THE SEPARATION AND REFLEXIVITY OF CIVIL SERVICE LAW[1]

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ABSTRACT: *The civil service law is a very complex area of the legal system. This regulation stays between civil law and public law. We would like to analyse this duality in our paper. The new tendencies move in opposite ways. The civil service law approximates to the labour law in one part of the countries and in the international context as well. This approximation happened the effect of New Public Management. The other tendency is the politicization of the civil service law. The result of the effect of politicization of the civil service law is a particular Hungarian system. The regulations are changed in the last five years many times, and established an special public law interpretation.*

KEY WORDS: *civil service law; administration; labour law; NPM*
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1. INTRODUCTORY THOUGHTS

The question of regulating the performance of work does not only fall under labour law. When it comes to conceptualisation and normalisation, transparency as well as the reasonableness and rationality of emphasizing separation or coherence is very important. The performance of work, putting workforce at someone's disposal, keeps these legal relationships together which takes place in civil law, and following György Kiss's division in the regulatory framework of the private law of work and the public law of work.

Due to the historical development, it is relatively easier to distinguish between performance of work under civil law and labour law. Labour law regulation required self-justification, and it was necessary to explain why subordination is needed in case of work activity performed for someone else, and in some other cases, why not. (Prugberger, 2006)*;* (Kiss, 2001)*;* (Prugberger, 2014) (Deakin, 2012)

In our opinion this constraint to dogmatic explanation led to the emergence of twofold (self-employment - employment), then threefold (self-employment - work performance of

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an employee-like person - employment) models. From then on, employment in relation to other work performance relationships had to be defined in relation to self-employment and contractual engagement. In this context, the contractual *indeterminacy* of service manifested itself as a fundamental demarcation in the work contract.

In Hungary in recent decades, besides the horizontal division of work performance relationships within the legal system, *the vertical division within the wider labour law has been questioned* in the case of performance of work/service in civil service. Civil service law is becoming an autonomous branch of law, at least in the sense of legal policy intention. Without challenging its connection to labour law, its relationship with administrative law to be strengthened is becoming dominant.

All of this is going on parallel to the civil service system becoming more open[2], or close, reflecting the operation of social subsystems. If we were to detach civil service from other social subsystems, we would impede social impacts, which would thus less guarantee its effectiveness. Civil service law (and labour law) is assessed through its social and economic effects. That is why we can regard it as self-reflective and self-sustaining. In its organisation it is closed, however, in a cognitive sense, it is open. Organizational closedness refers to the fact that law creates law, that is to say, it can reproduce itself based on the feedback from its inner operation. Cognitive openness means that the system is built on external signals. That is why law, politics and the economy interact with each other. (Arthurs, 2007); (Craig, 2006); It is true for both civil service law and labour law that *from the point of view of politics* they are the advancing and retreating branches of law. (Kiss, 2001)

The civil service system is becoming more open by the subjectivisation of managerial decisions, which the legislator explains in meeting the need for flexibility. [3] The concept of flexibility, however, involves security issues. In the concept of *flexicurity*, Hungarian legislation places too much emphasis on flexibility issues while the worker's security is neglected. The flexibility of working conditions and easing the stiffness of the Hungarian civil service system must also provide protection against unlawful and arbitrary employer decisions. This is necessary to protect the worker's fundamental human rights. Human rights are the only guarantee to end cogency.

The problem of regulation-deregulation can be mapped in making the civil service system more flexible, in the appearance of open and closed civil service systems, as maintaining and dismantling security regulation. If, in an earlier, fundamentally security regulation (see closed system), we make the concept more receptive, it necessarily entails decreasing the security level of regulation (open or more open system). Civil service reforms introduced in the past decades in Europe have tried to deal with the changes in the economy and society with more or less success.

The study is based on the fact that law is a highly politicised area and political and economic considerations are behind the legislative decisions. We are trying to find rules in regulations which sometimes lack a concerted, conceptual intention of implementation.

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[2] On the flexibility see European Commission Directorate-General for Employment, Social Affairs and Inclusion, Industrial Relations in Europe 2012, European Union 2013. p. 114.

[3] In the report of the European Commission it was also presented that there is a phenomenon of decline regarding the protection in the case of termination of the contract. See Industrial Relations in Europe 2012 p. 141. Section 8 of Act LVIII of 2010 in Hungary prescribed that a relationship of the civil servant can be terminated without notice. It was abolished by the Constitutional Court's decision of 8/2011. (18. II.).

That is why we are trying to stand on the rational ground and to consider aspects that form the basis of objective judgment and can be clarified from the analysis of legal regulation.

In recent years, there have been several publications about the autonomy of civil service law and the transformation of the labour court system. Meanwhile, Act LII of 2016 on State Officials (hereinafter: Áttv.) was born. It is clear that in the regulation of civil service the legislator diverges from the labour law of private sector. We do not want to discuss this divergence in this paper. We do this despite the fact that the 2010 Demmke/Moilanen research into civil service reforms of various cultural, administrative and political traditions found that in the regulation of private sector and public sector decentralisation was approaching due to adopting managerial approaches and HR considerations. (Demke, 2010)

The question arises, though, where we have arrived, where we are going. In what direction are we going on?

Can the divergence of the Hungarian civil service from the private sector be explained in any way?

What effect does the Act on State Officials have on existing civil service law regulation? How much fragmentation takes place in the regulation of civil service? If any. How does state service relationship contribute to making civil service more open or closed?

The forum system of civil service disputes also contribute to autonomy. It is a question how this new forum system unifies civil service law.

Ultimately, our question is if civil service law becomes a separate branch of law, how uniform, coherent and consistent the regulation is. How much does the fundamental constitutional right to equality prevail from the point of view of civil servants?

2. CIVIL SERVICE REFORMS IN GENERAL

Civil service systems have undergone major changes over the last decades, and it is not yet known which changes will be sustainable in the future. It is obvious that these systems are an essential part of the government system. Modern government depends on the work and workers of national civil service to a great extent.

According to an OECD study of 2012, the characteristics of the civil service employment can be described in general terms as follows: the employment of women is higher in relation to the whole economy, employment in part-time and in a fixed-term relationship is widespread, and workers are older. (Industrial Relations in Europe, 2012)

When looking back in time it indeed seems that every "era (…) has a few words that epitomise its world-view and that are fixed points by which all else can be measured. In the Middle Ages they were such words as faith, grace, God, nation; in the eighteenth century they were such words as reason, nature, and rights..." (Waldo, 1948) In civil service reform language changes from time to time. Classical civil service values such as neutrality, stability, hierarchy, autonomy and fairness and standardisation seem conservative, public management reform are characterised by the words *fluent* and *modern*. We tend to believe that the old bureaucratic civil service was bad and the new principle of "good governance" promises more. (Pollitt, & Bouckaert, 2000) Civil service reforms have led to rather controversial results. The bureaucratic model is replaced by the

new civil service, *new public management* organizations, post bureaucratic organizations, position organizations.

Obviously civil service reforms are not judged clearly at all, they are characterised by both successes and failures, and essentially they formulate their reform language as opposed to the "old" one.

It is very difficult to make a comparative analysis of the reform of civil service systems, since the factual and empirical examination of structures is almost impossible. This is even more relevant to examining the results of the reforms. For this reason, the examination of the system, including the assessment of the regulation of the Hungarian civil service system, is likely to pose the risk of displaying bias and perspectives from the author's part. At the same time, the difficulties of comparison lie in the considerable cultural, administrative and legal differences. The concept of civil service is completely different in Britain, France and Poland. (Demke, 2010)

In their research Demmke and Moilanen (Demke, 2010) confirm the OECD (Industrial Relations in Europe, 2012) analysis outcomes as follows: a transition from a centralised to decentralised determination of employment conditions, a shift to contractual or managerial governance, a development of position systems (from career systems to post-bureaucratic systems), a delegation of responsibilities to managers, an alignment of pay levels with private sector practices as well as a change of special retirement schemes. The research, however, considers these changes too broad and too vage a concept, full of paradoxes and ambivalences. Of course, they can be considered as an alternative to the old models, but this does not necessarily mean progress. What is certain is that the post-bureaucratic reform of civil services is gaining ground in all Member States, including Hungary. (Demke, 2010) At the same time, we think it is imperative to consider that the nature and impact of reform is defined by administrative, organizational and cultural traditions as well as politics. That is, the changes in civil service must be studied in the interaction of the legal-economic-political subsystems with regard to their embeddedness mentioned above. According to the Demmke/Moilanen research , it is difficult to classify the reforms implemented by the countries on the basis of similarities. The Eastern European countries are particularly diverse in terms of reforms: they have created hybrid systems with fragile career systems (if at all), less job security for civil servants than in other Member States, no specific pension systems for civil servants, recruitment systems are flexible and mobility flows that are too large. (Demke, 2010)

In the long run it seems promising to combine the efficiency and service capacity of decentralised organisations with the uniform and legalistic nature of hierarchical organisations. In this combination we can see that while there is demand for implementing radical reforms, the protection of old civil service values is also discussed (*value management*). (Demke, 2010)

3. CIVIL SERVICE REFORM IN HUNGARY – THE CURRENT SITUATION OF CIVIL SERVANTS

As mentioned above, the divergence of civil service law from labour law is increasing. However, it is necessary to see that becoming autonomous is an inescapable path. An inescapable path which is contrary to the trends at international level outlined above. It is

based on the public law approach growing since 2010 which took the first steps to differentiate civil service relationships from economic labour law.

The civil service system currently in force is the legislative product of the last 6 years preceded by a relative rest period of twenty years. But, of course, this did not mean that there were no significant changes during those twenty years. However, despite cyclicality, civil service law in Hungarian law - from the middle of the 20th century to the present day - somehow had no choice but to stay on the inescapable path, and by the time it seemed that it had finally set off on the designated path, it was forced into a new paradigm shift. The labour law solution could also be regarded as an inescapable path, just like the trichotomous labour law regulation after the change of regime and the current fragmented mass of rules. Forcing the civil service to the inescapable path is reflected in solutions which interrupted the organic development of a given period by a drastic change. That was the case when the state socialist labour law solution replaced the consistent progress of public law. But the legislator's current reform attempt may be interpreted in a similar way, which seeks to annul long-standing labour rights traditions to bring in public law regulation.

As a result of the above, we can agree with István György that the first major break in civil service pragmatics took place after WWII with the labour law approach coming to the fore. (György, 2015) The recent history of civil service law can be interpreted as a series of reforms and reform attempts.

However, we must add that the current development direction preferred by the legislator does not arise from the natural transformation of the area but the result of an artificial separation. The possibility of separation was naturally encoded in the structure of labour law and civil service law established in 1992. According to the original concept, it was planned to transpose a system already in existence in the Federal Republic of Germany, which would have started from a centrally defined civil service concept. This would have meant abandoning the former organizational principle. Thus, the function of which was the primary function of the institution would have been the dominant. (Horváth, 1989) But the solution based on the unity of the civil service came to nothing, since the new civil service system came into existence in a completely different form. The established civil service system was implemented in the form of a duplicate system, which distinguished the civil servant and the public worker. According to contemporary reasoning, one of the differentiating aspects between the two groups of people had roots in the practice of public authority and its extent and in principle it still does. In addition, we agree with György Kiss's view that the legislator did not decide whether the state or the local governments formed the legal status of public workers as a public authority or an owner. (KIss, 1995) On the other hand, to create a complete picture, it is also necessary to add that the term ‘public worker’ does not mean a job unlike ‘civil servant’, but it is a collective noun that embraces several occupations which are intended to fulfil state services.

The dual civil service system set up a closed career system, the rules of which significantly overlapped, in many places there were random differences. Of course, the legal background of the 1992 Labour Code is not negligible.

The next major step in the transformation of civil service law was the uniform civil service bill which would have returned to the original idea which would have implemented the new civil service regulation on the basis of the German model. However,

the attempt did not succeed primarily for political, secondly for conceptual reasons. The need for regulation faced legislative problems that seemed to be insurmountable in the pace of the reform attempt. Such an insurmountable obstacle was the standardization of the salary system and the protection of acquired rights. Both legal statuses became considerably embedded into labour law regulation due to the large number of implementing decrees relating to each status. Nevertheless, we must state that the bill proposed a number of solutions that would have filled gaps.[4]

The first major change after the failure of reform attempt of unification was Act LVIII of 2010 on the Legal Status of Government Officials. (hereinafter: Ktjv.). The legislator's ambitions took a 180 degree turn compared to the previous one. Instead of simplifying the formula, it became more complicated by the introduction of a new type of service. With this solution, the legal status of the civil servants working in the central administration was removed from the scope of the former Civil Servants Act (hereinafter: Ktv.) and it became separated. At that time, the two masses of legislation co-existed. The Ktjv. rulebook hardly contained any differences from that of the Ktv. It could be interpreted as a special legal status with regard to the general rules of the Ktv. We may say that it did not have any characteristics which would have justified the existence of the legislation. (Horváth, 2012) In addition to the introduction of a new legal status, the Ktjv. also regulated the employer/service provider's opportunity to terminate a legal status without justification. This way the legislator took a step towards the closed and open systems simultaneously. Making it more open was the abolition of the legal status in a flexible way which was not even typical in economic context, giving way to subjective employer decisions. The step towards making it more closed was the formulation of a new service status. The establishment of government official legal status can be interpreted as one of the starting point of the ongoing civil service reform, as this made it possible for the legislator to take a significant part of the rules formally out of the scope of labour law. This is confirmed by the fact that Act CXCIX of 2011 on the Civil Service Officials (hereinafter: Kttv.) was born shortly, which reversed the former provisions. From then on the general rule became a provision for government officials and the special rules became the special provisions for civil servants.

Can we, however, call the establishment of government official legal status a substantial change? Is there a real difference in the terms of service status? To this end we need to look at the conceptual set of the relevant legislation. Pursuant to the Kttv. a government official and civil servant *is a manager and administrator acting in the sphere of tasks and competences of a public administration body who prepares cases pertaining to the sphere of tasks and competences of the public administrative body for a substantive decision or, in the case of authority, to make a decision.* Obviously there is no difference between the job description of a civil servant and that of a government official. Thus, the real reform effort is not that they have introduced a new service status but how it has been introduced. This helped to overwrite the linkages which existed directly between office legal status and employment relationships.

Parallel to this, in the context of the changes, not only the substantive but also the procedural rules were restructured. As a first step, the Arbitration Committee for

[4] In our opinion the public employment contract is also part of it.

Government Officials[5] was established as a mandatory forum for legal remedy in case of civil service disputes. (Tánczos, 2015) This process will culminate with the transfer of civil service disputes to the jurisdiction of the administrative court. (Rab, 2016) This seemingly legal technical change constitutes the real paradigm shift and reform. Civil service law will fall within the jurisdiction of the administrative courts, thus apparently losing the remaining characteristics of private law. The latter must be emphasised as the reform builds on bogus solutions. In the present case, the reform suggested by the reforms and the nature of the legal relationships under consideration are in conflict with each other. This is reinforced by the most recent step in the reform process, Act LII of 2016 on State Officials (Áttv.).

The current solution is akin to the 2010 the Ktv. and the Ktjv. pair. The Áttv. set out specific rules for a special official stratum.

According to the wording of the Kttv. state officials are *persons employed under the jurisdiction of the Act on State Officials in the district (capital district) offices of the capital and county government offices*. At a conceptual level, we do not know more about them. Knowing the circumstances we must primarily answer the question whether the features of the system resulted in the formation of such a stratum of officials.

The simpler answer is 'no'. The visible intentions of the legislator did not indicate any sign of intention to form a new civil servant stratum. In itself, the formation of a new stratum of officials lacks a dogmatic and practical foundation. This is especially true in the light of the fact that the legislator and government rhetoric is about the formation of a uniform stratum of officials. However, standardization does not justify the further breakdown of an already fragmented structure. If we look at standardization as a process in itself, it should not be accomplished by separating individual personal strata.

The other answer is 'perhaps'. In office circles, it was probably not a secret that changes were to be made to civil servants, as changes could no longer be delayed in these areas, either. (Petró, 2014) Career models have been introduced for teachers though in a fragmented way, and there has been some change in the field of university instructors as well, and the possibility of a career model has been anticipated for healthcare professionals, too. It was certain that there would be changes. However, a significant part of the profession certainly did not think that changes would be introduced in the form of a new legal relationship. Unfortunately, the solution is not new. The same method was the basis for the termination of legal status without cause, introduced by the Ktjt. The method changed only in as much as the legislator created a more elaborate rule in the latter case.

The most important changes introduced occur in connection with the new salary system and the conditions for filling in a legal relationship. State official status - apart from the place of work - does not distinguish itself from the civil servant and government official strata, so we cannot really talk about a new entity. It is especially so, since by a curious paradox as of 1 January 2017 the wage grid formulated as a lex specialis set of rules will be used for government officials under the Kttv. where lex generalis prevails.

[5] On the institution see more: A Kormánytisztviselői Döntőbizottság határozatai bírósági felülvizsgálata, Összefoglaló vélemény, (Supervision of the decisions of the Arbitration Committee for Government Officials, Summary),Budapest,2015,in:http://www.lb.hu/sites/default/files/joggyak/kdb_hatarozatai_birosagi_ Felulvizsgalata _osszefoglalo_ velemeny.pdf, (20.12.2015.)

The principle of equal treatment in terms of career and remuneration rules can be seriously violated among state official, as well as between government officials and state officials.

The rules of the career system give the practitioner a wide discretion, in which equality aspects may be impaired and the quality of the value-based civil service stressed the legislature can be greatly devalued.

It is conceivable that the reform process will not stop at the introduction of state official status and the 2011-2012 solution will be repeated, which will make the status of state officials the general one. This, of course, will mean the expansion of statutory rules of the Áttv. At the same time, another trend can be observed, which is increasingly trying to empty the level of civil servants (at municipal level).

If all these Hungarian legal changes are interpreted in the light of international tendencies, it can be said that the development of Hungarian law could have followed the same paths only to certain elements. It is totally unnecessary to look for the elements of concepts related to great trends, because, according to Viktória Linder, the major problem is not the shifting of individual cycles and views, but the fact that in Hungarian law and politics there are no concepts at all. Thus, the implementations intended for the reform either go unrecognised or do not provide realistic solutions. (Mélypataki, 2015) Accordingly, we believe that some elements of the reform process were arbitrarily selected by the legislator from New Public Management and Neo Weberism.

With regard to the reform, we can draw interesting conclusions from the preamble to the Kttv.: *"A strong, but not stronger than justified, state capable of adapting to changes quickly and flexibly, promoting national interests can only be based on a civil service that enjoys public appreciation, is efficient and cost-effective, democratic, politically neutral, legitimate, the members of which have up-to-date professional knowledge, serve the interests of Hungary and the common good with impartiality and patriotism. Our aim is therefore to promote the establishment of a value-based civil service with a strong national identity to provide a predictable career path, the rules of which help officials in displaying behaviour worthy of their duty."* The reform does not break with civil service values, the legislator emphasizes the values of civil service. The Demmke/Moilanen research draws the attention to the very fact that it is not expedient to throw away the old one, for it is not certain that the new system is a good reform. In the Hungarian civil service, the development of a career path leads the reform process to a closed civil service system. At the same time, the legislator assumes that the state as a public authority becomes more adaptable to the surrounding environment. Adaptability can be achieved by becoming more open, for example by subjectivising decisions and by enforcing the principle of partnerships in determining employment conditions.

The same values and trending towards the open and closed system at the same time can be seen in case of the Áttv. The preamble emphasizes that the civil service must be a special career path fitting into the framework of the modern service provider state, which appreciates professional qualifications, experience and performance, in which the remuneration of the work is proportionate to the task and responsibility. The legislator thus supported the different career and remuneration system for state officials, which, as noted above, could violate the principle of equal treatment between service providers in comparable situations.

4. EVALUATION

In view of the above, we must both disagree and agree with the study of Attila Kun and Zoltán Petrovics, since we can agree that, from a dogmatic point of view, civil service law is not a separate branch of law but a special area of labour law. (Kun & Petrovics, 2014) But on the other hand, if we take into account the expression of the will of the state and violently stripping civil service law off labour law, a quasi-autonomous status of a branch of law can be conferred to it, which is the aforementioned inescapable path. This solution is accompanied by a paradox that is related to the status of a public worker legal relationship. One of the biggest losers of the reform process may be the public workers, due to the increasing dominance of private law rules. It is precisely because the fact that the rules on public workers remain in a "rest" state creates controversy, since if we look only at the personal scope, the logic of the legislator cannot be defended. The legislator neither removes public worker relationships from their attachment to employment relationship nor includes them into the concept of administrative law.

If we want to interpret the reform process itself, it is not enough to examine the personal scope. The personal scope in civil service law is always worth examining parallel with the organisational scope. In our opinion, organisational scope determines personal scope. Organisational scope determines the scope of the bodies where officials are employed. Today we can talk about a divided organisational scope based on the territorial division of public administration. The question is, however, more complicated. The explanation of the Kttv. applies when it comes to the fact that bodies falling within the organisational scope can be divided into two large groups: bodies governed by the government (state administration bodies) and autonomous bodies. This categorization reflects a different relationship to the hierarchical functioning in regulating the legal status of personnel. Government officials are employed by state administration bodies while civil servants are employed by autonomous administration bodies. (Hazafi, 2012) Such autonomous administration bodies are the local governments, the National Tax and Customs Administration, and several other bodies. So we have to amend our earlier position with the fact that, in principle, civil servants work in the lowest segment of public administration, but this is not necessarily the case. In regards to autonomous administration bodies, a possible change in regulation would interact not only with the regulatory environment, but with the career models to be introduced in the future. There are investigations into the interfaces of the regulation of civil and official relationships. In his research Zoltán Hazafi examines the alternatives of harmonising the rules of service for the personnel of the autonomous state administration bodies. In his view, this aspect is important as the former principle of “one office is one legal status", which had roots in the Ktv., but especially in the Kjt., cannot be enforced under these conditions. (Hazafi, 2012)

Behind the current changes, however, the prevalence of this particular direction cannot be seen. To answer the questions asked at the beginning of the study we can say that a disunited, fragmented regulation emerges from the reform processes. Presumably the current regulation intends to allow the legislator to form an official corps with a special new, perhaps even uniform, entity later. Perhaps this is supported by the provision which only extends the extension of the wage grid created in the Áttv. to government officials working at the government office, but not to civil servants. In the short term, local government offices may become vacant, since civil servants perform the same work as

state officials and government officials so they can easily find a job in the better paying sectors of public administration.

The legislator fragments the regulation with regard to personal and organisational scope, while attempts to unify the legal remedy system and make it autonomous in the case of persons of service status who are subject to different regulations. The legislator apparently wishes to enforce a concept of civil service which is different from the one before. This concept will probably only include the civil servants and possibly the professionals. Public-worker legal status is increasingly shifting towards private law. In the current Hungarian legal environment, the change may be the creation of a narrower official corps based on public law, using a uniform methodology. This means a reform of the civil service running counter to the Western European trends.

Public workers are getting further from those in government service and state service, and thus the principle of equal treatment in the public sector may be seriously violated. And the latter is particularly true of the status of those in government service and state service in terms of promotion and remuneration. Thus, according to the current state of the reform, in its process to autonomy civil service law is considered to be a rather fragmented regulation, and the aspirations to become more open and closed at the same time seem to eliminate predictability as a value in the civil service where being value-based is emphasized by the legislator.

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