University Doctoral (PhD) Dissertation Abstract

The role of participation rights in the employment relationship

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I. Research problem and the hypotheses

The Hungarian model and regulation of employee participation has always generated controversy in the legal literature, even if there was a common standpoint that many of the existing rules are inadequate. The regulation – regardless of its different text versions at specific points in time – has always been in the focus of critics which have yet to arrive to a resolution since the different opinions emphasize different reasons causing the anomalies of the Hungarian works council and blocking the spread of this form of employee representation and how this tendency should be or could be changed. At this point, I need to mention that during my research and the analysis of the relevant legal literature, I have discovered that even though the legislator missing to determine the aim and function of the works council was a regular argument, the Hungarian legal literature has also missed to make that determination overall. Despite emphasizing the dogmatic errors, the sources themselves have often used the definition of works council and employee participation interchangeably and with the same content, specifying its function as participation in the employer's decision-making and cooperation with the employer.

In addition, the Hungarian works council is typically compared to the German model as its role model, despite the argument, constantly existing since 1992, that the Hungarian regulation has become way too different from the German model. Partly that is the reason I have decided not to make a comparative analysis, since these two works council models are way too far apart from each other both in time and in regard to realization. Therefore, I have tried to examine the Hungarian regulation in itself, in order to find the possible internal contradictions and deficiencies in regard to the domestic conditions and legal traditions, and also, with regard to these, whether it is able to ensure the realization of the aim of the employee participation. However, it was impossible to analyse the whole regulation in detail due to the limits on the dissertation's length, therefore I tried to examine the most relevant and problematic parts of the regulation which I have chosen from among the ones uniformly criticized in the labour law literature.

Therefore, the main aim of my research was to explore the reasons behind the 'unpopularity' of the works council in Hungary.[1] During this, I have looked for the most relevant critics of

[1] In 2010 only 18 % of establishments, in 2015 17,9 % of establishments had works councils. BENYÓ Béla, *Az üzemi megállapodás, mint a rendezett munkaügyi kapcsolatok indikátora,* Munkaügyi Szemle, 2015/1, 21.,

the relevant legal literature for guidance, with regard to which I have examined the domestic status of the participation and the works council in a preferably logical sequence.

My *first hypothesis* during this examination was that the reason behind the anomalies of employee participation lies with the fact that, along the works council, it is an unprecedented, foreign body in the Hungarian (labour) law.

As a *second hypothesis*, I have assumed that the domestic participation system does not function appropriately due to the fact that the aims of employee participation and works councils have not been determined during the establishment of the regulation.

Finally, as a *third hypothesis*, I have assumed that the appropriate functioning of employee participation is obstructed by the internal contradictions and the great number of legal gaps found in the rules regulating it.

The topic has been narrowed down depending on the conclusions made at the end of examining each hypothesis, in case it proved necessary.

II. Research methodology

Several methods have been applied during my research, typically combined with each other. During the historical analysis, I tried to give a wholesome image on the 'pre-life' of the topic of the thesis, mixing the findings of contemporary sources with the discoveries of recent researches containing a more systematic analysis of the events. During the dogmatic analysis, especially while establishing the goals of workplace (industrial) democracy, I have used a significant number of legal literature written in the socialist era which often referred to Lenin or drew conclusions based on the capitalist-worker conflict. However, it was a characteristic of that time, even in case of serious legal works, thus I have decided to analyse and refer to those works which contained logical findings applicable to the socio-economic system of the present time even after removing this 'glaze'.

CSABAI István – KISGYÖRGY Sándor, *Konzultáció és kommunikáció az érdekképviseletekkel,* In: NEUMANN László (szerk.), *„Munkahelyi foglalkoztatási viszonyok 2010" kutatás,* Emóció Bt., Budapest, 2010, 245., CZUGLERNÉ IVÁNY Judit – KUN Attila – SZABÓ Imre Szilárd, *Az alternatív vitarendezés alanyai a munkavállalói oldalon; Mitől kollektív egy érdekvita? (szakszervezet, üzemi tanács),* HVG-ORAC, Jogpontok, Budapest, 2017, 21.

Regarding the parts which aimed at exploring the purpose of employee participation and conceptual clarification, I carried out basically a dogmatic analysis, the main guideline of which was the purposive approach.

Accordingly, besides a grammatical interpretation, I strived to reveal the legislator's intention through teleological legal interpretation during the analysis of the relevant legislation, especially regarding those rules which seemed to be difficult to interpret or proved to be contrary to other provisions. However, in connection, I consider it important to note that the explanatory memorandum of the Labour Code[2] – especially the part of the detailed reasons – often simply repeats the relevant legal provision or merely declares the amendment of the previous rule, without explaining the reason and aim of the change. In case this method of interpretation left me in doubt, I resorted to other methods in order to explore the purpose of the regulation, primarily the methods of logical interpretation such as *argumentum a contrario*, *argument a maiori ad minus*, *argument a simili*, and *argumentum ad absurdum*. In addition, I relied to a great extent on the contextual and the systematic interpretation, in particular during the analysis of the participation rights and the legal consequences of the infringement of these rights.

During the analysis of the existing legislation on the works council, I also elaborated the relevant case-law, including the anonymous individual decisions of the courts available in the Collection of Hungarian Court Decisions besides the judicial decisions of principle and judicial judgements of principle, as well as the related judicial uniformity decisions. Although I tried to narrow down the analysis of the case-law to the decisions on works councils, due to the close relationship between the works council and the trade union, and the issues concerning both legal institutions (e.g. labour protection), I also processed decisions on trade unions containing statements relevant to the topic of the thesis.

Finally, I also tried to rely on empirical experiences which partly means collecting and analysing statistical data and using the results of sampling-based researches to the necessary extent. My own personal experiences also appear in the background: as an employee myself and a trainee lawyer, I had the chance to observe the dynamics of the employment

[2] Act I of 2012 on the Labour Code (Labour Code).

relationship, the significance of participating in the determination of the working conditions, the problems and solutions arising from the exchange of opinions or the lack of it. Based on my experience gained in labour litigation, the importance of examining litigation issues as one of the measures of the enforceability of substantive rights, also became clear. And finally, while taking part in the internship program for PhD students ran by the President of the Curia of Hungary, I had the opportunity to learn about the judicial dimension as well as the problems faced by the courts when interpreting the legislation in force. Based on these personal experiences, I strived to implement all these aspects during my research as much as possible.

III. The structure of the thesis

The structure of the dissertation was fundamentally determined by the above hypotheses. Accordingly – and also following the classical form indeed – I have examined the historical background and evolution of employee participation in Hungary in the first chapter. This meant going back to the beginning and carry out the analysis in a linear manner over time in order to show the fullest possible picture on the development of this legal institution and whether it may be considered unprecedented in Hungary. During this analysis, it became clear that particular forms of participation existing at different times had distinctive functions, therefore, in the second chapter I tried to explore the aims of employee participation at present time, also examining the justification of those aims.

In the following chapter, the content of the various definitions and the relationship between them have been clarified, since the terms related to employee participation are regularly used interchangeably, despite the fact that these definitions have explicitly different meanings and cover different phenomena as it has been discovered at the end of the examination. During this analysis, I proceeded from the broader concept (workplace democracy) towards the narrower definitions, trying to present employee participation, works council and participation rights in an unambiguous system. Following – and partly as a result of – the conceptual clarification, the goals of employee participation were explored in the third chapter, during which I proceeded from the evaluation of the more general objectives towards the more specific and particularly labour law-related objectives.

Subsequently, based on the analysis performed in the previous three chapters, I determined the direction of further research by narrowing it down to the examination of the rules governing the works council. I have carried out the analysis of the rules on the election, the rights and the employment protection of the works council along the principles and reasons set in this chapter. Subsequently, but related to this chapter I have examined the set of rules governing the operation of the works council with an outlook on other related areas of law. Accordingly, I explored the relationship of the works council with data protection, followed by an analysis of the role of the works council in the event of the employer's insolvency.

During the analysis, I made partial conclusions at the end of each major and the smaller parts examining the rules on the works council. Establishing these partial conclusions enabled to summarize the results of the research in the last major chapter and then systematise the drawn conclusions accordingly. At the end of the summary and conclusions, I drew the final conclusion.

Based on the analysis so far, it may be stated that it is a cardinal question what purpose(s) and results the legislator intended to achieve through employee participation. It is indeed necessary in order to determine the function of the institution assigned to achieve these purposes and results as well as the appropriate content of the designated participation rights. The scope and content of the guarantees necessary in order for employee participation to carry out its function also depend on the established aims, thus enabling employees to exercise their right to participation through the works council and achieve the designated purposes. For instance, the legal rules of election, the provisions ensuring the exercise of participation rights, or the regulation on labour protection. Basically, the appropriateness of the regulation could be measured or, where necessary, adjusted based on the fact whether these rules achieve the objectives pursued, and whether they help or rather mean a hindrance in achieving them.

However, the Hungarian legislator failed to clearly and unambiguously define and specify these aims or the actual function of the relevant institutions. Therefore, in my view, it is necessary to examine the most important provisions of the current regulation, as well as those introducing appropriate safeguards. In the course of this, I chose the works council as the subject of my research, which is the classical and perhaps the most widespread form. In this regard, I excluded the works council of the civil servants from the analysis, because, due to the special nature of the civil servants' employment relationship and the employer's (state's)

person, it is not equivalent to the ‘regular’ works council. I narrowed the scope of the analysis furthermore to those employers who are legal entities or companies, because the number of employees typically reaches the threshold to elect a works council at such employers. Therefore, examining the legislation is basically relevant at such employers.

Therefore, I carried out the analysis along two questions. The first question was whether the current regulation of the works council provides participation for the employees in the employer’s decision-making to some extent, even if the exact aims of the legislation are not declared, or rather there are such internal contradictions, legal gaps, and other anomalies which hinder employee participation. The other question was whether the intention of the legislator can be detected at least indirectly as a result regarding the Hungarian employee participation system. Solely after answering these questions can be examined the third and final question whether the regulatory anomalies are caused partly or entirely by the lack of defining or openly declaring the aims of the regulation.

During the analysis, I narrowed down the subjects to be examined – with regard to the scope limits as well – to those rules without which a works council cannot be established, maintained or the participation rights cannot be exercised. Accordingly, I selected the rules on the election procedure of the works council for analysis because the establishment of the works council depends on these provisions; the rules governing the participation rights, because they determine the latitude of the works council, and whether it substantially provides some kind of participation or representation of interests for the employees; and finally, the legal institution of labour protection, without which no representative body could effectively carry out its task due to fear of retaliation from the employer. I excluded from the scope of examination the relationship of the works council and the trade union, and how their rights and operation level shall be distinguished on the one hand, because I wanted to find out whether the provisions on the works council or its rights themselves are suitable to ensure the functionality and supposed function of the works council, or they are rather hindered; on the other hand, without knowing the aims of employee participation, such as the function intended for the works council, it is impossible to determine whether it is necessary to clearly distinguish the works council from the trade union at all and, if so, in what respects. If, as a result of the investigation, it can be concluded that the rules governing the works council are in themselves capable of rendering it dysfunctional, examining whether and in what aspects

the works council and the trade union overlap – although it would also justify the regulatory anomalies – would not be of additional relevance to the analysis.

For this reason, in addition to the scopes outlined above, I have decided to also include in my analysis other issues from different areas of law that are relevant in relation to the works council and are particularly important, but little studied. Since I have approached the current regulation in terms of several regulations of different logics, but with a significant impact on the operation of the works council, a more definite answer can be given to the above questions, as it can be explored whether the aims and the concepts based on them in relation to the works council can only be discovered from a labour law point of view or across the entire legal system. Accordingly, I have examined the works council's nature as data controller and the data protection issues arising from the obligations implied by such a quality. The works council inevitably processes data, therefore it is essential to know whether the data protection rules allow or rather hinder the exercise of participation rights. The other subject examined was the rules governing the insolvency of the employer. It is undisputed that employees require a higher level of protection in the event of the insolvency of their employer, which is particularly true in case of the Hungarian participation model, which entitles for effective participation only regarding decisions on welfare funds, while the insolvency of the employer affects, inter alia, those funds. In the rest of the dissertation, therefore, I examined the current legislation on the basis of the above reasons and aspects, as a result of which the above questions can be answered, the hypotheses evaluated, and the final conclusion drawn.

IV. Conclusions

IV.1. The result of examining the first hypothesis

I found the first hypothesis partially confirmed based on the analysis carried out. Workplace democracy and works council are in fact not entirely unprecedented in Hungary, these institutions do have a long history. The development of works council in Hungary essentially began just when the models of Western countries started to emerge. Therefore it cannot be stated in relation to the regulation established and maintained after the change of regime that it is utterly unprecedented and thus a novelty in Hungarian labour law. However, it follows from three consecutive factors that the works council still feels 'foreign'.

On the one hand, after the 1956 Hungarian Revolution, the legislator clearly diminished – *de facto* abolished – for decades this more of a grassroots institution by giving precedence to the trade union movement which can be simply influenced politically or even managed from above. On the other hand, as a result, the organic evolution of the works council observable at the beginnings and noticeable in other countries did not occur, which have fundamentally determined and affected the place of this institution in the legal system, its purpose, its rights as well as its relationship to the trade union movement. After the change of regime, all this led to – and this is the third influencing factor – the legislator trying to re-create the works council from 'scratch' and based essentially on a top-down approach. However, instead of the previously existing Hungarian model, the legislator reached to the German model which have already been evolving for decades by that time in its own way and thus obtaining a decisive 'image'. And otherwise despite the fact that besides the works council, the trade union movement has also taken a considerably different path of development in Hungary than in Germany.

Therefore, adopting the German model after such a historical background could certainly make the Hungarian works council seem 'foreign' and unprecedented, even if the Hungarian legal traditions are mainly rooted in German law. Moreover, choosing and implementing the German model in Hungarian law took place – and this is a recurring criticism by jurisprudence and often by legal practice – without defining the role of the trade union movement at the same time. In the socialist era, workplace-level trade union movements were strengthened by the legislator, therefore the adoption of the German collective labour law model itself, which was otherwise based on sectoral and national level trade union movements, and the workplace level works councils, posed the risk of a dysfunctional and insufficient Hungarian model. Despite the professional and trade union concerns, the legislation of 1992 thus applied a rather top-down approach by introducing a new form with narrower rights but otherwise similar to the German model. Despite the fact, that the institution itself has a rather bottom-up approach as was shown by the historical development. It is therefore more of an 'imposed' works council model, the main framework of which was created by the legislator seeking political compromises rather than an 'organic' development of the balance of power between employees, trade unions and employers recognized by law. Unequivocally, the course of the development of this institution in practice has thus been determined as well as limited. This 'imposing' approach has stayed a characteristic of the

Labour Code of 2012 as well which maintained the most problematic parts besides adding new ones of the by then highly criticised, lesser-known and unpopular Hungarian model, leaving it in a 'vacuum'. Therefore, based on the examination of the first hypothesis, it can be stated that the works council in Hungary is not unprecedented, but rather established by law along the priorities of the legislator (top-down approach) by ignoring the current state of domestic collective labour law and 'skipping' the path of organic development.

IV.2. The result of examining the second hypothesis

Subsequently, I examined the second hypothesis, according to which the Hungarian employee participation system does not function properly – at least partly – due to the fact that the legislator failed to determine the goals of employee participation and the works council.

As the result of the analysis, it can be stated that workplace democracy aims to democratize the autocratic workplace, and to decrease the vulnerability of employees by introducing democratic procedures. Employee participation is a legal institution which – regardless of its form – ensures the direct or indirect participation of employees in all decisions made by any of the bodies of the employer, directly or indirectly affecting the employees or the working conditions of the employees of the undertaking. Employee participation may take several forms, though in Hungary, employee participation is typically understood as an indirect form of participation (exercised through elected representatives). Its classical form – which I have analysed – is the works council, a body elected and dismissed by the employees of the plant on a compulsory, secret and equal ballot in order to exercise the participation rights of the employees of the plant and to conclude a works agreement as a mandatory representative.[3] Furthermore, the so-called participation rights are the right to information, consultation and co-determination which are rights of varying strength granted to the works council as a form of participation within workplace democracy.

Even though all theories take the necessity of introducing democracy at the workplace for granted and identify workplace democracy and employee participation as goals to be achieved, I came to the conclusion during my analysis that instead these are principles or legal

[3] Employees are only able to exercise their participation rights together, through the works council. The works council does not represent its own interests or exercises its own rights, but those of the employees, representing these interests on their behalf and for their benefints. CZUGLERNÉ – KUN – SZABÓ *i.m.* 26.

institutions, necessary to achieve the goal(s). Therefore, I subsequently tried to explore which goals employee participation and its institutions such as the works council intend to achieve, and I have identified six main goals as a result.

The first aim is to *ensure the participation of society* in those decisions the society could not be involved otherwise through other social (state) organizations, but even so the negative consequences of which the society has to bear through its social security system and employment administration system in the spirit of social solidarity. Therefore, participation means that employees – and through them the whole society – are able to influence the outcome of those decisions that affect them and actually take part in the decision-making, because they cannot be expected to bear the consequences otherwise.

The second aim is to *represent the interests of employees and to ensure the participation of the labour force of the plant in establishing the content of the employment relationship.* The employers have a significant influence on their employees' lives, therefore it is necessary to enable the employees to have a say in the internal life and control and in the development of working conditions of the company they are employed by. However, this requires the employees or their representatives to also recognize and clearly communicate their own interests towards the employer. Employee participation therefore helps to reconcile interests and elaborate common goals through participation rights. Since trade unions represent solely their own members, there is a need for a different institution which represents all employees of the plant.

I have discovered *preventing dehumanization of workers* as the third aim. In the employer's organization, the decision-making sphere is moving further and further away from the levels of execution, therefore exploring and coordinating the interests of the employees and the employer is of great importance which may help to prevent the so-called dehumanization by making the employer see the employees as humans rather than as a means of production.

The fourth aim is to *balance the power in the workplace* by limiting the power of both the employer and the trade union. The aim of recognizing and ensuring the collective rights of workers is to redress the imbalance of powers between the parties. In this context, employee participation and the institution of the works council is a private law-based, internal counterweight to the employer's economic and legal decision-making power. These also serve

as the counterweight of trade unions. The works council, independent from the employer, may shape the content of the employment relationship and represents the interests of the employees, and also limiting the playing field of the trade union to some extent through the delimitation of competences, thus eliminating 'backdoor deals' between the employer and the trade union.

The fifth goal is to *ensure the autonomy (right of self-determination) of the employee(s)*. The right to self-determination as a fundamental right ensures the autonomy of the parties even in the employment relationship, allowing employees to influence the content of their employment relationship not only when establishing it, but throughout its term. Besides the individuals, the community of the employees is also entitled to such an autonomy vis-à-vis the employer. Consequently, the restriction of the freedom to conduct a business can be justified in favour of the employees' and the community's right of self-determination, one form of which may be employee participation in the employer's decisions determining the working conditions.

The last and sixth aim is *to monitor whether the employer complies with the legal obligations*. On the one hand, the right to participate in the decision-making includes the right to monitor the execution of these decisions for which individual employees lack the opportunity, the right and the resources. However, it is more feasible through institutions and rights provided to the whole employee community, such as employee participation. In addition, the state both entitled and obliged to monitor compliance with labour law rules has limited resources to do so, therefore an internal mechanism at the employer may complement state control, through which the state is able to monitor the lawfulness of the employer's activity – at least in the field of labour law – without additional resources, by the help of employees knowing and understanding the internal structure of the employer.

The current regulation implies that, among these aims, representing employee interests, ensuring the participation of the employee community in shaping the employment relationship, monitoring the activities of the employer, and balancing the power of the trade union are the goals of employee participation and the works council. It can therefore be concluded that the legislator did not declare the aims of the regulation, but only implies some of them through the legal rules, though without clarifying their content, scope and relationship with each other. Moreover, the task of the legislator should have been in principle to adapt the

rules to the declared objectives instead of only implying the aims through the legal provisions and adjusting these aims to the existing rules. Even more so, because this way the goals currently implied may perish just by amending the regulation, and then it becomes difficult to determine whether the existing regulation serves its purpose(s). Thus, I found the second hypothesis to be fully justified since the legislator failed to declare the aims of the legislation, which may be an obstacle to establishing an effective regulation on employee participation and the works council, and its functionality.

IV.3. The result of examining the third hypothesis

Finally, based on the analysis, I found the third hypothesis to be fully justified, according to which the great number of internal contradictions and gaps of the legislation in relation to significant issues are an obstacle to the functionality of employee participation and the works council. I extended the analysis beyond the issues traditionally considered relevant as well and examined two other issues which are in relation to the works council, but belong to different fields of law. I carried out in particular the analysis of data protection and insolvency rules with the works council in focus. As the result of it, I discovered the following sets of problems.

The first 'circle' covers *a set of missing and flawed concepts*. Within that, the first subset of the legislator's *failure to determine the aim of the whole legislation* may be established, since basically no concept or logic running through the whole legislation can be discovered which would serve as a guide at the interpretation of the rules regarding specific sub-issues (e.g. labour protection, welfare funds, participation rights). Declaring the aims would be necessary in order to determine the extent of the restriction on the employer's power (proportionality). The 'aimlessness' and illogical nature of the rules throughout the whole legislation is in itself able to hinder the functionality of the works council.

Presumably, the overall lack of defining the aim of the legislation may be the cause of the *erroneous concepts* developed for the specific rules. Such a flawed concept is the company model underlying the thresholds of electing a works council, which entirely disregards the structure and size of Hungarian companies and the number of employees employed by them, thus significantly reducing the number of employers where a works council can be elected. The very same problem lies with the size of the works council as the legislator fixed the

maximum number of its members without proper justification, thus jeopardizing the functioning of the works council which can mainly be set up at large companies.

Conceptual confusions can also be observed regarding those terms in the regulation on which the exercise of certain rights depends. For instance, the legislator unreasonably uses the term of fixed establishment ('önálló telephely') as a condition of establishing a works council, which has an underlying company law meaning, despite the fact that it is declared to be different than an establishment ('telephely') within the meaning of company law, as a distinct definition has been created. On the other hand, in relation to the right to co-determination, the term of welfare funds lacks a distinct definition, despite the fact that the expression faded from everyday language as well as from legal terminology, therefore its content is not clear at all.

The second 'circle' covers a set of *regulatory gaps or legal gaps*, by which I mean the lack of legal provisions and the legal gaps caused by specific provisions.[4] This includes the *lack of a detailed regulation*. Even though the provisions governing the election of works councils may seem relatively detailed at first glance, they are rather of a regulatory framework nature, as the legislator entrusts the election committee with establishing the detailed rules of the election procedure.

The lack of a detailed regulation also shows in the silence of the Labour Code on the possible effect of bankruptcy and liquidation proceedings on the rights of the works council, though this issue is partly touched by the Insolvency Act which lacks a labour law approach and logic. The same defect can be observed in relation to the data controller quality of the works council, in which respect the Labour Code should give a guideline besides the Privacy Act. However, the Labour Code contains such references among the general rules and even limited to a few sentences, which, this way, does not clarify for instance the situation when the works council is unable to comply with its data protection obligations due to the employer's conduct (liability issue). Moreover, the analysis of these areas emphasized that the legal personality of the works council is basically unregulated, which indeed hinders the enforcement of the

[4] Naturally, erroneous concepts can also cause legal gaps. However, I found it important to distinguish between these two categories since in one case the legal gap is caused by the erroneous concept of the legislation, while in the other case it is caused by the specific content of the regulation.

claims of the works council as well as the enforcement of claims against the works council itself.

Dogmatic errors may also be included in this circle. One example of this is the regulation of labour protection, which is fundamentally inaccurate. Even though the protection is based on the function of the works council and the activity of representing employees' interests which is performed by the works council as a body, solely the chairman of the works council is entitled to such protection, though only in case the chairman is not entitled to protection under another title. This leaves the works council, as a whole, unprotected.

Still staying in the circle of regulatory gaps (legal gaps), the *lack of special provisions* can be established as a separate category. By this I mean that although certain legal issues can be settled on the basis of the general labour law rules and principles, special provisions are indeed needed due to the nature of the works council. Such a need appears particularly in relation to the electoral procedure, in which special principles shall be introduced in order to enable effective remedy in the event of breaching the electoral rules. The most important in this regard would be to introduce the requirement of the fairness of election, the infringement of which could be established based even on such (several) minor breaches which cannot be a ground to the annulment of the results of the election under the current rules, even if that undermines the employees' confidence in the fairness of the election and the legitimacy of the works council.

The third major 'circle' covers the *lex imperfecta* nature of the regulation which clearly hinders the effectiveness of the legal rules. Although it could be categorised also as a regulatory gap, the significance of this deficiency justifies for it to be classified as a separate category, in which two subsets can be distinguished within one another. One of them covers *the lack and error of legal consequences*. In this regard, it was clear that, under the general rules, the 'regular' legal consequences of invalidity can be applied to the employer's conduct breaching the right to co-determination. However, due to the incoherence of the legislation, the case-law which prefers the restrictive interpretation – and partly the jurisprudence as well – takes the opposite view. In case of the right to information and consultation, the accepted position has also become the one emphasizing that only an infringement of the right may be established, but fulfilling the obligation arising from these rights – e. g. conducting the consultation – cannot be ordered. It would therefore be necessary to clarify the rules,

otherwise there would be no legal consequences for the infringement of participation rights, which would result in empty rules.

Within this can be distinguished the category of *rules without sanctions*. There clearly is no punishment for a person – be it the employer or anyone else – interfering with the establishment of the works council. Although it is possible to identify an infringement and apply certain legal consequences, these not necessarily have a dissuasive effect, which means that even the establishment of a works council can be 'blocked' for a longer period of time without any adverse consequences. It would therefore be appropriate to at least extend the power of the labour inspectorates to impose fines in such cases, which could indeed have dissuasiveness.[5]

The fourth 'circle' is a set of *rules promoting employers' interests*. Though the regulation, as a whole, ultimately favours the employer, there are also provisions clearly giving precedence to employers' interests over the employees' interests. This is typically the case when the exercise of a (participation) right depends solely on the employer's decision. For instance, when the employer itself can decide the disclosure of which information would harm the employer's legitimate interests, and thus on this ground is entitled to also refuse providing the information to the works council, or undertaking consultation. Consequently, the employers may refuse – practically anytime – fulfilling their obligations arising from participation rights with reference to their own classification.

The employer also benefits from the complete lack of sanctions for breaching the rules on participation rights and works councils, as well as from the fact that even legal consequences can solely be applied to a limited extent.

The fifth 'circle' covers a set of anomalies in the case-law, which not only measures the degree of the legislation's effectiveness, but also shapes – due to the lack of detailed regulation – the existing rules. Within there is the subset of *the unregulated judicial functions*, by which I mean that the legislation fails to distinguish which are those rights only the

[5] This naturally requires such an amount of fine which is higher than the 'advantage' the employer could possibly achieve, in which case it should also be taken into account that the infringement ab ovo affects the whole employee community.

employees' community is entitled to exercise, and to determine which circumstances the courts cannot examine.

Such is the case regarding the assurance and the withdrawal of labour protection, which is basically related to the function of the works council, and the function is related to the election. The term of office of the member (chairman) is linked to the election and is terminated only in the cases prescribed by law, which do not include his/her failure to perform his/her duties, in which case the employees would be entitled to exercise the right to dismiss the chairman anyway. Therefore, the employer can only request the employees to dismiss the chairman as this right solely belongs to them, since the employees are the ones entitled to elect him/her. Consequently, the chairman of the works council does not lose his/her right to labour protection merely by failing to perform his/her duties at the works council or refusing to take part in its work, therefore the court is not entitled to establish it either, since that would equal to exercising the employees' right to dismiss the works council('s) chairman. However, it is impossible in the absence of a statutory mandate, which in my opinion cannot be granted anyway since this would be a matter beyond the scope of the legal dispute, and the court is not entitled to exercise the employees' collective rights in relation to works council elections either. This is also supported by the rule that after the termination of the mandate of the works council, the consent of the employees' community must be obtained in relation to labour protection, thus the final holder of the right to terminate the protection is the community.

The other subset includes *errors in case-law*. Within this, a distinction must be made between the errors in practice that are due to the anomalies of the regulation, and the errors that are a result of using almost exclusively the restrictive interpretation. The courts misinterpreted the legal consequences applicable in case of a breach of the participation rights due to an *anomaly of the regulation,* which has already been discussed above. But this also includes the case when the court has established, in relation to labour protection that the works council is in fault by refusing to agree to the employer's request to dismiss the chairman, if the given facts and circumstances are grossly unreasonably assessed by the works council, or there is a sever error on its part in applying or interpreting the law. The works council is expected to be impartial, however, as a representative of employees' interests, it cannot give priority to the employer's interests, especially when the works council has to take a position on whether it can perform its duties and represent the employees' interests without one of its members or the chairman. Merely the conclusion of the court, that the refusal to consent imposes a

disproportionate burden on the employer, does not in itself mean that the works council was in fault and breached the principle of impartiality.

The other subset covers the cases when the courts prefer the restrictive interpretation and apply it even if a broad interpretation would be appropriate – the application of which is not prohibited in judicial practice, even if it must be done with caution. Thus, for instance, in case of an infringement of the right of co-determination, not only the declaration of invalidity is possible, but also the application of the legal consequences of invalidity (e.g. restoration of the original state) is appropriate under the general rules. The scope of welfare funds is also unduly narrowed by the case-law by not considering the service to be of welfare nature simply because it is also linked to a statutory obligation, albeit going beyond compared to what is required by law. It was also the same when, by failing to use the process of analogy, the court found that the election committee has no locus standi in civil proceedings. In my view, the application of the restrictive interpretation leads to this result partly because the regulation clearly promotes the interests of the employers, thus unintentionally, but naturally the restrictive interpretation of the legal rules will also result in giving priority to the interests of the employer.

However, in relation to the anomalies of judicial practice, it should also be emphasized that since the intention of the legislator (concept) is often indistinguishable or contradictory to the aims and function of employee participation (works council), basically, the courts should recreate this intention (concept) by a proper and correct interpretation of the rules. However, this would clash with the principle of the *praetor ius facere non potest*. In addition, the small number of cases does not allow the courts to create a uniform concept.[6] Consequently, adjustment of the legislation is needed at first in order to correct the case-law as well.

IV.4. The final conclusion

Overall, failing to define the aims and function of employee participation and the works council, which would define the framework and direction of the legislation, resulted in anomalies of the regulation. Therefore, the answers offered by the interpretation of the regulations – due to the lack of a comprehensive legislation – raise additional questions. This

[6] Between 2010-2019 the courts had 52 cases, covering works council election and participation rights.

may not only adversely affect the functioning of the works council, but also unduly hinders the enforcement of the rights of those concerned, in particular the works council and the employees. Since the scope of participation, the issues covered by the participation rights, and the enforcement of claims can only be properly defined in the light of the specific aims and the role intended for the works council, the final conclusion is that the role of the works council and employee participation in Hungary needs to be rethought and explicitly defined.[7] Without doing so, it is pointless to make *de lege ferenda* proposals in relation to the regulatory anomalies since such proposals would only result in the resolution of a few specific issues. It is impossible to 'correct' the entire legislation on works councils without knowing the legislator's intention and the principles guiding the regulation. With regard to this, I refrained from closing the dissertation with *de lege ferenda* proposals. Therefore, as a final thought, I emphasize that the legislator failed to establish and clearly define the aims of employee participation and the works council, which clearly is an obstacle to formulating a functional and effective regulation.

[7] KUN Attila, *A multinacionális vállalatok szociális felelőssége. CSR-alapú önszabályozás kontra (munka)jogi szabályozás,* Ad Librum, Budapest, 2009, 287.

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List of publications related to the dissertation

Articles, studies (9)

1. **Bagdi, K.**: A new side to employee participation: A possible tool to protect the employees' right to respect for private life in the era of digitalisation and data protection.
   Hungarian Labour Law e-Journal. 2, 48-70, 2019. ISSN: 2064-6526.

2. **Bagdi, K.**: Az üzemi tanács mint adatkezelő kapcsán felmerülő gyakorlati kérdések.
   Miskolci Jogi Szemle. 14 (1), 146-157, 2019. ISSN: 1788-0386.

   Level of HAS Committee on Legal and Political Sciences: A

3. **Bagdi, K.**: Az üzemi tanács mint önálló adatkezelő.
   Debreceni Jogi Műhely. 16 (1-2), 2-10, 2019. ISSN: 1787-775X.
   DOI: http://dx.doi.org/10.24169/DJM/2019/1-2/1

   Level of HAS Committee on Legal and Political Sciences: C

4. **Bagdi, K.**: Munkavállalói participáció, avagy a demokrácia megjelenése a munkahelyen.
   Munkajog. 1, 22-30, 2019. ISSN: 2560-1687.

5. **Bagdi, K.**: Üzemi tanács a bírói gyakorlatban.
   Jura. 23 (2), 277-287, 2017. ISSN: 1218-0793.

   Level of HAS Committee on Legal and Political Sciences: A

6. **Bagdi, K.**: A sztrájkhoz való jog az Emberi Jogok Európai Bíróságának gyakorlatában.
   Pro Futuro. 6 (1), 115-133, 2016. ISSN: 2063-1987.
   DOI: http://dx.doi.org/https://doi.org/10.26521/Profuturo/2016/1/4906

   Level of HAS Committee on Legal and Political Sciences: A

7. **Bagdi, K.**: Contract or Law?: The Legal Nature of Collective Agreements and Normative Works Agreements.
   In: interTALENT UNIDEB. Szerk.: Mándy Zsuzsanna, Debreceni Egyetem, Debrecen, 5-9, 2016. ISBN: 9789634729747

8. **Bagdi, K.**: A munka világának digitalizálódása: Beszámoló a debreceni műhelykonferenciáról. *Munkaügyi Szemle Online. 6*, 1-4, 2015. EISSN: 2064-3748.

   Level of HAS Committee on Legal and Political Sciences: C

9. **Bagdi, K.**: The Future of Employees' Board-Level Representation in The European Union. *Procedia Economics and Finance. 23*, 1394-1400, 2015. ISSN: 2212-5671. DOI: http://dx.doi.org/10.1016/S2212-5671(15)00419-0

Conference presentations (5)

10. **Bagdi, K.**: A munkavállalók pénzügyi részvételének szabályozása a magyar jogban. In: Munkajogi és szociális jogi doktoranduszok és pályakezdő oktatók hetedik konferenciája, [s.n.], "Közlésre elfogadva" [s.l.], 1-23, 2020.

11. **Bagdi, K.**: A Comparative Analysis of the Regulation of Works Agreements in Hungary and the EU Member States. *Profectus in Litteris. 6*, 25-31, 2014. ISSN: 2062-1469.

12. **Bagdi, K.**: Az Európai Üzemi Tanácsra vonatkozó szabályok a magyar jogban. In: Jogalkotás és jogalkalmazás a XXI. század Európájában. Szerk.: Zoványi Nikolett, Doktoranduszok Országos Szövetsége Jogtudományi Osztály, Budapest-Debrecen, 307-316, 2014. ISBN: 9786158004411

13. **Bagdi, K.**: Az üzemi megállapodás érvénytelensége, valamint annak jogkövetkezményei. In: Doktoranduszok Fóruma : Állam- és Jogtudományi Kar Szekciókiadványa. Szerk.: Szabó Miklós, Miskolci Egyetemi Kiadó, Miskolc, 9-13, 2015. ISBN: 9789633580875

14. **Bagdi, K.**: Ellenség vagy jó barát?: Avagy hogyan jellemezhető az üzemi tanács és a szakszervezet viszonya? In: Doktoranduszok fóruma : Miskolc, 2013. november 7. : Állam- és Jogtudományi Kar szekciókiadványa. Szerk.: Stipta István, ME Tudományszervezési és Nk. Oszt., Miskolc, 7-12, 2013.

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List of other publications

Articles, studies (2)

15. **Bagdi, K.**: A diszkriminációmentes munkadíjazás alapvető sajátosságai az Európai Unióban. *Debreceni Jogi Műhely. 10* (3), 158-171, 2013. ISSN: 1787-775X.

    Level of HAS Committee on Legal and Political Sciences: C

16. **Bagdi, K.**: A munkajog és a társasági jog határán Milyen szabályok alkalmazandók a munkaviszonyban álló vezető tisztségviselőkre? *De iurisprudentia et iure publico. 7* (2), 2013. ISSN: 1789-0446.

    Level of HAS Committee on Legal and Political Sciences: C

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