

# SYSTEMATIC THINKING ABOUT EMPLOYEE STATUS

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## Abstract

*Over the past decades, the international and European policy debate has focused on who is considered to be an employee and what kind of workers are covered by the protection of employees, i.e. the extension of the scope of labour law. There is a deep-set problem lying behind this global thinking. The application of the principle of equal treatment in private law encompasses a lot of tension. Private law including labour law is confronted with human and constitutional rights when vulnerable groups, like women, the elderly, parents, persons with disabilities are integrated into the labour market. In labour law human and constitutional rights make freedom of contract, being more limited than civil law, seek further compromises. In labour law, there is a clear conflict between the prohibition of discrimination, the freedom of contract and the freedom of provision provided by property law. In the event that labour law regulation is left alone and is not considered systematically, conflict can result in controversial legislative solutions.*

**Keywords:** *labour law regulation, flexicurity, social and labour market program, equality rights, integration policy, personal scope of labour law and labour protection, employee status, labour-market status.*

## 1. The significance of the system and its dilemma

*“The system is nothing but parts or elements making up a whole or a combination of those parts or elements - like the hierarchy of the ecosystem is made up of atoms, molecules, cells, and organs, organisms. The system is sustained during a continuous change of elements - e.g. organs in the course of cell replacement, societies in the course of the birth and death of their members. System laws can also be applied to spiritual phenomena. Gears will make up a tower clock to a certain degree of order, the letters will become texts to a certain degree of order and coherence of legal norms can*

*have two types of image: a set and a system. A set is the mere co-existence of the elements .... A system of organised order goes beyond a setlike state ...”<sup>1</sup> I quote Miklós Szabó from the Introduction to Law and State Science. The question is whether employee status or employee quality can be placed in a broader context. The goal is to create a general concept that allows to map the structure of employee existence that is operative, objective, truthful, and is rational. A complex concept of employee status can also be seen as the result of a construction work in legal dogmatics, in which it is important that the construction can be exerciseable.*

The question then arises as to how uniformly labour market can be treated, if it

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<sup>1</sup> Miklós Szabó: Legal System (Jogrendszer). In: Miklós Szabó (ed.): *Introduction into the Jurisprudence and Political Sciences. (Bevezetés a jog-és államtudományokba)*, Bíbor Kiadó, Miskolc, 2006, p. 109-110.

can be treated uniformly. If so, can a complex understanding of employee status treat the players in the labour force uniformly?

Compared to civil law, in labour law, due to state interference in the interest of the weaker party, contractual freedom of the parties is subject to more restriction - despite the fact that Act I of 2012 on the Labour Code (LC) aims to strengthen freedom, by derogating from the rules of the Labour Code, it makes *bilateral dispositivity* a general rule.

In labour law, the freedom of contract being more restrictive than in civil law is violated by limiting the freedom of choice, for example in quota regulations<sup>2</sup>. This conflict at the level of labour law regulation can be barely resolved in case of some vulnerable groups, like persons with disabilities<sup>3</sup>. This is particularly true when labour law regulation is *left alone* waiting for the solution to resolve the conflict.

In labour law, therefore, the restriction as a *legal fact* at the conclusion of the employment contract and its *legal effect* during the full employment relationship applies due to the increased need of the vulnerable employee to protect working time, rest, wages, derogation from the employment contract, termination of employment, even in the case of an incapacitated employee, even in the case of liability for damages. *Freedom of choice* conflicts with *restriction of choice*, which then affects the content of the entire legal relationship.

The problem is even more complicated because the policy of equal opportunities regarding the various vulnerable employees

is *heterogeneous*, so are the regulatory solutions for potential employees with some protected characteristics, be it gender, age, race, religion, political belief or disability. The principle of non-discrimination, preference and reasonable adjustments *have come to life*, and have not taken the usual forms of private law - dispositivity - but are principles of *strict compliance*.

Thus, in order to be able to apply the principle of equal treatment in a private law and in particular in a labour law context, it is necessary to find the way and build a mindset that may go beyond the labour law regulation framework, but the constitutional and human rights principles can still be applied within private law dogmatics. As a result, *a new system and new approach* will be developed. For my part, I am trying to contribute to this by the complex concept of employee status.

By extending the scope of the personal scope and / or that of the protection institutions, the current EU and international policy debate on the renewal of labour law is conducive, while by reducing defence regulation it is contrary to the application of equal treatment in labour law context. The future of labour law regulation is defined by several directions today, two of which are highlighted here:

- I. the *extension* of the personal scope of labour law status and / or labour law protection,
- II. the *flexible and secure* nature of labour law regulation taking into account the (dual) interest system of employees and employers<sup>4</sup>.

<sup>2</sup> According to the quota regulation prescribed in Act CXCI of 2011 § 23 Sec. 1. the employer is obliged to pay rehabilitation contribution fee if the number of employees surpasses 25 and 5% of the employees are not employees with changed working capacity.

<sup>3</sup> Attila Menyhárd: Challenges in the Recent Private Law Dogmatic. (Kihívások a mai magánjogi dogmatikában.) In: Miklós Szabó (ed): Legal Dogmatic and Theory. (Jogdogmatika és jogelmélet), Bíbor Kiadó, Miskolc, 2007. 291-307. He writes on the releasing character of constitutional rights on pages 300-303.

<sup>4</sup> The employee status was a hot issue on the ILO Conference of Future of Work in Genova, 3-5 July 2017.

These directions determine not only labour law, but in a broader sense also *the future of work and workforce*.

## 2. The extension of the personal scope of labour law status and / or labour law protection

What does the *protection system* mean? Mapping of the structure of being an employee and examining employee quality are directly related to the functioning of the labour law protection system. By labour law protection system, I mean all the rules and institutions regarding employee's protection. These create labour law and, in a sense, social law security for an employee. Examining the question, however, sets up a trap I have always tried to avoid in my research. Namely, I cannot mix the goals of labour law with those of social law. Since labour law is the law of the private sector, it cannot take over the duties of social law, the care-centeredness of the social welfare system cannot be imposed on it. By protecting the weaker party, however, labour law presents social law aspects of equal opportunities rules regarding *women, persons caring for children and persons with disabilities*. Moreover, not only labour law has social law implications, but employee status also has a *social side* to it.

Labour law protection system is defined within and outside the legal system: within the legal system horizontally and vertically, outside the legal system by

external - economic and social - circumstances.

By *horizontal* definition, I mean the particularities of the legal relationship that raise the question how labour law is related to civil law. Its *vertical* determination is inherent in constitutional law that is pervasive throughout the legal system, in other words it lies in fundamental rights. Both horizontal and vertical determinism can be captured in its history. Besides this and at the same time, the demand for or the renunciation of labour law protection regulation are constantly changing, reflecting economic and social changes and expectations.

At the same time, given the changing personal scope of labour law, the decision who is covered by labour law protection legislation in parallel to or irrespective of the extension of the employee nature is a question of legal policy and leads to a double and triple model of legal statuses in Europe<sup>5</sup>.

Thus, the extension or even the exclusion of the personal scope of labour law is aimed at what group of employees labour law legislation wishes to extend labour law regulation to. Separately or even at the same time, the extension of the scope of (certain) labour law protection institutions, which leads to the concept of a *person with a status similar to an employee*.

This is beneficial for disadvantaged groups (vulnerable groups), as they are mostly those who work in atypical employment relationships, doing dependent work and thus the extension of employee

<sup>5</sup> See more: Nicola Countouris: *The Changing Law of the Employment Relationship. Comparative Analyses in the European Context*. Hampshire, Burlington, Ashgate Publishing Company. 2007. 57-59.; Paul Davies – Mark Freedland: *Labour Markets, Welfare and the Personal Scope of Employment Law. Comparative Labour Law & Policy Journal*. 1999-2000. Vol. 21. p. 237-238.; A.C.L. Davies: *Perspectives on Labour Law*. Cambridge. Cambridge University Press. 2009. 77-96.; Simon Deakin – Gilian S. Morris: *Labour Law*. 6<sup>th</sup> edition. Oxford and Portland, Oregon, Hart Publishing. 2012. 172-182.; Simon Deakin: *The many Futures of the Employment Contract*. ESCR Centre for Business Research. University of Cambridge, Working Paper No. 191. 2000. 5-8. on the definition of the employee from the employer's perspective see: Gábor Mélypataki: *Definition of employee in the Hungarian and German Law from the Employer's Perspective (A munkavállaló fogalma a magyar és a német jogban a munkáltató szempontjából)*. Publications Universitatis Miskolcensis Sectio Juridica et Politica Tomus. Volume 30. Issue 2. Miskolc, Miskolc University Press. 2012. 521-540.

status and the related protection system means safer working conditions for them being employed part-time, for a fixed-term or as outworkers. In this respect, labour law legislation aiming at the normalization of atypical employment in Europe, including in Hungary, also helps to comply with the principle of equal treatment. Thus, the *inclusion* of part-time, fixed-term and outworking employment *in a labour law regulation* has facilitated the representation of vulnerable groups in employment relationship.

This protection would have been strengthened if, in accordance with the draft, the Labour Code had extended the application of employment law (leave, notice period, severance pay, liability provisions) to persons with a status similar to an employee.

Labour law regulations in Europe, however, are changing dynamically, their rules are loosening, becoming more flexible in line with the changes in labour market requirements and consumer demand. One of the driving principles of the labour market policy and based on this that of labour law regulation changes is the concept of *flexicurity*, which the general justification of the Labour Code also refers to. Apart from the economic driving force for change, human rights and equal opportunities policy are also serious regulatory factors which, as I have mentioned, are imperative to follow<sup>6</sup>.

If we consider the process from vulnerable groups' point of view, on the one hand labour law rules are loosening providing less protection for the employee. From the employee's point of view the rules relating to the termination of an employment relationship or the liability for damages are

changing unfavourably. Of course, this is beneficial to the employer. As an Anglo-American influence (*Freedland, Counturis*) the process is considered to be a mutual risk taken by the employer and employee. In my opinion, mutual risk is taken by partners, coordinated parties, and it is not to be discussed in labour law regulation.

On the other hand, this trend is sharply opposed by integration policy, which also affects labour law rules. Combating social exclusion cannot be want of protection regulation. Thus, it seems that equal rights and integration policies as social factors strongly deter labour law from becoming more flexible, since the integration of vulnerable groups requires protection regulation.

The question then arises, however, whether protection can only be given under labour law rules. The answer is clearly "No". Protection regulation can also be implemented by *flexicurity* as a *social and labour market program* and the relating transit labour market program through a system of social security, job search and rehabilitation services.

This approach to protection thus contributes to the creating protection not only for employees but also *workers*.

It is therefore clear that, when applying the principle of equal treatment, the status of vulnerable and disadvantaged groups is a wider employment issue. *Employability* includes employment rehabilitation, labour safety, employment policy, education policy, labour inspection rules and measures, job search support system, active labour market policy and the operation of a sustainable social care system.

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<sup>6</sup> Auer Peter – Gazier Bernard: Social and labour market reforms: four agendas. In: Ralf Rogowski – Robert Salais – Noel Whiteside (ed.): *Transforming European Employment Policy. Labour Market Transitions and the Promotion of Capability*. Edward Elgar, Cheltenham, UK, Northampton, Ma, USA, 2011. p. 34-36. Auer and Gazier present flexicurity as a social and labour market program such as the flexibility, capability, and transitional labour market. This approach is holistic based on systematic thinking.

The *Hungarian reality* of social and labour market programs means a special country-specific social and labour market model and strategy. One of the elements of this is the nature of labour law regulation, in which achieving the balance of flexibility and security is a major issue. The balance implies a degree of legal guarantees in a legal relationship that is still motivating for an employer requiring flexibility to maintain the legal relationship within the labour law framework.

In such a consistent labour market program, I believe that the applicability of human and constitutional rights in the labour law environment can be more successful, that is employee status must be viewed in a complex way.

The broad concept of employee status draws attention to the fact that the aim of labour law is not just to balance the imbalance between the parties. Among the goals of labour law there must also be one that, *through the extension of individual capacity, promotes the principle of autonomy and equality in work and ensures a decent living.*

With this, social and labour market programs have led us to the broad concept of employee status.

In labour law, *individual self-determination* is realized through the labour contract and the will of two subject positions of labour law<sup>7</sup>, so it is fundamental to define the scope of the subjects of the obligation, which implies that it has become a cardinal problem of labour law<sup>8</sup>. The dogmatic questions of employee status are of paramount importance as they are the basis and the starting point of labour law enforcement.

The Labour Code provides for subjects of employment relationships and the concept of employment contract. This wording, however, fails to handle the participants of the labour market, if not uniformly but more uniformly<sup>9</sup>.

I believe, however, that work performed according to contract by the able-bodied and disadvantaged groups, in particular those with disabilities goes beyond the provisions of the Labour Code, and there is a broader concept of employee status, which is a set of personal and environmental factors in a *legal, economic and social sense*. As the success of

<sup>7</sup> Not only the individuals of the obligation but also the realization of their will is in the focus.

<sup>8</sup> György Kiss: *Collision of Constitutional Rights in Labour Law. (Alapjogok kollíziója a munkajogban)*. Academic Thesis (Akadémiai Doktori Értekezés), Pécs, 2006. 249., 253., 258. In printed version György Kiss: *Collision of Constitutional Rights in Labour Law. (Alapjogok kollíziója a munkajogban)*. Pécs, Justus Tanácsadó Bt., 2010. See more: György Kiss: *Labour Law (Munkajog)*. Osiris, Budapest, 2005. 104. In the literature there is a concept which prescribes the determinants of the labour relationship through the definition of the employee (Labour law is the special law of employees). György Kiss: *Labour Law*, 116.

<sup>9</sup> § 32 of the Labour Code says: The parties to an employment relationship are the employer and the employee. § 33 says: Employer' means any person having the capacity to perform legal acts who is party to employment contracts with employees.

§ 42 (1) of the Labour Code says: An employment relationship is deemed established by entering into an employment contract.

(2) Under an employment contract:

a) the employee is required to work as instructed by the employer;

b) the employer is required to provide work for the employee and to pay wages.

§ 34 (1) Employee' means any natural person who works under an employment contract.

(2) Employees must be at least sixteen years of age. By way of derogation from the above, any person of at least fifteen years of age receiving full-time school education may enter into an employment relationship during school holidays.

§ 21 (5) Legal statements on behalf of incompetent persons shall be made by the legal representatives.

employment is not only determined by the individual's state of health and abilities, but also the economic and labour market conditions, the labour law and adult protection regulations responding to them: the development and capacity of the education and training system, the operation of the social care system, including the access to rehabilitation services and benefit policy.

If the goal is to integrate more people into the labour market, legislation must apply a *holistic approach* and realize that integration into the labour market is not only a labour law, but also a broader employment, rehabilitation, education and adult protection issue. Labour market integration also has a very strong fundamental rights aspect.

Complex thinking about employee status fits in with the EU objective and goal of state achieving higher employment and productivity<sup>10</sup>.

The renewability of labour law is now also shown by the extent to which the rules following economic changes *can be extended* to vulnerable groups, and how legislation is trying to meet the economic and social expectations of labour law regulation.

### 3. The social side of employee status

The social side of employee status can be interpreted from several aspects.

When examining the social side, one can speak about the *social aspects of labour law regulation*. Social rules of labour law include, for example, the protection of pregnant women, child-raising parents, the elderly, the blind, young employees and persons with disabilities. In fact, labour law, as an area of law, and the indefinability of the subject matter of the service and in connection to this the employer's right of instruction and control regarding the implementation of the work, is inherent in the protective character, which is why the infiltration of the social and public law norms into the regulation has always been felt. Social nature can be said to originate from protection itself, the protection of the employee.

However, since employment is not merely a labour law issue but also an employment and employment policy one, the social side of the status also includes the *occupational safety rules on employees belonging to vulnerable groups*.

It is important to point out that social nature in no way implies taking over the rules of social law. Labour law is the law of the private sector, *according to Deakin* it has a market-restricting function based on regulations to protect dependent subjects, or a market-correction one to loosen it, or a cross-over, market-constituting function<sup>11</sup>.

On the other hand, the regulatory area of social law that is linked to an insurance relationship, namely unemployment and

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<sup>10</sup> See Title IX and X of the Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012E%2FTXT> (last visited: 30.01.2018.) The commentary of the Labour Code also refers to Article XII of the Hungarian Fundamental Act, which says: (1) Everyone shall have the right to freely choose his or her job or profession, and the freedom to conduct a business. Everyone shall have a duty to contribute to the enrichment of the community through his or her work, performed according to his or her abilities and faculties. (2) Hungary shall endeavour to ensure the possibility of employment to everyone who is able and willing to work.

In the focus of the Green Paper it also stands how sustainable development can be reached by more and better jobs. Modernization of labour law plays a key role in the success of adjustment to the changing environment on behalf of the employees and companies. See more: Green Paper Modernising labour law to meet the challenges of the 21 st century, Brussels, 22.11.2006 COM(2006) 708 final.

<sup>11</sup> See more: Simon Deakin – Gilian S. Morris: *Labour Law. 6<sup>th</sup> edition*. Oxford and Portland, Oregon, Hart Publishing, 2012. p. 30-37; 131-190.

social security, is closely linked to labour law. Thus, the social side of employee status includes the employment relationships and similar relationships *the social security rules as well as rules on the support to jobseekers*.

Within the social security rules, an important point of contact for employee status is the rules on rehabilitation. In rehabilitation legislation, *rehabilitation services* and setting up a *system for providing help in returning to the labour market* are of utmost importance for employee status. All this is covered by an employment motivating and employer incentive policy, which is a matter of employment policy.

The changed forms of working arrangements, the new technological and scientific results of the 21st century create a feeling of *insecurity* and *worry* in the employees. Labour market is the ring of the private sector, where even the able-bodied workers can make their way in life only with great confidence and serious professional knowledge. This environment poses challenges to the institution of rehabilitation, including occupational rehabilitation. Since those who want to succeed in the open labour market today must have the following features: advanced interpersonal skills, abilities to work in a team, to identify and solve problems, to continue learning, to renew, and to internalise new technologies.

Ongoing *adaptation* to work has become the key to successful employment. All of the above features contribute to this flexibility. Employees are increasingly affected by career approaches in the 21st century. In addition, the subject undergoing rehabilitation needs to face the challenge of accepting that his/her past abilities have

changed, and s/he has to process it psychosocially, as well<sup>12</sup>.

*Labour ethics* has also changed. While earlier hard work, honesty, and integrity were important, today, changes discourage employees to get emotionally attached to their workplace and they seek external motivations, such as leisure activities and family. It implies that work is not necessarily the determining building block of personality.<sup>13</sup>

Occupational rehabilitation and *assessment* must also adjust to this. It implies that paper-based assessment is no longer sufficient, it is necessary to *simulate employment situations*. To this end it is necessary for the assessor to be aware of the trends in labour market. This implies cooperation with employment offices. Assessment should therefore use the holistic approach mentioned above and integrate the client's emotions as the subjects undergoing rehabilitation generally have lower self-esteem and less self-confidence. Predictability would be important for the subjects undergoing rehabilitation, but the current employment culture does not require long-term engagement<sup>14</sup>.

Thus, tension exists not only in labour law regulation, but also in the framework of rehabilitation. While rehabilitation needs to adapt to the changing employer structure, employee attitudes and work arrangements, the subjects undergoing rehabilitation seem to be lagging behind. It implies that rehabilitation must be fundamentally aligned with the changing economic and social environment, and labour market services must be organized in a competition approach, and must also provide services tailored to the client's specific needs.

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<sup>12</sup> Murray B. – Heron R.: Placement of Job-Seekers with Disabilities. Elements of an Effective Service. International Labour Organisation, 2003, 3-4.; Holmes J.: *Vocational Rehabilitation*. Blackwell Publishing, Oxford, 2007. 7-9.

<sup>13</sup> Murray B. – Heron R. (2007) 4.

<sup>14</sup> Murray B. – Heron R. (2007) 5.

#### 4. Difficulties in equal treatment in Hungarian labour law through the example of persons with disabilities

In the following, I wish to illustrate the contradictory nature of the employment of persons with disabilities in Hungarian labour law satisfying market demands, thus picturing the difficulties of transposing equality rules into contractual relations.

First of all, I highlight the terminological confusion, which is far from being the mistake of the Labour Code, but rather an inconsistency in legislation and law enforcement over decades<sup>15</sup>. The Labour Code contains provisions for persons with disabilities, receiving rehabilitation treatment and incapacitated workers. All this makes the application of labour law provisions confusing<sup>16</sup>.

Pursuant to Article 53 (3) of the Labour Code, derogation the employment contract is limited in the case of a person receiving rehabilitation treatment.

Pursuant to Article 66 (7) of the Labour Code, the regulations protecting the

notice of termination has been significantly reduced compared to both the old Labour Code of 1992 and the previous regulations. Earlier among the prohibitions of termination there was a rule regarding a person receiving a rehabilitation benefit, according to which the employer should not terminate an employment relationship by ordinary dismissal for a person receiving a rehabilitation benefit under a separate law during the period of incapacity to work<sup>17</sup>. The Labour Code currently provides for a restriction on termination within the scope of the termination by notice in the case of a person receiving a rehabilitation treatment and rehabilitation allowance, in accordance with Article 91 of the former Labour Code. That is, the restriction is not on the termination by notice in general, but *on termination on the grounds of health-related reasons*. The prohibition on termination was abolished, and the protection against termination is provided for as a restriction on a termination by notice. That is, restriction does not apply to each reason of dismissal.

<sup>15</sup> See more on the employment issue of disabled people in the Reports of the Hungarian Commissioner of Fundamental Rights: accession into the labour market in AJBH-2618/2012., the working circumstances and completion of the policy 'reasonable accommodation' in AJBH-5360/2012., education system for the efficient employment in AJBH-4832/2012.

<sup>16</sup> On the issue of definitions in the Hungarian legislation see: JAKAB NÓRA – HOFFMAN ISTVÁN – KÖNCZEI GYÖRGY: Rehabilitation of people with disabilities in Hungary: Questions and Results in Labour Law and Social Law, *ZEITSCHRIFT FÜR AUSLAENDISCHES UND INTERNATIONALES ARBEITS- UND SOZIALRECHT* 31:(1) p. 23-44. 2017.

Employees with changed working abilities are people with physical and mental disability, or whose chance for the maintenance of the workplace and being employed has been decreased because of their disability. The concept of employee with changed working abilities refers to people who have already been/worked on the labour market. (However, in the meantime, their working abilities *changed* i.e., became *reduced*). On the other hand, definition of people with changed working abilities can be also found in § 2 of Act No. CXCI of 2011 (in force since January 1<sup>st</sup>, 2012) on the Services of People with Changed Working Abilities.

The definition of a disabled person is laid down in § 4 of Act No. XXVI of 1998 on the Rights and Equalizing Opportunities of Persons with Disabilities. This definition is closed to the WHO definition of 2002. Persons with mental or physical disability are included in the definition of employee with changed working abilities, but there is a considerable part of disabled people who are not covered. Therefore, not all the legal provisions can be applied for disabled people, which may be applied for employees with changed working abilities. Some disabled people belong to the term "employee with changed working abilities", but e.g., people with intellectual and psychosocial disabilities mainly do not (they are very rarely employed). Therefore, they are invisible not only in the Hungarian legislation mostly, but also in the data collection. It is so, because many questionnaires refer to employees with changed working ability.

<sup>17</sup> Act XXII of 1992 § 90. Sec. (1) g) (Former Labour Code being in force till 30 June of 2012)

In my opinion, with minimal content the restriction on termination by notice limited to the person receiving rehabilitation allowance fits into the tendency of labour law that tends to weaken excessively employee centric regulation while maintaining legal relationships within the framework of the employment relationship.

Those receiving rehabilitation allowance and those with disabilities are entitled to additional leave.

The Labour Code regulates the work of an *incapacitated employee* as non-standard legal relationship together with persons with disabilities and persons with reduced working capacity.

The notion of an incapacitated employee involves the intellectually and psychosocially (mentally, psychically) disabled people's rights to work.

It is interesting why this new category of employees is included in the Labour Code. In Article 39 of 2011 the Constitutional Court adopted a decision on adult incapacitated persons employed in employment or other legal status on 30 May 2011. The Constitutional Court stated in its decision that the Parliament had established an unconstitutional omission by failing to create the statutory conditions and guarantees of the employment of adult incapacitated persons employed in employment or other legal status. The Constitutional Court therefore called upon the Parliament to perform its legislative task by 31 December 2011.

It is to be welcomed that Article 212 of the Labour Code establishes the basic principles of employment for incapacitated persons<sup>18</sup>.

Employing incapacitated persons includes the following specialties: job descriptions are more detailed, health aptitude tests cover all the duties of the post, work is monitored continuously, occupational safety rules are enforced more vigorously, provisions pertaining to young workers are applied but they cannot be obliged to pay special or general damages (Article 141 of the Labour Code). When employing an "incapacitated" employee, however, law enforcement and hence the employer are left to themselves by legislation.

In the case of the employment of incapacitated persons, collective labour law institutions, interest representatives and support persons have a very important role. By the 2011 legislation and the re-transformation of the rehabilitation system, the recipients of rehabilitation services are not the incapacitated employees, as they are mostly those who do not have an insured status. While in the case of employment-based rehabilitation, the Labour Code is applied, employment does not take place in the primary labour market as opposed to employing an incapacitated person, which does, without being involved in the rehabilitation system<sup>19</sup>.

The work of an incapacitated employee is a standard example of the fact

<sup>18</sup> Labour Code § 212 on the incapacitated employees

(1) Incapacitated employees or employees whose legal capacity has been partially limited having regard to employment may conclude employment relationships only for jobs which they are capable to handle on a stable and continuous basis in the light of their medical condition.

(2) The functions of the employee's job shall be determined by definition of the related responsibilities in detail. The employee's medical examination shall cover the employee's ability to handle the functions of the job.

(3) The employee's work shall be supervised continuously so as to ensure that the requirements of occupational safety and health are satisfied.

(4) The provisions pertaining to young employees shall apply to employees, with the proviso that they may not be compelled to pay compensation for damages or restitution.

<sup>19</sup> Such as Act CXCI of 2011 on the Services of People with Changed Working Abilities and Government Order 327 of 2011 (29. Dec.) on the Procedural Rules of Services of People with Changed Working Abilities.

that employee status is a condition for cooperation of subsystems. Regrettably, this subject-matter will only become a subject of rehabilitation if it is already in the labour market. Under the current rehabilitation rules, an incapacitated employee cannot enter the rehabilitation system before the first job, without this, however, effective employment is unimaginable.

An incapacitated employee, as a type of employment relationship, is listed as a foreign body in Chapter XV of the Labour Code. Employment of an incapacitated worker is conceivable in a regulatory system the creation of which is not only a task of labour law regulation. In labour law regulation, primary labour market is not about potential rehabilitation, training, mentoring of an incapacitated employee, and the supporter when taking a legal act.

But the employee status of an incapacitated employee is called into question even more so when we think about what an employee should be like today. Today's employee is firm, flexible, quickly adapts to changes and is always able to renew. The Hungarian labour law regulation strengthens the principle of partnerships, as the parties may derogate from the non-cogent provisions in the employment contract and the collective agreement as recorded in the Labour Code. The significance of individual and collective self-governments thus increases.

Persons with disabilities, however, without a support network, are unlikely to determine the working conditions if they can find employment at all.

## 5. Overcoming the employee status?

At the same time, it is worth considering that the future of work is not only about the protection of the employee, but also that of the *worker* in general. This approach, however, goes beyond the broad concept of employee status. *Deakin* and *Rogowski* and *Supiot* did not regard the rigidity of the Fordist model and the appearance of new technologies as the driving force of change. They highlighted the challenge to address unemployment, illness and aging due to loss of income, and the problems arising from the inequality of dependence. Collective labour law institutions were unable to provide effective protection for employees. The main reason for this is that social and economic rights<sup>20</sup> are based on institutions that were built on stable employment. *Supiot's* proposal was a labour law reform which looks *beyond employment* and in which protection is not only connected to an employment relationship but reaches beyond by new regulatory techniques and policy initiatives. This includes the substitution of employment status with labour force membership/status and also *social drawing rights*, which would also allow lifelong learning resources to be used<sup>21</sup>. This idea nicely fits into a social and labour market program. This will contribute to making the labour market more flexible by introducing more and more reforms into national legislation that are based on the reconciliation of work and family life and, in the absence of employment, social security contributions provide social security for the

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<sup>20</sup> On the development of economic and social rights see: Kaufmann, C.: *Globalisation and Labour Rights. The Conflict between Core Labour Rights and International Economic Law*. Hart Publishing, Oxford and Portland, Oregon, 2007.

<sup>21</sup> See more: *European Commission 1998: Transformation of labour and future of labour law in Europe*. Final Report, June 1998. 212-217. sections. About the effect of social rights upon the labour market see Simon Deakin: *Social Rights and the Market. An evolutionary Perspective*. In: Burchell, B. – Deakin, S. – Michie, J. – Rubery, J. (ed.): *Systems of Production. Markets, organisations and performance*. Routledge, London and New York, 2005. 75-88.

individual, and lifelong learning strategy shortens transition times between two jobs<sup>22</sup>.

An excellent example of the labour force membership is the Article 5 of Act LXXX of 1997 on the eligibility for social security benefits, in which the Hungarian State clearly establishes the right to social security for insured persons. The concept of eligibility for social security benefits covers a wider layer of workers. However, it is not about the extension of the scope of employment institutions but a matter of drawing social rights outside of employment.

In addition to labour force membership, I must mention the personal employment profile. A worker's personal employment profile assumes several work relationships in parallel and consecutively, as nowadays it is very rare for someone to spend one's entire work at a workplace. There are a number of work-related statuses attached to it temporarily or permanently. Thus, when a potential worker has a disability, is a woman, has a child, it further shades one's work, one is likely to drift towards precarious forms of employment. Besides one's talents, participation in the labour market is determined by the labour market regulatory activity of the state, the availability of employment policy instruments and services of social security. In the latter case, it is important to define services to a degree that helps the integration into the labour market. We can complement the concept of labour force membership with one more aspect. Beyond social security, the state's activities to organize social benefits and the resulting commitments are also very important. This goes beyond the social security system and applies to the entire adult protection regulation. Within this

regulation, it is essential to organize the assistance-type care in such a way that does not lead to a social policy trapped in assistance, "weaning off work". We must see, however, that the employment of disadvantaged persons in this new concept is fundamentally the same as the situation of an able person.

## 6. Conclusion

The question then arises as to how uniformly labour market can be treated, if it can be treated uniformly. If so, can a complex understanding of employee status treat the players in the labour force uniformly? I believe that labour market *cannot be treated* uniformly, but one can strive for a more uniform treatment using a well-thought-out concept. This can help to solve the application of human and constitutional rights in private law, and it can lead legislation to broaden the social rights related to participation in the labour market *going beyond* the scope of labour law.

The whole of Hungarian labour law regulation and the underlying employment contract is aimed at balancing the interests of the parties, which is influenced by countless external circumstances and has a number of protected features. Current labour law regulation will only be able to provide the community with the full service and can be an adequate, reasonable, economically correct, legal-ethical part of *labour turnover*, if it is part of a labour market program where employment adopts a *holistic* approach.

When thinking about employee status, the aim is to organize or combine the components to create a coherent whole. In this system, a change in employee quality or a need for labour law protection does not

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<sup>22</sup> This process was encouraged in the European Union by *open method of coordination* (OMC). See more: Deakin S. –Rogowski R.: Reflexive labour law, capabilities and the future of social Europe. In: Rogowski, R. – Salais, R. – Whiteside, N. (ed.) Transforming European Employment Policy. Labour Market Transitions and the Promotion of Capability. Edward Elgar, Cheltenham, UK, Northampton, MA, USA, 2011. 241-243.

shake the pillars of the system. The goal is to ensure that coherency is reached not through a coexistence of the components but in a *system of organised order*. This helps avoid

contradictions that can be clearly demonstrated during the employment of persons with disabilities.

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