THE STATE AS AN EMPLOYER–DOES IT PERSONALIZE A PUBLIC AUTHORITY OR AN OWNER?  

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1. INTRODUCTION

The state is a Janus-face actor in the legal system. It is a sole player with double identities, because it has a big role in the area of public law and in the area of private law at the same time. Not just the role of the state is double-sided, but the actions of the state as well. The state personalizes public authorities like legislation, law enforcement, judgement. It is a pseudo person in daily economy who has built the frameworks. This economy separates more circles. One of these circles is the employment policy and labour law. The state finances the institution and corrects the mistakes of the labour market with the instrument of social policy. It works as an invisible hand in this labour market, but this hand shows itself in the relationships of the civil service law, and in ‘the employment relationships with public employers’. In both cases the state is not just a regulator, but an active partner as well. This is a schizophrenic situation: the state has to limit its own authority. The state as an employer must observe the rules of the Labour Law Act. This obligation origin from its authority.

But what is the state in this situation? Owner or the lord of the poverty? The simple answer is ‘it depends’. The longer answer is that it depends on which side of the labour law is analysed. The civil service law is the public law side of the labour law, and the employment relationship with public employers is the private law side of it. The general question is that how both sides differ. The civil servants and the public employers provide public services. The difference is in the way the state provides these services. The labour law relation between the state and the employees has been influenced by the form of service-providing. The public transport or electricity as a service is based on the private law. The state has more own companies. These companies provide public services by public employers. The civil servants usually work in hospitals, schools, ministries, etc.

Where is the employer in labour law and civil service law? If we research the role of the state, we have to define the employer in general. The Labour Law Act says: “Employer’ means any person having the capacity to perform legal acts who is party to employment contracts with employees.” The definition of the Act prescribes two conjunctive conditions. If one person has legal capacity, it is not
enough, but the relation presumes a contract too. The legal capacity gives the chance for everyone, because the corporations and the state have this capacity as well. In the Hungarian legal system the state is a legal person. The category of the employer is generally not limited by the Act. The same rules are prevalent for both the natural and the legal persons. The state can make contract for labour law relations, but it is not characteristic. The field of the state is mainly the civil service law. The state is an abstract concept and it has indirect function in labour law relations. The state participating in the employment relationship is represented by concrete agencies, institutions or corporations. The corporations have role in labour law, the agencies or public institutions have role in the civil service law. The starting point is the same in both cases, but the character of the relationships is different. At first, the civil service law has stronger connection with political decision. The civil service law is influenced by politics indirectly, but significantly. The field of the labour law is the field of economical rationality. Secondly the scope of the authority has to be searched. The state-employer has generally more authority in the public sector and in the civil service law. This employment relationship has a strict hierarchical system. The state can decide about every conditions of the employment relationship. The civil servants have no chance to make a deal. They can just choose between accepting the conditions or not. In the labour law relationship the state is not stronger than a normal employer. The state is equal in the economical sector. It is just one cog in the machine in the economical society. The content of labour relation does not depend on just the will of the state. The authority is limited by the will of the employee as well. The employee has some instruments in social dialogues like collective bargaining and others. The state has recognized that more benefit come from the self-limited situation. The state is connected to this situation by only its actions; it just builds the economical frameworks.

But the answers are more complex. Gillian S. Morris wrote that despite the apparent convergence of the public and private sectors in terms of their employment practices, the case for special treatment of employment in the public service remains. This case is justified by the reference to two distinct sets of principles which are important to keep separation. “The obvious differences between the two sectors with regard to the size structure, the range of collective agreements, and the company’s interests represent outside the scope of these considerations in front. Above all, the tariff binding and the presence of a company or staff council.”

The power of state is weaker in the labour law relation. The state is bound by self-made rules. It is the same kind of owner as other employers. But it often forgets

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3GYULAVÁRI (Szerk.) Munkajog, ELTE – Eötvös Kiadó, 2014, 123. old.
which role it is playing actually. It applies instruments of authority in the state-owned corporations many times. It crosses the framework of private law.

The two sectors are parallel. These sectors are influenced by each other. Bercusson’s opinion is that these sectors did not recede from the others, but get closer to each other.\(^7\) It has rights that are influenced by the movements of the sectors. The rights of employer depend on the distance of these sectors.

2. THE STATE AS AN EMPLOYER IN THE CIVIL SERVICE LAW AND THE LABOUR LAW

There are many good papers about employees.\(^8\) I think the definition of the employee is a very important question. But this question is not the only one. Scientists analyse the other side (employer side) rarely. The employee’s and employer’s definition are strongly connected to each other. In literature there is an approach which defines the characteristics of employment relationship through the definition of employee. Therefore, the dogmatic issue of employee status and the personal scope are outstanding as they mean the realization of the labour law protection.

The function of the state depends on the relationships. Staff relations in civil service must differ from those in private employment because of the unique legal character of the state-employer and the overriding importance of the state's functions.\(^9\) The connection is closer in the relationship of civil servants, because they demonstrate the public authority of the state. They are an element in the machine of the power. Some opinions start from this point. Many researchers stand the civil service law as an element of public law.\(^10\) They characterize this connection as a public law connection, where the state has “unlimited power”. Every action in this relationship derives from the will of the state. The rights and possibilities of the civil servants are limited. This kind of service differs from the labour law. The state as an employer guarantees stability and carrier in exchange. The civil servants can decide just in several cases in this service relationship. The placement is a one-sided decision, and this comes from the will of the state automatically.

The system of civil service law is not so ceremonious in every country. The state has fewer rights in some countries. This less strict regulation is based on the common law in these countries, or on the labour law in the post-communist states. In both groups the difference is not so sharp between labour law and civil service law. In the Hungarian legal system the placement is not automatic. The civil servant can decide about the beginning of the relationship. In the common law countries the connection starts with a labour contract, and it is affected by collective bargaining as well. The collective labour law can be compared with the collective civil service

\(^8\) N. Jakab: On the significance of the employee status and of the personal scope of labour law regulation, Zbornik Radova Pravni Fakultet (NOVI SAD) to publish in 2016/3; Gy. Kiss: Alapjogok kollíziója a munkajogban, Justis Tanácsadó Betéti Űrsaság, 2010
law. They give a double system. They are like the two sides of a coin.\textsuperscript{11} The more important question is which focus we use? Frankel gives three bases:

- “Do civil servants have a right to form associations with trade union objectives? If they have this right, does the special nature of the state-employer impose any limitations on the scope and character of their organizations?

- Is it possible to have a process of direct negotiations on questions of salaries and other conditions of employment between a state employer and a civil service association? Can the state be bound by the outcome of such negotiations? In other words, is collective bargaining possible when the state is one of the direct parties?

- If there is some form of direct negotiations, what happens if the parties cannot reach agreement? Is there any other recourse open to them?”\textsuperscript{12}

In this double system we have to compare the task of the employer in the private and the public sector. In the private sector the state serves public service through own corporations. It has no public authority in this relationship. What extent does this situation differ from the civil service law? The first is the more unbound hierarchy. This connection stands closer to the normal labour law relations. This form is an atypical form of job. The freedom of the state is limited by its own ordinance. This role is an other character from the repertoire of the state. In this case the state is an element of the labour market. It is an employer like the others. It has to compete in fair frameworks with the other corporations, and it cannot use its power. It cannot cross the border between the two roles to protect itself from the rivals in the labour market. The state as an employer has to give same rights and same salaries for the public employees as the other employers. The state produces products and services and pays taxes. On the other side it depends on the market. It must not intervene the courses. On the other hand it reallocates the tax, and finances the salary of the civil servants. “The civil service occupies a peculiar, non-economic position in the community. Civil servants do not face their government-employer in the framework of a competitive market where salary ranges are circumscribed by supply and demand and by calculations of profit and loss. In theory, the limit on salaries of civil servants is a function of the capacity of a government to tax. In practice, however, we know that a government must seek to reconcile the salary expectations of civil servants with the imperatives of financial responsibility and political accountability — not to speak of sheer political expediency. Clearly, what is needed is some standard for evaluating civil service pay, a standard that could be regarded as fair and reasonable by civil servant and taxpayer alike.”\textsuperscript{13}

\textsuperscript{13}S.J. Frankel: The State as Employer and the Civil Service, in: Relations industrielles / Industrial Relations, vol. 18, n° 3, 1963, p. 318-333
3. **SUMMARY**

The state plays an indirect role in every relation. The speciality of the civil service law and the relationship of the public employees is that there are three parties.\(^{14}\) The first party is the state, as an employer, but it does not have power in these relations. The state is an abstract definition. The real direct party is a concrete corporation or ministry (institutions), who can practice the real rights and power of an employer. The institutions have rights to develop the labour relations what derives from the will of the state. The institutions are direct persons in the relationship. The employees are the third party. The position of the employee depends on what kind of mandate is given for the institution which has to form the relationship of the employment. The state can choose which mandate can be given. It is a very important freedom, but it is limited as well. The state is bound by itself. It cannot change the earlier decisions. The legal system builds the checks and balances too. It is a logical method, but the actions of the state are sometimes not logical. There are more situations, when the state tries to configure the ordinance to put the rival corporation at a disadvantage or influence the labour market. There are many examples, when the state as an employer in the labour law tries to apply its power. It is necessary that the state does not cross the borders of the legal system, and it behaves according to its role in every case.

**LITERATURE:**


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