

ABSTRACT OF THE PhD THESIS

**THEORETICAL BACKGROUND OF THE LEGAL CAPACITY AND ITS
LABOUR LAW ISSUES**

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1. SUMMARY OF THE RESERACH TASK, PROBLEM OF THE RESEARCH

The independent living movement of disabled people started in the 1950's, which resulted in several achievements. One of the most important is that beside the compensation oriented, benefit's trap disability policy other policies emerged, such as rehabilitation, and participation oriented disability policies mostly in one legal system affecting one another. According to the participation oriented disability policy, which reflects the WHO definition, the accomplishment of equal treatment and of equalising opportunities the integration of disabled people can be achieved. Beside the independent living new definitions emerged like empowerment and self-determination.

The disability movement got stronger and its players also changed with different interests. All values and interests were reconsidered. New comers like the UN and EU came to platform besides the European Disability Forum. These new protagonists affected the national policy from inside and form the lower platforms a new research area could be discerned: disability studies.

The UN Convention was implemented in Hungary by Act XCII of 2007, which became part of the Hungarian legislation. The negotiations taking part in the UN made a significant impact on the Hungarian Civil Law Codification, because the theoretical approach of the Convention was taken over in the codified text. Advance directives, supported decision making (furthermore regarded as SDM), abolishment of plenary guardianship and introduction of partial guardianship in certain types of cases draw the outline of the new regulation. This faced a great challenge among the representative parties.

While limiting the scope of research I tried to focus my investigation on certain legal institution.

The first step was to define the legal problem of my dissertation. In Hungarian labour law the conditions of being subject in a labour relationship are age of 16 and at least partial legal capacity. Generally speaking the employment of disabled people is a great problem, but I had to focus my research on one target group, ie. on people with the intellectual and psychological disability (furthermore referred to as target group). Further I concentrated on the legal capacity and employee issue from the target group's point of view.

As Article 72 of the Hungarian Labour Code prescribes the partial legal capacity of employees, the target group is excluded from this opportunity. However, according to the full legal capacity principle of the UN Convention these people could be potential employees.

According to this reasoning the dissertation contains two parts: civil law and labour law part according to legal capacity and employee status issue.

2. BASIC PRINCIPLE, BASIC QUESTION AND BASIC PROBLEM

I have defined a basic problem, a basic question and a basic problem

Basic principle: One can speak about the employee status of the target group only if the recommendation and theoretical background of the new Civil Code (but not coming into force, furthermore referred as “new Civil Code”) is accepted as legitimate based on the international, modern legal and disability studies literature.

Basic question: if this basic principle can be applied to solve legal problems, especially labour law problems.

Basic problem: the limitation on the volume of the PhD dissertation does not allow carrying out a research regarding all issues of the labour law. The focus is made on the employee statuses of the target group.

3. CONTENT OF THE DISSERTATION REGARDING FROM GEOGRAPHICAL AND THEORETICAL POINT OF VIEW

After determining the legal problem it is recommended to determine the content of the dissertation regarding the geography and theme. With regard to the geography the First part shall apply to the Member States of the United Nations; the Second Part shall apply to Canada and Great-Britain, the Third part to Germany and Austria, the Fourth part to Hungary, the Fifth part to Germany, Austria and Hungary. The *de lege ferenda* recommendations shall apply to the Hungarian legislation.

With regard to the theme of the dissertation the following issues are going to be discussed in the civil law part: factual competence, decision making competence, regulation regarding the capacity to contract. In the labour law part work ability, employee status and the employment of the target group are examined. The latest refers to the regulations of Act XXII of 1992 about the Labour Code, Act XCII of 1993 about labour law protection, Act III of 1993 about social allowances, Act LXXXIV of 2007 about the rehabilitation supplies, and of Ac IV of 1991 about the protection of job seekers.

4. HYPOTHESES

In order to solve the legal problem two hypotheses were defined:

1. As a principle, only the policy based on full legal capacity can be applied to the target group, because only this system can guarantee the autonomy, self-determination and human dignity of these people, ie. the protection of the legal capacity. This is a feasible model according to the German and Swedish regulation. Restrictions of legal capacity can happen only by means of legal guarantees and never generally.
2. The employee status, as a basic problem, is a great issue from the point of view of disabled people. This issue must be supported by dogmatic reasoning; the points of employment regulation should be outlined, which can answer the labour law problems of target group.

5. METHOD OF THE RESERACH

Methods of the research are desk research, historical, and comparative approach. Historical approach can be discerned in Anglo-Saxon literature, when I tried to sum up the result of capacity assessment, and the pre-history of SDM. Comparative method goes along the dissertation between the Anglo-Saxon, German and Austrian legislation.

In the dissertation I tried to focus on the *problem – hypothesis – thesis* approach, which helped a lot in the consequent reasoning.

6. LOGICAL SYNTHESIS OF THE DISSERTATION

While proving the hypotheses I set up a logical synthesis. In order to prove the employee status of the target group, I had to prove the theoretical background and legal institutions of the new Civil Code, but in order to be able to do this the international, modern legal and disability studies literature must have been worked up. That is why the First and Second part of the dissertation deal with the theoretical background of legal capacity, the Third part uses up the results of these parts demonstrating the regulations of the capacity to contract of full age in Germany and Austria, after that in the Fourth Part I tried to legitimate the concept of the new Civil Code regarding this issue.

After having proved the legal institutions of the new Civil Code based on the human right model of disability and on the theory of full legal capacity to act the employee status of the target group was examined by trying to answer dogmatic questions. Then the same research was carried on the definition of work ability, for which introduction recommendation was made. This part of the dissertation required independent research work in such way, as there was not too much literature available, therefore, by pointing out the employment issues of the target group the inherent principles of the labour law must have been applied regarding the individual and collective regulations of labour law and the regulations existing in Germany and Austria.

7. SUMMARY OF THE DISSERTATION

- I. CHALLENGES OF THE DISABILITY STUDIES – NEW APPROACHES, DIFFERENT ANSWERS
SIGNIFICANCE OF THE CONVENTION ON THE RIGHTS OF DISABLED PERSONS AND OF ITS
ARTICLE 12
 - a. If disability and the social issues arising with it are examined in a system, in their coherence, one can discern a progress, a continuous development, which can lead us from the medical model to the human right model of disability. The definition of disability from 2001 (WHO definition) has been changed because of the UN Convention, in a way, that the focuses have been modified. There is a much greater focus on the impairment of the individual and on the individual and environmental factors affecting it. Beyond the environmental factors the social, physical and legal environment are also meant. These all together influence one's activity potential, which determine one's participation in the society.
 - b. According to the theory of full legal capacity laid down in Article 12 of the UN Convention, the Member States shall supervise the regulations of their present guardianship system. The following must be taken into consideration:
 1. The starting concept of the regulation: if the regulation lays down the negative or positive fiction of capacity, ie. if it is based on the theory of capacity or incapacity.
 2. Introduction of supporting models.
 3. Practical applicability of supporting models:
 - inside the guardianship system,
 - outside, parallel to it.

4. if guardianship should be maintained.
 5. If the answer is affirmative:
 - if plenary guardianship should be maintained,
 - considering the introduction of such a guardianship model, which does not affect the capacity to act.
- c. The theory of full legal capacity has been prepared gradually by psychologists, psychiatrists, lawyers, economists and social workers since the 1970's. The protagonists show the complexity of the capacity assessment of people living with intellectual and psychosocial disability.

II. THEORY OF THE CAPACITY TO ACT

A) *The capacity, capable or not*

- a. The capacity can be assessed, and we can speak about the continuum or levels of competence. Furthermore, capacity changes continuously, which can be assessed between two points, ie. the total incapacity and full capacity. This can be called "two points" theory. Decisional capacity, the capacity to act, the factual competence, or the work ability could also be assessed and are determined by the complexity of the case, the legal and physical environment and by the communication.
- b. Assessment of the factual competence in the common law system means the assessment of decisional capacity, which includes the factual competence. This assessment can not be objective. The assessor should consult those people, who can communicate the will and wish of the target group.
- c. Among the criteria of the capacity assessment, appreciation was discussed, as it is quite challenging in the practice. *Firstly*, as decisional capacity is influenced by emotions, wishes, convictions, values and life experiences. *Secondly*, reasonability is also part of this criterion. However, it is weakened by internal and external factors, including the personal conviction of the assessor. *Thirdly*, each decision includes risk, which can be handled by the intellectually and psychosocially disabled people with appropriate help. The concept, which does not count on risk, is not feasible.

- d. *Capacity to contract* equals “*Geschäftsfähigkeit*” in the German and Austrian law. In the case of both definitions, the most important is that the individual shall understand the content of the case and shall act according to this. There is a connection between the capacity to contract and the decisional capacity, that is why the introduction of decisional capacity is recommended in the Austrian, German and Hungarian legal system among the regulations of the capacity to contract.

B) Guardianship as part of the disability policy

- a. The plenary guardianship deprives the social integration of the target group even on the level of disability policy.
- b. Guardianship as a legal institution and the functioning of guardianship is part of the disability policy.
- c. Besides the examination of the three main parts of disability policy – compensation-, rehabilitation-, and participation-oriented disability policy – it is also recommended to think over the functioning of the guardianship system (not) affecting the capacity to act, as one cannot speak about participation-oriented disability policy, if the legal system acknowledges the existence of plenary guardianship and it is used on a daily basis, generally.
- d. The regulation regarding the capacity to act in a legal system demonstrates the attitude of the state towards the target group, as legal subjects, even in the field of employment. Task of the welfare state is to guarantee the social rights. The capacity for right enables that the target group become entitled for the social rights, in theory. However, the existence of the guardianship in a legal system can destroy the practice of these rights. Therefore, it is part of the disability policy to think over the attitude toward the guardianship system.
- e. The disability movement, the social and economic changes have indicated one reform so far. It can be presumed that the second reform is going to be initiated by the UN Convention, which make the legislator face a great challenge. There are different ways, which the legislator can choose: 1. abolishing plenary guardianship and creation of the SDM system, 2. amending the guardianship system in the light of Article 12, 3. coexistence of the guardianship and the SDM model.

C) From the decision-test until SDM

- a. It was laid down that there is no reason to make a sharp distinction between the disability models, as continuity can be discerned, which is a natural result of the disability rights movement. This chapter was going to demonstrate this progress and coherence. This progress was inspired by the theories regarding the capacity to act of the target group. At one end the medical model, at the other end the human rights model can be discerned.
- b. The functioning of SDM cannot be understood without examining the capacity assessment. Because capacity can be different from a legal point of view: capacity for rights, capacity to act, factual competence, and capacity of actionable conduct. However, very few can be heard about the decisional capacity. This capacity make the practice of rights of the target group possible, by this way improving self-determination and social integration of the target group.

III. REGULATION REGARDING THE CAPACITY TO CONTRACT OF PEOPLE OF FULL AGE WITH SPECIAL REGARD TO THE CONFORMITY WITH ARTICLE 12 OF THE UN CONVENTION

A. Regulation of the capacity to contract of people of full age in Germany

The supportive – helping model has already emerged in the *Bürgerliches Gesetzbuch* (furthermore referred to as *BGB*) :

- In German law declarations play an important role.
- By formulating the rules of guardianship the protection of fundamental rights were taken into consideration.
- The interference is subsidiary; the best interest of the person is favoured. Before appointing a guardian, any other helper can be applied.
- Although guardian can be appointed to all cases, which would lead to incapacity to contract, it remains an exception.
- Aim of the guardianship is to represent the interest of the guarded person making possible his/her independent life arrangements by acting according his/her wishes and in cooperation with the rehabilitation (principle of rehabilitation).

- In BGB 1901. § Sections (2) – (4) it is laid down that the guardian must act according to the interests of the guarded person. The guardian should respect the wish of the guarded person, according to which he/she is able to lead his/her life. The guardian shall respect the identity of the guarded person. The wish must not be declared clearly, it is enough if it can be presumed.
- The guardian discusses all the important decisions with the guarded person, (s)he must know the wishes and images of the guarded person. It needs a trustful relationship.
- The *Einwilligungsvorbehalt* means approval of some declarations made by the guarded person, if (s)he is present alone in a contract and his/her capacity to contract is not obvious to others.
- It is important that the German law recognises cases, when someone has capacity to contract and but sometimes not. It means his/her capacity to contract varies because of psychosocial reasons. This is called relative capacity to contract.

In order to make the German system more effective the following suggestions were made:

- Installation of a net with all the actors working in the system.
- In contrary to the will of the person, appointment of a guardian shall not take place.
- Application of appropriate communicative measures (for example simple language).
- Agencies shall provide help in accordance to the needs of persons involved, in a flexible way.
- In order to practice the right to self-determination, the persons involved should take part in trainings; their skills should be improved gradually.

B. Regulation of the capacity to contract of people of full age in Austria

In the Austrian regulation representation, limitation of the capacity to contract and application of institutions not affecting the capacity to contract are the main rules.

- The regulation is based on the principle of subsidiary and gradation taking into consideration the right to self-determination of people respecting their wishes and will. (SDM elements)
- Act of the nearest relatives – the greatest potential of the reform – has already carried SDM elements. This does not affect the capacity to contract of the person and does not result in the loss of factual competence. This regulation proves that an institution not affecting the capacity to contract is legitimised in a Civil Code.

- In theory it has been already discussed that the capacity to contract should be considered relatively, because in this case the factual competence can be determined, assessed case by case.
- According to the recent regulation capacity to contract consists of two components: *objective* referring to age, state of health as a general component; *subjective* referring to appreciation as being the individual component. The appointment refers to the general component. If the appointment shall examine the subjective component, the compliance with the concept of full legal capacity laid down in Article 12 is going to be stronger.

IV. REGULATION OF THE CAPACITY TO CONTRACT IN HUNGARY

DOGMATIC QUESTIONS AND CODIFICATION OF THE CIVIL CODE

- a) There are different views on the connection of capacity to act and capacity to contract in the Hungarian law. The most favoured opinion is that the capacity to act is not a complex category contrary to the German and Austrian regulation. It equals with the capacity to contract. Therefore the statements regarding the regulation of capacity to contract in Germany and Austria can be applied.
- b) The relationship between factual competence and the capacity to act can not be defined on a certain basis. Why is it important to us? One of the main critics on the new Civil Code that the existence of the factual competence is a matter of fact, and the capacity to act is its legal graduation. However, according to the relationship between the two legal institutions this statement can hardly be maintained
- c) Part of the dissertation regarding the capacity assessment – according to the common law regulation – refers to the fact that factual competence is a separate category, which must be based on a complex assessment. However, according the Hungarian legislation the assessment of factual competence should mean the assessment of the capacity to act, which can not be reasonable. We can discern two separate definition referring to factual competence and capacity to act, and causality can be stated between them
- d) The Hungarian legislation before the II. World war contained some elements regarding the intellectually disabled, which disappeared after. These are the following: (1) The Hungarian law did not know such a guardianship, which would have been generally excluded the whole capacity to act. (2) There were two kinds of appointments of guardians: not affecting the

capacity to act and limiting the capacity to act. (3) According to the judicial practice the determination of the legal capacity must take place case by case.

- e) The new Civil Code is a pioneer of the second guardianship reforms. If its concept can be defended, this regulation could set an example to the Austrian and German legislation.
- f) This regulation in the new Civil Code is based upon the principle of the least restrictive measures, subsidiary and gradation, and results in a regulation not affecting the capacity to act of people of full age. In order to legitimate its concept the following approaches shall apply:
 - Human rights concept of disability.
 - Literature available concerning the capacity assessment in the common law.
 - Complex rehabilitation.
 - Shift in the guardianship system towards the supportive institutions.
- g) In order to be in compliance with the UN Convention, the aims followed during the Civil Code codification can be summarised as follows:
 - in accordance with the human rights and complex rehabilitation such a regulation should be introduced, of which aim is not limiting the rights, but respecting the autonomy;
 - principle of primacy of institutions not affecting the capacity to act;
 - if the limitation of the capacity to act can not be avoided, only limitation shall apply, which cannot be general,
 - in this system such a mechanism shall exist, where the limitation of rights and the support of the person can take place at the same time.
- h) In our opinion, plenary guardianship can not be legitimised, if we take into consideration that factual competence should be assessed case by case and the determination of group of cases offers enough discretion to determine, which contracts can be concluded by the person. By group of cases the court can determine tasks or activities. In practice it is not reasonable to determine the group of cases narrowly, because in order to expand it a new procedure should be started.
- i) In our opinion, in those cases where the person lacks his/her factual competence as a whole, the plenary guardianship does not result in right-protection, much more in their deprivation.

- j) The regulation concerning the limitation of the capacity to act can be summarised as follows:
- the general definition of appointing a guardian reflects the human right model of disability: *those, who because of mental ability, psychosocial state, addiction or because of other factors deriving from theses and hindering their social integration, cannot act on their own, only with help, are unable making decisions and statements independently, and without the limitation of the capacity to act, they would be threatened, they can be put under partial guardianship only in group of cases.*
 - Subsidiary institution: it can be applied only in the case of the best interest clause and if other institutions not affecting the capacity to act can not be applied.
 - Barrier free hearing of the guarded person.
 - Recognition of the fact that the communicative barriers cannot be reason for limitation.
 - The court must inform the people involved in the trial – according to the rules of the barrier free communication – about the applicability of SDM.
 - In the case of decision making the guardian must consult with the guarded person and take into consideration of his/her opinion. If it cannot be concluded, the guardian must act according to the previous statements. If they can not be determined, the values and interests of the person should be taken into consideration.
- k) It was laid down, that in order to guarantee the rights declared in Section (5) of Article 12, plenary guardianship is not a solution. The reasoning for that is the following:
- The new Civil Code contains appropriate guarantees for such legal subjects, who lack of factual competence “entirely and finally”. The limitation in group of cases results in such discretion on behalf of the court, which is appropriate. Beside the limitation in group of cases supporter can also be applied.
 - While determining the group of cases the court should make decision based on such an expert opinion, which defines factual competence by means of complex rehabilitation.

V. ISSUES OF THE EMPLOYEE STATUS IN THE CASE OF INTELLECTUALLY AND PSYCHOSOCIALLY DISABLED PEOPLE

A. *Place and Role of Work Ability in the Legal System*

a) Work ability in a context as ability for work does not exist in the German, Austrian and Hungarian legislation. Its characteristics are:

- relativity (to others, to legal fields and to the activity carried out beforehand)
- linked to services arising from the social security,
- assessable,
- it can be categorised.

In the following I have tried to find the place of work ability in the legal system, *but always from the disability's point of view*.

b) Work ability means ability for work, its assessment means the forecast of one's work ability.

c) In some states there is a link between the disability definition and work ability. This disability definition can prescribe the state's disability policy, because if work ability emerges in the definition, in that state the economic model is emphasised in the disability policy.

d) According to the link between the disability definition and services the following statements can be made. *Firstly*, by determining the conditions for entitlement of services there is a sharp distinction between those, who have already been on the labour market, and are ensured in the social security system; and disabled people, including the target group, who have never been on the open labour market and, therefore, they are not ensured. *Secondly*, the insured are entitled for services from the social security system; disabled people including the target group are entitled for allowances lacking insurance relationship. That is why it is very difficult to speak about work ability of the target group. *Thirdly*, work ability assessment of the target group could be effective in connection to the capacity-profile approach or procedural approach, which would result in a complex assessment. However, it needs the expansion and surpass of the insurance nature of work ability.

e) This present concept of work ability is not able to assess the work ability of the target group.

- f) By examining the link between the disability definition and employment measures, it was laid down, that special disability-dependent interferences are the followings: rehabilitation measures, sheltered employment and work adaptation. General employment measure is the quota regulation, which improves the integration of employees with altered working ability. However, they are not equal with disabled people.
- g) In order to prove the insurance-dependent nature of work ability, the German and Austrian legislation were demonstrated. *Austrian law*: the concept of work ability was pointed out in the social security system, but always from the disability's point of view. In the Austrian social security there is an expanded definition of work inability, and it contains the followings: earning incapacity, inability to carry out work, and invalidity. However, these definitions refer to gained disabilities.

The rules of job-protection and activity-protection from the disability's point of view have been also examined proving the relative nature of the work ability definition.

- h) *German law*: the relativity of work ability definition comes up in a different way. The function of work ability differs by the fields of law, ie. in the labour and social law. In labour law it is a precondition in the case of sick leave. In social law it is reason for the entitlement for sick pay.

There is a connection between work ability and earning capacity. That is why the levels of earning capacity could be applied to the work ability: partial work ability, temporary work ability, temporary work inability, full work inability.

- i) *Hungarian law*: by introducing the rehabilitation supplies, complex, objective and authentic assessment of the state of health has been introduced, which refers to the impairment affecting the whole body and prescribes the work ability changes. This work ability is called vocational work ability. However it can be applied only to people, who are insured.

The connection between the Hungarian disability definition and work ability has also been examined. Direct relationship could not be determined between the application for disability services and the work ability. The legislator applies the social concept of disability in the Hungarian disability definition, but all the entitlement conditions are based on the medical concept.

Looking closer to the judicial practice, it can be stated, that the determination of work ability is a medical question contrary to the Austrian law, where it is a legal question. Furthermore, the cases refer to the employer's liability in the case of accident at work place, which presumes that the target group is insured, ie. They have already been on the open labour market.

It can be stated, that according to the regulation in force in Hungary, the assessments treat work ability as a medical question and it does not mean ability-based-work-assessment. (Act LXXXIV of 2007 § 1. e), Act II 1993 § 49-50)

- j) The relationship between disability definition and the recent practise of work ability assessment (EMR, PCA, FIS) abroad was also examined. This part referred to the capacity assessment in the common law countries. However, there is a distinction between the assessment in the common law and continental countries. In common law countries it rather means the assessment of decisional capacity and factual competence. In continental law rules have been introduced to determine the conditions of entitlement for services, which refers to the work ability assessment.
- k) The *Lantegi* method is applied to assess the capacity of intellectually and psychosocially disabled people. It is much more labour law specific than the Work Ability Index. However, on its own it can not be effective; it should be linked to the rehabilitation measures (primary and secondary prevention).
- l) It can be summarised that the recent place of work ability in the German, Austrian and Hungarian legislation can not be solution for the problems of the target group regarding their employment and employee status.
- m) In the Hungarian legislation a great revision of the definition of employee with altered work ability can be suggested, as this definition does not include the target group, as most of them have never been present in a labour contract.

B) Issues of the Labour Law Regulation in Austria and Germany

- a) *Austria*: points of labour law regulation: quota, dismissal protection, principle of equal pay for equal work. Meeting point of the individual and collective labour is the dismissal protection.

In labour law regulation labour law protection has a distinct role. Secondary prevention is the field, which acquires the employer to adapt the work and workplace. In the last years psychical illnesses have increased.

b) *Germany*: points of the individual regulation are the following:

- quota,
 - control – documentation,
 - mutual information,
 - factual employment obligation.
- prohibition of negative discrimination,
- obligations of the employee::
 - Guarantee of the right for promotion.
 - Adaptation of work and workplace, including not only the physical, but also the legal environments. These are the practical consequences of the employment.
 - Overtime can not be ordered for disabled employees.
 - Disabled employees are entitled for extra holidays (5 days)
- Special dismissal protection beside the general dismissal protection. (*Analogia iuris*: special shall apply before the general rule.)

c) Points of the collective labour law issue:

- in the case of application of job seeker disabled persons the work council can influence the decision.
- The employer and the representative of the disabled employees can make an integration agreement, in which they lay down the practical consequences of the employment. It is regarded as the work council agreement.
- If the maintenance of the work relationship is endangered by health problems, the employer set up *Eingliederungsmanagement*. Its members are: the employees' representative (trade unions), the person in question, representative of the disabled people and the medical personal.

If the work relationship of the employee is endangered, the employer is obliged to cooperate with the disabled people's representative, and the *Integrationsamt*. The *Integrationsamt* also has a special obligation in the case of special dismissal protection

- Conditions of the dismissal protection:
 - the work council can give opinion on the employer's action regarding the termination of labour contract,
 - there is a representative of disabled people at the work place,
 - there is an institutional cooperation between the *Integrationsamt, Bundesagentur für Arbeit, Integrationsfachdienste*, work council and the disable people's representative.

- d) The German regulation is much more detailed than the Austrian regulation regarding the employment of disabled people. The points of regulations are similar. It will be very useful by pointing out the necessary regulations in the case of the employment of the target group.

- e) Regarding the content of the labour contract and labour relationship the German regulation can be an example, with special regard to the practical consequences of the employment. (Employment – legally barrier free)

C) Issues of the Hungarian Labour Law Legislation

During the research it was the point where the basic principle, basic question and basic problem must have been defined. Therefore the followings were discussed:

- characteristics of the labour law relation,
 - employee status generally and specially,
 - collision of fundamental rights, under which the limitation of right to free contract was proved,
 - using up the statements made about work ability and factual competence previously.
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- a) It has been declared that the traditional characteristics of labour law have been changing, but it does not mean, that the target group could not have been employed within a labour law relationship. For example in the German law exemption of giving introduction does not exclude the existence of a labour law relationship. It is also stated, that the employer's control on its own does not express the essence of the labour law relation. Under this point reference was made to atypical employment because in that case the work remains within the protective labour law

relationship. In our opinion the need for *flexicurity* is based on the guarantee of the right for work and free choice of work in the case of the target group.

- b) By defining the employee generally, it must be laid down, that employee is who carries out work for others. There is no connection between the capacity to act and employee status in that sense. This can also be discerned in the German law, where besides integration test can also be found. This dependent work is also important in the English law. The subordinate nature of the employee status is relevant in the French law. The integration test is also interesting in the case of the employment of the target group.
- c) The special employee status refers to the factual competence of the employee, his/her ability, skills, qualifications, state of health. This concept is very similar to the concept suggested for the work ability. It means that this special employee status cannot make equal with the factual competence, or with the capacity to act. However it does not emerge in the dogmatic concept of the employee status. What can be the reason for that? The work ability with its recent place in the legal system is not appropriate for the work ability assessment of the target group. This refers to two other issues: the issue of factual competence and work ability. The previous statements regarding the institutions have been called.
- d) § 15 of the Act XXVI of 1998 on the rights of disabled persons contain the right to adaptation of the work and workplace, although the target group cannot emerge in the open labour market.
- e) By legitimising the quota regulation it was laid down that the guarantee of the right for work and for the free choice of work make possible the restriction of the right for free conduct of contract. It means that by the conclusion of the labour contract collision of two fundamental rights can be demonstrated.
- f) During the whole labour law relationship supporter can be applied, which does not mean that the supporter is a third person in the employment contract. This supporter helps to practise the capacity to act. However in the case of the target group an SDM net is suggested to be created, in which the actors are: relatives, social workers, trade unions, disabled people's representative. Regarding the effectiveness of the collective labour law institutions, the German and Austrian regulation can be a good practice.

- g) By completing the labour contract the question arises, what happens to the rights and obligations deriving from performing work? The statements laid down regarding the factual competence and work ability were used up again.
- h) We have tried to point out the areas, which might arise while employing the intellectually and psychosocially disabled person.
- i) Dismissal Protection. It refers to people entitled for rehabilitation supplies. However, this definition is narrower than the employee with altered work ability, and does not include disabled people. It means that the recent regulation regarding dismissal regulation would not be applicable to the target group. That is why one of our suggestions was to revise the concept of the employee with altered work ability. Suggestions were also made how the definition could be amended: decreased work ability, partial work ability?
The target group is excluded from the dismissal protection, although this is the main point of their employment in Germany and Austria. Moreover, the collective institutions do not have any effects on the protection of the target group in the case of employment.
- j) The liability system was pointed out, as being an outstanding issue in the case of employment of the target group. However, the dogmatic of labour law liability is such a strict regulation, that we find it appropriate for these potential employees.
- k) While examining the primary and secondary prevention measures it was obvious that the concept of the employee with altered work ability shall be revised.
- l) The vocational rehabilitation was mentioned as third prevention. It referred to the employees with an employee-like status, the assessment of decisional capacity and work ability.
- m) Social employment was discussed as the employment of the target group takes place there according to the regulations of Act III of 1993. However this is not labour law relationship, this is institutional employment, including work-rehabilitation, similar to the sheltered employment in Germany. The train-place-maintain employment is similar to that part of the sheltered workshops in Germany, where the target group is employed as employee. In this case the regulations of the Labour Code regarding the young workers shall apply.

According to the results of the research the hypotheses became thesis:

1. As a principle, only the policy based on full legal capacity can be applied to the target group, because only this system can guarantee the autonomy, self-determination and human dignity of these people, ie. the protection of the legal capacity. Restrictions of legal capacity can take place only by means of legal guarantees and never generally.
2. The employee status, as a basic problem, is a great issue from the point of view of disabled people. This issue must be supported by dogmatic reasoning; the points of employment regulation should be outlined, which can answer the labour law problems of target group.

8. CATALOGUE OF THE PUBLICATIONS FROM THE SUBJECT MATTER OF THE THESIS

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Jakab Nóra – Kovács Melinda (2009): Odyssey of Legal Capacity from the Participants' Point of View. *Fogyatékoság és Társadalom*, 3-4., 375-389.