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# The Legal, Administrative and Managerial Aspects of the Civil Service[1]

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**Abstract:** The *main objective* of this article is to identify and capture the defining notion of the public function available within the Romanian and foreign doctrines. Nonetheless, due to the complexity of the subject covered in this article, a complete understanding of the notion as well as conducting a robust research will only be possible by meeting the following *secondary objectives*: identifying and analyzing the particularities of the public function notion defined in the literature, both from a judicial and administrative perspective; identifying and analyzing the legislative framework which differentiates the responsibilities and attributions of a public function, in order to exercise the public function prerogatives and to meet the general interests of society. In elaborating the scientific approach, an analysis of the available documents and legislation, as well as a review of the literature corresponding to this area of expertise were conducted. Upon finishing this article, the reader will be able to have a clear image of what the public function means from the administrative, judicial and managerial standpoint.

**Keywords:** civil service; general interest; legal framework; public power

## 1. Legal Aspects

After January 1st 1990, the social and economic relations suffered major changes, also reflected in the organization and functioning of the central and local authorities. This called for the definition and regulation of civil service and, consequently, Law 188/1999 on the Statute of civil servants has been adopted.

This document sets the legal framework of individual competences and responsibilities, allowing the public powers to exercise their prerogatives and to answer to the general interests of the society.

The means to achieve public administration in a State governed by the rule of law are human resources (Matei, 2006), as well as material, informational and

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financial resources (Giurgiu & Zaharie), as public authorities and institutions are merely juridical fictions. In order to carry out its specific activities, any civil service has its competences structured by positions. (Popescu-Slăniceanu, 2000)

The human resources in the State administration are thus conceptually and practically related to the notion of position, as defining the kind of activity a person is bound to perform by the legal relation of public law he/she entered by his/her own will.

The word position has several meanings in public law. Thus, according to the Constitution, there are the position of President of Romania, the position of Prime Minister of Romania, the position of judge and other positions. According to the doctrine, civil service reflects the social and cultural evolution, being a „synthetic product" characteristic to the 20th century. (Manda, 2007)

Traditionally, civil service is the fundamental notion of administrative law and is closely related to the notions of activity, authority, body etc. (Negulescu, 1934). As the traditional approach shows, civil service is in a close interdependence relationship with the State, whose functioning relies on the public power, on the right to order. At the same time, public power is regulated and organized by law, so that it can meet the general interests by means of the public services. These public services are delivered through public institutions, based on the idea of general interest, which they are called to satisfy, but they only can do so thanks to the people within them. (Negulescu, 1934)

The French doctrine (Laubadere & Gaudmet, 1998) states that, in order to make the public services work, the public authorities make use of a particular personnel, called public administration personnel, whose legal status differs from that of the employees under contract, as well as according to each one's qualifications. Therefore, the public administration personnel, represented by the civil servants corps, are a key segment of this administration.

As Professor Corneliu Manda (2007, p. 298) said, the public authorities personnel is structured according to departments, hierarchies and positions, of which only some are considered civil service. The person holding a civil service is called civil servant.

Professor Lucica Matei (2006, p. 246), following an ample research of the status of public administration personnel at European level concluded that „in almost every European country, civil servants are being defined differently, with a few exceptions: judges, soldiers, tax-collecting personnel, customs officers and policemen, who have special contract relations".

Similarly, most of the staff of ministries have special status. The other public employees can have a public contract in one county or a private contract in another country. The confusion is deepened by the fact it is extremely difficult to find a clear cut difference between civil servants and public sector employees, in a number of States. This difference is stated in almost all States, but there are still differences with regard to numbers or whether a certain category of personnel can or cannot be defined as civil servants. In some countries, up to 90% of the employees in the public sector are called *civil servants*, while in other countries they represent 15% or even less.

The juristic literature (Popescu-Slăniceanu, 2000, pp. 69-70) often defines just the State civil service and not the service to the local public administration authorities.

The relation between the civil service and the public service is not defined either, but just the relation between the civil service and the civil servant. The interdependence between civil service and public service is very important, because there are civil services and civil servants within the public services.

The Romanian legislation allows for special statutes for the civil servants in the specialized structures of Romania's, in the specialized structures of the President's Office, in the specialized structures of the Legislative Council, in the diplomatic and consular services, in the customs authority, in the police and other structures of the Ministry of the Interior and Administrative Reform (Law nr. 360 din 2002), as well as in other public services established by law. (Law nr. 188/1999, 2004, Art. 5, alin. 1)

The contents of each civil service, that is the specific prerogatives and competences that makes it different from other civil services, are established by the very normative act regulating the civil service and it is functioning in order to meet the general interests, considering that civil services are part of the public services (Manda & Manda, 2007). Obviously, when such a public entity is created and organized, the positions are established, as well as their hierarchical subordinations, and for each position the prerogatives of public power in a certain field of competence are determined, including the subordination and the cooperation relations. Consequently, the civil service, similarly to the State, is an institution based on the idea of general interest, which it strives to meet. (Negulescu, 1934, pp. 52-53)

The civil service can be modified or dissolved by normative act when the competent authority considers either that the respective civil service needs improvement or, that it is no longer necessary, or its duties can be taken over by another civil service. A special situation is that of the civil services within the autonomous agencies that are created and regulated by the very act by which these agencies are set up.

Civil service has competences established by law, including the prerogatives necessary to satisfy the general interests and to achieve the purposes of public interest for which it has been created and forbidding its use in personal interest.

According to the Romanian legislation, *civil service* is the totality of prerogatives and responsibilities determined by law, so that the central public administration, the local public administration and the autonomous administrative authorities can perform their prerogatives. (Law nr. 188/1999 2004, Art. 2, alin. 1) This totality of prerogatives should form a homogenous structure, able to fulfil the tasks of civil service with maximum efficiency and quality. (Popescu-Slăniceanu, 2000, pp. 390-391)

Essentially, the concept of central and local public administration personnel refers to all people having legal reports of position and qualified to directly or indirectly work within the central/local public services, with a view to promoting the interests of the central/local communities. (Manda & Manda, 2007, pp. 390-391)

Consequently, as a rule, the *civil servant* is a person appointed, according to the provisions of the law, to a civil service, while the exception is a person who no longer holds a civil service, for reasons that cannot be blamed on him/her and who becomes part of the reserve corps of civil servants, while maintaining his/her quality of civil servant. (Law nr. 188/1999, 2004, Art. 2, alin. 2)

The doctrine synthesized (Matei, 2006, p. 256) the main features of the civil service, pertinent for the analysis of the notion, thus: (Popescu-Slăniceanu, 2000, pp. 73-78)

a) the civil service is a totality of prerogatives determining the competences of the civil service, with a view to fulfilling its tasks of organizing the application and of applying and enforcing the law; (Manda & Manda, 2007, pg. 93-94)

b) most civil services in the central/local public administration bodies are performed by professionals, but there are some civil services performed by politically designated people, such as those of ministers, State secretaries, mayors, members of municipal/county councils etc.; (Iorgovan, 1929)

c) the prerogatives deriving from the contents of the civil service should be legal, that is for each civil service they should be established by primary normative acts and by secondary normative acts, issued based on the primary acts and aiming at their application;

d) the competences and prerogatives attached to the civil service cannot be established by contract, but exclusively by primary normative acts and by secondary normative acts, issued based on the primary acts and aiming at

their application, since the role of civil service is to answer general interests, that cannot be subject to a process of negotiations involving the factors of the civil service relation, which is governed by the administrative law;

e) the prerogatives corresponding to the civil service are established according to the specific specialized tasks each public service is performing with a view to satisfying a certain general interest; (Teodorescu, 1929)

f) the exercise of civil service should result in public power, either directly, e.g. decision making positions, or indirectly, e.g. actions of preparation, execution and control closely linked to the exercise of public authority;

g) the civil services are created to satisfy the general interests, and not individual interests;

h) the civil service exists prior to the appointment in the respective position of a future civil servant, meaning no competitive examination can be organized on the assumption the civil service will be subsequently created;

i) the civil service is continuous, i.e. it is created to satisfy the general interests as long as it exists; (Manda & Manda, 2007, pp. 393-394)

j) the civil service is compulsory, i.e. the rights and obligations attached to it should be fully respected and in good faith – they are a duty, not an option;

k) the effective exercise of the civil service allows its competence to be achieved, according to the prerogatives established by the normative act;

l) the funds necessary to finance the civil services come from the State budget or from the local budgets.

According to the characteristics of the civil service, the Romanian legislation stipulates the following principles underpinning the exercise of the civil service: a) the principle of legality, impartiality and objectivity; b) the principle of transparency; c) the principle of efficiency and efficacy; d) the principle of responsibility for the conformity with the legal provisions; e) the principle of citizen-oriented activity; f) the principle of stability in exercising the civil service; and g) the principle of hierarchical subordination.

## 2. Administrative Aspects

The notion of civil service is proper not only to the (Matei, 2006) administrative law or to the juristic approaches in general, but also to *public management* and to the *science or theory of administration*.

As professor Ioan Alexandru (2005, p. 63) noticed, the science of administration was considered either a science of the rational principles of administration[1], or as a political science. Supporter of the latter approach, Lorenz von Stein considered the administrative law was nothing else than a part of the theory of administration[2]; professor Paul Negulescu also spoke of the political character of the science of administration, that had no juristic character, but only a role of critical analysis of the administration from the point of view of resources, means and results. From this perspective, the object of the science of administration would be to develop rules which, applied to the public administration activity, would lead to an increase in its efficiency.

The science of administration views the public administration activity from the perspective of the notion of *administrative action*, as social action different from the other social actions; this is the starting point of all studies on the public administration.

The doctrine (Alexandru & al., 2005) confers to the administrative action the following *characteristics*: it is a social action that takes place only within an organized human community; it is an action responding to superior and external values[3]; it is placed between the value it is called to achieve and the execution of this value; it necessarily implies organization.

Based on the notion of administrative action, we could define the *civil service* as being *the totality of administrative actions or deeds done by a legally invested person, with prerogatives in achieving the competence of a public authority, consisting in all the rights and obligations pertaining to the complex legal relations between that person and the body that invested him/her*.

According to Professor A. Negoiţă (1997, p. 127), *the phrase „civil service"* has *two meanings*: a broader one and a narrower one, depending on the nature of the prerogatives attached to the service exercised by the employees of the different bodies of the public administration, more specifically if these prerogatives imply or not the use of the State authority.

As the above mentioned points on view show, *civil service is approached from an extremely narrow perspective:*

a. *Civil service* designates a legal situation of a person. From the point of view of public management, a civil service is defined within the formal organizational structure of a public institution, in agreement with the specific

[1] This concept was initially formulated in the French doctrine and then adopted by Constantin Dissescu from the Faculty of Law in Bucharest

[2] Georgio del Vechio defined political science as a science of the state´s activity consistent of two parts: the science of legislation and the science of administration (del Vechio, 1943)

[3] The administration's tasks are established within the political area.

legislation, but according to the specific activity that person has to carry out. The status of the occupant of a civil service implies the observance of some general rights and obligations stipulated in the general statute or in the special statutes of the civil servants.

b. *Civil service*, being a generalization of several positions in the public institution, integrates the tasks, competences and responsibilities of the occupants.

c. *Civil service* is often associated with the structure of the administrative system. From the point of view of public management, all occupants of managerial civil services in all departments of the public sector are managing civil servants, are subject to the principles of public management and exercise public management functions, being responsible for the results of the public institutions they manage (Matei, 2006, pp. 255-256). So, the managing civil servants are personally responsible for the results of the public institutions or of their component structures.

The responsibility for a good management is an administrative responsibility and influences the career of the civil servant. The managing civil servants can be dismissed for poor results or for the improper functioning of the public institutions, once their individual performances are considered *unsatisfactory* during the performance assessment process.

Several *characteristics of the civil service* can be thus derived from the above:

a. the rights and obligations regarding the achievement of competence, as well as the prerogatives defining the competence can only be established unilaterally, through legal norms, by the State organs. So, we are not dealing with a work contract, concluded freely and willingly by an institution and an employee, but with a regulation by a public institution;

b. these rights and obligations are prerogatives of the civil service, implicitly its competence;

c. *continuity,* that is the uninterrupted exercise of these rights and obligations inherent in the civil service, as long as the material and administrative competence of that civil service exists;

d. those entrusted to perform a service enter a complex of legal relations with the organ that entrusted them;

e. civil services can also be held by persons who are not employees of a State organ in general, a public administration authority in particular. These persons can be employees of organizations in the private sector, who are

invested, authorized, under legal conditions, to carry out a public service having status of public power; [1]

f. *the legal character* of the investiture, deriving from the juristic character of the administrative document/action of appointment.[2]

According to Professor Verginia Vedinaş (2002, p. 403), the civil servants can belong to different categories, based on the following criteria, as follows:

a) *Applicable juristic regime*: civil servants under contract and statutory civil servants, who can be civil servants subject to the general statute and civil servants subject to special statutes;

b) *Rigorousness of the discipline*: civilian civil servants, military civil servants, civil servants in the armed or police forces;

c) *The manner occupants are chosen*: appointed civil servants, elected civil servants, otherwise chosen;

d) *Independence from the political factor*: political civil servants, career civil servants, not related to politics;

e) *Prevalence of certain activities* in the competence of the civil service: managing civil servants and execution civil servants;

f) *Nature of the public authority* to which the civil service belongs: central/State civil servants and local civil servants.

## 3. The Notions of Civil Service and Civil Servant from Public Management Perspective

The doctrine states that the civil servant is that person who carries out his/her activity in public institutions and/or authorities from a position and/or civil service having individual objectives, tasks, competences and responsibilities defined in a clear, concise and consistent manner, allowing the occupant contribute to the accomplishment of the mission of the public institution/authority he/she has been appointed/elected to serve, according to the legal provisions. Mention should be made of the fact that the representatives of political parties are not civil servants, even if they hold different positions and civil services within the public sector. They are mainly interested to achieve political objectives and interfere in the public management systems

[1] However, these public functions do not fall into the category of career public functions, having integrated only some judicial characters of the employment relationship, especially those legal restrictions pertaining to the the civil servants' behaviour in exerting their public mandate.

[2] Unilateral act of public will, enforceable according to the public attributions of the one who issues it, the document is emitted according to the organization and applicability of the law.

through the political decisions they substantiate or initiate. They have a political mission that often does not coincide with the social mission the public institutions and authorities have.

Moreover, although the formal structure clearly determines the position of the political representatives in the organization of a public institution or authority, the politically appointed occupants of civil services tend to interfere in the contents of those civil services and to redefine their objectives, and sometimes even their tasks, competences and responsibilities, which frequently leads to malfunctions whose effects persist some time after the political mandate of the representative of the party that won the elections ends. These malfunctions appear because of the difference between the objectives of the public institution/authority, deriving from its social mission, and the objectives of the party/parties that won the elections. (Matei, 2006, pp. 229-236)

In the developed countries, with a mature political life, where both the voters and the politicians very well know the main political values, is ever more obvious the *compatibility* between the objectives of the two, so that the changes determined by the election results *only slightly vary the general policies and strategies and diversify the means used to accomplish the mission of the public institutions and authorities, and the interferences do not cause disruptions able to unbalance the entire public sector.*

It is therefore extremely important that the political representatives holding civil services without being civil servants set their political objectives according to the social mission of the public authorities and institutions, so that their own political strategies and those of the public institutions and authorities be fully compatible.

Practically, in the Romanian public sector, the initiative for strategies and policies comes mostly from the political representatives rather than from the public managers. The political competence is stronger and conceptually dominates the entire public sector for determined periods of time. Consequences arise, especially when there are political changes, and the systems of values of the parties are significantly different. The effects are also different. Such situations maintain the general crisis, having profound and long lasting bearing on the Romanian society as a whole.

While the notion of civil service was first developed and explained by the public law doctrine, mainly by the administrative law, the fundamental changes in view occurring in public management in the developed countries, in the last decades of the 20th century make us support a new theoretical and practical approach of civil service in public institutions in general.

The management of civil service is theoretically based on the overlapping of concepts, methods and subject of regulation of the two disciplines. The specificity of civil service law, as part of the public law, as compared to labor law, as part of the private law, requires changes in the approach of the economic and management processes applicable to the human resources management in the public sector.

So, besides the general notion expressed by the administrative law and clearly reflected in the legal framework whose content nobody can ignore in a State governed by the rule of law, *public management* (Matei, 2006, pp. 255-266) approaches the civil service in a practical manner, that determines the coordinates necessary to a good functioning of the public institution where the civil servants and political representatives carry out their activity.

Notwithstanding the differences of view between the two approaches that we shall refer to below it is absolutely necessary to understand and accept the fundamental compatibility between them. The managerial approach of the civil service and of the civil servant needs certain clarifications.
The civil service represents a factor of generalization of similar positions from the point of view of the extent of the authority and responsibilities within an institution belonging to the public sector. For instance, five positions correspond to the post of director in a public institution. If the civil service expresses „the extent" of the authority and responsibilities of a director, generally speaking *the positions particularly express*, for each position, the authority and responsibilities of the occupants, by means of specific elements, namely objectives and tasks.

The career civil services should be held only by civil servants who meet the compulsory requirements provided by law. Public management identifies two categories of civil services: managing civil services (as in the example above) and execution civil services, especially in the subordinate departments directly responsible to deliver public services, to apply and enforce the law and to exercise the prerogatives of public power. (Popescu, 1998)

*The political position* (Mate, 2001) is subject to the objectives of a political party. It defines *a position held by a politician within the managing or execution structure of his/her party* and generally has nothing to do with the formal structure of a public institution, that determines, from both the managerial and legal points of view, the contents and structure of the civil service and of the civil servant holding it.

Mention should be made of the fact that in the public sector the public institutions whose mission is legitimized by elections are headed by political representatives, helped by subordinate experts and professionals holding career civil service positions. In Romania, the above mentioned situation can be

mostly found in theory; in practice, in the public institutions, there is discontinuity in exercising the public management functions and often instability of the management system, as direct result of the changes occurring every four years on the political stage, which unlawfully affect the principle of continuity in the career civil service.

## 4. Conclusion

The public management (Matei, 2006, pp. 255-266) determines the dynamic factors and the operational framework defining the statutes and structure of the civil service and of the civil servant as employee of the public institution. The performance of a public institution is directly influenced by its employees, who are responsible, both as managers and execution personnel, for the results obtained.

Starting from this key element, we can easily understand why the involvement of political representatives limits the exercise of civil services and can lead to instability, discontinuity and difficulty in setting tasks, competences and responsibilities for how the public institutions efficiently accomplish the social and administrative mission for which they had been created and are functioning.

There is a tendency to contaminate the career civil service in the public authorities and institutions with cyclic political civil service. Even if the managerial civil service positions held by political representatives following elections have a mandate limited in time, the change of the leader should not affect the management team made out of experts and specialists holding career civil service positions. Some of them are appointed in civil service positions according to the legal procedures, others are elected by the voters and then become occupants of managerial civil service positions, having thus the competences and responsibilities inherent in the civil service for which they entered a competitive examination or in which they had been appointed. Although from political milieu, these occupants of managerial civil services exercise management functions.

## 5. References

Law no. 360 of 2002 on the Statute of the policeman, 360/2002 (June 24, 2002).

Law no. 188/1999 on the Statute of Civil Servants, 188/1999 (March 22, 2004).

Law no. 7 of 2006 on the status of the Parliamentary civil servant, 7/2006.

Alexandru, I., & al., e. (2005). *Drept administrativ/Administrative Law.* Bucharest: Lumina Lex.

del Vechio, G. (1943). *Lecţiuni de filosofie juridică/Legal philosophy lesson.* 4th Edition, translated by Constatin Drăgan. Bucharest.

Giurgiu, L., & Zaharie, C. (n.d.). *Drept administrativ, Curs universitar/Administrative Law, University course.* 7th Edition. Bucharest: Editura Pro Universitaria.

Iorgovan, A. (1929). *Tratat de drept administrativ/Administrative Law Treaty.* 3rd Edition, Vol II. Bucharest: Institutul de Arte Grafice "Eminescu" SA.

Laubadere, A., & Gaudmet, Y. (1998). *Traite de Droit administratif - La fonction publique/Treaty of Administrative Law - The Public Function*. 11th Edition Vol. 5. Paris.

Manda, C. (2007). *Drept adminstrativ/Administrative Law.* Bucharest: Lumina Lex.

Manda, C., & Manda, C. C. (2007). *Dreptul colectivităţilor locale/Local collectivities law*. 3rd revised edition. Bucharest: Lumina Lex.

Matei, A. (2001). *Integrarea managementului resurselor umane în reforma funcţiei publice/ Integration of human resource management in public service reform.* Bucharest: Economică.

Matei, L. (2006). *Managementul public/Public Management.* Bucharest: Economica.

Negoiţă, A. (1997). *Drept administrativ/Administrative Law.* Bucharest: Sylvi.

Negulescu, P. (1934). *Tratat de drept administrativ - Principii generale/Treaty of administrative law - General principles.* 4th Edition Vol. I. Bucharest: Institutul de Arte Grafice "E. Mârvan".

Popescu, A. (1998). *Reglementări ale relaţiilor de muncă-practică europeană/Regulation of European labor-practice relations.* Bucharest: Tribuna economică.

Popescu-Slăniceanu, I. (2000). *Funcţia Publică/Public Function.* Bucharest: Infodial.

Teodorescu, A. (1929). *Tratat de drept administrativ/ Treaty of Administrative law* 3rd Edition. Vol. I. Bucharest: Institutul de Arte Grafice "Eminescu" SA.

Vedinas, V. (2002). *Drept administrativ si instituţii politico-administrative/Administrative law and political and administrative institutions.* Bucharest: Lumina Lex.