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The Changing Concept of Employment: the Special Connection Between Labour Law and Civil Law in Hungary

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Abstract

The Hungarian labour law reform is a good example of how the idea of flexicurity is enforced in the 21st century in a post-socialist country. Flexible employment relationships overshadow the social side what is necessary in order to develop effectiveness and competitiveness. This process is completed by the relationship between labour and civil law and it is traced back to the special tradition of legal history. The present study surveys the main connection between labour and civil law and gives some remarks on the special private law-nature of labour law. This paper deals with one of the central questions of the Hungarian labour law reform, that is, the changing relationship between labour and civil law. This legal problem can be observed in Hungarian law for a long time. The study focuses on the civil law-type of the employment relationships and the differences between them. This study examines the regulation before 1st July of 2012 with the aim that development will be seen clearly in connection with the regulation in force. The study emphasizes what kind of fundamental changes the direct usage of civil law can perform in the strict structure of employment relationships.

Keywords: civil law, employees' rights, employment contract, freedom of contract, labour law

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1. Raising the problem

In Hungarian law the special connection between labour and civil law regulation is undisputable; its precedents in legal history, legal concepts and legal theory are certainly diverging (Szladits 1933: 234–254). However, the labour law regulation cannot be regarded identical with the norms of civil law, even if the general rules referring to the contracts and obligations, apart from some exceptions, are also relevant regarding the employment contracts. In Hungarian law employment relationship is valid only on condition that it is drafted in written form exclusively, so at this point the rules of the present Civil Code (Act V of 2013 on the Civil Code, previously Act IV of 1959 on the Civil Code) inevitably influence the structure of employment law as well. Naturally, the lack of a written contract is the employer's burden according to the article 23. § (1) of the present Labour Code (Act I of 2012 on the Labour Code) but if there is no written contract, although the parties manage to agree to establish an employment contract and perform it properly, the employment relationship is valid according to the legal practice on condition that the employee does not demand on written contract within 30 days after the first working day or the employee does not fulfil this.

From another point of view the Civil Code itself disposes about such contracts, within which framework working activity is possible even if disregarding the classical attributes of labour. Typically, mandate and contract for professional services belong to this circle, the former as obligation of care, and the latter as obligation of result. Mainly they are common in the fact of work exclusively, since both of them are based on the parties' equal position, while in an employment relationship the parties are in subordinated position what is one of the most defining elements of their legal relationship (MK 170).

In the following paragraphs I am going to examine some thought-raising problems about the special relationship between Hungarian labour law and civil law. This system of relations has changed seriously by the labour law reform in 2012 and this is a good example of changing, modernising and approaching labour law and civil law in a post-socialist state in the 21st century.

2. Labour Law as Private Law

In spite of the similarities and connection conceptual differentiation is necessary even if both types of contractual forms can be used in case of work. Regarding the parties' rights and obligations there are basic differences between legal relationships under the scope of labour law and civil law, so in everyday practice it is necessary to separate them from each other, since essential guarantees, which characterize the employee's legal status and which function is to ensure the legal protection for the employee against the employer in position of power, can be interpreted in employment relationships exclusively (Gyulavári 2014: 109–110).

Though in Hungarian law it has been an undecided question for a long time whether labour law as an independent branch of law should belong to public law, private law or to neither of them (Kiss 2008: 71–81), but now this dispute seems to be decided. In my opinion labour law regulation – consequently the legal nature of employment relationship – has some special features of public law, but they cannot overgrow the new structure of labour law regulation containing aspects and methods of civil law. On the one hand, the employer's right to give instructions in a broad sphere or the above mentioned hierarchical relationship are features of public law definitely, and on the other hand, there are facts that define employment contract as a special contract of civil law even if it has many specialities (Kenderes 2001: 113–120). It is noteworthy that with the aim to create legal relationships in connection with more flexible work, the legislator definitely approaches labour law to civil law in the operative Labour Code (Ministerial Explanation: 83–85). Consequently, only such elements get or can get central role in an employment relationship, which are based on the parties' consent exclusively what turns classical employment relationship into private law-type.

Before the comprehensive labour law reform of 2012 and the recodification of civil law in 2013–2014, which followed it, the relation and the practical application of the features mentioned above was rather uncertain. In its background it can be observed that in the Hungarian legal culture the real connection between labour and civil law was uncertain both on theoretical and practical level, even if in judicature a definite directive line was formed (Prugberger & Nádas 2014: 82–84). Namely, the Labour Code of 1992 (Act XXII of 1992 on the Labour Code) did not dispose about the applicability of the civil law rules in employment relationships, and this fact established the conceptual and practical separation of labour law. But in connection

with the practical problems it has become clear that this state is not sustainable for long, since employment relationship is a kind of contractual relationship as well; within which framework – in accordance with the civil law contracts – service and quid pro quo are facing, so this question should have been made clear.

In my opinion two questions should be answered as soon as possible, because without them to judge the legal nature of employment contracts correctly would be very difficult and to apply the basic rules in practice would also be difficult. First of all, the question should be asked whether the Civil Code can function as legal background of the Labour Code regarding that the Labour Code does not contain special regulation, and whether it is possible to apply the relevant rule of civil law. Take the connection between Act XXXIII of 1992 on the legal status of civil servants and the Labour Code regarding the questions where the act on the legal status of civil servants does not exclude the Labour Code or applies it unlikely because of the specialities of the civil servant status, Labour Code serves as an ex lege background law.

Of course, it would be possible, or to be more correct, it would have been possible if a concrete labour law rule did not exist and the rule of Labour Code does not exclude this kind of application. Since the Labour Code of 1992 remained silent in connection with this problem, the judicial practice had to solve it. According to this the rules of the Civil Code can be applied based on analogia legis regarding employment relationship on condition that the application and interpretation of a given rule is not contrary to the Labour Code (Prugberger & Nádas 2014: 82-84). In this way the judicial practice solved this problem, but this can be regarded only a partial solution, since in Hungary judge made law does not exist, neither was the circle of the applicable civil law rules unambiguous. Furthermore, it is impossible to state whether a given civil law rule is contrary to the Labour Code or not, namely, in lack of the relevant rules in the Labour Code, practically judging is left to the judicature's discretion.

Secondly, we should make further examination to see how the essence, methods, and fundamental principles of civil law regulation appeared or could have been appeared in the norm material and legal practice of labour law. In employment relationship the principle of freedom of contract is limited from several points of view because of the specialities of the regulation; consequently, the parties' free will may be performed only in a narrow circle in comparison with the legal conditions in civil law. Practically, the Labour Code of 1992 in connection with the most important elements of the employment relationship contained cogent rules, or at least such rules which ensured diversities for the employee's interest. The same features characterized

the rules of the collective agreement, since diversity from Labour Code was possible only for the sake of employee's social and economic interests. Namely, automatical application of the civil law rules was not possible because their starting point was the parties' equal position but not subordination. Another interesting question is the problem of principles influencing the whole Labour Code, since in the regulation of 1992 several rules were laid, which originated from civil law even if they should have been interpreted differently in connection with the employment relationship, but their origin and essence are the same. It must be added that the Labour Code also had its own typical fundamental principles of labour law exclusively. Their interpretation was developing continuously, so it was clear that civil law aspect of the fundamental principles could not be exclusive under the scope of the Labour Code. Altogether the Labour Code of 1992 drew from the intellectuality and basic regulations of civil law to the extent strictly necessary, and this was done – referring to the above mentioned analogia legis application method – mostly forced and urged by the legal practice. This phenomenon could not be influenced by the fact that the concept of the employment contract belongs to contract law, since the legislation rejected this kind of connection.

It is also worth to deal with such special questions, legal institutions in short, which were regulated in the Labour Code but it is declared that the rules of the civil law must be applied. Their presence justifies that the legislator – in spite of the fact that on the level of legislation establishing the background legal regulation-type of the Civil Code was not an aim – made it possible in those questions in which the application of the Civil Code seemed inevitable. In my opinion these special questions in legal practice emphasize the common points of the two legal fields. Non-competition agreement is a good example of it, since it is an independent type of contract according to the Labour Code, but regarding its content it connects closely to the employment contract (Prugberger 2014: 8–11). In case of this contract the rules of civil law must be applied correctly, even if the agreement itself belongs to the scope of the Labour Code, since it is not an employment contract (Rúzs Molnár 2009: 43-46). At the same time legal application was even more difficult since non-competition agreement referring to its essence and legal nature is actually a civil law contract, albeit with according to its content it is – or at least it can be – an organic part of the employment relationship since it has special rules in case of termination of the employment relationship (Kajtár 2013: 67–70). Temporary agency work also should be mentioned because in this three-way legal relationship employment relationship exists only between the agency and the employee, while between the agency and the borrower employer civil law contract is established (Bankó 2014a: 54–56). Namely,

it is also such kind of contract, which does not regulate specifically the employment relationship between the parties, but it is an important element of this atypical employment relationship, since without the agreement between the two employers manpower-lease could not be realised conceptually (Bankó 2014b: 133–136). As far as I am concerned, this kind of concrete connection in practice strengthened the approach between labour law and civil law regulation.

3. The Special Connection Between the Modernised Labour Law System and the Civil Code

In Hungary on 1st July 2012 the present Labour Code came into force (some rules came into force on 1st January 2013). Its creating process was difficult: one of its reasons was the tendency towards the new direction of labour law and the radical transformation of some very important rules (e.g. liability for damages, system of allowances, collective labour law). The law – besides intentional modernisation – is inspired by the need to meet the European and international standards, approaching to civil law and simplification (Ministerial Explanation: 82–86). Furthermore, the new Labour Code got 'companion', since – as mentioned before – on 15th March of 2014 Act V of 2013 on the Civil Code came into force what is very important since the new rules of the Labour Code are adjusted to this codex and regarding that the Civil Code has become the legal background of the Labour Code it is of high importance in connection with the labour law reform.

As far as the flexibility on fundamental principle level the new Labour Code is consistent with the Green Paper (Green Paper on Modernising Labour Law to Meet the Challenges of the 21st Century, European Commission) in many respects. The establishment, termination of the employment relationship, some concrete special rules of the performance are heading into the direction of modernisation emphasizing the parties' free will against the cogencies of the law (Gyulavári & Hős 2012: 252–258). A good example of the latter is article 51. § (1) of the Labour Code according to which the employer is obliged to ensure the conditions of work (e.g. necessary tools) only if the parties did not agree differently. Though the essence of the rule is unambiguous, it also raises the problem of unbalanced differences as a result of their legal situation that has to be reflected by the legal practice (questions of liability, requirement of equal treatment).

Namely, the Civil Code has become the legal background of the Labour Code of 2012, and its reasons are the demand on flexibility and the solution of practical problems. In spite of all these, the concept of the employment contract (and collective agreement) has not been inserted into the Civil Code and its explanation may be that in spite of the close connection, the Labour Code preserved its independent codex feature (Prugberger, Szalma 2012: 14–17). At the same time the above mentioned non-competition agreement is regulated in the present effective Labour Code unambiguously and separately referring to the fact that besides basic specialities the Civil Code has to be applied.

The type of background legal rule appears in the circle of application of general obligation rules like in the case of obligation of liability, grievance fee and statute of limitations. Rules of liability for damages proves that the Labour Code does not take all the relevant rules of the Civil Code word by word, but it adjusts them to the specialities of the employment relationship keeping their civil law-type even in the field of using concepts (e.g. in general duty of care, imputation, foreseeability, etc.). The system of fundamental principles of the law has changed similarly, as the whole law emphasizes to take into consideration the specialities of employment relationship, and it takes into consideration the parties' contractual freedom as much as possible, namely, urges both the employer and the employee beyond the legal cogencies to make free agreements regarding the questions, which are important for them (Ministerial Explanation: 83–85). So the law covers it separately in connection with single rules whether diversity from the main rule is possible and at which level (in employment contract or collective agreement). This way the legislator rather intends to help the parties instead of the previous strict structure and to establish the possibility of forming the parties' legal relationship according to their real economic needs. It is interesting that the situation in connection with the collective agreement is similar, namely, to deviate from the main rule is practically possible for either parties' sake, what is the opposite of the previous practice (Ministerial Explanation: 83, 85). Furthermore, the legislator urges the social partners to make collective agreements as often as possible by the simplifying rules of establishing contracts, since as a consequence of possibility of derogation of the law their legal relationship can be formed easily and efficiently, and conflicts of interests and legal disputes may be prevented more successfully. This is another effective approach of the concept of flexible employment.

4. Closing remarks

The interpretation above describes only a small part of the Hungarian labour law reform definitely focusing on the connection between labour law and civil law. Flexibility on the labour market and modernisation of legal relationships of labour are also part of the proper regulation; and putting the so called atypical employment relationships in the foreground is also relevant in this circle. In my opinion they also can be traced back to the definite adaptation of the concepts of civil law, since ultimately they are based on the principle of freedom of contract. Finally, I would like to state that the most important element of the Hungarian labour law reform is probably the legislator's decision that labour law is definitely approaching to the system of civil law; and – among other aspects – this can lead to the real modernisation of the employment law. However, we do not know how these new directions influence the employees' legal protection in the long term, since the Labour Code does not regard the classical social function of labour law as an extremely important interest that should be protected in the first place.

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