



ELLN Working Paper Series, February 2015

Opportunities and limits of application principles and Civil Code rules in Hungarian labour law
Crisis management with means of civil law

Prof. György Kiss

University of Pécs
Hungarian Academy of Sciences
University of Pécs Research Group of Comparative and European Employment Policy and Labour Law
National University of Public service

ISSN 2197-1102

Opportunities and limits of application principles and Civil Code rules
in Hungarian labour law
Crisis management with means of civil law

Prof. György Kiss

University of Pécs
Hungarian Academy of Sciences
University of Pécs Research Group of Comparative and European Employment Policy
and Labour Law
National University of Public service

**Working Paper No. 4
February 2015**

European Labour Law Network

Co-ordinator Prof. Dr. Bernd Waas
Chair of Civil- and Labour Law
Goethe University Frankfurt
Grüneburgplatz 1
D-60323 Frankfurt am Main

Phone: +49 (0) 69/798-34232

waas@jur.uni-frankfurt.de
www.labourlawnetwork.eu

The European Labour Law Network (ELLN) is a network of legal scholars who between them currently represent 31 countries in Europe.

Any opinions expressed in this Working Paper are those of the author(s) and not those of the ELLN. Research published in this series may include views on policy, but the ELLN itself takes no policy positions.

ELLN Working Papers often represent preliminary work. The main purpose of circulating them is to promote discussion. Citation of such a paper should account for its provisional character.

ABSTRACT

This Working Paper describes the correlation between the new Labour Code (of 2012) and the new Civil Code (of 2013) in the Hungarian law system. The examination is not autotelic. Since labour law was artificially separated from private law before the regime's economic and political change on the grounds of political and law policy, the implementation of principles and rules of civil law was out of the question, despite the fact that a cautious opening could be observed in law enforcement. After the change of regime, labour law created a relatively closed system and consequently could not find a solution to a number of problems that were raised by the labour market. Labour law was characterised by random flexibility and marginal security. In the course of the elaboration of the new Labour Code (LC) and the new Civil Code (CC), the indicated problem resurfaced, already as a possible crisis management tool, in order to also create a new type of flexibility and security. However, the endeavour to establish a transparent connection between labour law and private law failed, despite the initial intentions.

Table of contents

Section I: The subordination of the employee and the long-term legal relationship.....	5
Section II: Emergence of specific forms of private autonomy in labour law.....	8
Section III: Relationship between private law and labour law – Clause of Québec; The legal situation in Hungary – A missed opportunity.....	10
Section IV: Has the new Labour Code understood the spirit of the new Civil Code? The new Labour Code before and after amendment.....	14
Section V: Recommendation to elaborate new forms of modification of the conditions of the employment relationship.....	17

INTRODUCTION

Richardi has drafted the relationship of labour law and civil law as follows: *'Nicht die Geltung zivilrechtlicher Grundsätze, sondern im Gegenteil ihre Nichtgeltung muss begründet werden'*.¹ He also referred to the dependence of individual employees as the premise of labour law.² In any event, it was quite an effort to justify why there was no subordination in certain types of work performed for other persons, while this was self-evident in employment relationships. Needless to say, the formula is far from being so simple, which is duly indicated by the teleological nature of labour law conceptualization³ and the disintegration of the traditional fabric of labour law. The latter is reflected by *Freedland's* statements on *'false unity of the law of the contract of employment'* on the one hand, and on *'false duality between the contract of employment and other personal work of employment contract'* on the other hand.⁴

The reason why the relationship between labour law and civil law is so important at the level of legislation and law enforcement is that labour law is the law protecting the employee to counterbalance the employee's subordination. It determines how the legislator wants to provide this protection and by what tools. If labour law is not considered to fall under the scope of private law, the predominance of public law restrictions will prevail. With this solution – in the absence of private autonomy – labour law will not be part of private law, supplemented by public law components, but will be one area of public law in itself. It has been observed that the use of public law instruments during the economic crisis does not provide effective security⁵ and a combination of marginal flexibility and unstable protection arises.⁶

On account of its characteristics, labour law requires both long-term strategic flexibility and security. Since its instruments exist in civil law (due to legal transaction security), this Working Paper discusses the extent to which Hungarian labour law is linked to the principles and rules of civil law.

It can be observed that the use of public law instruments during the economic crisis does not provide effective security.

¹ R. Richardi/O. Wlotzke (eds.), *Münchener Handbuch zum Arbeitsrecht*, Band I. (Beck, München 2000) 9.

² R. Richardi, *Kollektivgewalt und Individualwille*, (Beck, München 1968) 1.

³ On the concept of employee in EU law and its applicability, see R Rebhahn, 'Die Arbeitnehmerbegriffe des Unionsrechts in der neueren Judikatur des EuGH' (2012), *EZfA*, 5. K. Ziegler, *Arbeitnehmerbegriffe im Europäischen Arbeitsrecht*, (Nomos – Beck, Baden-Baden 2011) 43-69; 124-206.

⁴ M Freedland, *The Personal Employment Contract*, (Oxford University Press, Oxford 2003) 15-28.

⁵ For a European comparison, see: D. Vaughan-Whitehead (ed.), *Work Inequalities in the Crisis; Evidence from Europe* (Cheltenham, UK – Northampton, MA, USA: Edward Elger; International Labor Office, Geneva, Switzerland 2011).

⁶ Green Paper – Modernising labour law to meet challenges of the 21st century [Commission of the European Communities, Brussels, 22.11.2006, COM (2006) 708 final] 6.

SECTION I: THE SUBORDINATION OF THE EMPLOYEE AND THE LONG-TERM LEGAL RELATIONSHIP

Before describing the regulations currently in force, the basic criteria of an employment relationship in Hungary is presented. These in fact indicate the inevitability of a link between labour and civil law, but also delineate the limits of this relationship. The two essential criteria of an employment relationship are the employee's legal subordination and the long-term nature of the legal relationship.

I.1: THE LEGAL NATURE OF SUBORDINATION IN THE EMPLOYMENT RELATIONSHIP

Initially, an employee's subordination was justified by his or her economic dependence. Because this type of dependence is not only characteristic of an employment relationship, it was useless as a *differentia specifica*.⁷ At a later stage, the theory of personal dependence heavily impacted the development of labour law, but was based on the premise of opposition to civil law.⁸ Undoubtedly, both economic and personal dependence contain real elements. However, it diverted the development of labour law in the direction of so-called status law instead of towards contract-based law.

The relationship of subordination arises from the economic and personal dependence of the employee.

That is why it made sense to justify the relationship of subordination on the basis of legal dogmatics. A general, i.e., not limited, definition of the service in the labour contract was suitable for this purpose.⁹ This is a special form of a so-called 'incomplete contract'¹⁰, which is the basis

⁷ It is appropriate to refer to Flume's statement in so far as the economically unequal position of partners also exists in private law transactions, which is balanced by the private autonomy-based market. W. Flume, *Allgemeiner Teil des bürgerlichen Rechts*. (Springer, Berlin 1979) 10.

⁸ H. Sinzheimer, *Über Grundgedanken und die Möglichkeit eines Einheitsarbeitsrechts in Deutschland* [in *Arbeitsrecht und Rechtssoziologie*]. (Frankfurt am Main, 1922) (Europa Verlag 1976) 35-47.

⁹ R. Richardi, 'Der Arbeitsvertrag im Zivilrechtssystem' (1988), *ZfA*, 251-252; T. Aubert-Monpeyssen, *Subordination juridique et relation de travail*, (Centre National de la Recherche Scientifique, Paris 1988) 96-132.

¹⁰ 'Incomplete contracts' are highly important, primarily in business life and transactions between companies. See B. Lyons, 'Incomplete contract theory and contracts between firms: a preliminary empirical study' (CCR Working Paper CCR 01-1, 2001) Nevertheless see A. Pankhurst, *Work effort under the incomplete contract of employment*, (New Hall, Cambridge 1988) 5-8.; D. Cambell – D. Harris, 'Flexibility in long-term contractual relationships: the role of co-operation' (1993) *JLS*, 166-191; See also O. Hart, 'Incomplete contracts' in John Eatwell et al. (eds.) *The New Palgrave: A Dictionary of Economics*, (McMillan, London 1987) 752-759.; O. Hart – J. Moore: 'Incomplete contracts and ownership' (www.aeweb.org/annual_mtg.../0105_1015_1702.pdf. Last download: 24th July, 2013.; R. Stone, *The Modern Law of Contract*, (Cavendish Publishing, London 2002) 68-69.; On the sensible balance between 'incomplete contract' and good-faith contract in labour law, see: J. Gaymer, *The Employment Relationship*, (London, Sweet & Maxwell 2001) 36-38.

for fulfilment as defined by other persons (*Fremdbestimmung*),¹¹ and partly for the theory and practice of employer prerogative.¹² However, this explanation for the relationship of subordination raises several questions. The first self-evident question is: what is the role of the labour contract? Does it merely establish the legal relationship or could it also amend the content of such a legal relationship? A further question is whether the employer is only entitled to specify fulfilment of the contract, or also to amend the content of the legal relationship? Finally, where does this entitlement derive from?

The relationship of subordination and the employer's unilateral power to amend it implies that the employer can modify the content of the labour contract and employment relationship itself. Naturally, this difference is not only attributable to the individual subordination, but also, inter alia, to the normative content of the collective agreement. In any case, the contractual base of subordination has become generally accepted, as has consequently the fact that the limitation of the employer's decision power is also determined by the contract.¹³

Labour contracts and employment relationships changed due to the relationship of subordination and the employer's power to amend them.

1.2: THE EFFECT OF THE LONG-TERM NATURE OF THE EMPLOYMENT RELATIONSHIP ON AMENDING THE CONTENT OF THE LEGAL RELATIONSHIP

The long-term nature of the employment relationship does not hinge on the question whether it was concluded for an indefinite or a definite period. This feature gives particular importance to the principles of *pacta sunt servanda* and *clausula rebus sic stantibus*. In case of such a legal relationship, future changes cannot really be foreseen. As a consequence, any contractual assurance made at a given moment is uncertain. The long-term nature of the legal relationship entails solutions that may foster temporary changes in the content of the legal relationship under specific circumstances. Due to this particular feature, Wank characterises employment relationships as an *Äquivalenzverhältnis*, which provides the employer with plenty of

The long-term nature of the employment relationship requires regulation, fostering both flexible solutions and employees' legal status of security.

¹¹ R Richardi: Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetze [Staudinger BGB] (Berlin: Walter de Gruyter (1989) Rz. 692-699.; M. Löwisch: „Schutz der Selbstbestimmung durch Fremdbestimmung“ ZfA (1996/2). 293-318.

¹² V. Leary, 'The paradox of worker right as human rights' in C. Lance – D. Stephen (eds.): Human rights, labor rights and international trade (Philadelphia: PENN 1966) 22–47. J Storey, Managerial Prerogative and the Question of Control (Routledge & Kegan Paul, London 1983); H B Bergen, 'Managerial prerogatives' HBR 1940/ March. 275 – 284; S. H. Slichter – J. J. Healy – R. E. Livernash, The Impact of Collective Bargaining on Management (The Brookings Institute, Washington DC 1960). See further: Royal Commission on Trade Unions and Employers' Associations 1965 - 1968, Report (Donovan Report). (London: Her Majesty's Stationery Office 1969); M. Stone: Managerial Freedom and Job Security (Greenwood Press Publishers, Westport, Connecticut 1982) 5-7; 130-149.

¹³ In any case, it is worth considering Birk's remark, asserting that the shaping and concretising power of the employer has been fundamentally adopted on the basis of unwritten law and law enforcement – also as a consequence of legal history experience. R. Birk, Die arbeitsrechtliche Leitungsmacht (Carl Heymanns, Köln 1973), 58-77.

scope to influence the content of the legal relationship in the process of contract fulfilment.¹⁴ As regards changes to this content, labour law generally reverts to private law instruments, albeit rather carefully.¹⁵ Nevertheless, public law instruments may be applied as well to protect employees.¹⁶

The long-term nature of the employment relationship requires regulations that promote flexible solutions and secure employees' legal status. In accordance with the contractual basis of subordination, both legislation and law enforcement refer to private – and not public – law instruments when establishing limitations to the employer's unilateral power to amend the employment relationship. This practice is especially relevant for terminations of employment relationships by the employer – despite the fact that in cases of priority protection, public law solutions may also be applied (see note 16.)¹⁷ Upon exploring the mutual obligations that make up the content of the employment relationship, we find that the employment relationship is not a simple contract of exchange, such as a work contract. Because the contract of employment – beyond the provision of service and remuneration due – contains a latent promise of continuation of the legal relationship, namely mutual readiness and willingness to perform the contract. Accordingly, there are two levels to an employment relationship. One is the current time of performance, while the other relates to the promise of future performance of the contract.¹⁸ Thereby, an employment relationship becomes a long-term legal relationship which, in its substance, differs from a personal service contract created for an indefinite period of time. This mutual promise induces a legislative solution that guarantees the stability of the employment relationship.

¹⁴ R. Wank: ‚Einvernehmliche Änderung von Arbeitsbedingungen‘ in W Hromadka (ed.): *Änderungen von Arbeitsbedingungen* (Verlag Recht und Wirtschaft, Heidelberg 1990) 40-41.

¹⁵ In this context, see the applicability of certain clauses of general conditions of contract and their limitations. P-H. Antonmattei, *‘Les clauses du contrat de travail’*, (Liaisons, Rueil–Malmaison 2009); M-F Clavel-Fauquenot et al, *‘Clauses du contrat du travail’*, *NJLS*, Février 2010H; Konzen, *‘Die AGB-Kontrolle im Arbeitsvertragsrecht’* in F. Häuser et al (Hrsg.) *Festschrift Walter Hadding* (Walter de Gruyter Recht, Berlin 2004) 148-149.

¹⁶ in this context, see some schemes of maternity protection, with special attention to the protection of dismissal and the mandatory amendment of the labour contract. Most recently, C-588/12 *Lyreco Belgium NV v. Sophie Rigers*.

¹⁷ H. Collins – K. D. Ewing – A. McColgan, *Labour Law* (Cambridge University Press, Cambridge 2012) 765 – 799. Specifically as regards unfair dismissal, see *ibid.* 800-854.

¹⁸ M Freedland, *The contract of employment* (Oxford: Clarendon Press 1976) 20. Regarding the provision of work or ‘implied terms’, see I. Smith – N. Randall, *Contract Actions in Modern Employment Law: Development and Issues* (Butterworths, London 2002) 66-68. W. Grobecker, *Implied terms und Treu und Glauben* (Duncker & Humblot, Berlin 1999) 234-256.

SECTION II: EMERGENCE OF SPECIFIC FORMS OF PRIVATE AUTONOMY IN LABOUR LAW

II.1: THE STRUCTURE OF LABOUR LAW

Labour law is a manifestation of private autonomy.¹⁹ However, the structure of labour law is complex; as a whole, it cannot function without the link between individual and collective labour law. This also means that multiple forms of manifestations of private autonomy are known in labour law, which is further enhanced by the complexity of collective labour law.²⁰

The correlation between individual and collective labour law in multiple dimensions brings several problems to the surface. The first is the relationship between labour contracts and collective agreements, in other words, the priority of individual or collective autonomy. This relationship in turn raises another question, namely the convertibility of the content of the labour contract referred to as ‘common’ – particularly in Hungarian labour law. If a given law prescribes binding or compulsory content in the contract of employment, it is not possible to agree on conflicting elements in the collective agreement.²¹ This may lead to serious consequences in the course of amending the contents of the employment relationship at a later stage. As the regulation of the content of a labour contract is binding, there is a significant difference in the contents of contracts of employment and of employment relationships. The binding or compulsory content of the contract of employment considerably limits the application of instruments outside of this contract in the course of the employment relationship. This implies that irrespective of the regulations of other schemes of collective labour law,²² the possibility of amending collective labour law is also lower. On the other hand, it also reduces the diversification of private autonomy in labour law, which conflicts with the outlined structure of labour law.

When considering the link between labour law and civil law, the source system of labour law should not be overlooked.

II.2: SOURCES OF LABOUR LAW

As regards the link between labour and civil law, alongside the presence of private autonomy, the source system of labour law should

¹⁹ See: R. Richardi, *Betriebsverfassung und Privatautonomie* (Walter de Gruyter, Berlin 1973) in particular 12-14.

²⁰ Richardi, (n 19) 7-19.; On the approach to human rights and collective labour law, see G. Morris – T. Archer, *Collective labour law*, (Hart Publishing, Oxford 2000) 26-36; as regards different aspects of collective labour law 43-97; 187-251; 299-305. On French labour law, see A. Mazeaud, ‘*Droit du travail*’ (LGDJ, Paris 2008) 76-88; 106-180; 183-203.

²¹ This is typically the case in Hungarian labour law. See Section 45 Sub 1 of the Hungarian LC: ‘The parties must specify in the contract of employment the employee’s personal wage and area of work.’

²² The possibilities to alter the legal relationship largely depend on the features of the regulation, primarily on the number and subject of cogent and relative dispositive norms.

not be overlooked. In this context, two issues should be considered. The first is the hierarchy of the sources of labour law; the second is the coherence of individual and collective norms of labour law.

The source system of labour law can generally be classified into legislative and contractual components.²³ The complexity of the sources of labour law is highlighted by *Adomeit*, who also analyses the source system of law in terms of amendments to the content of the employment relationship. Employment relationships differ from other relationships, also because their content is determined and affected by various factors (*Bestimmungsgründe*).²⁴ When defining the ranking of the hierarchy of law sources, a comparison of the statutes and contracts, as well as of the agreements at different levels and of different functions is made. Therefore, the sequence of the hierarchy of law sources and of sources that amend the content of an employment relationship does not assume an identical starting point and does not necessarily lead to identical results.²⁵

Establishing the hierarchy of law sources in terms of legal norms is not problematic. Yet for agreements with normative content, the basis of the definition of hierarchy is different. Such agreements have their place in the wider hierarchy of law sources due to their normative content. However, they must be set apart from the norm defined in the statute because they are agreements, and their cause is not a direct statutory empowerment but a contract, namely a contract of employment.²⁶

With reference to instruments that amend the content of an employment relationship, even this fairly wide scale hierarchy of law sources is further broadened by different unilateral normative acts that derive from the employer's right of discretion. These legal acts are ranked at a low level in the sequence of sources based upon which the content of an employment relationship can be amended.²⁷ In the source system of law beyond legislative sources, the contract of employment ranks highest, ahead of the collective agreement. This also implies that all other amendment instruments beyond legislation to amend an employment relationship are not only reinforced by the contract of employment, but also limit the power of the amendment.

²³ According to another classification – in English law – common law and legislation. See also classification as formal sources (common law, legislation) and voluntary sources, with special regard to collective agreements in the latter case. S. Deakin – G. S. Morris, *Labour Law* (Butterworths, London 1998) 65-66; 75-82.

²⁴ K. Adomeit, *Rechtsquellenfragen im Arbeitsrecht* (C. H. Beck'sche, München 1969). 5.

²⁵ Adomeit (n 24) 70-90.

²⁶ T. Mentzel, *Die Änderung von Arbeitsbedingungen kraft Direktionsrecht oder im Wege voran konsentierter Änderungsverträge* (Verlag Dr. Kovač, Hamburg 2003) 7-11, 70-73.

²⁷ Adomeit (n 24) 76-77.

It follows that the contract, namely the contract of employment, conceals the dogmatic basis of private autonomy in labour law. However, the depth of the employment relationship's content, which can be amended not only by the contract of employment, conceals the practice of private autonomy. One of the important instruments that stabilises employment relationships today is the permeability between individual and collective autonomy as well as the empowerment of unilateral methods of amendment through private law instruments.

SECTION III: RELATIONSHIP BETWEEN PRIVATE LAW AND LABOUR LAW – CLAUSE OF QUÉBEC; THE LEGAL SITUATION IN HUNGARY – A MISSED OPPORTUNITY

III.1: CAUTIOUS OPENING OF HUNGARIAN LABOUR LAW TOWARDS CONTRACTUALITY

Prior to the regime's economic and political change, civil law principles did not apply to labour law rules. For ideological reasons, labour law was artificially separated from civil law. In spite of this, some of the principles of civil law became applicable to certain legal instruments through law enforcement. Although it may not seem to make a difference today, the repeal of certain resolutions by the Supreme Court in the 1970s struck like a revelation.²⁸ Since then, the *contra legem* practice of labour law enforcement has become increasingly frequent. The most important milestone in this regard was the issuance of Statement No. 154 of the Labour College of the Supreme Court which transposed the European Union's rules on transfers of employment and the transfers of enterprises to be applied by courts without statutory regulation.²⁹

Permeability between individual and collective autonomy as well as the empowerment of unilateral methods of alteration through private law instruments are important instruments for stability.

The Labour Code that entered into force in 1992 (in the following: the old Labour Code) introduced some new insights on the relationship between labour law and civil law. The codified expression of labour law regulations undoubtedly declared the separation of this branch of law. However, the spirit of the old Labour Code suggested that the relationship between labour law and civil law could move closer together than ever before. The reasoning behind the law was that the labour market had been an integral part of the economic market; consequently, the legislator would have to also break with the authoritarian regulations. Private law regulations brought a drastic decrease in state intervention, while the codex was to only regulate guarantees in employment relationships through cogent norms. Unfortunately, this objective did not become a reality during the

²⁸ Thus, the Supreme Court's Labour College Statement No. 28 was repealed, for example, which prohibited any third party from assuming the liability of guarantor for damage caused by the employee, arguing that guarantee does not fall within the scope of labour law, but of private law.

²⁹ The old Labour Code entered into force on 1 July 1992 and did not provide for transfers of undertakings. The above-mentioned resolution by the Supreme Court was issued in October 1992.

applicability of the old Labour Code. The reason for this was that the legislator interpreted the use of the terms in the context of the legal norms and the collective agreement to be more favourable for employees; the collective agreement could therefore only derogate from the terms of the law if they were favourable for the employee. Under such circumstances, employers were unwilling and trade unions were unable to conclude collective agreements. It also meant that no contractual source system of law developed in Hungarian labour law.

The legislator had no choice but to substitute the lack of collective agreements with legal norms. As a consequence, the number of cogent norms increased, while the possibility of applying private law principles decreased. Despite all of this, labour law enforcement preferred the use of private law rules, although the Civil Code regulations that were in force³⁰ then did not unambiguously support the link between the Labour Code and Civil Code. The subject of the regulation was defined as follows in the first sentence of Section 1 (1) of the Civil Code: 'This Act governs the financial and specific personal relationships of the citizens, the state, local governments, economic and civic organisations, and other persons.' The second sentence was based on the Québec Clause³¹: 'Other statutes pertaining to the aforementioned relations shall, unless they stipulate otherwise, be construed in concert with this Act and in consideration of its provisions.'

With reference to the term 'financial and specific personal relationships', the question is whether the provisions of the Civil Code should be taken into account in the regulation of dependent work performed for another person. If so, is the old Labour Code the 'other statute pertaining to the aforementioned relationships', which should correspond to the Civil Code? It seemed that the use of the principles and rules of the Civil Code did not develop roots in the legislation, and law enforcement also became irresolute. However, the economic crisis has demonstrated that labour law built on norms and labour contracts with binding (compulsory) content is not flexible and cannot adapt to changes that would meet the often-mentioned flexicurity requirement extorted by the economic situation.

Labour contracts with binding content are not flexible enough to react and adapt to miscellaneous economic circumstances.

III.2: LUCKY COINCIDENCE: SIMULTANEOUS PREPARATION OF THE NEW LABOUR CODE AND THE NEW CIVIL CODE; CROSS-TALKS

The elaboration of the new Civil Code³² started before the revision of the Labour Code.³³ Supporters of the concept to establish a closer

³⁰ Act IV of 1959 on the Civil Code.

³¹ Code Civil du Québec, Disposition Préliminaire: (...) «Le code est constitué d'un ensemble de règles qui, en toutes matières auxquelles se rapportent la lettre, l'esprit ou l'objet de ses dispositions, établit, en termes exprès ou de façon implicite, le droit commun. En ces matières, il constitue le fondement des autres lois qui peuvent elles-mêmes ajouter au code ou y déroger.»

³² Act V of 2013 on the Civil Code.

³³ Act I of 2012 on the Labour Code.

relationship between private and labour law may have felt encouraged by the discussion paper submitted to the Editing Committee of the Civil Code in 2001. When defining certain contract types and establishing their order, it read as follows: '...the chapter on individual labour contracts may be inserted into the new Civil Code after sales contracts, its special modes and types (...), exchange contracts and contracts for employment.'³⁴ The reason behind such a solution would have been that it could have made an abolition of the binding (compulsory) content of the contract of employment referred to above possible.³⁵ Hence, the 'agreed' wage, for example, does not necessarily imply an agreement within the scope of the labour contract, but the collective agreement could include a wage agreement. In other words, the binding (compulsory) content of a contract could have become convertible under Hungarian labour law. This would also have meant further approximation, including certain declarations by the parties to become replaceable by the court.

Ultimately, this concept was removed from the agenda. However, the interpretation of the Civil Code draft regulations formed the basis for the preparation of the Labour Code. Section 1:1 of the Civil Code determined the scope of the Act. Pursuant to this, 'This Act governs the property and personal relations of persons under the principle of interdependence and the principle of equality.' Section 1:2 Sub 2 stipulates the following: 'The legislation relating to civil law shall be interpreted in accordance with the provisions of this Act.' The restriction of the 'legislation relating to civil law' in relation to labour law can be found in the justification of the Civil Code. In connection with the nature of the Civil Code, the legislator stipulates: '...in principle, the content boundaries of a code are worth widening until the positive effects of codification – the methodical homogeneity of synthesised norms, unity of terminology, the possibility of compression and shortening, etc. – facilitate law enforcement.' In the light of these aspects, the justification stipulates the following on the relationship between the new Civil Code and the Labour Code: 'The Act leaves the legal settlement of individual labour contracts in the Labour Code despite the fact that the legal background for the special settlement of employment relationship is established by provisions of the Civil Code, in particular the general provisions on contracts. However, the legal regulation on labour contracts has already incorporated plenty of

³⁴ Concept 2001, 147. Inclusion of the labour contract in the Civil Code was raised once more in the text of the Concept adopted with Government Resolution 1003/2003 of (I. 25.), as well as in the consolidated version of the Thematics (Tematika) adopted, along with the Concept, at the meeting of the Codification Committee on 18 November 2002. Published in the special issue of Magyar Közlöny (Hungarian Gazette) in 2003.

³⁵ A good example is Henssler-Preis, 'Diskussionsentwurf eines Arbeitsvertragsgesetzes' (ArbVG) § 1 Abs 2, 3: (2) Durch den Arbeitsvertrag wird der Arbeitnehmer zu Diensten nach Weisungen des Arbeitgebers (Arbeitsleistung) verpflichtet, der Arbeitgeber zur Zahlung des vereinbarten Entgelts. (3) Ein Entgelt gilt als stillschweigend vereinbart, wenn die Arbeitsleistung den Umständen nach nur gegen ein Entgelt zu erwarten ist.

specific features and it would therefore be difficult to integrate such a system of norms into a Civil Code.’ The justification is as follows: ‘For example, the employee’s nature as conceptually the ‘weaker party’ emerges as a distinguishing feature in the regulation and as a result, the effect of amendments to legal acts by the European Community is also much more intense than in other areas of private law.’³⁶

In my view, the following conclusions can be drawn from the above arguments. The justification of the Civil Code does not state that labour law is not part of private law, nor, consequently, that the employer’s and employee’s financial status and personal relationship does not constitute a ‘civil law relationship’. Labour law is undoubtedly part of private law, which has inevitably acquired public law characteristics. The incorporation of public law elements has become unavoidable due to one of the decisive functions of labour law: the protection of the employee’s legal status. Part of these elements are extraneous to traditional private law, but this statement now needs a more sophisticated approach since private law itself has been expanded with several protection items, despite the fact that traditional private law has but a few instruments to align social inequalities.³⁷ The methodological characteristic of private law is that it governs the relationships of interdependent and equal subjects; the requirement to protect the weaker party is a feature of private law as well. The technical preparatory committee of the new Hungarian Civil Code also states that this methodological principle does not always prevail, with special attention to the priority of consumer protection.³⁸

To summarise, the adoption of the principles and provisions of the new Civil Code basically depends on the spirit of the Labour Code. It is irrelevant from this perspective whether the regulations on the contract of employment and the employment relationship is part of the Civil Code or not.³⁹ In this respect, the provisions of the Labour Code must be divided chronologically. The vast majority of the Labour Code provisions entered into force on 1 July 2012. Other provisions came into force on 1 January 2013. The Civil Code only entered into force on 15 March 2014. Despite the fact that the text of the Civil Code had officially been available since February 2013, the announcement of the Act on the Amendment of Specific acts in Connection with the new Civil Code (which entered into force on 31 December 2013), entered into

Labour law is part of private law that has inevitably acquired public law characteristics, which is unavoidable due to the functions of labour law.

The adoption of the principles and provisions of the new Civil Code depends on the spirit of the Labour Code.

³⁶ See the justification of Act V, 2013 on Civil Code; IV. ‘The nature and importance of the new Civil Code’.

³⁷ L. Vékás, *Az új polgári törvénykönyv elméleti előkérdései* (The Theoretical Preliminary Questions of the new Hungarian Civil Code) (HVG-Orac, Budapest 2001) 141.

³⁸ L. Vékás, *Szakértői javaslat az új Polgári Törvénykönyv tervezetéhez* (Expert proposal to the Draft of the new Civil Code) (Complex, Budapest 2008) 70.

³⁹ In this context, see the solutions in different drafts of German labour contract regulations. I refer to the Herschel draft (1969), the Juristentag Hannover draft (1992), as well as the Henssler-Preis draft (2006).

force on 15 March 2014.⁴⁰ This Act amended the Civil Code in several regards and also led to substantial changes in the content of the Labour Code in multiple respects. This amendment changed the reluctant approach of the Labour Code to some degree, however, in my view, it did not substantially influence the relationship of the two Acts.

SECTION IV: HAS THE NEW LABOUR CODE UNDERSTOOD THE SPIRIT OF THE NEW CIVIL CODE? THE NEW LABOUR CODE BEFORE AND AFTER THE AMENDMENT

IV.1: FADING OF THE ORIGINAL CONCEPT - THE LABOUR CODE BEFORE THE AMENDMENT

The first phase of the technical preparation of the new Labour Code was characterised by strengthening the relationship between the Civil Code and the Labour Code. Yet this approach was gradually pushed into the background with the progress of work. This is well-demonstrated by Chapter II of Part One in the Labour Code entitled 'Legal Acts' [or Legal Declarations]. Since a legal act – in a private law context – is a general category, its detailed regulation in the Labour Code suggests that a specific type of legal act exists in labour law. The legislation practically applied simultaneously with the Civil Code which was still in force then, mostly repeating its provisions. In accordance with Section 31 of the Labour Code prior to its amendment and other respective provisions of Chapters XVII-XXII of the Civil Code applied to legal acts, such as the general rules of contract law, provisions for concluding contracts, representation, the content and subject matter of contracts, the nullity and amendments of contracts and acknowledgment of debts. The provisions did not, however, apply to collateral commitments for securing contracts, performance and set-off, breach of contract and provisions for termination.

It is inappropriate to append the Labour Code's regulation on the application of the referred parts of the Civil Code to the 'Legal Acts' chapter of the Labour Code.

Two remarks should be made about this solution. It is inappropriate to append the Labour Code's regulation on the application of the referred parts of the Civil Code to the 'Legal Acts' chapter of the Labour Code. This is because at the abstract level of the wording, legal relationships between people are generated, modified or terminated, as the case may be, by legal facts. A legal fact may be any external event or conscious human act. But there is always a legal instrument that lies behind a legal act, therefore either a general definition entitlement on the application of the Civil Code – similar to that in the Hensler-Preis draft – or a structurally appropriate layout would have been justified.

However, contextual objections to the mentioned solution in the LC were also made before its amendment. I have already touched on the binding (compulsory) content of the labour contract, which I will discuss in more detail later. Nevertheless, a significant obstacle to

⁴⁰ See Act CCLIII of 2013 on amendment of certain acts on the entry into force of the new Civil Code.

modifying the employment relationship is Section 19 of the Labour Code, which provides for the conditions that need to be met and remained unchanged even following the amendment of the Labour Code. Pursuant to this: 'The parties may render the conclusion, amendment or termination of the agreement contingent upon certain or uncertain future events (conditions). Any condition that would alter the employment relationship to the disadvantage of the worker or that would bring about the termination of the employment relationship may not be applied.' This provision is called into question by Section 43 of the Labour Code. The regulation provides for the relationship between the employment contract and the so-called employment relationship rule (statutes and collective agreements). According to this rule 'Unless otherwise provided for by law, the employment contract may derogate from the provisions of Part Two and from employment regulations to the benefit of the employee. Such derogations shall be adjudged by comparative assessment of related regulations.'⁴¹ As a result, the interpretation of the phrase 'more favourable terms for the employee' is far from straightforward. This problem is closely correlated with amendment possibilities of long-term legal relationships, with the simultaneous creation of flexibility and security.

*Status after the amendment
– results are still ambivalent.*

Eventually, the possibilities of applying private law principles and provisions of the Civil Code, prior to the amendment of the new Labour Code in connection with the new Civil Code, remained largely unused; this was not only due to the ambivalent approach towards the Civil Code described above, but also to the closed system of employment contract regulation.

IV.2: STATUS AFTER THE AMENDMENT, APPLICABILITY OF SEVERAL PRIVATE LAW PROVISIONS; RESULT STILL AMBIVALENT

Although the Labour Code moved much closer to the application of private law principles in the process of the amendment of the LC in connection with the Civil Code, the difference in the approach stands out even clearer due to the unchanged rules of the Labour Code.⁴² In my view, one of the key questions that arises in reference to the amendment is how Section 6:63 of the Civil Code is applied, which stipulates the creation and content of the contract. Pursuant to Sub 1 'Contracts are concluded upon the mutual and congruent expression of the parties' intent.' By virtue of Sub 3, 'If the contract is concluded, but the parties have not clearly defined the amount of remuneration, or if the market price has been stipulated as the applicable price, the average price prevailing on the date of the performance of work in the

⁴¹ See the rejection of the so-called Rosinentheorie. B. Detlev, 'Günstigkeitsprinzip im Arbeitsrecht', (Duncker & Humblot, Berlin 1994), pp. 169-171.

⁴² The Labour Code requires the application, among others, of the rules on the definition, effect, formalities and interpretation of legal acts, along with provisions on representation. It provides for the acknowledgment of debt, the settlement of monetary debt and set-offs.

market considered the place of performance shall be paid.’ The Labour Code allows for the application of these two subsections.

However, the applicability of Sub 3 is questionable. Section 45, Sub 1 of the Labour Code stipulates the content of the labour contract as follows: ‘The parties must specify in the employment contract the employee’s personal base wage and job function.’ In my view, this rule should be interpreted as follows: the Labour Code provides for the remuneration of work, the establishment of wages, the base wage and wage supplements in detail. It specifies the concept of time-based and performance-based wage, their establishment and provides for average earnings, etc. The regulation of wages is, in other words, fairly detailed, complex and casuistic. In the Hungarian labour legislation system – at least as regards wages – the above mentioned rule of the Civil Code is uninterpretable. It is impossible to define the level of remuneration unambiguously on the basis of the provisions in the Labour Code. I have no knowledge about such practice, either. Naturally, the apparent disproportion of service and remuneration could be raised, which is regulated in the Civil Code⁴³. However, the Labour Code does not say anything about its applicability, just as it does not say anything about the nullity of usurious contracts.⁴⁴ The application of the provision in question could, at most, be an option in case of the so-called other benefits, however, these benefits usually depend on specific conditions and are therefore relatively unambiguous. Another question arises, namely upon which request does the court decide how the concept of ‘the average price prevailing on the date of the performance of work’ should be interpreted. In my view, this is not a simple accounting rule, but a methodological question to define the content of the contract.

And this is where the issue about the application of Sub 2, Section 6:63 of the Civil Code comes in, which is not provided for in the Labour Code. By virtue of this rule ‘It is fundamental to the validity of a contract that an agreement is reached by the parties concerning all essential issues as well as those deemed relevant by either of the parties. An agreement on the issues that are deemed relevant shall be required for the conclusion of the contract if either party expressly indicates that an agreement on such issues is a precondition for the conclusion of the contract.’ In my view, this provision is important from the perspective of the parties’ autonomy, in so far as the contract shall express the purpose of its legal effect and the legal relationship; however, its

⁴³ Civil Code 6:98 §: (1) If, at the time of the conclusion of the contract, the difference between the value of a service and the remuneration due – without either party having the intention of making a gratuitous grant – is grossly unfair, the injured party shall be allowed to reject the contract. The contract shall not be rejected by the party who knew or could be expected to have known the gross disparity in value, or if he assumed the risk thereof.

⁴⁴ See Civil Code Section 6:97. If, by exploiting the other party’s situation, a contracting party gains excessive benefits or an unfair advantage when the contract is concluded, the contract shall be considered null and void.

content may be modified by the parties. By defining the compulsory content of the contract of employment, the Labour Code closes certain elements of the working conditions; that is, with respect to the base wage and the scope of work, there are no changing conditions of the employment relationship in Hungarian labour law other than the contract of employment.

At the same time, it is remarkable in this context that the Labour Code requires the application of rules on the conclusion of contracts based on standard contract conditions. By virtue of Section 6:77 Sub 1 of the Civil Code, 'Standard contract terms means contract terms that have been unilaterally drafted in advance by one of the parties for several transactions involving different parties, and which have not been individually negotiated by the parties.' By virtue of Section 6:78 Sub 1, 'Contract terms that have not been individually negotiated shall only become part of a contract if they have previously been made available to the other party for perusal before the conclusion of the contract, and if the other party has accepted those terms.'

The problem of alteration of employment relationship at multiple levels is extremely complex.

It derives from the comparison of standard contract conditions and the binding (compulsory) content of the labour contract that because of the provisions of the Labour Code, Hungarian labour law is unable to make use of the instruments available in private law and – as I have tried to show here – neither is it able to provide the status of protection to employees.

SECTION V: RECOMMENDATION TO ELABORATE NEW FORMS OF MODIFICATION OF THE CONDITIONS OF THE EMPLOYMENT RELATIONSHIP

V.1: PREREQUISITES FOR MODIFICATION OF THE CONDITIONS OF THE EMPLOYMENT RELATIONSHIP AT MULTIPLE LEVELS

The problem of modification of the employment relationship at multiple levels is extremely complex. One obvious solution is for the employer and employee, as parties to the contract of employment, to amend the contract when circumstances change. This solution is de facto hardly feasible for an employer with hundreds of employees. The irrationality of this solution is disguised by the fact that the contract of employment usually contains unilaterally pre-defined conditions.⁴⁵ Yet if such conditions derive from the implied terms of the contract, they can provide the employer with a broad scope for change.⁴⁶

⁴⁵ M. Henssler – W. Moll, 'AGB-kontrolle vorformulierter Arbeitsbedingungen', (C.H. Beck, München 2011); Suckow et al, 'Der vorformulierte Arbeitsvertrag', (Luchterhand, Köln 2011).

⁴⁶ I. Smith – N. Randall, 'Contract Actions in modern employment law: Developments and Issues' (Butterworths, London 2002) 29-96.; C. Barnard, 'Reconsidering the mechanism to regulate working conditions in the light of diversified and individualised employees and the declining labour unions, http://www.jil.go.jp/english/events/documents/clls04_barnard1.pdf, 51-58.; H. Collins, 'Implied duty to give information during performance of contracts' MLR, 1992

Another possibility to amend the employment relationship is through a collective agreement. In this respect, I shall refer to the solution applied in German law.⁴⁷ The different contractual clauses play a particular role in German law due to the unique scope of the normative part in collective agreements and the special applicability/effect of the agreement between the employer and the works council.⁴⁸ As far as the so-called *Bezugnahmeklausel* is concerned, the application of such a clause is in the interest of the employer because it can maintain flexibility provided by the collective agreement in the long run without requiring an amendment to the contract of employment.⁴⁹ The term *Öffnungsklausel* refers to a provision that provides bilateral disposition.⁵⁰

However, the collective agreement plays a role in the modification of the content of the employment relationship as well. The collective agreement may stipulate an agreement by the parties that the employer may unilaterally define or modify the working conditions of individual employees. It stands out in this respect that the two parties' interests should be proportional; these include the interest of the employee for the working conditions to remain unchanged, and the interest of the employer in flexibility to modify the working conditions.⁵¹

The third factor in the modification of working conditions is the employer's so-called extended right to command provided by clauses incorporated in the contract of employment – without entitlement in the collective agreement. Depending on the regulations in individual states, these clauses may either be applicable to specific working conditions only or to a wide range of working conditions, as the case may be.⁵²

The collective agreement may stipulate an agreement by the parties that the employer may unilaterally define or modify the working conditions of individual employees.

July, 556-562.; H. Collins, 'Regulating the employment relation for competitiveness', ILJ, 2001/1, 17-47; H. Collins, 'Legal response to the standard form contract of employment', ILJ, 2007/1, 2-18.; W. Grobecker, (n 18) 18. 231-256.

⁴⁷ See more recently: P. Flockenhaus, 'Vertragsgestaltung und Kollektivverträge', (Nomos, Baden-Baden 2012); F. Rost, 'Die "Erweiterung des Direktionsrecht" durch Tarifvertrag' in P. Hanau (Hrsg.) Richterliches Arbeitsrecht: Festschrift für Thomas Diederich zum 65. Geburtstag (Beck, München 1999) 505-518.; see further U. Preis, 'Grundfragen der Vertragsgestaltung im Arbeitsrecht', Luchterhand, Neuwied 1992) 80; 122-132.

⁴⁸ Specifically, see the instruments of the so-called *Bezugnahmeklausel* and *Öffnungsklausel*.

⁴⁹ Flockenhaus (n 47) 87-89. P. Hanau – Th. Kania, 'Die Bezugnahme auf Tarifverträge durch Arbeitsvertrag und betriebliche Übung, in M. Schlachter et al (Hrsg.) Tarifautonomie für ein neues Jahrhundert – Festschrift für Günter Schaub (Beck, München 1998) 239-262.

⁵⁰ Flockenhaus (n 47) 453-455.

⁵¹ Rost (n 47) 518.

⁵² See Antonmattei (n 15); Clavel-Fauquenot et al (n 15); M. Henssler – W. Moll (no 49); G. Thüsing, 'Vertragsrecht und AGB- Klauselwerke', (Beck, München 2007); J. Suckow et al (no 49); R. Rideout, 'Implied terms in the employment relationship' in R. Halson (ed.) 'Exploring the boundaries of contract' (Ashgate, London 1996) Ch. 7, 119-

It needs to be emphasised in this context that we are focusing here on the freedom to amend the working conditions in the employment process, and not merely its specific fulfilment.⁵³ This raises the possibility of the application of general conditions of the contract in labour law, as well as the question whether the contract of employment itself or the collective agreement (works agreement) might contain general contract conditions – in other words, whether this in itself could be such general conditions of the contract.⁵⁴

Before answering these questions, it is necessary to look at the criteria for the implementation of multiple-level modifications of working conditions.

As was highlighted earlier, a flexible modification of working conditions is not an option provided by civil law; it depends on the approach to labour legislation. The most important criterion of flexible modification of working conditions discussed above is inherent in the objective of the contract of employment. As the contract of employment is a long-term legal relationship, it must - in addition to establishing a legal relationship - provide for a unilateral modification of the employment relationship as well. This implies that the principle of *clausula rebus sic stantibus* is an integral part of the contract of employment. Naturally, there are essential content elements (*essentialia negotii*) of the contract of employment, but not in a sense that it would allow parties to solely agree on any essential element in the contract of employment, without the possibility of amendment.⁵⁵

Accordingly, the content elements of the contract of employment should be flexible and thus convertible. Consequently, the parties may agree in the contract of employment on the employer's unilateral right to amendment, on the dynamic reference to the collective agreement (or the works agreement), or even to consider the general conditions of the contract of employment as such.

The content elements of the contract of employment should be flexible.

The next criterion is the establishment of means to control the options of unilateral modifications. This is also control of more than one level. The first, so to say imminent level of control is inherent in the contract itself and derives from the fact that unilateral power to modify the employment contract is based on provisions that can be found in the contract. In this respect, a distinction can be made between control possibilities when general conditions of the contract are applied and

142.; H. Collins et al, 'Labour law' (Cambridge: Cambridge University Press 2012) 96-97; 135-137.

⁵³ See summary: R. Moll, 'Die Änderung der Arbeitsbedingungen durch den Arbeitgeber – insbesondere in der Unternehmenskrise' (Peter Lang, Frankfurt am Main 2009) 26-29; 95-126; 192-252.

⁵⁴ This problem is discussed in detail in G. Thüsing (no 52) 15, 58; Collins (no 46 Legal Responses) 2-18

⁵⁵ See also footnote 68.

control possibilities are included in the contract.⁵⁶ I shall briefly touch upon the dispute that has emerged concerning the legal status of the employee-consumer and the employer-entrepreneur in connection with the application of general conditions of the contract in labour law.⁵⁷ Despite the fact that such a distinction is decisive as regards the specific options for control, I do not consider this the main element of the solution to the problem. A good example of this is the new Hungarian Civil Code which considers contracts concluded with general conditions – as well as the application of relevant control instruments – a general category, and imposes additional requirements for the general conditions of contract to be applied to consumer contracts.⁵⁸

The second level of control should be provided by labour law regulation. Differentiation is also possible here. Solutions have been introduced that set forth requirements that supplement the general rules of performance in the course of the employment relationship. This is notable, especially in states where labour legislation is separate from the general normative provisions of contracts, as is the case in Hungary. The requirement of equitable assessment has relevance in this respect. Section 315 of BGB applies to the modification of the scope of the employment relationship as well as to control of this modification. If the employer's power of modification derives from the contract of employment, while referring to the reservation by *Birk*⁵⁹ on contractual entitlement, we do not refer to control of the scope but of equitable assessment.⁶⁰ I shall discuss the potential legal consequences of violation of this obligation under Hungarian law.

A further control instrument provided by labour legislation is inherent in the specific cases of facts concerning the termination of employment relationships. This includes, among others, the instrument of *Änderungskündigung*.⁶¹ Naturally, this instrument must also be embedded in a legal environment which is able to support its effective application.

⁵⁶ D. König, 'Die Inhaltskontrolle von Arbeitsverträgen in Deutschland, England und Frankreich', (Rombach, Freiburg 2010).

⁵⁷ On the application of unfair terms in consumer contracts regulations under the law of the U.K., see Collins (n 46 Legal Responses) 11-15; L. Watson, 'Employees and the Unfair Contract Terms Act', ILJ, 1995/4, 323-336.; M. Freedland (n 4) 190-192. For case law, see typically *Brigden v American Express Bank Ltd* [2000] IRLR (QBD); R. Stone, 'The modern law of contract', (Cavendish Publishing Limited, London 2002) 231, 250-254.

⁵⁸ See Hungarian Civil Code Sections 6:77-6:81.

⁵⁹ See under footnote 13.

⁶⁰ *Birk* (no 13) 55-56. On the application of equity in labour law, see G. Hoyningen-Huene, 'Die Billigkeit im Arbeitsrecht' (C.H. Beck, München 1978) 47-85, 128-172; Collins (no 17) 131-150. In connection with control of discretion, see the reasonable test. D. Brodie, 'The contract of employment' (W. Green & Son Ltd., Edinburgh 2008). 87-91.

⁶¹ See in particular S. Schröder, 'Das Verhältnis von Direktionsrecht und Änderungskündigung' (Lang, Frankfurt am Main 2011); J. Jüttner, 'Der Vorrang der Änderungskündigung vor der Beendigungskündigung' (Nomos, Baden-Baden 2011); W. Berkowsky, 'Die Änderungskündigung' (C. H. Beck, München 2004).

In my view, the most important option for control among those that can be defined in labour law is the influence of collective labour law on the employer's right to modification. This can be provided for in a collective agreement, but influence by employee representative bodies is found in certain member states as well – one good example is the German *Betriebsverfassungsgesetz*.⁶²

The multiple levels of the criteria described above and their complexity may ensure a balance between the economic interests of the employer – namely, flexible modification of the working conditions – and those of the employee for stability and existential security.

V.2: THE NECESSARY AMENDMENT OF THE HUNGARIAN LABOUR CODE

As regards the Hungarian legislation, we will first assess the proposed amendments to the Labour Code. As outlined earlier, very few options are available to the parties to modify the scope of the employment relationship. To expand these possibilities, a reassessment of the connection between the LC and the CC is necessary. In my view, applying the rules of civil law haphazardly is by no means an appropriate solution; instead, a general definition is necessary. Accordingly, the provisions of the CC prevail in the application of the LC, unless otherwise provided in the LC.

The second condition is clarification of the connection between the employment relationship and contract of employment. The concept of the employment relationship plays a key role in this particular connection. The LC defines the concept as follows: 'An employment relationship is deemed established by entering into a contract of employment. Under a contract of employment: the employee is required to work as instructed by the employer; the employer is required to provide work for the employee and to pay wages.' Beyond the definition of the essential elements of the content of the employment relationship, this wording includes the establishing function of the contract of employment. Apart from this, it is not necessarily appropriate to deem the elements of the content of the contract of employment as being 'required' (i.e., compulsory) elements of the content because this would suggest the following: first, these elements can only be agreed upon in the contract of employment, and further, with respect to the contract of employment or more precisely, the employment relationship, the so-called implied terms are out of the question. Obviously, the parties may also agree on aspects other than the compulsory elements of the content of the contract of employment.

Clarification of the connection between the employment relationship and the contract of employment as well as adapting the regulatory environment of labour law are additional important requirements.

⁶² Mentzel (No 26.), 134-136.

The third condition is adapting the regulatory environment of labour law. Section 53 of the LC provides for work in derogation from the contract of employment.⁶³ The special feature of this regulation is that it does not set forth any conditions with respect to the relevant decision. The previous LC at least made reference to the activity and financial status of the employer.⁶⁴ As a main rule, work in derogation from the contract of employment may not exceed 44 working days during a calendar year, but derogation from this rule is possible in the collective agreement. However, the legislator has not defined any relevant temporal limits; certain time periods have been set by law enforcement with reference made to the temporary character of the work. With consideration to the provisions of the current LC and the previous LC, the possibility of incorporating clauses in the contract of employment concerning the amendment of the employment relationship was out of the question. Nevertheless, the legislator felt that this was necessary. Section 150 (2) of the previous LC provided as follows: 'If the employer temporarily reduces the working time stipulated in the employment contract of an employee on account of economic reasons, the employee shall be entitled to his/her personal basic wage for such time lost, unless provisions pertaining to labour relations provide otherwise.'

Collective labour law is the most important instrument to control and influence the employer's right to modification.

Although this rule included the term 'temporarily', it did not refer to the provisions on the 44 working days. Cases of 'economic reasons' can be a protracted crisis well beyond 44 working days. Another feature of the rule is that neither the nature of the employer's legal statement is specified, nor the (contractual) authorisation to make such a legal statement. The justification merely sets out that the employer 'temporarily cuts working time'. Consequently, no contractual authorisation whatsoever is necessary, since the legislator provides for this without any kind of control. Another feature of the rule is the reduction of wages during the relevant time period. The personal basic wage is the wage laid down in the contract, without any wage supplements or so-called supplementary wage components. Moreover, it can be even lower, as provisions relating to labour relations – typically the collective agreement in this case – may have derogated to the detriment of the employee.⁶⁵

⁶³ Section 53 (1) Employers shall be entitled to temporarily reassign their employees to jobs and workplaces other than what is contained in the employment contracts or to another employer. (2) The duration of employment as referred to in Subsection (1) may not exceed a total of forty-four working days or three hundred and fifty-two scheduled hours during a calendar year. The employee affected shall be informed of the expected duration of work in derogation from the employment contract.

⁶⁴ Section 83/A (1) It shall not be deemed an amendment of the employment contract when the employee – for reasons in connection with the employer's operations – is ordered by the employer to temporarily work in another position in lieu of or in addition to his/her original position (reassignment). Section 105 (1) For economic reasons the employer may oblige its employee to work temporarily at places other than the normal place of work (posting) on condition that the posted employee continues to work under the employer's direction and instructions.

⁶⁵ EBH2003. 973.

The major regulation for changing the regulatory environment is Section 19 (1) of the LC which, in its current context, prohibits the application of the *clausula rebus sic stantibus* principle. The provision reads as follows: 'The parties may render the conclusion, amendment or termination of the agreement contingent upon certain and uncertain future events (conditions). Any condition that would alter the employment relationship to the disadvantage of the worker, or that would bring about the termination of the employment relationship may not be applied.' Apart from the fact that this provision renders any modification impossible, it raises a number of further problems as well. I have already touched upon the complexity of judging conditions that are more favourable for the employee in the context of Section 43 of the LC. We are talking about an extremely delicate balance here, and in this respect, the wording of Section 43 (2) of the LC is appropriate: 'Such derogations shall be adjudged by comparative assessment of related regulations.'⁶⁶ The term 'parties' is also ambiguous. In this context, the term refers to the parties (subjects) to the contract of employment: the employer and the employee. Therefore, the question inevitably arises whether the parties to a collective agreement may stipulate such conditions. Theoretically they can because the normative part of the collective agreement can provide for the 'rights and obligations arising out of or in connection with the employment relationship'.⁶⁷ At the same time, the terms of the contract can only be amended by agreement between the employer and the employee.

At this point, we should return to the classification of the content of the contract of employment. In order for flexible modifications to the scope of the employment relationship to become a reality in Hungarian labour law, the specific elements of the contract of employment should not be classified as required – in other words, compulsory – but essential elements.⁶⁸ This classification could be the basis of limitations to the flexible modification of the legal relationship.

V.3: LEVELS AND KINDS OF MODIFICATIONS OF THE EMPLOYMENT RELATIONSHIP; SUBJECTS OF MODIFICATION

In Hungarian labour law, the new system of amendments of the employment relationship must also be based on contractual authorisation. I shall not repeat the cases here in which the law itself allows the employer to modify the scope of the employment relationship.⁶⁹ Authorisation by contract of employment can be explicit when parties give authorisation to the employer, limiting such authorisation to specific cases and defining the elements of the content and the extent of the authorisation; this is therefor to be

⁶⁶ See footnote 41.

⁶⁷ Section 277 Sub 1.

⁶⁸ See Antonmattei (no 15) 17, 21.

⁶⁹ See comments on Section 150 sub (2) of the previous LC.

interpreted as prior anticipatory authorisation. If the contract of employment is concluded with general conditions of contract, it is possible that the contract compiled by the employer contains the clauses relating to the modification.

Entitlement provided in the contract of employment may not only address the employer directly, but the collective agreement can also be authorised to modify the employment relationship. However, this is only possible with restrictions under the current Hungarian regulations. The new LC has undoubtedly substantially altered the connection between the legal norm and the collective agreement by introducing bilateral disposition as the main rule. This is stipulated in Section 277 Sub 2. Pursuant to this provision, in the absence of an agreement to the contrary, derogations from the provisions of Part Two and Part Three are possible in collective agreements. This provision resembles the *Öffnungsklausel* in German law, but its effect prevails in a different legislative environment. While the *Öffnungsklausel* makes the parties to the collective agreement 'masters' of the tariff norm,⁷⁰ the modification power of the collective agreement is limited in Hungarian labour law due to the constraints of the contract of employment. The areas for which a collective agreement cannot entitle the employer to exercise unilateral modification are precisely those which – under appropriate conditions – would serve the stability and flexibility of the employment relationship.

CONCLUSION

There were high expectations for the reforms of civil law and labour law. Labour law experts in particular saw an opportunity for Hungarian labour law to open up towards private autonomy and to exploit all instruments of individual and collective labour law. There were obvious signs of retreat already in the course of the preparation of the new CC, but despite the fact that the contract of employment – as a private law contract – did not in the end become part of the CC, the steps necessary for renewal could have been taken for labour legislation. There are a number of reasons why this did not take place. Such change may not have been sufficiently important for decision makers; some labour law experts did not think it was timely or they might have felt threatened by the magnitude of the change, but it is also possible that some may have not even realised the significance of the question.

*The new system of amending
employment relationships
must also be based on
contractual authorisation*

⁷⁰ cf. §4 Abs. 3 Var. M. Löwisch – V. Rieble *'Tarifvertragsgesetz – Kommentar'* (Franz Vahlen, München 2012) 939.



About the author

Prof. György Kiss

University of Pécs
National University of Public service

For questions, criticism and feedback, please email: kiss.gyorgy@ajk.pte.hu