THE INSTITUTION OF MOBILITY
(OR HOW HIGH PUBLIC OFFICIALS ARE SUBORDINATED TO THE DISCRETIONARY WILL OF THE PRIME-MINISTER/GOVERNMENT IN ROMANIA)

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Abstract: - The management of public administration by a state government has its constitutional support. The mechanisms used to develop this operation are various, the executive being – in many cases – tempted to subordinate to public administration, inventing institutions through which it is subordinated to parties policy. One of these institutions is that of high public officials’ mobility, opening the way for the arbitrary in fields like stabilization and professionalization of public function. Practically cancelling the constitutional right of every citizen to choose the place and type of work, mobility seriously alters working relations, the trust in public authority and depolitization of the administration.

Key-Words: - public administration, public function, public authority, administration

1 Introduction

In states with consolidated democratic regime, the juridical status of public function and public official has been established for a long time. Answering to strict imperatives for the accession, Romania issued in 1999 the Law regarding the status of public officials the two institutions. Necessary distinctions have been made between public function and public office, public officials and contractual personnel, public officials and dignitaries. In order to increase the autonomy level of public administration towards the public
environment, principles like the following were used: stability in exercising public function, professionalization and specialization of public officials, transparency in exercising public functions etc. Incompatibilities and conflicts of interests at public officials were also defined, determining the competences of law courts in settling litigations. There are many aspects that rise questions in the administrative practice in Romania in the field related to public function and public official. Many of them originate in the delayed reflexes of the totalitarian regime, which are supported by mentalities that fetish political power, making it a discretionary authority. Then, the failure to accurately identify the border between public and private leads to arbitrary approaches, in many cases the appeal to public interest having only a justifying role in authorities’ decisions. It is also the case of the institution of high public officials mobility – an express way of subordinating them to the discretionary will of the prime-minister/government.

2. Theoretical and practical aspects

Before the elaboration of the current Romanian Constitution (December 1991, reviewed in 2003), the state function was the equivalent of public function. At present, the constitutional support of public function is established by art. 16 par.3 which stipulates that “public, civil and military functions and offices may be occupied, in the conditions of the law, by persons that have Romanian citizenship and residence in the country. The Romanian state guarantees the equality of chances between women and men for occupying these functions and offices”. Later on, the lawmaker defined public function as: “the group of attributions and duties, established in compliance with the law, in order for the public power prerogatives to be fulfilled by central public administration, local public administration and autonomous administrative authorities”.

But certain repercussions from the European administrative doctrine regarding the juridical nature of public function, have repercussions in jurisprudence as well. I mention here the theory of “contractual situation” by which the public function is approached in terms of civil law, perceived from contractual point of view (mandatory contract, in the opinion of some German authors or the administrative law contract, in the opinion of some French authors). I also consider the theory of “legal status” (supported by French experts), in which the state function is considered a legal status, because its incorporation deed is an authority deed, and the person assigned to exercise the function, exercises state authority and not the rights resulting from a contractual situation. (Dana Apostol Tofan, Administrative Law, vol. I, All Beck Press, Bucharest, 2003, p.283). Of course that aspects regarding public function are not even close to be clarified for good. Especially considering that in the recent doctrine, the public official is considered an institution at the border between administrative law and labour law. Inadequacies increase here, relativizing elements that define the juridical status of the public function and official. Especially if certain unregulated aspects in the status of public officials are transferred to the Labour Code. And this relativization allows in Romania successive amendments of the Law 188/1999 republished, gradually emptying the status of public officials of its content. One of these amendments is the one referring to the introduction of the institution of mobility, which makes high public officials instruments of political parties, an object of negotiation when distributing the functions.

3 High public officials mobility

1. The Government exercises the general management of public administration (art. 102 par.1 of the Romanian Constitution); 2. Stability in exercising the public function (a principle for exercising public function art. 3 letter f of the Law 188/1999, as further amended). 3. Exercising the work relations (occurred based on the appointment administrative document) is made for unlimited period (art. 4, par.2 of the Law 188/1999, as further amended). 4. The constitutional right of every citizen to chose the type of work and its place (art. 41, par. 1 of the Romanian Constitution). 5. Imperativeness for compliance between administrative deeds (normative and individual), and superior administrative deeds. Law 188/8th of December 1999 republished, regarding the Status of public officials, published in the Official Gazette of Romania no. 365/29th of May 2007 stipulates in art. 4 (par.1) that work relations occur and exercise based on the appointment administrative deed, issued in compliance with the law, and par. 2 stipulates that the exercise of work relations is made for unlimited period (exceptions for the exercise of this type of relations – are indicated in par. 3, but it is not the subject of our
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analysis). In fact, because it is a work relation, we retain for now the idea of a bilateral will, requiring the agreement (expressed by consent), between a natural person (public official) and a public authority (central or local).

The headquarters for the matter for high public officials is stipulated in Chapter 3 of the Law 188 republished, which establishes:

2. The cumulative requirements that have to be met by a person in order to enter the category of high public officials (art. 16,17); 2. The method for entering the category of high public officials – national contest, managed by a specially formed commission appointed through the prime-minister’s decision; 3. Designating, altering, suspending, ending work relations, as well as disciplinary punishment of high public officials (art. 19).

Based on these aspects, several questions can be drawn-up:

1. Which is the juridical value of the high public officials’ recruitment commission’s acts?

2. Does the promotion of national contest exclusively provide entrance in the group of public officials (it is only the compulsory and previous requirement for being appointed in a public function) or is it the procedure (with juridical consequences) that necessarily leads to the issuance of an administrative appointment deed in a public, individualized, precisely determined public function? (respectively, in a certain public authority) 3. Considering the various juridical effects of the deeds issued by the two entities involved in the appointment of high public officials (the contest commission and the central public authority), can we speak of two types of juridical relations (some general, potentially of work – entrance in the category of high public officials), others certain, actual, individualized – work relations) or only the administrative appointment deed may generate juridical relations (work relations)?

The answers to these questions require both variations and substance clarifications.

Therefore, by including in the analysis par. (2), art. 18 that stipulates that persons promoting national contest may be appointed in the category of high public officials related public functions, things get more complicated. This is because, the finality of the two forms of activity of the factors involved (the contest commission and the central public authority) is different:

a. Entrance, by meeting with the requirements, including by promoting the contest, in the category of high public officials (a professional body consisting of possible holders of high public officials category related public functions): general, undetermined, potentially work relation;

b. Actual occupation of a public function by those accessing to the quality of high public official (entered in the category of public high officials) or, according to the law, actual occupation of a public function in the category of high public officials, only by a part of those entered in this category based on a contest.

The fact that contest promotion does not also imply the obligation to issue the appointment deed in a public function results from the phrase “can be appointed” (art.18, alin.2).

Therefore, through a succession of artificial means, the lawmakers empties the value of the national contest, the result (promotion) not being, as it would have been normal, an imperative element, but only a condition. In essence, a compulsory requirement, but not enough for putting into practice the positive result of the contest.

More clearly, for the appointment in a public function from the category of high public officials, the requirements provided by art. 16 are compulsory, but the issuer is not obliged to issue the appointment deed, even the requirements have been met.

The insufficiency of requirements leaves room for the arbitrary, the issuing authority having the freedom to appoint or not in a public function from the category of high public officials. Based on what criteria will the election be made? Because the law does not provide such criteria, it is certain the unilateral, arbitrary and non-grounded will of the issuer makes the “selection”. The content of the text leads to other conclusions as well:

a) The achievement (through national contest) of the function of high public officials does not mean the actual exercise of a public function from the category of high public officials (only the persons agreed by the issuer will occupy these functions);

b) The decision maker in occupying a function from the category of high public officials is not the national commission (as it would have been normal) but the one appointed to issue the administrative appointment deed; c) persons who, by acquiring the quality of high public official (due to contest promotion) are arbitrarily divided in two categories: high public officials with portfolio (the public function where they are appointed through a government or prime-minister’s resolution), and high public officials without portfolio. The first enter certain juridical relations – as work relations, having the material, personal, territorial and
temporal competence in exercising the prerogatives of the occupied public function, first officers in generic juridical relations, potentially work relations. The first, certain occupiers of public functions, first officers only virtual, potential occupiers.

Here is another political compulsion instrument of professional officers, an instrument through which public administration is subordinated (based on a legislative vice) to parties politics.

Here there is another question: What juridical value do the result of the contest and the appointment deed have?

In practice, we notice that only the appointment deed causes juridical effects, the result of the contest having only the value of recommendation. In order to avoid the aforementioned negative consequences, we think that a complex administrative deed has efficacy in the field. Such a complex administrative deed may be issued together either by the National Agency of Public Officials and the public authority where work relations are exercised by the high public official (complex administrative deed confirmed by the prime-minister), or by the public authority where work relations are established and the Ministry of Interior and Administrative Reform (without confirmation or, for stability, confirmation through presidential decree).

Another aspect results from the power of the appointment deed. What does this mean? In the text of the Law 188/1999 as further amended, high public officials related functions are presented in a logical hierarchy: the general secretary of the Government, the deputy general secretary of the Government, general secretaries from ministries, prefects, deputy general secretaries from ministries, subprefects, etc.

What we have to drawn attention upon is the fact that prefects and subprefects are appointed through a governmental resolution, while general secretaries and deputy general secretaries from ministries are appointed through the prime-minister’s decision (inferior administrative deed as power). There occurs the paradox that inferior public functions (the function of subprefect) be occupied based on a higher power administrative deed.

In conclusion here are several considerations on the mobility of high public officials, an exclusively political institution, making the high public officials related functions an ancilla politicae for the prime-minister.

Mobility is, by nature, unconstitutional, seriously affecting the provisions of art. 41, par. 1 of the Romanian constitution (the constitutional right of every Romanian to choose the type of work and its place). Or, mobility is the institution that prevents this constitutional right, being nothing else but a masked transfer (but imperative). Therefore, mobility is a form of altering work relations, with a definitive character (for unlimited period), being based on an unconstitutional provision – at the appointment in public function, high public officials “have availability” for mobility – which coincides with the waiver (express or tacit) to a constitutional right, which is not acceptable from juridical point of view.

Being one of the altering forms of the work relations (as a relation between the public authority and the high public official) mobility is a transfer, the notion “passes” referring to the change of the activity development. Next, there is a consequence of mobility in the establishment of another working relation, between the high public official and the public authority (institution) it “passes” to. Producing the consequences of the transfer, it is certain that, in compliance with the provisions of Law 188/1999 republished, with further amendments, the transfer may be exclusively achieved with the consent of the high public official.

4 Conclusion

The aforementioned facts result in the fact that the discretionary character cannot operate – the unilateral expression of the power will -, by calling the public interest in order to achieve mobility. This public interest appears here as a political-party arbitrary will or, more seriously, as a client relation of the issuer of the act that alters work relations. Being a work relation, it is certain that its irrevocable alteration has to suppose the will of the issuer authority and of the high public official (therefore, an agreement of will).

The imperativeness of the text – forced transfer – breaches art. 41 par. 1 of the Romanian Constitution. It is an aberration, like the one creating privileges for the persons that have had a mandate of parliamentarian, acquiring the quality of public official ex officio (see the text of the Law 188/1999 as further amended).

In short: mobility means: abuse of power; coercion means for high public officials; de-professionalization of public function; breach of the immovability principle of high public officials. This is why, the texts of the Law 188/1999 as further amended, regarding mobility, as well as other regulation correlated to the institution of mobility are obviously unconstitutional.
References:

[8] Legea nr. 188/1999 privind Statutul funcționarului public republicată în Monitorul Oficial al României, Partea I, nr. 251 din 22 martie 2004