EFFECT OF LABOUR LAW REGULATION ON THE EMPLOYMENT RELATIONS BASED ON THE CONNECTION BETWEEN SOCIAL RIGHTS AND LABOUR MARKET

Nóra JAKAB[*]
Rab HENRIETT[**]
Andrea Judit SZŐLLŐS[***]

Abstract

In the world of employment, we can find several aspects that have effect on the labour market. Labour market cannot be independent from the legal regulation of employment; moreover – according to the tendencies – labour market processes basically define the role of labour law. A fundamental difference can be observed between the approach of Anglo-Saxon countries and researchers and the viewpoint of the continental law systems. In this paper the emphasized question is analysed through these two different approaches according to the following premise: the Anglo-Saxon legal thinking defining the current development of labour law bears significant differences related to the labour law regulation – which means the direct regulation of labour market – and to the legal guarantees behind employment as well. From the viewpoint of the labour market two main questions are examined in this paper: on the one hand, the expected and necessary level and method of public intervention in connection with social rights, and on the other hand the deepness of the intervention of labour law into the social relations driven by the market.

Keywords: *reflexive labour law, human capital, flexicurity, ability-theory, soft law tools.*

In our study, we undertook to collect, systematize and collide the regulatory issues that essentially determine the labour law science today. In our view, individual authors and viewpoints can react separately to the different parts of social and economic processes, however, they are only partial solutions without revealing their relations. The criticism is based on the scorching results. In our study, we tried to solve the collisions by interpreting economic, labour and social law views jointly. The dual view of co-authorship has helped us to revise our own ideas again and again, or to draw conclusions side by side or even against each other. The aim of our work is to widen labour law researches which are full of debates and dilemmas by combining the ones processing side by side, and at the same time to enrich our own research work with new methods and ideas. These new theories separately try to break through the rigid

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[**] The study was conducted in the framework of K117009 research entitled *The requirement of equal employment in the framework of HR trends reflecting changing labour law expectations*. The National Office for Research, Development and Innovation (NKFIH), under the contract number of K117009. Associate Professor, PhD, University of Debrecen, Faculty of Law and Political Sciences, Department of Agricultural, Environmental and Labour Law (e-mail: rab.henriett@law.unideb.hu).

[***] PhD Candidate, Deák Ferenc Doctorate School of Law, Miskolc, attorney (e-mail: drszollosandreajudit@gmail.com).

framework of the legal regulation and find solutions to the problems outlined. Our opinion is that although they have different starting bases, perspectives and suggest different solutions, they can be combined based on their common goal. The curve of our analysis is provided by these connection points. Accordingly, we divided our study into sections by grouping the results of the individual areas and maintained the interoperability between the theories by keeping the references between the points. We are planning to justify our hypothesis by providing our conclusions or to detect the lack of a reasonable relationship.

1. Changes in labour law regulations and labour market needs

Labour law does not only appear in the context of employment relations through legislation since the parties' agreement in this area is of decisive importance. Legal regulations beyond *hard law* - or we can call them *soft law* - have many forms in labour law that are widespread in Anglo-Saxon legal thinking. In general, both in the case of Anglo-Saxon and continental jurisdictions, we can start from self-regulation mechanisms within the work organization, organizational patterns, or from the organizational culture itself. In addition, stimuli arriving from outside the organization and the employment management tools required by competition can also be grouped here. In defining the content of the employment relationships, the principle of contractual freedom gains an increasing role, which strengthens the enforcement of *the partnership principle* in labour law. This also means that in the employment relationship based on Fordist traditions, the extensive right of instruction, control and supervision, which characterizes the employer, softens. This softening can be observed in certain atypical working relations, such as teleworking and outworking.

The enforcement of partner relationships and the need for dispositivity emerged in a labour market environment in which people change work places more frequently, work relationships for a definite period of time, seasonal work and labour hire are more frequent. Many people have become self-employed, the working time is changing flexibly, the nature of the work has become more diverse and flexible. The economic environment has also changed since we live in a knowledge-based society, and the economy must keep up with technological innovations and changing consumer demands. Employers must respond promptly to changes in tastes and create a work organization that can adapt effectively and quickly to the changing needs. Thus, the question may rightly arise: *is it still the responsibility of the law to assure workplace safety, or has time gone beyond that* and it rather has to protect income and employability?[1] The response of labour law regulation was the application of

[1] About labour law changes see for example: Deakin, S.–Morris, G. S.: *Labour Law*, 6th Edition. Hart Publishing. Oxford and Portland, Oregon, 2012, 30–37., 131–190.; Deakin, S.–Wilkinson, F.: *The Law of the Labour Market. Industrialisation. Employment and Legal Evolution.* Oxford University Press, Oxford, 2005; Blainpain, R.–Hendricks, F.: *European Labour Law*. Kluwer Law International, The Netherlands, 2010; Veneziani, B.: The Employment Relationship. In: Hepple, B.–Veneziani, B. (eds.): *The Transformation of Labour Law in Europe. A Comparative Study of 15 Countries 1945-2004.* Hart Publishing, Oxford and Portland, Oregon, 2009; Deakin, S.: The Contribution of Labour Law to Economic and Human Development. In: Davidov, G.–Langille, B. (szerk.): *The Idea of Labour law.* Oxford University Press, Oxford, 2011, 156–178; Freedland, M.–Countouris, N.: The Legal Characterization of Personal Work Relations and the Idea of Labour Law. In: Davidov, G.–Langille, B. (eds.): *The Idea of Labour law*. Oxford University Press, Oxford, 2011, 190–208.

the concept of 'flexicurity'[2]. *Flexicurity* is a social and labour market programme, one element of which is the nature of labour law regulation. Auer and Gazier differentiate four programmes: flexibility, flexicurity, transition labour market and ability programmes[3]. In the flexicurity programme, flexible measures should be followed by security measures, which are tools from beyond the actual labour law regulation. Thus, a more relaxed employment protection system should be supported by an active labour market policy, a strong job search support system and a sustainable social care system[4].

In addition to flexibility, an important topic of this paper is the analysis of the regulatory way and level of security. All this means the intensity of legal guarantees in a legal relationship which is still motivating for a flexible employer to keep the legal relationship under labour law.

The question of flexicurity, however, involves *dealing with the problems of vulnerable groups*, which basically means two challenges for labour law: creating, if necessary, rules protecting employment and enforcing them. To justify this hypothesis, the present study intends to designate the boundaries by the joint interpretation of the theory emphasising guarantees or that of the priority of the market.

Social exclusion relates to many groups who are unable to take advantage of the labour market and therefore, in their case, the legislator aims to increase the employment rate by means of macroeconomic policy.

In the case of the vulnerable group, such as pregnant women, child-raising parents, disabled people, women and young workers, the enjoyment of economic and social rights requires a strong protection from labour law while market conditions demand less stringent legislation from the legislator. It seems that the provision of social rights by the state is outlined in conflicting interests from the employer in the labour market regulation. This can be traced back to the traditional roles of the employer and employee and their positions. Moreover, we must not ignore that the position of the classical employee is significantly different from that of self-employed or atypical workers[5].

[2] About the concept of *flexicurity* see for example: Wilthagen, T.: Flexicurity: A New Paradigm for *Labour Market Policy Reform?* Berlin: WZB Discussion Paper FS I, 1998, 98–202; Ashiagbor, D.: 'Flexibility' and 'adaptability' in the EU employment strategy. In: Collins, H.–Davies, P.–Rideout, R. (eds.): *Legal Regulation of the Employment Relation*, London/Dordrecht: Kluwer Law International, 2000, 373–401; Wilthagen, T.–Tros, F.: The concept of 'flexicurity': a new approach to regulating employment and labour markets, *European Review of Labour and Research*, 2004/2, 166–186.

[3] Auer, P.– Gazier B.: Social and labour market reforms: four agendas. In: Rogowski, R.–Salais, R.–Whiteside, N. (eds.): Transforming European Employment Policy. Labour Market Transitions and the Promotion of Capability. Edward Elgar, Cheltenham, UK, Northampton, Ma, USA, 2011, 33–37. These reforms, with the exception of a capability-based reform, contain programs affecting labour market policies at micro- and macro level. They are aimed at the management of unemployment, low wages, inequality and low employment rates.

[4] See more about this: Auer, P.–Gazier, B.: i. m., 33–37; Guideline 21 of the Integrated Guidelines for growth and jobs for the period 2005-2008: „Promote flexibility, combined with employment security and reduce labour market segmentation, having due regard to the role of social partners." https://2007-2013.espa.gr/elibrary/integrated_guidelines_Growth_Jobs_en.pdf (2017.02.15.); Similarly: Guideline 7 of the Europe 2020 Integrated Guidelines for economic and employment policies of the Member States and of the Union. http://ec.europa.eu/eu2020/pdf/Brochure%20Integrated%20Guidelines.pdf (2017.02.15.).

[5] The dilemma is based on the classical *worker-employee* problem, arising from the conceptual differences and uncertainties that appear in the national and international literature, which therefore results in uncertainty regarding the role of labour law. See for example: Countouris, N.: *The Changing Law of the Employment Relationship*. Ashgate Publishing, Aldershot, 2007; Freedland, M.: *The personal employment contract*. Oxford University Press,

In today's labour market regulation, *new regulatory techniques* are needed, too, as opposed to the previous hierarchy- and instruction-based system. This all follows directly from the principle of partnership. Such techniques are for example, tax incentives for employees and self-employed workers, the operation of employment pension schemes, shareholding of workers, temporary subsidies to business organizations if they employ long-term jobseekers.

The new information and consultation mechanisms that favour partner relations between the employer and the employees' community are also needed because of the changed labour market needs.

Human rights struggles, among others the enforcement of social rights and globalization, which gained strength from the second half of the 20th century, have a major impact on the directions of labour law regulations. The outcomes of human rights emerge as a bastion from the whole labour law regulation, for example, equality, the free choice of work and occupation, and the right to social security[6].

2. Reflexivity of labour law regulation and significance of skills

The question arises whether throughout these changes is it really only labour law regulations which interfere in the social and economic processes? Isn't it rather that labour law regulation, in a continuous *interaction* with the economic and social environment surrounding it, follows the labour market processes, responding to these processes subsequently? It cannot be neglected that the regulations of branches and fields of law are mostly shaped by problems of legal relevance created by life, of course, depending on (legal) political decisions. Labour law regulation, besides transforming its own rules in a self-reflexive way, responds to the social, economic, and thus labour market processes, too.

The issue we are discussing therefore concerns the reflexivity of labour law regulation. The term *reflexive labour law* was first used by *Rogowski* and *Wilthagen* in 1994. According to the theory, the legal system has to be considered as an autonomous system, similarly to the political and economic systems. The common feature of the three subsystems is that they all have to protect their own institutions. By separating law, politics and the market, a decentralized social structure is created, in which the power is divided among the autonomous, but interrelated institutions. The autonomy of the legal system is a precondition for the rule of law and the objective administration of justice. It would not be appropriate to separate the legal system from its external environment. If the legal system were to lose its independence, it would simply become an expression of political power. At the same

Oxford, 2003; Gyulavári T.: *A szürke állomány. Gazdaságilag függő munkavégzés a munkaviszony és az önfoglalkoztatás határán. (The Gray Stock. Economically Dependent Work on the Boundaries of Employment and Self-employment.)* Pázmány Press, Budapest, 2014; Kiss Gy.: A munkavállalóhoz hasonló jogállású személy problematikája az Európai Unióban és e jogállás szabályozásának hiánya a Munka Törvénykönyvében. *Jogtudományi Közlöny*, (The Problem of a Person with a Status Similar to That of a Worker in the European Union and the Lack of Regulation of this Status in the Labour Code. *Jurisprudence Gazette*. 2013/1, 1–14., Bankó Z.: *Az atipikus munkajogviszonyok.* (*Atypical labour relations.*) Dialóg Campus Kiadó, Budapest–Pécs, 2010.

[6] About the challenges of labour law, see: Collins, H.–Ewing, K. D.–McColgan, A.: *Labour Law*. Cambridge University Press, Cambridge, 2012, 38–44. See also: Rogowski, R.–Salais, R.–Whiteside, N. (eds.): *Transforming European Employment Policy – Labour Market Transitions and the Promotion of Capability*. Edward Elgar Publishing, Cheltenham, 2011, 229–242; Owens, R.: The Future of the Law of Work. A Review Essay of Labour Law in an Era of Globalization: Transformative Practices and Possibilities. *Adelaide Law Review*, 2002/23, 345–373.

time, if we were to separate the law from other social subsystems, we would impede social impacts, which would thus less guarantee its effectiveness. This is particularly true in the case of labour law, which is assessed through its social and economic effects. Therefore, we can regard it as self-reflexive and self-sustaining. *It is closed regarding its organisation, though open in a cognitive way.* Organizational closeness refers to the fact that law creates law, namely, it is able to reproduce itself on the basis of the feedback of its inner operation. Cognitive openness means that the system is building from external signals. Therefore, law, politics and the economy interact with each other. According to this reflexive legal theory, there is a certain degree of interaction among the systems, however, this does not mean that law, politics or the economy are completely open to the impacts of other systems[7].

Consequently, we can state that law uses indirect control techniques to influence, which is its self-regulation and self-reflexion. Legal regulations give us little information about how the actors of another system receive them, therefore it is necessary to understand the legal context of social sciences besides analysing internal processes. *After its example, the European labour law and the labour law of the Member States can be interpreted in a reflexive way, too.* All this can also be traced in the development of the European social policy and social rights closely linked to the European labour law. Since in the European Union, the goals of employment and social policy complement and fulfil each other. The example of a reflexive labour law regulation is the Open Method of Coordination (OMC), launched by the European Council in Lisbon in March 2000[8]. Subsequently, the OMC was incorporated into the Employment Strategy, and it

[7] About reflexive labour legislation, see: Wilthagen, T.–Rogowski, R. (eds.): *Reflexive Labour Law. Studies in Industrial Relations and Employment Regulation*. Kluwer, Deventer, Boston, 1994; Wilthagen, T.–Rogowski, R.: Reflexive Labour Law. An introduction. In: Wilthagen, T.–Rogowski, R. (eds.): *Reflexive Labour Law. Studies in Industrial Relations and Employment Regulation*. Kluwer, Deventer, Boston, 1994; ROGOWSKI, R.: Industrial Relations, Labour Conflict Resolution and Reflexive Labour Law. In: Wilthagen, T.–Rogowski, R. (eds.): *Reflexive Labour Law. Studies in Industrial Relations and Employment Regulation*. Kluwer, Deventer, Boston, 1994; WILTHAGEN, T.: Reflexive Rationality in the Regulation of Occupational Health and Safety. In: Wilthagen, T.–Rogowski, R. (eds.): *Reflexive Labour Law. Studies in Industrial Relations and Employment Regulation.* Kluwer, Deventer, Boston, 1994; ARTHURS, H.: Corporate Self-Regulation: Political Economy, State Regulation and Reflexive Labour Law. In: Bercusson, B.–Estlund, C. (eds.): *Regulating Labour Law in the Wake of Globalisation. New Challenges, New Institutions.* Hart Publishing, Oxford and Portland, Oregon, 2007, 19–36. Barnard, C.–Deakin, S.–Gillian, S. M.: *The Future of Labour Law*. Liber Amicorum Hepple, B. QC, Hart Publishing, Oxford and Portland Oregon, 2004; Craig, J. D. R.–Lynk, S. M. (eds.): *Globalization and the future of Labour Law*. Cambridge University Press, Cambridge, 2006.

[8] See: Trubek, D.–Trubek, L.: Hard and Soft Law in the Construction of Social Europe: the Role of the Open Method of Co-ordination. *European Law Journal, Review of European Law in Context*, 2005/3, 343–364; DEHOUSSE, R.: *The Open Method of Coordination*: *A New Policy Paradigm?* Paper presented at the First Pan-European Conference on European Union Politics "The Politics of European Integration: Academic Acquis and Future Challenges." Bordeaux, 26-28 September 2002. http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.538.1209&rep=rep1&type=pdf (2017.04.21.); Hajdú J.: *Az Európai Unió szociális joga – különös tekintettel a szociális biztonsági koordinációra /Social law in the European Union – Social security coordination*. JATEPress, Szeged, 2008, 7–9; GYULAVÁRI T.: Európai Szociálpolitikai Menetrend. *Esély*, 2001/5, 92–109; COM(2000) 379 final Social policy agenda. Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions; COM(2008) 412 final Renewed Social Agenda: Opportunities, Access and Solidarity in the 21st century Europe. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions; Bercusson, B.: *European Labour Law*. Cambridge University Press, Cambridge, 2009, 168–198.

provided a completely new direction - based on non-legal mechanism - for policy forming and implementation. However, since it was introduced in many areas, *the coordination of the coordination* was needed in 2003. A wider involvement of actors was introduced at Member State levels and economic, employment and social open coordination mechanisms were linked to enhance mutual efficiency. The results of the anti-unemployment campaign, *the employment and economic trends, and the reforms of the open coordination mechanism traced within the social policy, too,* led to *the interconnection of social and economic processes*. Thus, national action plans were made integrated in the fields of social exclusion, pension schemes and health care, and became known as Joint Social Protection Report from 2007. Certainly, the OMC has become a determining tool for EU policy-making[9].

Reflexive labour law legislation has a major role in developing a social policy in which as many people live well as possible according to their abilities and enjoy social rights in full. In addition to *Freedland* and *Countouris*, *Deakin* and *Rogowski* refer to *Sen* and *Nussbaum*'s ability theory, too, and they link all this to the labour market (see Sen's theory in point 3)[10]. Labour law is aimed at not only balancing the imbalance between the parties. It also has to be one of the aims of the labour law to promote the principle of autonomy and equality in work, to ensure decent living and to assure social rights by extending individual capacity. This theory goes beyond the boundaries of the labour contract and applies to the working man and human rights form the limits of employment relationship. It gives more room to collective bargaining and thus to the principle of partner relationship in labour law. Thus, the relationship related to the labour law and the market formulated by *Deakin* can logically be deduced, too. Furthermore, the necessity of human resource management and the presence of non-labour law regulations provided by it can be justified easier.

Among the constitutional aspects of the rule of law, the fact that fundamental principles and fundamental rights enshrined in the constitution respecting international human rights and fundamental freedoms directly determine the frameworks and constituents of legislation is of primary importance[11]. This effect obviously does not only have to prevail within the framework of constitutional legislation, but also in the full legal system of each country. The limitation of the guarantees from material point of view will balance the enforcement of market demands with the system of the protection of fundamental rights[12]. On the basis of the liberal labour law approach, this creates an automatic equilibrium situation, because if the level of labour law protection is alleviated, the role of the protection of fundamental rights is strengthened.

[9] Deakin, S.–Rogowski, R.: i. m., 230–238.

[10] Nussbaum, M.: *Sex and Social Justice.* Oxford University Press, Oxford, 1999, 41-42. About the relationship of the market and ability-theory see: Deakin, S.: Social Rights and the Market. An evolutionary Perspective. In: Burchell, B.–Deakin, S.–Michie, J.–Rubery, J. (eds.): *Systems of Production. Markets, organisations and performance.* Routledge, London, New York, 2005, 75–88; Deakin, S.–Rogowski, r.: Reflexive labour law, capabilities and the future of social Europe. In: Rogowski, R.–Salais, R.–Whiteside, N. (eds.): *Transforming European Employment Policy. Labour Market Transitions and the Promotion of Capability*. Edward Elgar, Cheltenham, UK, Northampton, MA, USA, 2011, 229–254.

[11] Ádám A.: Az emberi és állampolgári jogok jellegéről és korlátairól. / *The Nature and Limits of Human and Civil Rights. Jogtudományi Közlöny*, (Jurisprudence Gazette), 1993/11–12, 409–421.

[12] The system of fundamental rights and their collision is comprehensively covered by the monographic analysis of the following work: Kiss Gy.: *Alapjogok kollíziója a munkajogban.* / *The Collision of Fundamental Rights in the Labour Law*. Justis Bt., Pécs, 2010.

The evaluation of politics and institutions is thus determined by their ability to fulfil the individual's abilities. For this reason, those who have been left out of the labour market for a long time or who are threatened to lose their jobs have the right to claim concerning the functioning of the labour market why they have no access to paid work. Therefore, labour law has not only the role of reducing the risk of exclusion, but also that of increasing the freedom of mankind through labour relations. For the well-being of an individual depends not only on his physical ability but also on the economic and social environment surrounding him. The legal system either helps or frustrates individuals in achieving their goals. The ability-based approach for understanding the relationship between the legal system and the market (labour market) is based on three assumptions:

On the one hand, the market is not an automatic mechanism, as it is supported by institutions with different functions. The legal regulation has its role here, too, since it can transform the operation of the market. This is the key to the co-development and interaction between the legal system and the economy.

On the other hand, the freedom of choice of individuals in the labour market also depends on how well the institutions can develop their skills. That is, access to the market is not only a negative freedom of the individual, but also a real ability to enjoy the economic and social rights recognized by the legal system.

Thirdly, in order to ensure the effective co-development of economic and legal institutions, a reflexive and learning-centred regulatory and governmental concept is needed. Namely, we must learn from coordination problems through the diversity of living models[13].

Deakin and *Rogowski* believe that in the Supiot report, the very issue arose that is how the labour law can be re-regulated in a way that it can cope with the market and organizational environment. Supiot did *not regard the rigidity of the Fordist model and the appearance of new technologies* as the motive for the change we mentioned. *In addition to these, he highlighted* the challenges of loss of income due to unemployment, disease and aging, and problems arising from the inequality of dependent relations. *Collective labour law institutions were incapable of providing effective protection to workers.* The main reason for this is that social and economic rights[14] were based on institutions that were built on stable employment. His proposal was a labour law reform that looked beyond employment and linked protection not only to employment, but it also went beyond it and used new regulatory techniques and policy initiatives. This included introducing labour market membership / status instead of employee status and social drawing rights, which would also allow lifelong learning resources to be used[15]. We will return to this topic when analysing the labour market judgment of labour law in the works of other authors[16]. This conception is entirely consistent with the ability-based approach. All this contributes to making the labour market more flexible by introducing more and more reforms in national rules that were based on the reconciliation of work and family life, and in the absence of

[13] Ádám A.: i. m., 238–241.

[14] About the development of economic and social rights see: Kaufmann, C.: *Globalisation and Labour Rights. The Conflict between Core Labour Rights and International Economic Law*. Hart Publishing, Oxford and Portland, Oregon, 2007.

[15] See in more details: European Commission: *Transformation of labour and future of labour law in Europe*. Final report. June 1998, p. 23–24.

[16] Arthurs, H. W.: *Labour Law after Labour*. Osgood CLPE Research Paper 2011/5, 12–29.

employment, the payment of social security contributions gave individuals a sense of security. Legal instruments can thus be suitable solutions reflecting not only labour market needs but also the benefits of employees even in the absence of an agreement by the parties. However, the appropriate legal instruments can be expected not primarily from the framework of hard legal solutions but from the more easily or 'unnoticedly' formulated field of soft law. For example, in the European Union, the OMC helped to launch the process, which adopted soft law guidelines instead of hard law regulations. Let us just think about parental leave, fixed-term and part-time directives. Reflexive elements appeared in this regulation, too, as the collective bargaining and the possibilities of flexible implementation played a major role in the drafting of the directives. The purpose of the directives was based on the principle of equal treatment, the reconciliation of work and private life and the more flexible employment relationship[17].

The rreflexive labour law regulation puts the emphasis from the problem of deregulation on the interaction and co-development of the functioning of the market and the legal system. The normalization of atypical working conditions is thus placed in another context and it strengthens the need for a social and employment policy where institutions allow everyone to enjoy economic and social rights and achieve their individual goals. For its realization determines the effectiveness of economic and legal institutions.

3. Human capital in the relationship between labour and social legislation and the labour market

The above described new role of labour law is largely related to *the human resource management approach in economics*, which represents employees as human capital, thereby associating economic rationality with labour law legal protection. However, this role of legal protection cannot only be found in the social law guarantee scheme of the labour law but also in economic theories that reflect market considerations. The importance of human capital in economics has also been gradually overwhelmed with a moral dimension. The most prominent representative of this approach is *Sen*. His theory can be studied from a number of perspectives, such as the dimension of social protection, the relationship between the law-market-society subsystems and the relations of the labour market. The means of labour and social legislation provide the framework for labour market regulation. Those explained relating to the reflexive labour law regulation gain a specific meaning in this chapter.

In this context, *Sen* stated that economic development cannot be measured only by economic indicators, but it is necessary to integrate aspects other than economic indicators into the considerations determining development, i.e. the scope of economic operators needs to be expanded.[18] One of its decisive elements is the power of human capital - namely, the freedom of people to act - which *must be interpreted as an economic factor in relation to the market*, too[19]. However, to increase the role of human capital, it is essential to take into account the labour and social legal instruments, as this is the (legal)

[17] Deakin, S.–Rogowski, R.: i. m., 241–243.

[18] Kun, A.: *A munkajogi megfelelés ösztönzésének újszerű jogi eszközei.* / *New Legal Instruments for Encouraging Labour Law Compliance.* L'Harmattan-KRE, Budapest, 2014, 44–45. [Hereinafter referred to as: Kun (2014)].

[19] Sen, A: Work and rights. ILO. *International Labour Review*, 2000/2, 119–129.

environment that determines the scope of the labour market actors. On the one hand, the employer's possibilities, and on the other hand, the guarantees to protect the employee. Thus, we get to the point again that the balanced functioning of the labour market *can be ensured by the balance of labour and social law*, so maintaining that balance is necessary in the development of law. In *Sen's* view, for example, economic opportunities, political freedom, social benefits, guarantees of transparency and security of life are to be considered in their context and by their collective enforcement individuals are to become active promoters of change, not just passive recipients of benefits[20]. Namely, this is how the guarantees of development can be realized. In this context, social needs also appear as an indispensable condition for development and thus they become a part of the general needs of economic operators.

As we have already mentioned, this viewpoint is not capable of introducing substantive legal solutions by rigid rules (by *hard law*) because that way the ability to adapt quickly and flexibly would come to an end, which is why it is necessary to take such a view into account. *Market considerations can become aspects of employment primarily by means of tools beyond labour law*, which, on the one hand, represent the appearance of a variety of compliance incentives, a kind of *soft law* self-regulation methods.[21] On the other hand, through the tools developed by human resource management, by means of the demands for suitable labour law regulation and the need for flexibility and contractual freedom, namely, by efforts made in order to weaken the labour law and to reduce the level of the social protection they can be in the limelight of the labour law. Answers to these questions belong no longer to the field of economics, but to that of law[22] and, in particular, they cause dilemma to the labour law since the relationship between the law and the economy is a constantly changing system of relations. For this reason, the goal is not the creation of a single equilibrium position but the development of the legal regulation which ensures continuous development causes the dilemma of the labour law.

Accordingly, the study of the relationship between the labour market and the labour law has become a research field within the science of labour law, therefore we referred to the relation between the changes in labour law regulations and labour market demands under section 1. In the Anglo-Saxon area, researchers are in a better position because the rigidity of statutory law in many cases does not bind them. However, the relationship between the labour market and labour law needs to be analysed even if it is accepted. *Deakin* examined in detail the role of labour law in market growth, i.e. the integration of human capital considerations into labour law. Accordingly, he grouped the market-driven role of the labour law into market-restricting, market-correcting and

[20] Sen, A.: *A fejlődés mint szabadság*. / *Development as Freedom.* Európa Könyvkiadó / Europa Publishing House, Budapest, 2003, 11.

[21] Alhambra, M. A. Garcia-Muñoz–Haar, B. P. Ter–KUN, A.: Soft On The Inside; Hard for The Outside: An Analysis Of The Legal Nature Of New Forms Of International Labour Law. *The International Journal of Comparative Labour Law and Industrial Relations*, 2011/4, 337–363.

[22] About the role of soft law see in detail: Blutman, L.: In the Trap of a Legal Metaphor: International Soft Law. *The International and Comparative Law Quarterly*, Vol. 59, 3/2010. 605–624; KUN A.: A puha jog (soft law) szerepe és hatákonysága a munkajogban – Az új Munka Törvénykönyve apropóján. (The Role of Soft Law and Its Effectiveness in Labour Law – With Regard to the New Labour Code) In: Kartona Klára–Szalai Ákos (szerk.): Hatékony-e a Magyar jog? (Is Hungarian Law Effective?) Budapest, Pázmány Press, 2013, 83–115.

market-creating functions[23]. It is possible to build this relationship with tools within and beyond labour law, but it must also be added that any self-regulatory mechanism can gain space in the system of legally binding legal sources if it is needed. Recognizing this process - together with the independent development path of labour law - regardless of the theoretical starting point, we must take into consideration that this will mean a post-reflection as a result of current processes. The Hungarian labour law defines as an essential path of self-regulation, for example, that any agreement between the parties can be assumed as a contractual form, furthermore, in the case of a larger group of employees, this agreement is also formulated by law in the form of a collective agreement. As an employer-controlled regulatory process, we can point out the creation of *internal rules*, which is already recognized by the Hungarian law as an actual labour law act[24]. The role of labour law is *simply the shifting of employment issues from the level of individual interests to community interests, and thus to the normative regulatory area*[25]. The current trends in labour law are based on the results of these aforementioned searches, i.e. they are looking for the answer for the question of what the role of labour law can be from the aspect of serving the needs of the labour market sensitive to economic development. This issue must be examined in the context of this study, as it also involves the question of the level of legal protection in employment relationships. As we have drawn up from several angles, the strength of *Sen*'s economic theory is that it raises human capital and economic development to the level of a fundamental right, a protected value. This point of view is so embedded in the science of labour law that, as *Attila Kun* also highlights[26] –*Langille*, based directly on *Sen*'s views, regards human resources as a moral basis for labour law development[27]. In such an environment, the assessment of employees is transformed regardless of legal regulation. It is not difficult to imagine that, irrespective of the level of social protection, the value of human resources is reflected in the rights granted to employees, in establishing the framework of the employment relationship, and in determining the content of the employment contract. Nevertheless, the *Sen* theory and the *soft law* solutions are not suitable for establishing the protection of all actors in the labour market without legal guarantees. For the starting point is the concept of human capital. However, an employee who does not have such a high level of 'value' in the labour market can only be placed in a similarly protected position in the case of labour law protection. In our opinion, however, it is not necessarily labour law, or not just labour law that can overcome these disadvantages, since through the priority management of the principle of equal treatment or the application of active tools of employment policy, the law undertakes to formulate a comprehensive – beyond labour law- solution by means of social and labour

[23] Deakin, S.: The Contribution of Labour Law to Economic and Human Development in: Davidov, Guy–Langille, Brian (eds.): *The Idea of Labour Law*. Oxford Press, New York, 2011, 156–159.

[24] See Article 17 of Act I of 2012 on the Labour Code (Mt.), which names the employer's code among legal declarations.

[25] *Hepple* formulates similarly: „Labour law stems from the idea of the subordination of the individual worker to the capitalist enterprise…" Idézi: DEAKIN, S.–MORRIS, G. S.: *Labour Law (5th edition).* Hart Publishing, Oxford and Portland, Oregon, 2009. See original source: Hepple, B. (ed.): *The Making of Labour Law in Europe.* Mansell, London, 1986, Introduction, 11.

[26] Kun, A (2014): i. m., 45.

[27] Langille, B.: Labour Law's Theory of Justice. In: Davidov, G.–Langille, B. (eds.): *The Idea of Labour Law*. Oxford University Press, New York, 2011. 112; Hasonló célokat fogalmaz meg Vosko – Vosko, Leah F.: Out of the shadow? In: Davidov, G.–Langille, B. (eds.): i. m., 368.

market programmes (see flexicurity concept).

The science of labour law therefore needs to examine whether *labour law is a legal instrument for economic regulation or a guarantee that creates a brake*. This dilemma defines the work of theoretical professionals working in the field of labour law today. The problem is where to place labour law regulation on the scale between the two extreme points of view and at which point it is necessary for the law to interfere with the functioning of the market. The designation of this cannot be decided on the basis of scientific theories, but responding to the labour market processes; it depends on the sensitivity of each legal system and its creators and users. In this context, *Arthurs* attempts to make suggestions in the direction that labour law cannot be limited to the legal status of employees under the employment relationship [28] while also suggesting that labour law is itself a guarantee system and thus the function of labour law is to ensure the necessary guarantees for the employees. Though fundamentally inconsistent, more conservative approaches reflecting continental legal concepts – see for example, the viewpoint of *Weiss*, who takes a stand in favour of direct legislation regarding the aims and methodology of labour law [29] – also recognize the need to renew labour law in order to make regulatory instruments more efficient[30] So, on the whole, we can conclude concerning this issue that, following the continental legal approach, even those arguing for the classical *hard law* do not averse to the renewal of labour law, however, they consider it necessary to fix the legal framework of labour market processes as a guarantee, namely to protect employees in a weaker position on the basis of unequal power.

To put it simply, the question can also be defined as whether there is a direct regulatory role for labour law, or it just has to provide legal framework or guarantees for employment. In both alternatives, we can acknowledge the guarantee position of labour law, which can be renewed just as the labour law itself. This also arises from the self-reflexive nature of labour law regulation, which in this respect can be justified by the need for renewal due to changing needs arising from the characteristics of the labour market.

The specific relationship between labour law actors cannot be disregarded when assessing the question, since the relationship between the employee and the employer, which is basically an unbalanced hierarchical relation through the right of instruction, also determines the realistic level of flexible adaptation. An example of this is *Bellace*'s analysis, who also re-examined the human right assessment of labour law in the light of international conventions and the EU law. From his summary, it can be seen that employers' and employees' interests are opposing regarding this issue[31]. Therefore, *the level of the impact of labour market processes places the regulatory role of labour law into a different position.* The protection of employees justifies the granting of labour law guarantees, not just framework, and moreover, it means raising it to a higher level if we also accept the direct regulatory role of labour law. On the other hand, in the position of employers who are exposed to

[28] Arthurs, Harry W.: *Labour Law after Labour*. Osgood CLPE Research Paper, 2011/5, 12–29.

[29] Weiss, M: Re-Inventing Labour Law. In: Davidov, G.–Langille, B. (eds.): i. m., 43–57.

[30] Howe, J: The Broad Idea of Labour Law. In: Davidov, G.–Langille, B. (eds.): i. m., 299–300.

[31] Bellace, J.: Who Defines the Meaning of Human Rights at Work? In: Ales, E.–Senatori, I. (eds.): *The Transnational Dimension of Labour Relations. A new order in the Making?* Collana Fondanzione Marco Biagi, G. Giappichelli Editore, Torino, 2013, 111–135.

labour market processes and work in constantly changing conditions, the recognition of fundamental rights is often questionable[32], consequently the direct regulatory role of labour law is to be minimized.

From the previous issue the following problem is adequately followed: deciding whether the direction of legislation must be in line with market needs or should it be a higher-level approach. There is also a great number of standpoints in labour law concerning this matter. *Researchers approaching from a more conservative, continental point of view* [33] clearly want to make labour law independent from economic expectations, viewing their close interdependence as a loss of the position of the labour law. To justify their view, *representatives of more modern standpoints* primarily rely on Anglo-Saxon law, which basically attributes a different role to substantive law, and they expressly recognize that the content of labour law is dictated by the market. Here we refer to the reflexive nature of labour law. According to *Deakin*'s approach, the outcome of labour market trends and changes basically determines the closely related labour law.[34] Furthermore - as we have repeatedly referred to - it appears in the labour law literature that some authors extend the scope of labour law, too, so for example, *Vosko* argues that the full spectrum of labour market relations is aimed at by the labour law, without limiting the scope to the segment of employment relating to employment relations[35]. *Mitchell* and *Arup* even define labour law as a "labour market law" on this basis[36]. This difference is reflected in the choice of the regulation level and in the adoption of the aforementioned soft law solutions as substitutes for statutory law, which is not yet mature in the labour law literature.

Starting from the assumption that *soft law* tools can integrate new elements, even in a way acceptable for human resource management trends, into employment relations in the absence of specific norms, too, then the question arises whether the regulatory direction of soft law would be more appropriate than legislation tailored according to market needs. This issue has an entirely different role in Anglo-Saxon law than in continental jurisdiction. According to the former, this basically depends on a resolution, while in the case of continental legal systems, the problem of law enforcement and legal protection is immediately raised in relation to the question. The statutory law thinking in the case of continental legal systems also means that we are prepared for the case where enforcement is required. Namely, the issues governed by the law are regarded safer, and they represent a higher level of legal protection for law enforcement as compared to voluntary legislation and law application. From this point of view, regulation cannot be completely shifted towards *soft law*, as it can jeopardize the legitimacy of individual labour law. Beside the current functioning of the economy, the vulnerability of the labour market players is very strong, so even the circle of general employees may not be left alone by labour law and we have not yet mentioned the need to protect disadvantaged employees in the labour market. In our opinion, the strengthening of the level of the responsibility of economic operators precedes the development of responsible activities of companies (CSR - Corporate

[32] *Bellace* formulates employers' concerns regarding the right to strike. See: BELLACE, J.: i. m., 111–135.
[33] For example, Rolf Birk and Tamas Prugberger.
[34] Deakin, S.–Morris, G.: i. m., 2.
[35] Vosko, Leah F.: i. m., 368.
[36] Quote: Idézi: KUN A. (2014): i. m., 21.

Social Responsibility). Those who lead this path may be able to assure guarantees through self-regulation, however, in the case of those who lag behind on this path (primarily the SME sector or those who do not deal with this because of the lack of relevance of the PR value) the preservation of labour law guarantees is justified now at statutory law level, too. The law-forming role of *soft law* in continental law appears in its hard law-forming power[37]. Or, as the *Fenwick-Novitz* co-authors point out, the significance of modern regulation methods is that they intend to respond to the weaknesses of traditional regulatory modes in an innovative way[38]. The same can be said of the success of the open coordination mechanism, which can respond flexibly and relatively quickly to current needs. However, the open coordination mechanism cannot serve as a solution to the challenges of legislation at a national level.

4. Closing thoughts

Overall, it can be concluded that labour law and social protection systems can be judged uniformly, which cannot disregard economic development. While the primary objective regarding social protection is to increase the protection against economic vulnerability and to provide a guarantee for living at subsistence level, the main demands concerning the development of labour law are to increase flexibility and decision-making autonomy of the parties and to decrease the level of legal regulation. At first glance, the two procedures have contradictory directions. In the present study, however, we have attempted to show that this contradiction is only apparent. For the new focus of labour law development is human capital, which is a value that requires fundamental rights protection and at the same time it is also the key to economic development. Thus, the guarantees of protecting this human value must be provided by labour law in order to promote economic development, (too). This is, however, not only a matter of labour law regulation, but also that of labour market regulation, and it is related to the desire of the area of social law to reduce employees' vulnerability through fundamental rights protection. Ideally, this dual demand - though from a different perspective - leads to the same result regarding the labour market.

It is also safe to say that the legal framework for labour market processes has gone beyond the dimension of employment. The labour market space to which labour legislation can be extended has expanded horizontally. This labour market is influenced by the changes in the economy and society, which increasingly calls for need for a regulatory framework of the labour market to be filled with direct labour law legislation, the content of which shall be filled with hard law tools and – through their effects on hard law - *soft law* tools. Keeping security is still needed, and one way of renewing the guarantee instruments of labour market is to combine these tools. This also means that in defining the legal framework of the labour market, the balance between labour law and social legislation can give employees security. Reducing the level of protection can only be imagined if fundamental constitutional rights are respected. If we accept that the source of the seemingly contradictory employers' and

[37] *Attila Kun* reveals depths even beyond this. See: Kun A. (2014): i. m. However, these aspects are beyond the scope of the main issues examined in this study.

[38] Quote: Kun A. (2014): i. m., 21. See original source: Fenwick, C.–Novitz, t.: Conclusion: Regulation to Protect Workers' Human Rights. In: Fenwick, C.–Novitz, T. (eds.): *Human Rights at Work.* Hart Publishing, Oxford and Portland, Oregon, 2010, 605.

employees' interests is the human being, it seems reasonable to achieve a reduction in the level of protection with respect to general personality rights in order to enjoy the fullest possible economic and social rights.

References

- Ádám A.: Az emberi és állampolgári jogok jellegéről és korlátairól. / *The Nature and Limits of Human and Civil Rights. Jogtudományi Közlöny*, (Jurisprudence Gazette), 1993/11–12
- Ales, E.–Senatori, I. (eds.): *The Transnational Dimension of Labour Relations. A new order in the Making?* Collana Fondanzione Marco Biagi, G. Giappichelli Editore, Torino, 2013
- Alhambra, M. A. Garcia-Muñoz–Haar, B. P. Ter–Kun, A.: Soft On The Inside; Hard for The Outside: An Analysis Of The Legal Nature Of New Forms Of International Labour Law. *The International Journal of Comparative Labour Law and Industrial Relations*, 2011/4
- Arthurs, H. W.: *Labour Law after Labour*. Osgood CLPE Research Paper 2011/5
- Barnard, C.–Deakin, S.–Gillian, S. M.: *The Future of Labour Law*. Liber Amicorum Hepple, B. QC, Hart Publishing, Oxford and Portland Oregon, 2004
- Blainpain, R.–Hendricks, F.: *European Labour Law*. Kluwer Law International, The Netherlands, 2010
- Blutman, L.: In the Trap of a Legal Metaphor: International Soft Law. *The International and Comparative Law Quarterly*, Vol. 59, 3/2010. 605–624
- Bercusson, B.–Estlund, C. (eds.): *Regulating Labour Law in the Wake of Globalisation. New Challenges, New Institutions.* Hart Publishing, Oxford and Portland, Oregon, 2007
- Burchell, B.–Deakin, S.–Michie, J.–Rubery, J. (eds.): *Systems of Production. Markets, organisations and performance.* Routledge, London, New York, 2005
- Collins, H.–Ewing, K. D.–McColgan, A.: *Labour Law*. Cambridge University Press, Cambridge, 2012
- Collins, H.–Davies, P.–Rideout, R. (eds.): *Legal Regulation of the Employment Relation*, London/Dordrecht: Kluwer Law International, 2000
- Countouris, N.: *The Changing Law of the Employment Relationship*. Ashgate Publishing, Aldershot, 2007
- Craig, J. D. R.–Lynk, S. M. (eds.): *Globalization and the future of Labour Law*. Cambridge University Press, Cambridge, 2006
- Davidov, G.–Langille, B. (szerk.): The Idea of Labour law. Oxford University Press, Oxford, 2011
- Deakin, S.–Morris, G. S.: *Labour Law*, 6th edition. Hart Publishing. Oxford and Portland, Oregon, 2012
- Deakin, S.–Wilkinson, F.: The Law of the Labour Market. Industrialisation. Employment and Legal Evolution. Oxford University Press, Oxford, 2005
- Dehousse, R.: *The Open Method of Coordination*: *A New Policy Paradigm?* Paper presented at the First Pan-European Conference on European Union Politics "The Politics of European Integration: Academic Acquis and Future Challenges." Bordeaux, 26-28 September 2002. http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.538.1209&rep=rep1&type=pdf
- Fenwick, C.–Novitz, T. (eds.): *Human Rights at Work.* Hart Publishing, Oxford and Portland, Oregon, 2010
- Freedland, M.: *The personal employment contract.* Oxford University Press, Oxford, 2003

- Gyulavári T.: *A szürke állomány. Gazdaságilag függő munkavégzés a munkaviszony és az önfoglalkoztatás határán. (The Gray Stock. Economically Dependent Work on the Boundaries of Employment and Self-employment.)* Pázmány Press, Budapest, 2014
- Hajdú J.: *Az Európai Unió szociális joga – különös tekintettel a szociális biztonsági koordinációra /Social law in the European Union – Social security coordination*. JATEPress, Szeged, 2008, 7–9; Gyulavári T.: Európai Szociálpolitikai Menetrend. *Esély*, 2001/5, 92–109; COM(2000) 379 final Social policy agenda
- Hepple, B.–Veneziani, B. (eds.): *The Transformation of Labour Law in Europe. A Comparative Study of 15 Countries 1945-2004.* Hart Publishing, Oxford and Portland, Oregon, 2009
- Kartona Klára–Szalai Ákos (szerk.): Hatékony-e a Magyar jog? (Is Hungarian Law Effective?) Budapest, Pázmány Press, 2013
- Kaufmann, C.: *Globalisation and Labour Rights. The Conflict between Core Labour Rights and International Economic Law*. Hart Publishing, Oxford and Portland, Oregon, 2007
- KISS Gy.: A munkavállalóhoz hasonló jogállású személy problematikája az Európai Unióban és e jogállás szabályozásának hiánya a Munka Törvénykönyvében. *Jogtudományi Közlöny*, (The Problem of a Person with a Status Similar to That of a Worker in the European Union and the Lack of Regulation of this Status in the Labour Code. *Jurisprudence Gazette.* 2013/1, 1–14., Bankó Z.: *Az atipikus munkajogviszonyok.* (*Atypical labour relations.*) Dialóg Campus Kiadó, Budapest–Pécs, 2010
- Kun, A.: *A munkajogi megfelelés ösztönzésének újszerű jogi eszközei. / New Legal Instruments for Encouraging Labour Law Compliance.* L'Harmattan-KRE, Budapest, 2014
- Nussbaum, M.: *Sex and Social Justice.* Oxford University Press, Oxford, 1999
- Owens, R.: The Future of the Law of Work. A Review Essay of Labour Law in an Era of Globalization: Transformative Practices and Possibilities. *Adelaide Law Review*, 2002/23
- Rogowski, R.–Salais, R.–Whiteside, N. (eds.): *Transforming European Employment Policy – Labour Market Transitions and the Promotion of Capability*. Edward Elgar Publishing, Cheltenham, 2011
- Sen, A.: *A fejlődés mint szabadság*. / *Development as Freedom*. Európa Könyvkiadó / Europa Publishing House, Budapest, 2003
- Sen, A: Work and rights. ILO. *International Labour Review*, 2000/2
- Trubek, D.–Trubek, L.: Hard and Soft Law in the Construction of Social Europe: the Role of the Open Method of Co-ordination. *European Law Journal, Review of European Law in Context*, 2005/3
- Wilthagen, T.–Rogowski, R. (eds.): *Reflexive Labour Law. Studies in Industrial Relations and Employment Regulation.* Kluwer, Deventer, Boston, 1994
- Wilthagen, T.: Flexicurity: A New Paradigm for *Labour Market Policy Reform?* Berlin: WZB Discussion Paper FS I, 1998
- Wilthagen, T.–Tros, F.: The concept of 'flexicurity': a new approach to regulating employment and labour markets, *European Review of Labour and Research*, 2004/2
- European Commission: *Transformation of labour and future of labour law in Europe*. Final report. June 1998
- Guideline 7 of the Europe 2020 Integrated Guidelines for economic and employment policies of the Member States and of the Union. http://ec.europa.eu/eu2020/pdf/Brochure%20Integrated%20Guidelines.pdf