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THE DOGMATIC ISSUES AND THE CONTROVERSIES OF THE LABOUR CONTRACT IN HUNGARY

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I.
SUMMARY OF THE RESEARCH TASK
THE AIMS OF THE RESEARCH

The dogmatic issues and the controversies of the labour contract in Hungary cover a great area. In the course of the research the whole individual labour law shall be examined, which could not be carried out fundamentally without the examination of the collective labour law rules connected with it. Though the labour contract and the labour law relation are distinctive definitions, they can not be separated; they must be examined together from a dogmatic point of view in order to gain real information. The connection between the labour and the civil law (private law), therefore the connection between the Labour Law Act and the Civil Code are crucial points in the dissertation.

This legal area (according to some ideas: this branch of law) is affected by economical and political circumstances much more than the other parts of the civilest. This is a characteristic of the labour law. It was important to clear which branch of law the labour law belongs to regarding the dogmatic issues of the labour contract. Without this distinction the research could not have a real base. The same is true with reference to the regulation methods of the labour relations either in Hungary or abroad.

The approach of the labour contract varied a lot during the years. It was different before 1945, in the socialist era and after the transformation of regime. It is also reasonable to detail what creates the specific nature of the labour contract compared to other contracts related labour relations such as the mandate and the undertaking contract. In my opinion the legal institutions can not be presented appropriately without the historical roots and evidence. Therefore the research shall deal with this aspect as well.

That is why it has been important to present the regulation referring to the work activity at the first place. The labour contract has been being formed during a historical development and it still happens.

Regarding the object of the labour law it can be concluded, that the relations of the nondependent work are essential. After this part the dissertation deals with the main issue, namely with the dogmatic controversies and gaps of the labour contract (and the labour relations) and with the solutions of these issue.

I aimed the examination of the following questions:

- dogmatic questions of the lack of the labour contract's written form,
- lack of pre-contract in labour law and its consequences,
- choice as an action creating labour relation,
- lack of the labour law protection against the blankets,
- connections between the corporate law and labour contract, regulative and dogmatic distinctions,
- controversial system of the employment's (labour contract) qualification,

- labour law and civil law questions of some specific employment (labour contract) forms,
- connections between the obliged undertaking and the labour contract,
- positive and negative relations of the work lease and the work lease contracts,
- Civil Code's institutions possibly used in the field of the labour contract and the labour law relations.

From the above mentioned aims it can be drawn, that the dissertation has an approach starting from the general and leading to the special, after this I found better to deal with other general issues. It was needed to point out the dogmatic place of the labour contract. In order to be able to answer the dogmatic questions the examination of the possibilities to disseminate the up to date contradictions between the Labour Law Act and the Civil Code were needed. The supervision of my (quite different) alternatives was needed to declare their reality.

In the last chapter of the dissertation I have not summarized the previous statements. I aimed at presenting the ideas about the dogmatic of the labour contract (and labour law relation) pointing out the problems of the recent regulation and the lack of regulation regarding the above mentioned questions. The task is to work out a set of rules, which creates reasonability between the labour law and civil law rules pointing out the appropriate dogmatic place of the labour contract. It needs longer time.

II.
THE METHODS AND SOURCES OF THE RESEARCH

In the course of the preparation various methods have been applied regarding the different issues. With regard to the whole thesis it was necessary to use interdisciplinary view. The theme is basically labour law, but the economical and sociological approaches have to be applied. Furthermore other branches of law such as civil law, administrative law, business law, financial law and social security law were taken into account. The EU directives regarding the labour law have been looked closer too. The complex approach was required continuously. The historical approach could be discerned in each chapter. The dogmatic of the labour contract can be presented only in its development, therefore a chapter deals with the historical development of the institutions besides describing the same development in Hungary.

The comparative method has also been applied. In order to present the crucial definitions and institutions the measures of the law dogmatic have been used. At the end of each chapter and especially at the end of the subchapters in Chapter VI summaries are made. Chapter VI is the core of the dissertation. The final Chapter contains ideas and recommendations. In the course of the preparation the presentation of the recent regulation has been avoided (see in the footnotes). It was more important to point out the problems and to find alternatives to solve them. Therefore critical approach has been also applied.

The literature I worked up goes back to the end of the XIX and the beginning of the XX Century. This is also true to the analysis of the regulation. Not only the Hungarian but also the English and German literature has been worked up. The EU rules (directives and frameworks) have been taken into account

also. The frameworks of statues referring to the civil law and labour law have been looked through, especially the Corporate Act, the concepts of the new Civil Code and the new Labour Law Act. The thesis called for the integration of the previous and recent case law. This has been carried out by analyzing commentaries and judgments.

My intensive research work (10-15 years), the publications based upon it and the documents of the international and national conferences have been a great help to form my opinion.

My practical experiences working as an attorney too helped the preparation a lot. It pointed out such numerous problems from a theoretical point of view which can not be discerned in the literature.

III.
SUMMARY OF THE SCIENTIFIC RESULTS AND THE POSSIBILITIES OF USE

1.
The economical and political rules affect the law system and its development. The effect is much greater in the labour law compared to other branches of law. Because of the change of the economical (and political) relations some convergent items can be found in the West- and Middle East-European law development including the Hungarian law as well. These economical and political reasons indicated the preparation of the Labour Law Act 1992 including the individual and collective labour law. These reasons also indicate the modification of these rules.

2.
The approach of the place of labour law in the branches of law varied according to the periods, social and political systems, and periods of time. Albeit these differences did not change the base of the regulation, they had a sort of modifying effect. In my opinion the labour law, especially its individual part is connected with the private law (civil law).

3.
The possible methods of the regulation vary in the Hungarian and the West European countries. In Hungary the codex regulation is applicable in a three sided system. Beside the Labour Law Act there are two other acts serving as ius speciale about the civil and public servants. In the most Western-European countries contrary to the Hungarian practice a much featured regulation is applied. In the international law the ILO agreements, recommendations; orders are the most important measures beside the EU directives.

4.
The approach to the labour law and the labour contract was different before 1945, during the socialism and after the transformation of regime. Before 1945 there was not a specific, independent regulation in the field of the labour law. The rules were incorporated into the civil law, and they were rules of the private law. In the draft private law statute the service contract served as a general definition. It included several types of contracts (like servant contract, farm Manager contract, contracts of factory workers and apprentice etc.).

The socialist law took out the labour law from the civil law and created a labour law codex being appropriate to the socialist direct ruling. The change came by the Labour Law Act XXII 1992, which has a rather civil law approach thanked to the democratic transformation of regime, but it is constantly a codex.

5.
The history of the labour contract derives from the Roman Law (locatio conductio operarum, mandatum), and it affected the latter labour law regulation. The labour law in the Middle age did not make any contribution, except the servant contracts, the labour relation of the guilds, the manufactures and the mines' workers.

The labour law in its recent interpretation was born in the liberalism of contracts period. This led to the interference of the state because of the power of the employer resulting in a balance shift. Collective contracts were concluded at this time, their scope was extended and it was the time of interference by means of the state and statues (or lower measures of the regulation.)

This development ends with the continuation of the above mentioned period and still lasts as consolidate period.

6.
With regard to the object of the labour law it is essential that the service or activity in the public or private sector depends on the employer (lack of independence) and the employee acts according to the order of the employer. Consequently, all the nondependent work activity comes under the scope of the labour law independently from the employer. Therefore the following come under the scope of the labour law: the labour relation, the relation of the public servants regarding the work activity and the labour relations.

7.
Chapter VI presents the contradictions and gaps in theory and practice regarding the labour contract and the regulation of the labour relation and also the ways of their solution. My approach to the issue is based upon the general principle of interpretation. According to this principle the content of the contract and the fulfillment of the contract cover not only the rules of the contract and the points the parties agree with, but also the other criterions relating to the contract and to the type of service.

8.
The lack of the written form of the labour contract and its legal consequence of voidance has dogmatic doubts. To this only the employee can refer within 30 days from the conclusion of the contract. After this the voidance is not regulated. The exclusion of the reference to the voidance does not suppose the annulment of the voidance. Albeit, the case law tries to apply this practice in order to fill the gap. The 91/533/EC Directive tries to handle this problem by the duty to inform on behalf of the employer.

9.
The labour law – without any reason - does not know and regulate the pre-contract. If it were applied, it would have positive effect on behalf of the employer and would encourage the application of the labour relations at a large scale.

10.
The recent Labour Law Act mentions the choice as the creator of the labour relation. However, the Act does not regulate it and therefore it is not clear how the choice functions. In my opinion the choice in this sense could not be applied in the Labour Law Act. Furthermore, my recommendation is to harmonize the rules of the Labour Law Act and Corporate Act regarding the status of the management. Namely, the manager shall act according to the labour contract in a labour relation.

11.
The lack of the protection in the labour law against the blankets gives a great opportunity to destroy the balance between the parties. The Civil Code concept, which contains the labour contract namely, sets rules to the blankets. The time of the entry into force is unsure; therefore it would be reasonable to extend the recent protection in the Civil Code (actio popularis) to the law of the labour contract by means of the modification of the Labour Law Act.

12.
The corporate law, the labour contract and the labour relation are connected with each other controversially many times. Therefore without the workers' council and the trade unions the participation (Supreme Body, referred as SB) of the employees in the control of the corporate can not be carried out. The reason of that is that the delegates of the employees are pointed out by the workers' council with the opinion of the trade union. In case of lack of the above mentioned opinion it would be reasonable if the community of the employees directly were entitled to delegate.

It is obvious that there are problems regarding the labour relations of management according to the Corporate Act. Albeit, the new Corporate Act declares absolutely unreasonably that the management can not carry out work within labour relation. The regulation relating to the management in the future should make it possible to conclude either labour contract or civil law contract under the consideration of the given circumstances. It is the right dogmatic approach.

13.
If we qualify an employment relation the first question is whether a labour or civil relation was created between the parties. At this point the number of the distinctive reasoning is not essential. It is more important to choose those arguments which are characteristic with regard to the work. Generally speaking the whole appearance of the work is crucial. The authorities carrying out the classification (OMMF, APEH and the Court) increase the uncertainty because of the different provisions relating to them. It can be concluded, that the parallel control of the labour and tax authorities does not result in the same consequences. This is against the principle of the legal safety; furthermore the supervision of the decisions

of the authorities could result in a third way of solution.

14.
The issue of the obliged undertakings and the labour contract are connected in a sense, because the obliged undertakings (hard to define) or an alternative of them are chosen in order to avoid the strict rules of the labour law. This undertaking has advantages and disadvantages on behalf of the employer and the employee. In order to discern the obliged undertakings the Labour Law Act Art 75/A helps a lot, which protects the interest of the employee and gives standpoints to classify the type of the contract. It also would have helped, if the Labour Law Act had defined the definition of the labour contract in a draft October 2002 laid down by the Minsitry. This definition is similar to the distinctive civil law contracts. It must be emphasized that the undertakings do not derive from the gaps of the labour law regulation. Consequently their termination can not be expected from the codification of the Labour Law Act.

15.
There are numerous labour law and civil law relations and contradictions in the field of the work lease and the work lease contracts. The work lease is an atypical institution, in which the characteristics of the labour and civil law are mixed. The work lease is a special connection among three parties based upon two different legal relations. One is concluded between the lender and the borrower, this relation belongs mainly to the civil law. The other is concluded between the lender and the employee, which is a legal relation.

In order to deal with the abuse of the work lease the legislator laid down if the work lease is terminated because of a reason within the lender's interest, than the labour relation is established between the borrower and the employee. This is not a fortunate solution. By this provision the legislator establishes labour relation, where the parties did not want to be in a contract. This is a so called "compulsory labour contract" which can not be explained on a dogmatic basis because of the private law oriented labour relation and because of the parties' autonomy. It would have been much more reasonable, if the lender had liability for damages in favor of the employee in the event of the inappropriate act of the lender or in case of the failure within the lender's interest. The amount of the compensation can be summed by the lucrum cessans giving the right to the parties to make decision whether to conclude a contract or not.

The EU directive about the work lease has not been entered into force yet, therefore the equivalence rules prohibiting the discrimination can not be realized: The rules of the termination of the labour relation are more disadvantaged, the principle of equal payment shall not apply etc.

Consequently, taking into account the above mentioned problems, the work lease is such an atypical labour relation that is suitable to solve numerous problems which can not be solved or which are hard to be solved by the labour law.

16.
There are numerous legal institutions in the Civil Code, among its leading principles and its provisions which are applicable in the filed of the labour contract and the labour relation such as:

- No person shall be entitled to refer to his own actionable conduct in order to obtain advantages ,
- willful conduct inducing bona fide,
- commitment to the offer,
- pre-contract,
- contest the blankets,
- the value of the service and the consideration due is grossly unfair, the right to contest,
- usurious contract (null),
- collateral commitments for securing contracts (liquidated damages, security deposit, surety ship, lien and earnest),
- liability for damages on behalf of the employee based upon the civil law (to support the prevention of damages) .

Most of these are applied in the case law by means of analogia legis. In my opinion it would be rather reasonable to regulate them definitely fulfilling the requirement of the legal safety.

17.

The issue of the place of the labour contract in the branches of law would be much easier, if the recent contradiction between the Labour Law Act and Civil code were solved. This would have more alternatives, each has advantages and drawbacks. My alternatives are the following:

- Labour Law Act and Civil Code separated from each other,
- regulation in more statues,
- the Civil Code as general core set of rules,
- Labour Law Act including the whole civil law provisions,
- the Civil Code as the general code, but in a selective way and not as a whole,
- Labour Law Act containing the detailed provisions, and labour contract among the other definite contracts of the Civil Code,
- detailed regulation of the labour contract/labour realtion in the Civil Code,
- complex, codex regulation in the field of the labour law.

Analyzing the alternatives, in my opinion the alternative of “the Labour Law Act containing the detailed provisions and the labour contract among the definite contracts in the Civil Code “is based upon the reality. Though it is difficult to make a statement regarding the future. Furthermore contrary to the western European practice the complex, codex regulation is also a good choice, if we look into the far future.

18.

Chapter VIII consists of ideas and recommendations. It is a synthesis of which main thought is how it can be achieved to harmonize the labour law and the civil law in a way that is suitable to solve the dogmatic problems of the labour contract and the labour relation.

The above mentioned results of the research under points 1-18 can be summarized in the following:

A./

The statements of the dissertation make a contribution to the legislation, presenting the problems which come up at different levels of the labour law legislative power. Consequently the dissertation is suitable to be applied in the course of the further labour and civil law codification.

B./

The dissertation tries to be applicable to the practice as well by means of the right interpretation and application of legal institutions.

C./

The results of dissertation shall be applied directly or indirectly. Furthermore the dissertation with its issues, ideas and recommendations is also suitable to encourage the inner development of the civilest and the labour law.

D./

Eventually, the results of the research are also applied in the Labour Law as a subject at the Department of Labour and Agricultural Law.

IV.
THE CATALOGUE OF THE PUBLICATIONS FROM THE SUBJECT MATTER OF THE DISSERTATION

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   Business and Law, 2002/7-8.

2. György KENDERES: *Some questions of the modernization of the effective labour law*
   Labour Review, 2000/5. sz.

3. György KENDERES: *The connection between the regulation of the labour law and the ownership changes,*
   Labour Review, 1990/11.

4. György KENDERES: *Some questions of the modernization of the labour regulations in the light of the attitude of the civil law,*
   In.: The codificational and the functional connections of the labour law and the civil law (collections of essays)
   Editors: Manfred PLOETZ and Hilda TÓTH
   Publisher Novotni, Miskolc 2001

5. György KENDERES: *The disputable questions of the forced establishment of the labour relationship by the borrowing of the manpower*,
   Labour Review 2006/6.

6. György KENDERES: *The effect of the ownership changes to the regulation of the labour law,*
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   Economy and Society Researcher Institute of the Trade Unions, Bp. 1990

7. György KENDERES: *Contradictions and gaps by the regulation of the labour contract*,

Manuscript 2006, Jurisprudential Journal (under appearance)

8. György KENDERES: *Possibilities of the approaching the Labour Code to the Civil Law* Codification Study, Ministry of Social and Family Affairs, 1999

9. György KENDERES - Krisztina BÁNYAI: *The actual questions of the qualification of the employment (labour) relationship*, Economy and Law 2004/7-8.

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13. György KENDERES - Krisztina BÁNYAI: *Civil Law relations of special Labour Law legal institutions,* In: Feast studies out of respect for József Radnay's 75. birthday, Editors: Ottó CZÚCZ and István SZABÓ, Publisher Bíbor, Miskolc 2002

14. György KENDERES: *Connections between the regulations of the civil law and the labour law from the point of view of the codification of the Labour Code*, Business and Law 2000/1.

15. György KENDERES: *Correspondence between the company law and the labour law and their problems*, Business and Law 2004/12

16. György KENDERES - Tamás PRUGBERGER: *About the economical reform from the point of view of the law,* Borsod Review 1989/2.

17. György KENDERES - Tamás PRUGBERGER: *The law of the civil servants*, Publisher of University of Miskolc, 1994

18. György KENDERES - Tamás PRUGBERGER: *The new regulations of the relationship of the civil servants,* Hungarian Administration, 1993/6.

19. György KENDERES - Tamás PRUGBERGER: *About the law of civil servants in the mirror of the new regulations of the relationship,* Hungarian Administration, 1991/10.

20. György KENDERES - Tamás PRUGBERGER: *The development of the dogmatical system of the labour law in the mirror of the changes of the economy and the social politics* In: Liber Amicorum, Studia Ida Hágelmayer, Dedicate Feast studies out of respect for Ida Hágelmayer, ELTE ÁJK Department of Labour and Social Law, Bp. 2005

21. György KENDERES - Tamás PRUGBERGER: *Remark to the seasonable theoretical and practical*

problems of the borrowing of the manpower
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22. György KENDERES - Tamás PRUGBERGER: *The questions of the regulation of the labour law and the civil law*,
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Marking 1989/1.

24. György KENDERES – Zoltán RÁCZ – Irén TATÁR: Is it possible for a Ltd. member to make employment relationship with the Ltd,
Economy and Society, 1990/4. sz.

25. GECSÉNÉ-TOMÁNÉ-KENDERES: Labour law and social security law,
Legal knowledge II., Publisher Novotni, Miskolc 2004.