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Eötvös Loránd University, Faculty of Law • 1053 Budapest, Egyetem tér 1–3, Hungary

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Looking for the Disappeared Comparative Advantages in Public Service

Abstract

A change in labour law necessarily follows a change of political and economic regime. In 1992, the labour regulation of competition, non-profit and public sector in Hungary became structurally separate. However, due to budgetary problems, the regulation of the civil service is structurally divided in the regulation of this sector, namely in a dual system trichotomous division. The study describes and analyses the three-decade problems of public service regulation, in particular the unjustified fragmentation of regulation and the amortization of comparative advantages, which adversely affect the ability of the civil service to acquire and retain labour force. As for the end result, it may adversely affect the quality of public services and members of society.

Keywords: comparative advantage, public sector, dismissal, civil service official, public servant, remuneration, fragmentation of legislation

The fact that lawyers create the laws is similarly insane as if the doctors had created the diseases.
Murphy's Law for Lawyers

According to the public administration legal textbook published in the Horthy Era, financial advantages played the most important role among the entitlements of public officials.¹ Due to the changing values and circumstances and the occurrence of new phenomena, the 75 years that have passed undermined and changed numerous rules on employment conditions. My paper investigates the stability of public service jobs, considered as a comparative advantage, and the predictability of advancement. These are complex legal

* István Horváth is assistant professor at Eötvös Loránd University, Faculty of Law, Department of Criminology. This study was prepared under Project 5.2.2 'Research of the investigation of international organised crime from the point of view of the exchange of information' of the Internal Security Fund supported by the Ministry of the Interior in Hungary.

¹ Vargha, *Közigazgatási jog szeminárium* (jegyzet, Budapest, 1940/41. tanév) 181.

institutions that characterize the attraction of public service in the labour market and the quality of public services. I shall examine the afterlife of the erstwhile public service comparative advantages...

I The Comparative Advantage: From Economy to Public Service

David Ricardo, the British classical economist, established the model based on *comparative advantages*. He came to the conclusion that relative advantages must prevail over absolute advantages in the field of trade.² *The adaptation of relative advantages defined in economics to the public sector* indicates a positive derogation from the private sector, revealed in particular employment conditions. Such conditions, that result in a lower salary than in the private sector, however, provide a stable and reliable existence, avoiding the risks of the private sector. By this, the ability of the public sector to acquire and maintain a workforce was secured. The reliability of employment conditions is revealed in the regulations of two legal institutions: on the one hand, the *restriction of terminating the legal relationship by the employer* compared that of the private sector and, on the other hand, *career progression* that guarantees pay increases upon meeting the legal provisions. That is professional advancement.

Regulatory tools related to common labour law guarantee the comparative advantages in the public sector. The legislative role of the state is dominant, affecting all segments of the legal relationship and is mainly *binding* in nature, hence negotiation between parties is excluded or restricted. For this reason, the regulatory function of the collective agreement is excluded or limited for a particular group of employees. The employer, trade union or their confederation acquires power to regulate in cases where the state resigns from the legislation process and hands over this competence.³

II The International Environment of Regulation: The Opening of the Closed Public Sector

Prior to surveying the Hungarian regulations, it is reasonable to provide a short overview of the *international trends* affecting the public sector. The economic processes of the 1990s urged developed countries to revise the legislation of public affairs and reconsider *the role of the state* in them. *Reform programmes* aimed at tasks of the private and public sectors were launched in almost all OECD countries, which clearly outline the trends although the results varied. The goal was to make the public sector more effective and more adjusted to the needs of society.

² Ecopedia.hu, 'Komparatív előny' <<http://ecopedia.hu/komparativ-elony>> accessed 17 September 2017.

³ Franz Traxler, 'Collective bargaining and industrial change: a case of disorganization? A comparative analysis of eighteen OECD countries' (1996) 12 (2) *European Sociological Review*, 271–287. <<https://doi.org/10.1093/oxfordjournals.esr.a018192>> accessed 19 October 2021.

Many commonalities and similarities were observed in the *human resource management* of the private and public sectors, hence the *raison d'être* for applying same solutions occurred for their codification. Demands articulated around the millennium included *efficacy and downsizing, decentralisation and flexibility, independence and responsibility in using human resources*.⁴

A common feature was the *transformation of the labour market*: it became gradually harder to acquire and maintain a quality labour force in the public sector. Globalisation and international integration require the investigation of the conditions of public service in international dimensions. Studies date the initiation of changes in public sector, the opening of the closed public sector and the introduction of certain elements of private labour law to the beginning of the 1980s. The traditional assignment was partly replaced by particular contractual forms to break down the traditional hierarchy of the public sector.⁵ The change was mainly driven by the high level of public expenditure that could negatively affect national competitiveness in the globalising world economy.

The *macroeconomic necessities* were reinforced by the *Maastricht criteria* (the conditions for adopting the Euro as a common currency) in the EU countries that were required for economic and monetary union (EMU) membership and the Stability and Growth Pact of 1997, by maintaining the pressure on the budget policy of the governments. Moreover, added to the macroeconomic factors was *microeconomic scepticism*, namely, whether the traditional forms of public service could strengthen and maintain all employees in this sector and the level of services available, reflecting the growing expectation regarding both quality and efficacy. In most countries, the characteristic features of the legal status in public service, including the 'cumbersome' system of public and legal administration, are the central assessment of salaries, primitive forms of human resource management and resisting the impact of the trade unions.⁶

Decisive facts: directly or indirectly, governments employ public servants constituting 20–30% of the total labour force; they define the expenditure of the public sector with regard to the economic policy in effect. The political sensitivity of particular public services justifies the government having strict control over such services. Numerous proposed structural and employment reforms support the increasing role of public sector employers; however, the government aspect mentioned urges control over the activities of particular organisations. For the trade unions, public service is one of the critical areas of their exercise of economic and political influence; nevertheless, they have to face the decreasing number of members and constant pressure due to employers' need for flexibility.⁷

⁴ Horváth István, *Diagnózis és terápia, Javaslat a magyar közszolgálat szabályozásának reformjára – figyelemmel az EU tagállamok jogalkotására, hazai múltunkra és jelenünkre* (PhD thesis, Pécsi Tudományegyetem, Állam- és Jogtudományi Kar, Munkajogi Program 2006, Pécs) 127.

⁵ Kiss György, *A közszolgálat – hatósági és nem közhatalmi jellegű – munkavégzés szabályozásának meghatározó elemei az Európai Unió egyes tagállamaiban* (manuscript, 2002) 3–16.

⁶ 'Synthesis of reform experiences in nine OECD-countries: Government roles and functions and Public Management' (OECD PUMA/SGF 1999 Paris, 99/1) 6.

⁷ Kiss (n 5) 1–3.

1 Jobs in the Public Sector: The Amortisation of Stability

One of the main elements of the special legal regulation of public service is *the stability of employment*; namely, it is long term and provides a certain guarantee for the individual's career. In many OECD countries, however, *stability as value is being eroded*, and many public servants are employed for a definite period.⁸

The *Employment policy* of particular OECD countries directly and indirectly affects the regulation of public service. The *downsizing processes* due to economic efficiency offer two major methods. According to the first one, the number of employees should be reduced by a certain percentage in each year. According to the second, the number of employees in the public sector is reduced due to privatisation, outsourcing or other institutional reforms. One of the consequences of privatization may be being redundant that is accompanied by other negative consequences. On the one hand, the employment of ex-public servants in the private sector requires an active employment policy and training, and, on the other hand, downsizings often resulted in the deteriorating level of public services. The first great volume downsizing in Hungary, promulgated in a government decree, took place in 2003.⁹

2 The Transforming Social Values Decompose the Comparative Advantages

Critics and expectations regarding the Hungarian public service cannot exclude the problems that occurred within the framework of OECD membership. It is to be highlighted that while *employment security in the public sector decreased* and legal possibilities providing privileges changed, salaries and benefits were not raised in parallel with the private sector. Due to this process, the comparative advantages of the public sector have been narrowed down or even diminished, hence qualified labour and managers in particular will be hard to be found in the public administration. For this reason, a separate *chief official body* was established in various countries to manage this problem. This body usually preserves the narrowing and diminishing comparative advantages (e.g. excellent remuneration, other benefits).¹⁰

A new dimension of the conflict, in which the legislation takes a side, is the difference between the traditional public service values and the demands brought by the rapid changes in society. The expectation regarding the efficient operation of public service plays an important role in almost all OECD countries; however, it requires qualified labour that is hard to come by. Consequently, human resource management shall be totally revised and renewed.¹¹

⁸ Horváth (n 4) 107.

⁹ Government Decree 1106/2003. (X.31.) on the government redundancy.

¹⁰ Act XXXVI of 2001 introduced institution of senior counselor providing the excellent salary advancement. The Act LXXXIII of 2007 terminated this position.

¹¹ Balázs István, 'A közszolgálati fejlődés tendenciái a világ fejlett országaiban' (2011) 51 (11) Magyar Közigazgatás, 641–647.

3 Diminishing Salary Advancement Based on Time in Public Service

In addition to the above trend, public service remuneration considered as comparative advantage and eliminating the risk of the private sector is gradually deteriorating. It is *career advancement based on service time spent in the public sector* that is also attacked by the generation conflict between the senior generation with less ability to adapt and the more flexible and skilled young generation.¹² The restrictive effect of *state economic policy* draws the attention of the government to the salary and employment policy of the public sector even more. The complex effect of the increasingly global and integrated financial markets and the monetary coercive factors regarding the unified currency system of the EU undermined a certain set of measures available to member states, restricting their decision-making autonomy. The government therefore gripped tighter on the remaining economic policy tools, including *public sector expenditure*, more precisely, the rules on salaries in the public sector.¹³

Salary advancement based on the service time spent in the public sector and guaranteed by a legal provision considered as a comparative advantage was undermined by *performance evaluations*, imported from the private sector. The presence of performance requirements in the public sector was unknown prior to that. The *New Public Management* that gained momentum in the mid-1990s aimed at improving the effectiveness and quality of the public sector tried to adapt various administrative and organisational methods that had been successful in the private sector. The time spent in the public sector, previously considered as a comparative advantage, was gradually replaced by performance assessment and *remuneration based on such assessments*. Such a pay system is regarded as questioning *public service as a traditional career* and challenged career advancement and employment stability. A negative assessment not only affects the salary paid to the public servant but also their employment. A series of negative assessments may lead to the termination of employment. The vanishing of classical public service values may upset the *labour market balance* between the private and public sector.¹⁴

III The Legal Structure of Civilian Public Service: Causeless Duplications with Controversial Rules

Before analysing the comparative advantages, I shall briefly summarise the *regulatory framework* of in which it is situated. The legislative result, or more precisely, the consequence of change of system in the field of labour law is the duplicated legal regulation of the civilian

¹² Balázs (n 11) 645.

¹³ Stephen Bach, *The Management of Employment Relations in the NHS: Pay, Work Organisation and the Internal Market* (PhD thesis, University of Warwick 1998) 4.

¹⁴ Balázs István, 'A teljesítményhez kötött illetményrendszer bevezetésének helyzete az Európai Unió országában' (2002) 52 (10) Magyar Közigazgatás, 577–581.

public service; namely the parallel introduction of public servant and civil servant legal status. The introduction of the market economy required the elimination of the earlier unified system that disregarded the legal status and the function of employers. For this reason, *Act XXII of 1992 on the Labour Code* (hereinafter referred to as the earlier Labour Code), and – as I term civilian public service – *Act XXIII of 1992 on the Legal Status of Civil Servants* (hereinafter referred to as Act on Civil Servants) that regulates public service and *Act XXIII of 1992 on the Legal Status of Public Servants* (hereinafter referred to as Act on Public Servants) were adopted.

The passing of the earlier Labour Code aimed at the for profit and non-profit sectors was accompanied by the legal regulation of the public sector. It was not necessary, however, that budgetary institutions carrying out local public tasks and providing public services were not included as employers in a single bill. Undoubtedly, a striking difference between civil servant and public servant legal status was found in the former practicing the power of the state. *The different labour law regulation of the for-profit sector and the public sector* does not explain, however, the so-called *trichotomous law structure*, as practicing the power of the state as characteristic feature was not considered as a cause. My opinion is supported by the foreign and Hungarian legal history, as there is no such distinction as it is specified in the Act on Civil Servants and Act on Public Servants.¹⁵

The regulation of *civil servant status* is not only the consequence of the change of systems but also a replacement of a missing link in a historical process. On the contrary, the *public servant status* was brought about by the fall of communism. A bigger group of people carrying out various public services (e.g. in public education, public health, public library) was offered a labour market status that was better than those in the private sector – but worse than that of civil servants – to secure the level of services and one of the sources of citizens who provided the political foundation of the system. In exchange for that, the state restricted the assertion of interest in labour relationships to some extent.¹⁶

The background of the labour regulation entering into effect in 1992 reveals a fundamental financial factor that could not have been omitted by the governments in power. This is *the economic state of the country, namely the gigantic budget deficit*.¹⁷ In the first half of the 1990s, the governments sacrificed the sources required to establish a bourgeois existence for supporting the accumulation of capital. This is clear from the government decree of 1995 on austerity measures for economic stabilisation: ‘...the Government thinks it is desirable that the allocation of assets from the budgetary institutions and the people should be carried for the benefit of entrepreneurs’.¹⁸

The Act on Public Servants and then Act CXCIX of 2011 on Civil Service Officials (hereinafter referred to as Act on Civil Service Officials), which in 2012 replaced the Act on

¹⁵ Horváth (n 4) 28.

¹⁶ Berki Erzsébet, *A köz szolgáloi* (manuscript 1998, Budapest) 3–5.

¹⁷ Barabás Gyula, Hamecz István, Neményi Judit, ‘A költségvetés finanszírozási rendszerének átalakítása és az eladósodás megfékezése – I. rész’ (1998) XLV (July–August) *Közgazdasági Szemle*, 653–674.

¹⁸ Government Decree 1023/1995. (III. 22.) on the corrective measures of 1995 for the economic stability.

Civil Servants, and Act LII of 2016 on State Officials (hereinafter referred to as Act on State Officials) (see also V. I. *The fragmentation of legal regulations (two codification types)*) resulted in another type of duplication from 1992, that employment in public services requiring a similar legal status were regulated otherwise without any proper reason. Work carried out under such a legal relationship meant fulfilling state and local government tasks specified in legal regulations, covered by budgetary sources.

IV Stability of Employment – Undermined or Diminished Comparative Advantages

Regarding the *stability of legal status*, a comparative advantage is, what legal institutions are available to prevent the termination of employment by the employer, through no fault of the public sector employee. Before that, I shall reflect on the differences governing the rules on termination specified in Act I of 2012 on the Labour Code (hereinafter referred to as Labour Code) and on dismissal specified in the Act on Public Servants and Act on Civil Service Officials.

1 Termination and Dismissal Causes

Termination as per the Labour Code, which is the typical termination of so-called stable legal relations for an indefinite period,¹⁹ as a means of terminating employment has been replaced by employee *dismissal*, reviving the name that was applied in law prior to 1945. Termination and dismissal are usually accompanied by a specific *cause*. For the regulation of these, the legislator applied different methods. The Labour Code preserved the *relatively fixed dismissal system* of the previous Codes. The law does not specify the causes of termination in a taxative way; instead the cause shall meet the requirements of the Labour Code.²⁰ The Act on Public Servants and Act on Civil Service Officials recalled the dismissal system prior to 1945; namely, it applies an absolutely fixed structure that is different from that used by the Labour Code. Dismissal shall be carried out in accordance with the causes of defined in a taxative way.²¹

The termination of the employment for indefinite period meant no comparative advantage compared to the private sector since the labour law change of system in 1992. For the most part, with the taxative definitions, the Act on Public Servants and Act on Civil Service Officials used the same causes specified in the termination rule of the earlier Labour Code.²² A positive change brought by the past 25 years is that, against the Labour Code, the Act on Public Servants and Act on Civil Service Officials provides *females with at least 40 years of*

¹⁹ Kiss György, *Munkajog* (Osiris Kiadó 2005, Budapest) 235.

²⁰ See s 66 para 2 of the Labour Code.

²¹ Gyulavári Tamás (ed), *Munkajog* (ELTE Eötvös Kiadó 2014, Budapest) 188.

²² Earlier Labour Code s 89 para 3; Civil Servants Act s 17 para 1 and Act on Public Servants. Section 30 para 1.

employment with the possibility of retirement, which is rather advantageous compared to the general rules. Upon request, their employers shall terminate such employment.²³

2 And Those That May Be Hardly Justified – The Comparative Disadvantages

The tide turned in the field of regulation: comparative disadvantages compared to the labour law of the private sector were codified in the Act on Civil Service Officials, replacing the Act on Civil Servants in 2012. Two statements of facts were added to the causes for dismissal that unfortunately justify the undue special situation of vulnerability of public employees to their employer. The Act on Civil Service Officials obliges the employer to dismiss if the *government official's superior loses trust*²⁴ in the government official. Even the *codification* is wrongful! Erosion of confidence may not be the cause; only the consequence of the dismissal. The explanatory rule the Act on Civil Service Officials, according to which erosion of confidence is declared when the government official fails to meet certain requirements specified in the law, makes no difference. The norms defined in there, however, do not lead to an erosion of confidence when they are infringed.²⁵ One of them is: *carrying out tasks with professional loyalty towards the superior*: this almost means that servility is required. Instead, the legitimate instructions of the executives shall be followed, as the public service official (as the person practicing the power of the state) shall be loyal to the rule of law.

Unfortunately, the further explanatory rule of the Act on Civil Service Officials also leads to a dead end. According to the law, *professional loyalty*, devotion to professional values, collaboration with executives and co-workers and carrying out tasks with discipline, professional dedication and in a perceptive way are all norms.²⁶ If this regulation is reversed is it considered as erosion of confidence when a government official ends up having a professional difference of opinion with his or her superior? Lack of collaboration with fellow workers is not an erosion of confidence but inability to fit in at the workplace, and if the tasks are carried out without discipline or professional dedication and in an imperceptive way, the person is unfit for the job. Moreover, we shall not forget what the term confidence implies. According to Merriam Webster's Dictionary, it is a relation of trust or intimacy, reliance on another's discretion. Hence, erosion of confidence requires different a statement of facts than those specified by Act on Civil Service Officials...

Another codification problem in the Act on Civil Service Officials in relation with erosion of confidence is the *possibility of launching a disciplinary procedure*. According to

²³ Act on Public Servants pt III ch II s 30 para 1; The public servant employment shall be terminated if the condition specified in Act LXXXI of 1997 s 18 para 2 item *a*) is demanded by the public servant no later than the end of the termination period. [For civil service see the Act on Civil Service Officials s 63 para 2 item *f*].

²⁴ Act on Civil Service Officials pt IV ch III s 63 para 2 item *e*).

²⁵ Act on Civil Service Officials pt IV ch III s 66 para 1.

²⁶ Act on Civil Service Officials pt IV ch III s 76 para 2.

Act on Civil Service Officials, upon the suspicion beyond reasonable doubt of professional misconduct, the person practicing employer's right shall launch the procedure.²⁷ The cited rule of Act on Civil Service Officials is illogical. The disciplinary procedure should be launched to make clear whether the suspicion beyond reasonable doubt is true or just leads to erosion of confidence.

Rejecting a unilateral modification of appointment by the employer, which is impossible in the codification of the Labour Code (which has private law characteristics), *partly leads to dismissal*. According to the law, acceptance is automatic, the consent of the civil servant is not required to change the place of work within the particular settlement and if the change of job title requires the modification of the appointment.²⁸ (This latter is a codification failure, as the modification of appointment does not follow the change, it is rather the contrary: the modification itself is the change). Beside the fact the public servants working in the other field of the public services are not in such a vulnerable situation, the provision *is a disadvantage regarding their employment* because, in line with the Labour Code, the modification of a labour contract, including the change of job title and place of work, shall be carried out with the mutual consent of the employee and the employer.

The provision of the Act on Civil Service Officials is reprehensible as the employer's power, differing from the contractual theory of the common law of labour, is not accompanied by higher job security for the employee, for instance with an institutional system to prevent dismissal without legitimate grounds. That is to say, one scale of the balance is empty. A further legislation effort, possibly implying *negative discrimination*, is the rule based on which the modification of their appointment by the employer shall not be disproportionately injurious to the government official, especially with regard his/her health and family conditions is not applicable to executive government officials (e.g. the department head and her/his deputy).²⁹

3 The Protection of the Public Service Job – The Possible Foundation

Regarding international experience also, public service regulation shall protect the employee from the insecurity that is the characteristic feature of the private sector, hence the possibility of terminating employment is less in the public sector.³⁰ The regulation and sociology of public service, in contrast with the private sector, is affected by the fact that public services may not be relocated from one country to another. Due to the characteristic of the service, more precisely because of its stability (administration, health and education tasks), public service possesses all assets required *for legal institutions that guarantee employment stability*. Stability is not only in the interest of the public service employee, but also of the state, as *avoiding*

²⁷ Act on Civil Service Officials pt IV ch III s 156 para 1.

²⁸ Act on Civil Service Officials pt IV ch III s 48 para 2 items c) and d).

²⁹ Act on Civil Service Officials pt IV ch III s 8 para 6.

³⁰ Synthesis of reform experience in nine OECD countries (n 6) 8.

dismissals is a saving for the budget. International experience demonstrates that dismissal is very expensive both directly and indirectly. Besides the compensation accompanying dismissal, unemployment benefit, re-training and premature retirement pension increase the state expenditure and the *drop in demand for consumable goods* is also accompanied by negative economic effects.³¹

4 Unprotected Civil Service Officials

Putting some emotion in my paper, for me, the Act on Public Servants and Act on Civil Service Officials seem to have been adopted by two different states. Just a simple question: why is a room guard in a museum of a local government protected better against dismissal than the civil servant in the mayor's office, which is the operator of this museum? Since the *change of labour system in 1992*, diverging legislative approach may be observed in Act on Public Servants and Act on Civil Service Officials. Under the scope of the Act on Civil Service Officials, the *institutionalized prevention of dismissal ceased* in cases of termination due to any organisational cause. Upon losing the comparative advantage, the public official is *more vulnerable than those employed in the private and non-profit sector*. According to the Labour Code, the termination of employment of two categories³² in a vulnerable labour situation due to ability of the employee or the operation of employer may be carried out if there is no other unoccupied position at the workplace or the employee rejects such a job offer.³³ The Act on Civil Service Officials contains no such preventive regulation. A complete U turn may be observed: employees *under the scope of the Act on Civil Service Officials has some comparative advantages* compared to civil service officials proceeding with public administration competency.

Only one dismissal preventive measure remained in the Act on Civil Service Officials: the official may be dismissed on the grounds of being unfit due to health reasons if there is no other unoccupied position at the workplace or the employee rejects such job offer.³⁴ There is no need to search for a job at the public administration body under the direction of the official body...

The so-called 'reserve pool' effective as of the amendment of Act on Civil Servants and preserved by Act on Civil Service Officials is not aimed at preventing dismissal. Those who have been dismissed are placed in the reserve for the duration termination of employment to find them suitable job at another public administration organization.³⁵ At the same time, however, being in the reserve does not guarantee the avoidance of termination of employment

³¹ Horváth (n 4) 104.

³² A person not retired with age within five years of age limit for entitlement for old age pension, or mother who is not in unpaid vacation regarding child support, father raising his child alone until the child turns age 3.

³³ Labour Code pt II ch X s 66 para 4.

³⁴ Act on Civil Service Officials pt IV ch III s 63 para 4.

³⁵ Act on Civil Service Officials pt IV ch III s 73.

even if there is a suitable job. As a Curia of Hungary *decision* states: subsequent to placing the employee in the reserve, the employer is not obliged to offer him/her the vacant job, hence the civil servant may not establish a right to it even though she/he was aware of the vacant job.³⁶

5 Public Servants: Two Chances to Prevent Dismissal with One Exception That Seems to Be Negatively Discriminating

In 2007, the *provisions aimed at preventing dismissal being* more ample than before according to the Act on Public Servants became effective.³⁷ The inconsistency of public service legislation is such that the change did not inspire the lawmakers, regarding both the Act on Civil Servants and the Act on Civil Service Officials. Indeed, as we have already seen in the example of the latter Act, the direction of the regulation is the contrary. The *legislation's intervention of a public law character* is undoubtedly considered as a comparative public service advantage compared to the Labour Code. There are two chances to *prevent dismissal* of non-retirement-age public servants without legitimate grounds (unfit due to medical reasons, reorganisation, redundancy, or if the activity is terminated): *obligation by the employer to offer job or part-time job*.

The Act on Public Servants requires the maintainer of the employer, upon the request of the employee, to search for and offer the suitable job in all institutions under the scope of the law (e.g. in all public institutions of a particular local government) prior to communicating the dismissal.³⁸

In the case of collaboration, multiple local governments may conclude an agreement to offer job; mainly the smaller settlements may 'save' public servants from being dismissed, where there few institutions are maintained by the local government and jobs are scarce in the private sector as well.³⁹ Dismissal requires the lack of a job that can be offered or if the offered job was rejected.

Moreover, to prevent dismissal, the Act on Public Servants introduced the *compulsory part-time job stipulation* upon the request of public servants in 2007. It might as well be called the *solidarity-based distribution of working time*. It is better when more people are employed in part-time jobs than when too many lose their job besides the full-time employees. This idea originates from Germany. The government tried to apply the *job preserving policy of the Volkswagen Group* to the Eastern part of Germany. In 1994, a *framework agreement* was signed to *preserve jobs*. According to this, the working hours and the remuneration could be reduced to certain or to all employees (e.g. from 40 hours a week to 32, with partial compensation) to avoid the final step, dismissal⁴⁰ According to the Act on Public Servants, the

³⁶ BH 2008. 251.

³⁷ See Act C of 2007 on the modification of Act on Public Servants; effective as of September 1, 2007.

³⁸ Act on Public Servants pt III ch II s 30/A.

³⁹ Act on Public Servants pt III ch II s 30/D.

⁴⁰ Für Grafe, 'Die Umsetzung des § 15. BAT-O im Land Brandenburg' (1995) 3 (50) Arbeit und Arbeitsrecht, 190–193.

employment of those public servants who jointly request the modification of working hours in writing may not be terminated if it does not exceed the distributable daily or weekly total working hours communicated by the employer. The employer shall modify the appointment in accordance with such a request.⁴¹

The *negative part of the regulation* is that the legislation preserved the *vertical approach* that entered into force in 1992 with the Act on Public Servants which restricts the number of jobs to be offered. That is to say, the system only includes employers in a hierarchical relationship with the public institution and its maintainer. The evidence for the *lack of a unified public service legislation concept since the change of system* is that employers under the effect of the Act on Civil Servants and then the Act on Civil Service Official are not included in the job offer scheme. It is not a surprise, however, as the dismissal prevention guaranteed by law ceased to exist in public administration. It would therefore be absurd that, when there is no regulation to avoid the dismissal of civil service officials under the effect of Act on Civil Service Official, public servants are offered civil service jobs. It would be that absurd if, for instance, the public servant of the public institution in a city offered a job in the mayor's office of that city instead of being made redundant. One person less on the dole in that settlement...

And the probable negative discrimination mentioned in the title: Act CCIV of 2011 on Higher Education (hereinafter referred to as Act on Higher Education) excludes the application of the rules on preventing dismissal in the Act on Public Servants in higher education institutions operating as budgetary institutions.⁴² A question: does not the Act on Higher Education violate the difference-making as per the so-called other situation?⁴³ It differentiates between legal subjects in a comparable situation (of public servant legal status) on the basis of which sector they belong to (other situation), in a detrimental way.

6 Remunerations Related to Dismissal – One Budget, Different Expenditures

For starters: employers in the public sector, due to the continuity of services they provide and free from the negative effects of the partly globalised economy, are in a *more stable position* than those in the private sector. Hence, dismissals for causes specified in the legal regulation (e.g. re-organisation, dismissal ordered by the maintainer) are more scarce than in the private sector. I think the *expected legislative reaction* should be something like this: the legal regulation of the public labour law compensates the loss of a job in the public sector with higher compensation than in private labour law.

The *legal regulations on the public service of the change of labour system* support the above assumption, however, in *totally different aspects*. While the Act on Civil Servants

⁴¹ Act on Public Servants pt III ch II s 30/B.

⁴² Act on Higher Education part III pt VII ch s 24 para 6 item b).

⁴³ Fundamental Law of Hungary s XV para 2.

required a six months' termination period⁴⁴ regardless of the time spent in public service, the Act on Public Servants takes the time spent in public service into account. In cases of public service of less than five years, two months (that is, one third of the public servant termination period was given,) and upon 30 years of public employment, the maximum of eight months was granted. There was another distinctive feature between the Act on Public Servants and the Act on Civil Servants. By eroding the common law binding with a private law approach, the former provided the possibility of a longer termination period than specified in Act on Public Servants, but no longer than one year or the employer and the trade union could regulate in accordance with it in the collective agreement.⁴⁵

The Act on Civil Servants provided no possibility for negotiation, making regulation by a collective agreement impossible. That is another example of *legislative inconsistency*: the contradicting legal regulation of using the same budgetary source. However, the contradictory public service regulation provided a *significant comparative advantage regarding the termination period* compared to the earlier period regulated by the Labour Code. The 'initial' termination period (30 days) of the latter was the half of the public servant minimum and one-sixth of the civil servant minimum. The maximum of the private and non-profit sector guaranteed by legal provision after twenty years of employment (90 days)⁴⁶ was the half of the six-month termination period of the similar employment in public service.⁴⁷

The *legal conditions of severance pay meant similar comparative advantages* to the termination period. Again, the Act on Civil Servants was better than the Act on Public Servants: in the case of public employment for less than 5 years (even though only for a few days), the severance pay was two months' salary. The maximum time was twenty years of service, with a severance pay of twelve months' salary.⁴⁸ The severance pay of public servants is much more moderate. One month's severance pay required at least one year of public employment and, in case of at least twenty years of employment, public servants were entitled to two thirds of that offered to civil servants (eight months' salary).⁴⁹ Both legislations, in line with the regulatory function, provided better conditions for severance pay than the previous Labour Code. At least three times more time (three years at minimum) was required for one month's severance pay than in public service, and the severance pay guaranteed by the law after 25 years of employment (six months' salary) was the half that of the severance pay after 20 years of civil servant and three quarters of the public servant.⁵⁰

The benchmark of twenty-five years later remained the same. The regulations of the Labour Code that entered into force in 2012 on the minimum termination period and the

⁴⁴ Act on Civil Servants ch II s 18 para 1.

⁴⁵ Act on Public Servants pt III ch II s 33.

⁴⁶ Earlier Labour Code pt III ch IV 92 para 1–2.

⁴⁷ Act on Public Servants pt III ch II s 33, para 1 item d).

⁴⁸ Act on Civil Servants ch II s 19 para 2.

⁴⁹ Act on Public Servants pt III ch II para s 37 para 5.

⁵⁰ Earlier Labour Code pt III ch IV s 95 para 4.

severance pay are the same as the Labour Code of 1992, apart from one exception. This exception is that the dismissed employee, in a detrimental situation, who will retire in five years is entitled to between one and three months' absentee pay above the severance payment, based on the time she/he spent at the employer.⁵¹ *In the relation of the Labour Code and Act on Public Servants*, regarding the similar regulations of the latter, the proportions remained the same, hence the comparative advantage of 1992 survived, namely, the termination period and severance pay in the case of dismissal not attributable to the public servant. Moreover, the employee dismissed from the public job within five years of his/her entitlement to retirement is eligible for more severance pay (four months' absentee pay is added to it).⁵²

However, the Act on Civil Service Officials stipulates otherwise. The beneficial conditions of termination period and severance pay are lost or were significantly reduced, and the tide turned regarding the Act on Public Servants. The termination period was reduced to the third specified in Act on Civil Service Officials (two months).⁵³ Since the legislator disregards the time spent in public service, a public official with long service loses his/her years of service contrary to an employee or a public servant, as his/her termination period is shorter. After twenty years of employment, the termination period is longer by one third and in case of public employment of similar length, the termination period is three times more than that of a government official or civil servant. *The erstwhile privileges of the dismissed employees from public service also disappeared*: the severance pay of public servants and civil servants was reduced to the level of public servants, hence the regulations of the two laws were unified. At least three years spent in public service is required for the minimal severance pay (equal to one month's absentee pay), and twenty years in public service results in eight months' pay.⁵⁴ This means an advantage of three months' severance pay compared to those employees employed for twenty years.⁵⁵

7 The Consequences of Unlawful Termination of Employment by the Employer – Contradictions Keep Going with Disappearing Comparative Advantages

There are significant and *inexplicable differences* in the two laws on public services twenty-five years after the public service regulation entered into force. Regarding *public servants*, in parallel with the introduction of the Labour Code in 2012, the separate regulation of Act on Public Servants regarding the legal consequences of unlawful dismissal of a public servant (sanctioning unlawful termination in a more beneficial way for the employee than the Labour Code) was

⁵¹ Labour Code pt II ch X s 69 para 3–4.

⁵² Act on Public Servants pt III ch II s 33 and 37 para 7.

⁵³ Act on Civil Service Officials pt IV ch III s 68 para 1.

⁵⁴ Act on Public Servants pt III ch II s 37 para 6 and Act on Civil Service Officials s 69 para 2.

⁵⁵ Labour Code pt II ch X s 77 para 3.

*terminated by the legislator.*⁵⁶ Hence, those regulations that are more detrimental than the ineffective ones of the Act on Public Servants are binding.⁵⁷ To demonstrate the *lost comparative advantage*, as a general legal consequence of unlawful dismissal of a public servant, *the Act on Public Servants was more beneficial than the Labour Code for the public servant in four areas:*

- a) Higher amount of compensation for damages (from 2 to 36 months' salary compared to 12 months' at maximum stipulated by the Labour Code).
- b) The court assessed the violation and its consequences for determining the amount of compensation.
- c) Unlike the absentee pay, the average salary shall include all payment made in public service employment.
- d) In the case of violation by the employer other than according to the Labour Code, the Act on Public Servants provided the possibility of further employment in the same position at the request of the employee (if the dismissal was conducted without due practice of law). If the public servant did not request re-employment in the original position, the court could order, by assessing all circumstances including the violation and its consequences, the employer was to pay an amount equal to a minimum of two months' maximum twelve months' average salary.⁵⁸

The invalidation of independent sanctioning Act on Public Servants resulted in *public service employment erroneously gaining private law legal status*. If the public service regulation protects the stability of the legal status of public service employment more than private labour law then it should bring more detrimental legal consequences to the employer than private law in the event of unlawful termination, by doing so, providing the validation of special and general prevention.

Why is the termination of government or civil servant legal status sanctioned more severely in the Act on Civil Service Officials than the termination of public servants' [Act on Public Servants] legal status? The general rule of the Act on Civil Service Officials maximizes compensation for damages at twenty four months' salary that is the double of twelve months' absentee pay. Moreover, there is an unjustified contradiction by the legislator: upon assessing the amount of income-supplementing compensation; the Labour Code, affecting public servant legal status, does not provide judicial discretion as per the Act on Civil Service Officials regarding all aspects of the case, hence the weight of violation and its consequences.⁵⁹ Why does the Labour Code regulate income supplementing compensation and why does the Act on Civil Service Officials talk about lump sum settlement? Regarding the employer of both laws, the general rule of liability is regardless of culpability,⁶⁰ so what is the explanation of applying different measures upon the dismissal of civil servants and public servants?

⁵⁶ Act LXXXVI of 2012 on the enforcement of the Labour Code and transition regulations and amendments s 26.

⁵⁷ Labour Code pt II ch X 82 and 83 para s 82 and 83.

⁵⁸ Act on Public Servants pt III ch II, s 34, in force until June 30, 2012.

⁵⁹ Act on Civil Service Officials pt IV ch III s 193 para 5.

⁶⁰ Act on Civil Service Officials pt IV ch III s 167 para 1 and Labour Code s 166 para 1.

V Partial Erosion of Payment Advancement

Another classic distinctive comparative advantage of the public service besides stability was a calculable *salary progression*. It could become a comparative advantage, meaning a calculable career element, as the state established an artificial remuneration system by applying legislative measures that were separated from the effects of the labour market. Hence, *the price of labour in the public sector is speculative in nature*.⁶¹ The mentioned separation, however, may not be interpreted in the literal sense. The economy indirectly affects the salaries in the public sector, as the source for such remuneration is the budget which relies on the incomes from the economy. Therefore, economic *stagnation, fall or crisis* eventually erodes the career advancement specified by the legislator.

Such processes were observed in the Act on Civil Servants, Act on Civil Service Officials and then in Act on Public Servants. The compulsory minimum salary was increased by a factor of 17.25 between 1992 (HUF 8,000) and 2018 (HUF 138,000).⁶² This affects the lowest grades in the public service jobs (entrant positions or positions not requiring a qualification), as the public sector cannot pay less than the private sector, where employees are in the worst situation. The increase in the minimal wage, for fifteen years from the entering into force in 1992 and the introduction of minimum wage⁶³ in 2006 did not affect the public servant and civil servant salary scheme. The *change started* in 2008, when the collapse of *Lehman Brothers Holdings* marked the *beginning of the crisis of the global economy*. Hundreds of banks and companies went bankrupt. Consequences: high rate of unemployment not experienced for decades, increasing budget deficit, recession; all in all, the bankruptcy of capitalism.⁶⁴ As my paper supports it by facts and figures: the *effect of the crisis*, gradually increasing and affecting more people, has been *preserved* in the public sector for a decade.

Another reason for the *erosion of the function of salary progression* is the increase in the minimum wage and guaranteed minimum wage. This raise undermined the budget, which is the source of public service salaries, making the salary scheme increasingly complicated. The rate of *increase of the two minimal standards* was higher than the performance of the economy. For instance, the minimum wage was increased by double the growth of the national product of Hungary between 1998 and 2013.⁶⁵

⁶¹ Francisco Cardon, *Performance Related Pay in the Public Service in OECD and EU Member States* (SIGMA Support for Improvement in Governance and Management, 2002) 3.

⁶² Government Decree 430/2016. (XII. 15.) on the Mandatory Minimum Wage and on the Guaranteed Wage Minimum.

⁶³ Government Decree 316/2005. (XII. 25.) on the Mandatory Minimum Wage and on the Guaranteed Wage Minimum.

⁶⁴ See <https://index.hu/gazdasag/vilag/2009/09/15/egy_nap_mely_megrengette_a_vilagot/> accessed 1 February 2018.

⁶⁵ See <<http://magyarnarancs.hu/belpol/maganak-emel-minimalberek-negy-kormanyzati-ciklusban-86996>> accessed 1 February 2018.

1 The Fragmentation of Legislation – Two Codification Types

During the twenty-five years since the change of the system of labour law, it became clear that, regardless of the reasons, the legislator was unable to *regulate the remuneration of public servants and civil servants consistently*. ‘Saving’ particular groups in public employment from the devaluation of salary progression *led to the further fragmentation of the present regulatory structure, which is unreasonably divided*. On the whole, this is *not an exclusively Hungarian characteristic*. When the actual trend of public service reforms is taken into consideration, *the fragmentation mentioned may be observed elsewhere, too*.⁶⁶

There is no coherent pattern for national legislation; the idea of unified public service is wasted. Regarding salary advancement, the regulation of Hungarian public service became too complicated, that is to say, obscure.⁶⁷

Concerning the scope of the Act on Public Servants and the Act on Civil Service Officials, fragmentation is *embodied in the two different codification methods*. Regarding Act on Public Servants, the *public service employment legal status remained*, however, the salary advancement of different public service employee groups is regulated by other legal provisions. The first regulatory step, to meet the transparency requirement, remains within the framework of the Act on Public Servants. In 2006, the legislator separated the career and salary advancement of instructors in *public higher education*, teachers and researchers, from the general provisions of the Act on Public Servants, hence independent and special rules applied to these groups within the law.⁶⁸ Subsequent to this, the lawmaker changed the method. By keeping the public servant employment legal status, it ‘took away’ certain professions, by sector-specific laws, from the salary advancement model of the Act on Public Servants, for instance teachers in national public education,⁶⁹ and physicians and public health professionals.⁷⁰

Regarding the Act on Civil Service Officials, the legislator chose a slightly different fragmentation solution. Employees of government offices were excluded from the salary scheme of public service officials (see 2. *Without comparative advantage: equalization of the*

⁶⁶ Christoph Demmke, Timo Moilanen, ‘The future of public employment in central public administration – Restructuring in times of government transformation and the impact on status development’ (Study commissioned by the Chancellery of the Prime Minister of the Republic of Poland, European Institute of Public Administration, 2012, Maastricht, Berlin, Helsinki) 6.

⁶⁷ Hazafi Zoltán, ‘Néhány gondolat a közigazgatás munkaerő-piaci versenyképességéről’ (2015) Hadtudomány, <https://www.mhht.eu/hadtudomany/2015/2015_elektronikus_kulonszam/4_HAZAFI_ZOLTAN.pdf> accessed 16 November 2017.

⁶⁸ Act on Public Servants pt III ch V s 79/B–79/E.

⁶⁹ Act CXC of 2011 on National Public Education 64 para 1: Regarding the employees and public servants of the public education institutions (hereinafter referred to as employee), in parallel with the stipulation of present Act, the Labour Code and the Act on Public Servants shall be applied.

⁷⁰ Act LXXXIV of 2003 on Certain Aspects of Performing Healthcare Activities: This Act specifies the advancement rules in the health care for the public servants, the employed health employees and the health and the load place on the health care workers. (See Annex 1 and 2 for the salary scheme of physicians, specialized health care employees and particular health care employees).

remuneration) and a formally independent legal status was created: The Act on State Officials included state employment legal status. This was required to exclude government office employees from the salary progression of the Act on Civil Service Officials. Apart from the different place of work, there are no distinctive features of state and government employment legal status that could *establish their independent legal status*. However, regarding employees of similar, therefore comparable legal status, the legal requirement would have undermined the principle of equal treatment because of the more beneficial remuneration of government office employees under the effect of Act on Civil Service Officials.

According to the original legislative concept, as of 2018, the more beneficial regulations of state employee legal status would include the ministries and public administration bodies specified by law under the direction of the government or ministries.⁷¹ Due to the lack of money, the legislator *delayed* the extension to central public administration of the career advancement system valid for government offices *by one year*.⁷²

The other example concerning the Act on Civil Service Officials is the *legislation method of the Act on Public Servants*. By preserving the status, Parliament withdraws its own civil servants from the *salary advancement scheme of the Act on Civil Service Officials*. It created provisions for the classification, career and pay advancement of public servants in the National assembly.⁷³ Other public servants, especially those who work in the mayor's office of the local government and common local government office (approximately 200,000 employees) were left alone by the legislator. Therefore, in the beginning of 2018, the public servants in public administration resorted to a measure very uncommon in the public sector: *they went on strike*.⁷⁴

2 Without Comparative Advantage – Equalization of the Remuneration

Besides the jubilee award – which rewards time spent in a longer legal relationship in public or civil service –, there are no comparative advantages of remuneration as per Act on Public Servants and Act on Civil Service Officials. As the result of the global economic crisis that broke out a year before, *the thirteenth months' salary* was taken away from civil servants and public servant in 2009.⁷⁵

Those groups who were not drawn from the effect of Act on Public Servants and Act on Civil Service Officials, lost the *salary advancement acquired as a comparative advantage*, guaranteed by law. On the one hand, the basic salary of civil service officials (HUF 38,650⁷⁶),

⁷¹ Act on State Officials ch III s 37.

⁷² Act LXXII of 2017 on budget planning for 2018, s 93.

⁷³ Act CLXXXVII of 2017 on the modification of Act CXCV of 2011 on Public Service Officials and Act XXXVI of 2012 on the National Assembly s 124.

⁷⁴ See <<https://24.hu/belfold/2018/01/03/januarban-ket-napra-zarhatnak-az-onkormanyzatok-sztrajk-miatt/>> accessed 3 February 2018.

⁷⁵ See Act CX of 2008 for the modification on the payment rules of thirteen months' salary.

⁷⁶ The amount of basic remuneration is the same in 2018 as it was in 2008. <<https://www.kozszolga.hu/illetmenyalap>> accessed 3 February 2018.

and on the other hand, the decade-long freezing of the amount related to the first pay class of different salary categories serving the similar purpose for public servants, guarantees nothing but the *entitlement to minimum wage or the guaranteed wage minimum* for the employees, under the above legal regulations, who are increasing in number each year, regardless of the educational attainment, qualification and public service time required for the job.

Double effect. One is the long term lack of change in the mentioned amount and the other is the increase in the minimum wage and guaranteed wage minimum at a higher rate than economic growth. The consequences are not only the erosion of salary advancement, but partly also its total losing of function. While the salary advancement of public servants and civil servants has been frozen since the global economic crisis, the minimum wage doubled from HUF 69,000 to HUF 138,000 and the guaranteed minimum wage was raised from HUF 82,800 to HUF 180,500 (2.18 times growth) between 2008 and 2018.⁷⁷

As a result of the disappearance of the comparative advantage due to the flat rate by the Act on Civil Service Officials, an entrant trainee with a degree just earned belonging to category I and a senior counsellor with 14 years of experience are both entitled to the guaranteed minimum wage of HUF 180,500, as a basic salary.⁷⁸ The situation is much worse in category II, in which only high school graduation is required. There is no advancement between the trainee freshly graduated from high school and a senior colleague with more than 37 years of experience.⁷⁹ And the list of the erosion of comparative advantages has not ended yet. Due to the entitlement to a guaranteed wage minimum, a similar basic salary is issued to the entrant trainee in a position requiring a secondary school education and the senior counsellor with a university degree working for more than a decade.

The situation of the *public servants whose salary advancement is regulated by the Act on Public Servants* is similarly awful. 121 of the total 170 salary grades of the 10 salary classes of the salary scheme; that is to say, the 71% of the advancement system based on educational attainment, qualification and the time spent in public service is *immaterial*.⁸⁰ In financial terms, the following consequences are observed among the two groups of public servants:

There is *no advancement in the lowest salary grade A*, where jobs either or not requiring primary education belong. So both the entrant and the senior about to retire earn the minimum wage. The situation is even worse in the other salary categories. Regarding the two extreme examples: an employee who just graduated from high school in a position requiring a high school graduation (salary grade C) earns the guaranteed wage minimum as per the *Act on Civil Service Officials* similar to an incumbent in a *position requiring a university degree, holding a PhD and with six years of experience*.⁸¹

⁷⁷ See <<http://www.munkaugyiforum.hu/munkaugyi-segedanyagok/minimalber-2008-2018-atttekinto>> accessed 3 February 2018.

⁷⁸ See Act on Civil Service Officials Annex 1.

⁷⁹ See Act on Civil Service Officials Annex 2.

⁸⁰ See <<http://24ora.eu/kozalkalmazotti-bertabla-2018-fizetesi-fokozatok/>> accessed 3 February 2018.

⁸¹ See Act on Public Servants pt III ch V s 61.

If it is examined through the spectacles of the employment in general, *besides the elimination of advancement*, the public servants and public officials concerned are entitled to the minimum standards of the private sectors as guaranteed or basic salary, that is to say, the minimum salaries legally paid.

Final Remarks

Although my paper disregards them, I cannot hide my *doubts occurred during the drafting* of this study: are not the above-described salary rules against the Fundamental Law of Hungary? Where there is no advancement, it may violate fundamental rights such as:

*a) human dignity is inviolable;*⁸²

*b) Hungary provides the fundamental rights to everyone without distinction, namely, without making distinction according to any other situation;*⁸³

*c) all employees are entitled to working conditions that respect his/her dignity.*⁸⁴

Do these regulations violate the above fundamental rights of *employees in a comparable situation* regarding:

– on the one hand, the educational attainment required for the job and the skills and qualification recognised by the state,

– and, on the other hand, the duration of time recognised for the classification; *it does not apply adequate distinction?*

Furthermore, does it not violate the human dignity and the requirement of working conditions respecting dignity when the law orders to pay similar or almost identical salary to the master and apprentice?

⁸² Fundamental Law of Hungary s II.

⁸³ Fundamental Law of Hungary s XV para 2.

⁸⁴ Fundamental Law of Hungary s XVII para 3.

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