charter of Fundamental Rights and Freedoms** (Act No. 2/1993 Coll.) contains more specific labour-law rights. The Article 9 prohibits forced labour and regulates exceptions from this restriction. Articles 26 – 30 regulate freedom to choose an occupation, obtain means of living by work, social protection of those who cannot provide for themselves, right to form and to join trade unions for the protection of his interests, right to strike, right to fair wages and satisfactory

important is the Labour Code, Employment Act and Collective Bargaining Act.⁶ I should also mention the Public Servants Act regulating the service of public servants, which has not taken effect yet.⁷ Many other acts connected to labour law are dealing with labour law only marginally, the rest of the issues are governed by secondary legislation. The large number of important secondary legislation was already incorporated into the Labour Code of 2006, which makes the orientation in labour legislation a little bit easier.

Since May 1, 2004 the Czech Republic forms part of the European Union, hence the whole *acquis communautaire*⁸ became the integral part of the national legal order. Primary law, secondary law as well as court decisions affect us as a member state.⁹ Many directives had already been implemented to the Labour Code, or were enacted as individual separate acts.¹⁰ Some directives have vertical direct effect on individuals, and are directly applicable before being implemented by member states under certain conditions; provisions have to lay down the rights clearly, precisely, unconditionally while time limit for implementation has expired.¹¹

The sources of the EC law, mainly regulations, come into force by being published in the Official Journal of the European Communities which does not leave the Member States with an opportunity to change or modify them whatsoever.¹²

Concerning decisions of the European Court of Justice (hereinafter as "ECJ"), they are binding for the national courts of member states in cases of preliminary ruling. The courts have to apply previous decisions or refer their own preliminary question to the ECJ and wait for the change. Even though it seems that ECJ considers its rulings generally binding which could overly help the legal certainty, we have to understand the rulings as important source of law for the interpretation of principles of EC law that can

conditions of employment, right to special health and labour protection of pregnant women, minors and handicapped people and last but not the least social security benefits for the needy.

⁶ Employment Act (Act No. 435/2004 Coll.) sets forth the rules for Czech nationals and foreigners regulating access on the employment market in Czech Republic.

⁷ Act No. 218/2002 Coll. the next possible year of effect is set on the year 2012. The date of effect has been postponed so many times that even 2012 is not very certain.

⁸ The law of the European Union.

⁹ Primary law consists of Treaties establishing the Communities and the European Union. Secondary law consist of regulations, directives, decisions, opinions and recommendations, agreements, communications and recommendations, and white and green papers.

¹⁰ For example, for the long time anticipated the Anti-discriminatory Act that recently 1st September 2009 came into effect, which is the reaction on the directive 2000/78/EC establishing general framework for equal treatment in employment and occupation.

¹¹ See decision of ECJ C-6/90 Francovich v Italy

¹² Štefko M., Czech Labour Law in European Context, Charles University in Prague, Faculty of Law 2007, p. 44

either extend or narrow them according to the social situation or conditions, hence maintain the flexibility of law.¹³

International law (more precisely international treaties) is another item on the list of formal sources. Treaties are concluded between states or can result from activities of international organizations.¹⁴ They become a part of national legal order if they had been approved by the Parliament, ratified by the President and are legally binding. They appear in the publication called Collection of International Treaties which appeared for the first time in the year 2000. Before this date, the information about their conclusion and approval was publicised in the general Collection of Laws of Czech Republic (hereinafter as "Coll.")

After this brief international excursion I come back to the national sphere where I have not run out of the possible labour law sources. Collective agreements are normative contracts concluded between an employer (or an employer organization) and his employees. Employees can be organized in trade unions or in works councils. Since collective agreement is a legal act, the parties who stipulate it must have contractual capacity, which in this case workers council does not have.¹⁵ According to the Section 22 LC, only a trade union is legally entitled to conclude an agreement. What can be the subject-matter of collective agreements is set forth in Section 23 LC as well as differentiation between a plant agreement and a higher level agreement.¹⁶ Collective bargaining agreement is not the only „internal“ source of law. The Labour Code recognizes two further sources. Firstly, internal rules (or regulations) mentioned in Section 305 LC. By this instrument an employer may set out wage or salary rights only if the respective collective agreement lays down this possibility or if no trade union exercises activity at an employer's undertaking, more so the regulation can not impose duties on any individual employee. It is issued as a written document binding for both sides. The second type is called work rule (or regulation) regulated in Section 306 LC

¹³ See Raitio J., Laporta F., Peczenik A., Schauer F., *The Principle of Legal Certainty in EC Law*, Kluwer Academic Publishers, 2003, p. 87 - 89

¹⁴ In labour law field the most important is ILO – International Labour Organization.

¹⁵ Vysokajová M., Kahle B., Doležilek J., *Labour Code with Commentary (Zákoník práce s komentářem)*, ASPI, a.s., Prague 2007, p. 48

¹⁶ It may in particular regulate wage and salary rights and other rights in labour relations as well as rights or duties of the parties to such agreement. A collective bargaining agreement may not impose duties on individual employees. Legal definitions provides Section 23(2) LC. A plant agreement is concluded between one employer or more employers and one or more trade union organizations operating at such plant. Whereas a higher level agreement is concluded between an organization (association) or organizations (associations) of employers and the competent trade union organization or trade union organizations.

which also cannot impose any duties to individuals, and cannot regulate anything that pertains to the realm of the aforementioned internal rules; it can only detail the provisions of the Labour Code or other statutory provisions. The Employer needs foregoing written permission from the trade union to issue this document.

As for the last type of source we can consider moral principles which are not used by themselves, only in case that other acts and provisions assign their application.¹⁷ In the Labour Code we can find the reference in Section 13 and 14 LC. Employers should create and develop labour relations in compliance, among others, with good manners (bonos mores); the exercise of rights and duties ensuing from labour relations may not infringe, without a legal cause, the rights and legitimate interests of the other party to the labour relations and may not be in breach of good morals. The wider connection to the Czech Civil Code enables application of Section 39 of the aforementioned code which declares legal act, whose content or purpose may contradict or circumvent legislative act or can be contrary to good morals, to be invalid. Sometimes this moderating component can even overrule provisions very clear and precise but in the particular case causing unjust consequences which would be eventually considered immoral i.e. “contra bonos mores”. In conclusion, good morals mainly serve as a guidance principle for the interpretation of law.

1.2.2 Sources of Spanish labour law

First of all I would like to dedicate the first two paragraphs to a short introduction to the Spanish legal system. The formal sources are well enumerated in the Spanish Civil Code (hereinafter referred to as “SCC”). According to Article 1 SCC the sources are legislative acts, customs and general principles, whereas customary rules can be used only if there is no applicable law and must not be contrary to the public morals or public order. The general principles can be used if there is deficiency of law or custom without losing their illustrative character. The jurisprudence has a complementary role to the legal order that repeatedly establishes the Supreme Court while interpreting the law, custom or general principles of law.

¹⁷ See Galvas M. a kol., Labour Law of Czech Republic (Pracovní právo České republiky), Masarykova Univerzita, Brno 2004, p. 48

Spanish legal system is hierarchical; the laws of lower jurisdiction can not conflict laws of a higher jurisdiction. The rank is, from higher to lower level: organic laws can be very well compared to our constitutional laws, ordinary laws and unique acts with legislative power called legislative decrees and decree laws.¹⁸ Then there are regulations dictated by the executive power, usually by the Government.¹⁹ As well as in our country, they specify and detail the laws.

It is the Workers' Statute (referred to hereinafter as "WS") directly governing contracts of employment, representation of workers in an enterprise and collective bargaining, sets off the sources of legal relations in Art.3.1 WS as the laws and regulations of the State, collective agreements, volition of the parties and use of local and occupational practices and customs. Even though it is rather incomplete, there is no doubt the supranational law and general principles are included as well.

The Spanish Constitution (cited hereinafter as "SC") elaborates its labour content in a similar manner as most modern constitutions. It encompasses the right to found unions (the syndical liberty) and to strike, to collective labour bargaining, duty and right to work, and to the free choice of profession or trade, to advancement through work, and to a sufficient remuneration for the satisfaction of employees' needs and those of their families, as well as no discrimination on account of their gender.²⁰ The right to lockout and free enterprise is recognized within the framework of a market economy.²¹ A wide variety of social and economic rights promote policies guaranteeing professional training and retraining, labour safety and hygiene, the need of rest by

¹⁸ **Organic laws** (Leyes Orgánicas) regulate predefined types of issues, as set in the Spanish Constitution: the Autonomy Statutes (Estatutos de Autonomía de las Comunidades Autónomas Art. 81 SC), electoral laws (Art. 69 SC), ombudsman (Defensor del Pueblo, Art. 54 SC), Council of State (Consejo de Estado, Art. 107 SC), military organization (Art. 8 SC), abdications and renunciations of the Crown (Art. 57 SC), popular initiative and referendum (Art. 87, 92 SC), authorization of international treaties (Art. 93 SC), and most importantly laws specifying the fundamental rights and public liberties of citizens („reservas de leyes orgánicas“ the Art. 81 SC). **Ordinary laws** ((Leyes Ordinarias) are all the laws whose subject matter is not reserved to organic laws by the Constitution. Legislative delegation must be expressly granted to the Government for a concrete matter and with a fixed time limit for its exercise. Art. 82 SC Government provisions containing delegated legislation shall bear the title of „**Legislative Decrees**“ Art. 85 SC. The **Royal Legislative Decree** (Real Decreto Legislativo) is mainly used as a form that approves the full revised text of certain statute or law (Texto Refundido). „In case of extraordinary and urgent need, the Government may issue temporary legislative provisions which shall take the form of **decree laws** (Decreto Ley) and which may not affect the legal system of the basic State institutions, the rights, duties and freedoms of the citizens contained in Part 1, the system of Self-governing Communities, or the general electoral law.“ Art. 86 SC.

¹⁹ The two types are: **Royal Decree** (Real Decreto) issued by the Council of Ministers and **Order** (Orden Ministerial) dictated directly by ministers and is of lower level than the decree.

²⁰ Art. 28, 35, 37 SC

²¹ Art. 37,38 SC

limiting the duration of working day, by periodic paid holidays, full employment, economic stability, social security, protection of emigrants etc.²²

The most important State laws are the Workers' Statute²³, the law on the prevention of work-related accidents²⁴, the law on infractions and sanctions in social order²⁵ and the law on labour procedure²⁶. Regulations are abundant mainly in the fields of prevention of labour accidents or social security, e.g. the royal decree governing the working regime of the Social Security's mutual insurance associations.²⁷

Self-Governing Communities can not regulate almost anything due to the fact that Art. 149 SC reserves labour legislation to the State however the Constitutional Court interprets the „labour legislation“ in the strict sense, narrowing the meaning only to employment relationship of the worker who performs dependent work, therefore Communities can regulate employment policies, constitution and organization of labour administration or subventions to the employers to motivate them to reduce working hours or to improve working conditions.²⁸

In another group of sources we can mention collective agreements, framework agreements with normative effect, agreements on specific matters, company pacts and binding judgements in arbitration. I would dedicate few lines to each and every one of them starting with collective agreements. There are two types of collective agreements that vary according to their normative power. The first type is based on the provisions of Workers' Statute and thus has normative efficiency. The content of an agreement is imposed automatically to the individual labour relationship without any need of special employer-employee contract. The breach of this Statute-based type falls to the ambit of social jurisdiction. The second type is purely a contractual agreement following the provisions of the Spanish Civil Code. It is elaborated in situations of necessity when the company's committees, workers' representants or trade unions decide so, if the negotiating parties cannot conclude collective agreement for disputes or also in the case if the requirements for elaboration of the Statute-based agreement have not been met

²² Art. 39 – 52 SC

²³ Royal Legislative Decree 1/1995 of 24 March that approves the revised text of the Workers' Statute.

²⁴ Law no. 31/1995 of 8 November (Ley de Prevención de Riesgos Laborales)

²⁵ Royal Legislative Decree 5/2002 of 4 August that approves the revised text of the law (Ley sobre infracciones y Sanciones del orden social).

²⁶ Royal Legislative Decree 2/1995 of 7 April that approves the revised text of the law (Ley de Procedimiento Laboral)

²⁷ Royal Decree 688/2005 of 10 June regulating working regime of the Social Security's mutual insurance associations that deal with industrial accident and occupational illness as an external prevention service.

²⁸ Ramírez Martínez, Juan M., Curso de Derecho del Trabajo 17a edición, Tirant lo Blanch, Valencia 2008, p.68

(e.g. the minimum representative percentage to form a bargaining commission could not be reached). They can choose this type voluntarily as well. Breach of this agreement is resolved in the same way as an ordinary contract before civil courts.²⁹

Framework agreements are stipulated between associations of trade unions and employer associations and their purpose is to create rules for bargaining or rules for solving problems between collective agreements of different levels, but only generally for a specific industrial field or territory. On the other hand agreements, on concrete matters although they are very similar, can contain only particular issues, for instance, extrajudicial solving of labour conflicts.³⁰ Company pacts (*pactos de empresa*) have normative power and are subsidiary to collective agreements. They can be used only if and when we cannot apply any provision of collective agreement in force or when it is laid down by the Workers' Statute.³¹ Arbitration judgements or conciliation agreements resulting from the extrajudicial proceedings of labour disputes concerning collective agreements are binding for the parties and have the normative effect like if they were Statute-based collective agreements.³²

The use of customs is quite reduced, allowed only if there is lack of law, conventions, and collective agreements while at the same time three conditions are fulfilled: they are in long-term use, generally approved in certain industrial field, have social or professional character and are not contrary to existing laws.

General principles of labour law are mostly incorporated in labour provisions. Only very few are unwritten e.g. in *dubio pro operario* which means that if there is a norm with ambiguous interpretations the one in favour of the worker should be applied.

At last, European and international law follow the same path as in our national legal system so I will not talk about them again.³³

²⁹ Ramírez Martínez, Juan M., *Curso de Derecho del Trabajo* 17a edición, Tirant lo Blanch, Valencia 2008, p.69-72

³⁰ Art. 83.2 WS

³¹ Company pact can be compared to our internal regulation. It can comprise professional classification (Art. 22 WS), promotion rules, provisions about payslip (Art. 24 WS), irregular distribution of working hours (Art. 34.2 WS) etc.

³² Art. 91 WS

³³ International treaties become internal laws once they have been signed, ratified and published in the Official State Bulletin (*Boletín Oficial del Estado*, or B.O.E.), Art. 96 SC.

I.3 Basic Rights, Principles and Contractual Freedom

I.3.1 Basic rights, principles and contractual freedom in the Czech Republic

Basic principles do not have normative character. They are general legal rules modifying provisions, guiding and helping the interpretation. In some cases, principles are embodied to the written law, which gives them the normative strength of law that has to be applied. We should bear them in mind while using any provision, in this case, of labour law.³⁴

A labour relationship is a type of private law contract guided by private law principles. Even though the whole branch of labour law is separated from the civil law, they are connected, otherwise it would be impossible. Before the new Labour Code of 2006 was enacted, civil law did not have subsidiary effect. The natural ties were forcefully broken and labour law was basically excluded from the civil law. The previous regulation was directed by peremptory rules, following the principle "*what is not permitted is prohibited*", which diminished contractual freedom. Right now the Labour Code contains a different, rather contrary principle;³⁵ "*what is not prohibited, is permitted*" and got fully back into the civil law family, where the will of subjects is far more independent and free than it is in public law. Nonetheless, contractual freedom is still considerably limited, leaving the freedom only in the negotiation of individual working conditions. To sum it up, parties may not deviate from the provisions explicitly designated or indicating that no derogation is acceptable, may not eliminate the provisions referring to the application of the Civil Code or deviate from the provisions stipulating liability and reflecting EU regulations, unless such derogation is in favour of an employee.³⁶ After all, this makes labour law relations more flexible than they used to be, and civil law broadens its application under certain conditions to the employer-employee relationship, resulting to become subsidiary.³⁷ Very confusing situation was

³⁴ See Galvas M. a kol., Labour Law of Czech Republic (Pracovní právo České republiky), Masarykova Univerzita, Brno 2004, p. 98

³⁵ Section 4 LC adopted principle of delegation that was supposed to be easier to apply. Delegation means that LC contains only specific sections of CC that can be used in labour law relations, or those explicitly excluded. But this Section (among many others) was revoked by the decision of the Constitutional Court on 12 March 2008, file number I.ÚS 83/06 or 116/2008 Coll.

³⁶ Section 2(1),(2) LC

³⁷ Subsidiary application means that if the Labour Code does not provide otherwise, the Civil Code can be used. It is not written in the Labour Code itself, but according to the reasoning of the Constitutional Court it is natural private law principle. Civil code will be used in cases if Labour Code does not have

created because the subsidiarity principle lives along with the old delegation principle which remains noticeable in many parts of the Labour Code.³⁸ The above said does not change anything to the fact that contractual freedom finally found its way to our labour law. This includes the freedom to choose a contractual partner, freedom to choose whether or not to enter into a contract, to decide its content and form as well as its termination.³⁹ Fundamental principles are laid down in the Labour Code in Sections 13 and 14. As a general clause is considered to be Section 14 LC "*The exercise of rights and duties ensuing from labour relations may not infringe, without a legal cause, the rights and legitimate interests of the other party to the labour relations and may not be in breach of good morals (contra bonos mores)*". Section 13 LC enumerates duties of an employer that are more of a guideline nature than a direct obligation, nevertheless, an employee can demand its fulfilling before the courts. An employer, for example, may not transfer the risk from performance of dependent work to employees; must ensure equal treatment and non discrimination for all employees and job seekers; must comply with the principle of equal pay; must provide to each employee the information concerning labour relations, must acquaint employees with the relevant collective (bargaining) agreement and internal rules; may not impose on an employee a monetary sanction for a breach of duty ensuing from his labour relationship (this does not apply to damages for which an employee is liable); may not require from his employee the securement of a labour relationship obligation; least but not the last, an employee is entitled to be assigned work within the scope of the normal weekly working hours before the initiation of work.

The target of criticism definitely aims to the fact that in the latter mentioned section we can find only employers' duties but not a single one of an employee that might have been e.g. respecting the legitimate interests of an employer, duty to cooperate with other employees or to be loyal to the employer which plays very important role in building trust and confidence in the employer-employee relationship.⁴⁰

We can count in an additional principle of Section 3 LC that dependent work may exclusively be carried out in employment relationship in accordance with the

special regulation of the matter, if the Labour Code doesn't exclude provisions of Civil Code expressively, and if the application is not against labour law principles.

³⁸ Delegation to the CC is still present in the Section 6, 8, 9, 12, 18, 23, 28, 39, 177, 187, 191, 248, 249, 271, 324, 326, 329, 331, 333, 334, 363, 376, 384 of the LC.

³⁹ Urbančíková, A., Contractual freedom in labour law (Smluvní svoboda v pracovním právu), Právo a zaměstnání no.7-8/2005, p.32

⁴⁰ Jakubka, J., The first experiences with the application of the Labour Code (První zkušenosti s používáním nového zákoníku práce), Práce a mzda no.3/2007, p.15

Labour Code.⁴¹ The rest was already remembered above, in the part dealing with Constitution and Charter of Fundamental Rights and Freedoms.

1.3.2 Basic rights, principles and contractual freedom in Spain

In the Spanish labour law the private law principles are in common use (the principle of minimal regulation, the principle of the optimal condition or irrevocability of rights). The relation of the Workers' Statute and the Spanish Civil Code is subsidiary. In other words, in case some question is not regulated by the Statute, there is a loophole in the law (*laguna de la ley*), Civil Code shall be used (e.g. regulation of cause, object and consent while considering validity of employment contract, lapse of time). In the whole Statute there is only one case of direct delegation to the Civil Code which does not make any rule of it (in Art. 7.6 WS full contractual capacity). As for the principles peculiar to the labour law we can subsume already mentioned "in doubt, for the benefit of the employee" (*in dubio pro operario*) or "the most favourable norm" for an employee (*la norma más favorable*). In case of collision of interpretation within one norm or two valid norms of the same level in hierarchy where one excludes the use of another, we use the principles mentioned above. Principle of the most favourable condition (*condición más beneficiosa*) can be found in Art. 3.1 c) WS, it means that participants to the contract can establish by a mutual agreement (or an employer unilaterally) working conditions more favourable than those in the legislation or collective agreements, and will become a part of the individual conditions of the employment contracts realized. In case the employer decides not expressly, to establish the condition, some time is needed to be considered existent, even though jurisprudence takes into account only those stated explicitly.⁴²

⁴¹ As an employment relationship are taken in account: employment relationship and legal relations based on agreements for work performed outside an employment relationship.

⁴² However, collective agreement can never be a source of the most favourable condition, occasionally can be connected to certain job position and if a person changes position he/she will lose the condition. Otherwise the condition is intangible and can be accumulated; resulting in practical consequence that if any law or collective agreement amends certain condition, the most favourable one will change automatically for the better. For example: collective agreement gives 31 days of vacations, the most favourable condition for some group of specialized workers is 33 days, if later the collective agreement establishes 32 days of vacations, the special group of workers will have right to 34 days. There are also three ways to "neutralize" the most favourable condition, first is the renouncement of an employee or by an agreement with an employer, second can be due to substantial changes of work conditions (Art. 41 WS), third is by mechanism of "Absorption or Compensation". All the three types have to be permitted in the collective agreement.

Pursuant to Art 17.1 WS is the right not to be discriminated against both direct and indirect, prohibiting the employer to discriminate employees or job seekers on the grounds of sex, marital status, age,⁴³ disability, origin, race or ethnicity, social condition, religion or convictions, political ideas, sexual orientation, affiliation to the trade unions or its agreements.⁴⁴ To ensure observance of this right, an employer has to elaborate a plan of equality (un plan de igualdad) that has to be applied in case that the following four situations occur. First, if the company (not only the workplace) has more than 250 employees either fixed-term or permanent ones. Second, if company's collective agreement says so. Third, if the higher labour authority imposed sanctions to the company and in place of the accessory penalties, their obligation is to elaborate and exercise this plan of equality. Fourth, company voluntarily decides so while government encourages this initiative by providing some kind of support (e.g. necessary technical help).

The right to respect dignity and private life more amplified in Art. 2. e) WS as well as in Art. 7 of the organic law 3/2007 for the effective equality of women and men (Ley Organica para la Igualdad Efectiva de Mujeres y Hombres) targets „attacks“ due to sex or sexual orientation, which could be presented as any conduct of verbal or physical sexual character contemplating or producing offensive attack against a person especially when it is done in an intimidating or degrading manner.

Another important basic right is the right to promotion and professional formation in Art. 19.4 WS and Art. 19 of Law on the prevention of work-related accidents (hereinafter as “LPWA”). This does not mean that an employer will provide any education to his employees it only means that in case of technological changes or change of position of an employee, which might result in a grave risks for himself or for

⁴³ See decision of the ECJ C-388/07(Age Concern England) concerning Article 6(1) of Directive 2000/78 (on equal treatment in employment and occupation) giving the Member States the option „to provide, within the context of national law, for certain kinds of differences in treatment on grounds of age if they are 'objectively and reasonably' justified by a legitimate aim, such as employment policy, or labour market or vocational training objectives, and if the means of achieving that aim are appropriate and necessary.“

⁴⁴ According to the Art. 314 of the Penal Code a penalty of imprisonment can be imposed ranging from 6 months to 2 years or a fine equivalent to 6 to 12 months for serious discrimination (discriminación grave) at work both in public and private field against a person because of his-her ideology, religion or conviction, ethnicity, race, nationality, sex, sexual orientation, family situation, illness or discapacity, for showing off affiliation to the trade unions, family relationship at work, using one of the official languages in Spain if the employer, after receiving an administrative order or sanction for serious discrimination fails to restore the situation in preceding administrative proceedings. The person supposedly discriminated has to give circumstantial evidence and then the discrimination is presumed to be existent until proven otherwise. To explain the institute of “fine” or “*Días multa*” the accused is sentenced to pay a prescribed amount of money for certain number of days (between € 1.2 and € 300.5).

third parties, an employer has the duty to facilitate proper safety education and practice to avoid these possible dangerous consequences. In this case an employee has the duty to follow the course. Furthermore, Art. 23 WS establishes the right for employees to have necessary time off to attend exams as well as the right to choose the work shift, adjustment of working hours or to take educational/training leave (permiso de formación).

Another employer's legal responsibility (and right of an employee) is to apply safety, health and labour risk prevention policy, that goes along with the duty of an employee to watch his/her own labour safety and health.⁴⁵

Unlike in our labour regulation there are duties of employees laid down directly in the Workers' Statute. Duty to diligence or performance means that an employee does not only put in his/her time but also renders some work in return for the salary.

Another type of duty is considered „good faith of the contract“. The law demands an employee to act in compliance with obligations of his working position. Both employer and employee have to meet requirements of „good faith“ („buena fe contractual“).⁴⁶ Generally, it is explained as that an employee cares enough for the company so that the company does not suffer any damage or loss either done by him/herself personally or just by not avoiding it. It comprises of obligations such as announcing any deficiencies at work (lack of material, malfunction of machines etc.); not causing any accident; not accepting any gifts, advantages or bribe money as a payment for not fulfilling his/her duties; keeping and protecting business secret not only at times when the relationship lasts but after its termination as well; not performing any concurrent jobs (while the contract lasts). According to the sentence of the Spanish Constitutional Court „good faith“ in this sense should not be confused with „loyalty to the company's interests“.⁴⁷

As for the last, we can mention rights and obligations arising from the conception of dependent work, such as employer's right to give instructions, and employee's duty to obey his orders within the labour ambit if they are not illegal, abusive, dangerous for an employee or against fundamental rights, disciplinary right or

⁴⁵ Articles 4.2d), 5.b), 19, 36 and 1.8.b) WS, the LPWA and its regulations, as well as Articles 2, 4.3, 5.2, 11, 13, 29, 39.3 and 40.2 of the Law on social order infractions and penalties (Ley sobre Infracciones y Sanciones de Orden Social, the full revised text approved by Royal Legislative Decree 5/2000 of 4 August)

⁴⁶ Art. 20.2., 5a), 54.2 WS

⁴⁷ STC (Sentencia del Tribunal Constitucional) 1/1998 of 12 January

right to control, duty to contribute to production increase, and not to concur with an employer's activity.

Contractual freedom is recognized constitutionally in Art. 38 SC „freedom of establishment in the economic framework“ which authorizes an employer to determine number of employees, the way of selection as well as choose who can be hired or not. This freedom can be limited by other freedoms mentioned in the Constitution like the principle of equality, non discrimination, the right to work or protection of disabled people along with the state policy of full employment (Art. 40.1 SC). An employer can hire as many employees as he wants but their dismissal is strictly regulated hence more complicated. For the protection of the handicapped people, as well as in our country there should be a minimum of 2% of them in the company with more than 50 employees. There is no obligation to employ them but if not, administrative sanctions would follow.⁴⁸ Concerning the freedom of election, an employer has to bear in mind regulations of employment policy realized by Public Services of Employment (Servicios Públicos de Empleo) or private employment agencies authorized by the National Public Service of Employment (Servicio Público de Empleo Estatal);⁴⁹ antidiscriminatory rules and educational requirements.

Chapter II

Types of Labour Relations in the Czech Republic and Spain

II.1 Types and their division in the Czech Republic

The conception of labour law relations is specified right in the very first section of the Czech Labour Code. Included are relations arising between employers and employees while performing dependent work and collective labour relations. Traditionally, also relations of the employment law regulated by different laws are meant to be in this group.

⁴⁸ Art. 15.3 of the law on social order infractions and penalties.

⁴⁹ In Spain, profit-making intermediary agencies for employment are prohibited in Art. 16.2 WS but in the Law on Employment 56/2003 of 16 December, Art. 21 anticipates intermediary agencies that are authorized but without any distinction whether they are profit-making or not.

In terms of participants we can classify them into the two groups *individual* and *collective*. The individual is comprised of the relations before the creation of employment relationship (even though LC does not expressly indicate the last one as such), those existing simultaneously with the individual employment relationship, and relations derived, connected with the main ones, which can last even without the primary relationship (damage liability or other labour law sanctions). The collective relations are characterized by its protective character. The subjects here are not individuals but employee and employer representative bodies and also the State involved in tripartite negotiations. With a different technique of classification according to the types of rights and duties the division could be into *basic relations* (employment relationship and agreements on work performed outside employment relationship), *other relations connected to the basic relations* (sanctions, control and adherence to the labour law regulations) and *relations of participation on work* subsuming three groups. First, labour relations of judicial trainees, public prosecutors, junior lawyers, and employees, who perform state administration in administrative authorities as a service provided by the Czech Republic to the public according to the Public Servants Act are subject to the Labour Code where it is so expressly laid down in the LC or in another act. Second, civil servant trainees, officials of self-governing local area entities, university teachers, educationists, directors of public institutions of investigation, master mariners and ship captains and its crew, employees of the Probation and Mediation Service, Ombudsman and his deputy, employed advocates and legal assistants, judge and public prosecutor's assistants, trainee notaries, notary candidates, trainee distrainers, distrainer candidates, co-operative and its members governed by the LC, unless other statutory provisions set forth otherwise. Third, public office functions regulated, where this is expressly provided, by the LC or other statutory provisions (except for those performed in employment relationship), however, the last group is not expressly denoted as „labour relations“.⁵⁰ I would at least mention an additional group of high management and other executives in leading management functions (e.g. member of the board of directors). They can not be employed as regular employees, and their relationship is based on the executive contract, which is not an employment

⁵⁰ See Bělina, M., a kol., *Labour Law (Pracovní právo)*, 3rd edition, C. H. Beck, Praha 2007, p. 57 – 62; Section 5 LC

contract. It is beyond the labour law regulation therefore the mandate contract regulated in the Czech Commercial Code shall be applied.⁵¹

II.2 Types and their division in Spain

Spanish labour relations can be categorized in the same manner as in the Czech jurisprudence, into individual and collective or the basic and derived. Our Labour Code has the main division in the Section 5. In the Workers' Statute we can find similar division, right in Art. 1 concerning the scope of the Workers' Statute, describing dependent work and what labour relations do not fall into the ambit of its regulation, together with Art. 2 WS enumerating "special groups" of labour relations. General employment relationship, containing many kinds of contracts used for even more different occasions, is explained later. In the following part I am looking closer at both special and excluded relations.

„*Special labour relations*“ (relaciones laborales especiales), enumerated in Art. 2.1 WS or mentioned as such in other laws are those which do not follow all the provisions of Workers' Statute due to the fact that every single one of them is governed by separate legislation to take account of the particularities of the type of work involved respecting basic rights recognized by the Constitution. Thanks to this special group, the grey zones on the half way between civil and labour relations can be covered.

Top management is regulated by Royal Decree 1382/1985 of 1 August, by an individual contract, the rest by WS and other labour legislation in case that the individual contract refers to them. Collective agreements cannot be applied. The contract has to be in writing, otherwise the person is considered to be a highest ranking executive if his/her job tasks are of that nature.⁵²

⁵¹ Czech Commercial Code (Law 531/1991 Coll.) Section 66(2) and 566 et seq. The Supreme Court decided on the parallel existence of employment relationship and executive function, first in the decision on 17th of August 21 Cdo 737/2004 in the sense that if the position performed on the basis of the employment relationship overlaps with the position of the high management, the employment relationship is void, and also that once a person is an executive, can be hired in the same company only for work that has nothing in common with the high management position. Similarly the decision on 18th December 2003, 21 Cdo 1269/2003 procurement is a special relation between an entrepreneur and a holder of procuration, not an employment relationship, not obstructing the possibility of creating one for different position, with different job description.

⁵² Minimal content of the contract is: identification of the parties, object of the contract, retribution, duration, working time, full dedication, non-competition duty, compensation for extinction of the contract. Probationary period cannot exceed 9 months (in case of permanent contract)

Relations of commercial representative agents are regulated by Royal Decree 1438/1985 of 1 August, by a local collective agreement, and an individual contract. WS is used subsidiarily if the Royal Decree or character of its provisions does not exclude it from the use. The commercial representative is a person who carries out and concludes personally commercial operation on account of an employer without assuming any risks and benefits.⁵³ The contract has to be written and one copy delivered to the Employment Office. Temporary contract cannot exceed 3 years, and probationary period is regulated by WS. Remuneration can be stipulated as fixed, as commission or a mix of both components.

Domestic servants are regulated by Royal Decree 1424/1985 of 1 August with subsidiary use of WS. It is understood to be a special service between a family representant (titular del hogar familiar) and a person who renders services for remuneration, dependently, on another person's account in the area of a household. The „family representant“ does not necessarily have to be an owner of the household, he/she has to be the beneficiary of the performed works.⁵⁴ Household is understood in a wider sense so that the mobile homes or temporary ones are also included. The employment contract may be written or verbal, though it is most often verbal. Social security contributions are much lower than of the normal worker therefore the system totally excludes unemployment benefit, provides a low pension and offers little compensation for dismissal (severance payment).

Professional sportspersons are persons who devote themselves on a regular basis to practising a sport on behalf of, and under the organization and direction of, a sports body or club, in return for payment. The trainers and other sport technicians seem to fall out of this group although jurisprudence often holds contrary opinion. Their work is fully covered by Royal Decree 1006/1985 of 26 June and WS. The contract has to be written with minimal content (parties, object, retribution and duration of the contract). The salary can be either in the individual or collective agreement bearing in mind provisions of the minimal wage.⁵⁵

⁵³ Excluded are the employees with fixed working hours and workplace, and insurance agents. The Royal Decree closely describes rights and duties of both parties that are similar to those of commercial representative in the Czech Commercial Code (Law 531/1991 Coll., § 652 – 672a).

⁵⁴ Excluded are domestic works on account of a company like hotel or cleaning industry, repairmen etc.

⁵⁵ The Royal Decree more regulates working time, vacations, specific rights and duties (right to effective occupation - not to be excluded from training, duty of diligence to his/her physical conditions, observe the game rules, temporary cessations of sportspersons, special causes of dismissal etc.)

Relation of an artist engaged in public performance and an organiser of such production is regulated by Royal Decree 1435/1985 and WS. The activity has to be voluntary on behalf and within an organization of another, for remuneration. As above, the auxiliary technicians and administrations are excluded, along with the private performances which are ranked among ordinary labour relationships. Minors younger than sixteen need administrative authorisation. The contract should be written with minimal content part of which is probationary period (it can be concluded in contracts with duration longer than ten days).

Dock labourers (*estibadores portuarios*) are regulated by Royal Decree Law 2/1986 of 23 May, on the public service of cargo handling, Royal Decree 371/1987 of 13 March and WS if not in opposition to the Law 48/2003 on the economic regime and services provided by ports of general interest. The last mentioned law specifies cargo handling activities like loading, unloading or transloading of a ship on behalf of licensed companies. Every port has to create a port association of economic interest (*agrupación portuaria de interés económico - APIE*) whose objective is to provide its member companies with the dock labourers whose number is limited by a licence. Consequently, the worker is hired by the APIE and according to the needs is assigned to a member company.

Actuation of advocates in law firms is regulated by Additional Disposition of the Law 22/2005 of 18 November, Royal Decree 1331/2006 of 17 November, collective agreements, individual agreements, uses, customs and again subsidiary WS. It is applied to the advocates working in a law firm, on another person's account within an organization and direction of the representant of the law firm. The contract has to be in written form, permanent or temporary up to four years, if exercised longer, it becomes indefinite.⁵⁶

Ultimately, the professions mentioned in other laws to be the type of „special relations“ are for example disabled people in special employment centres, inmates

⁵⁶ Minimal content of the contract: identification of the parties, object, modality of the contract (e.g. training contract), duration, working hours, vacations, retribution, regime of service rendering, additionally probationary period (up to six months with indefinite contract and two months with temporary), permanence and non competence agreements. Furthermore, the Royal Decree contains special duties of an advocate (to respect values, obligations and professional ethics, duty to study continuously, fulfil the tasks diligently, obey the representant/s of the law firm unless the orders are contrary to the principles of advocacy). Anticipated is also breach of duties and special cases of dismissal (e.g. grave loss of confidence between the law firm representant and the advocate) along with those regulated in WS.

performing work in the prison, civil workers in military establishments, resident doctors, minors in detention centres or religion professors.

From the broad group of employees few groups of workers (types of work) are totally excluded from the labour law by Art. 1.3 WS. Some of them are not directly named, even though general description in Art.1.1 WS might seem to be able to subsume them, it is very difficult to distinguish if there are necessary requisites such as dependence or subordination to the direction of another, the difficulties come especially with certain types of association contracts, contracts for work and service contracts. An association contract (in industrial associations) allows putting together money or business to obtain profit, regulated by Art. 1665 CC and Art. 116 of the Commercial Code, the presence of social bound excludes dependence and subordination, it is not a contract of exchange but of an association. So as for the contract for work (*locatio operis*) although the above mentioned requisites of dependent work can be present it is regulated in Art. 1588 CC. The service contract, reflected in Art. 1582-1587 CC, does not fall into the range of labour relations even though it was the real predecessor of the employment contract of these days.

In the final dispositions of the Worker's Statute the major group of „*self-employed workers*“ is excluded from the labour legislation (except if some labour provision says otherwise) and submitted to the new Self-Employed Workers' Statute, the law 20/2007 of 11 July (hereinafter as „SWS“), it is applied to the natural persons who „carry out in an habitual, personal and direct manner, for their own account, and outside the sphere of direction and organization of other persons, an economic or professional activity for financial gain, providing or not providing, occupation for employed workers.“⁵⁷ Half way between an employee and autonomous worker „an economically dependent autonomous worker“ was granted particular interest. He/she has to carry out the economic or professional activity for financial gain, habitually, personally, directly and predominantly for one natural or legal person, called the client, on whom he or she depends economically, receiving from that client at least 75 % of his or her income for the performance of work and economic or professional activities.⁵⁸

⁵⁷ Art. 1 SWS; the Statute further establishes individual and collective rights of self-employed/ autonomous workers (right not to be discriminated, fundamental rights and public freedoms, right to labour risk prevention in the companies who hire self-employed workers, protection of minors, economic guarantees, right to affiliation to the syndicate or professional association of his free election)

⁵⁸ Art. 11-18 SWS, the special provisions deal with situations typical for the employees, such as types and form of contract, professional associations representing this group of workers and special types of agreements “agreement of professional interest” (*acuerdo de interés profesional*), a statutory minimum

Labour relations expressly mentioned in Art.1.3 exclude many relations lacking one or more of the basic elements of dependent work such as servants and employees of the state, local corporations and autonomous communities.⁵⁹ Forced labour is also excluded, the Convention of ILO No. 29 prohibits forced labour but does not consider as forced obligatory military service, civil obligations (jury duty, elections), labour as a penitentiary punishment, emergency works in case of force majeure (fire, floods etc.), community work. The Spanish Constitution apart from prohibiting labour as a punishment, counts with obligatory military service, substitutive social services, possibility to establish civil service to satisfy general needs, and regulates citizen's duties in case of damages or other calamities.⁶⁰

Company counselors and administrators/directors/managers form another excluded group. The activity is limited to the position of a member of an administrative authority in the company executing duties inherent to the specified position. The main problem is to distinguish between a counselor and an administrator absolutely excluded of the labour provisions and a manager that is an employee although also in a special group, because nowhere there are defined their inherent job descriptions.

Finally, the last few groups excluded are works performed for friends, neighbours or voluntarily (charity work) for no remuneration even for the company with profitable nature. Works within the family (by family members) because the work is not considered to be on other person's account and the results flow into the family budget. „Autonomous commercial agents or dealers“ (intermediarios autónomos en operaciones mercantiles) working in a commercial sphere on account of one or more companies but independently, regulating his/her own work conditions, assuming personal obligation and responsibility for the results as well as the risks and benefits of the operation, and for the last authorized transporters with their own heavy goods vehicles who obtained an administrative authorization.

of 18 days for vacation if an agreement does not stipulate more (unlike regular employment, the vacations are not paid), maximal working hours have to be established in the agreement of professional interest, impediments to work (including gender violence), and ways of termination.

⁵⁹ Different bodies of officials are governed by correspondent laws, additional disposition n. 9 of the Law 30/1984 of 2 august on Civil Service Reform Measures (Ley de Medidas para la Reforma de la Función Pública.), Law 7/2007 of 12 April, Basic Statute of the Public Employees (Estatuto Básico del Empleado Público) establishes regime of civil servants and other public employees of the general state administration, autonomous communities, local administrations, public agencies and entities dependent on the public administrations and public universities. Law 55/2003 of 16 December 2003 on the Statutory Framework for statutory staff of the health services.

⁶⁰ Art. 25.2, 30.2, 30.3, 30.4, 31.3 CE, Law 7/1985 of the local electoral regime (Ley de Bases de Régimen Local), Law 2/1985 on Civil Protection etc.

Chapter III

Employment Relationship in the Czech Republic and in Spain

III.1 Formation of Employment Relationship in the Czech Republic

An employment relationship can be created if both parties agree on a contract representing their genuine and free will. Section 33 LC contemplates two possibilities of formation include the contract of employment and appointment. The parties can not use any other type than those presumed in the above mentioned section.⁶¹ The most commonly used is indeed the contract. Appointment is permitted only for public service relationships comprising heads of government agencies, heads of their branches, directors of state enterprises and heads of their branches, heads of state funds (if managed by one executive officer), heads of organizations receiving contributions from the state budget and directors of schools if they are legal entities, unless another Act provides otherwise. An appointment is made by a person competent as laid down in another Act or by the head of the competent government agency. An appointment can establish an employment relationship only if the respected person is not already a participant of another.⁶²

III.1.1 Employment Relationship Participants in the Czech Republic

Employment relationship is concluded between an employer and an employee. An employer can be both natural and legal person employing an individual in a labour relationship. He/she acts in labour relations in his/her own name and bears liability ensuing from these relations.⁶³ An employer of both legal forms, has to have legal

⁶¹ For example election used to be one of the possibilities for the formation of employment contract, and appointment had much wider range of use in the Labour Code of 1965 valid until 31.12.2006. In case some company statutes presume election to institute someone into a job position, it is no longer a way of creation of the relationship but only one of the pre-requirements followed by subsequent contract. Since 1.1. 2007 all the employment relationships already created by election or appointment (in cases not mentioned in Section 33 LC) are considered to be created by an employment contract.

⁶² See Bělina, M. a kol., Labour Law (Pracovní právo), 3rd edition, C. H. Beck, Praha 2007, p. 181;

⁶³ Section 7 LC, in the Section 8 LC is specified that the legal status of employers if they are legal entities shall be governed by sections 18, 19, 19a, 19b, 19c, 20, 20a, 20f, 20g, 20h, 20i, and 20j of the Civil Code.

subjectivity - it is an abstract construct encompassing the ability to have rights and duties; contractual capacity (the legal ability to enter into a contract, acquire rights and incur liabilities); procedural capacity (to make a claim); and be able to assume his/her own liability. The State as an employer is considered to be legal entity but rights and duties are exercised by the head of the competent government agency.⁶⁴ An individual can be subject to the rights and duties since their birth but the full contractual capacity in terms of being an employer acquires a person who has yet reached the age of eighteen, other modalities of early emancipation mentioned in the Civil Code (emancipation for the purpose of marriage of minors over sixteen years of age) cannot be used, because the LC contains special provision excluding the one in the Civil Code. On the other hand, employing other persons as employees (e.g. a driver, gardener or domestic servants) is allowed without any special permission to any citizen who is legally capable.⁶⁵

On the other hand, an employee needs to be only fifteen years old to enter into the employment relationship, however, employment contracts start date cannot precede the day of termination of compulsory education. There is one exception from the full contractual capacity laid down by the Section 252 LC, an „agreement on liability“ (liability for the values entrusted with an employee) may be concluded with an individual only if he/she is eighteen years old. The children under the age of fifteen (or until they finish compulsory education) may only perform artistic, cultural, advertising or sport activity under the conditions laid down in the Employment Act. The activities should be suitable for their age, must not be dangerous, does not obstruct education, and not harming his/her healthy physical, mental, moral or social development. The permission is issued by the employment office after a petition is submitted by a legitimate representant of the child.

Unlike the Spanish Constitution, our Constitution does not contain the right to employment but the Charter of Fundamental Rights and Freedoms does contain increased labour protection of women, adolescents, and persons with health problems; more specified in LC, the minors under the age of eighteen should be provided with a break of thirty minutes after every four and a half hours, forty-eight hours of

⁶⁴ Other employees of the agency may enter into such legal acts under the conditions laid down in the Act on the Czech Republic's Property and Representation in Legal Relations.

⁶⁵ Vysokajová M., Kahle B., Doležilek J., Labour Code with Commentary (Zákoník práce s komentářem), ASPI, a.s., Prague 2007, p. 31 and Section 9 of the Czech Civil Code

uninterrupted rest period per week.⁶⁶ The minor cannot perform overtime work and night work, only if it is necessary for their formation or education, they can perform one hour of night work, which must immediately follow his daytime work according to the schedule of working shifts. They may not be employed underground on the extraction of minerals or drilling tunnels or galleries, perform work which is inadequate, hazardous or harmful, or exposes them to an increased risk of injury. Pregnant women and women until the ninth month after giving birth have the right to change shifts, request to work only part-time or request some other suitable adjustment to her weekly working hours, instruction to go on business trips only with their consent, right to breaks for breastfeeding etc.⁶⁷

III.1.2 Employment Contract (*Essentialia Negotii*)

Employment contract is a formal agreement between an employer and an employee, stating the terms of employment in an organization. It is an expression of contractual freedom, where an employee can choose his/her employer, type of work, workplace to satisfy his/her individual needs. The relation is characterized by the performance of dependent work defined in Section 2(4) LC as a “personal performance of work by an employee for his employer within the relationship of the employer's superiority and his employee's subordination, according to the employer's instructions (orders), or according to the instructions given in the employer's name, for a wage, salary or other remuneration paid for work done within the working hours (or otherwise determined or agreed time) at the employer's workplace (or at some other agreed place), at the employer's costs and liability.”⁶⁸ The contract is valid as soon as the basic terms as well as additional agreements, that one part considers to be necessary, are agreed upon. The minimum content of a contract is according to the Section 34 LC: the type of work which the employee will perform, the place or places of work, the date on which the employee will start working. Employment relationship is created the day given in

⁶⁶ Sections 88(1), 92(1) LC

⁶⁷ Division 3 LC (Sections 239 – 247), more detailed description is in the ministerial notification n. 288/2003 Coll. determining work and workplaces prohibited to the pregnant and breast-feeding women, mothers till the ninth month after giving birth and to the minors.

⁶⁸ See Supreme Court decision file number 21 Cdo 59/2005, the employment relationship comprises both active component part (to perform something – dare, facere) and passive component (omittere, non facere) which can be required to fulfill his/her labour duties (to refrain from activities that would harm an employer as an aspect of loyalty), therefore, an employment relationship does not end with the end of workshift, assumed obligations can be breached even during the rest periods or vacations.

the contract as the date when he/she takes up work. Determination of the contract to be indefinite or temporary is not one of the essentials because it is deemed to last for an indefinite period, unless a fixed term has been expressly agreed. The ruling of the Czech Constitutional Court liberated contractual freedom to that extent that the parties can divert from many of the provisions of the LC and stipulate many labour conditions differently.⁶⁹

The employer must conclude the contract in writing and give one copy to the employee. This is a measure preventing future disputes arising from the oral employment contracts. Nevertheless, the unwritten contract is still valid, only the employer may be sanctioned according to the Law 251/2005 Coll. on labour inspection. This consequence was adopted to protect employees to avoid „de facto employment relationships“; Section 21(1) LC sets down the rule that nullity due to the lack of form (e.g. in writing) required by the LC may not be applied to an employment contract. The principle of relative invalidity newly incorporated into our Labour Code makes void only those contracts whose invalidity was pronounced by court upon request by the injured party.⁷⁰

Directive 91/553/EC provides that an employer shall be obliged to notify an employee of the essential aspects of the contract or employment relationship. It is elaborated in Section 37 LC, where the employment contract does not include the details of the rights and duties arising from an employment relationship, the employer shall notify his employee in writing within one month from the formation of such employment relationship (if it is longer than one month). The information must contain: name of the employer and employee, seat or address of the employer, more specified job description and workplace, the length of paid vacation, or the method of determining it, information about the notice periods of termination, the weekly hours of work and their schedule, wage or salary details and the remuneration method (pay days and the place and method of payment), facts on collective agreements and its participants. This information is usually included in the individual contract therefore no

⁶⁹ Decision of the Constitutional Court on 12 March 2008, file number I.ÚS 83/06 or 116/2008 Coll. declaring obligatory only the provisions regulating participants, compensation of a damage, provisions enumerated in Section 363(1) LC compiling the European law or provisions implying to have mandatory character.

⁷⁰ In the previous Labour Code of 1965, the absence of written contract established only void employment relationship viewed as “de facto relationship” protecting the employees to the same extent as were regular employees, except for the cases of termination of the “contract” which could be renounced by any party at any time.

other written information is necessary. In some cases other details are provided in internal regulations or collective agreements.⁷¹

III.1.3 Other Agreements to the Employment Contract

Probationary period (trial period) is the initial period of employment, during which the employer carefully considers whether the employee's work performance is sufficient enough and if he/she fits into the workplace. In most states it is generally between 30-90 days, in our country it cannot exceed three months, once stipulated less can not be exceeded to the remaining three months. The period is suspended during the impediments to work on the part of the employee. It may also be agreed in connection with establishing labour relations by the appointment, and always has to have written form otherwise is void.⁷² There is no distinction between types of employees and applicable probationary period as it is in Spanish labour law.

A non-competence agreement is a written agreement protecting an employer from exploitation of know-how or knowledge acquired by an employee, while working for an employer. It can be justly required from the employee with regard to the nature or information. An employee has to refrain from performance of gainful activity which would be identical with his employer's business activity or which would be of a competitive nature for no longer than one year. An employer is bound in the agreement to provide adequate monetary compensation to the employee (not less than his/her monthly earnings) or may withdraw from the agreement but only while the employee is still employed. The employee may terminate the agreement if the employer has not paid him the monetary compensation or its part within 15 days of the maturity day.⁷³

So as for the wage, it is agreed in the relevant collective agreement or employment contract or the employer determines it in the internal regulations or the relevant wage statement but always before the start of carrying out the work.⁷⁴

⁷¹ See the decision of ECJ C-306/07 (**Ruben Andersen v Kommunernes Landsforening**) stating that „an employee who is not a member of a union which is a party to a collective agreement governing his employment relationship is being regarded as 'covered by' that agreement“ and therefore has the right to be „informed“ in the light of the Directive 91/533/EEC.

⁷² Section 35 LC

⁷³ Section 310 LC

⁷⁴ Section 113 LC

It may also be important for an employer to establish the right to send an employee on business trips if necessary, without this agreement an employee cannot be obliged to do so.⁷⁵

III.2 Formation of an Employment Relationship in Spain

An employment relationship governed by the Workers' Statute can be created only by an employment contract. Unlike our Labour Code, an appointment is not another alternative for its formation. Generally, the institute of appointment exists and aims at the same type of people as in our legislation – public officials but their relations and appointment itself is regulated by administrative law.⁷⁶ The non-civil service employees working in public offices are hired according to the labour legislation for the private sector.⁷⁷

III.2.1 Employment Relationship Participants in Spain

One of the basic elements of the employment contract is the contractual capacity of a worker which is closely connected with age and nationality. Two situations can occur considering the age requisite. Firstly, full capacity, where no other consent is needed. Secondly, limited capacity, where authorization is required as stated in Art.7.6 WS. The full capacity to conclude employment contract enjoy those with the full general contractual capacity conformable with Art. 314 Civil Code. All types of employment contracts can be stipulated by persons 18 years old or older, a minor

⁷⁵ Section 42 LC

⁷⁶ The public officials are covered by numerous legislation. Basic rules are in the Law 7/2007 of 12 April, Basic Statute of the Public Employees (Estatuto Básico del Empleado Público), however the legislative, executive or judicial bodies, armed forces, security corps, staff of the “Bank of Spain”, “Deposit Security Funds”, Trust Entities, have their own legislations, with subsidiary use of the Statute of Public Employees. The Law 11/1985 of 2nd August on trade union freedom (Ley Orgánica de Libertad Sindical) recognised the right to collective bargaining and trade union freedom for civil servants. The Law 9/1987 of 12 May on representative bodies in public administrations (Ley de Órganos de Representación en las Administraciones Públicas) establishes participation their employment conditions. The Law 30/1992 of 26 November on Jurisdiction of the Public Administrations and Common Administrative Proceedings (Ley de Régimen Jurídico de las Administraciones Públicas y del Procedimiento Administrativo Común)

⁷⁷ These employees occupy positions of maintenance workers and technicians, this possibility was introduced by the Law 30/1984 of 2 august on Civil Service Reform Measures (Ley de Medidas de Reforma de la Función Pública) For more see:

<http://www.eurofound.europa.eu/eiro/2001/02/feature/es0102232f.htm>

(younger than 18) emancipated through a marriage or a minor (younger than 14) emancipated by a judge, and a person younger than 18 and older than 16, single, living independently from their parents with their consent but without their economical support. The rest of minors have limited capacity and need parental consent (or consent of a tutor or an office responsible for the minor). The consent authorizes a minor to perform all the rights and duties of the relationship including resignation. Lack of consent makes the contract void but the right to remuneration for the work already carried out remains.

The Spanish Constitution grants the right to employment only to the Spanish Citizen (Art. 35.1 SC). Foreigners, of course, can work upon fulfilling special conditions stipulated by law.⁷⁸ EU citizens follow different regulatory regime of European legislation.

Although the worker has contractual capacity, some types can be prohibited for many different reasons like age, sex, education or health condition. There is absolute prohibition of any work for minors under 16 years of age except for the public performances however, the public labour authority has to give consent if there is no danger for physical or educational development (Art. 6.4. WS). Another restriction regards employees younger than 18 which can not perform overtime work, has to have a thirty-minute break every four hours, night work or other work considered dangerous or unhealthy.⁷⁹ Working conditions have to be adjusted as stated in Art. 26 LPWA for the pregnant and breast-feeding women, enabling them to change job position or function, suspension in case of risk during pregnancy adopt measures to prevent them from night work or shift work. Other differentiation between sexes is not permitted due to non-discrimination policy, therefore some parts of the Decree of 26 July 1957 relating to the work prohibited to women and minors have to be suspended. Educational limitations are mentioned in Art. 39 WS concerning functional mobility in the sense that one company does not have any other limitations than specific educational requirements.

An employer can be both personal and legal entity as well as a foundation for which the work is performed. In concrete, we have to determine the real person in

⁷⁸ Ordinary law 4/2000 of 11 January reformed by the ordinary laws 8/2000 of 22 December and 14/2003 of 20 November on the rights and freedoms of foreigners in Spain and their social integration (*Ley sobre los Derechos y Libertades de los Extranjeros en España y su Integración Social*). Specified in the Royal Decree 2393/2004 of 30 December.

⁷⁹ Art. 6.2 WS and Art. 27.2 of the law on the prevention of work-related accidents (LPWA). List of types of work prohibited for young persons under the age of 18 years is contained in the Decree of 26 July 1957 and Directive 94/33/CE prohibiting working in mines.

charge („el titular“) who has the right to give orders and make decisions about the employees as well as the means of production. The person always has to be natural person with full contractual capacity according to the Civil Code (subjects older than eighteen, older than sixteen emancipated through a marriage or independently living minors with parental consent).

There are special requirements for the employees of the public sector.⁸⁰ The State (including Autonomous Communities) represented by the Public Administration Sector Conference as a cooperation body and the Public Employment Coordination Committee as a technical and working body for the coordination of staff policy runs the agenda of recruiting new employees in accordance with Art. 103.3 SC. The public officials, to be hired, have to pass a special public exam (oposición) or undergo evaluation of his/her curriculum along with the exam, ages served and courses taken (concurso-oposición).⁸¹ Working in the public sector is viewed as prestigious where only individuals getting the best public-exam grades are inscribed on the list, and have to wait until some position is offered to them.⁸²

III.2.2 Employment Contract (Essentialia Negotii)

Definition of the employment contract is not mentioned in any Spanish statute, it can only be derived from the Art.1.1 WS, and defined as a contract where an employee voluntarily binds him/herself to render services personally for remuneration at another person's cost within the organization and direction of an employer.⁸³

The function of the contract is to create a relation between an employer and an employee and also to regulate working conditions

⁸⁰ Art.103.3 CE „The law shall lay down the status of civil servants, the entry into the civil service in accordance with the principles of **merit and ability**, the special features of the exercise of their right to union membership, the system of incompatibilities and the guarantees regarding impartiality in the discharge of their duties.“ The public sector covers all levels of government (central, regional and local) and all sectors in which the State is active (education, health, transport, energy, etc.).

⁸¹ Regulated by Law 7/2007 of 12 of April, Basic Statute of Public Employees.

⁸² Out of the all employed citizens in Spain 19 090 000 (60.15% of the population) 2 637 000 works in public sector (it is 13.8% of all the employees) available at http://www.mpr.es/NR/rdonlyres/B06AE95E-C289-49A0-9C6E-3435867D9001/100805/Public_employment_SpainINTERNET.pdf

⁸³ This is a traditional demonstration of dependence, an employee has to comply with the working hours, work exclusively for the employer obey his rules and instructions and be subject to employer's control. But as gradual changes continue towards more flexibility, even without some of these elements, the relationship does not become independent. Vice versa, if some autonomous professions have components of dependence it does not make them dependent as well.

Essential elements required in performance of contracts are: the consent, the object and the cause pursuant to Art. 1261 CC. What could be emphasized is that the contract is fully consensual therefore perfect upon conclusion, without any regard to actual start of the work. The consent has to be free, voluntary and done by somebody with contractual capacity. Object of the contract has to be possible, certain and not against the law or „good customs“ (contrario las buenas costumbres).⁸⁴ The cause is identified with its typical social function, and consists in an exchange between subordinated work, retribution at an employer's expense and responsibility. The form of the employment contract can be either written or oral (Art.8.1 WS). Although the written contract is not necessary it is strongly encouraged, however in some cases written form is obligatory, when a legal provision prescribes so (e.g. in the case of training contracts, formation or vocational contracts, relief and fixed-discontinuous contracts, performance of a determined assignment or service, part-time and domestic employment contracts, as well as those entered into by employees hired in Spain to work abroad for Spanish companies. Similarly, temporary contracts due to production circumstances with duration of over four weeks shall also be in written form. The written form has to be observed when required by law or one of the contracting parties. Art. 8.2 WS establishes presumption that in case of the absence of written form, full-time permanent contract was concluded, if not proved otherwise by temporal character of the said work.

If the employment relationship exceeds four weeks, employer has to inform in written form an employee of the essentials of the contract and major work conditions or their possible changes. Royal Decree 1659/1998 names the essentials as such: identification of the parties, the date of commencement of the employment relationship and its supposed duration, address of the employer and address of the workplace and whether or not it has a mobile character, professional classification, salary or wage and the periodicity of the pay day, the distribution of working time, the right to vacation, notice period of dismissal and applicable collective agreement. In case one of the parts is invalid, it does not affect the validity of the rest of the contract. The fact that the whole contract would be void does not affect an employee's right to remuneration for the hours actually worked.

⁸⁴ Art. 1271 of the Spanish Civil Code

III.2.3 Other Agreements to the Employment Contract

Probationary periods are a common element of most employment contracts that can be used as a screening tool to find out abilities of an employer and his/her adaptation to the company. It has to be stipulated in a written form otherwise it is not valid and cannot be convalidated afterwards in the collective agreement (e.g. establishing all contracts to have probationary period). The law declares null probationary clauses if an employee had been working in the company with the same job description although with different contract or under different modifications.⁸⁵ Generally, the clause will be invalid if the company knows well enough the employee's skills well enough. Probationary period cannot exceed 6 months for the employees with technical degree, for the rest of the employees 2 to 3 months.⁸⁶ The collective agreement can determine different duration not only in lesser extent but higher as well, excluding the respective legal provisions. Only if it is obviously excessive or arbitrary creating abuse of the right it becomes inefficient and the Statutory limits will apply. After all, while concluding every single employment contract, the period can be lower than the one set out in the law or collective agreement. In situations like sickness, maternity, adoption or custodianship, probationary period is extended for the time that had been missed. After the probationary time elapses, the normal terms of the employment contract will come into force.

Loyalty oaths are designed to limit employee's ability to change employers and work for a competitor or him/herself. We can find three types of Spanish employment contracts. First, *full dedication agreement* ("pacto de plena dedicación) employer can oblige an employee to sign this agreement to ensure that he/she will not render services for another employer but only for adequate compensation (Art. 21.1. WS). An employee can renounce this agreement in written form with the notification period of 30 days, and get back his/her liberty to work somewhere else, losing economic benefits or other rights implied.

Second, *"non-competition agreement"* (pacto de no concurrencia), once the employment relationship ends, obligation of non competence lasts if it was explicitly concluded within the following legal limits (Art. 21.2. WS); for the technical employees

⁸⁵ For example employees who worked there as trainees and continue in same position for the same company.

⁸⁶ For the companies with more than 25 employees the probationary period is 2 months, 3 months are applied in the companies with less than 25 employees. (Art. 14 WS)

it cannot exceed 2 years and 6 months for the rest of employees. An employer has to have a real industrial or commercial reason, and has to pay remuneration to the employee (if he does not pay, the employee is not bound by the agreement, on the other hand, in case the employee does not fulfil the obligation, he/she has to indemnify the employer with fixed amount of money decided by a judge).

Other type could be translated as "*permanency in the company agreement*" (pacto de permanencia en la empresa), if an employee received some education or special training in order to launch some project or to carry out specific work at expense of an employer, an agreement to stay in the company can be concluded. The obligation cannot last longer than 2 years and has to be stipulated in a written form.

III.3 Permanent and Temporary Employment Contracts

III.3.1 Permanent and Temporary Contracts in the Czech Republic

The Czech Labour Code contains in Art. 39 a brief description of the two alternatives of contract duration stating that an employment relationship lasts for an indefinite period unless a fixed date has been expressly agreed.⁸⁷ A temporary employment relationship between the same parties may be agreed or prolonged for a total period of two years from the beginning of such employment relationship between the same parties within the said period, only if there is an interruption of at least six months, previous employment contracts are not taken into account. It means that the parties can conclude only one two-year long temporary employment relationship or few shorter ones until they reach the maximum of two years. This regulation reflects the limitations laid down by the Directive 1999/70/EC trying to prevent unlimited repetition or prolongation of the temporary contracts.⁸⁸ The few exceptions to this rule are: when special law requires fixed-term employment relationship as a condition for the creation of other claims; the replacement of an employee when he/she is not able to perform work; grave operational reasons on the part of the employer consisting in the specific features of the work (the reasons have to be specified in the written agreement or in the

⁸⁷ The date can be determined by specified date, event (completion of specific task, return from maternity or parental leave) or by number of days to be worked. If the date is not precisely specified it has to be identified in a way ruling out any doubts of when the temporary contract shall terminate. See Supreme court decision file n. 21 Cdo 512/2001, SRNS, volume n. 15, p. 121

⁸⁸ Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP

internal regulation of the employer if there are no trade unions engaged).⁸⁹ If an employer concludes this contract without fulfilling the above conditions and the employee gives written notice insisting on being employed, the employment relationship becomes indefinite. This also occurs if an employee continues working after the contract duration elapsed and, at the same time, the employer knows about this continuation. The rules above can not be applied on the contracts between an employment agency and an employee assigned temporarily for another employer.

A temporary contract is a widespread as instrument of flexibility enabling workforces to be maintained at low cost but employers should pay more to temporary workers in order to compensate them for their higher instability and reduce their rotation costs. The use of fixed-term employment contracts for the sake of labour market flexibility and employment growth, may cause side effects like low job security and short employment relations can thwart training and lower labour productivity. Temporary workers are supposed to be equally paid for the same tasks as their permanent counterparts, and labour laws defend them against discrimination. Our country has a low proportion of temporary (fixed-term) contracts than we can find in other countries. According to the Czech Statistical Office the temporary contracts represent 8% of the whole labour law contraction both in the year 2002 and 2008.⁹⁰

III.3.2 Permanent and Temporary Contracts in Spain

According to Art. 15.1 WS, employment contracts can be stipulated as indefinite or temporary. Even though it is an individual decision there are certain rules. Permanent employment contracts are used in general. Every permanent contract has to be communicated to the respective Public Service of Employment within ten days of the commencement of the contract. „Transition“ from the temporary to the permanent contract is possible in case the temporary contract circumvents the law (Art.15.3 WS). The very specific consequence follows if an employer does not fulfil the duty to pay his

⁸⁹ See decision of ECJ C-519/08 (*Koukou v Elliniko Dimosio*) “successive fixed-term employment contracts can not be used on the sole ground that such use is founded on provisions in the general laws or regulations of a Member State. Whilst, the concept of ‘objective reasons’, must be justified by the existence of specific factors connected inter alia with the activity in question and the conditions under which it is carried out.”

⁹⁰ Czech Statistical Office, Yearbook on Employment Statistics 2009, Table 2.35: Proportion of employees with temporary contracts (Podíl počtu zaměstnanců se smlouvou na dobu určitou) available at [http://www.czso.cz/csu/2009edicniplan.nsf/t/5B004C401D/\\$File/3111090235.pdf](http://www.czso.cz/csu/2009edicniplan.nsf/t/5B004C401D/$File/3111090235.pdf)

share of social insurance contribution longer than given probationary period that could have been concluded. If so, the temporary employee acquires the same conditions and treatment as permanent one. Jurisprudence considers circumvention of the law in cases when: the temporary contract does not meet the proper requirements, especially causal temporary nature (however, a wrong choice of the type of temporal contract constitutes only formal irregularity); the contract, having an indefinite character at the beginning, is afterwards "completed" with a time limit; and if an employee exceeds twenty-four months in the period of 30 months in one company at the same position under two or more temporary contracts or its modifications (except for internship, relief or provisional contracts).⁹¹

A feature of the Spanish labour market is the high incidence of all types of fixed-term contracts. In a relatively short period of time, the Spanish labour market went from having virtually no temporary work to a proportion of 31% of all the contracts in the year 2002, since then the percentage decreased only to 29,3% covering one third of the whole economy.⁹² Spanish employers utilize this institute at large during the periods of unemployment contracting different employees every single year, avoiding the obligation of severance pay circumventing the maximal period of temporary contract for one employee.

The law contemplates various cases of its use. To hire an employee for the realization of work or service; if the market circumstances result in the excessive need of employees as a response to the increased labour tasks; in case of substitution for the employees with the right to get back their job positions, for example a woman returning from her maternity leave. Other legally contemplated cases of temporary contracts are those helping and supporting employment. It includes the substitution of employment contracts with „relief contracts“ to replace employees who are partially or entirely retired, temporary contracts that can be concluded with disabled people or by certain companies (empresas de inserción), internship contracts such as vocational training contracts or trainee contracts.

⁹¹ See the decision of ECJ C-378/07 to C-380/07 (*Angelidaki, Greece*) concerning the Fixed Term Work Directive (1999/70/EC) saying that „the renewal of successive fixed-term employment contracts in the public sector is deemed to be justified by ‘objective reasons’ within the meaning of that clause solely on the ground that those contracts are founded on legal provisions allowing them to be renewed in order to meet certain temporary needs when, in fact, those needs are fixed and permanent.“

⁹² Sciarra, S.: *The evolution of labour law (1992-2003)*, National Report by Rodríguez-Piñero Royo, Miguel C., *Developments in Labour Law in Spain Between 1992 and 2002*, Office for Official Publications of the European Communities, Luxemburg 2005, p.247-286 available at http://www.nd.edu/~lawlib/students/guide_labor_law/v2EvolutionofLabourLaw.pdf

All the above mentioned suggest that there is a significant amount of contractual types and modalities. We can define numerous basic contracts from which two are considered indefinite and the rest is a fusion of temporary full-time or part time employment contracts. I believe each of them deserves a brief introduction.

„*Contract facilitating permanent contractation*“ (contrato para el fomento de la contratacion indefinida). It is a type of a permanent contract regulated in additional dispositions to the law 12/2001 of 9th July, and has to be concluded in consistency with the official model in a written form, with the unemployed who generally have difficulties entering the labour market. Their objective is to facilitate collocation of the following groups.⁹³ The main difference from the general permanent contract is that the indemnification in case of wrongful dismissal is rather limited and that the contracts cannot be used in the company where in previous six months collective dismissal was issued or in case the court declared wrongful dismissal (unless the collective redundancy was accepted by the workers' representants).

„*Contract for the realization of work or service*“ (contrato por obra o servicio determinado) is a contract with a determined duration, in order to contract workers for determinated work or service, who work independently („con autonomía y sustantividad propia“) within the scope of the company, whose duration, although limited in time, is at the beginning uncertain.⁹⁴ Collective agreements can identify certain work or tasks that can be covered by this type of contract but cannot modify it to such extent to create a new type of contract or broaden its prerequisites to tasks that cannot be subsumed to the general activity of the company. Usually, it is used for permanent works that need concession. The form should be written with clear and precise specification of the work or service. If a worker is hired by this contract for other tasks or in case the written form is not observed, the contract would change into indefinite, if not proved the obvious temporality of the work performed. The estimated duration can be concluded, but in case

⁹³ Young people between the ages of 16 and 30, unemployed women in professions with small ratio of women, people older than 45, handicapped and those registered at a public employment office (unemployment register) longer than 6 months, with those who were previously employed in the same company for a fixed term, worked as trainees or to get vocational training. With the cancelation of the contract, employee is entitled to 33 days of salary for every year of employment up to max. 24 months.

⁹³ Art. 15.1. a) WS and Art. 2 Royal Decree 2720/1998 of 18 December, it is also used for works

⁹⁴ Art. 15.1. a) WS and Art. 2 Royal Decree 2720/1998 of 18 December, it is also used for works that are not inserted in constant „seasonal cycle“. They are performed ordinarily but are individualized and not permanent. For example: a cook at school have fixed-discontinuous contract because it is repeated activity in certain periods but not the whole year. On the contrary if the school offers extracurricular activities, which are habitual but not the same every year we use the contract for the realization of work or service.

of non fulfilment the contract remains valid but the contract can not be prolonged, only concluded new one for different assignments. Termination of the contract is possible by realization of work along with fifteen days prior notification (verbal or written) where the contract was concluded for a period longer than one month. Non-fulfilment obligates an employer to pay compensation equivalent to the salaries correspondent to the remaining period of time determined in the contract.

„*Eventual contract for the reasons of production*“ (contrato eventual por circunstancias de la producción) is used to face up an increase and accumulation of tasks due to the economical circumstances within company activities. A collective agreement can determine types of work to be covered by this contract and the maximum number of contractors. Maximal duration can be up to six months during the course of twelve months, the prolongation is permitted only once but still for the maximum period of six months, when the maximum time is exceeded, the worker gains the permanent status as with an indefinite contract.⁹⁵ The contract has to have a written form if the duration is more than four weeks or concluded as part-time; the reason for its justification has to be clearly and precisely described, referring to the provisions of the Workers' Statute or the Royal Decree is not considered sufficient.⁹⁶ Extinction comes after the time concluded in the contract elapses or after the notification by one of the parties. Without this notification of termination, the contract is extended to the legal maximum of six months, or becomes indefinite if the six months had been already reached.

„*Transitory contracts*“ (contrato de interinidad), the two objectives of this contract are: first is to replace absent workers who have the right to come back to the company and to obtain their previous job position; second is to temporarily occupy a position with someone during the process of selection or promotion in order to fill it permanently.⁹⁷ Moreover, there is a special presumption used to replace a female worker, gender violence victim, who suspended her contract or uses her right to „geographical mobility“ or a change of a workplace.

⁹⁵ Art. 15.1 b) WS and Art. 3 of Royal Decree 2720/1998 of 18 December. This contract is used in public sector (public administrations) not when there is lack of officials but when there are vacant positions where a transitory contract should be used.

⁹⁶ Non-performance leads to relative breach of formal requisites.

⁹⁷ Art. 15.1 c) WS and Art. 4 of Royal Decree 2720/1998 of 18 December, In private companies the duration in cases of vacant positions can not exceed 3 months, public administrations are regulated by other norms.

“Temporary contracts to support employment” (contratos para el fomento de empleo) are intended to maintain or expand employment incentives, the two main types are: temporary contract to substitute early retirees.⁹⁸ Second type is a temporary employment support contract facilitating the professional integration of unemployed persons.⁹⁹

„Training contract“ (contrato para la formación) replaced the traditional contract of apprenticeship and is now one of the principal methods used for personnel selection and for absorbing young people into the labour market. They obtain theoretical and practical training required to adequately perform a job or exercise an occupation which needs a given level of qualification. The worker has to be older than sixteen and younger than twenty-one. The age limitation is not taken into consideration in relation to unemployed handicapped people, unemployed for more than three years, the socially excluded, foreign workers, and people incorporated in training workshops (Escuelas-Taller), youth employment centres (Casas de Oficio), and employment workshops (Talleres de Empleo). Its duration cannot be less than six months or exceeding two years, other periods, depending on the nature of the occupation or job, may be fixed through a collective agreement. In this case, the maximum length may not exceed three years, or four years if the contract is concluded with a disabled person. The theoretical education is included in the effective working hours. When the contract is fulfilled, the employer has to give the worker a certificate which attests duration of the theoretical training and the acquired level of practical training.

„Work-experience contract (internship)“ (contrato de trabajo en prácticas) is meant to facilitate professional practice for workers who have recently acquired an academic degree from university or went through vocational training (intermediate or higher), including other recognized equivalent academic degrees (by Ministry of Education and Science or Autonomous Communities) that qualify professional practice. It has to be concluded in the four years immediately following the end of the corresponding studies (or 6 years if the person has some kind of disability). Its duration cannot be less than six months or exceeding two years. Minimal retribution can be laid down by a collective agreement but never less than 60% than ordinary employee

⁹⁸ Art. 1-5 of Royal Decree 1194/1985 of 17 July. The substitutes are recruited from the unemployed registered in the correspondent Employment Office; any modality of the contracts can be utilized except for the eventual contract for the reasons of production and part-time contracts except for the substitution of retirees already working part-time. Minimal duration is one year.

⁹⁹ Art. 17.3 WS, it supports employment of disabled workers and along with the Law 44/2007 regulates insertion companies employing disadvantaged people to enable their rehabilitation into working life.

in the same position receives. Ultimately the employer gives the employee a certificate of practice with time served and job description.¹⁰⁰

Part-time contracts (*contratos a tiempo parcial*) are regulated in Art. 12 WS. The aim is to enable employment when the production process does not require full-time workers or when workers cannot perform their work on a full-time basis, thereby promoting the stability of part-time employment. The employment contract is considered to be a part-time when the services rendered over a given number of hours per day, week, month or year is less than the working time of a comparable full-time worker or less than the maximum legal working time. The contract may be temporary or fixed-term, except in the case of training contracts. Part-time workers may not work overtime, except in the event of force majeure (to repair or prevent extraordinary or urgent damages, however they may agree with the employer to additional or supplementary working hours on top of the ordinary hours stipulated in the contract.¹⁰¹

„*Periodic permanent contract*“ (*contrato a tiempo parcial de trabajo fijo periódico*), is used for work that is repeated periodically at certain dates within normal activity range of a company, the contract has to be of indefinite duration.¹⁰²

„*Discontinuous permanent contract*“ (*contrato de trabajo fijo discontinuo*), Art. 15.8 WS, involves an irregular sequence of activity and inactivity that is not predetermined and also is within the normal range of a company. The work is repeated but not on certain dates. It is mostly used in agriculture. The contract has to be in writing in one document because it is going to be interrupted and renewed every year; the time has to be approximately determined as well as the means of convocation and its detailed rules that have to be already set off in the applicable collective agreement along with specification of working hours. The contract has to be indefinite. Unlike the previous case, the workers do not have the right to be summoned but in case the workers were not called to work according to the rules in collective agreement, the wrongful dismissal can be objected.

¹⁰⁰ Art. 11.1 WS and Royal Decree 488/1998 of 27 of March

¹⁰¹ Art 12 WS amplified in Royal Decree 2317/1993 of 29 December. The contractual number of additional hours may not exceed ordinary hours by 15%, unless otherwise established in a collective agreement, but in any case may not exceed 60%. The total number of ordinary and additional hours may not exceed the maximum legal daily limit for part-time work. Remuneration for additional hours will be the same as for ordinary hours.

¹⁰² Art.12.3 WS, the periods are repeating every year (a hotel receptionist from July 1 till August 31), since the contract is indefinite, if the worker is not summoned to work the next season he/she can claim against dismissal.

“*Replacement contract (hand-over contract)*“ (contrato de relevo) is concluded with workers in the unemployment register or workers who have already a fixed-term contract with a company, to take over the part of the time made available by workers entering partial retirement. The new previously unemployed employee takes over part of work which was reduced to the partial retiree, and later the rest when the old worker finally retires. The working day and wage can be reduced between 25% and 85%.¹⁰³

At last, there are two special fixed term contracts of indefinite as well as full or part time character.

„*Work-at-home contract*“ (contrato de trabajo a domicilio) regulated in Art. 13.1 WS, the work is supposed to be performed at home or a place chosen by the employee without direct supervision from the employer.

„*Group employment contract*“ (contrato de grupo), Art. 10.2 WS, applying to the case where a number of employees are formed into a group, and where the intention is to perform work collectively, an employer does not exercise his rights towards each of them individually but only to their representant who gets paid and distributes the salary to the group. Typical examples of such a group work are groups of musicians or performing artists.

Chapter IV

Agreements on Work Performed Outside an Employment Relationship

IV.1 Overview of the Czech Regulation

Even though employment relationships are the prevalent type of labour relations, dependent work takes in other supplemental temporary types of agreements. Agreements on work performed outside an employment relationship enable employees to obtain economical means of support in case he/she does not have a chance to be contracted as a regular employee by the employment contract or to the contrary, provide for a person already in the regular employment relationship additional source of support. It also brings many benefits to the employer; opening a possibility to contract

¹⁰³ Art. 12.6 and 7 WS with Art. 166 of The General Law of the Social Security (Ley General de la Seguridad Social, approved by Royal Decree 1/1994 of 20 June), Royal Decree 1131/2002 of 31 October, and new Law 40/2007

someone for work assignments of a lesser extent, more specific, not strictly based on an organizational subordination and avoids many duties and obligations arising from the employment relationship. This results to weaker protection of this relationship, more specifically of the employee, bearing at the same time greater contractual freedom. This type of work (as well as the participants) is subject to special regulation of Sections 74 – 77 LC and subsidiary to the provisions of employment relationship except for the regulation of remuneration, working hours and rest periods, severance pay, impediments to work on the part of an employee and termination of an employment relationship, which does not mean they cannot conclude it in an individual agreement. This type of employment is sometimes identified as „precarious employment“.

There are two modalities of the agreements. First, an *agreement on work performance* (dohoda o provedení práce) where work performed may not exceed 150 hours in one calendar year. The said amount of hours also includes hours of work carried out by certain employee for the same employer in one calendar year based on another agreement on work performance. An agreement setting out more than prescribed limit would be void, however, could be considered to be an agreement on working activity or employment contract. The agreement does not have to have a written form because of the smaller extent of works performed under it. The content should clarify the work description, extent of the work and remuneration which can not be less than minimal wage. Termination of the contract depends on what was stipulated otherwise the legal provision indicates the possibility of termination by agreement or by completion of work. Notice of termination, immediate termination or withdrawal from it is possible only if laid down by an individual agreement.¹⁰⁴

Second type, an *agreement on working activity* (dohoda o pracovní činnosti) may be concluded by an employer with an individual provided that the volume of work covered does not exceed 150 hours in one calendar year. If it does exceed one-half of normal weekly working hours, this agreement cannot be applied. Fulfilment of this limit is considered in the scope of the entire period for which an agreement on working activity was concluded. If the period exceeds fifty-two weeks, time of the performed work shall not overpass the average of the half of normal weekly working hours in the period of fifty-two weeks.¹⁰⁵ Unlike the previous agreement, this one has to be in

¹⁰⁴ See Bělina, M., a kol., Labour Law (Pracovní právo), 3rd edition, C. H. Beck, Praha 2007, p. 387;

¹⁰⁵ Section 76(2) and (3) LC, practically, the work in particular weeks can exceed one half of weekly working hours but in the computed average it should not exceed the limit.

writing under the sanction of invalidity, whereas one copy has to be given to an employee even without his/her demand. So as to the content, the agreement has to determine type of work, described as an assigned repeated activity - not a specific task, the agreed scope of working hours and the period for which it is concluded (that can be indefinite as well as temporary). In case the basic terms are not validly stipulated or the written form was not followed, the whole agreement is void or, under some conditions, the relationship can be considered as an employment relationship. Unlike the agreement on work performance, here the parties can arrange the right to a paid leave or allowing some impediments to work.¹⁰⁶ A wider range of options for termination of the relationship are available. It can be terminated at a day (if the agreement was temporary), by mutual consent of the parties; unilaterally it may be terminated by any reason or without. The notice period in the latter case is fifteen days starting the day of the notice being served on the other party. An immediate termination of an agreement on working activity can be realized if the parties stipulated certain causes into the agreement.¹⁰⁷

IV.2 Overview of the Spanish Regulation

In the Spanish labour law, we cannot find similar contracts falling out of the employment relationship range as we have in the Czech Labour Code. The system is different, of course, and resembling performance contracts are fully included into the employment relationship. Classification of contract types is much more elaborated and divided than in our labour law, however, Workers' Statute is of very general nature in comparison to our detailed Labour Code, that is why every type of contract as well as other institutes, e.g. special relations is governed by its own royal decree, whereas our Labour Code usually contains special provisions inside. I would at least mention two contracts already described above in the section dedicated to the contracts. First, *a contract for the realization of work or service* has the same object as our agreement on working activity, but its duration is not very limited because is defined as a fixed-term contract, that by law, cannot last longer than two years but certainly not as short as 150

¹⁰⁶ The maternity or parental leave is provided by law without any need to stipulate it separately, like e.g. compensatory salary during sickness, marriage, death of a relative, searching for a new job (Section 191-196 LC, governmental decree n. 590/2006 Coll.)

¹⁰⁷ See Bělina, M., a kol., *Labour Law (Pracovní právo)*, 3rd edition, C. H. Beck, Praha 2007, p. 386-87;

hours. Second, *an eventual contract for the reasons of production*, although considering the detailed description, there are only few similarities to both of our performance contracts, I am giving this example because the object can fall within the group of reasons for which a Czech employer might use an agreement on working activity (excess accumulation of economic tasks, temporary sudden commercial needs of an employer which can be cyclical every year), and the duration is limited to six months during the period of twelve months having the real character of short-time work, not only temporary (defined by Spanish labour law as having the maximum of twenty-four months in the period of thirty months).¹⁰⁸ The specific purpose is preventing its extension to other works or activities for which we can use our performance agreements.

Conclusion

Czech and Spanish labour law belong to the same group of continental law. The democratic social structure and close view on basic human rights, freedoms and principles of law makes these two systems similar in many ways. The main differences arise from the composition of states, different traditions and history. The question of political system is projected in the different legislation types however not much into the content, because after all it has to meet the criteria of the new modern labour law. The general function of the labour law is to protect employees as they form the weaker part in labour law relations. The cardinal labour rights are equally written in basic documents such as the Spanish Constitution or the Charter of Fundamental Rights and Freedoms of Czech Republic. The diversion starts to be visible in the division of labour relations and different classifications. Spanish Workers' Statute excludes many types of individual labour law relations sorting them into a group of "special relations" that are regulated by many Royal Decrees as well as by the Workers' Statute. In the Czech Republic, many of these occupations are not regulated separately or do not exist as a group at all. The special types of employment relationships in Spain are: top management, commercial representative agents, domestic servants, and professional

¹⁰⁸ See the decision of ECJ C-306/07 (*Ruben Andersen v Kommunernes Landsforening*). The words 'temporary contract' in the Directive 91/533/EC are to be interpreted as referring to contracts and employment relationships entered into for a short period. ... it is for the national courts to determine the duration in each... that duration must, however, be fixed so as to provide effective protection of the rights conferred on workers by the directive.

sportspersons, artists engaged in public performances, dock labourers, and advocates in law firms. On the other hand, in our country, top management with commercial representative agents are the matter of the Commercial Code, and the rest is considered to fall within the huge group of self-employed workers totally outside of the scope of the Czech labour law.

So as to the excluded group, the resemblance in both states is very obvious. Spanish Workers' Statute excludes self-employed workers, public servants, company counselors and administrators, autonomous commercial agents or dealers, and works performed for friends and family. The same groups are excluded in our country as well even though not in express words. Only public servants are somewhat connected to the Labour Code in case a certain act or the Labour Code itself say so. The employment relationship in Spain is established solely by an employment contract. Here, along with the contract, an appointment is also possible but for leading employees mainly in public administration. Due to the European legislation essential terms of a contract are practically the same although in case of obligatory written form, Spanish Royal Decree lists more requisites than just the workplace, the type of work and the start date.

Permanent and temporary regulation could be considered as a type of contract per se. In the Czech labour law it has no further differentiation. In Spain, so as to the permanent contract there is no big difference, it is the temporary contract which is divided into numerous different types of contracts. So many modalities, each for different circumstances, which are sometimes hard to use, creating difficulties with subsuming respective work under the appropriate contract. Some of these temporary contract types serve for the same purpose as our agreements on work performance outside an employment relationship.

The purpose of such a variety of Spanish employment contracts is explained as a response to the need in times of crisis and high unemployment in Spain. The effort is mostly seen in the replacement contract, where the elderly people partially retire and the rest is taken over by the unemployed people to integrate them at least a little bit into the labour process. We can also say that this helps to the employers as well by giving them possibility to use special contracts to satisfy their special commercial needs, e.g. it is easier to hire an employee using the "contract facilitating permanent contration" than regular permanent contract because the indemnity for wrongful dismissal are much lower than for the latter.

This all might have helped to revitalize Spanish employment market in the eighties but during this crisis it has no effect at all. From the 45 828 172 inhabitants (as of 1st January 2009) of Spain, 23 101 500 are economically active and 4 010 700 are unemployed. The current unemployment rate is the highest in Spanish history. Over the past 2 years the number of unemployed Spaniards had fourfold and counts 20% of the active population.

The Czech labour law cannot show off such detailed regulation but has the comfort to fit any situation to what is available. The rules are set quite straight therefore not so many disputes arise about the use of appropriate contract type as in Spain. Labour law also was not created for the purpose to fight unemployment. Right now, in comparison with Spain, we are lucky to have only 9.8% of unemployment. Although our labour law contract types do not offer many possibilities and room for manoeuvres simplicity of institutes have many advantages as well. It meets one of the requirements of law, to be comprehensible to laymen.

The differences are not so significant after all. To ensure the effective mobility of workers within the European Union, the regulation is based on the general principle of eliminating any direct or indirect discrimination based on nationality as regards employment, remuneration and other working conditions, and harmonization of all the labour law aspects, accordingly, the basic standards are similar to everyone.

Druhy pracovněprávních vztahů v České republice a ve Španělsku

Hlavním účelem této české části je zhodnotit a shrnout hlavní rysy a rozdíly české a španělské úpravy. Historické pozadí tvorby pracovního práva obou zemí je poznamenáno dlouhými totalitními režimy. Španělsko svrhlo frankistickou vládu v polovině sedmdesátých let a otevřelo se demokratickým reformám. Přijetím nové španělské Ústavy v r. 1978 bylo do právního řádu vtěleno mnoho základních práv a svobod pracovněprávního charakteru (např. právo i povinnost pracovat, právo na svobodnou volbu povolání, zákaz diskriminace či základní sociální práva). Na tyto události navázalo i přijetí španělského zákoníku práce v r. 1980, nazvaný „Estatuto de los Trabajadores“ neboli Statut pracovníků. Vstupem Španělska do Evropských společenství v r. 1986, se spustila vlna legislativních změn, která kulminovala po vzniku Evropské unie. Počínaje rokem 1993 se hlavním motorem změn stala povinnost harmonizace evropských směrnic, které sblíží většinu právních odvětví členských států.

Jiná situace nastala v České republice. Po Sametové revoluci byla vytvořena nová česká Ústava až při příležitosti rozdělení České a Slovenské federativní republiky. Základní sociální práva našla své místo v Listině základních práv a svobod, zákoník práce z r. 1965 byl ovšem zachován. Samozřejmě, že nezůstal nezměněn, musel reagovat na nové potřeby tržní ekonomiky, nástup privatizace a omezený vliv státu. I snaha začlenit se do Evropské unie s sebou přinesla řadu změn v rámci zajištění fungování svobody usazování a tím i jednotného trhu (např. úprava nediskriminace a rovného zacházení, základních pracovních podmínek, bezpečnosti a ochrany zdraví při práci, konkurenční doložky, zákazu řetězení pracovního poměru na dobu určitou atd). Vstupem do Evropské unie již další velké změny nenastaly až do r. 2006, kdy vešel v platnost nový zákoník práce zavádějící princip „co není zakázáno, je dovozeno“ (se značnými omezeními) a delegační způsob propojení s občanským zákoníkem (tzn. občanský zákoník se použije jen tedy, jestliže to zákoník práce výslovně stanoví). Ústavní soud svým nálezem č. 116/2008 Sb. rozšířil smluvní svobodu účastníků mimo jiné tak, že změnil komplikovaná pravidla pro možnost odchýlit se od zákoníku práce a to pouze na případy, kdy to zákoník práce (výslovně) zakazuje nebo z povahy jeho ustanovení vyplývá, že se od něj nelze odchýlit, a od ustanovení, kterými se zpracovávají předpisy Evropských společenství, ledaže by šlo o odchýlení ve prospěch zaměstnance. Pro vztah k občanskému zákoníku byl zaveden princip subsidiarity (tzn.

pokud zákoník práce nebude obsahovat určité pravidlo, vždy se podpůrně použije občanský zákoník). Účastníci tak nadále mohou použít občanský zákoník i bez výslovné delegace zákoníku práce. Vztah španělského Statutu pracovníků a občanského zákoníku (Código Civil) je také ovládnut zásadou subsidiarity. Občanský zákoník je předpisem „obecného práva“ („derecho común“) subsidiárně platným vůči ostatním soukromoprávním předpisům. Explicitní ustanovení o jeho podpůrném použití však nenajdeme ve Statutu pracovníků, ale přímo v úvodních člancích španělského občanského zákoníku.

Prameny práva

Pod pojmem prameny práva rozumíme zdroje poznání práva, které nauka dělí do dvou základních skupin. Prameny materiální, jako společenské okolnosti vzniku daných právních pravidel a prameny formální, jako státem uznané formy vyjádření práva. Pouze takové pravidlo chování, které má státem uznanou formu pramene práva, je právní normou.

K formálním pramenům pracovního práva v České republice řadíme normativní právní akty (Ústava ČR, Listina základních práv a svobod, zákoník práce, zákon o kolektivním vyjednávání, zákon o zaměstnanosti, minimální mzdě či zákon o inspekci práce), vnitropodnikové právní normy (pracovní řád a vnitřní předpis), technické normy upravující bezpečnost a zdraví při práci, mezinárodní smlouvy, primární a sekundární právo Evropských společenství a silou přesvědčivosti působící rozsudky vyšších soudů.

Postupem doby nabývají čím dál tím více na významu kolektivní smlouvy. Jedná se o smlouvy mezi zaměstnavateli a zaměstnanci, jejichž obsahem jsou individuální a kolektivní vztahy. Kolektivní smlouva může upravovat platové či mzdové podmínky a ostatní práva v pracovněprávních vztazích, přičemž nesmí ukládat povinnosti jednotlivým zaměstnancům. Odborové sdružování a kolektivní vyjednávání je hlavním projevem svobody sdružování na ochranu hospodářských a sociálních zájmů garantováno již Ústavou. Zaměstnanci se ve většině případů organizují v odbory nebo v zaměstnanecké rady (mohou působit i vedle odborových organizací), které na rozdíl od odborů nejsou nadány právní subjektivitou, nemohou být proto ani stranou kolektivní smlouvy. V případě, že u zaměstnavatele nepůsobí odborová organizace nebo pokud to stanoví kolektivní smlouva, může výše zmíněná práva zaměstnavatel upravit sám

vnitřním předpisem. Posledním vnitropodnikovým aktem je pracovní řád, který pouze rozvádí ustanovení zákoníku práce a jiných předpisů.

Prameny práva Evropských společenství u nás platí od vstupu do Evropské unie, tj. od 1. 5. 2004. Jedná se hlavně o nařízení, která jsou přímo aplikovatelná v členských státech a směrnice, které musí být ve stanovené lhůtě implementovány do našeho právního řádu. Směrnice může být v určitých případech přímo aplikovatelná. Jednotlivci se jí mohou dovolávat po vypršení časového limitu, který je dán státu k transpozici do národního právního řádu, splňuje-li požadavek přesnosti a jasnosti bez nutnosti další prováděcí úpravy, podmínku bezpodmínečnosti a zároveň poskytuje jednotlivci práva nikoli povinnosti. Pramenem jsou i některá rozhodnutí Evropského soudního dvora. Nejzásadnější význam mají rozhodnutí o předběžné otázce, zajišťující jednotný výklad evropského práva, která jsou závazná pro národní soudy všech členských států. Ostatní rozhodnutí zavazují zúčastněné strany, ačkoli Evropský soudní dvůr považuje všechna svá rozhodnutí za precedenční, čímž je ohrožena právní jistota ostatních států Evropské unie.

Mezinárodní smlouvy jak dvoustranné, mnohostranné či úmluvy které jsou výsledkem činnosti mezinárodních organizací jsou součástí českého právního řádu, pokud byly schváleny Parlamentem, ratifikovány prezidentem a řádně publikovány. Nejdůležitější organizací je v tomto ohledu Mezinárodní organizace práce, která již od r. 1919 formuluje mezinárodní pracovní standardy a vytváří mezinárodní úmluvy, které členské státy mohou či nemusí přijmout.

Doplňkovým pramenem práva, spíše považovaným za výkladové pravidlo, jsou dobré mravy. Pojem dobrých mravů zahrnuje platné normy morálky, které společnost uznává a zároveň má zájem na jejich dodržování. V samotném zákoníku práce jsou zmíněny v souvislosti s výkonem pracovněprávních práv a povinností, které nesmí být v rozporu s dobrými mravy nebo s povinností zaměstnavatele při vytváření pracovněprávních vztahů v souladu s dobrými mravy. V neposlední řadě se může aplikovat i korektiv dobrých mravů v občanském zákoníku, který považuje za neplatné právní úkony, které se přičí dobrým mravům.

Prameny práva ve Španělsku jsou v mezinárodní rovině shodná s naší úpravou. Jak mezinárodní smlouvy, tak evropské právo jsou součástí právního řádu se všemi důsledky z toho vyplývajícími. Španělský občanský zákoník vyjmenovává obecné prameny práva již ve svém prvním článku. Jsou jimi legislativní akty, zvyky a obecné principy, přičemž zvyky je možno použít jen neexistuje-li aplikovatelný právní předpis,

nesmí se však přičít veřejnému pořádku. Právních předpisů je několik druhů. Organické zákony (*Leyes Orgánicas*) by se daly přirovnat k našim ústavním zákonům. Mohou upravovat jen základní práva a svobody, volební zákony, autonomní statuty jednotlivých autonomních oblastí, záležitosti obrany, referenda a další otázky, které stanoví španělská Ústava. Obyčejné zákony (*Leyes Ordinarias*) upravují vše co není vyhrazeno zákonům organickým. Legislativní dekrety (*Decretos Legislativos*) a královské legislativní dekrety (*Reales Decretos Legislativos*) jsou speciální podzákonné právní předpisy se silou zákona, které vydává vláda po předchozí výslovné zákonné delegaci. V případě mimořádné a naléhavé potřeby vydává vláda též legislativní nařízení (*Decreto Ley*), které se ovšem nesmí týkat základních práv a svobod občanů, autonomních oblastí a všeobecného volebního zákona. Běžnými podzákonnými předpisy jsou potom královská nařízení (*Reales Decretos*) a ministerské vyhlášky (*Ordenes Ministeriales*).

Statut pracovníků za prameny pracovního práva považuje zákony a nařízení státu, kolektivní smlouvy, vůli smluvních stran, zvyklosti a praktiky daného zaměstnání. Jako příklad nejdůležitějších předpisů v této oblasti můžeme zmínit Ústavu, Statut pracovníků, zákon o prevenci pracovních rizik, zákon o pracovněprávním procesu a zákon o přestupcích a sankcích na úseku sociálního pořádku.

Z hlediska českého práva je zajímavá úprava kolektivních smluv dvojího charakteru, vymezená zákonnou úpravou, kterou se řídí. První (statutární) vychází ze Statutu pracovníků, má normativní charakter, a její obsah se stává součástí pracovněprávního vztahu zaměstnavatele a zaměstnance bez speciální dvoustranné smlouvy. Porušení povinností z těchto kolektivních smluv se řeší v rámci „sociálního soudnictví“. Druhý typ se zakládá smluvně a spadá do působnosti španělského občanského zákoníku. K přijetí této kolektivní smlouvy je nutné přistoupit v zákonem vymezených případech, např. po rozhodnutí podnikových výborů, zástupců zaměstnanců či odborů nebo nemohou-li se strany dohodnout na podobě statutární kolektivní smlouvy. Vzhledem k občanskoprávnímu základu, se spory z této smlouvy řeší před obecnými civilními soudy. Zaměstnanecké a zaměstnavatelské organizace určitých průmyslových oborů uzavírají rámcové dohody. Otázky v nich zpracovávané jsou ale vždy pouze dílčí, např. mimosoudní řešení pracovněprávních sporů. Posledním institutem jsou podnikové dohody (*pactos de empresa*), které mají subsidiární charakter ke kolektivním smlouvám.

Pracovněprávní principy, práva a povinnosti

O hlavní soukromoprávní zásadě „co není zakázáno, je dovoleno“ jsem se již zmiňovala v úvodu, budu se tedy jen stručně věnovat typickým zásadám českého pracovního práva uvedeným v zákoníku práce. Zákonné vyjádření zavádí principy pracovního práva ve formě povinností zaměstnavatele. Patří mezi ně hlavně zákaz přenášení rizika z výkonu závislé práce na zaměstnance, zajištění rovného zacházení se zaměstnanci, nediskriminace, rovného odměňování za stejnou práci a práci stejné hodnoty, zásada poskytování informací a projednání, zákaz ukládání peněžních postihů za porušení pracovněprávních povinností, zákaz sjednávání zajištění závazku v pracovněprávním vztahu a zásada jednání, a v neposlední řadě vytváření a rozvíjení pracovních vztahů v souladu s dobrými mravy. Na druhou stranu, povinnosti zaměstnanců zde nejsou vůbec zmíněny, kromě těch které lze dovodit z pojmu závislé práce, by bylo možné považovat za povinnost loajalitu, respektování legitimních zájmů zaměstnavatele či povinnost spolupracovat s ostatními zaměstnanci.

Ve španělské úpravě podobná vyjádření existují. Zavazují zaměstnance k povinnosti podílet se na zvyšování produkce a nekonkurovat zaměstnavateli. Souhrnem povinností je definován institut „smluvní dobré víry“, která ukládá zaměstnanci jednat v souladu s povinnostmi vyplývajícími z jeho pracovní pozice a brát ohledy na to, aby zaměstnavateli nevznikaly škody. V praxi to pro zaměstnance znamená ohlašovací povinnost ohledně nedostatků na zařízeních či materiálech, nepřijímat dary či úplatky, dodržovat obchodní tajemství či nepracovat za doby trvání pracovního poměru v konkurenčním prostředí. Španělská úprava k tomu všemu zakotvuje ještě speciální pracovněprávní principy používané jako interpretační vodítka pro výklad všech pracovněprávních ustanovení. Jako hlavní je uváděn princip „v pochybnostech ve prospěch pracovníka“ (in dubio pro operario), který je již z dikce jasný bez nutnosti dalších podrobností. Nastane-li kolize mezi dvěma či více předpisy stejné právní síly, rozpor se řeší „použitím pro zaměstnance výhodnějšího pravidla“. Posledním je princip „výhodnější podmínky“ umožňující sjednat jak dvoustrannou dohodou, tak jednostranně z podnětu zaměstnavatele nadstandardní pracovní podmínky (např. pro určitou skupinu pracovníků), které se tímto způsobem stanou součástí individuální pracovní smlouvy.

Zákaz diskriminace je ve Statutu pracovníků velmi detailně propracován a zakládá nejen sankce v oblasti sociálního soudnictví, ale při vážnějších proviněních hrozí i trestní sankce odnětí svobody od dvou měsíců do šesti let. Diskriminaci v českém prostředí upravuje zákon o zaměstnanosti, antidiskriminační či přestupkový zákon. Diskriminace sama o sobě trestným činem není. Trestní zákon jen definuje několik skutkových podstat trestných činů, které mohou mít souvislost s diskriminačními postoji či předsudky.

Druhy pracovněprávních vztahů

Pracovněprávní vztah je právem upravený vztah alespoň dvou subjektů, který vzniká v souvislosti s jejich účastí na pracovním procesu. Zákoník práce je dělí na dvě základní skupiny, individuální a kolektivní. Předmětem individuálního pracovněprávního vztahu je konání práce za odměnu (zahrnuje pracovní poměr a vztahy vyplývající z dohod konaných mimo pracovní poměr). Řadíme sem i vztahy s tímto související, předcházející vznik pracovního poměru, existující paralelně s nimi (např. vztahy v oblasti bezpečnosti práce) a odvozené od základních (sankční vztahy). Kolektivní pracovněprávní vztahy se vyznačují pluralitou subjektů. Na jedné straně stojí zaměstnavatel (popř. svaz zaměstnavatelů) a na druhé zastupitelské orgány zaměstnanců.

Vztahy, na které se zákoník práce vztahuje jen pokud to ten či jiné předpisy výslovně stanoví a ty, které se jím řídí subsidiárně (tzn. nestanoví-li zvláštní předpis jinak) nazývá nauka dalšími vztahy účasti na práci. Mezi ně patří např. vztahy justičních čekatelů, zaměstnanců ve služebním poměru, čekatelů na výkon státní služby, zaměstnanců Probační a mediační služby, akademických pracovníků vysokých škol, pedagogických pracovníků, velitelů plavidel a členů posádek plavidel provozujících námořní plavbu, advokátů vykonávajících advokacii v pracovním poměru a advokátních koncipientů, asistentů soudců, asistentů státních zástupců, notářských kandidátů a koncipientů, exekutorských kandidátů a koncipientů. Právní postavení manažerů a vysokých vedoucích pracovníků společnosti není nikde upraveno, manažerské smlouvy jsou uzavírány podle ustanovení obchodního zákoníku o mandátní smlouvě.

Španělská nauka nijak zvlášť netřídí pracovněprávní vztahy na základní, odvozené, pracovní či pracovněprávní, ačkoli by bylo možné udělat podobné třídění včetně univerzálně platného dělení vztahů na individuální a kolektivní. Statut

pracovníků definuje nejdříve závislou práci jako základ individuálního pracovněprávního vztahu, dále pracovněprávní vztahy „speciální“ a „vyloučené“.

Za speciální považuje ty, jejichž hlavní těžiště normativní úpravy spočívá v královských nařízeních (Reales Decretos) a Statut pracovníků se na ně použije pouze podpůrně, pokud nařízení nestanoví jinak. Mohou být přirovnány k některým našim vztahům účasti na práci podléhajícím principu subsidiarity. Výčet ve Statutu pracovníků není taxativní a připouští, aby jiné zákony mohly prohlásit za „speciální“ i další činnosti a zahrnuje: vrcholový management, obchodní zástupce, služby v domácnosti neprovozované jako je podnikatelská činnost (služebnictvo, úklid), profesionální sportovce, výkonné umělce, přístavní dělníky (jejichž náplní práce je nakládka a vykládka lodí), podobně jako u nás, advokáty zaměstnané v právnických kancelářích, zdravotně postižené ve speciálních pracovních centrech, práce odsouzených osob ve vězení, civilní zaměstnanci na vojenských základnách, doktory zaměstnané v nemocnicích, mladistvé v nápravných zařízeních nebo duchovní.

Z dosahu pracovního práva jsou ve Španělsku výslovně vyloučení autonomní pracovníci (u nás osoby samostatně výdělečně činné), osoby ve službách státu a oblastních samospráv, veřejní funkcionáři, členové rad či jiných orgánů společností, nezávislí obchodní zástupci, autorizovaní přepravci s vlastními nákladními vozidly a nakonec i sousedské, rodinné a dobrovolné práce, za které nenáleží odměna. Vztahy těchto osob se řídí vlastními právními předpisy, které obsahují komplexní úpravu plynoucí ze zvláštností daného pracovního odvětví. Základní statut veřejných zaměstnanců se vztahuje nejen na veřejné funkcionáře, ale i řadové zaměstnance veřejného sektoru. Samostatně vymezuje účastníky, základní práva a povinnosti, způsob výběru zaměstnanců veřejných úřadů, podrobné dělení jednotlivých kategorií státních zaměstnanců, služební postup, podmínky kolektivního vyjednávání i speciální způsoby zániku pracovního vztahu.

Pracovní poměr

Pracovní poměr se v České republice zakládá zpravidla pracovní smlouvou. Jmenováním vzniká pouze u vedoucích pozic, například organizačních složek státu, státních podniků, příspěvkových organizací či školských právnických osob. Ve Španělsku je pracovní poměr možné založit pouze pracovní smlouvou. Jmenování je institutem administrativním, vyhrazeným pro státní zaměstnance.

Smluvními stranami mohou být v pozici zaměstnavatele právnické i fyzické osoby. Vzhledem k požadavku osobního výkonu práce, zaměstnancem se může stát pouze osoba fyzická. Dle české úpravy, fyzická osoba v roli zaměstnavatele má způsobilost k právům a povinnostem od narození, způsobilost svými úkony nabývat práva a povinnosti, neboli způsobilost k právním úkonům vzniká až dovršením 18 let věku. Ustanovení o zplnoletnění obsažená v občanském zákoníku se pro účely zákoníku práce aplikovat nemohou. Jinak je tomu u zaměstnance, jehož způsobilost mít v pracovněprávních vztazích práva a povinnosti, jakož i vlastními úkony tyto povinnosti nabývat vzniká dovršením 15 let, současně však platí, že nástup do práce může být sjednán až po ukončení školní docházky. Tímto dnem může zaměstnanec plně uplatňovat svá práva a povinnosti. Jedinou výjimkou je dohoda o hmotné odpovědnosti, kterou je možné uzavřít nejdříve v den, kdy dosáhne 18 let.

Ve Španělsku se nerozlišuje mezi pracovněprávní způsobilostí zaměstnance a zaměstnavatele. Plnou způsobilost k právním úkonům a tedy i k uzavření pracovněprávní smlouvy (ať již stojí na kterékoli straně) vzniká zletilostí, tak jak ji definuje španělský občanský zákoník. Ten kromě obecné zásady dovršení 18 let věku počítá i se zplnoletněním v případě uzavření manželství. Plnou způsobilost mají též svobodné osoby starší 16 a mladší 18 let žijící nezávisle na rodičích, bez jejich ekonomické podpory, kteří s tímto způsobem života nezletilého souhlasí. Zplnoletnit „nezávislostí“ lze i osobu mladší 16 a starší 14 let souhlasem soudu. Ostatní nezletilí mají přístup na pracovní trh díky institutu limitované právní způsobilosti upravené ve Statutu pracovníků. Limitovaná právní způsobilost spočívá v udělení souhlasu rodičů (či jiného zákonného zástupce nezletilého) k tomu, aby dítě mohlo uzavřít pracovní smlouvu. Souhlas takto udělený, nezletilého opravňuje ke kterémukoli dalším pracovněprávním úkonům včetně výpovědi. Pro fyzické osoby zaměstnavatele platí, že způsobilost se řídí španělským občanským zákoníkem a nastupuje zletilostí (případně zplnoletněním svatbou či nezávislostí).

Hlavním předpokladem vzniku pracovního poměru je uzavření pracovní smlouvy. Český zaměstnavatel je povinen ji uzavřít písemně s výjimkou případů, kdy je uzavírán pracovní poměr na dobu kratší než jeden měsíc. Ovšem ani nedodržení písemné formy nemá za následek absolutní neplatnost. Pracovní poměr tak bude platný do doby, než se jí některý z účastníků nedovolá. Princip relativní neplatnosti tak odstranil dřívější důsledek neplatnosti pracovní smlouvy - faktický pracovní poměr. Jako podstatné náležitosti pracovní smlouvy stanoví zákoník práce druh práce, který má

zaměstnanec pro zaměstnavatele vykonávat, místo nebo místa výkonu práce, ve kterých má být práce vykonávána a den nástupu do práce. Doba na kterou je pracovní poměr sjednáván není podstatnou náležitostí a není-li uvedena platí předpoklad, že pracovní poměr byl uzavřen na dobu neurčitou. Neobsahuje-li pracovní smlouva údaje o právech a povinnostech vyplývajících z pracovního poměru, je zaměstnavatel povinen zaměstnance o nich písemně informovat a to nejpozději do 1 měsíce od vzniku pracovního poměru. Obsah této informace vychází z evropské směrnice č. 91/553/EC.

Španělské pracovní právo umožňuje pracovní smlouvu jak písemnou tak ústní. Písemně musí být uzavřena pokud to stanoví zákon nebo je to požadavek jedné ze stran. Není-li písemná forma dodržena, má se za to, že je uzavřena na zákonem stanovenou týdenní pracovní dobu a na dobu neurčitou. Statut pracovníků neobsahuje žádné podstatné náležitosti, bez kterých by se pracovní smlouva neobešla. Stanoví pouze povinnost informovat zaměstnance o „základních prvcích“ (elementos esenciales) smlouvy a hlavních pracovních podmínkách, které nejsou již ve Statutu vyjmenovány a vymezuje je až královské nařízení, které také vychází z povinně uváděných informací dle výše zmiňované směrnice.

Zkušební doba je v Čechách jednou z podmínek, které mohou být sjednány ve smlouvě pracovní či jiné. Je nutno ji sjednat vždy písemně na dobu, která nesmí překročit tři měsíce ode dne vzniku pracovního poměru. Následné prodloužení dovoleno není a to i v případě, že byla původně stanovena na dobu kratší než maximální. K prodloužení dochází pouze v případě překážek v práci, pro které zaměstnanec v průběhu zkušební doby práci nevykonává. Španělská úprava je velmi podobná, liší se hlavně délkou zkušebních dob. Zaměstnanci technického zaměření mohou být ve zkušební době až na šest měsíců, s ostatními zaměstnanci je sjednávána na dobu dvou měsíců, je-li ve společnosti více jak 25 zaměstnanců a tři měsíce ve společnostech s více jak 25 zaměstnanci. Kolektivní smlouvy mohou stanovit i doby vyšší než je zákonné minimum. Na druhou stranu, zneužívá-li zaměstnavatel tohoto práva a určuje dobu nepřiměřenou, stane se kolektivní smlouva v tomto bodě neúčinnou.

Pracovní smlouva na dobu určitou a neurčitou

Zákoník práce se zabývá dobou pracovního poměru velmi stručně. Pracovní poměr je sjednán na dobu neurčitou, pokud nebyla v pracovní smlouvě výslovně určena

doba jeho trvání. Způsoby určení mohou být různé, od přesného data, určením počtu měsíců či jiným způsobem ze kterého je možné určit, o jakou dobu se jedná. Mezi týmiž účastníky ji lze sjednat nebo prodlužovat nejvýše na dobu 2 let. Pokud od skončení předchozího pracovního poměru na dobu určitou uplynula doba delší než 6 měsíců, k předchozímu pracovnímu poměru na dobu určitou mezi týmiž účastníky se nepřihlíží. Existují i výjimky pro které toto pravidlo neplatí (stanoví-li tak zvláštní předpis, jedná-li se o náhradu za dočasně nepřítomného zaměstnance, z vážných provozních důvodů na straně zaměstnavatele nebo potřeba spočívá ve zvláštní povaze práce zaměstnance). Sjedná-li zaměstnavatel se zaměstnancem trvání pracovního poměru na dobu určitou, ačkoliv nebyly splněny zákonem stanovené podmínky a oznámil-li zaměstnanec před uplynutím sjednané doby písemně zaměstnavateli, že trvá na tom, aby ho dále zaměstnával, platí, že se jedná o pracovní poměr na dobu neurčitou.

Ve Španělsku jsou ve Statutu pracovníků výslovně vyjmenovány případy, kdy je možné uzavřít smlouvu na dobu určitou. Jedná se o případy, najmutí zaměstnance k vykonání určité práce nebo služby, v důsledku nahromadění úkolů způsobené tržními okolnostmi, v případech zástupu nepřítomného zaměstnance, který má právo po svém návratu získat své místo zpět, či smlouvy na dobu určitou na podporu zaměstnanosti. Přeměna pracovního poměru z určitého na neurčitý je stejná jako u nás, nastupuje tehdy, je-li smlouva sjednaná v rozporu se zákonem (tzv. „fraude de ley“). Mírnější následek nastává pokud zaměstnavatel neodvádí za zaměstnance platby na sociální pojištění po dobu delší než by činila zkušební doba, která by mohla být v konkrétním případě dle zákona sjednána. Zaměstnanec tak získá nárok na „stejně podmínky a zacházení jako má zaměstnanec na dobu neurčitou“. To neplatí, prokáže-li se dočasnost vykonávané práce či služeb. Dvouletá lhůta s šestiměsíční přestávkou je zde formulována tak, že pracovní poměr na dobu určitou nesmí přesáhnout 24 měsíců v období 30 kalendářních měsíců, s výjimkou stáží, smluv o náhradnictví a prozatímních smluv viz níže.

Španělské pracovní právo se nespokojilo s dělením smluv jen dle doby, na kterou se uzavírají. Jednotlivé smluvní typy v sobě zahrnují různý účel, pracovní dobu, dobu trvání i okruh osob s kterými je možno smlouvu uzavřít. Pokusím se stručně charakterizovat ty nejhlavnější. Vzhledem k tomu, že španělské smluvní typy nemají český ekvivalent, jsou jejich názvy pouze orientačním překladem, nikoli oficiálním názvem.

„*Smlouvy usnadňující uzavírání smluv na dobu neurčitou*“ jsou uzavírány s osobami, které mají tradičně ztížený přístup na pracovní trh. Jejich účelem je usnadnit

pracovní začlenění mladých lidí mezi 16 a 30 lety, nezaměstnaných žen v profesích s jejich malým zastoupením, osob starších 45 let, handicapovaných a osob registrovaných na tamějším úřadu práce po dobu delší 6 měsíců. Navíc i s těmi, kteří dříve pracovali na dobu určitou, v rámci stáže nebo pracovní praxe u zaměstnavatele, který tímto způsobem přijímá nové zaměstnance. Hlavní rozdíl od normální smlouvy na dobu neurčitou je omezená povinnost odškodnění v případech neoprávněné výpovědi.

„*Smlouva o provedení práce nebo služby*“ je smlouvou na dobu určitou s nejistou dobou trvání. Z toho důvodu, překročí-li se sjednaná doba, smlouva i přesto zůstává platná. Prodloužena může být, jen změní-li se zároveň i druh práce, který musí spadat do rámce předmětu činnosti zaměstnavatele. Kolektivní smlouvy většinou určují okruh prací, které budou zajišťovány těmito zaměstnanci, protože zaměstnanec pracuje na zaměstnavateli relativně nezávisle. V případě, že by nebyla uzavřena smlouva písemně nebo druh práce nesplňuje zákonné požadavky, změní se na smlouvu na dobu neurčitou.

„*Příležitostná smlouva závislá na okolnostech produkce*“ čelí zvýšené potřebě a nahromadění pracovních úkolů závislých na ekonomické situaci. Kolektivní smlouva, stejně jako v předešlém případě určuje okruh prací i maximální počet kontrahentů. Doba na kterou je smlouva uzavřena nesmí přesáhnout 6 měsíců v období 12 měsíců jinak se její trvání opět změní na dobu neurčitou.

„*Prozatímní smlouvy*“ jejichž účelem je nahradit nepřítomné zaměstnance, kteří mají právo vrátit se na své pracovní místo po odpadnutí překážky v práci nebo dočasně zaplnit uvolněnou pracovní pozici v době probíhajícího výběrového řízení. Speciálním případem je využití této smlouvy k nahrazení pracovnice, oběti sexuálního násilí, která dočasně přerušila pracovní poměr a využila možnosti změny pobytu či místa výkonu práce.

„*Smlouvy na dobu určitou na podporu zaměstnanosti*“ jejich účelem je zvýšit počet zaměstnaných osob buď nahrazením předčasných důchodců nezaměstnanými osobami nebo pomocí podpůrných smluv na dobu určitou usnadňující profesionální uplatnění handicapovaných nezaměstnaných ve společnostech jako jsou u nás chráněné dílny. Smlouva nesmí být sjednána na částečný úvazek a musí být uzavřena alespoň na dobu jednoho roku.

„*Smlouva o odborné praxi*“ nahradila tradiční učňovskou smlouvu a stala se jedním z hlavních způsobů začleňování mladých lidí do zaměstnání, tím, že získají jak praktické tak teoretické znalosti v oborech, které vyžadují určitou úroveň praxe.

Smlouva nesmí být uzavřena na dobu kratší než šest měsíců a delší než dva roky. Odborná praxe je v určitých oborech považována za součást vzdělání, je proto určena osobám od 16 do 21 let. Věkové omezení se nevztahuje na osoby zdravotně postižené, nezaměstnané déle než tři roky, sociálně vyloučené, zahraniční pracovníky, a osoby začleněné v učňovských dílnách, zaměstnaneckých centrech pro mladistvé či zaměstnaneckých dílnách (podobné našim rekvalifikačním centrům). Teoretické vzdělání je nedílnou součástí odborného výcviku a počítá se do pracovní doby. Za vykonanou práci přísluší odměna, která nesmí být nižší než stanovená minimální mzda. Podobnou povinnost u nás zakotvuje školský zákon, podle kterého zaměstnavatel musí poskytnout žákům středních škol a studentům vyšších odborných škol odměnu za produktivní činnost ve výši 30% minimální mzdy.

„*Smlouva o stáži*“ poskytuje stážistům příležitost získat praktické zkušenosti spojené s jejich studijním programem. Stážistou může být pouze absolvent vysoké, vyšší odborné školy či držitel jiného Ministerstvem školství uznaného titulu. Smlouvu mohou absolventi uzavřít pokud od konce jejich studia neuběhly více jak čtyři roky. Doba trvání stáže nesmí být kratší šesti měsíců a delší dvou let. Na rozdíl od neplacených stáží jak je známe u nás, ve Španělsku je nutné stážistovi platit mzdu, která nesmí být nižší než 60% mzdy srovnatelného zaměstnance dané firmy.

„*Pracovní smlouva na částečný úvazek*“ je jakákoli smlouva, která je uzavřena na dobu kratší než stanovená týdenní, měsíční či roční pracovní doba nebo na dobu kratší než je pracovní doba srovnatelného zaměstnance na plný úvazek v dané společnosti. Ve Španělsku pracovní poměr na částečný úvazek nemá velikou tradici. Podíl takto zaměstnaných tvoří pouhých 11%, u nás dokonce jen 4,3%. Zaměstnanci nesmí pracovat přesčas, pouze v případech událostí způsobených vyšší mocí je možné nařídít přesčasové práce k odstranění náhlých škod. Lze se však dohodnout na „dodatečných či doplňkových“ přesčasech, které obecně nesmí překročit 15% zkráceného pracovního úvazku. Kolektivní smlouvy mohou tuto hranici zvýšit až na 60%.

„*Smlouva na částečný úvazek na stálé práce pravidelně se opakující*“ je, ačkoli to tak na první pohled nevypadá, smlouvou na dobu neurčitou. Využívá se při najímání zaměstnanců na práce, které se v určených obdobích periodicky opakují. Není-li pracovník v daném období „vyzván k práci“ má právo žalovat jako v případě neoprávněného propuštění. Příkladem může být sezónní recepční pracující každoročně u stejného zaměstnavatele ve stejném období např. od 1.7. do 31.8.

„Smlouva na stálé práce nepravidelně se opakující“, které spadají do předmětu činnosti zaměstnavatele. Opět se jedná o smlouvu na dobu neurčitou s tím, že se mimo pracovní období pozastavuje a každým rokem obnovuje. Požadavky jsou jak na obsah, tak i na formu. Písemná smlouva musí obsahovat přibližná období, na která se vztahuje včetně způsobu výzvy k práci (např. podle služebního stáří). Není-li zaměstnanec vyzván k práci v důsledku nesprávného postupu při svolávání zaměstnanců, je oprávněn namítat neoprávněné propuštění. Nejrozšířenější je jejich použití v zemědělství.

„Smlouva o náhradnictví“ je formou flexibilní formy organizace práce na principu sdílení pracovního místa. Společnost ji sjednává s nezaměstnaným registrovaným na úřadu práce nebo s vlastním zaměstnancem v pracovním poměru na dobu určitou, aby převzal část úvazku po zaměstnanci, kterému byl úvazek snížen z důvodu částečného odchodu do důchodu. Pracovní doba a odměna mohou být částečnému důchodci zredukovány v rozmezí 25% - 85%.

Poslední dvě pracovním právem výslovně upravené smlouvy jsou „smlouva pro práci z domova“ a „skupinová pracovní smlouva“. U druhé zmiňované je jednou stranou zaměstnavatel a druhou skupina lidí zastoupená jediným zástupcem jednajícím za všechny. Je mu placena odměna, kterou následně rozdělí mezi ostatní členy (např. hudební skupiny či orchestry).

Dohody o pracích konaných mimo pracovní poměr

České pracovní právo rozlišuje mezi pracovním poměrem a dohodami o pracích konaných mimo pracovní poměr z hlediska rozsahu konané práce. Zaměstnavatel tak při plnění krátkodobých úkolů nemusí najímat zaměstnance na dobu neurčitou a vyhne se povinností plynoucím z pracovního poměru, které ani pro zaměstnance nemusí být nutně nevýhodou. Jiný je režim placení daní, sociálního a zdravotního pojištění, výpovědní lhůty, nároku na dovolenou, překážek v práci na straně zaměstnance, či neexistence odstupného. Vyznačují se nízkou ochrannou funkcí a stabilitou hlavně z pohledu zaměstnance, proto se jinak nazývají překerní zaměstnání.

Prvním typem je dohoda o pracovní činnosti určená pro práce, jejichž předpokládaný rozsah není vyšší než 150 hodin v jednom kalendářním roce. Zároveň musí být splněna podmínka, že zaměstnanec nemůže vykonávat práci v rozsahu překračujícím v průměru polovinu stanovené týdenní pracovní doby, posuzováno za celou dobu, na kterou byla uzavřena (max. 52 týdnů). Do tohoto rozsahu se započítává

také práce zaměstnance pro zaměstnavatele v témže roce na základě jiné dohody o provedení práce. Dohoda musí být v písemné formě, v opačném případě je stížena sankcí neplatnosti. Mezi základní obsahové náležitosti patří druh práce, sjednaná odměna a doba, na kterou se dohoda uzavírá. Na rozdíl od dohody o provedení práce, si strany mohou upravit dovolenou, rozšířit použití překážek v práci na straně zaměstnance a stanovit způsoby zrušení dohody. Dohodu může ukončit kterýkoli z účastníků bez udání důvodu s výpovědní dobou jež činí 15 dní a počíná plynout doručením výpovědi druhé straně.

Druhou možností zaměstnavatele, není-li schopen zajistit určité krátkodobé práce vlastními pracovníky, je dohoda o provedení práce. Využívá se hlavně pro jednorázová plnění, která se neopakují. Obsahem dohody by měl být především pracovní úkol, rozsah práce a odměna, která nesmí být nižší než stanovená minimální mzda. Předpokládaný rozsah práce nesmí překročit 150 hodin ročně, do kterého se samozřejmě započítávají i doby z jiných dohod o provedení práce mezi stejnými účastníky. Písemná forma se vzhledem k objemu práce nevyžaduje.

Španělská úprava nijak nerozlišuje mezi pracovním poměrem a jinými vztahy upravenými ve Statutu pracovníků. Krátkodobé práce jsou pracovním poměrem bez rozdílu účelu, trvání či povahy účastníků. Neexistuje sice srovnatelná kategorie prací konaných mimo pracovní poměr, ale je možné najít podobné smlouvy upravující podobné instituty. Prvním z nich je „*smlouva o provedení práce nebo služby*“, která sloučila předměty obou českých dohod. Jejich společným rysem je dočasnost. Není vymezena počtem hodin, ale pouze obecnou dobou určitou. Nejedná se tedy o nic jiného, než o pracovní poměr s maximální délkou trvání dvou let. Do určité míry sem můžeme zařadit i „*příležitostnou smlouvu závislou na okolnostech produkce*“, která se krátkodobým charakterem více přibližuje české úpravě. Se svými šesti měsíci (v období čítajícím 12 měsíců) má ze všech španělských smluv nejkratší dobu trvání. Účel smlouvy je zúžen na okolnosti náhlého nárůstu pracovních úkolů, které s sebou nesou různé fáze hospodářského cyklu, každoročně se opakujících i nepředvídatelných. Souvislost vidím opět v nestálé povaze prací, pro které zaměstnavatel volí smluvní typ krátkodobého charakteru.

Závěr

Pracovní právo obecně je vždy kompromisem mnoha různých protichůdných sil. Co se nakonec odrazí v zákonných ustanoveních, a které názory zůstanou nevyslyšeny je většinou dáno momentální společenskou situací. Pryč jsou naštěstí doby, kdy zaměstnanci byli téměř bez ochrany. Převládající zájem na průmyslovém a výrobním rozvoji nahradil zájem na ochraně zaměstnanců. Postupně bylo zaručeno právo na ochranu zdraví, zabezpečení při úrazu a ve stáří, centrem zájmu se staly pracovní podmínky, přestávky v práci a zavádění dovolené na zotavenou. Zákonodárce si uvědomoval jak slabou stranou smluvního vztahu zaměstnanci jsou a čím dál tím více reguloval chování zaměstnavatelů. České pracovní právo tak dostalo na dlouhou dobu podobu státem nadmíru regulovaného odvětví, kde se smluvní strany nemohly odchýlit od zákonné úpravy.

Otázkou je, zda ve stejné míře volají po smluvní svobodě zaměstnanci i zaměstnavatelé. S uvolněním pracovního trhu, vstupem do Evropské unie a současnou hospodářskou krizí je uvolnění rigidních vztahů samozřejmě žádoucí. Nový zákoník práce sice umožňuje sjednávat pracovní podmínky daleko flexibilněji, přesto myslím, že jak zaměstnanci tak zaměstnavatelé cítí, že se mnoho nezměnilo.

Z hlediska mé práce bych se ráda pozastavila nad úpravou pracovních poměrů. Zákoník práce upravuje poměrně jasně pracovní poměr na dobu určitou, neurčitou i dohody o pracích konaných mimo pracovní poměr (krátkodobá zaměstnání). Nijak nebrání ani částečným úvazkům nebo nerovnoměrnému rozvržení pracovní doby, přesto jejich použití není moc běžné. Určitě to nebude proto, že zaměstnavatelé chtějí za každou cenu upřednostňovat pracovní poměr na dobu neurčitou na stanovenou týdenní pracovní dobu nad ostatními krátkodobějšími formami. Jistou roli hraje nedostatečná praxe, neboť flexibilní formy zaměstnávání u nás nemají velkou historii.

Ve většině evropských zemí jsou částečné úvazky běžnou formou zaměstnávání, dokonce je na ně nahlíženo mírně negativně, z hlediska jejich nestability. Je to dáno množstvím lidí, kteří by rádi pracovali na plný úvazek, ale spokojí se alespoň s částečným. Naopak u nás je mnoho těch, kteří by uvítali zkrácený úvazek, není jim to však umožněno. Například ve Španělsku jsou krátkodobé pracovní poměry prostředkem boje s nezaměstnaností. Na jednu stranu umožní více lidem získat ekonomické prostředky a na druhou stranu dává zaměstnavatelům širší možnosti uzavíráním „úspornějších typů“ smluv.

Bylo by proto dobré, aby byly zákoníkem práce upraveny i flexibilní formy práce o které by se zaměstnavatelé mohli opřít při vytváření pracovních míst. Nejvíce by u nás tyto změny uvítaly ženy s dětmi, studenti nebo lidé se zdravotními problémy. A nejen oni stojí před nelehkým úkolem skloubit pracovní dobu s osobním životem. Jen častější použití pružné pracovní doby by vyřešila spoustu problémů spojených s faktem, že většině zaměstnancům končí pracovní doba ve stejnou hodinu. Obstarání administrativních záležitostí tak musí řešit dovolenou, což se rozhodně neslučuje s jejím hlavním účelem, a to regenerací sil zaměstnance.

Práce z domova by umožnila například matkám s dětmi získat více ekonomických prostředků, zvláště když je tolik zaměstnání, která by v dnešní době informačních technologií, z domova mohla být vykonávána. Odnímalo by to určité povinnosti zaměstnavatele spojené s poskytováním místa výkonu práce, přestávek v práci či zabezpečování ochrany při práci a náklady na pracovní sílu by se tím snížily. Pro zaměstnance, kteří musí denně dojíždět by se staly domácí kancelářské práce příjemnou alternativou.

Sdílení pracovního místa (španělská úprava ho zná v souvislosti s odchodem zaměstnanců do částečného důchodu), by se určitě ujalo na pozicích, kde nelze zavést pružnou pracovní dobu (např. zaměstnanci pracující v úředních hodinách).

Velký nedostatek vidím i v nízkém počtu hodin u dohod konaných mimo pracovní poměr. Alespoň dvojnásobným zvýšením by se zamezilo již tak častému obcházení zákonem stanovených limitů a čistě nárazový charakter by se změnil v zajímavou alternativu k pracovnímu poměru na dobu určitou.

Z praktického hlediska, většina pružných forem práce je u nás možná a proveditelná, ochota zaměstnavatelů bez výslovných zákonných ustanovení a dostatečných zkušeností je však problémem daleko složitějším. Nezbyvá tedy než doufat v to, že si flexibilní formy zaměstnání najdou brzy své místo v pracovním právu a zaměstnavatelé brzy zjistí, že mohou být i pro ně přínosem.

LIST OF ABBREVIATIONS

B.O.E.	Official State Bulletin (the Spanish collection of laws)
Coll.	Collection of Laws of Czech Republic
CEEP	European Centre of Enterprises with Public Participation
EC	European Communities
ECJ	European Court of Justice
ETUC	European Trade Union Confederation
EU	European Union
ILO	International Labour Organization
LC	Czech Labour Code (Zákoník práce)
LPWA	Law on the Prevention of Work-related Accidents
SCC	Spanish Civil Code
SC	Spanish Constitution
SWS	Self-Employed Workers' Statute
UNICE	Union of Industrial and Employer's Confederations of Europe
ÚS	Czech Constitutional Court (Ústavní soud)
WS	The Workers' Statute (Estatuto de los trabajadores)

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Summary

The purpose of my thesis is to analyse chosen parts of the Czech and Spanish labour law. The thesis is composed of four chapters; each of them is dealing with different aspect of the labour law.

The first chapter explains in its three sections basic concepts and the difference between legal relations and labour relations, sources of law in both states, as well as explains basic principles of labour law along with contractual freedom.

The second chapter generally explores types of labour relations, as determined by the Czech Labour Code and Spanish counterpart - the Workers' Statute. Showing that Spanish law distinguishes, and separately regulates more special groups which mostly are not regulated by the Czech labour law at all (e.g. top management, domestic servants, sportsperson or dock labourers). This chapter is divided into two sections each dedicated to one of the respective states.

The third chapter is more ample and subdivided in three main sections. The first section focuses on employment relationship in the Czech Republic and comprises of three topics such as participants, employment contract and other agreements to the employment contract. The second concerns exactly the same things but in connection with Spain. The third section presents the regulation of a permanent and fixed-term employment contract separately for each state.

The fourth chapter consists of two sections, first illustrates Czech agreements on work performed outside an employment relationship and the second is attempting to find and suggest similar institutes in the Spanish labour law.

In the conclusion, I am comparing the basic regulation of special and excluded relations in Spain to our excluded relations in Czech Republic. Further, I am pointing out a possible reason why Spanish labour law has so many contractual types and advantages of simpler legislation.

The main aim of the thesis is to briefly introduce Spanish labour law to the Czech readers. I think that using the comparison method makes it more understandable by seeing the direct differences than just describing Spanish labour relations alone. Since my paper is written in English, the very last part provides a short Czech summary of the important findings and issues.

Keywords: employment relationship, employment contract,
agreements on work performed outside an employment relationship