THE LEGAL NATURE OF THE PUBLIC FUNCTION

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Abstract: *In this paper we propose to make an analysis at the world level of the juridical norms regarding the public function and the civil servant.*
The public function is a juridical situation, that is a an unitary and interdependent complex of rights and obligations which devolve to his keeper to whom it confers his own real statute and not just a content of juridical report, formed between the civil servant and his superior or between the first and the one who is under his administration, in which the parts are distinguished only through the opposability, which can sometimes be mutual, of the rights and obligations which devolve in their quality as participants to the juridical relationship

Key words *: civil servant, public function, administration, the statute of the civil servant*
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The concept of public function has traditionally been laid down as a fundamental concept of public law, especially of administrative law, and it is bound to the concept of activity, authority, organ etc. An organ o state or a public authority, in general, as a structure, is made up of three elements: the competence, material and financial means and the personnel, and the personnel, at its turn, is structured on divisions, hierarchical positions and lines, of which only certain of them appear as public positions. The holder of a public position, in a generic approach, is called a public worker.

These ideas represent a constant o the public law doctrine or the administrative science, and that's the reason why public function appears to be one of the favourite elements of corporatists' and a criteria of measuring the statute laws of countries integrated in a political form as The European Union.

There are traditions of public function in every western country which shouldn't be mistaken by the issue of a general statute. It is stated that the first country to have adopted a general statute of the public function is Spain, through *The 1852 Law,* followed by Luxembourg, through a law issued in 1872 and Denmark, in 1899.

In Italy, the first statute of the civil servant was adopted on the 22nd of November 1908 and in the Republic of Ireland the first law related to the public function dates from 1922. Holland and Belgium adopted the first law about civil servants in 1929, and *The general regulations of the civil servants in the Kingdom* appears in 1931.

In Germany, which has traditions regarding the public function ever since Middle Ages, the first law related to the general encoding of the public function regulations was adopted by the national socialist régime in 1937, A Bavarian Code of public function has existed since the beginning of the 19th century.

In France, the first statute of the public function was adopted by the Vichy regime.

Greece adopted the first Statute o the civil servant in 1951, inspired by the French statute, the German law, but also by the English law of the public function.

In our country there is a rich tradition regarding the regulation of all aspects related to the system of the function in the state administration through a statute.

The issue of civil servants, "the high officials", has always been a major concern for the legal systems and government systems known in history, and our legislations didn't make any exception from these intercessions.

The first laws which dwelt on the problem of civil servants in a more developed and coherent form were *The Organic Regulations,* in Moldova and Muntenia.

The Constitution from 1866 had some provisions related to "public functions", but these didn't determine the adoption of some more detailed regulations in this respect, although the stipulations from article 131, paragraph 5 from the Constitution expressed the adoption of a special law "for the conditions of the admissibility and advancement to the functions of public administration".

On the doctrinarism plan, The treaty of administrative law of professor Paul Negulescu, who approached, under scientific criteria, the aspects related to the public function and the public servant.

The first unitary provision in this filed was adopted in 1923, respectively *The law of the public servants' statute* which showed the principles settled by the Constitution from 1923 and which had represented for a long period of time the common law in that respect.

In virtue of this law, in the same year, on the 3rd November, *The regulation of the law of civil servants* was adopted and it detailed many of the provisions of the law.

To those provisions others had been added, which issued in the following years and they were related to certain categories o civil servants. In this respect, we can mention *The law for administrative unification,* from 1925, which contained the provisions referring to the civil servants from the local administration and *The law from 1929 for the organization of the ministries,* which contained provisions regarding the civil servants from the central administration and the high officials.

The civil servants' statute, adopted in 1923 was applied until 1940, when *The Code of civil servants* was adopted, which, after many modifications, was abrogated immediately after 1944, adopting in 1946 *The law for the civil servants' statute,* nr. 746 from the 22nd September, which was also abolished in 1949.

The period that followed after 1949 and especially after the adoption in 1950 of the Work Code is characterized by a legal regime based on contractual report, applicable to civil servants, even if in some fields of activity, railway transport, post office, banking system communications etc special provisions have been adopted.

The political realities through which Romania had passed after Second World War, as well as other countries which were influenced by the Soviet empire, as a result o the Yalta treaty, couldn't be without effect regarding the provision o the public function. There was a theory, according to which, the civil servants, by such a statute, were a privileged class, an instrument held by the middle-class landlords to be able to exploit the workers and the peasants.

It was one of the most unfortunate time in our country, during the Stalinist period being actually physically destroyed the entire political class of the country and the entire public body of the state, from Government to the communal guard. This is how we can explain why no one of the three socialist constitutions contains provisions referring to the public function, thus accounting that the civil servant is "a workman", subjected to the same conditions of the Work Code from 1950.

Subsequently, the Work Code from 1972 came with a slight modification, raising the issue of a *General Statute of the Personnel in the State machinery.*

Until the year 1989 a general statute for the civil servants hadn't been adopted, but there had been adopted, by law, professional and disciplinary statutes, for different fields: the banking system, transports, post office and telecommunication etc.

Romanian Constitution, adopted in 1991, contains some provisions which constitute the main framework of regulating these legal institutions. As examples we can enumerate article 16, last paragraph according to which the public functions and dignities, civil and military, can be taken by people which have exclusively Romanian citizenship and residence in Romania, article 37, paragraph 3, sets up the interdiction to be member in a political party for a series of civil servants:

the magistrates of the Constitutional Court, the magistrates, active members of army and police force etc.

The Romanian Constitution, modified and completed by *The law of revision of the Romanian Constitution, nr 429/2003,* keeps a part of these provisions, but sets up others new, thus, according to art. 16, paragraph 4, "After the Romania's adhesions to the European Union, the citizens from the Union, who fulfil the requirements of the organic law have the right to elect and be elected in the authorities of the local public administration". Also, the possibility to fill a position in public offices and public dignities is no longer reserved exclusively for people with Romanian citizenship, art. 16, paragraph 3, setting up the possibility for the people who "have Romanian citizenship and Romanian residence".

Also, *The law regarding the civil servants' statute, nr. 188/199,* modified and republished in may, 2007 regulates in detail aspects related to the categories o public servants, their rights and obligations, their selection and appointment, the evaluation of their activity, their liability etc.

Regarding the regulation o the public function and the civil servants in the European Constitutions, we can outline the existence of two systems: one system is dedicated to the exclusive competence of the legislative power of Parliament, in order to settle the rules applicable to the public function and to the civil servants (ex. Denmark, Germany, Greece, Spain, Italy etc), and in another system it is also stipulated the competence of the executive, determining their competences (ex. Belgium, England, Holland, France and Norway), in all these countries there are codes or statutes, which constitute what we could call "common law" in the subject.

On the doctrinarism plan and in the dispute with the modalities of recognition in the legislative filed of the public function and of the civil servant and with the jurisprudence of these times there have been issued two fundamental concepts regarding the legal nature of the public function and implicitly of the civil servant.

One o these concepts considers that the public function is contractual, being based on the term contract-after some German authors (P. Laband), or the "administrative contract"-after some French authors (Laferiere).

After another concept, that of the legal fundament of the public function, sustained by a great part of the French specialists in the field law is put at the origin of public function, as an authority document of the state. Thus, he holder of the public function exercises the state authority, not rights and obligations assigned by the contract.

This concept was also agreed by the Romanian doctrine of that time, and, in this respect, M. Varzaru stated that "civil servants are neither the stakeholders, nor the *negotiorum gestiori*, or the commissioners o those who had appointed them. The appointing document is not a contract of civil nature, because the will and the approval of the appointed civil servant-elements which play an important role in the civil contracts-have no importance when appointing, not even afterwards, when they exercise their job. Between the reports issued within the state and its civil servants and the civil reports between two private persons there is no comparison; in the first case, the reports are related to public law, in the latter case, they are related to civil law. The civil servants have no power and no right from the authority who appointed them but their competence, both *ratione loci* and *ratione material* is held by them from the organic law of their function.

After the Work Code had entered into force in 1950, the doctrinarians of the time tried to explain public function through its regulations as well. The specialists in labour law considered the collective work agreement the only reason of the work report, inclusively that of the public function.

Basically, the supporters of this concept considered the job report as a true work report and the regulations of this report are regulations of the labour law.

The authors of administrative law had underlain their concept on the idea of the double juridical report of the public function. In this respect, Mircea Anghene thought that "the civil servant appears to be the object of two types of legal reports. Firstly, he appears as the subject of a job report which arises through the appointment or selection document. According to this document and based on it, the civil servant exerts his attributions related to that function, acting on the state's

behalf. But the civil servant appears also as the subject of the legal report where the civil servant enters with the institution which employs him, report which makes the object of the labour law".
Specialized literature (A. Iorgovan), considered that the two categories of legal reports, that of administrative law and labour law make an indissoluble dialectic entity, as the civil servant who actually exerts his job duties doesn't stop being a subject to the legal work reports, as well as the civil servant who exerts the duties of disciplinary authority towards those subordinated to him, continues to be an overauthorised subject to the administrative law.

Although the classic system where the public function is created and exerted is actually considered a system of public law, in the specialized literature, but also in practice we can speak about its exertion in a private law system as well. Such an issue arises especially related to some administrative public functions which is the case of the self-governing institutions, functions which could be exerted both in a public law system and in a private law system.

This is also the reason why in specialized literature we can speak about "privatizing the public function", mentioning that in order to exert certain public functions it is preferable a private law system, based on a negotiable work contract.
Concerning the analysis of the features o the public function, first a definition of this should be set up, and still the doctrine will have to formulate different definitions.

Thus, Paul Negulescu defines public function as "the complex of powers and skills, organized under law in order to fulfil a general interest, in order to be held, temporarily, by a titular (or by several), a person who, exerting the powers limited to their skills, is pursuing the accomplishment of the goal for which the function has been created".

A Iorgovan defines public function as being "the legal situation of the person, legally appointed, with duties in accomplishing the competence of a public authority, which consists in all the rights and obligations which make the complex legal content between that person and the organ which invested them".

Professor A Negoita says that the public function represents "the totality of the duties established by law or by legal documents, issued on the base of law and executed by it, duties which a person employed by a body o the public administration fulfils and which has the legal ability of accomplishing these duties of the public administration".
Law nr. 188/1999 as it was modified, defines public function as being the "totality of attributions and responsibilities established by the public authority or by the public institution, under the law, in order to fulfil its competences.

The public function can be defined –in the widest meaning of the concept- as representing a normatively predetermined legal situation set up from a unitary complex of rights and obligations through which accomplishment it is fulfilled, in a specific way, the competence of a state body, exerting public power, according to the duties of that certain authority.
Public functions are created under law, under a document of power, in conclusion one-sided not contractual. At the same time, public functions can be altered or their content can be changed, unilaterally, by law or by a subsequent document, without the agreement of those exerting it.

The public function is a legal situation, a unitary complex and interdependent of rights and obligations which all back on its holder, to whom it confers a really own statute, and not a simple content of a legal report, made between the civil servant and his senior or between the first and the client, in which the parts can be distinguished only through the opposed situation, sometimes mutual, of the rights and obligations which fall back on them as participants in the respective legal relationship.

If in a common legal report the rights and the obligations are closely related to the formation, amendment and cancellation of the relationship, in the case of the function the rights and the obligations pre-exist relationships themselves and their formation, amendment and cancellation after producing an act or a legal fact is just the opportunity to exercise that faculty or statutory duties which are not just the products of the exclusive will of the titular subject, limited, in its actions, not so much in their formation, but above all at their achievement. In other words, through the function contribute to triggering the law incidence to solve a given case.

They have a certain degree of specialization, a competence determined by law, within which they follow the satisfaction of a particular interest.

The public function has his own character, belonging just to the invested one into an authority to achieve his competence. In the function they could commit only certain acts and facts under the powers of that institution, which delineates within the organ, a function of other, even similar.

The public function has a continuous character or permanent in time, during the entire interval since the investment to the disinvestment of the holder which it belongs to, whether if it exists or not a term.

Also the function has a binding by the duty of exercising rights and accomplish the obligations of the content, which means that this is not a faculty or a possibility, like the subjective right conferred on individuals or entities and to which exists the opportunity to enter or not, after his own will , in juridical reports as his own interest.

Indeed, the public administrative function must be exercised in any circumstance which needs its intervention - automatically or on request- even if over a certain attribution the authority has a right of appreciation or the opportunity to choose a solution of the situation. This task of resolving or reference even against a request (not necessarily require intervention by law or a favourable settlement from the authority), operates permanently because the failure of position by the executive organs - or by failure to resolve in time, either by solving the unjustified refusal of an application relating to a recognized legal right- allow triggering of a legal proceeding that can complete with bringing to court the guilty (including for insubordination if it has a hierarchical mood), of the executive authority which it belongs to, while obligating it to take and fulfil the required measures, to pay the damages and moral damages, according to the Law on Administrative Contentious 554/2004 (in the case of the civil servant) or the justice which should solve any case that was referred (in the case of the judge- according to The Civil Code).

Another feature is that only by effectively achieve all the functions of an authority it is realized the practical exercise of the authority's competence under statutory powers set. That means that the functions must be effectively entrusted to individuals able to perform them, who have the will and energy necessary to achieve them. Of course, it can exist functions unoccupied by owners and, sometimes, even unexercised functions, but these don't affect, overall, the achievement of the organ's attributions, but only fulfil their entirety. Also, sometimes there may be delegation or replacement of functions like exceptional circumstances when the same person will ensure the effective exercise of two or more positions just to ensure the normal functioning of the institution.

In exercising the function there is a contribution to public power, either in a direct form , where incumbent executives that issuing legal acts of power or authority (usually by the head of authority or institution), or indirectly through the actions of preparation, execution and control closely related or in connection with the exercise of state authority (the inspectors, referees, etc..).

This clarification is necessary because only in this way we can distinguish between public functions and other public authority existing even within the same authorities (first returning to the holders , other subordinates superiors), on the one hand, and functions up especially in the internal functional structures- based on contract work (secretarial, registry, accounting)- designed to ensure only the proper functioning of institutions which are not related to actual exercise of public power, why they meet even in governmental administrations, non-state, the private ones, commercial companies, etc. their exercise relying on contract workers, possibly on the Civil Convention. In other words, the civil service shall reflect the essence of the activity features consisting in the exercise of public power by the authority on which integrates that function.

Exercise of public functions provides the material and financial problem of ensuring that its holder must be fitted, and pay him for the effort and activities they perform. .Making an interest of a public service, which may be of a state or local authorities, recognized as such by the state, it is understood that the public function is exercised in the interest of a person which has a legal obligation to provide material and financial means needed to carry public function. As such, the

amounts required must be provided in the state budget and, respectively, in local budgets at a level that would ensure continuous and effective exercise of the function.

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