| Chapter 3 |

Romania: Development of Labor Law Under the Banner of Flexibility

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ABSTRACT

The last decade of Romanian labor law has been marked by a series of innovations and amendments under the banner of flexibility. In the case of both individual and collective labor law, the acceleration in the introduction of more flexible regulatory elements has been caused by the economic crisis that started after 2006, although there are also strong voices in the literature that the reference to the global economic crisis is not always tenable and has sometimes served as a good excuse for introducing certain legislative changes. In this chapter, we present the current regulation of individual and collective employment contracts, together with its theoretical and practical issues, starting from the specificities of the development of Romanian labor law.

KEYWORDS

labor law, labor contract, collective agreement, flexicurity, Romania

1. Introduction

In this chapter, we present the current regulation of individual and collective employment contracts, together with its theoretical and practical issues, starting from the specificities of the development of Romanian labor law. The analysis of the topic requires a complex approach because, on the one hand, it is necessary to view labor law institutions in the context of their historical development, and on the other hand, it is essential to describe the transformations of the dynamically changing legal background, to outline its current challenges, and to identify future directions. While in Romania we are witnessing a very active process of regulation in the field of individual labor law, the role of collective labor law has become more marginal since the entry into force of Law No. 62 of 10 May 2011 concerning social dialogue (Social Dialogue Act). At the same time, the amendments to Law 53 of 2003, the Romanian Labor Code, cannot always be considered as positive or encouraging labor relationships. Regardless of this, however, the Labor Code has undergone several very recent amendments and additions in this field, which were made necessary by

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the COVID-19 pandemic, but will in all likelihood be part of Romanian labor law even after it passes.

2. The Place of Labor Law in the Romanian Legal System

To better understand the place and role of labor law in the Romanian legal system, it is necessary to shortly present the development of Romanian labor law.

In Romanian legal history, the unification of the country in 1918 is an inevitable point of reference. Different laws had previously been in force in different regions of the unified new state, and one of the most important tasks for the newly created Romanian state was to establish a uniform legal system throughout its territory, as soon as possible. This was not achieved in the same way or with the same success in all fields of the law. In the case of labor law, the development of uniform legislation was facilitated by the fact that there was not yet a consolidated, comprehensive body of law, and the period in question practically coincides with the dynamic development of labor law itself, when its regulations were becoming increasingly defined as an autonomous branch of the Romanian legal system.

In the first period after 1918, the fundamental question was how to establish a unified Romanian legal system. Initially, the Russian (Bessarabia), Austrian (Bukovina), Hungarian (Transylvania) and of course Romanian (Old Kingdom) laws were applied in the different regions of the country. The length of time needed to bring uniform standards into force varies from one field of law to another, as does the method used to achieve this: either by extending the application of previous Romanian laws to the whole country, or by drafting and bringing completely new legislation into force.[1]

In the field of labor law, the legislation applied in the Old Kingdom was initially extended, including the 1912 law regulating the status and insurance of workers, which in the domestic scholarly literature is also referred to by some authors (in our opinion, with great exaggeration) as the first Romanian Labor Law.[2] From the 1920s onwards, a very active legislative process began in Romania, partly in connection with the activities of the ILO, and the new labor legislation was applied throughout all regions of the country. The labor law legislation of the period culminated in the 1929 law regulating employment contracts, but the 1920 law regulating labor disputes and the 1921 law on trade unions also played a prominent role.

The first piece of legislation in Romania that could truly be considered a Labor Law in title and content was Law 3 of 1950, which was later repealed by the next Labor Law of 1972. The 1972 Labor Law, which underwent several amendments and additions of a novel nature, formed the basis of the Romanian labor law legislation after the regime change until the current Labor Law, Law 53 of 2003, was published.

1 Țiclea, 2018, p. 18.

2 Gâlcă, 2012. Much of the literature takes the opposite view, see Țop, 2018, pp. 56–58; Ștefănescu, 2012a, pp. 207–218, among others.

In the scholarly literature on Romanian labor law, there are divergent opinions as to which law can be considered the first true labor law, nevertheless, there is consensus on the autonomy of labor law as a legal discipline.[3]

The solution of regulating employment contracts within the Civil Code is alien to the tradition of Romanian labor law, and the unanimous position of the domestic scholarly literature is in line with the idea of the autonomy of labor law. There are also isolated views that labor law developed in parallel with civil law, and that the individual employment contract itself cannot be derived from any type of contract regulated by the Civil Code, since its roots are to be found in the contracts used by guilds.[4] The vast majority of Romanian legal scholars, however, are of the opposite opinion, and take the view that the regulation of the employment contract has its roots in the succinct articles 1412 and 1470 of the 1864 Romanian Labor Code, which settled the issue of *locatio operarum* until they were repealed by the 1950 Labor Code.[5] Subsequently, and under the 1972 Labor Code, the possibility that a contract of employment could be governed by a law other than the Labor Code, the primary source of labor law, was not even considered.

After the regime change, a new Labor Code (2003) and a new Civil Code (2009, in force since 1 October 2011) was adopted in Romania and the relationship between the two pieces of legislation was clearly defined. The Civil Code does not contain any provisions on employment contracts, and the preparatory theses adopted in Government Resolution No. 277 of 2009 already state that the monistic Civil Code deals with contracts, family, and commercial legal relationships, as well as issues of private international law. Art. 2 merely states, in general terms, that the provisions of the Civil Code are to be regarded as a set of rules constituting common law in all matters governed by its letter and spirit. However, the Labor Code makes it clear in art. 278 that civil law is to be applied in a complementary manner, provided that the provisions in question are not in conflict with the specific characteristics of employment relationships.[6]

3. The Place and Importance of the Individual Employment Contract in Romanian Labor Law

Art. 1 of the Romanian Labor Code states that employment relationships in general fall within its scope. However, this seemingly *lato sensu* scope must be interpreted in the context of arts. 2 and 278 (2), which show a somewhat restrictive interpretation of the scope of the Labor Code. Art. 2 lists the entities to which the legislation applies,

3 Moreover, in the domestic literature there is an isolated opinion that the Civil Code played no role whatsoever in the development of labor law, and labor law developed completely in parallel with civil law (Gâlcă, 2012).

4 Gâlcă, 2012.

5 Cf.: Țop, 2018, pp. 54–59; Ștefănescu, 2012b, pp. 113–135; Ștefănescu, 2014, pp. 7–8; Țiclea, 2015, pp. 14–18; Athanasiu-Dima, 2005, p. 23; Ghimpu et al., 1978, p. 163.

6 Cf.: Ștefănescu and Beligrădeanu, 2009, pp. 11–55; Duțu, 2013, p. 21.

and it is clear from this list that only those working under an individual employment contract are included.[7] Art. 278 (2) returns to the question of the scope of the law in its concluding provisions, stating that the provisions of the Labor Code apply as common law to employment relationships other than those based on an employment contract as well, provided that the specific provisions are not exhaustive and their application is not incompatible with the particular nature of the employment relationship in question.

In conclusion, we can say that, *stricto sensu*, the full scope of labor law under Romanian labor law covers only and exclusively employment relationships based on an employment contract, but *lato sensu* it covers all employment relationships regardless of their source.[8] However, there is no complete consensus in the domestic scholarly literature as to the actual scope of labor law and the contractual employment relationships that should and can be taken into account. Without going into the details of the analysis of the literature, the situation of domestic workers, who, according to some opinions, can work based on an employment contract, is mentioned as an example, based on the fact that, according to the Labor Code, a physical person can be an employer and can therefore conclude an employment contract for domestic work with another physical person.[9] Similarly, an interesting question has been raised as to whether it is possible to apply employment and labor law by concluding a simple civil law service contract between the parties instead of an individual employment contract, but the answer is clearly that employment in the labor law sense can only be carried out based on an employment contract.[10]

Following the entry into force of GD 488/2017 on the approval of the regulation on the organization and functioning of the Labor Inspectorate, art. 12(1), Pct. B, letter d, the labor inspector has the right to decide on the very legal nature of the contract concluded between the parties, determining whether it corresponds to an employment relationship or not. However, the criteria according to which he could do so are not laid down, nor are the effects of such a reclassification. The question also arises as to whether, once the contract has been reclassified as an employment contract,

7 Art. 2 of the Labor Code. The provisions of this code apply to:
a) Romanian citizens *under an individual employment contract,* engaged in an activity in Romania; b) Romanian citizens *under an individual employment contract* and engaged in an activity abroad, under contracts concluded with a Romanian employer, unless the legislation of the country where the individual employment contract is performed is more favorable; c) foreign nationals or stateless persons *under an individual employment contract,* engaged in an activity for a Romanian employer on Romanian territory; d) persons having acquired the refugee status and employed *under an individual employment contract* on Romanian territory, under the terms of the law; e) apprentices engaged in an activity *under an on-the-job apprenticeship contract*; f) employers, natural and legal persons; e) trade unions and employer's representative organizations.
However, an apprenticeship contract is defined in art. 208 as a 'specific type of employment contract,' which means that it is in fact an employment contract.

8 Beligrădeanu, 2010, pp. 87–93.

9 See Tinca, 2006, pp. 39–46; Țop, 2013, pp. 172–180.

10 See Beligrădeanu, 2013, pp. 239–249; Gheorghe, 2013, pp. 225–229; Rogozea and Anghelie, 2018, pp. 63–72; Ștefănescu, 2018, pp. 25–42.

the labor inspector could apply the appropriate penalties for undeclared work. There is a strong opinion in the literature that the labor inspector's ability to identify the employment relationship himself should be abolished, and that only the labor court should do this.[11]

The publication of the 2019 Administrative Code (Emergency Government Decree No. 57 of 2019) has brought the interpretation of the relationship between employment and public-law employment to the fore once again, as the legislation contains provisions for the entire public sector. Thus, it has become a key issue to distinguish between the categories of 'employee,' 'civil servant,' and 'contract staff' to which the law applies, based on precise criteria, especially considering that art. 542 of the Administrative Code, while referring to the corresponding provision of the Labor Code, also includes explicit provisions for individual employment contracts.[12] The provisions of the new administrative legislation on individual employment contracts are based on the Labor Code, the characteristic feature of the employment relationship being that the employee has been employed in the public sector.[13] For the first time in domestic legislation, this law includes specific provisions regarding the possibility of employees with a labor contract to switch to working from home,[14] although in our view, instead of referring to the provision of the Labor Code on working from home, a reference to the Telework Act No. 81 of 2018 would have been more appropriate.

In conclusion, labor law in its entirety only covers legal relationships based on individual employment contracts, but Romanian law also regulates numerous other employment relationships, which are covered to a greater or lesser extent by labor law. However, situations of employment that remain outside this regulatory area are also present, such as those of the gig economy or platform-based employment, leaving the workers completely unprotected by labor law.

4. The Place of Individual and Collective Labor Contracts in the Labor Law and Their Interrelationship

The first Romanian Labor Code contained almost the same number of articles, and albeit quite briefly, it included provisions for the most important issues of individual and collective labor contracts. Similarly, the 1972 Labor Act included provisions for both institutions in employment contracts. In its original version, the Romanian Labor Code in force provided for collective agreements in a separate title, but the legislature later transferred the regulation of collective labor law to a separate law, Law No. 62 of 2011 on Social Dialogue, so that now the Labor Code only discusses collective

11 Dimitriu, 2018, pp. 63–81.
12 Godeanu, 2020, pp. 45–53.
13 The employment relationship of public servants based on an act of appointment is referred to in some of the literature as an individual administrative contract, similar to the term individual employment contract (Ștefănescu, 2020, p. 23).
14 Ștefănescu, 2019, pp. 41–46.

labor agreements at the level of a reference, or merely defines the framework of collective labor law institutions.

While the individual employment contract is the main cornerstone of the overall individual labor law and its importance is unquestionable, the role of the collective employment contract in Romania has been increasingly marginalized, especially since the new collective labor law has abolished the possibility of collective bargaining and contracting at national level.

The essence of the relationship between individual and collective employment contracts is described in art. 11 of the Labor Code, which states that an employment contract may not contain provisions on a lower level of rights, nor provisions that are contrary to those laid down by law or collective agreements. A similar provision is contained in art. 132 of the Law concerning Social Dialogue. Based on the two provisions above, the provisions on employees' rights must comply with the following rules: an individual employment contract may not set a lower level of rights than that provided for in the collective agreement or in a statutory provision; and a collective agreement may not set a lower level of rights than that provided for in a piece of legislation. Consequently, in the context of Romanian labor law, it is not possible to deviate from the legal level to the detriment of workers, either through individual or collective bargaining.

5. Regulatory Developments and Trends in Romanian Labor Law

The last decade of Romanian labor law has been marked by a series of innovations and amendments under the banner of flexibility. In the case of both individual and collective labor law, the acceleration in the introduction of more flexible regulatory elements has been caused by the economic crisis that started after 2006, although there are also strong voices in the literature that the reference to the global economic crisis is not always tenable and has sometimes served as a good excuse for introducing certain legislative changes.[15] Legislative interventions in the field of individual labor law have in many cases led to genuinely positive results, filling necessary gaps. In contrast, from the point of view of collective labor law and social dialogue, the introduction of the new code has had a disastrous effect, and it is not by chance that the literature has called the consequences of the 2011 legislative changes a 'post-earthquake' situation.[16] An important milestone on the road leading to the slow death of realistic and effective social dialogue was Law 62 of 2011, which is still in force with minor amendments. In addition, the amendments to the Labor Code have also had an impact on the system of collective bargaining and trade union life, for example by weakening the legal instruments available to protect trade union representatives.

15 Voiculescu, 2011, pp. 48–57.
16 Roșioru, 2018, p. 73.

The most significant of the amendments to the Labor Code in terms of making labor law more flexible is Law 40 of 2011. The introduction of the legislation was heavily criticized by the trade unions, which explains why it finally entered into force with the government taking responsibility.[17] The literature extensively shows the opinion that this was not at all a fortunate decision, as a law of this magnitude should not have been enacted without the agreement of the social partners. The Constitutional Court also examined the law, but in its decision No. 383 of 2011, it was declared constitutional in its entirety.[18]

The explanatory memorandum of the law explicitly states that the objective of flexible regulation is to contribute to a more dynamic labor market and to bring the Romanian Labor Code closer to international standards and the requirements of EU directives. However, this does not mean that there were problems of compliance regarding the Romanian Labor Code in the past.[19] Similarly, overall, the amending law cannot be said to have introduced flexible elements at the expense of security, but has indeed introduced innovations in line with the flexicurity principle in several respects. The more dynamic functioning of the labor market depends, of course, on several factors which the amendment of the Labor Code cannot and will not necessarily be able to influence, such as the decreasing number of the active population due to low birth rates and emigration; nevertheless, the instruments of labor law regulation are obviously not negligible in terms of, for example, eradicating the black economy, increasing the employment rate, or reducing unemployment.[20]

Regardless of this, it is no coincidence that the amendments introduced by Law 40 of 2011 were considered to have been primarily aimed at meeting the labor market needs of foreign investors, and thus to have contributed to improving employment indicators, but it would have been better to pay more attention to the social realities at home and the real risk of poverty faced by Romanian workers.[21] Similar views were expressed by other prominent Romanian labor lawyers, who argued that although the amendments are in line with flexicurity principles and the EU standards, they clearly favor employers and reflect the demands for change formulated by employers.[22]

What are the main areas of the Labor Code affected by the amendments introduced by Law 40 of 2011? The new legislation introduced substantial changes to the provisions on temporary agency work, fixed-term contracts, working time and probationary periods, but also covered several other issues.

The new legislation still contains a taxative list of cases in which fixed-term employment contracts can be concluded, but the range of possibilities has been broadened. The maximum duration of this type of contract has been increased from 24 months to 36 months, but it can be extended for certain projects for the entire

17 Vallasek and Petrovics, 2018, pp. 27–28.
18 Beligrădeanu and Ştefănescu, 2011, p. 11.
19 Voiculescu, 2011, pp. 48–57.
20 Incălţărău and Maha, 2014, pp. 44–66.
21 Voiculescu, 2011, pp. 48–57.
22 Gheorghe, 2011, p. 102.

period needed to complete the work. However, the maximum number of successive employment contracts that can be concluded with the same worker is three. In contrast to the previous provisions, the new legislation no longer contains the rule that, after the expiration of a fixed-term employment contract or contracts, the employer is obliged to employ the next worker for an indefinite period. However, the maximum possible probationary period for fixed-term employment contracts has not changed, despite the fact that they can be concluded for a significantly longer period than under the previous provisions.[23] In the case of temporary agency work, there are also several amendments, which, among other things, have allowed a wider possibility to conclude such contracts for a limited period, unlike the previous legislation, which only allowed temporary agency work if an employer needed workers to cover the interruption of an employee's contract.[24]

The new regulation on the probationary period was also intended to allow for more flexible employment, providing for a longer period of 90 and 120 calendar days respectively, within which the parties should have the possibility to terminate the employment relationship with immediate effect without giving any reason. The only exceptions are for disabled workers, for whom a uniform maximum probationary period of 30 days can be set.[25] Although the provision in the Labor Code that determined the maximum number of consecutive probationary periods for employees has been deleted, there is still a limitation for employers, as there is a maximum of 12 months of probationary period for a given job.[26]

Some elements of the working time and rest period rules have also been changed to the detriment of workers. For example, the introduced legislation allows the employer to decide on a longer reference period than the previous provision allowed. Similarly, a much-analyzed new provision was the one that allowed the employers to reduce the working week from five to four days, with proportionately reduced pay, if they were forced to reduce their activities for economic, technological, or structural reasons for a period of more than 30 days, until the economic reasons for the reduction ceased to exist.[27]

Law 40 of 2011 contains 14 articles that deal with the termination of employment contract.[28] Overall, it can be concluded that the amendments were necessary in many respects because of shortcomings that could be identified in the previous legislation, without weakening the protection of workers. However, as pointed out in the literature, there remain several questions whose interpretation is not clear. Such is the case

23 For more details see Gheorghe, 2011, pp. 95–103.
24 For details see Pătrașcu, 2011, pp. 67–76.
25 Pătru, 2013, p. 113.
26 Art. 82 of the Romanian Labor Code specifies that 'no more than three successive individual labor contracts for a definite period may be concluded between the same parties. The individual labor contracts for a definite period concluded within three months from the termination of a labor contract for a definite period shall be considered successive contracts and may not have a duration exceeding 12 months each'.
27 Beligrădeanu and Ștefănescu, 2011, p. 17.
28 Dumitriu, 2011b, p. 66.

of the termination of an employment contract due to the fulfillment of retirement conditions, which was only one in a series of amendments. But the new legislation also affects certain cases of termination of an employment contract by the employer and the rules on termination by the employee, and the ban on trade union leaders for two years after their mandate has been lifted, which is a significant change in prohibitions on termination.[29]

In addition to the amendment of the Labor Code by Law 40 of 2011, the emergence of Law 81 of 2018 on teleworking is another reference point that characterizes the evolution of individual labor law over the last decade. The emergence of the legislation is a significant step forward, and in retrospect it is particularly fortunate that it came into force just before the outbreak of COVID-19 pandemic. At the same time, it is also a fact that the new teleworking legislation has several serious flaws, and the shortcomings or practical difficulties of its application became clear precisely in the context of the pandemic, when masses of workers were affected by the forced transition to teleworking.[30]

The introduction of the telework law was virtually unanimously viewed positively by the Romanian labor law community, but also by the social partners, and its introduction was indeed necessary.[31] The need for more flexible forms of employment, including the regulation of teleworking, has been increasingly expressed in the Romanian literature of the early 2000s and by the social partners, and this is particularly true after the 2011 amendment of the Romanian Labor Code.[32] The amendment already discussed above, as we have seen, should also be seen as a response to the need for flexibility,[33] but it only addressed fixed-term contracts and temporary agency work among atypical forms of employment. The plan to introduce teleworking was explicitly explained in Chapter 5 of the government program for 2017–2020 with the justification that the 70% employment rate target can only be achieved if the labor market is sufficiently dynamic and flexible, and the strategy for creating new jobs includes the creation of a regulatory framework for teleworking as a priority. This idea is present in the explanatory memorandum of the law, which stresses that teleworking is a key to increasing productivity and competitiveness, while at the same time providing the necessary balance of flexibility and security for the worker. The introduction of the Telework Act was thus preceded by considerable anticipation, but experts had already highlighted several problems with the draft law, and the critical voices did not disappear after its publication. It is also not clear why the legislature wanted to address the issue of telework in a separate piece of legislation,

29 Dumitriu, 2011b, pp. 58–64.

30 Previously, only an insignificant number of workers worked remotely or from home. 0.4% in 2018, and slightly more in 2019, but still only 0.8%. See https://ec.europa.eu/eurostat/web/products-eurostat-news/-/DDN-20180620-1 (Accessed: 15 February 2021).

31 Georgescu, 2019, pp. 35–40.

32 For example, some argue that the rise in oil prices in 2008 has highlighted the need to introduce regulation on telework (Țiclea, 2015, p. 379).

33 Voiculescu, 2011, pp. 48–57.

instead of adding provisions on telework to the Labor Code. In our opinion, this solution would have better reflected the tradition of code-based regulation of labor law in Romania.[34]

The most frequent criticism, however, was that the law leaves much to be desired exactly in the much-discussed area of flexibility. For example, the provisions on health and safety and authorization reduce the worker's flexibility to work in different locations, even spontaneously, and ultimately the place of work is most likely to be the worker's place of residence. On the other hand, the regularity of teleworking was questionable because the stated that for the employee to be considered a teleworker, it was sufficient to work at a place other than the employer's premises for one working day per month.[35] In the context of the COVID-19 pandemic, it was already amended twice, in 2020 and 2021, and the amendments are clearly a move toward simplification and restructuring in response to the criticisms previously made.

For example, the definition of telework in art. 2 of the Telework Act was also changed, and in its current form, telework is now defined as a form of work organization in which the employee, voluntarily and on a regular basis, performs the typical tasks of his/her position, occupation, or profession away from the employer's premises, using computer and communication equipment. The definition has therefore been amended to exclude one working day per month. The definition clearly shows the main characteristics of telework in the Romanian legislature's concept of telework: *its voluntary nature*, which means that the employee cannot be assigned to telework by unilateral decision of the employer;[36] *regularity*; and the fact that *the work is carried out at a place other than the workplace* and *with the help of computer equipment*. The telework contract has some mandatory elements, listed in art. 5. This means that it is necessary to define the place of work and to indicate precisely how much time the employee spends on the employer's premises. The contract must lay down the method of documenting working time; the conditions for the exercise of the employer's right of control; the specific obligations of the parties regarding health and safety and other matters; the rules for the distribution of any costs incurred; the method of fulfilling the employer's obligation to provide information; and the method of transporting materials necessary for the work to the place of work. However, the employment contract must also state the measures the employer will take to facilitate the worker's integration into the workplace.[37]

The process of making individual labor law more flexible is still ongoing, with several pieces of legislation recently adopted to counter the negative effects of the COVID-19 pandemic, which have made substantial amendments to the Labor Code. These amendments will be discussed later.

34 Vallasek and Mélypataki, 2020, pp. 177–191.
35 Teleoaca Vartolomei, 2018, pp. 45–52, Marica; 2018, pp. 81–100; Popescu, 2018, pp. 50–55.
36 Popescu, 2018, pp. 50–55.
37 Georgescu, 2018, pp. 105–106.

The regulation of collective labor law institutions has changed radically following the introduction of the new Social Dialogue Act in 2011. Since its entry into force, the law has been amended several times, but all the problems that the social partners, especially the trade unions, have criticized from the beginning and which have been repeatedly highlighted in the literature, are still present.

As with Law 40 of 2011, which amended the Labor Code, this legislation was enacted through governmental ownership, without any broader consensus. The lack of proper consultation with the social partners is, in our view, unacceptable for a law that aims to define a framework for real social dialogue. In some opinions, it would have been appropriate to include the issue of social dialogue itself in the Labor Code,[38] but we do not believe that such a unified framework of labor law rules is necessary. Some authors have also pointed out that it would have been more appropriate to call the new legislation *a collective labor relationships law* rather than a social dialogue law.[39]

However, it is indeed problematic that the social dialogue law has not been properly aligned with the provisions of the Labor Code on several points. Such overlaps can be observed between the two pieces of legislation, for example on labor disputes.[40] But questions are also raised by the limited formulation of the exercise of the right of association in art. 3 of the law, according to which 'employees with an employment contract, civil servants, civil servants with special status, members of cooperatives and agricultural workers' may form or join a trade union. To ensure that the right of association is not violated in the case of unlisted professional categories, such as those in the liberal professions or in special situations, such as temporary unemployment, the literature has also suggested that the wording of the law should only list the exceptional prohibitions, and not those who are free to exercise their constitutional right to association, such as in the case of the police and military personnel.[41]

In the hastily and inadequately drafted law, we can also observe that, in the case of the same rights and institutions, it contains different wording for trade unions and employers' organizations, whereas ideally these should be 'mirror norms.'[42]

In addition to the special law, the Labor Code contains separate titles on social dialogue (Title VII), collective labor agreements (Title VIII), labor conflicts (Title IX) and strikes (Title X), but these contain only a general framework in a few articles, while for all other issues, Act No. 62 of 2011 is applicable.

38 Țiclea, 2011, p. 11.
39 Popescu, 2011, pp. 11–12.
40 Țiclea, 2011, pp. 12–16
41 Popescu, 2011, pp. 13–14.
42 Popescu, 2011, p. 14.

6. The Content and Regulation of Individual Employment Contracts in Romanian Law

As we have seen above, in Romanian labor law, the central element and pillar of the employment relationship is the individual employment contract. After the publication of the Social Dialogue Law, some of the Romanian literature formulated a specific criticism according to which, contrary to the spirit of the Labor Code, it could in fact be called a code of individual labor contract rather than a real Labor Law.[43] To paraphrase Simon Deakin, if it can be stated that the employment relationship is the cornerstone of society and of modern labor law,[44] then in Romanian labor law the essential building block of this cornerstone is the individual employment contract.

Art. 10 of the Labor Law defines a contract of employment as a contract under which a natural person, the employee, undertakes to work for the benefit and under the direction of a natural or legal person employer in return for remuneration called wages. The concept of *employee* is not defined in the Romanian Labor Code, which in its art. 13 only deals with the conditions of capacity to work. Based on the definitions in the literature, an employee is considered a person who makes his or her own labor available for the benefit of the employer and for which he or she is paid wages by the employer in return. The definition of the term *employer* in the Labor Code is also rather general, the normative text emphasizes the conditions of legal capacity, but in the first paragraph of art. 14 it states that 'an employer within the meaning of the present Code is a natural or legal person who is entitled to employ workers under a contract of employment pursuant to the law.' The definition in the literature follows the legal definition, generally listing slightly more characteristics, meaning that an employer is defined as a natural or legal person who provides a workplace for the employee, ensures working conditions, and pays the employee in return for working in a subordinate position.[45]

It is also clear from the definition of an employment contract that Romanian labor law does not recognize *multiple legal personality,* i.e., the possibility of more than one person on the employer's or employee's side being party to an employment contract. This does not mean that in practice there are no situations that resemble job sharing or employee sharing, but in all such cases the only legal instruments available to the parties are those offered by domestic legislation, such as part-time contracts or the cumulation of employment contracts.

In Romanian law, an employment contract is a type of contract linked to form or formal contract. Following the amendment of the Labor Law in 2011, the written form is no longer only necessary for provability, but also *ad validitatem,* i.e., it is a condition of validity. Art. 16 (1) places the responsibility for meeting this

43 Ștefănescu, 2013, pp. 17–18.
44 Deakin, 2000, p. 10.
45 Ștefănescu, 2014, p. 243. For more, see Vallasek, 2020, pp. 19–22.

condition on the employer. However, in addition to the literature, case-law also points out that the responsibility also lies with the employee, who must be aware that his or her employment is only valid based on a written and signed contract of employment.[46]

As an addition to the written form, in the context of the COVID-19 pandemic, Emergency Government Decree No 36 of 2021 was published, which, by extending art. 16, allows the employment contract to be drawn up in electronic form, with an electronic signature, if both parties wish to choose this option. During the period of social distancing and teleworking, the introduction of this option was indeed a logical step. It not clear, however, how in such a case art. 16 (3) of the same directive, which requires the employer to provide the employee with a copy of the employment contract before the start of the employment relationship, should be interpreted and applied in the future. Para. 4 requires that a copy of the employment contract be kept at the place of work, but the legislature inserted art. 16,[1] which explicitly provides that the employment contract may also be kept in electronic form.

In the 2011 amendment, the legislature also introduced the requirement that the employment contract must be drafted in the Romanian language. The Labor Code does not prohibit the drafting of an employment contract in any language other than Romanian, but a contract drafted solely in another language cannot be considered valid. There have been lively debates in the literature on this issue, with some authors considering the linguistic validity requirement to be contrary to Community law, as it constitutes an obstacle to the free movement of persons, their freedom of employment and their freedom of establishment.[47] In another approach, some argue that the wording of art. 16[48] is not without question marks, since, after stating the formal requirements, it provides for the employer's liability only in respect of the written form and not the language of the contract, and therefore it could be interpreted that, although the written form is a valid criterion, the language of the contract is not.[49] Nevertheless, the majority of the literature and practice itself considers both conditions as conditions for validity.[50]

As a rule, an individual employment contract is for an indefinite period. This is stipulated in art. 12 and employment can be carried out otherwise in the case of legitimate exceptions. As they constitute exceptions, it should always be specified in the employment contract. If we look at the additional provisions on 'atypical' employment in the Labor Law or the Telework Law, we can see that in principle

46 Curtea de Apel București, Secția a VII—a pentru cauze privind conflicte de muncă și asigurări sociale, Decizia nr. 3973/2015 and Decizia nr. 4578/R/2014 cited in Uță, 2016, pp. 41–45 and pp. 157–161.

47 Ținca, 2014, pp. 141–155; Athanasiu and Vlăsceanu 2016, pp. 48–63.

48 Art. 16 (1): The employment contract is concluded by agreement between the parties, in written form, in Romanian, before the employee starts work. The employer is obliged to conclude the employment contract in writing.

49 Dimitriu, 2012, p. 105.

50 Ținca, 2014, pp. 141–155; Athanasiu and Vlăsceanu 2016, pp. 48–63; Țiclea, 2015b, pp. 31–34; Panainte, 2017, pp. 32–33; Țop, 2018, pp. 207–213.

in all such cases it is necessary to include in the employment contract appropriate clarifications on the type of contract, and that in addition to the generally mandatory content elements, there may be additional mandatory content elements specified by law.

For guidance on the mandatory content elements of an employment contract, see arts. 17 and 18 of the Labor Code on the duty to inform, which transpose the provisions of the Council Directive of 14 October 1991 on an employer's obligation to inform employees of the conditions applicable to the contract or employment relationship (91/533/EEC) into domestic law. Art. 17 lists 15 mandatory content elements whose modification requires a written amendment to the employment contract. These are the data identifying the parties, the place or places of work, the employer's registered office or place of residence, the occupation defined according to the Romanian Classification of Occupations, the job description, the scope of duties, the criteria used by the employer to classify the professional activity, the risks involved in the performance of the activity, the starting date of the employment relationship, the duration of the employment relationship if there is a fixed-term contract, the duration of the rest leave, the notice period, the remuneration, the payment periods, the daily and weekly working hours, the collective labor agreement in force, the length of the probationary period, and procedures for the use of electronic signatures.

In the case of work abroad, art. 18 extends the scope of the duty to inform to include information arising from the specific characteristics of the place of work, such as the climate, local customs, the currency in which the remuneration is paid, etc.

The content of the employment contract is regulated by art. 20 of the Labor Code, which lists four specific clauses that may be included in the employment contract based on negotiations between the parties, but the list is not exhaustive and any other clause that is in accordance with the legal framework may be agreed upon by the parties. The Labor Code only regulates in detail the conditions of the confidentiality agreement, the non-competition agreement, the continuing vocational training agreement, and the mobility agreement.

Title XII of the Labor Code considering the labor jurisdiction establishes the general provision that the object of the labor jurisdiction shall be to solve labor conflicts concerning the conclusion, execution, amendment, suspension, and termination of individual or collective labor contracts stipulated in the present code, as well as the requests concerning the legal relationships between social partners. Although in Romania there are no special courts for labor jurisdiction, according to Law 304/2004 on judicial organization art. 35 and 36, depending on the complexity and number of cases, there shall be divisions or, where appropriate, specialized panels for civil cases, professional cases, criminal cases, juvenile and family cases, administrative and tax cases, and cases concerning labor and social security disputes, insolvency, unfair competition or other matters, as well as specialized panels for maritime and river cases. The panel for the first instance in labor disputes and social security cases shall consist of one judge and two judicial assistants.

7. The Content and Regulation of Collective Labor Lontracts in Romanian law, Data, and Problems

Collective agreements in Romania date back to 1919 as with the Romanian Railway Company or the Bucharest Gas and Electricity Works, so the first collective agreements actually appeared a decade before the legislation was even in place.[51]

The 1989 regime change led to a renewal of collective bargaining legislation, which was then regulated in detail in the 2003 Labor Act, until the entry into force of Act 62 of 2011 on social dialogue. Thereafter, social dialogue was pushed into the background, and today the Labor Law contains only a very general framework for collective bargaining and contract in Articles 229–230. The most important provision in the Labor Code is the one that makes collective bargaining at the plant level compulsory, except in cases where the institution employs fewer than 21 workers.

The recent weakening of social dialogue is not just a Romanian phenomenon. However, in the Romanian literature, the negative impact of the law on social dialogue on real social dialogue is practically universally acknowledged and considered all the more regrettable, since collective bargaining can be considered as a cornerstone of labor law.[52] The 2011 Act itself has already undergone numerous amendments, the most significant of which is the 2016 amendment. This however has not necessarily been a positive change, but rather an opportunity for further criticism.[53]

According to art. 229 of the Labor Code, a collective labor agreement is an agreement in writing between the employer or employers' organization, on the one hand, and the trade unions or other legally represented workers, on the other, which lays down provisions on working conditions, pay and other rights and obligations arising from the employment relationship. Art. 1 of the Social Dialogue Act contains a similar definition of the term: a collective agreement is a written agreement between an employer or employers' organization and a trade union or workers' representative body, which defines the rights and obligations arising from the employment relationship. Collective agreements are concluded to protect and represent the interests of the contracting parties, to avoid or limit labor conflicts, and to ensure social peace. The two legal definitions found in the Romanian labor law in force therefore have basically similar content, are partly complementary in nature, and differ only in nuances of complexity.[54]

In the case of civil servants, a similarly written agreement between a trade union or a representative body of civil servants or representatives of public offices and public institutions is called a *collective agreement*.

Prior to the publication of Act 62 of 2011, under Act 130 of 1996, perhaps the most important level of collective bargaining was national bargaining.

51 Țop, 2018, p. 119; Țichindelean, 2015, pp. 13–18.
52 Volonciu, 2019, p. 80.
53 Țichindelean, 2016, pp. 27–37; Țiclea, 2016, pp. 15–18; Uluitu, 2016, pp. 286–290.
54 Moarcăș Costea, 2012, p. 181.

Collective agreements at national level were binding for all employers and employees in Romania, and thus the coverage of employees by collective labor agreements was practically exhaustive. The importance of collective bargaining at the national level was also acknowledged by the Romanian Constitutional Court in its examination of the constitutionality of the previous legislation, when in its Decision 96/2008, it said the state was obliged to guarantee minimum labor rights for all workers in a uniform manner. Later, however, in relation to Law 62 of 2011, in its Decision 574/2011, it took the position that the State has discretion to organize the rules of collective bargaining. The new legislation abolished national collective bargaining, resulting in the fact that collective bargaining coverage fell to around 36% in a single year, according to union statistics, and remained low thereafter as well.[55]

The employer or the employers' representative bodies have the primary right to initiate collective bargaining, but trade unions or workers' representatives also have the right of initiative. As a rule, there is no obligation to bargain on the part of the employer, but the exceptional, plant-level obligation to bargain under the Labor Code, as indicated above, is repeated in art. 129 of Law 62. However, there is no obligation to negotiate or conclude contracts at the level of enterprise groups or sectors.

Partly for this reason, very few collective agreements have been concluded at the sectoral and plant group levels under the new legislation, so the focus has shifted to the plant level, but at this level most collective agreements are negotiated not by trade unions but, in their absence, by employee representation, which has much less leverage and power in practice. The trend is also clear from the official data: while at sectoral level, six to eight sectors managed to conclude collective agreements under the old legislation, after 2011 this number has been reduced to two at most, with practically only education and health having sectoral collective agreements.[56] At the plant group level, the situation is slightly better, with the number of collective agreements concluded in a year still ranging between five and 10 after 2011.[57] Similarly, official ministry figures show that in 2020, there were 43,531 employers who were obliged by law to initiate collective bargaining due to the number of employees, as the Labor Code, art. 229 specifies that collective negotiation at the unit level is mandatory, except when the employer has less than 21 employees. Nevertheless, the data show only 5,742 factory-level collective agreements, of which nearly 1,500 are amendments or extensions of preexisting collective agreements.[58] Although there is no reason to believe that the number of collective agreements has been significantly affected by this fact, as the statistics for the past year are in line with the trend observed previously, it is necessary to note that collective agreements expiring during the state of emergency and alert declared under COVID-19 provide for the extension of collective

55 Vallasek and Petrovics, 2018, p. 18; Guga et al., 2016, p. 30. We do not have exact official figures, but other authors, referring to ILO and OECD data, estimate an even lower rate. Cf.: Chivu et al., 2013, p. 18; Stoiciu, 2019; Trif and Paolucci, 2019, p. 504.
56 Ministerul Muncii și Protecției Sociale, 2020a.
57 Ministerul Muncii și Protecției Sociale, 2020b.
58 Ministerul Muncii și Protecției Sociale, 2020c, pp. 28–48.

agreements under Decree 195 of 2020 and Law 55 of 2020, for the entire period of the special conditions and for a further 90 days thereafter.

The collective employment contract shall be concluded for a fixed period of not less than 12 months and not more than 24 months. Still, the parties can decide to extend the application of the collective labor contract, under the conditions of the law, only once, for a maximum of 12 months. If there is no collective labor contract in an establishment, the parties may agree to negotiate it at any time.

In the case of contracts negotiated at sectoral level, the collective agreement will be registered at that level only if the number of employees in the member establishments of the signatory employers' organizations is more than half the total number of employees in the sector. Otherwise, the contract will be registered as a group contract. If this condition is met, the application of the collective agreement recorded at the level of a sector of activity shall be extended to all the units in that sector.

In addition to the termination of national-level bargaining, the provisions of the existing legislation on the establishment of trade unions and their representativeness have also contributed significantly to the weakening of social dialogue.

A trade union is considered representative at plant level if more than half of the employees are members.[59] Pursuant to art. 134 (2)(a), employees at the enterprise level may be represented at the time of the conclusion of a collective agreement by legally constituted and representative trade unions or, where there is no representative trade union, by a trade union federation representative of the sector concerned, and of which the trade union in the enterprise is a member or, in the absence of trade unions, by the elected representatives of the employees. In addition to the fact that, despite the plural used in the wording, since representativeness requires half of the members plus one, it is impossible to have more than one representative trade union at the enterprise level at the same time, the current wording of art. 134 leads to the conclusion that it is possible to conclude a contract exclusively by a representative federation.[60] However, as the content of art. 135 has not changed, in the absence of a representative trade union at company level, bargaining without employee representation is still excluded. Art. 135 continues to provide that, in companies where there is no representative trade union, either the representative confederation shall negotiate the collective agreement with the elected representatives of the employees on the employees' side or, where the trade union in the company is not a member of a trade union federation representative at sectoral level, the employees' representative shall be entitled to negotiate.

The general regulatory framework for the content of collective agreements is laid down in art. 229 (1) of the Labor Code. According to this provision, as we have seen above, a collective agreement is an agreement on *working conditions, pay, and other rights and obligations arising from the employment relationship*. Within the limits

59 However, the provision, which has been widely criticised in the literature, is also considered to be not excessive, although indeed difficult to implement. Naubauer, 2012, pp. 32–35.
60 Ionescu, 2016, pp. 65–69.

of the above short definition, the parties' freedom to negotiate and conclude contracts prevails. Art. 132 of the Law on Social Dialogue merely expands on the above provisions by introducing four specific rules defining the concrete content of collective agreements. These rules are as follows: a collective agreement may only provide for rights and obligations in accordance with legal conditions; statutory provisions on workers' rights are minimal; a collective agreement at a lower level may not provide for fewer rights for workers than those provided for in a higher-level agreement, and individual employment contracts may not provide for a lower level of workers' rights than those provided for in a collective agreement.

Any provisions of a collective agreement that are in conflict with the above rules are considered null and void. Art. 142 of the law, which provides for nullity, also stipulates that in the event of a declaration of nullity, the parties have the right to renegotiate the provisions in question, with the clarification that until the renegotiation is concluded, the more favorable provisions for the employees on the matter in question, as provided for by law or by the higher level collective agreement, will apply.[61]

Thus, Romanian labor law does not allow for the possibility, which has seeped into the labor law practice of some Western European countries that collective agreements may limit the benefits and rights of employees compared to those provided for by law.[62]

However, there are several provisions in the Social Dialogue Act, the Labor Code or even other legislation that outline the scope of the content of collective agreements. Firstly, the definition in the Social Dialogue Act refers to the categories of rights and obligations arising from the employment relationship, agreements on the resolution of labor disputes and arbitration awards as the subject of collective agreements. And the chapter on trade unions shows that a collective agreement can define the various additional rights of trade union leaders. Examples of other provisions of the Labor Code include the possibility of a collective agreement to specify more days off than the statutory minimum, and the possibility of a company plan for continuing vocational training as an annex to the collective agreement. Act No 202 of 2002 on equal opportunities between women and men makes it compulsory for collective agreements to include a prohibition of all gender discrimination. Act No 204 of 2006 on voluntary private pension insurance states that it is possible to propose in a collective agreement to join a certain voluntary pension fund.

The list of examples could go on, but it can be clearly stated that, based on Romanian labor law practice, and without claiming to be exhaustive, the following can be identified as the scope of collective agreements adopted at different levels: working conditions, working time and rest periods, probationary period, vocational training, provisions on wages (except in the public sector) and provisions specifying the various obligations of employees.

61 Grety, 2018, pp. 60–64.

62 This interpretation is confirmed by the consistent position of the Romanian Constitutional Court: in its Decision 438/2011 it refers back to its previous Decisions 511/2006 and 294/2007 (Țiclea, 2015a, p. 260).

8. Concluding Remarks on Current Issues in the Development of Romanian Labor Law

The COVID-19 pandemic, which began in 2020, hit Romanian labor law in a phase of development that strongly emphasized flexibility and shaped the rules of individual and collective labor contracts accordingly. This process, in our opinion, has been accelerated by this unforeseen situation. The mass shift of workers to teleworking has made it necessary to rethink the regulation of teleworking, the first signs of which are already visible in the legislation, and further changes are likely to follow. In the period between 2020 and 2021, 18 pieces of legislation were published that have amended, supplemented, or in some way affected the provisions of the Labor Code. These include two pieces of legislation which are, in our view, significant but not necessarily thought through well, and which will have a debatable impact on labor law practice in the period ahead. Both were adopted by emergency government decree, which was an unfortunate but obvious solution in the context of the pandemic to change a piece of legislation as significant as the Labor Code.

Emergency Government Decree No. 36 of 2021 introduced the previously mentioned rules on electronic signatures and electronic contracts of employment, but it also redefined the concept of teleworking in a simpler form than before, and introduced simplifying novelties in terms of labor protection issues, allowing the use of digitalization tools.

Emergency Government Decree No. 37 of 2021 abolished the obligation for companies with no more than 9 employees to draw up internal rules and job descriptions. In our opinion, this provision will not be of any practical use, but it may create numerous problems in the future, for example in terms of sanctioning disciplinary offences or evaluating the performance of the employee, the rules of which are contained in this document.

Simpler but mutually beneficial provisions for the employer have been introduced by the Labor Code Supplementary Act No. 213 of 2020, which allows the employer to outsource HR tasks to an expert and, in the case of individual labor disputes, the conciliation procedure itself to an external person, usually an expert in labor law.[63]

The direction of development of Romanian labor law is therefore clearly outlined, and is moving toward the adoption of the principles of flexicurity. However, the issue of security should not be forgotten alongside flexibility, as the primary task of labor law remains to provide workers with adequate protection in an unbalanced employment relationship. As Davies and Freedland put it in their book entitled Labor and the Law, 'The main object of labor law has always been, and we venture to say will always be, to be a countervailing power to counteract the inequality of bargaining power which is inherent and must be inherent in the employment relationship.'[64]

63 Țop, 2020, pp. 26–32; Sâmboan, 2020, pp. 70–86.
64 Davies and Freedland, 1983, p. 18.

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