László Pribula[1]: Problems Concerning The State As a Legal Entity

Debreceni Jogi Műhely, 2006. évi (III. évfolyam) 1. szám, (2006. január)

The state is one of the most common legal entities in civil law. A basic principle of classical civil law is that it must not make any difference between legal entities in terms of legal capacity.(the legal capacities of all the legal entities are equal, general and absolute), since the civil law is mainly the law of property of equal legal entities. The legal idea of socialism did not accept this principle, so the „Polgári Törvénykönyv" (the Hungarian code of civil law, hereafter: Civil Code) – although this Code was based on classical civil law - defined the state as a primary" legal entity. It meant that there were three types of legal entities. One of them was natural persons. Of course, they had absolute legal capacities. The second one was legal persons. They had legal capacities limited by their provinces. The third one was the state. It had, of course, absolute legal capacity since it had no „limited provinces" So the state was not a legal person but a third type of legal entities.

This idea became antiquated with the change of the regime, but it took more than ten years for the legislative body to improve this old system. First of all the provisions of the Civil Code before the change of the regime are worth being examined.

Section 26

(1) The state has legal capacity. Its legal capacity comprises all rights and obligations which, by virtue of their nature cannot be attached exclusively to persons.

(2) The state shall enter into a civil law relationship directly especially if the property covered by the legal relationship is due to the state, and

a) does not belong under the administration of any state organ or is administered by a state organ, which is not an independent subject of law, or

b) the purpose of the property is not definitely specified.

Section 27

The state shall be represented by the Minister of Finance, if it directly participates in a civil law relationship; the Minister of Finance may exercise this power through another state organ, as well, or delegate it to another state organ. A legal rule may provide otherwise.

This text was first modified by Act XIV:1991 – but only in relation to the distant future. This Act changed a lot of outdated rules of the Civil Code (for instance this Act put an end to the period which made no disctinction between forms of ownership and it declared that the legal representation of the state should be provided by the „Kincstári Jogügyi Igazgatóság", but the preparation of this organization should take a long period – so till that time the old rules should be in force. That meant that – temporarily – everything remained unchanged since the legislative body has not created the Act of „Kincstári Jogügyi Igazgatóság" – so far.

The first real change of this text was created – interestingly enough – by the Corporation Act (Act CXLIV:1997). This Act declared for the first time that the state is not a „primary" legal entity but a legal person. This Act was created as early as 1997 but it came into force only on 16 June, 1998. This rule did not modify the 26.-27.§ of the Civil Code but replaced the old provision of 28.§ (1) of the Civil Code with the following new provision:„The State, as the subject of property related to legal relations, shall be considered as a legal person."

The effective date of the new Corporation Act (16 June, 1998) was preceeded by the Act XXXIII:1998 (1 April, 1998). So this Act abrogated the whole 26.-27.§ of the Civil Code in connection with the legal entity of the state. This idea seemed also logical, since the fact that the state as a recognized legal person makes the provisions connected to the primary legal entity unnecessary. But there was an error. The reason for this Act was the modification of the Civil Code by the Corpration Act, because it declared that the state is a legal person. But one of the old rules was to be retained: the legal represantion of the state. So this provision was regulated in the 28.§ (1) of the Civil Code. So here are the modified provisions – between 1 April and 16 June, 1998:

Section 28

(1) In accordance with the applicable legal rules, the state shall recognize state, economic and social organs and organizations, societies and other organizations as legal entities if their responsibilities require that they have pecuniary rights and obligations. The state shall be represented by the Minister of Finance, if it directly participates in a civil law relationship; the Minister of Finance may exercise this power through another state organ as well or delegate it to another state organ. A legal rule may provide otherwise.

However, the legislative power made an unintended error. The Corporation Act followed the above mentioned Act and its text contained only one provision which declared that the State, as the subject of property related to legal relations, shall be deemed a legal person. So the rules in respect of the legal representation of the state disappeared.

The above mentioned error was corrected on 1 October, 1998, when the Act XL:1998 completed the effective text with the rule of legal representation, so now the text in respect of the state as a legal entity is the following:

Section 28

(1) The State, as the subject of property related legal relations, shall be deemed a legal person. The state shall be represented by the Minister of Finance, if it directly participates in a civil law relationship; the Minister of Finance may exercise this power through another state organ as well or delegate it to another state organ. A legal rule may provide otherwise.

So the state is a normal legal person like – for example – a foundation, a cooperative society or a public-service corporation. Yet a lot of provisions of the Civil Code give some priority to the state. In some but not all cases this priority has legal justification. The rules in the Civil Code are worth being examined which attribute a significant role to the state. First I would like to make three groups:

a.) The first group includes the rules in which the priority of the state has some legal justification and which conforms to the classical idea of civil law. The rules that belong to the first group consider the state – as in every modern civil code – as a last solution. For example: If there is no other heir, an estate shall pass to the state. If the owner of a thing that has been found does not come forward within the period of one year, and consequently the finder does not acquire ownership, the ownership or the profit on the sale of the thing may be claimed by the state. The state can also gain priority by sanction of invalidation and unjust enrichment. Based on a motion filed by the public prosecutor, the court shall be entitled to award the state the performance that is due to a party who has concluded a contract that is contrary to good morals, who has deceived or illegally threatened the other party, or who has otherwise proceeded fraudulently. In the case of a usurious contract, the performance to be returned to the party who caused the injury shall be awarded to the state. When inherent rights are violated and the amount of punitive damages that can be imposed is insufficient to mitigate

the gravity of the actionable conduct, the court shall also be entitled to penalize the perpetrator by ordering him to pay a fine to be used for public purposes.

b.) The second group shall contain the rules which are connected to the duties of the state (local authorities also have public duties) and to objects of exlusive state ownership. Here are the rules concerning the legal persons of public law, for example: public foundations, non-profit and public corporations, whose existence is justified by public duties of the state or local authorities.

c.) However, there are some provisions which make orders in connection with the priority of the state. These provisions are by no means modern. Here is a selection of them:

- In some cases the legislative authority does not use precise texts – these texts conform to the legal view of the previous period in terms of the definition of business associations. The state, legal persons, unincorporated business associations and natural persons may found economic associations with their own company names to pursue and promote economic activities within a business partnership. So the state seems to be a special legal entity not a legal person.
- Among the rules of acquisition of ownership we can meet acquisition of ownership by means of official resolution or auction. Here the Civil Code regulates that the state, if it acquires ownership pursuant to a court decision or other official resolution without indemnification – for example: forfeiture of property -, shall be liable for the obligations of the ex-owner existing at the time of acquisition of ownership to a bona fide person on the basis of a legal regulation, court decision, or other official resolution or a commutative contract to the extent of the value of the property. However, the state shall be liable only if the attachment of the other property items of the ex-owner has been unsuccessful. But there are some problems in connection with this regulation. Local authorities could acquire ownership without indemnifications – for example pursuant to resolutions of compensation authorities: What does this discrimination make? In a few years, when compensation procedures are ended these provisions will only exist in connection with forfeiture of property (it is an institution of criminal law). Is there any reason to maintain this provision? If the answer is yes, is it right to regulate it in the Civil Code and not in the Criminal Code?
- It is a very interesting problem that by the rules of breach of contract the Civil Code prescribes that the enforcement of claims based on a breach of contract is compulsory if the consideration stipulated in the contract is performed in part or in whole from the central budget. If the enforcement of claims based on a breach of contract is compulsory and the obligee fails to perform this obligation without any good reasons, a monetary claim (indemnification, default penalty, price reduction) can be enforced on behalf of the state by the financial institution making the payments from the central budget. With no reason there is a bit of disorder: this text was written when there was only one financial institution in Hungary, the Hungarian National Bank, which is the note-issuing bank, and at that time all the payments of the central budget (including councils that is the „former" local authorities) were made by this bank. The problem is always the same: why does the Civil Code make a difference between the budget of the state and local authorities?
- In contract law there are a lot of contracts which have some provisions in connection with the priority of the state. In the era of socialism the state monopolized services like transportation, insurance, forwarding. This idea makes some contracts unnecessary. First of all the supply contract (by concluding a supply contract, a seller shall be obliged to deliver the thing defined therein to a customer at a later agreed date or period, and the customer shall be obliged to accept delivery of the thing and pay its price – it is a common sale), but the sense of agricultural products sale contacts (the definition of these contracts

is so complicated: by concluding agricultural product sales contracts, producers shall be obliged to deliver crops and/or produce that they themselves have produced or livestock that they themselves have raised in the quantity specified and at a predetermined future date into the possession and ownership (management) of customers, and customers shall be obliged to accept delivery of such crops, produce, or livestock and pay the contracted purchase prices for them) is disputable.

But the Civil Code should be modified after the „Metro-Case"

On 7 April, 1998 the Hungarian State (represented by the Minister of Finance, Budapest and Budapesti Közlekedési Részvénytársaság (Budapest Traffic Company – BKV), the investor signed a contract named „Agreement". This declared the conditions for the construction of the underground line between South-Buda and Rákospalota (No. 4. line). The main provisions of this „Agreement" are the following:

The costs of the whole investment must not exceed 514.000.000 ECU

Rate of financing the investment: The Hungarian State – Budapest: 60 % - 40 %

The investor and the operator of the constructing would be the BKV which is in 100 % ownership of Budapest

Parts of the contributions from the state and Budapest: 1.) contribution of capital 2.) contribution to credit, interest and other costs 3.) contribution to ÁFA (value added tax)

The Central Budget Act of 1998 (Act CXLVI:1997) contained the expenses of the year 1998. construction as subvention for local authorities.

After the 1998 parliamentary elections a new coalition government came to power and soon the government disagreed with Budapest about the investment in the future. The government said that because of financial reasons the investment is not rational. On behalf of the government the Minister of Finance wrote a letter to the Mayor of Budapest (on 10 November, 1998) and then to BKV – which was in summary of a prompt notice. He told the Mayor that because of the resolution of the government, the Ministry could not afford to finance the investment. So the Central Budget Act of 1999 did not contain the expenses of the 1999 year construction.

Of course, Budapest did not agree with the opinion of the state and brought an action against the state before Pesti Központi Kerületi Bíróság (a court, PKKB) for the statement of nullity of this notice. PKKB said in its (later final) verdict that the notice in the letter dated on 10 November, 1998 is null and void.

The judgement, however, did not mean the end of further disputes. The Minister of Finance wrote another letter (dated 2 July, 1999) to the Mayor and he informed him about the fact that „the Ministry could not afford the investment: The contract is valid, it is true, but it does not oblige the state to pay. Afterwards, Budapest brought an action against the state before Fővárosi Bíróság (a court, FB), because of the repuidation of the performance from the state.

There were a lot of legal controversies between the parties during the trial. It is quite interesting that there were no facts disputed. But the interpretations of several provisions were absolutely different.

The first disputed question was: Was the Minister of Finance entitled to represent the state by concluding the „Agreement"?

According to the Civil Code the state shall be represented by the Minister of Finance, if it directly participates in a civil law relationship; the Minister of Finance may exercise this power through another state organ as well or delegate it to another state organ. A legal rule may provide otherwise. In the state's opinion there is a legal rule which provides otherwise. The Minister of Finance could incur a liability financed from the Central Budget according to the provisions of Act XXXVIII of 1992 on the financial system of the state. Budapest thought that the Minister could represent the state without any limitation.

The state expressed its opinion that this investment is a local authority investment supported by the Central Budget. The Act on the financial system of the state prescribes that „Very Significant Investment" is the investment whose costs are more than 0,2 % of all the annual expenses of the Central Budget. The detailed provisions with respect to these expenses are included in the Resolution of the Government 157/1995. (XII.26.) about planning central expenses. So the state was of the opinion that according to the Civil Code the state should be represented by the Minister of Finance unless a legal rule provides otherwise. The Minister could incur a financial liability according to the provisions on the financial system of the state. The Minister has no general authorization for incurring an undetermined liability financed from the Central Budget, mostly if this liability is regarded to be a long term one. The Minister is entitled to manage the whole budget procedure. But the annual budget has the right to decide everything about the annual expenses. So the annual Central Budget Act gives authority to the Minister for incurring financial liabilities during the next year. The Central Budget Act for 1998 gave authority to borrow credit (50.000.000 ECU). But in the Central Budget Act for 1999 there were no provisions about the investment so next year the Minister could do nothing. So he was entitled to sign the „Agreement" but only in connection with the year of 1998.

Budapest thought that this idea is in contrast with the normal way of legal thinking. That would abolish investments for a long term since that would require a new contract to be signed about the annual expenses of the investment every year. The representation of the state does not give exception from the civil responsibility of the state. The Minister of Finance – of course on terms of an act – could incur liabilities for a long term and provided that the next central budget does not give enough money for these liabilities, the state breaches the agreement. The Civil Code prescribes that no one may allege their own imputable act in order to gain advantages. The Minister is a member of the Government which has majority in the Parlament so the Government is able to get its way in the legislation. The reason that the state was not able to fulfil the incurred liabilities because of the Parlament's decision is not credible.

The second question is: Did the state perform the liabilities defined in the „Agreement"?

The answer comes from the ideas above: Budapest said „no" since the state was obliged to carry out the whole investment. Tha state said yes because the annual Central Budget Act gave authorization for incurring a financial liability only in the year of 1998 and this annual obligation was fulfilled.

The third question is: could the condemnation judgement be enforceable?

Budapest was of the opinion that a condemnation judgement in connection with the state was a normal judgement and it could be enforceable according to the provisions of the civil law. But in the state's opinion a court is not entitled to decide on central budget questions. The procedure which creates the annual Central Budget Act is regulated by the act of the state's financial system. Provided that the judgement obliges the state to pay an amount which is a „Very Significant Investment", the court makes a decision about following central budget

acts. Budapest declared that this opinion would be a claim for the unjustified priority of the state.

The court (Fővárosi Bíróság) adopted the view of Budapest. According to the Code on Civil Procedure a relief sought concerning condemnation may take place only for recovery of an expired claim. It is true that there are exceptions – e.g. in actions for allowances, annuities and other temporary provisions a relief sought concerning condemnation may be filed for standing provisions as well and relief sought for the return of an apartment, other premises or immovable properties may be filed even before the expiry of the obligation to return them, provided that restitution is to take place at a definite date – but not in thus case. However, Legfelsőbb Bíróság reversaled the decision of Fővárosi Bíróság and made a judgement of dismissal. According to the reasons of the decision, the state shall be required to obligations related to budgetary appropriations.

From 19 Jule, 2003 according to Section 28 (2) of Civil Code the state shall be required to honor obligations of restitution, reimbursement and compensation and commitments to bona fide persons even int he absence and in excess of budgetary appropriations. However, the priority of the state must be limited to the extent that does not violate the most important principle of civil law, which is the principle of equality of the parties.

Pribula László[1]: Az állam jogi személyiségének problémái

Az állam a polgári jog egyik leggyakrabban szereplő jogalanya. A klasszikus magánjog egyik alapvető elve, hogy a jogalanyok között a jogképesség szempontjából nem tehető különbség (azaz valamennyi jogalany jogképessége egyenlő, feltétlen és általános), hiszen a polgári jog az egymásnak mellérendelt jogalanyok vagyoni és bizonyos személyi jogviszonyait tárgyalja. Az alapelvet azonban a szocialista jogi felfogás nem osztotta, hiszen az állam kiemelt jogalanyisága az egyébként klasszikus magánjogi alapokon (is) nyugvó Polgári Törvénykönyvbe is belekerült. Ennek értelmében a jogi személyek csoportjától eltérően – ahol a főszabály a korlátozott, tehát a feladathoz kötődő jogalanyiság volt – az állam volt a természetes személyek körén kívül eső egyetlen olyan jogalany, amelyik jogképessége korlátlan volt, lévén az államnak nincs behatárolt feladatköre. E felfogás a rendszerváltozás után túlhaladottá vált, azonban mintegy tíz évig tartott az államra vonatkozó Ptk. anyag „rendbetétele". Az állam jogalanyiságának kiemelt vagy a többi jogalannyal azonos szerepének egyik nagy próbatétele volt a metróper, ahol lényegében két felfogás küzdött egymással: az egyik szerint az állam ugyanolyan feltételekkel vállal polgári jogi kötelezettséget, mint bármely más jogalany, a másik szerint az állam kötelezettségvállalása a költségvetési törvény keretei által behatárolt. Ez a két felfogás különbségét jól mutatják a metróperrel kapcsolatos ítéletek. A Ptk. legutóbbi, ez irányú módosítása ugyan igyekezett e kérdést részben rendezni, de hosszú évekig még sok jogvita várható az állam jogalanyiságával kapcsolatban.

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BIBLIOGRAPHY

1. Balázs István: Az állami szerepkörök a fogyasztói társadalomban és a piacgazdaságban (Közigazgatás reformja 1992. 10.-19.)

2. Czuczai Jenő: A metróper tanulságai hazánk EU csatlakozása szempontjából (Napi Jogász 2002/2. 5.-11.)
3. Gárdos István: A metróper és az állam jogi személyisége (Jogtudományi Közlöny 2001/11. 460.-468.)
4. Menyhárd Attila: Az állam javára marasztalás (Polgári Jogi Kodifikáció 2003/4. 30.-35.)
5. Sajó András: A jogállamiság feltétlen eleme a jogbiztonság. Szakmai megjegyzések a Legfelsőbb Bíróság „metróper" ítéletéhez (Napi Jogász 2001/6. 5.-7.)
6. Sárközy Tamás: Az állam és szervei jogalanyiságáról (Chikán Attila jubileum 2004. 45.-53.)

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