STABILITY OF PUBLIC OFFICE, A CURRENT PRINCIPLE?

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ABSTRACT: *Since the first law regarding the public office, The Status of Civil Servants – Law No. 188/1999, the principle of stability was mentioned among the basic principles in connection with the public office. The law not only proclaimed it, but set a group of dispositions aiming to protect the career of the civil servant. Also, through the provisions of the same law, the National Agency of Civil Servants was established. The body of civil servants was also established, as an entity for selecting occupants of vacant public offices from the group of civil servants that lost their position for reasons that were not attributable to them. The Constitutional Court valued the principle when, through Decision No. 1257/2009, ruled that some public authorities are fundamental institutions of the state and their legal status include their structure, operations, competences, number and status of personnel that cannot be changed easily. In spite of all these, governments have learned to minimize the principle of stability of public office, one of the causes being the absence of solid legal dispositions opposing this.*

KEY WORDS: *civil servant, public office, stability of public office, career of civil servant*
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A general status of the civil servant[1] was established for the first time after 1990 by Law no. 188/1999. It was, and it is, obvious that the spirit of this law aims towards a stability in office and a right to career of the civil servant. Since the beginning, art. 4 of the law mentioned the stability in office of the civil servant as a basic principle. Later on,

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[1] We use the term "civil servant" with the meaning given by art. 2 par. (1) from the Law no. 188/1999, of a person appointed on a public office according to law. Romanian doctrine makes a difference between the "civil servant" appointed by law and any other employee in the administration or private companies that fills a position according to a labor contract. Public office represents, according to par. (1) of the same article, a sum of tasks and responsibilities, established by law, with the purpose of accomplishing the public power prerogatives by the central or local administration, or by the autonomous administrative authorities.

Law no. 161/2003 modified the first art. of Law no. 188/1999, adding par. (2) stating that the aim of the law was to ensure stability, professionalism, transparent and unbiased public service, both in the interest of citizens and public authorities and institutions. The same Law no. 161/2003 introduced "the back body of civil servants" composed by those who ended their service for faultless reasons, in case the public authority suffered structure changes or ended its activity. Civil servants could maintain the member status of the back body of civil servants for two years. Art. 89, par. (3) and art. 93, par. (4)-(6) showed that any time there is a temporary vacancy of a public office, a substitute has first to be searched in the back body of civil servants and only afterwards outside it. After many amendments of Law no. 188/1999, in the current version, the same dispositions may be found in art. 4 par. (3) letter a) and letter b) and also, art. 104. par. (3) letter b) of art. 4 mentions that if a temporary vacant public office is filled with a person from outside the back body of civil servants, that person may not enter into the body at the end of the vacancy. Art. 104 f the law states that the National Agency of Civil Servants is competent to reassign the civil servants into public authorities within the same town or within 50 km around; the reassignment should be done in a public office with the same category, class and professional degree with the public office detained before. A reassignment on a leading public office can be made if the civil servant had performed similar tasks.

These provisions of the law, combined with those regarding the selection of civil servants by competition, enforce the idea that once entered into the body of civil servants a person acquires a special status. This status is in close connection with the professionalization of the civil servant, due to the selection based on competition, continuous training and evaluation.

According to legal provisions, it seems that balancing the fair and non-politically partisan public service delivery on one hand and the responsiveness of civil servants to the policies of the current executive on the other hand, the legislator has ruled in favor of the former situation. We agree with the conclusions of a study regarding this balance: although without political involvement in administration an incoming political administration would find itself unable to change policy direction and such a situation will be undemocratic, public services should be kept safe from attempts of misusing them for partisan purposes. Public services also need technical capacity to survive changes of government so that they will ensure the capacity of future governments to govern[2].

Recent studies on the relation between politics and civil service found that a strict Weberian bureaucratic dichotomy, where policies were developed by politicians and implemented by bureaucrats, can no longer be found in Europe[3]. The roles of bureaucrats and political executives became to a greater extent interlinked in the policy process and hybrid forms of relations were developed. One factor in this shift of situation was the emergence of new roles in the politico-administrative relations, such as advisors, experts or assistants.

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[2] Matheson, A. et al., 2007, *Study on the Political Involvement in Senior Staffing and on the Delineation of Responsibilities Between Ministers and Senior Civil Servants*, OECD Working Papers on Public Governance, 2007/6, OECD Publishing. DOI10.1787/136274825752.

[3] Schreurs, F, Steen, T, Vandenabeele, W, *Politico-administrative relations in top civil service in the EU member countries*, EGPA/IIAS – Study group on personnel policies project, Study commissioned by the Belgian EU-Presidency draft version, p.3, http://www.eupan.eu/files/repository/0101213125239 _101210Politico-AdministrativeRelations.pdf

An important change introduced in Law no. 188/1999 by art. XIII, point. 8 of Law no. 161/2003 was the creation of the category of high civil servants and the nomination of prefect as belonging to this new category, starting with the year 2006 (article 12 of Law no. 188/1999 amended by Law 161/2003). Before Law no. 161/2003 entered into force, the prefect, as the representative of the Government in every county, according to art. 26 par. (2) of Law no. 215/2001 in the initial form, was not a civil servant but a public official nominated by the government, meaning that the prefect was a political office, in close relation with the government. As the prefect is coordinating all the local deconcentrated authorities that are, directly or indirectly, subordinated to the government, the change introduced by Law no. 161/2003 was considered a reinforcement of the separation of civil servants in leading offices from politics[4]. According to art. 17 form Law no. 340/2004 regarding the institution of the prefect, political membership was forbidden for those occupying this office, under the sanction of dismissal.

Although the transformation of the prefect into a civil servant was envisaged since 2003, there was no political will to separate this public office from politics starting with the first generation of high civil servants. In December 2009 Government Ordinance no. 19/2005 entered into force, stating that the persons occupying the office of prefect will become high civil servants in the same office on the condition of passing an assessment; only prefect offices that will become vacant after the first of January 2006 will be occupied following a competition, as described by the Law no. 188/1999. In the following years, in 2009 and afterwards in 2012, when the party or political alliance forming a government changed, prefects were changed. There were no changes in Law no. 188/1999 but the principle of mobility was used, moving persons that were no longer wanted as prefects on other offices of high civil servants. Of course, there is nothing wrong with the principle of mobility, as it definitely has its merits for a greater efficiency of the activities of public authorities, except it should not be used for hiding political interests in connection with public offices.

Political interests found their way in connection with other leading offices. Government Ordinance no. 37/2009 abolished all leading public offices of the deconcentrated public administration authorities established in the Appendix of Law no. 188/1999, and replaced them with management offices to be filled according with labour legislation. The Constitutional Court, by Decision no. 1257/2009, abolished the Government Ordinance, considering that it could not modify an organic law, such as the one regarding the status of civil servants. Beyond the legal aspects considered, the Constitutional Court could not fail to observe the real reason behind the provisions of Government Ordinance no. 37/2009, and it mentioned that this legal act expresses a tendency of politicization of the governmental institutions at local level and threatens the constitutional and legal status of the public office.

Nevertheless, governments had already found a new way of obtaining their political goals in controlling public authorities at a local level. Several central administrative authorities suffered multiple reorganization processes during the last years. A simple example is offered by the National Environmental Guard, restructured several times by the Government Decision no. 1224/2007, Government Decision no. 112/2009, and

[4] C. Munteanu, *Consideraţii privind organizarea şi devoltarea instituţiei prefectului în România,* in "Revista Transilvană de Ştiinţe Administrative", no. 1/2006 (16), pp. 85-91.

Government Decision 1005/2012. In 2009 the Regional agencies were established. On this occasion, the chief county commissioners were released from office, as their office was eliminated. After releasing them, they were offered executing offices. Leading offices established in the Regional agencies were occupied by competition. Then, in 2012 the Regional agencies were eliminated and county agencies were re-established. Once again, leading offices from the regional level disappeared and new leading offices appeared at the county level and competitions were organised for filling them. Former leading civil servants were offered executing offices[5].

The political goals behind these formal changes were obvious. Government Decision 1005/2012 was issued as a consequence of Government Ordinance no. 58/2012. Provisions of art. V, par. (3) and par. (4) of the Ordinance stated that, considering the reorganisation, the personnel of the regional agencies will be taken into the county agencies, will be assigned to equivalent offices and will maintain their pay. But in Government Decision 1005/2012 art. 20 only mentioned that the personnel of the regional agencies will be taken into the county agencies, saying nothing about assigning them on equivalent offices. Again, when Government Decision no. 1005/2012 was put into practice, the leading civil servants from regional agencies were released from office and offered executing offices, while the leading new established public offices were opened for competition.

In our opinion, in every case the dispositions of Law no. 188/1999 were breached. First of all, article 100 contains provisions regarding the reorganisation of a public authority, stating that the civil servants will be assigned in the new compartments or offices if the tasks are modified by less than 50%. The assignment would respect the category, class or grade of the civil servant. We consider that such provisions have to be considered not only in case a local authority is reorganising its structure, even if it is a moral person, but when a central authority is reorganised by eliminating some subordinate authorities and creating new ones. In this case, a change in the working position of the civil servant will occur, and there will be no justification for releasing from office. Our opinion seems to be sustained by Decision no. 142/R-CONT/25.01.2012 of the Pitești Court of Appeal[6] regarding a legal dispute caused by Government Decision no. 566/2011 that reorganised the Financial Guard. County agencies were reorganised as bodies without legal personality and the number of public offices was reduced. The plaintiff was an executing civil servant who was released from office on the ground that his position was dissolved as a result of reorganization. The releasing decision mentioned that art. 100 from the Law no. 188/1999 had no incidence. The plaintiff contested the releasing decision to the issuing authority, prior to addressing the court, as Law no. 554/2004 required and, at the same time, filed to the court a request for suspending the effect of the releasing decision. According to art. 14 from Law 554/2004, in order to grant the suspension, the court had to find if there is an appearance of illegality of the contested administrative act. Letter no. 895704/13.07.2011 of The National Agency of Civil Servants confirmed that reorganising according to Government Decision no. 566/2011

[5] The same route was followed for reorganising other public authorities, for example the National Environment Protection Agency by Goverment Decision no. 918/2010, the Ministry of Agriculture by Government Decision no. 725/2010, The National Customs Authority by Government Decision no. 110/2009.
[6] http://www.asistenta-juridica.eu/jurisprudenta.php?id=10632, June 2nd 2013.

was a situation where art. 100 from the Law no. 188/1999 was incident and that, only after exhausting the appointment procedure of the whole staff in the new organisational structure, the authority may proceed to releasing decisions under article 99 paragraph (1) letter b) of Law no.188/1999. Both the first instance court (*Tribunal*) and the Court of Appeal ruled in favor of the plaintiff granting the suspension of the releasing decision until the competent court will rule upon its legality.

A different opinion was expressed by the High Court of Cassation and Justice in the Decision no. 712 from March 2nd 2006[7], related to the implementation of Government Decision no. 333/2005[8] for reorganising the territorial directorates for forestry and hunting into territorial inspectorates for forestry and hunting. The court found that, although according to art. 4 of the Government Decision, the office of chief inspector is equivalent to the one of executive director, the tasks of the two offices differ with more that 50%, as the approval of the National Agency of Civil Servants for opening the competition shows. So, there is not a situation of a change in the working position, but a reorganization that resulted in the disappearing of the old office of executive director and the need of competition for filling the new office of chief inspector. We do not agree with the court grounds. On one hand, if the normative act states that the two offices (executive director of the disbanded authority and chief inspector of the new authority) are equivalent, that means that the tasks are the same or very similar. On the other hand, the Court should have not taken for granted the conclusions of the National Authority of Civil Servants, as it is subordinated to the Government together with the restructured central authority. Last, if the normative act states that civil servants will be moved on the equivalent offices in the newly created local authority and defines which offices are equivalent, it is obvious that opening for competition the new leading office, defined as equivalent with an old one, is ilegal.

Even if we consider that releasing from office is the right way to proceed in case a change of structure would occur at a local level, eliminating some subordinate authorities and creating new ones, the new leading public offices should not be opened for competition, but offered to the released servants that entered the back body of civil servants, according to art. 104 of Law no. 188/1999. That is because if a leading civil servant is released and then offered an executing office within the newly created subordinate structure the principle of the right to a career of the civil servant is breached. Even if, according to art. 104 par. (3) of Law no. 188/1999, such a reassignment is possible with the consent of the civil servant, in situations like the ones described above, it would be a decision enforced on the civil servant who might accept a lower category than the unemployment.

If a reassignment on a lower ranked office is considered possible, why should not a reassignment on an equivalent office according to art. 104 par. (2) be possible? In our opinion, reassignment on an equivalent office, if at a local level a structure is disbanded and another is created, is mandatory, even if the two structures have not the same rank. Otherwise, the way the Government is acting, every time local bodies of central authorities are reorganised, professional leading civil servants are either downgraded or released from office, the back body of civil servants is not used – causing the dropping out

[7] http://www.scj.ro/SCA%20rezumate%202006/SCA%20r%20712%202006.htm, June 15th 2013.
[8] The act was reorganizing the forestry local authorities.

from this body of the former leading civil servants that were not used, and new untrained persons are absorbed into the body of civil servants, all these movements breaching the very essence of the status of civil servants. Figure 1 describes the process. It is not only a question of professional specialised performance, but a question of good management also. A leading civil servant will be familiar with the strengths and weaknesses of the body, with the performance of the subordinates and will develop a strategy for improving the performance of the body. As long as there is no reason to doubt his professional or management performances, releasing him from office will be just a waste of human resources. This may also prove a waste of money, as training is mandatory for such civil servants and the state is paying for it.

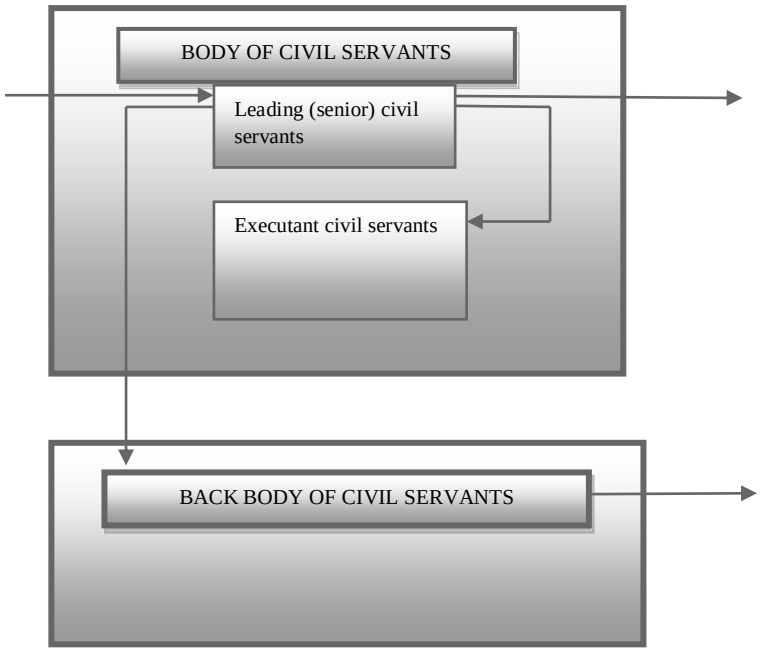

Figure 1. The route of leading (senior) civil servants in the process of reorganising local authorities

Another issue to be considered regards the possibility for the civil servant to contest to court the releasing decision, in situations created by the normative acts regarding the reorganisation of the National Environmental Guard, as described above, or any other similar situations. The contesting procedure, according to Law no. 554/2004 requires that a demand for retracting the releasing act should be submitted to the issuing authority within 30 days from the issuing date, before taking the matter to court. A period of 30 days is allowed for the authority to give an answer. After that, the plaintiff may address to court in an interval of 6 months. At least a month will pass after the complaint is registered to the court before the first term for the trial is set. The decision of the court may be appealed, the appeal will not suspend the effects of the sentence of the first

instance court. During this time, before the trial will end, the competition for filling the new leading office in the newly created local authority will start and finish quite quickly. What can be done?

If the contestant is requesting the suspension of the releasing decision until the trial is over, a problem occurs. If, according to art. 14, or art. 15 of the Law no. 554/2004, the court is granting the suspension, what will the status of the civil servant be? A suspension of the releasing decision will generally put the civil servant back on his old office, only this time such an office no longer exists, as the old administrative authority is disbanded. So, it appears that a suspension of the releasing decision is not even reasonably possible.

If the contestant will ask for the suspension or the annulment of the competition opened for filling the new office, the request may be rejected on the grounds that the plaintiff has no interest for such a request as he did not enter the competition. If he should enter the competition, the complaint against the releasing decision will be considered as lacking interest.

Generally, if a complaint against a releasing decision is admitted, the civil servant will be reinstated on his former office. According to art. 99, par. (1) letter c) from Law no. 188/1999, a civil servant will be released from office following the admission of a reinstatement request of another civil servant that was released or dismissed illegally or groundless, beginning with the date of the court decision that is ordering the reinstatement is final. The legal text is using the term "reinstatement". That means that the releasing decision may be contested, requesting at the same time the "reinstatement", if the civil servant is released from a public office that is not disbanded. In the case discussed here, the civil servant would request the annulment of the releasing decision and the "instatement" on the equivalent new office. In our opinion such a request should be admissible with the consequence of releasing the civil servant that occupied the office following the competition illegally organised, according to the dispositions of art. 99, par. (1) letter c) from Law no. 188/1999. It is a case where a public office was occupied by a civil servant while another civil servant had the right be instated on the same office. Courts, however, would not embrace this interpretation. The Court of Appeal Cluj has ruled in the Decision no. 585/2012[9] that the complaint against illegal release form office with the request of instating, according to law, on the equivalent leading office of the newly created local administrative authority, bears no interest as the new leading office has already been filled by competition. Such interpretation makes impossible for the illegally released civil servant to contest the release decision, even if according to law he should have been moved from the disbanded leading office to the new one. The Romanian Constitution grants, in art. 21, access to justice in defending any legal right or interest. Or, the stability in office mentioned by Law no. 188/1999, along with the right to be moved on the equivalent office, mentioned in the legal acts concerning the restructuring of local administrative authorities within a central authority, are rights that should be defendable in court.

This imperfection of Law no. 188/1999 makes possible for the administration to constantly change the leading civil servants in the deconcentrated local authorities, even against legal dispositions that protect the stability of public office.

[9] Not published.

The main issue here is whether the government is set upon a specialised and trained body of civil servants or upon a politic leadership of local deconcentrated administrative authorities. There is no absolute answer on the benefits or drawbacks of such actions. For example, in the French law, although the prefect is a civil servant, the office does not have the same protection regarding stability, but is at the disposal of the government that may revoke him at anytime. For this reason the prefect is regarded as a politic office[10]. But in the French law the provisions of the law are clear in this respect. The same study mentioned above[11] shows that in countries with different outcomes for the relation between politics and administration, a fair balance can be obtained[12].

Whatever the solution chosen, a perfect correspondence should exist between the spirit of the law and the will of the administration. This would be only fair for the civil servants that would be aware of all the risks when competing for a position and will strengthen the public trust in the fact that the administration is permanently following the law, as the principle of legality is one of the basic principles for the administration in a state of law. This is an important goal as international reports still show high levels of public concern about the prevalence of corruption in Romania[13].

In our opinion, if a strong need is found for the increase of the politic control at local level, this may be obtained by the direct nomination of prefects by the government, even on political grounds, with the consequence of removing the principle of stability for this public office. A prefect is coordinating the activity of deconcentrated local authorities and being a good manager is the most important quality. The leading civil servants inside a specialised administrative authority should be good specialists, and they should be protected by the principle of stability of the public office. According to Law no. 340/2004, art. 21, par. (2), the prefect may propose to the ministers and heads of central public administration authorities the sanctioning of deconcentrated administrative authority leaders in their subordination. So, whenever a leader of a deconcentrated body is considered to be inefficient, he may be sanctioned, and in the end dismissed if necessary. But all this will be done within the legal limits and with the possibility of court control. This way, a balance may be obtained, between the need of political control and the need for well trained specialists. This will also prove a good solution to remove corruption suspicions by ensuring permanent control of courts upon the status of the civil servant and respect of legal principles regarding the public office and civil servants.

[10] P. Foillard, *Droit administrative,* Paradigme, Orléans, 2010, p.50.
[11] Schreurs, F, Steen, T, Vandenabeele, *op.cit.*, p. 13-16.
[12] The study is mentioning Belgium for a relation dominated by the politic factor, Netherlands for a relation with an autonomous public service and France as a technocracy.
[13] Cf. Eurobarometer n° 374 of February 2012, http://ec.europa.eu/public_opinion/archives/ebs/ebs_374_en.pdf and the Transparency International 2012 Corruption Perceptions Index, http://www.transparency.org/cpi2012/results.