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University of Turku

# LABOUR LAW PROTECTION OF TRAINEES

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## Abstract

The main purpose of this PhD thesis is to answer the question of whether trainees should belong within the personal scope of labour law or whether there are any other legal opportunities to avoid their precariousness in the labour market. In the current research dogmatic and comparative legal analysis is used. The legal acts, provisions of collective agreements, relevant court and labour court practice, and vocational and higher education institutions' regulations concerning traineeships are analysed. The regulations of the European Union (EU), the International Labour Organization and different countries, including France, Estonia, Finland, Slovenia and the United States of America are analysed.

It is argued that trainees should belong within the scope of labour law regardless of the special features of traineeships. Trainees perform subordinate work to the employer and, therefore, fulfil the most important criterion of an employment relationship. The implicit and explicit exemption of trainees from the scope of labour law in practice is the result of improper interpretation of labour law. The fundamental tests determining the scope of labour law do not exclude trainees from the category of 'employees'. Different interpretation leads to the precariousness of trainees in the labour market: neither the traineeship agreement nor the substantial and private international law rules of the EU in cross-border cases provide trainees protection comparable to labour law.

Trainees working in the framework of a traineeship agreement are exposed to precariousness due to the special features of the agreement as well as their limited labour rights. Their right of association and collective bargaining as well as their most important individual rights are limited. A trainee that is not regarded as an 'employee' often has no right to compensation, her/his health and safety is protected only if the traineeship forms part of educational curriculum, and working time is limited if the trainee receives compensation. The substantial law rules of the EU are unable to independently protect the labour rights of (cross-border) trainees. The protection of trainees through private international law rules of the EU concerns only cross-border cases, can distort national labour law and is very complicated because of the lack of consensus as regards the method of the interpretation of the term 'individual employment contract'.

Even with the existence of sufficiently protective alternative regulations, trainees should, according to the labour law in force, be classified as 'employees'. This would guarantee them all labour rights and it would be difficult to explain why, in the case of conflict between the provisions of labour law and another field of law (for example, educational law), the latter one should be applied. The specific characteristics of traineeships could be taken into account by regulating these as special temporary employment contracts similar to apprenticeships.

Since in the case of traineeships the fulfilment of subordination criterion is not problematic, the theoretical suggestions to broaden the scope of labour law do not contribute to the better protection of trainees in a manner that would justify the reconstruction of the basics of labour law. These alternatives are also too abstract to be able to replace the existing system of determining the scope of labour law.

## Tiivistelmä

### Harjoittelijan työoikeudellinen suoja

Tämän tutkimuksen tarkoituksena on vastata kysymykseen siitä, pitäisikö harjoittelijoiden kuulua työoikeuden sovellusalan piiriin, vai onko olemassa muita mahdollisuuksia heidän suojaamiseksi työmarkkinoilla. Vastauksen löytämiseksi tähän tutkimuskysymykseen väitöskirjassa hyödynnetään lainopillista ja oikeusvertailevaa metodologiaa. Tutkimuksen tarkoituksena on analysoida harjoittelua koskevaa lainsäädäntöä, kollektiivisopimuksia, relevanttia oikeuskäytäntöä tavallisten ja työtuomioistuinten näkökulmasta sekä ammatti- ja korkeakoulujen sääntöjä harjoittelusta. Tutkimuksessa tarkastellaan Kansainvälisen työjärjestön, Euroopan unionin ja eri maiden, kuten Ranskan, Viron, Suomen, Slovenian ja Amerikan Yhdysvaltojen sääntelyä harjoitteluun liittyen.

Tutkimuksessa tullaan siihen johtopäätelmään, että harjoittelijoiden tulisi kuulua työoikeuden sovellusalan piiriin riippumatta siitä, että harjoittelun ominaispiirteet ovat erilaisia suhteessa perinteiseen työsuhteeseen. Harjoittelijat työskentelevät työnantajan johdon ja valvonnan alaisuudessa, minkä vuoksi työsuhteen tärkein tunnusmerkki - direktio-tunnusmerkki täyttyy. Harjoittelijoiden suora ja epäsuora poissulkeminen työoikeuden sovellusalasta johtuu siitä, että työoikeutta tulkitaan väärällä tavalla. Työoikeuden sovellusalan määrittelevät tarkoitukset eivät estä harjoittelijoiden luokittelua työntekijöiksi. Erilainen tulkinta johtaa harjoittelijoiden epävarmaan asemaan työmarkkinoilla. Harjoittelusopimus tai Euroopan unionin sääntely eivät pysty tarjoamaan harjoittelijoille rajanylittävissä asioissa samankaltaista suojaa kuin työoikeus.

Harjoittelusopimuksen puitteissa työskentelevät harjoittelijat ovat epävarmassa asemassa sekä harjoittelusopimuksen tekoon liittyvistä syistä että heidän rajoitettujen oikeuksiensa takia. Järjestäytymisvapaus, oikeus kollektiiviseen sopimiseen ja tärkeimmät individuaaliset oikeudet ovat harjoittelijoiden kohdalla suppeita. Harjoittelijalla, jota ei luokitella työntekijäksi, ei yleensä ole oikeutta palkkaan. Työsuojelunormit soveltuvat vain koulutuksen yhteydessä järjestettävälle harjoittelulle. Harjoittelijan työaika on myös rajoitettu vain niissä tapauksissa, kun hänelle maksetaan palkkaa. Euroopan unionin vapaata liikkuvuutta koskevat ja kansainvälisen yksityisoikeuden normit eivät itsenäisesti takaamaan turvaa (kansainvälisille) harjoittelijoille. Kansainvälisen yksityisoikeuden normit soveltuvat vain kansainvälisissä tapauksissa ja ne voivat väärillä kansallista työoikeutta. Niiden soveltaminen on erittäin monimutkaista, koska 'individual employment contract' -määritelmän sisällöstä ei ole saavutettu yhteisymmärrystä.

Vaikka riittävän suojaavaa muuta normistoa olisi olemassa, harjoittelijat tulisi luokitella työntekijöiksi voimassa olevan työlainsäädännön perusteella. Työntekijällä on siten kaikki työoikeudesta johtuvat oikeudet ja olisikin vaikeaa perustella, miksi työoikeuden ja jonkun muun oikeudenalan (esimerkiksi koulutusta koskevan lainsäädännön) välisessä ristiriidassa tulisi soveltaa viimeksi mainittua. Harjoittelun erityispiirteet (erityisesti sen koulutustarkoitus) eivät estä harjoittelujen katsomista työoikeudelliseen kontekstiin kuuluviksi, minkä vuoksi niistä tulisi säännellä tässä kehikossa. Harjoittelua on mahdollista reguloida samankaltaisena epätyypillisenä määräaikaisena työsopimuksena kuin oppisopimuskoulutusta.

Koska harjoittelussa täyttyy direktio-tunnusmerkki, eivät työoikeuden sovellusalan laajentamiseksi annetut teoreettiset ehdotukset takaa harjoittelijoille siinä määrin parempaa suojaa, että ne oikeuttaisivat työoikeuden perusteiden jälleenrakentamisen. Vaihtoehtoiset teoreettiset näkökulmat työoikeuden sovellusalan määrittelemiseksi ovat myös liian abstrakteja vallitsevan systeemin korvaamiseksi.

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## **List of original publications**

1. A. Rosin; M. Muda “Labour Law Status of a Trainee: The Case of Estonia with Comparative Insights from the US, Finland and France”- *European Labour Law Journal*, No.4/2013, pp. 292-312.
2. A. Rosin; M. Erikson “A Trainee’s Right to a Wage: Estonian Situation with Comparative Insights from Slovenia, the United States of America and Finland”- *European Journal of Social Law* 3/2014, pp. 189-205.
3. A. Rosin “Precariousness of Trainees that Work in the Framework of a Traineeship Agreement”- *International Journal of Comparative Labour Law and Industrial Relations*, Vol. 32, No. 2, 2016, pp. 131-160.
4. A. Rosin “Cross-border Trainees and Personal Scope of Labour Law: The Puzzle of National, EU and Private International Law”- in the publication process, forthcoming in *European Law Review* issue 6 2017.

## 1. Introduction

### 1.1 Background, importance and actuality of the research

*David Hyde, a 22-year-old from New Zealand, was delighted when he was accepted as an intern with a UN agency. He had hoped for a paid position, because, he says: "I think my work does have a value."*

*He admits that, during the interview process, the UN told him quite clearly that Geneva was an expensive town, and wanted reassurances that he would be able to fund his internship himself.*

*"I guess my budget was not realistic in the end," he says. "It was way more expensive than I imagined. I thought I could find a really budget way to live, but to be honest I've ended up living in a tent."*

*He had not spent too many nights tenting in the shores of Lake Geneva before he was noticed, and soon his story was on the front pages of the Geneva newspapers. Genevans were shocked that the famous and much-loved institution should be connected to such a case. But inside the United Nations itself, there was little astonishment.<sup>1</sup>*

This example illustrates vividly the problems connected to the use of traineeships. With the situation of high youth unemployment more efforts are needed to help young people enter into the labour market. The use of traineeships in this context is connected with the hope that the obtainment of hands-on working experience eases school-to-work transition. However, the widespread adoption of traineeships has also been accompanied by growing concerns as to their learning content and the working conditions of trainees. Work-based learning can actually end up being a form of cheap or free labour.

The global youth unemployment rate in 2016 was 13.1%. The youth unemployment rate is almost three times higher than that of adult workers. In 2017 no change in the global unemployment rate of young people is expected.<sup>2</sup> In the EU the youth unemployment rate reached to 18.6% in 2016.<sup>3</sup>

The European Union (EU),<sup>4</sup> International Labour Organisation (ILO),<sup>5</sup> Organisation of Economic Cooperation and Development (OECD)<sup>6</sup> and a number of economic studies<sup>7</sup> highlight that the role

<sup>1</sup>I. Foulkes, *How a UN intern was forced to live in a tent in Geneva*, BBC News, Geneva, 12.08.2015, <http://www.bbc.com/news/world-europe-33893384>.

<sup>2</sup> World Employment and Social Outlook – Trends for Youth 2016, International Labour Office, 2016, [http://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/---publ/documents/publication/wcms\\_513739.pdf](http://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/---publ/documents/publication/wcms_513739.pdf), pp. 6-7.

<sup>3</sup>Unemployment rate by sex and age - annual average, Eurostat, 16.03.2017, <http://appsso.eurostat.ec.europa.eu/nui/submitViewTableAction.do>

<sup>4</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions. Youth on the Move. An initiative to unleash the potential of young people to achieve smart, sustainable and inclusive growth in the European Union. European Commission, Brussels 15 Sept. 2010, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0477:FIN:EN:PDF>.

<sup>5</sup> ILC 101<sup>st</sup> Session 2010. Report V. The Youth Employment Crisis: Time for Action. ILO, 2012, [http://www.ilo.org/public/libdoc/ilo/2012/112B09\\_39\\_engl.pdf](http://www.ilo.org/public/libdoc/ilo/2012/112B09_39_engl.pdf).

<sup>6</sup> Recommendation to G20 labour ministers. OECD, 2012, <http://www.oecd.org/newsroom/g20labourministersmustfocusonyoungjobseekers.htm>.

<sup>7</sup> See for example F. Caroleo & F. Pastore „Youth participation in the labour market in Germany, Spain and Sweden,“ in *Youth Unemployment and Social Exclusion in Europe: a Comparative Study*, ed. T Hammer (Policy Press, Bristol, 2003) ,109-133 or P.Domadenik & F. Pastore „Influence of education and training

of traineeships in reducing youth unemployment is substantial by building bridges between the education and the labour market. Because of that reason all mentioned organisations promote the broader use of traineeships. However, using traineeships as a means to promote school-to-work transition is problematic from the point of view of young people's labour protection. There is a tendency in Europe,<sup>8</sup> the United States of America (US),<sup>9</sup> Australia,<sup>10</sup> Canada<sup>11</sup> and China<sup>12</sup> to use traineeships for the benefit of the employer rather than the trainee, leading to the trainee's insecure position in the labour market rather than to a stable job. Instead of providing trainees with on-the-job training, they are used as cheap or free members of workforce to perform regular work. This again affects regular employees, who can be replaced by the trainees and remain on the unemployment rolls because of labour performed by unprotected trainees.<sup>13</sup>

To avoid the misuse of traineeships, the EU and the ILO recommend that traineeships be legally regulated and monitored.<sup>14</sup> However, there are no legal instruments adopted by the ILO to guide the regulation of traineeships or other work-based schemes. In the EU the Council has adopted a recommendation on a Quality Framework for Traineeships<sup>15</sup> (Quality Framework) that addresses certain problems concerning traineeships. Still, even though the first steps to regulate traineeships have been made, a range of issues arising from the use of such schemes are left unsolved.

The complications start with the definition of a traineeship. No common internationally accepted definition exists. Work-based schemes, the purpose of which is to obtain skills and knowledge in a work place, are called traineeships, internship, stages, sometimes even volunteer positions or apprenticeships; these terms may denote the same, similar or different work-based schemes, depending on national practice or legal regulation. It appears that two models of traineeships (internships) can be distinguished: an ideal model in which theoretical and practical learning are combined, and work-based schemes that are called traineeships/internships and cover a variety of cheap and unprotected labour performed by young people. In this thesis I have presumed that a traineeship is a work-based learning scheme that combines learning with working.<sup>16</sup>

I have studied traineeships in a strict sense. Apprentices are exempted from the discussion because of the somewhat unique nature of apprenticeships. If traineeships are understood as

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systems on participation of young people in labour market of CEE economies: a comparison of Poland and Slovenia", *International Journal of Entrepreneurship and Small Business*, Vol. 3, No. 5 (2006): 640-666.

<sup>8</sup> See, for example, the reasoning for the adoption of Council Recommendation 2014/C 88/01 of 10 March 2014 on a Quality Framework for Traineeships, OJ C 88, 27.3.2014, p. 1–4, preamble.

<sup>9</sup> See R.Perlin. *Intern Nation: How to Earn Nothing and Learn Little in the Brave New Economy*. London, New York: Verso, 2012, 71; D.C.Yamada „The employment law rights of student interns.“ *Connecticut Law Review*, Vol 35 (2002): 215-257; N. Bacon „Unpaid internships: the history, policy and future implications of Fact sheet #71“, *Ohio State Entrepreneurial Business Law Journal*. Vol 6(2011): 67-96; S. Braun „The Obama crackdown: Another failed attempt to regulate the exploitation of unpaid internships“, *Southwestern Law Review*, Vol. 41, Issue 2(2012):281- 307.

<sup>10</sup> A. Stewart, R. Owens, *Experience or Exploitation: The Nature and Prevalence of Unpaid Work Experience*, Internships and Trial Periods in Australia, January 2013.

<sup>11</sup> *Ibid.*

<sup>12</sup> E. Brown, K. DeCant, „Exploiting Chinese interns as unprotected industrial labor.“ *Asian-Pacific Law & Policy Journal*, Vol 15:2, 2014, pp.149-195

<sup>13</sup> R.Perlin. *Intern Nation: How to earn nothing and learn little in the brave new economy*. London, New York: Verso, 2012.

<sup>14</sup> Council Recommendation on a Quality Framework for Traineeships 2014/C 88/01, OJ L 206, 27.3.2014, p.1; The Youth Employment Crisis: Time for Action. Resolution and conclusions of the 101st Session of the International Labour Conference, Geneva, 2012. ILO, 2012, [http://www.ilo.org/wcmsp5/groups/public/---ed\\_norm/---relconf/documents/meetingdocument/wcms\\_185950.pdf](http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_185950.pdf), p. 7.

<sup>15</sup> Council Recommendation on a Quality Framework for Traineeships 2014/C 88/01, OJ L 206, 27.3.2014, p.1.

<sup>16</sup> See more profound explanation concerning the definition of traineeship in part 1.2.1.

short- to medium-term work practice including a training component that facilitates the transition from education and training to the labour market, apprenticeships are defined as systematic, long-term alternating training periods at the workplace in an educational institution or training centre.<sup>17</sup> Usually apprentices are regarded as ‘employees’ and therefore, they do not face the same problems as trainees. Nevertheless, I admit that the distinctions between traineeships and apprenticeships are not always clear-cut and with the marginalisation of labour relationships the line between these two is becoming more blurred. I address four types of traineeships: traineeships organised as part of vocational and higher education; traineeships forming part of active labour market services; traineeships for new graduates (open-market traineeships) and cross-border traineeships.

Ideally a traineeship should include both a working and a learning component, which means that on the one hand it is similar to the employment relationship, and on the other hand it can be regarded as an educational tool used to obtain skills and knowledge. This twofold nature of a traineeship makes it difficult to determine whether a trainee should be regarded as an employee or should be left outside the scope of labour law. The task is even more complicated when taking into account that the determination of a labour relationship is not clear-cut and depends on the evaluation of several characteristics. It is unclear which characteristics should be decisive in the classification of a trainee as an employee. If trainees are left outside of labour law, the question of their protection by alternative legal regulation arises. It must be determined whether and which rights of trainees should be protected and how the alternative regulation interacts with labour law. It is unclear whether the existence of alternative regulation itself excludes trainees from the personal scope of labour law. Additionally, the extent of protection provided by alternative regulation compared to labour law determines whether trainees become atypical, but protected or precarious workers.

In resolving these rather practical questions of the protection of trainees, a more theoretical issue concerning the possibilities and limits of the existing labour law in accommodating new forms of work is confronted. It is questionable whether the tests traditionally used to determine employee status include vulnerable workers within the scope of labour law in today’s world, or if these need replacement. If new characteristics were to be used to determine the personal scope of labour law, it must be ascertained which criteria distinguish workers protected by labour law from other (less protected) workers.

There is very little (academic) research conducted on the legal protection of trainees. No comparative academic research on traineeships in the EU has been carried out. There are also only a few country-specific studies concerning traineeships. However, Perlin<sup>18</sup> has studied the internship phenomenon in the United States of America (US); in the EU the Commission has given a comparative overview of traineeship arrangements in the Member States (MS)<sup>19</sup>; Paulin<sup>20</sup> has studied the legal status of

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<sup>17</sup> Analytical document accompanying the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Towards a Quality Framework on Traineeships. European Commission, December 5, 2012, <http://ec.europa.eu/social/main.jsp?catId=1045>, p. 7.

<sup>18</sup> Perlin, *supra* 13.

<sup>19</sup> Study on a comprehensive overview on traineeship arrangements in Member States, European Commission, 2012, [ec.europa.eu/social/BlobServlet?docId=7754&langId=en](http://ec.europa.eu/social/BlobServlet?docId=7754&langId=en), p. 442.

<sup>20</sup> J.-F. Paulin, S. Thivin. *L’étudiant en entreprise*. Lamy, Wolters Kluwer France, 2010; J.-F. Paulin “Le développement équivoque des stages : Institutionnalisation du travail gratuit ou outil de formation et d’insertion professionnelle?” *Chroniques du travail*. Vol 1, déc. IRT Aix Marseille, 2011, pp 109-124; J.-F. Paulin “Stages et stagiaires sans contrat de travail.” *Encyclopédie juridique. Répertoire de droit du travail*. Vol 3, janvier. Dalloz, 2012.

trainees in France; Stewart and Owens<sup>21</sup> have carried out a comprehensive study on internships and trial periods in Australia; and Kairinen<sup>22</sup> and Tiitinen<sup>23</sup> have briefly discussed the labour law status of the trainee in Finland.

The theoretical literature concerning the idea, boundaries and possibilities of the existing labour law as well as the academic research on the alternatives to regulate working relationships is more voluminous. To offer some examples: Davidov has addressed the question of the idea, boundaries and possibilities in his several writings<sup>24</sup>; Langille<sup>25</sup> has dealt with the fundamentals of labour law; Countouris<sup>26</sup> has addressed labour law in the context of changing work arrangements; Freedland<sup>27</sup> has discussed issues concerning new forms of work and proposed alternatives to the existing labour law; and Supiot<sup>28</sup> has analysed the changing nature of work and its implications to labour law.

In this study I aim at least partly to fill the gap in the legal research of traineeships from the point of view of labour law. Because of the novelty of the theme, the purpose of this study is to map the legal situation of trainees with reference to their labour rights and open up further discussion on their labour law status. I have studied traineeships mainly in the context of the EU. However, because academic research, legal regulations and court practice concerning traineeships in Europe is very scarce, I have used comparative insights from the US.

## 1.2 Key concepts

Throughout the annexed articles and the summary part of the dissertation some key concepts have been used. I will shortly clarify the content of these concepts.

### 1.2.1 Traineeship

As the theme of this thesis concerns traineeships, the most important term to be defined is ‘traineeship’. Although at first glance this term seems self-explanatory, defining ‘traineeship’ can be complicated. I have used legal regulations as well as policy documents and academic literature to find out what this term means in various contexts.

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<sup>21</sup> Stewart, Owens, *supra* 10.

<sup>22</sup> M.Kairinen *Työoikeus perusteineen*, Raisio: Työelämän tietopalvelu OY, 2009.

<sup>23</sup> K.P.Tiitinen *Työsopimus-oikeus*, Helsinki:Talentum, 2012.

<sup>24</sup> G.Davidov, “The (changing) idea of labour law”, *International Labour Review*, Vol. 146 (2007), No. 3-4; G.Davidov, “The reports of my death are greatly exaggerated: Employee as a viable (though overly-used) legal concept”, May 2005, SSRN: <http://ssrn.com/abstract=783484> or <http://dx.doi.org/10.2139/ssrn.783484>.

<sup>25</sup> B.Langille, “Labour Law’s Theory of Justice” in G.Davidov, B.Langille (Eds.) *The Idea of Labour Law*, New York: Oxford University Press, 2011; B.Langille “Labour Law’s Back Pages” in G.Davidov, B.Langille (Eds.) *Boundaries and Frontiers of Labour Law: Goals and Means in the Regulation of Work*, Oxford: Hart Publishing, 2006.

<sup>26</sup>N. Countouris, *The Changing Law of the Employment Relationship: Comparative Analyses in the European Context*, Aldershot: Ashgate Publishing, 2007; M. Freedland and N. Kountouris, *The Legal Construction of Personal Work Relations*, Oxford: Oxford University Press, 2011.

<sup>27</sup> M.Freedland, N.Kountouris *The Legal Construction of Personal Work Relations*. Oxford: Oxford University Press, 2011; M.Freedland, “Application of labour and employment law beyond the contract of employment”, *International Labour Review*, Vol 146 (2007), No 1-2, pp. 3-20; M. Freedland, “From the contract of employment to the personal work nexus”, *Industrial Law Journal*, Vol 25 (2006), No 1, pp. 1-29.

<sup>28</sup> A. Supiot, *Transformation of labour and future of labour law in Europe*, Luxembourg: Office for Official Publications of the European Communities, 1999; A.Supiot, *Beyond employment. Changes in work and the future of labour law in Europe*, Oxford: Oxford University Press, 2001.

There are no legal instruments adopted by the ILO to guide the regulation of traineeships or other work-based schemes. Neither has the ILO given a definition of traineeship. In the policy documents of the EU a traineeship is defined as a limited period of work practice spent at a business, public bodies or non-profit institutions by students or by young people having recently completed their education, in order to gain valuable hands-on work experience ahead of taking up regular employment. The EU uses the term ‘traineeships’ as a synonym to the terms ‘internships’ or ‘stages’.<sup>29</sup> In the Quality Framework a legal definition of a traineeship is given. It is defined as a limited period of work practice, whether paid or not, which includes a learning and training component, undertaken in order to gain practical and professional experience with a view to improving employability and facilitating transition to regular employment.<sup>30</sup> If the definition of a traineeship used in the EU policy documents does not foresee the combination of the learning and training component, the Quality Framework insists that additionally to work experience, some learning opportunities must be provided.

Among the MSs of the EU the definition of a traineeship varies. In the MSs in which legal definitions exist, a strong link between education and work experience can be detected. Usually a trainee is a pupil, a student or a person who is working temporarily to acquire on-the-job experience which is relevant to his/her studies. In most MSs the legal position of a trainee is not equal to the legal position of an employee or apprentice.<sup>31</sup>

In common law countries the term ‘internship’ to designate work-based schemes is more commonly used. For example, in the United Kingdom work-based schemes outside of formal education are referred to as ‘internships’ although there is no legal status of ‘intern’. The legal position of interns depends on the nature of the work undertaken as part of the internship. The term can be used to describe placements which vary considerably in terms of content, quality and remuneration. Work-based schemes that form part of higher education courses are often referred to as ‘sandwich placements’ or ‘work placements’.<sup>32</sup> In the US no legal definition of ‘internship’ exists either. In practice, what defines an internship depends largely on who’s doing the defining<sup>33</sup> and the word ‘intern’ is a kind of smokescreen lumping together an explosion of intermittent and precarious roles that might otherwise be called volunteer work, temp work, a summer job, and so on.<sup>34</sup>

As shown above, there is no clear concept of traineeship, which means that a range of work arrangements can fall within this category. Traineeships can, on one hand, be highly structured schemes in which learning is combined with work practice and, on the other, constitute a form of unpaid and unprotected labour. As already said in this thesis, I have presumed that a traineeship is a work-based learning scheme that combines learning with working.

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<sup>29</sup> Analytical document accompanying the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Towards a Quality Framework on Traineeships. European Commission, 5 Dec. 2012, [www.adapt.it/englishbulletin/docs/comm\\_analytical\\_paper.pdf](http://www.adapt.it/englishbulletin/docs/comm_analytical_paper.pdf), p.7.; Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Towards a Quality Framework on Traineeships. Second-stage consultation of the social partners at European level under Article 154 TFEU, <http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1446711507815&uri=CELEX:52012DC0728>, part 1.

<sup>30</sup> Council Recommendation of 10 March 2014 on a Quality Framework for Traineeships, OJ C 88, 27.3.2014, p. 1–4, preamble 27.

<sup>31</sup> Study on traineeship arrangements, *supra* 19, p.132.

<sup>32</sup> Study on traineeship arrangements, *supra* 19, pp.815, 818.

<sup>33</sup> Perlin, *supra* 13, pp.25–26.

<sup>34</sup> Perlin, *supra* 13, p. xi.

### 1.2.2 Standard and non-standard work

Another concept that has been used in the introductory parts of the articles and in the summary part of the thesis is the concept of non-standard work. The definition of non-standard work is based on the definition of standard work. A standard worker is a full-time worker engaged from nine to five, five days a week under a contract of indefinite duration, who is engaged in a bipartite relationship with an employer and works on the employer's premises.<sup>35</sup> In this thesis the terms 'traditional labour relationship' and 'regular employment' have been used in the same meaning. The essential elements of a standard employment relationship include an on-going employment contract, adequate social benefits, the existence of a single employer, a standard work day and week, and employment frequently in a unionised sector.<sup>36</sup>

Non-standard work includes working arrangements that differ along one or more axes from the standard model. The most prominent models of non-standard work discussed in the academic literature are part-time work, temporary work, temporary agency work, and working arrangements that are not classified as employment relationships. This list is not exhaustive, and other work arrangements that differ from the dominant model can also be regarded as non-standard work.<sup>37</sup> The fact that non-standard work is an open concept including all work arrangements that differ from standard employment enables us to also study traineeships from this viewpoint. Although traineeships can be regarded as an educational experience, the essential feature of a traineeship is hands-on work. Therefore, a traineeship is a work arrangement that differs from the dominant model of employment by its partly educational nature and can be regarded as a form of non-standard work. In this thesis the terms 'atypical work' and 'new forms of work' have also been used to signify non-standard work.

The delineation between standard and non-standard work is not intended to suggest that there exists a clear binary divide between these two groups. It has been argued that defining the work arrangements in the new economy simply in contrast to standard work can be misleading. This can mean ignoring the important changes in standard work and the significant differences among the wide group of non-standard work.<sup>38</sup> There is also a potential for overlap among different groups of non-standard work. Still, the standard labour relationship has been firmly embedded in labour law and continues to represent the dominant model of legally protected work; therefore the terms 'standard' and 'non-standard' can help to highlight the prominence of the standard labour relationship in the legal arena compared to other forms of work.<sup>39</sup> Regarding traineeships as a form of non-standard work as opposed to standard labour relationships enables us to compare the labour law status of trainees with the status of standard employees and draw conclusions concerning their probable precariousness. Furthermore, the notion of 'precarious work' itself is, to a substantial extent, connected to non-standard work.<sup>40</sup>

<sup>35</sup> U. Muckenberger, *Non-Standard Forms of Work and the Role of Changes in Labour and Social Security Legislation*, 17 International Journal of the Sociology of Law 381 (1989).

<sup>36</sup> J. Fudge, R. Owens, "Precarious work, women and the new economy: The challenge to legal norms" in J. Fudge, R. Owens (Eds.), *Precarious work, women and the new Economy. The challenge to legal norms*, Oxford: Hart Publishing, 2006, p.10.

<sup>37</sup>D. McCann, Regulating flexible work, <http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199218790.001.0001/acprof-9780199218790> (accessed 9 Sept.2015), pp.4-5.

<sup>38</sup>Fudge, Owens, *supra* 36, p.12.

<sup>39</sup> McCann, *supra* 37, pp.5-7.

<sup>40</sup>G. Rogers, "Precarious work in Western Europe: The state of the debate" in G. Rogers and J. Rogers (eds.), *Precarious jobs in labour market regulation: The growth of atypical employment in Western Europe*, Geneva:International Institute for Labour Studies, 1989, p. 5; McCann, *supra* 37, p. 6.

### 1.2.3 Precarious work

Throughout the thesis I have discussed the possible precariousness of trainees resulting from their poor legal protection. As mentioned earlier, precariousness is, to a substantial extent, connected to non-standard work. However, these concepts do not necessarily overlap. Non-standard work is not always precarious and standard work secure.<sup>41</sup>

There is no shared concept of precarious work either in Europe or in other jurisdictions such as Australia, Canada and the US.<sup>42</sup> Still, the most prominent explanation of precarious work used in academic legal literature seems to be the concept of precarious work provided by Rogers.<sup>43</sup> He brings forth four dimensions of precarious work: first, the degree of certainty of continuing work—precarious jobs are undertaken for a short period of time or the risk of job loss is high; second, the control over work—the less the worker controls working conditions, wages, or the pace of work, the more precarious the work is; third, the protection of workers' rights through laws, customary practices, or collective agreements—a low level of regulatory protection characterises precarious work; fourth, income—low-paid jobs are regarded as precarious. The precariousness of a working arrangement can be identified if certain combinations of these aspects exist. The presence of only one of these dimensions does not make a working arrangement precarious.<sup>44</sup>

Alternatively to the use of Rogers' concept of precarious work, researchers who conducted the European Study of Precarious Employment suggest the use of more precise characteristics of a work relationship to measure precariousness, including instability, insecurity, risk of unemployment, risk of working poverty, low pay, bad health risks, and working conditions.<sup>45</sup> At the same time, Fudge and Owens find that although different forms of non-standard work present particular challenges for the worker, they all tend to be distinguished by low wages, few benefits, the absence of collective representation, and little job security.<sup>46</sup>

Standing concentrates on the precariat instead of precarious work. According to his understanding, the precariat is a distinctive socio-economic group.<sup>47</sup> The precariat consists of people that lack the following forms of labour-related security: labour market security (adequate income-earning opportunities), employment security (dismissal protection, hiring-firing regulations), job security (the opportunity to retain a niche in employment, barriers to skill dilution, opportunities to upward mobility), work security (protection against occupational illnesses and accidents through health and safety and working time rules), skill reproduction security (opportunity to gain and use skills), income security (adequate stable income), and representation security (collective labour rights).<sup>48</sup> He also recognises the heterogeneity of the precariat and finds that not all people in the precariat value all seven forms of security although they fare badly in all respects.<sup>49</sup>

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<sup>41</sup> Rogers, *supra* 40, p.5.

<sup>42</sup> Fudge, Owens, *supra* 36, pp.11-12.

<sup>43</sup> Rogers, *supra* 40, p.5.

<sup>44</sup> Rogers, *supra* 40, p.3; McCann, *supra* 37, p.6.

<sup>45</sup> D. Ashiagbor, "Promoting precariousness? The response of EU employment policies to precarious work" in J. Fudge, R. Owens (Eds.), *Precarious work, women and the new Economy. The challenge to legal norms*, Oxford: Hart Publishing, 2006, p.80.

<sup>46</sup> Fudge, Owens, *supra* 36, p.12.

<sup>47</sup> Guy Standing, *Precariat: The new dangerous class*, London: Bloomsbury Academic, 2011, p.7.

<sup>48</sup> Standing, *supra* 47, p.10.

<sup>49</sup> Standing, *supra* 47, pp.11,13.



On the basis of these understandings of precariousness, a precarious job can be characterised as unstable, low-paid work with health risks, unfavourable working conditions, and low-level regulatory and collective protection. Precarious work includes work arrangements that differ from standard work with poorer protection of workers' rights. In order for traineeships to be classified as a form of precarious work, the working conditions and regulatory protection of trainees should be worse compared to that of standard workers. In this thesis I have discussed the precariousness of trainees mainly through the lenses of the personal scope of labour law. I have analysed the classification of trainees as employees and their precariousness resulting from their exemption from the personal scope of labour law.

### **1.3 Research questions, argument and structure**

The main purpose of this PhD thesis is to answer the question of whether trainees should belong within the personal scope of labour law or whether there are any other legal opportunities to avoid their precariousness in the labour market.

In order to answer the principal research question, the following sub-questions must be addressed:

- 1) Whether and under which criteria can trainees be considered as employees or left outside the scope of labour law regulation?
  - a. Does a trainee fulfil the traditional criteria of an employment relationship including subordination and payment of remuneration?
  - b. What other criteria can be used to determine the labour law status of a trainee?
  - c. Is the exemption of trainees from the scope of labour law connected to the fundamental tests used or is it the result of improper interpretation of labour law?
  - d. Which alternative ways in the determination of the scope of labour law would improve the protection of trainees?
  
- 2) Are the rights of trainees working in the framework of a traineeship agreement protected sufficiently in order to exclude them from the scope of labour law and prevent their precariousness in the labour market?
  - a. How does the legal nature of a traineeship agreement influence the protection of trainees?
  - b. How are the labour rights of trainees working in the framework of a traineeship agreement protected?
  - c. Does the traineeship agreement guarantee similar rights compared to a labour contract?
  
- 3) What is the role of the substantive law and the private international law rules of the EU in determining the national labour law status of cross-border trainees?
  - a. Does the substantive law of the EU regard trainees as 'workers'?
  - b. Do the private international law rules in the EU classify traineeships as 'individual employment relationships'?
  - c. How do the previous classifications influence the national labour law status of cross-border trainees?

The main argument of the thesis is that trainees should belong within the scope of labour law regardless of the special features of traineeships. Trainees perform subordinate work to the employer

and therefore fulfil the most important criterion of an employment relationship. The implicit and explicit exemption of trainees from the scope of labour law in practice is the result of improper interpretation of labour law. The fundamental tests determining the scope of labour law do not exclude trainees from the category of ‘employees’. Different interpretation leads to the precariousness of trainees in the labour market: neither the traineeship agreement nor the substantial and private international law rules of the EU in cross-border cases provide trainees similar protection as labour law.

The dissertation consists of four articles and a summary part of the dissertation. Three articles have been published in internationally peer-reviewed journals:

1. A. Rosin; M. Muda “Labour Law Status of a Trainee: The Case of Estonia with Comparative Insights from the US, Finland and France”- *European Labour Law Journal*, No.4/2013, pp.292-312 (afterwards referred to as Annexed Article 1).
2. A. Rosin; M. Erikson “A Trainee’s Right to a Wage: Estonian Situation with Comparative Insights from Slovenia, the United States of America and Finland”- *European Journal of Social Law* 3/2014, pp. 189-205 (afterwards referred to as Annexed Article 2).
3. A. Rosin “Precariousness of Trainees that Work in the Framework of a Traineeship Agreement”- *International Journal of Comparative Labour Law and Industrial Relations*, Vol. 32, No. 2, 2016, pp. 131-160 (afterwards referred to as Annexed Article 3).

The fourth article is in the publication process:

4. A. Rosin “Cross-border Trainees and Personal Scope of Labour Law: The Puzzle of National, EU and Private International Law” (afterwards referred to as Annexed article 4).

In Annexed Article 1, Annexed Article 2 and in part 3 of the summary the first sub-question of the main research question is answered. In Annexed Article 3 the third and in Annexed Article 4 the fourth sub-question is answered. More specific content of the annexed articles is given in part 2 of the dissertation.

The summary of the thesis continues with the explanation of the methods and sources of the research. Then, as already explained, in part 2 the annexed articles are presented and in part 3 the content of the articles is analysed in the context of more theoretical discussion concerning the personal scope of labour law. In part 3 the main theoretical framework of the thesis is presented. In the final part the conclusions of the thesis are given.

## **1.4 Methods and sources**

I have been interested in the application and interpretation of legal norms with the aim to determine the ability of these norms to protect trainees in the labour market. For this purpose I find that doctrinal research is the most suitable method to be used. As mentioned earlier, the regulation and court practice concerning traineeships in different EU countries is scarce. Therefore, it has not been possible to concentrate only in studying the legal regulation of one country. As a result, I have used legal comparisons between different MS and with the US to answer the research question.

Doctrinal research has been conceptualized as a ‘two-part process’, involving the identification and interpretation of legal texts.<sup>50</sup> As part of this process, it is first necessary to collect all relevant materials, including normative cases, legislation, treaties, authoritative non-binding cases and scholarly writings.<sup>51</sup> Then, doctrinal research involves creating a hypothesis as to the validity and precise meaning of the legal texts, combining ‘specific interpretations of legal principles, rules and concepts in a (newly) systematized whole’.<sup>52</sup>

In this study I have identified and interpreted several domestic and international legal acts, and I have analysed the provisions of collective agreements and the decisions of courts. Additionally, vocational and higher education institutions’ regulations concerning traineeships have been analysed. More precisely, the legal regulations of the ILO, EU, France, Estonia, Finland, and Slovenia, and the federal regulations of the US have been addressed. The relevant decisions of the Court of Justice of the European Union (CJEU), the Freedom of Association Committee of the Governing Body of the ILO, the courts of France, Estonia, Finland, Slovenia and the US, and the Labour Dispute Committees of Estonia and Finnish Labour Advisory Board (TN) are analysed. I have briefly addressed vocational and higher education institutions’ regulations in Estonia and Finland and collective agreements in Finland. Also, I have examined the scarce scholarly writings concerning the legal regulation of traineeships as well as more voluminous literature on labour law in general.

Building on this doctrinal analysis, legal comparison is used to identify similarities and differences between different legal systems. Legal comparison means that in this thesis I limit myself mainly to normative comparison. I engage in comparative law through the ‘law as rules’ approach and pay less attention to the context. The functionalist method as a working tool is used. The functionalist method of comparative legal research presumes that social problems are universal. Laws respond to these needs in various ways, but the end results are comparable. The determination of a concrete problem is the starting point for the functionalistic approach. Comparative lawyers should seek institutions that have the same role that is those which solve the same problem.<sup>53</sup> In this thesis I address the problem concerning the protection of trainees in the labour market and seek different regulations that address this problem in the studied countries.

Legal comparison can serve several purposes. First, it helps to put one’s own national experience into perspective and is therefore a good tool to understand national law.<sup>54</sup> Second, comparative research allows us to acknowledge certain trends and developments and to forecast future developments.<sup>55</sup> Third, comparative method enables us to better understand the application of international private labour law.<sup>56</sup> Fourth, comparative research can be used as a tool for national

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<sup>50</sup> T. Hutchinson, and N. Duncan, “Defining and describing what we do: doctrinal legal research”, *Deakin Law Review*, Vol.17 No 1 (2012), pp.83–119.

<sup>51</sup> M. van Hoecke, “Legal doctrine: which method(s) for what kind of discipline?” in: M. van Hoecke (Ed.), *Methodologies of legal research: what kind of method for what kind of discipline?*, Oxford: Hart Publications, 2011, p.10.

<sup>52</sup> *Ibid.*, pp.14, 17.

<sup>53</sup> E.Örücü “Developing comparative law” in E.Örücü, D. Nelken (Eds.), *Comparative law. A handbook*. Oxford and Portland: Hart Publishing, 2007, p.51.

<sup>54</sup> R. Blainpain (Ed.), *Comparative labour law and industrial relations in industrialized market economies*. Xth Edition. Alphen aan den Rijn: Kluwer Law International, 2010, p.5.

<sup>55</sup> *Ibid.*, p.7.

<sup>56</sup> Blainpain, *supra* 54, p.6.

legal reform. It enables us to enrich reformers' imagination and increase the set of alternatives to be taken into account.<sup>57</sup>

Throughout my articles I have used comparative law for all of these purposes. I have concentrated on analysing national law with the help of comparative method and made propositions for possible national legal reform. All four papers as well as the summary part of the thesis use comparative legal research to describe and understand current trends and forecast future developments as regards traineeships as well as labour law. Finally, in my fourth paper I have addressed the problems concerning the application of international private labour law.

In order to understand current trends and to discover alternatives in the regulation of traineeships I have compared the regulation and practice of France, Estonia, Finland, and Slovenia and the federal regulation and practice of the US. As it has been correctly stated, when a single researcher chooses legal systems for comparison, it is often simply their 'home law' and the law of the country which is linguistically accessible and with which the researcher may have some ties.<sup>58</sup> I need to admit that these circumstances have also affected my choice of the countries of comparison.

Nevertheless, it is important to understand the significance of the choice of the countries of comparison. It has been found that if the purpose of the comparative research is the unification or harmonisation of legal rules, similar economic, social, political and cultural factors of the countries as well as the same legal problems need to exist.<sup>59</sup> On the contrary, if the aim is to better understand national law or to even borrow certain solutions from other systems the researcher should look similar and different systems or only different systems.<sup>60</sup>

In choosing the countries for comparison I have taken the middle way by comparing different countries from the EU and the US. These countries are regarded as developed countries and represent common and civil law systems. Hence, they do not represent diametrically different legal systems. However, in choosing similar systems there must be a minimum of difference between the systems to make a comparative enquiry worthwhile.<sup>61</sup> Therefore, I have decided to compare the legislation of the countries that differ from each other as regards their regulative practice as well as labour markets and industrial systems.

Finnish labour regulation reflects the central features of the Nordic model of industrial relations. It is characterised by a high level of organisation on both the employee and the employer side and an important role played by collective bargaining in labour regulation.<sup>62</sup> In 2013 the trade union density rate in Finland was 69 per cent.<sup>63</sup> The comprehensive and detailed labour legislation in Finland is complemented by collective agreements. Statutory rules generally allow derogation by means of

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<sup>57</sup> M. Weiss "The future of comparative labor law as an academic discipline and as a practical tool." *Comparative Labor Law and Policy Journal*, Vol 25 (2003), pp.169-181.

<sup>58</sup> G.Dannemann "Comparative law: Study of similarities or differences?" in M.Reimann, R.Zimmermann (Eds.), *The Oxford handbook of comparative law*, Oxford: Oxford University Press, 2008, p.409.

<sup>59</sup> *Ibid*, p.409.

<sup>60</sup>Dannemann, *supra* 58, p.411.

<sup>61</sup>Dannemann, *supra* 58, p.409.

<sup>62</sup> National Labour Law Profile: Republic of Finland, ILO, [http://www.ilo.org/ifpdial/information-resources/national-labour-law-profiles/WCMS\\_158896/lang--en/index.htm](http://www.ilo.org/ifpdial/information-resources/national-labour-law-profiles/WCMS_158896/lang--en/index.htm).

<sup>63</sup> OECD Employment database, Union members and employees, [https://stats.oecd.org/Index.aspx?DataSetCode=UN\\_DEN](https://stats.oecd.org/Index.aspx?DataSetCode=UN_DEN).

collective agreements, usually concluded between national federations of employers and employees.<sup>64</sup>

In other studied countries the influence of social partners on labour regulation is far more modest. In 2013 the trade union density rate in France was 7.7 per cent, in Estonia 6.4 per cent, in the US 10.8 per cent, and in Slovenia 23.1 per cent.<sup>65</sup> France and Slovenia belong to the group of countries that are characterised by considerable labour market segmentation. French tradition supports the intervention of the state in social affairs and labour law and allows collective agreements to derogate from law only if this is more favourable to the employee.<sup>66</sup> The employment protection legislation in France is particularly stringent and the reforms undertaken have mainly liberalized the use of non-standard employment contracts.<sup>67</sup> The difficulty of accessing permanent employment has led young people to engage in non-standard forms of work.<sup>68</sup> Similar is the situation in Slovenia, where the employment protection legislation is stricter than average in the OECD and young people are more engaged in atypical work.<sup>69</sup>

Estonia and the US represent liberal labour markets, where employment protection is low both in the case of permanent as well as temporary contracts. In Estonia labour relationships are mainly regulated by the Employment Contracts' Act (TLS), effective since July 2009, that introduced comprehensive deregulation to the employment protection legislation. Instead of focusing on temporary contracts, the TLS tackled the regular contracts; it reduced the notice period for redundancy and cut the dismissal costs.<sup>70</sup> Although the new TLS made the labour law regulation more flexible, it has been found that it did not lead to any major changes in trends in the labour market. Major dismissals had already been made before the new law became effective, and this proves that the Estonian labour market was already sufficiently flexible under the old Employment Contract Act.<sup>71</sup> In the US, the employment-at-will norm, by which either employer or employee can terminate a work relationship at any time, makes the distinction between permanent and temporary workers meaningless.<sup>72</sup> Among OECD countries the US has the least stringent employment protection legislation.<sup>73</sup>

The chosen countries also differ in their approach to the regulation of traineeships. In France the unified regulation of traineeships exists; alternatively, in Estonia and Finland different types of

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<sup>64</sup> *Ibid.*

<sup>65</sup> OECD Employment database, Union members and employees, [https://stats.oecd.org/Index.aspx?DataSetCode=UN\\_DEN](https://stats.oecd.org/Index.aspx?DataSetCode=UN_DEN).

<sup>66</sup> M. Despax, J. Rojot, J.-P. Laborde, *Labour law in France*, Alphen aan den Rijn: Kluwer Law International, 2011, p.5, pp.33-34.

<sup>67</sup> T. le Barbanchon, F. Malherbet, "An anatomy of the French labour market. Country case study on labour market segmentation," Employment Working Paper No. 142, ILO 2013, [http://www.ilo.org/wcmsp5/groups/public/---ed\\_emp/---ifp\\_skills/documents/publication/wcms\\_218969.pdf](http://www.ilo.org/wcmsp5/groups/public/---ed_emp/---ifp_skills/documents/publication/wcms_218969.pdf), pp.11, 17.

<sup>68</sup> Study on traineeship arrangements, *supra* 19, p.442.

<sup>69</sup> Assessment and Recommendations, in OECD Reviews of Labour Market and Social Policies: Slovenia 2009, OECD Publishing, <http://dx.doi.org/10.1787/9789264068995-2-en>.

<sup>70</sup> Z. Brixiova, "Labour market flexibility in Estonia: What more can be done?," OECD Economics Department Working Papers, No. 697. OECD Publishing, 2009, <http://dx.doi.org/10.1787/224177441445>, p.15.

<sup>71</sup> R. Eamets, "Labour market and labour market policies during Great Recession: The case of Estonia", IZA Journal of European Labor Studies 2013, 2:4, <http://www.izaioels.com/content/2/1/4>.

<sup>72</sup> G. Quintini, S. Martin, "Same same but different: School-to-work transitions in emerging and advanced economies", OECD Social, Employment and Migration Working Papers, No. 154, OECD Publishing, 2014, <http://dx.doi.org/10.1787/5jzbb2t1rewc-en>, p.20.

<sup>73</sup> OECD, Employment Protection Legislation Database, Strictness of Employment Protection – Temporary Contracts, [http://stats.oecd.org/Index.aspx?DataSetCode=EPL\\_T#](http://stats.oecd.org/Index.aspx?DataSetCode=EPL_T#).

traineeships are regulated separately and the use and the conditions of a traineeship agreement depend on the type of a traineeship. In Slovenia certain traineeships are regulated within labour law as special types of labour contracts. In the US interns are protected only by labour law if they can be classified as ‘employees’. Compared to other studied countries more extensive court practice on interns’ labour law status and their right to a wage exists in the US.

The choice of the countries of comparison in different articles differs. Depending on the theme of the paper I have compared the countries, the regulations of which provide regulative alternatives or enable us to better understand current trends. In the summary part of the thesis I refer back to the articles and discuss the regulative practices of all of the studied countries.

## 2. Presentation of the annexed articles

The dissertation consists of the following four articles. Short abstracts of the papers are given below. Full-length articles are provided as annexes to this thesis.

### **1. A. Rosin, M. Muda, Labour law status of a trainee: The Estonian situation with comparative insights from Finland, France and the US, *European Labour Law Journal*, No.4/2013, pp.292-312 (hereafter referred to as Annexed Article 1).**

This article aims to answer the question of whether trainees can be regarded as ‘employees’ or should be left outside the scope of labour law. In this paper we have compared the regulations of Estonia, Finland, France and the US. First, we have determined the legal definitions of traineeships in different states and explicit exemptions of certain trainees from the scope of labour law. Then, we have analysed the labour law status of trainees, who are not explicitly exempted from the scope of labour law. We discussed the traditional characteristics of employment relationship, including subordination and payment of remuneration, and analysed whether trainees can be distinguished from ‘employees’ on the basis of these characteristics. It has been concluded that it is difficult to differentiate between trainees not belonging within the scope of labour law and ‘employees’ using traditional characteristics of a labour relationship because a trainee usually fulfils the subordination criterion, and remuneration is not decisive in the classification of a work arrangement as employment.

Subsequently traineeship-specific characteristics that courts and legislators have used in exempting trainees from the protection of labour law are analysed. We used the US six-step test as a point of reference. In the US, the Department of Labor (DOL) suggests that the following circumstances prove that an intern is not an ‘employee’:

- 1) the training, even though it includes actual operation of the facilities of the employer, is similar to that which would be given in a vocational school;
- 2) the training is for the benefit of the intern;
- 3) interns do not displace regular employees, but work under close observation;
- 4) the employer that provides the training derives no immediate advantage from the activities of the intern and on occasion the employer’s operations may actually be impeded;
- 5) the intern is not necessarily entitled to a job at the completion of the training period;
- 6) the employer and the intern understand that the intern is not entitled to a wage for the time spent in training.

We compared these characteristics with the criteria used in Finland, France and Estonia and analyse whether the US test can be applied in Estonia to distinguish between trainees and ‘employees’. It is concluded that in Estonia only two criteria from the US test can be applied: trainees are not regarded as ‘employees’ if the trainee obtains new skills, knowledge or work experience during the traineeship or gains some other advantage, and the trainee is supervised during the traineeship and does not work independently. We also found that the explicit exemption of trainees from the scope of labour law can create clarity regarding their status. At the same time we brought attention to the probable precariousness of trainees excluded from the scope of labour law and emphasised the need to regulate traineeships separately.

*The author of the thesis was mainly responsible for writing the article; the co-author corrected and complemented the article.*

**2. A. Rosin, M. Erikson, A trainee's right to a wage: the Estonian situation with comparative insights from Slovenia, the United States of America and Finland, *European Journal of Social Law*, No.3, Aug.-Sept.-Oct. 2014, pp.189-205 (hereafter referred to as Annexed Article 2).**

In the second article the problems concerning trainee's wage are analysed. It became evident in the first article that one of the reasons why trainees are not regarded as 'employees' was their non-receipt of a wage. In the second article we aimed to analyse the influence of the payment or non-payment of a wage on the occurrence of an employment relationship in the context of traineeships. The research question was posed as follows: whether and under which conditions a trainee should be entitled to a wage in Estonia. In order to answer the research question we compared Estonian regulations with the regulations of Slovenia, the US and Finland.

First, we determined the legal definition of a wage in the studied countries and the permissible modes of payment. We concluded that compared to the other analysed countries, Estonian law is one of the most restrictive by enabling payment for work monetarily only. We found that demanding the payment of a wage only monetarily may lead employers to the conclusion of other than labour contracts if non-monetary modes of payment are used and may result in the deprivation of other labour rights from the worker as well.

Second, we analysed the preconditions of a trainee's right to a wage, including the performance of work, the expectation of compensation and the benefit to the employer. We argued that a trainee performs work similar to 'employees', and calling it practical education does not change its actual nature. It was also concluded that the explicit exemption of trainees from the scope of labour law and as a result the denial of their right to a wage is not grounded from a labour law perspective. If on the basis of the characteristics of an employment relationship the existence of the latter one can be determined, other legal acts are not in a position to deny explicitly its absence. We also found that the trainees' right to a wage cannot be denied with reference to her/his signature on a traineeship agreement, because the existence of an employment relationship cannot be decided on the basis of the title of the contract but according to the factual circumstances and criteria of the employment relationship. Additionally, we discussed the influence of the trainee's expectation of compensation on her/his right to a wage. It was argued that the aim of learning instead or besides the aim to earn money is not a criterion that should be taken into account in the determination of an employment relationship. Finally, we analysed if a trainee's right to a wage is dependent on the employer. We argued that in Estonia a trainee is entitled to a wage both if the employer is an educational institution and if the employer is a body outside the school. We also found that a trainee needs to bring direct benefits to the employer in order to receive a wage. As a conclusion we argued that a trainee fulfils the preconditions of receiving a wage and therefore should receive one.

Third, we discussed the conditions of the payment of a wage in order to find out whether the contradiction between a trainee's right to a wage and the educational nature of a traineeship can be resolved through the creative approach to the modes of payment. We concluded that in the case education is provided during the traineeship, a trainee should not receive a wage in the same conditions as standard employees, but the obtainment of skills and knowledge could be regarded as a wage and/or the trainees could be paid subminimum wage. This would enable us to avoid the exemption of trainees from the scope of labour law, guarantee them other labour rights and motivate employers to provide traineeships.

*The author of the thesis was mainly responsible for writing the article; the co-author corrected and complemented the article.*



**3. A. Rosin, Precariousness of trainees that work in the framework of a traineeship agreement, *International Journal of Comparative Labour Law and Industrial Relations*, Vol. 32, No. 2, 2016, pp. 131-160 (hereafter referred to as Annexed Article 3).**

In the third article I have concentrated on traineeship agreements. My purpose was to examine the labour rights of trainees that work in the framework of a traineeship agreement and are exempted from the scope of labour law. I aimed to determine whether the protection provided to trainees working in the framework of a traineeship agreement is comparable to the one provided to ‘employees’ by labour law. I posed the following research question: whether the rights of trainees working in the framework of a traineeship agreement are protected sufficiently in order to exclude them from the scope of labour law and prevent their precariousness in the labour market. The EU’s Quality Framework for Traineeships was taken as a reference point and it was analysed how Estonian, Finnish, and French regulations respond to this model. I also analysed critically the content of the Quality Framework.

In the beginning of the paper I opened up the concept of precariousness. On the basis of different understandings of precariousness used in the academic literature concerning labour law I defined precarious job as unstable, low-paid work with health risks, unfavourable working conditions, and low-level regulatory and collective protection. I continued with discussing the legal nature of a traineeship agreement and its influence on the precariousness of trainees. I discussed issues concerning the formal requirements, obligatory conditions, and parties of a traineeship agreement. It was argued that the consequences of the breach of the formal requirements of a traineeship agreement are more unfavourable to the trainee than that of the labour contract. If the existence of an employment relationship is presumed even if the formal requirements are breached, this may not be the case regarding traineeship agreements. Additionally, I analysed the obligatory conditions of a traineeship agreement. I found that the Quality Framework gives limited attention to the educational conditions of the traineeship in the agreement, and the MS poorly regulate working conditions. As a consequence a trainee can end up performing menial tasks and substituting regular employers instead of obtaining on-the-job training, or work in bad conditions. Both can lead to precariousness. I argued that both the educational and working components of the traineeship need to be regulated in the agreement. Finally, I analysed the parties of the traineeship agreement and found that in some cases a trainee is not a party. I argued that not being a party reduces the ability of a trainee to influence the content of the traineeship arrangement and increases her/his precariousness.

Next, I analysed the labour rights of trainees that work in the framework of a traineeship agreement. I discussed collective as well as individual labour rights. I argued that despite acknowledging the right of association and collective bargaining as fundamental rights, some MS reserve the exercise of these rights to ‘employees’. In France, for example, trainees cannot form trade unions unless they are regarded as ‘employees’ and do not have the right to conclude collective agreements. In Finland, only the latter right of the possible trade unions of trainees is absent. I also found that the most important individual rights of trainees are poorly protected. A trainee that is not regarded as ‘employee’ often has no right to compensation, her/his health and safety is protected only in the case of traineeships forming part of educational curricula, and working time is limited if the trainee receives compensation.

It is concluded that with more protective regulation of traineeships, the precariousness of trainees can be prevented even without including them into the scope of labour law. It is proposed that on the EU level and/or in the other studied MS more protective regulation of traineeships should be imposed

in order to prevent the precariousness of trainees or, as an alternative, their inclusion in the scope of labour law should be considered.

**4. A. Rosin, Cross-border Trainees and Personal Scope of Labour Law: The Puzzle of National, EU and Private International Law, forthcoming in European Law Review issue 6 2017 (hereafter referred to as Annexed Article 4).**

In the fourth paper cross-border traineeships are addressed. This article aims to answer the question of whether cross-border trainees fall within the personal scope of national labour laws and how the substantive law of the European Union (EU) and private international law rules (PIL) affect their classification as ‘employees’. The provisions of EU law and their interaction with legal regulation in Estonia, Finland, and France were analysed.

First, the labour law status of cross-border trainees in the light of the substantive law of the EU was discussed. I addressed the classification of cross-border trainees as ‘workers’ and compared it with their classification as ‘employees’ according to national labour laws. The influence of that classification on their labour rights was also analysed. I concluded that despite the fulfilment of subordination criterion, in national practice cross-border trainees are not always regarded as ‘employees’. Their labour law status is determined on the basis of other criteria. These criteria do not necessarily overlap with the indicia used by the CJEU in the determination of the ‘worker’-status of cross-border trainees. As a result, depending on the factual circumstances a cross-border can be regarded as a ‘worker’ and not as an ‘employee’ and *vice versa* in the same traineeship arrangement. Although the concept of ‘worker’ can be in some cases broader than that of ‘employee’, the CJEU has avoided intervention in the national labour law by determining its personal scope. In order to guarantee the free movement of persons the CJEU has forbidden the discrimination of foreign trainees compared to domestic ones and their ‘worker’-status only grants them the rights of ‘employees’ if domestic trainees are also included in the personal scope of national labour laws.

Second, I discussed the status of cross-border trainees according to the PIL of the EU. I analysed whether cross-border traineeships can be regarded as ‘individual employment contracts’ for the purposes of PIL rules and how this classification influences trainees’ protection by labour law. I found that the autonomous as well as national interpretation of the term ‘individual employment contract’ can lead to the application of the mandatory labour law provisions of the host country even if the cross-border trainee is not considered as an ‘employee’ according to national labour law. I argued that this intervention cannot be avoided as long as the labour law status of a person is determined on an *ad hoc* basis and the courts have broad discretion in this process. Nevertheless, the outcomes of the classification process in the courts of different MSs and CJEU can be brought closer if the process is guided by the basic justifications of labour law. The notion of the ‘employment relationship’ should not cover only traditional employment, but a variety of work arrangements characterised by subordination and dependency of the worker on the employer.

### 3. Labour law and its possibilities to regulate traineeships

In the articles forming part of this thesis I have analysed traineeships in the light of tests used to determine the personal scope of labour law. I have also discussed issues concerning the precariousness of trainees in the labour market. However, the unclear labour law status of trainees is not only a practical problem influencing their school-to-work transition and protection in the labour market. More broadly approached it raises the question of the adequacy of existent labour law in nowadays labour market. In this part of the thesis I aim to bring the issue of traineeships and the results of the conducted research into a broader theoretical framework dealing with the personal scope of labour law.

#### 3.1 Justifications of labour law

The external changes in the labour market, including reductions in union membership, changes in the organisation of production, the feminisation of labour, and government policies supporting these trends have challenged the traditional protective function of labour law.<sup>74</sup> This again raises questions regarding the conceptual coherence of labour law and its relevancy to the new empirical realities.<sup>75</sup> A number of academics have tried to respond to the fundamental challenges of labour law by asking whether the traditional justifications of labour law still hold or by trying to redefine the purpose of labour law.

There appears to be three lines of argumentation: some academics argue that the traditional purpose of labour law still holds; others find that there has been a breakdown in the purpose of labour law; for the third group the basic normative idea is insufficient and needs adaptation. As a result, some researchers support adapting the 'old' labour law to new forms of work, while others call for the repair or replacement of labour law. Questioning the traditional justifications goes hand in hand with the determination of the scope of labour law. The field of labour law dealing mainly with the relationship between the employer and the employee performs its protective function only towards relationships that can be defined as employment. The initial idea of labour law relies on the assumption that there are certain working relationships that need special regulation. Therefore, the determination of these relationships is important for the determination of the purpose of labour law, and also the other way round.

The most commonly accepted traditional justification of labour law has been the inequality of bargaining power between employees and employers. One of the most known labour law researchers supporting the idea of the adequacy of the inequality of bargaining power in today's world is Davidov. According to Davidov the concept of unequal bargaining power can be understood on two levels, within or outside neo-classical economic theory. In the first case unequal bargaining power means market failures that result in the relative inability of the employee to influence the wage rate and other contracts terms. If employers' competition for labour is limited, they have the power to lower wages and working conditions below those that employees would have been accepted in fully competitive market. Employees' information deficiencies; the costs of moving from one job to another; firm-specific training, pensions and benefits; and the existence of unemployment give employers superior market position.<sup>76</sup> If the pure market concept of unequal bargaining power would

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<sup>74</sup> R.Dukes, *The labour constitution*, Oxford: Oxford University Press, 2014, p.1.

<sup>75</sup> G.Davidov, B.Langille (Eds.) *The Idea of Labour Law*, New York: Oxford University Press, 2011, p.1.

<sup>76</sup> G.Davidov, "The reports of my death are greatly exaggerated: Employee as a viable (though overly-used) legal concept", in G.Davidov, B.Langille (Eds.), *Boundaries and Frontiers of Labour Law: Goals and Means in the Regulation of Work*, Oxford: Hart Publishing, 2006, pp.138-140.

be used, the main goal of labour law would be to guarantee the efficiency of the labour market through the elimination of market failures.<sup>77</sup>

However, even if the market works perfectly, some aspects of the employment contract can be considered unacceptable. Although it is efficient and the employee agrees that the employer can discriminate, ignore health and safety requirements, and pay below minimum wage, society does not accept these arrangements.<sup>78</sup> The existence of the inequality in bargaining power is also an empirical question and extremely difficult to measure. The inherent vagueness of this concept cannot provide much help in determining who should be considered as an ‘employee’.<sup>79</sup>

Another understanding of unequal bargaining power refers to the existence of subordination: the employee agrees to submit her/himself to the control of the employer. Even though the employer agrees to pay wages in return, the parties of an employment agreement are not equal. If the employer’s obligations are clear at the conclusion of the agreement, the employee agrees to an open-ended clause, giving the employer the right to issue commands that change over time. Therefore, the inherent inequality of power in the employment relationship justifies special regulations aiming at the prevention of abuse of power by employers.<sup>80</sup>

Weiss also finds that the main goal of labour law is and has always been to compensate for the inequality of bargaining power.<sup>81</sup> In referring to Hugo Sinzheimer he connects the inequality of bargaining power with the protection of human dignity. The original idea of labour law is the protection of employees’ material needs, their health and safety, and human dignity.<sup>82</sup> According to Sinzheimer the object of transaction in a labour relationship is not a commodity, but the human being as such. The main problem of labour law is personal dependency. The labour relationship may endanger human dignity, and therefore fighting for it is one of the main goals of labour law.<sup>83</sup> Therefore, the danger for the human dignity of the employee derives from the special relationship between the employee and the employer characterised by the employer’s supreme power to determine the conditions of this relationship. Weiss finds that the assumptions put forward by Sinzheimer are still valid in spite of the dramatic changes in work reality and there is no need for a change of paradigm. Still, the structure of the field may need adaption to the new circumstances.<sup>84</sup>

The field of labour law aimed at protecting the rights of employees has been traditionally justified with the existence of a subordinate relationship between the employer and the employee. Subordination is the main criterion that validates the protection of a worker by labour law norms and determines its actual scope.

However, there are many academics that criticise using the inequality of bargaining power as the normative justification of labour law. They form the second group of researchers, who find that labour law should be based on other justifications. Collins refers to the same two understandings of unequal bargaining power provided by Davidov, but calls them as efficiency and social justice justifications. He finds that both of these justifications are vulnerable to critiques. Similar to

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<sup>77</sup> *Ibid.*, p.140.

<sup>78</sup> Employee as a viable concept, *supra* 76, p.140.

<sup>79</sup> Employee as a viable concept, *supra* 76, pp.141-142.

<sup>80</sup> G.Davidov, *Purposive Approach to Labour Law*, Oxford: Oxford University Press, 2016, pp.53-54.

<sup>81</sup> M.Weiss, “Re-inventing labour law” in G.Davidov, B.Langille (Eds.) *The Idea of Labour Law*, New York: Oxford University Press, 2011, p.44.

<sup>82</sup> *Ibid.*

<sup>83</sup> Weiss, *supra* 81, p.44.

<sup>84</sup> Weiss, *supra* 81, pp.46-47.

Davidov, he argues that the efficiency-based justifications can be deployed in ways that dismantle most of the special rules of employment. At the same time social justice justifications are challenged on the ground that these goals should be pursued through other governmental measures.<sup>85</sup> Hyde is also critical to the old assumptions of labour law. For him the understanding that the employment relationship is the site of the greatest social oppression and inequality of bargaining power, the most revolting excesses of power and the greatest social conflict is not true today. Hyde argues that serious inequality and conflict are now found among individuals outside the labour market. He finds that the problem is the concept of employment itself that, by using the subordination test, leaves out the neediest and includes less vulnerable.<sup>86</sup> Langille criticises the traditional view to the reasoning 'labour is not a commodity'. He finds that often 'labour is not a commodity' is seen through the lens of 'inequality of the bargaining power' although it gives a broader rationale for labour law.<sup>87</sup> Langille suggests that the purpose of labour regulation is to improve the lives of the inhabitants of the world, insofar as work has something to do with it.<sup>88</sup>

The critics of the inequality of bargaining power see no reason for a labour law to be connected with a subordination relationship. They propose untying the field of labour law from the concept of subordination and employment relationship. Labour law should achieve new goals. Redistribution of resources, power and risks, and the idea of the inequality of bargaining power are replaced by efficiency and capabilities justifications. It is argued that the goal of labour law is to achieve efficiency by correcting market failures and improving the competitiveness of businesses and economies.<sup>89</sup> Others find that the main aim of labour law is to regulate human capital deployment to maximise human freedom. According to Langille, this broader understanding about the scope and purpose of labour law enables us to go beyond the traditional employee-employer categories and contractual relationships and find normative justifications for the regulation of non-contractual relationships and non-traditional labour law subjects.<sup>90</sup> Davidov describes these new goals as universal because they are seen as good for society at large in contrast to goals protecting the interests of employees.<sup>91</sup>

Nevertheless, the shift to universal goals is not unproblematic either. First, by downplaying the conflict of interests between employers and employees, new justifications risk losing support to the entire body or significant parts of labour law. Second, it is unlikely that labour laws based on universal justifications gain more support from employers, who resist advancing universal goals at their expense.<sup>92</sup>

The third group of academics has chosen the middle way. They believe that inequality of bargaining power resulting from market deficiencies and subordinate relationship is still valid justification for labour law. However, determining the personal scope of labour law in reference to the subordinate employment relationship only is not justified in changed circumstances. As a result they propose

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<sup>85</sup> H.Collins "Theories of rights as justifications for labour law" in G.Davidov, B.Langille (Eds.) *The Idea of Labour Law*, New York: Oxford University Press, 2011, p.137.

<sup>86</sup> A.Hyde "What is labour law?" in G.Davidov, B.Langille (Eds.), *Boundaries and Frontiers of Labour Law: Goals and Means in the Regulation of Work*, Oxford: Hart Publishing, 2006, pp.46-48.

<sup>87</sup> B.Langille, "Labour law's theory of justice" in G.Davidov, B.Langille (Eds.) *The Idea of Labour Law*, New York: Oxford University Press, 2011, p.111.

<sup>88</sup> *Ibid*, p.112.

<sup>89</sup> Hyde, *supra* 86, pp.58-59.

<sup>90</sup> Langille, *supra* 87, p.114.

<sup>91</sup> Purposive Approach, *supra* 80, p.69.

<sup>92</sup> Purposive Approach, *supra* 80, pp.69-71.

broadening the personal scope of labour law by applying labour laws to a larger group of workers than that of ‘employees’.

Freedland and Kountouris find that the inequality of bargaining power is still the central ideological driver of labour law. Nevertheless, this normative basis is insufficient in several aspects. First, it is so bound up with and bounded by the idea of subordination that it does not easily operate in the regulations of relations lying beyond the scope of subordinate employment. Second, it is also bounded by the idea of bilateral and contractual relations. Finally, it tends to encourage dogmatic and sometimes false assumptions about the location or incidence of disadvantage and vulnerability within the sphere of personal work relations.<sup>93</sup> Freedland and Kountouris suggest focusing upon workers’ claims to certain kinds of treatment instead of focusing on subordination. These claims underlie the notion of inequality of bargaining power in subordinate relationships but also extend partly to all personal work relations.<sup>94</sup>

In the opinion of Supiot, subordination remains the main criterion in the definition of ‘employment contract’. However, he finds that the treatment of subordination is becoming more complex.<sup>95</sup> On one hand, new developments have brought about greater on-the-job autonomy and reduced employers’ control over employees; on the other hand, more casual employment arrangements increase employers’ control over workers in these relationships. Supiot uses the example of training and fixed-term contracts for young people, in which employers can also influence workers’ behaviour through the right to decide whether to extend the contract upon expiry.<sup>96</sup> In many countries the legal notion of subordination has developed in a way that it is no longer defined as giving orders in the performance of work, but also in terms of the integration of workers into the employer’s organisation. Dealing with the broader concept of subordination has become more uncertain and complex.<sup>97</sup> Supiot finds that the scope of labour law should be expanded in order to include all contracts involving the performance of work for others, not only strict subordinate relationships. Courts should redefine the notion of employment contract without formulating a restrictive concept of subordination on the basis of a single criterion.<sup>98</sup>

Traditional as well as new justifications of labour law appear to have their pros and cons, and therefore the purpose of labour law can be determined from all three perspectives. As a result, the aim of labour law can be either to reduce the inequality of bargaining power between the employer and employee in a subordinate relationship; to benefit the society at large; or to protect vulnerable workers that do not necessarily work in a subordinate relationship. However, labour law in force is based on the assumption that the inequality of bargaining power exists between the employer and the employee. Labour law is designed to protect the employee as the weaker party of the relationship. The aim of this study is to analyse the labour law status of trainees mainly in the context of current labour law and therefore, I find it difficult to completely abandon inequality of bargaining power as the justification of labour law. Without underestimating several academics’ efforts in articulating new universal goals of labour law, I also find their proposals to be too vague in order to analyse certain work arrangements from those perspectives. As Davidov explains, even though the universal

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<sup>93</sup> M.Freedland, N.Kountouris *The Legal Construction of Personal Work Relations*. Oxford: Oxford University Press, 2011, p.370

<sup>94</sup> *Ibid.*, p.371.

<sup>95</sup> A.Supiot, *Beyond employment. Changes in work and the future of labour law in Europe*, Oxford: Oxford University Press, 2001, p.11.

<sup>96</sup> *Ibid.*, pp.10-11.

<sup>97</sup> Supiot, *supra* 95, p.12.

<sup>98</sup> Supiot, *supra* 95, pp.219,220.

goals of labour law are important, these are less useful when one is trying to address actual problems concerning the irrelevance of labour law for non-standard workers.<sup>99</sup>

Because of these reasons I will not discuss further the universal justifications of labour law but continue with analysing the labour law protection of trainees by presuming that inequality of bargaining power is still a valid justification of labour law. I will concentrate on the authors that favour the determination of the scope of labour law according to the subordination test and authors who find that the scope of labour law should include subordinate as well as other vulnerable workers. The most systematic framework for dealing with new forms of work in the context of traditional labour law has been provided by Davidov. The most prominent recent theories concerning the broadening of the personal scope of labour law have been worked out by Freedland and Kountouris, and Supiot. Therefore, I will analyse their theories and traineeships in the context of these theories. I aim to discuss whether the problems concerning the labour law protection of trainees are connected to the basic tests applied to determine its personal scope or resulted from incorrect interpretation of labour law. I also analyse how the broader personal scope of labour law would influence the status of trainees.

## **3.2 Protection of trainees through purposive interpretation of labour law**

### **3.2.1 Protection of vulnerable workers as the purpose of labour law**

Davidov is one of the most well-known proponents of the validity of traditional justifications of labour law. He argues that labour law does not need a change of paradigm and most of the problems connected to the application of labour law to new forms of work can be overcome with purposive interpretation.<sup>100</sup> He proposes using the approach in which labour law is seen as the protector of vulnerable workers.<sup>101</sup>

According to Davidov, labour law protection should be guaranteed to vulnerable workers.<sup>102</sup> The protection of labour law can be justified with two basic vulnerabilities suffered by employees: democratic deficits and dependency.<sup>103</sup> Employment differs from other forms of remunerated work first by the organisation of work through the structure of governance with democratic deficits. Governance is needed because of the inclination to join forces and work together with others and the necessity to coordinate production. Because employment relationships are usually continuous and circumstances change, continuous coordination is needed.<sup>104</sup> If the basic principles of democracy foresee that every person affected by the decision of the government should have a right to participate in that government, the participation of employees in workplace decisions is limited. Even the arrangements that give employees some say regarding the production process and their place in it do not eliminate the control, inherent in employment relationships. The superior power of the employer results in the inability of the employee to control her/his own (working) life.<sup>105</sup>

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<sup>99</sup>G.Davidov, "Re-matching labour laws with their purpose" in Davidov, B.Langille (Eds.) *The Idea of Labour Law*, New York: Oxford University Press, 2011, p.181.

<sup>100</sup> Re-matching labour laws, *supra* 99, p.181.

<sup>101</sup> Re-matching labour laws, *supra* 99, p.181.

<sup>102</sup> Re-matching labour laws, *supra* 99, p.181.

<sup>103</sup> Re-matching labour laws, *supra* 99, p.188.

<sup>104</sup> G.Davidov "The three axes of employment relationships: A characterization of workers in need of protection", *University of Toronto Law Journal*, Vol 52 (2002), pp.357-418.

<sup>105</sup> *Ibid*, pp.380-381.

The second aspect that makes employees vulnerable is their dependency on their relationship with a specific employer. They are dependent for the fulfilment of their social, psychological, and economic needs. From the social and psychological viewpoint, work enables people to interact, meet, and be with one another; it is a source of an individual's identity and important in the achievement of social status and prestige.<sup>106</sup> In order to fulfil these needs, employees rely on their relationship with a specific employer differently from independent contractors that do not usually depend on a specific client. An employee's economic dependency means that the employee cannot spread risk in the market but must rely on the specific employment relationship. Even though different employees bear different risks depending on their working conditions, they all rely on their employer for their livelihood.<sup>107</sup>

Workers that suffer from both vulnerabilities should be considered as 'employees' and be subject to the full package of labour law.<sup>108</sup> However, the level of these vulnerabilities does not have to be equal. The combination of the three axes of subordination, economic dependence and social/psychological dependency is important. If one vulnerability is stronger, the others may be weaker.<sup>109</sup>

Davidov's aim is not to change the foundations of the determination of the personal scope of labour law. For him the existence of subordination between the employer and the employee is the main justification of labour law protection. However, he articulates the substance of this relationship at a more abstract level through the categories of democratic deficit and dependency. In order to elaborate these categories and prove the existence of democratic deficits and/or dependency he uses different, more specific indicia.

He takes the ILO's Employment Relationship Recommendation<sup>110</sup> and different legal systems as a reference point and concludes that twelve relevant indicia can be used from purposive point of view to determine the existence of an employment relationship. The first group of indicia suggests the existence of an employment relationship and the lack of thereof suggests otherwise. These indicia include the characteristics of democratic deficit (subordination), including integration into the employer's organisation, inability to choose working time and place, and obligation to be available to work, and dependency, including a single/main employer, the provision of tools and materials by the employer, no chance of profit/risk of loss, no entrepreneurial control, and job-specific investments. The absence of continuity of the relationship signifies the lack of dependency and therefore speaks against the existence of an employment relationship. The last group of indicia suggests the existence of an employment relationship, but lack thereof does not suggest otherwise. Direct day-to day control, right to weekly rest and annual leave, and a non-competition clause are additional proof to the existence of subordination and therefore also of an employment relationship.

### 3.2.2 Trainees as vulnerable workers

According to Davidov, the main test determining the personal scope of labour law consists of ascertaining whether the worker suffers from democratic deficit and dependency. Therefore, trainees

<sup>106</sup> Three axes, *supra* 104, p.387.

<sup>107</sup> Three axes, *supra* 104, pp.388- 389, 393.

<sup>108</sup> Purposive Approach, *supra* 80, pp.128-129.

<sup>109</sup> Purposive Approach, *supra* 80, p.134.

<sup>110</sup> ILO Recommendation concerning the employment relationship, No. 198, 15 June 2006, [http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100\\_ILO\\_CODE:R198](http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:R198)



should also be covered by labour law protection if they are characterised by these vulnerabilities. Democratic deficit is a more general level of subordination or control. In the annexed articles it has been found that in the case of traineeships the subordination of a trainee to the control of the employer usually does not create problems. The existence of subordination between the trainee and the employer is connected with the very nature of a traineeship. Scarce legal provisions regulating traineeships describe it as a learning process that includes hands-on working in the working environment and is supervised and guided. It is presumed that a trainee is partly a student and is not able to work independently.<sup>111</sup> Academics find that trainees are strongly integrated into the employing enterprise and subordinate to it.<sup>112</sup> The courts, for example, in the US and France, and the Labour Council in Finland also recognise the existence of a subordinate relationship between the trainee and the employer.<sup>113</sup> Hence, problematic issues in the inclusion of trainees within the personal scope of labour law lie elsewhere than that of subordination.

In addition to the existence of democratic deficit, it must be analysed whether trainees fulfil the dependency criterion. Davidov proposes different criteria for the determination of the existence of dependency, including single/main employer, the provision of tools and materials by the employer, no chance of profit/risk of loss, no entrepreneurial control, job-specific investments, and continuity of the relationship.

The most important question is of whether a worker can spread risk or if (s)he is dependent on the specific employer.<sup>114</sup> For example high-tech professionals can find a job at any time and spread their risk by changing jobs easily. Therefore, although suffering from democratic deficits, they are in no position of dependency.<sup>115</sup> Inability to spread risk is the leading criterion for the identification of economic dependency.<sup>116</sup> The sharing of the commercial risk of the employer has also been regarded as one of the criteria to distinguish between undertakings and ‘workers’ by the CJEU. In the case C-413/13 it has found that one of the characteristics of a ‘worker’ is that (s)he does not share in the employer’s commercial risk.<sup>117</sup> It is difficult to determine the dependency characteristic of trainees on the basis of their ability to spread economic risk. Since trainees often work without any compensation, they are not economically dependent on the employer. Nevertheless, a trainee works clearly for the benefit of a single employer and is dependent on the employer in fulfilling other social and psychological needs. For example, in Annexed Article 3 I have shown that often the obtainment of vocational or higher education by the trainee depends on passing the traineeship.<sup>118</sup> In other cases participation in traineeship(s) is a precondition for entering the labour market. Working as an

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<sup>111</sup>For example legal definitions of traineeships in France and Estonia foresee that traineeships are carried out in a working environment; in Estonia the supervision of a trainee is included in the definition. Also the obligatory conditions of traineeship agreement refer to trainee’s strong subordination to the employer. See A.Rosin, M. Muda, “Labour law status of a trainee: The Estonian situation with comparative insights from Finland, France and the US”, *European Labour Law Journal*, No.4 (2013), pp.292-312, pp.295-296, 300; A.Rosin, “Precariousness of trainees working in the framework of a traineeship agreement,” *International Journal of Comparative Labour Law and Industrial Relations*, No.2 (2016), pp.131-160, pp.142-144; A.Rosin “Cross-border Trainees and Personal Scope of Labour Law: The Puzzle of National, EU and Private International Law”, pp.13-14.

<sup>112</sup> M. Freedland “Application of labour and employment law beyond the contract of employment”, *International Labour Review*, Vol. 146, No 1–2 (2007), pp.3–20, p.13.

<sup>113</sup> A.Rosin, M. Muda, “Labour law status of a trainee: The Estonian situation with comparative insights from Finland, France and the US”, *European Labour Law Journal*, No.4 (2013), pp.292-312, p.300.

<sup>114</sup>Three axes, *supra* 104, p.402.

<sup>115</sup>Three axes, *supra* 104, p.369.

<sup>116</sup>Three axes, *supra* 104, pp.402, 406.

<sup>117</sup> *FNV Kunsten Informatie en Media v. Staat der Nederlanden* (C-413/13) [2014] ECLI:EU:C:2014:2411

<sup>118</sup> A.Rosin, Precariousness of trainees that work in the framework of a traineeship agreement, *International Journal of Comparative Labour Law and Industrial Relations*, Vol. 32, No. 2, 2016, pp. 131-160, p.146.

independent contractor or simultaneously for several employers during the traineeship is usually not an accepted alternative. These dependencies can make trainees even more vulnerable compared to workers who are economically dependent but have completed their education and are already in the labour market. Having education and earlier work experience enables a person to more easily find other work and reduces the risk of losing their income. Other factors that signal the economic independence of the worker, including the possession of tools and machinery used and the exercise of entrepreneurial control over important business decisions (whether to hire assistants, purchase or deploy equipment, or provide services to other customers),<sup>119</sup> speak for the dependent status of the trainee. A trainee usually uses the employer's tools and does not control important business decisions.

Another criterion that strengthens the ties between the worker and the employer and heightens the level of dependency is the provision of job-specific training (also referred to as job-specific investments).<sup>120</sup> One of the main aims of traineeships is to provide on-the-job training. From the vulnerability aspect it is important whether the provided training is transferable or job-specific. In the first case a trainee obtains skills that enable better entrance into the labour market without tying her/him to a specific employer. For example, a future builder that learns concrete construction skills can work not only for the employer that provides training but also for other employers. In the second case the obtained skills can be used to work only for a specific employer. For example, learning to use the specific machinery of the employer's factory during the traineeship results in non-transferable training. Therefore, in the second case a trainee is more dependent on the employer than if transferable training is provided.

In practice it is unclear which kind of training is provided during traineeships. As has been shown in Annexed Article 3, the Quality Framework contributes to the improvement of the learning quality of traineeships only by recommending the establishment of the educational aim in the traineeship agreement. It also recommends that the MS should promote best practices as regards learning and training objectives and assign trainees tasks that enable these objectives to be attained.<sup>121</sup> No specification on the universality or transferability of the obtained skills is foreseen. Similar are Estonian, Finnish and French regulations that also foresee the inclusion of the educational aim of the traineeship in the traineeship agreement.<sup>122</sup> However, the exact educational content of the traineeship is largely left to the hands of the parties. If in the case of traineeships forming part of vocational or higher education, curricula can set certain frames for the skills that are expected to be obtained; open-market trainees can obtain any skills that the parties agree on. Therefore, it is possible that in the studied countries or in the other MS of the EU trainees obtain either transferable or job-specific skills and depending on the factual circumstances can be regarded as less or more dependent on the employer.

The idea that job-specific training ties the worker with a specific employer and because of that dependency the worker is more likely to deserve labour law protection is reflected in the administrative practice of the US. The US Department of Labor (DOL) has clearly explained that an internship should provide the individual with skills that can be used in multiple employment settings,

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<sup>119</sup> Purposive Approach, *supra* 80, p.131.

<sup>120</sup> Purposive Approach, *supra* 80, pp.128-129.

<sup>121</sup> Quality Framework, *supra* 15, recommendation 4, 5; Rosin, *supra* 117, p.142.

<sup>122</sup> Rosin, *supra* 118, pp.143-144.

rather than skills particular to one employer's operation in order not to be regarded as an 'employee'.<sup>123</sup>

The third characteristic that can be problematic in the case of traineeships is the continuity of the relationship. For Davidov, lack of a continuous relationship indicates against 'employee'-status if the engagement is one time or rare. In cases of one-time engagement no dependency exists, and even though there can be subordination during this engagement, without any level of dependency it would be difficult to classify the worker as a vulnerable one.<sup>124</sup> The use of continuity as one of the criteria to determine the existence of dependency itself is problematic. As Davidov explains, it appears to be losing some ground. He also argues that if one-time engagements are used to evade responsibility and the relationship is in fact continuous, the argument of the absence of continuity should not be used as an indication against 'employee'-status.<sup>125</sup>

In annexed articles 1-3 it has been shown that traineeships usually last for a limited period of time. The actual duration of traineeships varies: a traineeship can be conducted under the name of testing days and last only few days,<sup>126</sup> it can be limited to several months,<sup>127</sup> or it can have no legally determined duration.<sup>128</sup> What is then the continuity requirement for traineeships in order to regard trainees sufficiently dependent on the employer? In the opinion of Davidov, daily one-time engagement speaks against the existence of dependency.<sup>129</sup> On the contrary, as has been discussed in Annexed Article 1, the Estonian Labour Dispute Committees have classified testing days as employment from the first day of training regardless of the actual duration of the traineeship.<sup>130</sup> Also, in Annexed Article 4 I have shown that the CJEU's practice concerning the duration of cross-border traineeships is mixed. The CJEU has found that national courts can examine whether the trainee has completed sufficient hours of work to familiarise himself with the work in determining the 'worker'-status of a trainee. The case concerned a trainee who worked for ten weeks.<sup>131</sup> In this case the CJEU appears to connect the continuity requirement with the educational nature of the traineeship and demand a longer duration from on-the-job learning schemes compared to other work arrangements for the classification of a person as a 'worker'. However, in other cases it has held that the duration of a traineeship is not decisive in this classification.<sup>132</sup>

Keeping in mind that traineeships are rather poorly regulated and because of this reason trainees can actually end up in precarious work, I find it ungrounded to connect the continuity requirement with the (probable) educational nature of traineeships. The occurrence of the dependency cannot be avoided even if the trainee works only for a few days. Here I refer back to the dependency of a trainee

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<sup>123</sup> Fact Sheet #71: Internship Programs Under The Fair Labor Standards Act. United States Department of Labor. Wage and Hour Division, April 2010, <http://www.dol.gov/whd/regs/compliance/whdfs71.htm>.

<sup>124</sup> Purposive Approach, *supra* 80, p.30.

<sup>125</sup> Purposive Approach, *supra* 80, pp.129-130.

<sup>126</sup> A. Rosin; M. Erikson "A trainee's right to a wage: Estonian situation with comparative insights from Slovenia, the United States of America and Finland", *European Journal of Social Law*, No 3(2014), pp.189-205, p.194.

<sup>127</sup> Rosin, *supra* 118, p.152.

<sup>128</sup> Rosin, Muda, *supra* 113, p.304; Rosin, *supra* 117, p.152.

<sup>129</sup> Purposive Approach, *supra* 80, p.130.

<sup>130</sup> Rosin, Muda, *supra* 113, p.306.

<sup>131</sup> *M.J.E. Bernini v. Minister van Onderwijs en Wetenschappen* (C-3/90) [1992] E.C.R. I-1098; [1992] 29 C.M.L.R. 1215.

<sup>132</sup> *S.M.Brown v. The Secretary of State for Scotland* (C-197/86) [1988] E.C.R. 3205; *F. Ninni-Orasche v. Bundesminister für Wissenschaft, Verkehr and Kunst* (C-413/01) [2003] E.C.R. I-1187, para. 25; see also A.Rosin, "Cross-border Trainees and Personal Scope of Labour Law: The Puzzle of National, EU and Private International Law ", pp.21-23.

connected to the obtainment of vocational or higher education or entrance to the labour market. Therefore, trainees should be treated in the same way as other workers and only their one-time engagements regarded as insufficient to generate the necessary level of dependency.

### 3.2.3 Trainees' labour law status

As Davidov argues, the final decision on whether a worker should be covered by labour law cannot be based on counting the number of indicia. The combination of democratic deficit and dependency is important: if part of indicia is stronger, others can be weaker.<sup>133</sup> In the case of traineeships strong democratic deficit (subordination) of a trainee can be detected. In this sense trainees differ substantially from personal workers in-between 'employees' and independent contractors.

The fulfilment of dependency axe is more problematic. It is clear that as a rule in the case of traineeships materials and tools are provided by the employer and the trainee has no entrepreneurial control over her/his work. A trainee also usually works for a single employer and therefore the ability to spread risk is reduced. Nevertheless, trainees often do not receive compensation and their economic dependence on the employer is questionable. Even if direct economic dependency is weak, social dependency on the employer in obtaining education or entering the labour market is stronger. Additionally, the receipt of only job-specific training can increase the trainee's dependency. This raise in dependency level can mean that trainees that do not enhance their labour market opportunities by obtaining transferable skills enter the group of vulnerable workers. Finally, the limited duration of a traineeship can signal the lower level of dependency. However, the absence of continuity can play a role only if the engagement is one time or only incidental. Also, the longer the traineeship, the higher dependency level is. Therefore, long-term traineeships that risk using trainees as cheap or free labour are more likely to belong within the regulatory scope of labour law. To conclude, in practice traineeships are rarely too incidental to exempt trainees on this basis from the category of vulnerable workers.

It is obvious that in the case of traineeships the democratic deficit axis is stronger than the dependence axis. Nevertheless, the existence of both of these vulnerabilities is clearly detectable, and according to the purposive interpretation of labour law trainees should belong to the category of vulnerable workers and entitled to labour law protection. This knowledge, however, does not solve the problem of exempting trainees from the scope of labour law in practice. Davidov explains that labour laws are not applied to vulnerable workers for two reasons: first, because of a mismatch between normative considerations and courts opinion on characteristics enabling the application of labour laws and second, because the contractual terms, factual characteristics and normative characteristics of the relationship do not overlap.<sup>134</sup>

He addresses six common problems in the application of labour laws to bilateral relations including the use of the characteristics of the traditional labour relationship instead of real normative considerations in determining the scope of labour law, evasion of the application of labour laws by sidestepping certain normative characteristics of labour relationship without changing its true nature, the insertion of contractual stipulations that do not represent the true nature of the relationship,<sup>135</sup> the exclusion of non-standard work arrangements by labour laws, exclusion of intermediary category of

<sup>133</sup> Purposive Approach, *supra* 80, p.134.

<sup>134</sup> Re-matching labour laws, *supra* 99, p.182.

<sup>135</sup> Re-matching labour laws, *supra* 99, p.184.

workers between employees and independent contractors,<sup>136</sup> and too broad judicial interpretation of the concept of a labour relationship.<sup>137</sup>

In the case of traineeships two of these problems can be detected. To begin, the use of the characteristics of traditional labour relationship in determining the scope of labour law can be observed. Davidov explains that one reason for the exclusion of vulnerable workers from labour law is the use of indicia detached from their normative foundations and based on traditional employment relations.<sup>138</sup> As has been shown that in annexed articles 1 and 2 in Estonia, Finland, and Slovenia certain trainees have been explicitly exempted from the scope of labour law with reference to their unemployment or student status.<sup>139</sup> Legislators and courts use a characteristic that is irrelevant from the purposive point of view. Without giving a thought to the purpose of labour law, they compare a traineeship with a traditional employment relationship, and in finding that it differs from the latter because of the trainee's formal status, situate traineeships outside the scope of labour law.

Another characteristic that is used to exempt trainees from the protection of labour law concerns the employer. For example, in Annexed Article 2 it has been shown that in Finland the Labour Council has exempted from the scope of labour law traineeships that are organised in an educational institution.<sup>140</sup> Regardless of the fact that the law enables us to interpret the term 'employer' broadly and does not forbid educational institutions to act as employers, the Labour Council considers traditional labour relationship and exempts students' work at schools from the scope of labour law. However, if a student performs productive work in a subordinate relationship, the fact that it is not performed in the work environment outside the school is irrelevant. Although the school is not a traditional workplace (for students) the existence of an employment relationship should not be based on the criteria of traditional employment.

Additionally, the receipt of a wage by a trainee has created problems in her/his classification as an 'employee'. For example, as has been shown in Annexed Article 1, in US court practice the existence of *quid pro quo* for the work done has been regarded as an obligatory criterion for the classification of an intern as an 'employee'.<sup>141</sup> Nevertheless, working for free does not reduce, but even increases the vulnerability of the trainee. Also, if the receipt of a wage determines the existence of an employment relationship, the employer has the opportunity to avoid it by the simple act of non-payment. Therefore, although in a traditional employment relationship the 'employee' receives a monetary wage, this cannot be used as a justification to exempt unpaid trainees from the personal scope of labour law. The same applies to the arrangements in which the trainee receives education or payment in kind. As Davidov argues, the form of payment says nothing about the existence or lack of subordination/dependency.<sup>142</sup>

In the case of traineeships the use of contractual stipulations that do not represent the true nature of the relationship can also be observed. Traineeships are often regulated by a traineeship agreement between the trainee and the employer, the trainee, the employer and the educational institution, or

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<sup>136</sup> Re-matching labour laws, *supra* 99, p.185.

<sup>137</sup> Re-matching labour laws, *supra* 99, p.186.

<sup>138</sup> Re-matching labour laws, *supra* 99, p.182.

<sup>139</sup> In Estonia trainees participating in a traineeship as part of active labour market services are explicitly exempted from the scope of labour laws; in Finland vocational education trainees are exempted; in Slovenia the courts have found the status of student and employee mutually exclusive. See Rosin, Muda, *supra* 113, p.297; Rosin, Erikson, *supra* 126, p.195.

<sup>140</sup> Rosin, Erikson, *supra* 126, p.200.

<sup>141</sup> Rosin, Muda, *supra* 113, p.300.

<sup>142</sup> Purposive Approach, *supra* 80, p.130.

even the educational institution and the employer only.<sup>143</sup> It is presumed that if a traineeship agreement has been concluded, the relationship is covered by this agreement only, and therefore labour law does not apply to trainees. However, the legal analysis of traineeship agreements conducted in Annexed Article 3 shows that the protection provided by this contract is often not comparable to labour law protection. The poor regulation of the conditions and conclusion of a traineeship agreement as well as trainees' unfavourable labour rights compared to 'employees' do not enable to use a traineeship agreement as a substitute to the labour contract.<sup>144</sup>

In a situation where the rights of trainees working in the framework of a traineeship agreement are poorer compared to 'employees, using the former is more useful for the employer. Therefore, a traineeship agreement may also be concluded in order to hide the true nature of the relationship. Still, if the work is performed in a subordinate relationship to the employer but in the auspices of the traineeship agreement, the contractual stipulations that consider this action as learning should not have any effect in the determination of the actual status of a trainee. As Davidov states, in these cases the determination of the 'employee'-status must be based on the true nature of the relationship.<sup>145</sup> In order to avoid the mismatch between the purposes of labour law and its application, the 'employee'-status of a trainee should not be excluded only because she/he works in the framework of a traineeship agreement.

The above analysis proves that the purposive interpretation of labour law can be used to solve the problems connected to the labour law status of trainees. There is no need to change the paradigm in labour law, but there is a need to correct and broader interpretation of labour law keeping in mind the special characteristics of an employment relationship and the variety of work arrangements in today's world. In most countries the employment relationship has been defined sufficiently broadly in order to be adaptable for changing circumstances over time.

### 3.3. Protection of trainees through broader scope of labour law

#### 3.3.1 Deficiencies of traditional determination of the scope of labour law

On the contrary to Davidov, who presumed that vulnerable workers deserving the protection of labour law can be distinguished from other personal workers, Freedland and Supiot argue that determining the personal scope of labour law on the basis of the subordination test has many deficiencies. There is no single cut-off point between the employee and other workers.<sup>146</sup>

For Freedland and Kountouris the binary divide between the contract of employment and the independent contract for services, where the former is characterised by subordination and other personal work contracts are characterised by the independence of the worker from the work recipient, is dysfunctional and false.<sup>147</sup> The dichotomy is dysfunctional because of the difficulties in drawing distinctions between the contract of employment and the contract for services. In addition to the content of basic tests to be applied to determine the existence of an employment contract, the way how these tests should be applied is contestable. Also, it is unclear whether the classification of employees or independent contracts should be made uniform in labour law and other fields of law.<sup>148</sup>

<sup>143</sup>Rosin, *supra* 118, pp.144-145.

<sup>144</sup> Rosin, *supra* 118, p.158.

<sup>145</sup> Re-matching labour laws, *supra* 99, p.184.

<sup>146</sup> M.Freedland, *The Personal Employment Contract*, Oxford: Oxford University Press, 2003, pp.18-22.

<sup>147</sup> Freedland, Kountouris, *supra* 93, p.269.

<sup>148</sup> Freedland, Kountouris, *supra* 93, pp.107-108.

The binary divide has become a false dichotomy because of the growth of intermediate or ambivalent personal work arrangements. Differently from the post-war situation, when this dichotomy corresponded rather closely with social and economic realities, the distinction between employees and independent contractors has now been maintained in the sphere of legal argumentation having no firm connection with real life.<sup>149</sup>

Freedland and Kountouris mention additional false constructs connected to the binary divide. The categories of the employment contract and the contract for services can be falsely conceived of as homogenous although these categories usually include a variety of arrangements. Besides the false unity effect, false symmetry is created between these two categories because the unity attributed to employment contracts is also attributed to contracts for services. Lastly, false opposites between employment contracts and contracts for services are created by the presumption that the employment contract is a unique contract compared to other contracts for the performance of personal work.<sup>150</sup>

Similar to Freedland and Kountouris, the labour law expert group led by Supiot<sup>151</sup> finds that the subordination test is not sufficient to determine the personal scope of labour law. They explain that the traditional concept of the member of the labour force was built around the idea of a male breadwinner undergoing a short period of vocational training before working on a permanent basis in the same job in the same company before taking retirement a few years before his death. The membership of the labour force was homogenous and employees had common interests, which were guarded by trade unions as their representatives. The employee devoted his whole life to the company that secured him a permanent job in return.<sup>152</sup> Today companies still demand much from their employees as regards their level of training, adaptability, ability to work independently, etc., but they do not guarantee any job security in return. New models of work are based on the idea of mobility and the heterogeneity of the workforce and it must be solved how labour law can ensure security to these workers.<sup>153</sup>

Both Freedland and Kountouris, and Supiot propose abandoning subordination relationships and the contract of employment paradigm in the determination of the scope of labour law. As an alternative Freedland and Kountouris suggest analysing personal work contracts as a family of contracts, some of which fall within the sub-category of employment contracts while others do not.<sup>154</sup> Supiot finds that the ‘employee’-status making security contingent upon subordination needs to be replaced by a ‘labour force membership’ status based on a comprehensive approach to work.<sup>155</sup>

### **3.3.2 ‘Personal work relation’ and ‘labour force membership’ as new boundary concepts of labour law**

Freedland and Kountouris foresee the concept of ‘personal work relation’ as providing a ‘soft boundary’ for labour law. They propose a starting definition according to which the personal work relation is “a connection or set of connections, between a person- the worker- and another person or persons or an organization or organizations, arising from an engagement or arrangement or set of

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<sup>149</sup>Freedland, Kountouris, *supra* 93, pp.107-109.

<sup>150</sup> Freedland, Kountouris, *supra* 93, pp.109-112.

<sup>151</sup>Supiot, *supra* 95.

<sup>152</sup>Supiot, *supra* 95, pp.24-25.

<sup>153</sup> Supiot, *supra* 95, pp.25-26.

<sup>154</sup> Freedland, Kountouris, *supra* 93, p.120.

<sup>155</sup> Supiot, *supra* 95, p.52.

arrangements for the carrying out of work or rendering of service or services by the worker personally, that is to say wholly or primarily by the worker himself or herself'.<sup>156</sup>

The family of personal work relations includes the employment contract that is the dominant head of the family and other personal work contracts, which are analysed separately, not through the lens of the employment contract.<sup>157</sup> Other personal work contracts form a loose group of diverse contracts that should not be seen through an optic of exclusion, i.e. a single contract type united by their externality to labour law.<sup>158</sup>

Seven leading types of personal work relations can be identified:

- 1) standard employment work relations;
- 2) the personal work relations of public service or public office;
- 3) the personal work relations of those engaged in liberal professions;
- 4) the personal work relations of individual entrepreneurial workers, such as freelancers and consultants;
- 5) the personal work relations of atypical workers such as casual, temporary, and part-time workers;
- 6) the personal work relations of those engaged in preparatory work, such as trainees, apprentices, or interns, and
- 7) the personal work relations of volunteers.<sup>159</sup>

The abovementioned categories are not intended to cover all possible personal work relations and neither are these mutually exclusive. Different categories of personal work relations can overlap and intersect.<sup>160</sup> Additionally certain dynamics between different types of personal work relations as well as their movement into the sphere of non-personal business relations and informal economy can be detected.<sup>161</sup> These seven categories can also be divided into three broader categories, whereas standard and public service work can be defined as 'secure work'; the work of liberal professions and individual entrepreneurial workers correspond to 'autonomous work', and the last three groups form 'precarious work'.<sup>162</sup>

The expert group led by Supiot finds that the main aim of labour law should be the protection of workers during transitions between jobs instead of protecting the employee in a specific subordinate employment relationship.<sup>163</sup> The scope of labour law should be determined not on the basis of subordination, but according to the concept of work. Work is the only concept that extends beyond employment without encompassing life in its entirety. Work is distinguished from activity in that it results from an obligation voluntarily accepted or compulsorily imposed. The obligation can result from a contract (employment, self-employment), or a legal condition (monk, civil servant), and be assumed against payment (employment) or without payment (traineeship, voluntary work).<sup>164</sup> The paradigm of labour force membership should cover all these various forms of work that a person may perform during her/his life. The expert group emphasises the need not to disregard non-

<sup>156</sup> Freedland, Kountouris, *supra* 93, pp.29-31.

<sup>157</sup> Freedland, Kountouris, *supra* 93, p.121.

<sup>158</sup> Freedland, Kountouris, *supra* 93, pp.284-285.

<sup>159</sup> Freedland, Kountouris, *supra* 93, p.348.

<sup>160</sup> Freedland, Kountouris, *supra* 93, p.348.

<sup>161</sup> Freedland, Kountouris, *supra* 93, pp.356-357.

<sup>162</sup> Freedland, Kountouris, *supra* 93, pp.346, 348.

<sup>163</sup> Supiot, *supra* 95, p.221.

<sup>164</sup> Supiot, *supra* 95, p.54.



marketable forms of work. It is explained that non-marketable forms of work can be even more important to society compared to paid employment, and often make the latter one possible.<sup>165</sup>

Freedland and Kountouris, and Supiot suggest similarly the expansion of the scope of labour law by including other, non- or semi-subordinate and non-standard workers. However, the alternative proposed by Supiot appears to be broader than that of Freedland and Kountouris because it includes domestic work and the work of independent contractors, whereas Freedland and Kountouris operate in the sphere of work for another person. Freedland and Kountouris themselves suggest that their boundary concept is a somewhat narrower one and is more connected to the stricter field of labour law than with social law.<sup>166</sup>

### 3.3.3 Labour rights of ‘personal workers’ and ‘labour force members’

Freedland and Kountouris argue that the reference to the personal work profile provides a self-conscious way to regulate personal work relations.<sup>167</sup> They explain that a personal work profile should be used as an analytical concept and is not to be seen as the floor of certain labour rights.<sup>168</sup> Therefore, different personal work relations should not be regulated similarly, but their actual nature must be taken into account. A complex framework for the regulation of personal work relations is provided.

First, Freedland and Kountouris argue that labour regulations for personal work relations should recognise and shape working lives and careers because many of labour law’s protections are dependent not only on a particular personal work relation, but upon different personal work relations that the person is engaged in over defined periods of time.<sup>169</sup> Second, they suggest that personal work relationships should be considered from five dimensions, including that of the worker dealing with the question of whether a person belongs to the personal scope of labour law, the employer in the case of a complex employment organisation, duration and continuity, the personality or substitutability of the worker, and the purpose of the personal work relation.<sup>170</sup> Third, they appear to give some weight to the dynamics of different personal work relations in the regulations. Finally, Freedland and Kountouris propose that the regulation of personal work relations should be based on the ideas of respect of dignity, capability, and stability.<sup>171</sup>

As Freedland and Kountouris themselves admit, the inherent limitation of their project is predominantly concerned with de-constructing the existing framework centered upon an employment contract and providing less of an analysis of the regulation of personal work relations.<sup>172</sup> Although they point to several important aspects in the regulation of personal work relationships, the complexity of their analysis renders the application of this framework to a concrete relationship difficult. Broad justifications of regulating personal work relations provided by Freedland and Kountouris are not helpful either because of their abstract nature and incomplete analysis.<sup>173</sup> They

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<sup>165</sup> Supiot, *supra* 95, p.53.

<sup>166</sup> Freedland, Kountouris, *supra* 93, pp.24-28.

<sup>167</sup> Freedland, Kountouris, *supra* 93, pp.364-365.

<sup>168</sup> Freedland, Kountouris, *supra* 93, p.201.

<sup>169</sup> Freedland, Kountouris, *supra* 93, pp.367-368.

<sup>170</sup> Freedland, Kountouris, *supra* 93, pp. 124-125.

<sup>171</sup> Freedland, Kountouris, *supra* 93, pp. 371-372.

<sup>172</sup> Freedland, Kountouris, *supra* 93, p. 435.

<sup>173</sup> See, for example, the critics to their use of the concept of ‘dignity’ in C.McCrudden, “Labour law as human rights law: A critique of the use of ‘dignity’ by Freedland and Kountouris” in A.Bogg, C.Costello, ACL Davies and J.Prassl (Eds.) *The Autonomy of Labour Law*, Oxford: Hart Publishing, 2015, pp. 275-289.

explain that they do not focus on providing an exhaustive analyse of the goals of labour law, because their work is concerned with the justification of disparate regulatory protection of different groups of personal workers.<sup>174</sup> However, I find it difficult to discuss the issues concerning the personal scope of labour law without defining its goals. The purpose of labour law and its personal scope are interconnected.

The main contribution of Freedland and Kountouris appears to be their proposal of disparate regulatory protection mechanisms for different groups of workers. By using a multidimensional approach they have divided different personal work relations into groups that include personal work relations sharing the same problem(s) and should be regulated similarly and separately from other groups.

Differently from Freedland and Kountouris, Supiot approaches labour force membership as a status that creates a floor of rights to people performing work. The social rights of labour force members can be divided into three concentric circles, including rights based on unpaid work (retirement benefits for child caring, accident coverage for volunteer work), rights based on occupational activity (health and safety), and rights connected to subordinate employment. Additionally, labour force membership should guarantee workers' social drawing rights, i.e. rights that are unrelated to paid employment in a narrower sense and can be exercised on a discretionary basis rather than in the occurrence of risk. Social drawing rights are related to work in general and include, for example, time off for union activities, training credits, and parental leave. These rights release time for other work situations by regarding the time used for these situations as working time in an employment relationship. Also, social drawing rights provide for work to be funded outside the market. Funding is organised on a joint basis by the State, employer, social security services, mutual insurance bodies, or by the worker her/himself.<sup>175</sup> Social drawing rights allow workers to deal with flexibility on an individual basis and help them to cope with the demand for security in uncertain circumstances.<sup>176</sup>

### 3.3.4 New boundary concepts and the protection of trainees

Personal work approach and the labour force members approach are normative exercises that foresee broadening the personal scope of labour law on the basis of other concepts than that of 'employee' and 'employment relationship'. However, in dealing with the entire field of labour law, these approaches are rather abstract. A high level of abstraction again renders the application of these theories to a concrete work arrangement complicated. As my thesis concerns traineeships, my aim is not to evaluate the new boundary concepts in their entirety, but to discuss only the aspects that are sufficiently clear and add value to the understanding of traineeships.

#### 3.3.4.1 Protection of trainees as personal workers

As already mentioned, Freedland and Kountouris argue that the analyse of personal work relations should transcend from the worker dimension to other dimensions including the employer, duration/continuity, personality, and purpose/aim dimension. The determination of whether a worker belongs to the personal scope of labour law is not sufficient in defining her/his labour rights. The disputable facts can lie in other dimensions than that of subordination. Analysing these dimensions enables us to detect different work relations united by one or more

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<sup>174</sup> Freedland, Kountouris, *supra* 93, p. 375.

<sup>175</sup> Supiot, *supra* 95, pp.56-57.

<sup>176</sup> Supiot, *supra* 95, p.222.

disputable aspects, and as a result find a legal regulation that treats these relationships in the same way.<sup>177</sup> In this way other personal work contracts are not pushed into conformity with standard employment, and contracts that do not conform to this model relegated into the sphere with obscure regulation.<sup>178</sup>

Although trainees are subordinate to the employer, the problem concerning their labour law protection lies in the purpose/aim dimension. The existing labour law based on the binary divide between the contract of employment and the independent contract for services presumes that the purpose of these contracts is to provide work for remuneration. If the work is provided in the modality of subordination of the worker to the employer, the worker is considered an ‘employee’ and covered by labour law protection. Otherwise the worker is classified as an independent contractor outside the personal scope of labour law. Often courts and legislators use the educational aim of a traineeship in order to argue that trainees are not ‘employees’. As has been shown in Annexed Article 2 the courts often find that trainees do not expect compensation, but education, and therefore should be regarded as non-employees. For example, in France the Supreme Court has denied the occurrence of a labour relationship regardless of the existence of subordination if the trainee fulfils the aims set out in the traineeship agreement,<sup>179</sup> the Finnish Labour Council has exempted trainees from the personal scope of labour law because the aim of the traineeship was to improve trainees’ labour market position,<sup>180</sup> and the Supreme Court of the US has exempted trainees from the protection of the Fair Labour Standards Act because the aim of their work is not to receive compensation.<sup>181</sup>

Freedland and Kountouris confront the normally unquestioned presumption that all personal work contracts have the single purpose of providing work in exchange for remuneration. They argue that a variety of purposes for personal work contracts can be identified, and among others, show the example of training contracts and apprenticeships.<sup>182</sup> They create a group of personal work relations of labour market entrants. This group incorporates work relations the aim of which is the obtainment of on-the-job training in order to facilitate the entrance into the labour market. In addition to the unification of similar personal work relations, this shared purpose enables to distinguish the personal work relations of labour market entrants from other groups of personal work relations. Also, the looser framework can help to develop the norms that are responsive to the special needs of this group.<sup>183</sup>

It appears that the personal work relations framework could add some flexibility to the current labour law by acknowledging that the main aim of a working arrangement can be other than to earn remuneration. Therefore, the absence of the expectation of compensation does not mean that these personal workers should not have any labour rights. It can also lead to the separate regulation of on-the-job training arrangements that takes into account the purpose of learning. As a result, the regulation could secure the obtainment of skills and knowledge, and create a balance between the employer’s obligation to pay a wage and provide training. In addition to the determination of the

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<sup>177</sup> F. Pennings “The various categories of workers performing work personally” in F.Pennings, C.Bosse (Eds.) *The Protection of Working Relationships*. Alphen aan den Rijn: Kluwer Law International, 2011, p.10.

<sup>178</sup> M. Freedland, “From the contract of employment to the personal work nexus”, *Industrial Law Journal*, Vol 25 (2006), No 1, pp. 1-29, p.20.

<sup>179</sup> *Ibid*, p.301

<sup>180</sup> Rosin, Erikson, *supra* 126, p.199.

<sup>181</sup> Rosin, Erikson, *supra* 126, p.198.

<sup>182</sup> Freedland, Kountouris, *supra* 93, p.125.

<sup>183</sup> Freedland, *supra* 178, p.20.

rights and obligations of the employer and the worker, the role of third parties (educational institution, state) in these arrangements could be regulated.

Another benefit that the personal work relations approach could bring about is the abolishment of differences between the regulations of on-the-job training schemes. The unreasoned divergences between the regulation of apprenticeships and traineeships and the discrepancies between the regulations of different types of traineeships would be avoided. The regulation of personal work relations of labour market entrants could replace the incidental regulation of traineeships and other work-based schemes through different educational, labour, and administrative laws, and the internal regulations of educational institutions. A unified approach to personal work relations of labour market entrants would create more systematic regulation of traineeships as well as other on-the-job training schemes, guarantee more equal labour rights to these workers, and avoid the generation of fully unprotected groups of labour market entrants.

However, the same can be achieved by a broader and correct interpretation of labour law that is based on its substance and sets aside the factors that do and should not influence the classification of a worker as an employee. The purposive interpretation of labour law analysed in part 3.2 can be helpful in this context. The courts and legislators have presumed falsely that trainees do not expect compensation. Closer analysis of the regulations of Estonia, Finland and the US conducted in Annexed Article 2 shows that the expectation of compensation is to be determined according to factual circumstances.<sup>184</sup> If the trainee performs subordinate work in the same way as an ‘employee’, her/his aim to obtain compensation should be presumed.<sup>185</sup> Neither can the subjective intention of a trainee to receive compensation be used as a basis to exempt her/him from the protection of labour law. For example, even though in the US the subjective intention of a trainee to receive compensation matters in determining her/his labour law status, it is difficult to evaluate the subjective aim. Similarly, the aim to receive compensation as well as to obtain knowledge can exist in parallel.<sup>186</sup> In Finland, the expectation of compensation as a precondition to the existence of a labour relationship has been derived from the government’s proposal to the Employment Contracts’ Act, not foreseen in the act itself.<sup>187</sup> In Estonia, the subjective expectation of compensation has no relevance at all to the labour law status of a worker.<sup>188</sup> Therefore, in using the educational aim of a traineeship as a basis to exempt trainees from the scope of labour law, the legislators and courts have created a characteristic of a labour relationship that does not comply with the basic principles of labour law.

Compared to clear legal regulations, enabling more room for courts to interpret various forms of employment can affect legal certainty. It can be argued that if broad discretion is given to courts, it is unclear whether a concrete relationship forms employment before the court has established it. However, the main criterion of an employment relationship is subordination, and this is made clear in most of the laws of the studied countries. In the case of traineeships this criterion is fulfilled, which means that already in the beginning of the relationship it is possible to regard it as employment. A more problematic issue concerns the trainee’s wage. If the payment of a wage is allowed in other values than money or material goods including skills and knowledge,<sup>189</sup> it is up to the employer to decide whether the trainee is paid or receives only training. The court as an impartial body will decide the issue only after a dispute has arisen. Hence, in order to guarantee

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<sup>184</sup> Rosin, Erikson, *supra* 126, pp.193-194, 197.

<sup>185</sup> Rosin, Erikson, *supra* 126, p.197.

<sup>186</sup> Rosin, Erikson, *supra* 126, p.199.

<sup>187</sup> Rosin, Erikson, *supra* 126, p.198.

<sup>188</sup> Rosin, Erikson, *supra* 126, p.199.

<sup>189</sup> Rosin, Erikson, *supra* 126, p.202.

the equal treatment of trainees regarding their working conditions, for the purposes of legal certainty, trainees' wages and training conditions should be separately regulated. Nevertheless, this separate regulation does not presuppose the exemption of trainees from the scope of labour law. In the example of apprenticeship contracts traineeship agreements can be regulated as a particular type of employment contract.

#### 3.3.4.2 Protection of trainees as labour force members

The most important aspect describing the concept of labour force membership in the context of traineeships is the understanding that labour force membership is not dependent on the performance of marketable work. As has been repeatedly explained, one of the reasons why trainees are not covered by labour law protection is the dual nature of the traineeship: on the one hand a traineeship is seen as learning; on the other hand it includes hands-on working. Therefore, a traineeship is not purely marketable work, i.e. the provision of monetarily estimable services for remuneration. Supiot and his expert group classify training as a non-marketable form of work that is usually unpaid.<sup>190</sup> In my opinion the situation is more complicated: among the various forms of traineeships there are arrangements that are paid; additionally trainees do not work only for their own advantage, but also bring benefits to the employer. As a result, traineeships appear to be situated in-between marketable and non-marketable work, and depending on the intensity of the training component resemble more one or the other.

To date non-marketable forms of work have been excluded from the general scope of labour law. Hence, trainees can be protected by labour law provisions only if the resemblance of the training arrangement to paid employment can be proved. This diversification between protected marketable and unprotected non-marketable work has led courts to weigh benefits received by the trainee and by the employer from the traineeship. As has been shown in Annexed Article 2 in the US the Supreme Court has insisted the training to be for the benefit of the trainee in order for the trainee not to be classified as an 'employee'.<sup>191</sup> In Annexed Article 1 it has been discussed that in Finland the TN has regarded trainees that benefit the employer through their participation in an ordinary production process as employees.<sup>192</sup> However, different courts in the studied countries appear to have struggled with the problem that a traineeship usually benefits the trainee as well as the employer. If the trainee performs work, benefitting the employer cannot be avoided; work experience obtained by the trainee also gives her/him an advantage. The concept of labour force membership that abolishes the differentiation between non-marketable and marketable work could help to solve this problem. If workers were classified as labour force members even if performing non-marketable work, the need to push traineeships into the frames of paid employment for the purposes of trainees' labour law protection would disappear. As a result there would be no need for the trainees to prove that they benefit the employer and the employer to prove the opposite.

New alternative proposals to determine the scope of labour law enlighten different aspects connected to new forms of work that can be taken into account in the legislative or judicial process. Freedland and Kountouris clearly imply that work can be performed not only with the aim to earn money. They propose disparate regulatory protection of different groups of personal workers including the group of labour market entrants to which trainees also belong. Considering labour market entrants as a separate category of personal workers, not as students, enforces their right to labour law protection. Also, it refers to the need for a labour law to treat equally workers participating in different work-

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<sup>190</sup> Supiot, *supra* 95, pp.53-54.

<sup>191</sup> Rosin, Muda, *supra* 113, pp.304-305.

<sup>192</sup> Rosin, Erikson, *supra* 125, p.201.

based schemes. Therefore, the labour law protection of a labour market entrant should not be dependent on her/his participation in an apprenticeship or traineeship or on the type of the traineeship. Supiot's theoretical proposal unites all persons performing different forms of marketable and non-marketable work under the category of labour force members. He also foresees differentiated labour law protection to different groups of labour force members. As a result, trainees' labour law protection is not dependent on their performance of work similar to paid employment.

Nevertheless, the same can be achieved without changing the foundations of labour law. Purposive interpretation of labour law that includes trainees within the scope of labour law and the regulation of traineeships as a separate category of employment contract enables trainees' labour rights to be protected as well the obtainment of skills and knowledge to be guaranteed. Since in the case of traineeships the fulfilment of the subordination criterion is not problematic, the theoretical suggestions to broaden the scope of labour law do not contribute to the better protection of trainees in a manner that would justify the reconstruction of the basics of labour law. Both analysed theoretical proposals help, above all, workers that cannot fulfil the subordination criterion. This is not the case regarding traineeships. Both analysed theoretical alternatives are also rather too abstract to be applicable in practice instead of labour law in force.

## 4. Conclusion

On the basis of the conducted research it can be concluded that trainees should belong to the personal scope of labour law and the alternative legal regulations of traineeships do not provide trainees comparable protection from precariousness.

Traditional labour law is based on the idea that there exists an inequality of bargaining power between the employer and the employee that needs reconciliation. The employee is regarded as a weaker party of the relationship because of her/his subordination to the employer. The classification of a person as an 'employee' brings her/him into the protective sphere of labour law, and as a result the classification process determines the actual scope of labour law. Courts have wide discretion in this process, which enables various work arrangements to be included within the scope of labour law and gives labour law the flexibility to react to the changes in the labour market over time. The ability to determine the existence of an employment relationship on an *ad hoc* basis without the legislator's direct interference into this process is a crucial characteristic of labour law. However, even in the condition of wide discretion, in the determination of the scope of labour law subordination as the main characteristic of an employment relationship needs to be kept in mind.

Trainees work in a subordinate relationship to the employer and should therefore be regarded as 'employees'. Other characteristics, such as the aim of learning, the non-receipt of a monetary wage, the performance of work in the facilities of the educational institution, calling work during the traineeship the obtainment of practical education, the limited duration of the traineeship, the regulation of traineeships through traineeship agreements, poorer work results compared to regular workers, and the trainee's student or unemployment status have no relevance in the classification of a trainee as an 'employee' as long as the subordination criterion is fulfilled. Therefore, the explicit as well as implicit exemption of trainees from the scope of labour laws is not grounded. The denial of the 'employee'-status of trainees in practice is not rooted in the fundamental tests used to determine the personal scope of labour law but connected to an incorrect interpretation of labour law. Labour law should not be interpreted through the lens of a traditional employment relationship, but according to the purpose of labour law. Labour law does not need a change of paradigm.

Currently the alternative ways do not guarantee the protection of trainees at the same level as their inclusion within the scope of labour law. The regulation of traineeships through civil law traineeship agreements has led to the reduction of the labour rights of trainees. The consequences of the breach of the formal requirements of a traineeship agreement are more unfavourable to the trainee than that of the labour contract. If the existence of an employment relationship is presumed even if the formal requirements are breached, this may not be the case regarding traineeship agreements. The obligatory conditions of a traineeship agreement also usually do not include both an educational and working component. If at the EU level the educational conditions are poorly regulated, the MS give less attention to working conditions. As a consequence a trainee can end up performing menial tasks and substituting regular employers instead of obtaining on-the-job training, or work in bad working conditions. In some cases a trainee is not a party of the traineeship agreement, which reduces her/his ability to influence the content of the traineeship. The labour rights of trainees that work in the framework of a traineeship agreement are also poorer compared to 'employees'. Their right of association and collective bargaining is limited, and their most important individual rights are poorly protected. A trainee that is not regarded as an employee often has no right to compensation, her/his health and safety is protected only in the case of traineeships forming part of educational curricula, and working time is limited in the case of paid traineeships.

Another alternative to regulate traineeships at least in cross-border cases is through the substantive law of the EU and the PIL rules of the EU. The criteria that are used in national practice to determine the labour law status of trainees do not necessarily overlap with the indicia used by the ECJ in their classification as 'workers'. A cross-border trainee can be regarded as a 'worker' and not as an 'employee' and *vice versa* in the same arrangement. The 'worker'-classification alone does not broaden national labour law protection to cross-border trainees. Nevertheless, the EU intervenes in the determination of the personal scope of national labour laws through the PIL rules by securing the application of the mandatory labour laws of the host country to cross-border trainees. The autonomous as well as national interpretation of the term 'individual employment contract' can lead to the application of the mandatory labour law provisions of the host country even if the cross-border trainee is not considered an 'employee' according to national labour law. However, the protection of trainees through PIL rules concerns only cross-border cases, can distort national labour law, and is very complicated because of the lack of consensus as regards the method of interpretation. Therefore, this is clearly not an alternative way of regulation that could avoid the precariousness of trainees in the labour market.

Even if alternative regulations would provide trainees protection that is comparable to that of labour law, it would be difficult to deny the fact that trainees perform subordinate work. Therefore, even in the existence of an alternative regulation, trainees should, according to the labour law in force be classified as 'employees'. This, again, would mean that a trainee has the same rights as an ordinary 'employee' and it would be difficult to explain why in the case of conflict between the provisions of labour law and another field of law (for example, educational law) the latter one should be applied. Hence, traineeships should be regarded as employment. Their specific characteristics could be taken into account by regulating these as special temporary employment contracts similar to apprenticeships.

Since in the case of traineeships the fulfilment of the subordination criterion is not problematic, the theoretical suggestions to broaden the scope of labour law do not contribute to the better protection of trainees in a manner that would justify the reconstruction of the basics of labour law. These are also too abstract to be able to replace the existing system of determining the scope of labour law. New theoretical alternatives nevertheless enlighten different aspects connected to new forms of work that can be taken into account in the legislative process or court in determining the scope of labour laws in the framework of the current system. Freedland and Kountouris imply clearly that work can be performed not only with the aim to earn money. They propose disparate regulatory protection for different groups of personal workers including the group of labour market entrants in which trainees belong. Considering labour market entrants as a separate category of personal workers, not as students, enforces their right to labour law protection. Also, it refers to the need for a labour law to treat equally workers participating in different work-based schemes. Therefore, the labour law protection of a labour market entrant should not be dependent on her/his participation in apprenticeship or traineeship or on the type of the traineeship. Suptot proposes that the scope of labour law should be determined not on the basis of subordination, but according to the concept of work, including marketable and non-marketable forms of work. The abolishment of the different treatment of non-marketable and marketable work would put an end to the need to push traineeships into the frames of traditional paid employment for the purposes of trainees' labour law protection.



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