

## GAPS IN LABOUR LAW AND THEIR INFLUENCE ON FLEXIBILITY AND STABILITY OF THE LABOUR LAW SYSTEM

Viktoras Tiažkijus

Vilnius University, Faculty of Law,  
Department of Private Law  
Saulėtekio av. 9, Block I, LT-10222 Vilnius, Lithuania  
Telephone (+370 5) 236 6170  
E-mail: tiazkijus@yahoo.com

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**Abstract.** *The Labour Code of the Republic of Lithuania was enacted on 4 June 2002. However, the practice of ten years has shown that even the systematisation of this branch of law by means of codification could not help avoiding gaps in labour law. The Lithuanian labour law system balances on the brink of flexibility, liberalisation and stability. The purpose of this article is to examine the legal side of this problem and to evaluate the quality of legal regulation of labour relations, also to propose instruments and means to improve them. The main aim of the article is to show the difference between gaps in labour law and some similar (contiguous) legal phenomena that will also be discussed in the article.*

**Keywords:** *gap in law, gap in labour law, legal mistake, contradictory court practice, legal phenomena similar to legal gaps.*

## Introduction

Almost ten years have passed since the Lithuanian Labour Code was enacted. The practice of the Republic of Lithuania, the European Union and other countries has shown that labour law system balances on the brink of flexibility, liberalisation and stability. This situation is influenced by many reasons: global economic crisis, laws lagging behind dynamically developing public labour relations, mistakes of the legislator, low level of legal culture and growing social tension. Therefore, both political and legal instruments are used in order to amend this situation. Political means are used for filling in the legal vacuum and for eliminating gaps in law. It is noteworthy that the Lithuanian legal system, as well as the legal systems of many other countries, are gradually becoming more and more pluralistic, i.e. the system, where political authority loses its monopolistic legislative role, which is partially intercepted by various institutions that apply law. Court precedents as well as court opinions, case law summaries and other such factors that influence the regulation of labour relations become more frequently discussed. During the international scientific conference “Labour market of 21<sup>st</sup> century: looking for flexibility and security” held in May 2012, many opinions regarding changes in the global economics and the use of various legal techniques in order to avoid social crisis and conflicts were expressed. The purpose of this article is to examine the legal side of this problem and to evaluate the quality of legal regulation of labour relations, as well as to propose instruments and means to improve them.

When creating labour law of the Republic of Lithuania, it was thought that the systematisation of this law branch by means of codification is the most optimal way to achieve harmonious, consistent and interacting labour law system. Unfortunately, the practice has shown that this idea wasn't fully achieved. Even if the Lithuanian labour law was codified – the Labour Code of Republic of Lithuania<sup>1</sup> was enacted on 4 June 2002 (hereinafter – the ‘Labour Code’) – gaps in labour law couldn't be avoided. Absence of legal gaps is only possible in theory<sup>2</sup>. In the opinion of E. Kūris, legal gaps (ordinary legal gaps) are a frequent and unavoidable phenomenon, which is characteristic to various law branches; and only the Constitution is considered as the law without any gaps<sup>3</sup>. In the doctrine of the Constitutional Court of the Republic of Lithuania, the special term ‘legislative omission’ is used to describe a legal gap that is prohibited by law and in particular by *ius supremum* (the Constitution). For this reason, a legislative omission, as a legal gap prohibited by law, differs from other legal gaps, which - even if they cause problems in legal practice - are only a precondition for refining legal regulation<sup>4</sup>.

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1 Labour Code of Republic of Lithuania. *Official Gazette*. 2002, No. 64-2569.

2 For example: Vaišvila, A. *Teisės teorija*. Antrasis leidimas [Theory of Law. Second Edition]. Vilnius: Justitia, 2004, p. 395–400.

3 Kūris, E. *Konstitucija kaip teisė be spragų* [The Constitution as Law without Gaps]. *Jurisprudencija*. 2006, 12(90): 11.

4 Jarašiūnas, E.; Spruogis, E. *Legislatyvinės omissijos problemos Konstitucinėje jurisprudencijoje* [Issues of Legislative Omission in the Constitutional Jurisprudence]. *Europos konstitucinių teismų konferencijos XIV kongresui parengtas nacionalinis pranešimas*. Vilnius, 2007, p. 36.

It is understandable why gaps in labour law are completely unacceptable phenomena. They cause many negative consequences, for example: they burden the defence of employee rights, hinder the adjustment of interests of personal scope of labour law, and allow emergence of doubts regarding the effective implementation of labour law norms. This is characteristic not only to the Lithuanian labour law, but also to the labour law of many other countries. The problem is serious enough to have raised an international discussion at this point. Therefore, it is not accidental that on 21 October 2008, a conference regarding the problems of elimination of gaps in labour law and social security was held at the Institute of State and Law of the Russian Academy of Sciences. It was agreed that, regardless of any problems, the economic crisis should not turn into a social crisis, i.e. the sphere that is largely regulated by labour law<sup>5</sup>, because social policy makes an essential input into a functioning market economy as well as into comprehensive and sustainable economic development<sup>6</sup>.

## 1. The Concept of a Gap in Labour Law

Lawyers suggest a wide variety of both concepts: a gap in law and a gap in labour law. However, everyone agrees that a gap in law is described as an absence of legal norm or at least a partial absence of it. In other words, it is agreed that a gap in law means that there is no legal regulation of the specific public relation.

Some authors say that albeit the law regulates various relations, real life is always far more multiform. It is impossible to create rules of behaviour that would define all the possible variants of conduct that all people in all situations would choose. Hence, sooner or later it could resurface that law does not regulate one or another particular relation; and this situation would be regarded as a gap in law<sup>7</sup>.

Other authors refer to some additional attributes of a gap in law. For example, P. Nedbailo thinks that a gap in law is a situation that is not regulated by law and that falls into the sphere of regulation of general principles of law; however, there is no specific legal norm or even if a specific legal norm exists, it has flaws that could not be eliminated by means of interpretation<sup>8</sup>. V. Lazarev agrees with this definition, but he also specifies it by pointing out that a gap in law is such an absence of a legal norm, where the necessity of legal regulation is determined not only by general principles of

5 See: Probely v trudovom prave i prave socialnogo obespechenija i puti ikh ustrahehija (obzor nauchho-prakticheskoy konferencii) [Gaps in Labour Law and in Law of Social Security and the Ways to Eliminate Them (the review of a scientific-practical conference)]. *Gosudarstvo i pravo*. 2009, 8: 111–115.

6 Weiss, M. Corporate Social Responsibility: A Concept for the 21st Century. *Labour Market of the 21st Century: Looking for Flexibility and Security*. The Material of an international scientific conference of 12–14 May 2011, p. 33.

7 See: Mikelėnienė, D.; Mikelėnas, V. *Teismo procesas: Teisės aiškinimo ir taikymo aspektai* [Judicial Process: Legal Interpretation and Application]. Vilnius: Justitia, 1999, p. 155–160; Vansevičius, S. *Valstybės ir teisės teorija* [Theory of State and Law]. Justitia: Vilnius, 2000, p. 241–243.

8 Nedbailo, P. E. *Primeniye sovetskikh pravovykh norm* [The Use of Soviet Labour Norms]. Moskva, 1960, p. 454–456.

law, but also by the development of public relations and the need to apply law while solving specific cases<sup>9</sup>.

Some authors consider that the absence of specific legal norm does not necessary mean that a gap in law exists, because “the alleged” gap in law can be overcome by using general principles of law and the means of juridical technique<sup>10</sup>. There are much more opinions expressed by various scientists, however, there is no need to discuss or list all of them. It is far more important to name the attributes and the singularities of a gap in the Lithuanian labour law. Hence, this is what we shall begin with.

Which public relations should have constituted the subject of regulation of the Lithuanian labour law? Has the right group of public relations that objectively need to be regulated by the method of regulation of labour law been chosen and incorporated into legal acts that were valid at the given time? If it has not, then we have gaps in labour law related to the flaws of legal regulation model of labour relations and flaws related to the consequences of inappropriate forecasting. If the answer to the above-mentioned question is in the negative, the need to acknowledge that some labour relations shouldn't be regulated by labour law arises as well. In this case, the gap we are talking about would be “alleged”.

At the moment we have an odd legal situation where the following question arises: the norms of which law branch should regulate labour of persons working in partnership, cooperative, agricultural, joint stock or other enterprises based on membership? Their status is specific: they are the owners of assets; and on the other hand, they perform labour functions. The legislator provides no answer to this question. In effect, the former version of the Law on Employment Contract provided that the singularities of labour of the above-mentioned people were determined by laws, regulations or collective agreements regulating the activities of those communities and enterprises. Labour relations arising in educational practice, work practice or at the time of public works were determined by laws and other legal acts. It is important to note that these relations are considered to be labour relations falling within the field of regulation of labour law, however, they still have some particular singularities distinguishing them. Neither then, nor now are any of these singularities disclosed in any regulatory act. Even the position of the legislator and the court practice in this field is not consistent. The problem is very well known, but no solution has been found yet.

The Lithuanian proverb says that “The holy seat never remains empty”. This is true and we can see the consequences of such legal regulation. Who can ensure that specialists do not work during their training practice? Because they do work! But the work they do shouldn't be called labour at all. It is elementary exploitation of those people when no labour or social guarantees are provided for them, because the Lithuanian labour law knows no such thing as a training contract. There are no labour law provisions in the Lithuanian legal system to regulate this relationship. In this situation, we face a gap.

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9 Lazarev, V. V. Ponjatje probelov v prave [The Concept of Gaps in Law]. *Sov. Gosudarstvo i pravo*. 1967, 4: 93–96.

10 Pigolin, A. S. Obnaruzheniye i preodoleniye probelov prava [Locating and Eliminating Gaps in Law]. *Sov. Gosudarstvo i pravo*. 1970, 3: 50.

And this is not the only example of a holey labour law system that sadly, but exists at present time.

The singularities of the legal status of an executive of a legal entity is yet another problem worth to mention. Whether an employment contract needs to be concluded with an executive of a legal entity? Or can a civil contract be concluded with him or her instead? The Lithuanian laws that regulate specific legal forms of legal entities give different answers to this question.

In the Law on Joint Stock Companies<sup>11</sup> it is established that an employment contract is concluded with an executive of the company. Though, neither the Labour Code nor the above-mentioned Law regulates the singularities of labour relations of an executive. We face a situation where the executive of the administration of a joint stock company is both: an employee and a sole administrative body at the same time, whose status is regulated by civil law. In addition to this, the executive also performs functions of a representative of the employer.

There is no homogenous opinion in the practice of the Lithuanian courts on this question either. The Supreme Court of Lithuania has stated that the singularities of the relationship between the head of administration and the company is the basis to acknowledge that this relationship corresponds to a civil legal relation, to which the norms regulating the contract of agency are applied; therefore, according to the Court, this relationship does not correspond to labour relations, even where an employment contract is concluded between the company and the head of administration<sup>12</sup>.

The Law on Individual Enterprises<sup>13</sup> states that an individual company has a sole administrative body, i.e. the executive of the individual company. At the same time, the owner of the individual company is a sole administrative body, provided that the regulations of the individual enterprise do not establish otherwise. Naturally, the owner can appoint another person as the executive of the company. In this case, the employment contract or civil contract is drawn up with the executive of the individual enterprise. Thus, the legislator leaves a right for the owner of an individual enterprise to decide the way that the legal relation between the individual enterprise and its executive is to be formalised.

In the Law on Public Bodies<sup>14</sup> it is established that person authorised by the general meeting of shareholders concludes or terminates an employment contract with the executive of a public institution. Conclusion or termination of an employment contract shall take place in the name of a public institution in question. Whereas in the Law on Associations<sup>15</sup> the legal form of the relationship between the association and the appointed members of its executive body is not defined at all. This indeterminate situation allows us think that any legal form that is not prohibited by laws could be chosen. Here

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11 Law on Joint Stock Companies. *Official Gazette*. 1998, No. 36-961.

12 *Court Practice*. 2002 02 08, No. 16.

13 Law on Individual Enterprises. *Official Gazette*. 2003, No. 112-4991.

14 Law on Public Bodies. *Official Gazette*. 1996, No. 68-1633.

15 Law on Associations. *Official Gazette*. 2004, No. 25-745.

is yet another example. According to the Law on Partnerships<sup>16</sup>, the appointed general members of the partnership perform the functions of an administrative body. These functions can be performed on the basis of both – partnership (joint activity) agreement and a labour contract.

The labour of underage is yet another problem related to the subject of regulation of labour law. What legal regulation is needed when underage people take part in organising the work of cinematography and theatre entertainment organisations or even perform in concerts and television shows? What legal relations appear when an employment service “rents” its employees to other employers? All the above-mentioned relations are assumed to be a part of the subject of regulation of labour law, because they do satisfy the main features of labour relations. We shall briefly discuss those features.

1. First of all, labour relations directly materialise the abilities of human beings. Hence, labour law does not regulate all labour relations. It regulates only those labour relations where the use of labour force directly impacts the personality of a human being. Consequently, according to labour law, human being performs a function of labour, i.e. a person works according to his or her profession, specialisation, qualification or serves in a particular position. In other words, the function of the employee’s labour is defined by quality features, but not by the end result of the work.
2. Second main feature of labour law is the public nature of labour relations. The labour function is not performed in isolation. The labour process is always performed along with other employees. When employees perform their labour functions, the labour process is formed and labour law regulates this process. Labour law determines the order of the labour process to be performed by each employee on a daily basis. Labour law also determines general principles of organising the labour process, which is why the end result, which is the characteristic feature of civil law, is not the crucial feature in labour relations.
3. The process of organising labour needs to be controlled. Therefore, subordination to the party organising the labour process (i.e. to the employer) is another feature of labour relations. This feature is also not typical of civil legal relations. For example, labour law does not regulate relations arising where a construction company builds a house for the customer, because both parts of this relationship are interested in the end result of the work. In this case, civil legal relations of material nature are developed between them. But the relation between the construction company and its employees is of a different nature, because employees are subordinated to the will of their employer; the employer determines the order of labour and etc. The customer is interested in having a house built for him and the construction company cares that its employees (builders) come to work on time, perform their work functions in a quailed manner and follow the rules of internal work order and etc. The employer determines the nature and the order of work and employees must follow this order while working. Therefore,

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16 Law on Partnerships. *Official Gazette*. 2003, No. 112-4990.

the main aspect here is subordination – a feature that is not characteristic to civil legal relations, but is of crucial importance in labour relations.

Remunerated nature of labour means that a person materialising his labour abilities obtains a compensation (a salary) for performing his labour abilities.

However, life never stays in the same place all the time. That is why by constantly changing and developing it also brings some changes into the labour sphere. Legal regulation that was suitable a mere decade ago might not be as efficient nowadays. Therefore, it is time to amend the Labour Code by adding a new institute – the singularities of regulating the labour relations for separate categories of workers. Thereby the emerged gap would be eliminated.

The Labour Code determines no particular level of legal regulation of labour relations; that is why the existing situation is uncertain. Sometimes this problem is being solved by applying civil law norms. Even if due to the nature and purpose of labour law Article 9 of the Labour Code does allow applying norms of other branches of law regulating similar relations; this is not a suitable solution to the problem. In practice, civil law is applied to labour relations when such things as protection of commercial secrets, provisions on non-competition, compensation of moral damage and etc. need to be regulated. On the other hand, unlimited use of civil law can lead to the emergence of legally peculiar situations. Here is an example. According to a general rule of civil law, a contract is considered to be invalid when the compulsory written form of the contract is not complied with. Article 99(2) of the Labour Code states that the employment agreement shall be concluded according to the model form. But the breach of this model form brings only administrative liability to the employer and has no influence on the emergence of labour relations. According to Article 99(1) of the Labour Code, an employment contract is considered to be concluded when both parties agree on its conditions. Thus, it is obvious that analogy with civil law cannot remove gaps in labour law where public relations require specific regulation of labour law and no such specific regulation exist.

Having discussed the above-mentioned problems, we are able to adduce the definition of a gap in labour law. *A gap in labour law means the lack of legal regulation of public relations that constitute the subject matter of labour law and which, due to their nature and purpose, should be and have to be objectively regulated by labour law norms.*

Therefore, the real gap in labour law can be eliminated only by enacting adequate legislation. If it is only an illusion of a gap, it can be eliminated by other means. For this reason, we do not agree with Tomas Bagdanskis, who states that court practice is a source of law that helps eliminating gaps in law<sup>17</sup>. Real gaps in labour law should be distinguished from similar legal phenomena, which will be discussed in the following section.

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17 Bagdanskis, T. Teismų praktikos kaip darbo teisės šaltinio taikymo problemos. *Darbo rinka XXI amžiuje: lankstumo ir saugumo paieškos*. Tarptautinės mokslinės konferencijos 2011 m. gegužės 12–14 d. straipsnių rinkinys [Labour Market of the 21st Century: Looking for Flexibility and Security. The material of an international scientific conference 12–14 May 2011], p. 493.

## 2. Separation of Gaps in Labour Law from Similar (Contiguous) Legal Phenomena

Gaps in labour law should be distinguished from contiguous legal phenomena, i.e. from such practical situations, where it is hard or even impossible to reach the purposes of effective implementation of labour law norms because of the mistakes made by the legislator, unspecified definitions or inaccurate formulations, evaluative definitions, collisions and etc. In other words, the absence of legal regulation should not be confused with defects of law.

Those legal phenomena should not be confused with gaps in law, where no legal norms exist. In cases where it is hard or even impossible to attain the purposes of effective implementation of labour law norms because of these legal phenomena, we face another problem: a legal norm does exist, but this norm has such defects that burdens the implementation of a norm, creates preconditions for various interpretations and becomes an illusion of a gap. The means of juridical technique (interpretation and concretisation) and court practice is used in such situations. However, regardless of the means chosen, the result of such elimination must be stabile, comprehensible and correspond to the purposes of labour law. Only then we can talk about the precedents of application of law, which, according to E. Kūris, do not compete with a law or modify it, but co-exist and supplement it<sup>18</sup>. If this result cannot be achieved by means of interpretation or concretisation, then this phenomenon becomes a reason for a gap in law and requires the interference of the legislator.

Let us take a look at those phenomena mentioned above. There are quite a few of them: legal mistakes, contradictory court practice or gibberish formulations.

A legal mistake is understood as the defect of expressing the will of the legislator. This mistake can be both of technical and systematic (logical) nature.

Article 4(3) of the Labour Code states that enterprises, agencies, organisations may, acting within the limits of their respective competence and in the manner prescribed by laws, adopt local (internal) regulatory acts establishing working conditions not regulated by labour laws specified in paragraphs 1 and 2 of that Article and by other regulatory acts as well as granting work, social and everyday life privileges to employees or their groups in addition to those established by laws and other regulatory acts. However, Articles 129(4) and 125(5) and 130(1) and 130(3) temporarily (until 1 January 2010) had allowed the reduction of guaranties given to employees by law if such reduction of guarantees was prescribed in the collective agreement.

This solution might be justifiable in times of economic crisis. Nevertheless, this solution should not cause any malfunctions of the labour law system, even if temporal, which could manifest itself in a contradiction between the general and special provisions of the Labour Code.

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18 Kūris, E. Teismo precedentas kaip teisės šaltinis Lietuvoje: Konstitucinė doktrina, teisinio mąstymo stereotipai ir kontrargumentai [Judicial Precedent as a Source of Law in Lithuania: the Official Constitutional Doctrine, Stereotypes of Legal Thinking and Counter-arguments]. *Jurisprudencija*. 2009, 2(116): 1.

Article 6 of the Law on Trade Unions<sup>19</sup> states that a trade union shall be considered to have been established from the day when the conditions specified in this Article are met. Article 8 of the same Law requires that the regulations (statutes) of the trade union are registered in the Register of Legal Entities. The following question arises: when exactly can a trade union be considered to have been established? In order to answer to that question, we should begin with the concept of personal scope of law.

Natural and legal entities form the personal scope of civil law. The emergence of personal scope in labour law is unrelated to the acquisition of a status of a legal entity. Moreover, according to Article 19 of the Labour Code, trade unions are representatives of employees. There is no requirement for the representatives of employees to be legal entities. Therefore, trade unions only have to meet the requirements of Article 6 of Law on Trade Unions and to represent employees.

In practice, a discussion is ongoing on the following question: which trade union is to be considered as a trade union operating in the enterprise? Is it the trade union registered as a trade union operating in the enterprise, or is it the trade union established in the enterprise itself? The latter opinion is considered to be the correct one. Accordingly, a division of a territorial trade union could not be treated as a trade union operating in the enterprise.

Contradictory court practice is yet another phenomenon that might resemble a gap in law. Article 141(3) of the Labour Code states that if an employee that is to be dismissed is not fully paid, he or she is to be paid average salary for the entire period of delay that was not caused by reason of fault on the part of the employee. The following question arises when talking about the provision referred above: should the application of the sanction be associated with the size of the delayed salary? Sadly, but as of 22 January 2008 the Supreme Court of Lithuania (hereinafter – ‘the Supreme Court’) was of the opinion that the Labour Code did not envisage the possibility of reducing the size of the above-mentioned payout; and this situation is not considered as a gap in labour law<sup>20</sup>. A new provision was formulated some time afterwards: a dismissed employee, whose full payout was delayed, shall be paid the remnant amount of the unpaid salary, but not the entire average salary<sup>21</sup>.

There is nothing odd about the fact that even the Constitutional Court of Republic of Lithuania has “blessed” this practice. The Constitutional Court found that the precedents created by the courts in the respective categories of cases bind both the courts of lower instance and the court that created such precedent. In the case of an objective necessity, precedents might be changed or appended. In the case of competition between precedents, i.e. when two different decisions in analogous cases are awarded, things

19 Law on Trade Unions. *Official Gazette*. 1994, No. 42-458.

20 Judgment of the Supreme Court of Lithuania (hereinafter – ‘SCL’) dated 2 October 2006 in the civil case *D. S. v. Alytaus Tekstilė*, No. 3K-3-523/2006; judgment of the SCL, dated 20 September 2006 in the civil case *R. R. v. Alytaus Tekstilė*, No. 3K-3-491/2006; judgment of the SCL dated 22 June 2007 in the civil case *V. M. v. UAB Izabelita*, No. 3K-3-260/2007.

21 Judgment of the SCL date 2 January 2008 in the civil case *D.L. v. UAB Fleming Baldai*, No. 3K-3-82/2008.

like date of adoption of a decision, significant economic or social changes that could have possibly occurred from the date of adoption of the decision and etc. are taken into consideration<sup>22</sup>. It is somewhat doubtful that such a loose interpretation of significance of a precedent and its potential will help eliminate the gaps in labour law and reveal the true will of the legislator.

At present we might talk about a situation of imperfect laws. And this could be true about all branches of law, not only about the labour law system. We must face the fact that laws and other regulatory enactments, adopted even with a purpose of eliminating gaps in law, are at a certain degree influenced by the needs and political goals of political parties in power. The true will of the legislator is difficult to reveal, unless the right of authentic interpretation is granted to the legislator, which, of course, currently does not exist. The law is being interpreted by different persons and institutions. Along with the fact that there is no special institution to coordinate and evaluate the consistence of laws and regulatory acts with the law system as a whole, not only legal mistakes, contradictory court practice, but gibberish formulations too, are amongst those legal phenomena that make reaching the purposes of effective implementation of labour law norms difficult or even impossible.

However, the practice has shown that these defects are impossible to avoid. In the following section of the article, we will discuss special instruments that labour law possesses in order to make the given legal regulation clear.

### 3. Special Designations of Labour Law that Allow Avoiding Vague Legal Regulation

The special role in organising the labour law system devolves to *designations that ensure its proper functioning during the implementation of labour law norms*. It is definitions, conflict regulatory designations, presumptions, juridical fictions and etc. These designations make the implementation of labour law norms much easier. To make it clear, we shall adduce some examples of the above-mentioned regulatory designations:

- *Presumption*. Presumption is considered an acknowledgment of a fact as being genuine; if not or until proved otherwise. We can find the following example in labour law: the fault of the employer is presumed when an employee suffers damage.
- *Analogy*. Analogy is an application of the norms regulating similar situations or application of general principles of law in cases where the law envisages no adequate situation. Article 9 of the Labour Code can be given as an example. According to the paragraph 1 of the above-mentioned Article, where there is no

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22 Decision of the Constitutional Court of Republic of Lithuania dated 24 October 2007, "Regarding the conformity of Articles 4 and 165 of the Civil Code of the Republic of Lithuania with the Constitution of the Republic of Lithuania". *Official Gazette*. 2007, No. 110-4511.

direct provision in labour law regulating a certain relationship, the provisions of labour law regulating similar relations shall be applied.

- *Collision.* Collision is considered to be a contradiction between norms or laws regulating the same or close public relations. For example, Article 8(1) of the Labour Code states that where international agreements of the Republic of Lithuania establish rules other than those laid down by the Labour Code and other labour laws of the Republic of Lithuania, the rules of the international agreements of the Republic of Lithuania shall apply.
- *Definition.* The example of *definition* is laid down in Article 93 of the Labour Code, which states that the employment contract shall be an agreement between an employee and the employer, whereby an employee undertakes to perform work of a certain profession, speciality, qualification or to perform specific duties in accordance with the working regulations established at the workplace, whereas the employer undertakes to provide the employee with the work specified in the contract, to pay the agreed wage and to ensure working conditions as set in labour laws, other regulatory acts, the collective agreement and by agreement between the parties.
- *Fiction.* Fiction is a means of juridical technique. Article 26(2) of the Labour Code is an example. Article 26(2) states that where a term, calculated in months, ends within a month with no appropriate day, the term shall end on the last day of that month. Where it is impossible to determine exactly the starting month of the term calculated in years, or the starting day of the term calculated in months, the last day of the term shall be considered to be the thirtieth day of June or the fifteenth day of the month accordingly.

*Regulatory designations, the main function of which is to ensure the development of the labour law system* is the group of regulatory designations characteristic to labour law. The regulatory designations that constitute this group must ensure consistent development and improvement of the labour law system. This goal is sought via the extent of concretisation of particular regulatory designations. The above-mentioned extent of concretisation can be of local or individual-contractual level. Therefore, all regulatory designations comprising the said group could be divided into three subgroups: abstract, typical and recommended designations.

1. *Abstract regulatory designations* have no explicit criteria for concretisation. There is a wide variety of examples of such abstract regulatory designations: *fair remuneration for work* (Article 2(1)(6) of the Labour Code) or *principles of justice, reasonableness and good faith*, laid down in Article 4(4) of the Labour Code.
2. *Typical regulatory designations* encompass the rules of concretisation. Some particular restrictions are also determined. As long as a party acts within the boundaries of those restrictions, it has a certain degree of freedom in choosing its own way of conduct; or it may be allowed to choose a certain way of conduct from the open-ended list of possible versions of conduct. In the latter situation, a

party may choose such a version of conduct that, by analogy, can lead to another version of conduct that was not defined in the above-mentioned list.

Here is an example: *a minimum limit* of the yearly minimal vacation is laid down in Article 166 of the Labour Code; or *the maximum limit* of the working hours per week, which cannot exceed forty hours per week, is laid down in Article 144(1) of the Labour Code. In some provisions, as is Article 158(1) of the Labour Code, both *minimum and maximum limits* are laid down. Article 158(1) of the Labour Code states that employees shall be granted a break of maximum two hours and minimum half an hour to rest and to eat. The *alternative versions of conduct* to choose from may also be established in labour law provisions, for example, Article 171(2) of the Labour Code states that the employees entitled to an extended annual leave and an additional annual leave shall be granted, subject to their request, either only an extended annual leave or the minimum annual leave with added additional annual leave. The example of the above-mentioned open-ended list is the list of serious breaches of working duties, laid down in Article 235(2) of the Labour Code. Parts 1 to 10 of Article 235(2) list the specific examples and part 11 envisages that other offences, which are in gross breach of the working procedure, can be considered as a serious breach of working duties. Thus, having a model list of such offences, the personal scope of labour law should be able to foresee the actions in specific situations that could be considered as “other offences”.

3. The functional purpose of designations (*recommended designations*) in the system of labour law is based on the fact that the legislator indicates the preferred way of conduct in situations where it is an exceptional competence of the personal scope of labour law to solve certain question. Let us take a model form of an employment contract as an example. Article 99(2) of the Labour Code was reviewed by Resolution No. 115 of the Government of Republic of Lithuania<sup>23</sup>, dated 28 January 2003. Article 95 of the Labour Code states that an employment contract is considered to be concluded where the parties to the contract agree on the essential conditions of the contract. The parties are allowed to agree on subsidiary conditions. The model form of the employment contract approved by the Government helps persons formalise labour relations properly. On the other hand, the parties are not obliged to replicate the model form word by word. The parties must follow the imperative provisions of the Labour Code, but the order for laying down the conditions of the employment contract depends on the will of the parties.

Undoubtedly, the latter example is the expression of liberalisation process in the Lithuanian labour law. During the decade of existence of the Labour Code, it was amended forty times. In between 2008 and 2011 twenty-five amendments were passed. In the first half-year of 2012, the national parliament has already adjusted the Labour

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23 Resolution No. 115 of the Government of Republic of Lithuania, dated 28 January 2003. *Official Gazette*, 2003, No. 11-412.

Code eight times. Modernisation of regulation of labour relations, creation of legal preconditions for more flexible and modern regulation of labour relations, which would match the interests of both the employee and the employer and which would nevertheless stimulate social dialogue in order to implement the security principles in practice, are only some of many other reasons given in the explanatory letters to the amendment projects<sup>24</sup>. Regardless of the fact that the word “liberalisation” is rarely mentioned<sup>25</sup>, the process of liberalisation of the Labour Code in Lithuania is gradually continuing in both projects submitted to the national parliament and in the laws passed by the parliament<sup>26</sup>.

Seeking for compromise, looking for the balance between different public relations is of crucial significance to the process of liberalisation of labour relations. Fair working conditions result in improved motivation and willingness of workers for high performance<sup>27</sup>; this makes the avoidance of social crisis more stable. Even if legislation in this field lacks better systematisation and the elements of chaos cannot always be avoided<sup>28</sup>, in Lithuania the process of liberalisation of labour relations is still quite fluent. The tendency of this relation is the strengthening of social policy, but still many efforts are undertaken in order to keep the clarity of social relations and to avoid social conflicts.

As all the amendments of the Labour Code should satisfy the principles of legal regulation of labour relations and the basic provisions (*inforium* principle) laid down in Articles 4(2) and 4(4) of the Labour Code<sup>29</sup>, the Government cannot amend any provision that establishes conditions for the employees that are less favourable than those laid down in the Labour Code and other labour laws. According to Article 4(4) of the Labour Code, tripartite agreements, collective agreements and local (internal) regulatory acts related to working conditions, under which the position of the employees is made less favourable than that established by the Code, laws and other regulatory acts, shall be null and void. In the cases where this Code and other laws do not directly prohibit the parties of legal relations pertaining to labour to establish, of their own accord and by way of an agreement, mutual rights and obligations, the above parties shall be guided by the principles of justice, reasonableness and good faith. These are the boundaries that the Labour Code itself establishes.

Therefore, wise social policy determines the stability of the society and prevents social conflicts. In times of global economic crisis, changes in social policy should be especially careful<sup>30</sup>. That is why real liberalism in labour relations is the search for a compromise and the balancing of interests of all parties of labour relations.

24 Tiažkijus, V.; Vėgelis, V. Ar vyksta liberalizavimas Lietuvoje? [Is there a Liberalization in Lithuania?]. *Ekonomika ir visuomenė*. 2012, 7-8: 36–39.

25 Only few explanatory letters to the amendment projects have mentioned „liberalisation“: namely draft No. IXP-3871, dated 14 September 2004, and draft No. XP-1492, dated 21 June 2006.

26 Tiažkijus, V.; Vėgelis, V., *supra* note 24.

27 Weiss, M., *supra* note 6, p. 32.

28 Tiažkijus, V.; Vėgelis, V., *supra* note 24.

29 *Ibid.*

30 *Ibid.*

## Conclusions

1. A gap in labour law means the lack of legal regulation of public relations that constitute the subject matter of labour law. A gap in law can be eliminated only by enacting adequate legislation.

2. Where a labour law norm exists, but for some reasons (such as abstract, unsuitable formulation, legal mistakes, evaluative features of the definition, collisions and etc.) it is difficult to implement it, it is not a gap in law. The flaws of such a norm can be eliminated by means of juridical technique.

3. A court precedent cannot be considered to be the source of labour law and as a means for eliminating gaps in law. A court precedent could at best help reveal the true will of the legislator. Thus, we cannot accept the reasoning that for the time being a pluralistic legal system is developing in Lithuania, in which the political authority does not have the monopoly of legislative powers and in which court precedents compete with and in some occasions even supplement or change the regulatory acts of the legislator,.

4. At present, the elimination of gaps in labour law is chaotic. This negatively affects the stability and flexibility of this branch of law.

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## DARBO TEISĖS SPRAGOS IR JŲ ĮTAKA DARBO TEISĖS SISTEMOS LANKSTUMUI IR STABILUMUI

Viktoras Tiažkijus

Vilniaus universitetas, Lietuva

**Santrauka.** Praėjo beveik dešimt metų nuo Lietuvos Respublikos darbo kodekso priėmimo. Lietuvos Respublikos, Europos Sąjungos bei kitų valstybių praktika parodė, kad darbo teisės sistema balansuoja ties lankstumo, liberalizavimo ir stabilumo riba. Tai vyksta dėl įvairių priežasčių: pasaulinės ekonomikos krizės, įstatymų atsilikimo nuo dinamiškai besivystančių visuomeninių darbo santykių, įstatymų leidėjo klaidų, žemo teisinės kultūros lygio bei didėjančios socialinės įtampos. Susidariusią situaciją bandoma taisyti tiek politinėmis, tiek teisinėmis priemonėmis. Politinėmis priemonėmis siekiama užpildyti susidariusį teisinį vakuumą ir pašalinti teisės spragas. Pažymėtina, kad pamažu Lietuvos ir kitų valstybių teisinė sistema darosi vis labiau pliuralistinė, t. y. politinė valdžia praranda teisėkūros monopolinį vaidmenį, o ji iš dalies perima įvairios teisės taikymo institucijos. Vis dažniau kalbama

*apie teismų precedentus, išaiškinimus, teismų praktikos apibendrinimus ir kitus veiksnius, darančius įtaką darbo santykių teisiniam reguliavimui. 2011 m. gegužės mėnesį įvyko tarptautinė mokslinė konferencija „Darbo rinka XXI amžiuje: lankstumo ir saugumo beiškant“, kurios metu buvo išsakyta daug nuomonių dėl globalinių ekonomikos pasikeitimų ir įvairių juridinės technikos priemonių taikymo, siekiant išvengti socialinės krizės ir konfliktų. Mūsų tikslas yra pažvelgti į šią problemą iš teisės pusės, įvertinti darbo santykių teisinio reguliavimo kokybę ir pasiūlyti priemones ir būdus šiam reguliavimui tobulinti.*

**Reikšminiai žodžiai:** *teisės spraga, darbo teisės spraga, teisės klaida, prieštaringa teismų praktika, teisiniai reiškiniai, giminingi teisės spragai.*

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**Viktoras Tiažkijus**, Vilniaus universiteto Teisės fakulteto Privatinės teisės katedros docentas, Socialinių mokslų (teisės krypties) daktaras. Mokslinių tyrimų kryptis: darbo teisė.

**Viktoras Tiažkijus**, Vilnius University, Faculty of Law, Department of Private Law, Associate Professor, Doctor of Social Sciences (Law). Research interest: Labour law.