ConScienS
DOI: 10.5281/zenodo.4542238

Romanian Public Sector Staff. Categories. Applicable Legal Rules. Particularities

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ABSTRACT: The study aims to create a picture of staff working in the public sector in Romania. The objectives they address are the following. First, it is proposed to identify the categories of staff who carry out their activity within the public authorities and institutions in the Romanian system. Then the three main categories are identified and analyzed: people who fulfill public dignities; persons holding public office and contract staff. The analysis of the legal situation of each category is made through the prism of the current legal framework, starting with the Constitution and the laws adopted on its basis, related to the constants derived from the doctrine and jurisprudence. Particular attention is paid to the two Codes, namely the Labor Code and the Administrative Code, in terms of the relationship between their provisions in regulating the legal situation of all staff.

KEYWORDS: staff, categories, public office, public dignity, contractual functions, civil servants, employees, contract staff, public law, private law

Brief theory of public sector staff

In every state in the world, the staff that carries out their activity in what is called the "state apparatus" or "public sector" have certain particularities, in terms of the categories that compose it, of the rules applicable to each of them, of the legal situation, of deontology which is specific to him. In Romania, the staff of public authorities and institutions is structured in three main categories.

The first of these are civil servants, who work in all types of public authorities and institutions, not only in the executive sphere (administrative authorities). We thus consider the authorities and institutions that are part of the sphere of the 3 powers of the state, respectively legislative, judicial and executive, but also those that exceed the three classic powers, have a status of autonomy and are placed under parliamentary control, in order to achieve precisely the balance between the powers of the state, such as the People's Advocate, the Court of Accounts, the Legislative Council or the Constitutional Court.

I mentioned it first not because it would be the most representative in terms of numbers, but because it is the most significant in terms of the specific legal situation, the essence of which is that civil servants are the bearers of public prerogatives. They personalize the state and, as the old Romanian doctrine is expressed, as are its officials, so is the state they work for.

Another argument for which I mentioned them first is that in Romania, civil servants are subject to the statutory regime, which springs from an organic law regulating their legal status, which guarantees them stability and the right to a career. We thus interpret that, at the level of the rule of law, civil servants enjoy stability in office, which makes them present themselves as a kind of backbone of the public institutional gear. Civil servants are those who, beyond the political changes, the governments that come and go, the alliances and forces that assume the fate of the government and administration of the country, carry on the existence of the state and local authorities, respectively the authorities and institutions through which they perform the duties, provides services and satisfies the needs of those who compose them.

The next category we mention is that of dignitaries, respectively of holders of public dignities, at central and local level, appointed by election or by appointment, for a determined period, generically called mandate. The political origin of the functions they perform and their legal status makes them subject to the political game, in the sense that the duration of this mandate will be equal to the duration of the governing force of the political force that gave them that dignity.

The legal rules applicable to dignitaries are found first of all in the Constitution (The Romanian Constitution was published in the Official Gazette no. 233 of November 21, 1991. It was revised by Law no. 429/2003, published in Official Gazette no. 758 of October 29, 2003 and republished in Official Gazette no. 767 of October 31, 2003), but also in other infra-constitutional normative acts. For example, the members of the bicameral Parliament of Romania (In the Romanian constitutional tradition, the Parliament has a bicameral structure, enshrined in the current Constitution which provides, in art. 61 para. (2) that *"Parliament is composed of the Chamber of Deputies and the Senate"*) are subject to the rules established by Law no. 96/2006 on the Statute of Deputies and Senators (republished in the Official Gazette no. 49 of January 22, 2016). The members of the Government, headed by the Prime Minister, have a status regulated by the Administrative Code, Part II dedicated to the central public administration. Autonomous public authorities are also led by persons who have the rank of dignitaries and whose status is regulated by special organic laws, such as Law no. 35/1997 on the People's Advocate (republished in the Official Gazette no. 181 of February 27, 2018) which provides for the election and termination of the mandate, its regime, the attributions, the deputies of the People's Advocate, the relations with the Parliament, and, very important, the fact that *"the People's Advocate cannot be subject to any imperative or representative mandate. No one can force the People's Advocate to obey his orders"* (the provision is contained in art. 2 para. (4) of Law no. 35/1997).

The third category is made up of contract staff, which, in turn, includes two subcategories, employees, respectively those employed under an employment contract and those appointed under a management contract.

They are a category of staff that differs from civil servants in that they do not exercise the prerogatives of public power. The contract staff, also evoked by the notion of employees, is the one who, by its specificity, is subject to the rules established by the labor legislation, in the center of which is the Labor Code, but an element of novelty, which occurred since 2019, was brought by the Romanian Administrative Code, approved by GEO no. 57/2019 (published in the Official Gazette no. 555 of July 5, 2019), which, for the first time, devotes a distinct part *(lato sensu)* to the regulation of public administration staff, an aspect to which we will return. Until the adoption of the Administrative Code, there was no independent regulation to enshrine special rules on contract staff in public administration, except for a Code of Conduct for contract staff in public administration, approved by Law no. 477/2004 (published in the Official Gazette no 1105 of November 26, 2004), which was drafted, for the most part, according to the model of the Code of Conduct for civil servants, adopted by Law no. 7/2004 (republished in the Official Gazette no. 525 of August 2, 2007), both repealed by the Administrative Code. We specify that, until the adoption of the current Administrative Code, the regulation of civil servants, as well as of other legal institutions, was achieved through distinct organic laws (for example, the local public administration was regulated by Law no. 215/2001, republished in the Official Gazette no. 123 of February 20, 2007; The government and the ministries were regulated by Law no. 90/2001, published in the Official Gazette no. 164 of April 2, 2001).

Through the Administrative Code, all this disparate legislation, including that dedicated to the civil servant, has been merged into a separate, unitary normative act, which includes distinct parts, dedicated to these categories of authorities, as well as to public administration staff.

The contract staff, as we have shown, includes employees, namely those employed under an individual employment contract and persons working under a management contract. The management contract is not to be confused with the employment contract. The first is regulated by the Civil Code (The Civil Code was approved by Law no. 287/2009, published in the Official Gazette no. 511 of July 24, 2009. It was implemented by Law no. 71/2011 and republished in the Official Gazette no. 409 of June 10, 2011), to which are added special laws that regulate the legal regime, while the employment contract is regulated by the labor legislation, in the center of which is the Labor Code (approved by Law no. 53/2003, republished in Official Gazette no. 345 of May 18, 2011).

We specify that the notion of the manager is found in two different ways and two different legal regimes. The first is contractual staff employed under a management contract, which is subject to private law, and the second in the form of public managers, who represent the holders of a specific public position (the specific public position of public manager is provided in Annex 5 to the Administrative Code containing the list of public positions, section II B, position 24.) bearing this name and who are subject to the regime of public law, currently regulated by the GEO no. 92/2008 regarding the status of the civil servant called public manager (published in the Official Gazette no. 484 of June 30, 2008). According to art. 1 para. (2) of this normative act, *"the status of public managers is conferred by the role, attributions and responsibilities incumbent on them as agents of change in the field of public administration reform"*. Moreover, this specific civil service was created in order to honor the commitments made in relations with the European Union to accelerate public administration reform, by creating a professional and apolitical body of civil servants, called public managers.

We find in the Romanian system a diversity of professional and extra-professional categories that carry out their activity in the public sector. We say extraprofessional because public dignities are not professions, and holders of public dignities cannot be called professionals in a certain field. This variety and diversity of categories correspond to a multitude of names, a different terminology, which evokes legal categories between which there are similarities and differences.

Peculiarities of the legal situation of public sector staff

We draw attention from the beginning to the meaning of the notions used, even by the name of this section. First, we refer to public sector staff, a phrase that has the merit of encompassing all three categories of staff that we identified in the previous section. Moreover, such a category also has a legal determination, the title of Part VI of the Administrative Code, after referring to civil servants and contract staff, mentions, finally, the staff paid from public funds, which includes, in practice, everyone.

We make the second observation regarding the use of the phrase of legal situation, which we consider to be integrative in terms of the legal rules governing each of the categories identified in the previous section.

The notion of the legal situation includes both the public law regime, applicable to dignitaries and civil servants, and the private law regime, to which the contract staff is subject, both employees and those who work as managers.

Regarding the applicable legal regime, specific to the current legal and institutional realities is the fact that we can no longer speak of a strict, firm delimitation between the rules of public law applicable to dignitaries and civil servants and the rules of private law applicable to contracts. The rule is also applicable in other areas, such as politics, for example, and we consider the distinction between right-wing and left-wing currents, between liberal and socialist conceptions and policies, and examples can continue.

Referring strictly to the legal rules applicable to the categories of staff working in the public or budgetary sector, it is common to them that, through their activity, they contribute to the competence of the public authorities and institutions of which they are part, respectively of the attributions they are conferred by law. And these attributions have as purpose and finality the provision of services to natural or legal persons, through which social needs of public interest are satisfied, at national or local level. From this perspective, they are enshrined in the legal rules that apply to them similar requirements established by the legislator in terms of the duties to which they are subject both in their activity and in their private life, with all the consequences arising from it.

In fact, as noted in the literature, a tendency to rethink, starting with the terminological aspect, is also felt at the supranational level. Thus, "a careful analysis of current developments in various countries, especially in the European Union, shows that there is a recomposition - on unitary criteria, not unique - of labor relations, either private or public law, which determines new similarities between them" (Ştefănescu 2017, 27).

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We will analyze, in the following, some aspects specific to each of the enunciated categories, in order to then identify elements common to all.

As regards the category of dignitaries, until the adoption of the Administrative Code there was no definition that the legislator should enshrine in a framework regulation, such definitions being found, as a rule, in doctrine, jurisprudence or sectoral regulations, such as they would be the normative acts in the field of salary (for example, Law no. 153/2017 on the remuneration of staff paid from public funds, published in the Official Gazette no. 492 of June 28, 2017, contains, in Annex IX provisions on elected public dignity functions (A), named (B), elected within the bodies of the local public authority (C), positions assimilated with public dignity functions (D)) or similar ones, as well as the normative acts that regulated different authorities or public institutions within which dignitaries carried out their activity, at central (for example, Law no. 90/2001 on the organization and functioning of the Government, currently repealed by the Administrative Code, regulated aspects of the status of members of the Government, starting with the Prime Minister) or local level or regulated different categories of dignitaries (for example Law no. 393/2004 on the Statute of local elected officials, published in the Official Gazette. no. 912 of October 7, 2004, currently repealed by the Administrative Code).

Article 5 lit. v) of the Administrative Code defines dignitaries as persons exercising functions of public dignity under a mandate, according to the Constitution, this code and other normative acts. The notion of the position of public dignity, in its turn, according to letter z) of the same text, represents the set of attributions and responsibilities established by the Constitution, laws and/or other normative acts, as the case may be, obtained by investment, as a result of the electoral process, directly or indirectly, or by appointment.

From the corroboration of all these provisions related to the constants of the doctrine result some elements that, in our opinion, characterize the category of public dignitaries.

a) Persons who hold and exercise functions of public dignity have the quality of dignitaries;

b) The functions of public dignity are exercised on the basis of a mandate, a notion that evokes the period of time between the moment from which the function of public dignity is

exercised and the one in which the exercise of the function ceases, either, as a rule, at the expiration or from this moment, under the conditions provided by law.

c) The ways of acquiring a position of public dignity are the election or appointment;

d) The content of the functions of public dignity is represented by the attributions and responsibilities incumbent on their holder, according to the Constitution and the laws adopted on its basis. For example, we find provisions regarding the members of the Government, headed by the Prime Minister, both in the Constitution and in the second part of the Administrative Code dedicated to the central public administration. In the same sense, the rules applicable to members of Parliament, deputies and senators, are found both in the Constitution and in Law no. 96/2006 on the Statute of Deputies and Senators, but also in the Regulations of the two Chambers of Parliament (Senate Regulation of October 24, 2005, republished in Official Gazette no. 990 of October 27, 2020; Rules of Procedure of the Chamber of Deputies of 24 February 1994, republished in the Official Gazette no. 338 of April 27, 2020; Regulation of the joint activities of the Chamber of Deputies and the Senate of March 3, 1992, republished in Official Gazette no. 247 of March 25, 2020).

As a legal nature, the regime governing the status of those holding a position of public dignity is a regime of public power. By public power regime we mean according to art. 5 lit. j) of the Administrative Code all the prerogatives and constraints provided by law in order to exercise the attributions of public administration authorities and institutions and which give them the possibility to impose themselves with binding legal force in their relations with natural or legal persons, to defend the public interest.

Civil servants are the second category of staff, which we can identify by the attribute of professional category, because, unlike dignitaries, they exercise a professional activity, as a rule, for an indefinite period, representing, as we expressed in the first section, the backbone of the institutional architecture of the public sector. Article 5 lit. y) defines the civil service as the set of attributions and responsibilities, established under the law, in order to exercise the prerogatives of public power by public authorities and institutions. As it results from the above definition and we mentioned from the first part of this study, the essence of civil servants is that they exercise public power prerogatives, which separates officials from contract staff, but resembles the incumbents' public dignity.

In the Romanian system, not only is this fundamental feature of civil servants determined to be the holders of prerogatives of public power, but it is also determined what these prerogatives consist of, through art. 370 of the Administrative Code (Art. 370: *"Prerogatives of public power. (1) The prerogatives of public power are exercised through general activities and through special activities. (2) The general activities involving the exercise of the prerogatives of public power, by the public authorities and institutions provided in art. 369, are the following: a) elaboration of draft normative acts and other regulations specific to the public authority or institution, as well as ensuring their approval; b) elaboration of public policy proposals and strategies, of programs, studies, analyzes and statistics necessary for the substantiation and implementation of public policies, as well as of acts necessary for the execution of laws, in order to achieve the competence of the public authority or institution; c) authorization, inspection, control and public audit; d) management of human resources and public funds; e) representation of the interests of the public authority or institution in its relations with natural or legal persons of public or private law, from the country and from abroad, within the competences established by the head of the public authority or institution, as well as legal representation of the authority or the public institution in which it operates; f) carrying out activities in accordance with the strategies in the field of information society, except for the situation in which they aim at monitoring and maintenance of information equipment. (3) The activities of special character which involve the exercise of the prerogatives of public power are the following: a) specialized activities necessary for the realization of the constitutional prerogatives of the Parliament; b)*

specialized activities necessary to achieve the constitutional prerogatives of the President of Romania; c) activities for approving the draft normative acts in order to systematize, unify, coordinate the entire legislation and keep the official records of the Romanian legislation; d) specialized activities necessary for the realization of the foreign policy of the state; e) specialized activities and ensuring the necessary support for the protection of the fundamental rights and freedoms of the person, of private and public property, prevention and discovery of crimes, observance of public order and peace; f) specialized activities necessary for the application of the legal regime of the execution of sentences and measures of deprivation of liberty pronounced by the courts; g) customs activities; h) other activities with a special character regarding the exercise of public authority in areas of exclusive competence of the state, based on and in the execution of laws and other normative acts. (4) The establishment of positions in the civil service regime is mandatory, insofar as the activities provided in par. (1)-(3), except for the positions related to the staff from the categories provided in art. 382 lit. c), h) and i), as well as of the positions within the autonomous authorities, for which the categories of staff are established by the special legislation. (5) The public positions are established by law."). An element of novelty that the Administrative Code brings compared to the old regulation consists in the fact that, unlike art. 2 of the former Law no. 188/1999 on the Statute of civil servants, currently repealed, identifies two categories of prerogatives of public power, some through which general activities are carried out and others through specific activities (Vedinaș 2020, 290).

From the existence of the two types of prerogatives results two categories of civil servants, respectively civil servants subject to the general statute, represented by part VI of the Administrative Code, title II entitled even the statute of civil servants and civil servants subject to special statutes, adopted by Special organic laws, such as the police (The status of the police officer is regulated by Law no. 360/2002, published in the Official Gazette no. 440 of June 24, 2002), parliamentary civil servants (The status of the parliamentary civil servant was approved by Law no. 7/2006, published in the Official Gazette no. 35 of January 16, 2006.), diplomatic and consular staff (The statute of the Romanian diplomatic and consular corps was approved by Law no. 269/2003, published in the Official Gazette no. 441 of June 23, 2003) and examples could continue.

The contract staff, as we have shown, consists of employees, which include persons employed under an individual employment contract and staff employed under a management contract.

The element of novelty, truly revolutionary, that the Administrative Code brings is the fact that it regulates for the first time the legal situation of the contractual staff within the public authorities and institutions. As we expressed in a previous study (Godeanu 2018, 272), the Administrative Code brings a solution of unitary regulation of all public sector staff, while maintaining the differences between categories.

An important clarification is required, namely that, in addition to the separate regulations applicable to the three categories of staff, there are normative acts that create a unitary framework for all public sector staff, such as those on pay, records or the Social Dialogue Law no. 62/2011 (republished in the Official Gazette no. 625 of August 31, 2012), which, in addition to the common provisions, also contains separate provisions for civil servants. Referring to the latter law, the doctrine recognized its quality of *"common law for contract staff and civil servants in terms of social dialogue."* (Ștefănescu 2017, 27) Equally, by enshrining provisions for civil servants distinct from those applicable to employees, *"a recognition by the legislator of the identity of the civil servant and his employment relationship is achieved."* (Vedinaș and Vorniceanu 2011, 77).

Common aspects of the legal situation of the three categories of staff in the Romanian public sector

A first aspect is that the records of all staff paid from public funds are regulated and effectively carried out. Rules on how to do this are found in Part VI, Title II Chap. IV of the Administrative Code regarding the record of staff paid from public funds and the national system of record of employment in the public sector.

The second aspect concerns the fact that the salary regime of all those who carry out their activity in the public sector is regulated by a single law, respectively Law no. 153/2017 on the remuneration of staff paid from public funds.

A third aspect concerns the existence, through the Administrative Code, of a regulation with the value of a framework law that contains provisions regarding the organization, functioning and staff of all public authorities and institutions, regardless of their status. As we have shown, it enshrines legal rules for all categories of staff, principles of organization and operation that are valid and binding throughout the public sector, such as legality, equality, transparency or the principle of the satisfaction of the general interest. Also in the Administrative Code is provided, in art. 546, the number of positions in the cabinet and chancellery of dignitaries whose right is recognized by law and the examples could continue.

Fourthly, we mention the existence, at central level, of the National Agency of Civil Servants, which is a specialized central authority subordinated to the ministry with responsibilities in the field of public administration, whose mission is to develop a professional, stable and impartial body of civil servants as well as the creation of a record necessary for the management of staff paid from public funds. The attributions of this public authority cover the staff from the entire public sector, which allows the promotion of unitary staff policies, regulations of the same character, which would allow a true proper management of these staff.

A last aspect that we mention is that of creating the normative framework of interinstitutional collaboration, the principle of loyal collaboration being one of the principles that, being promoted by the jurisprudence of the European courts, penetrated the Constitutional Court and the courts that compose the judiciary in Romania, but also in the administrative and governmental practice itself.

Conclusions

The analysis of staff in the budget sector is of particular importance, as the quality of this staff influences the quality of the work of public authorities and institutions.

We could see that this staff is subject to both separate rules - public or private law, but also the fact that there is an interference between these two branches of law. “For over a century there has been a mutual movement to influence labor law through rules of public law and civil service law through protective rules of private labor law” (Ștefănescu 2017, 27).

It is sufficient to mention the penetration of bargaining in the civil service, by recognizing the possibility of concluding collective service agreements, which are the correspondent of collective labor agreements in labor law.

It is neither important to “expel” the norms of public or private law from one branch or another of law, nor to “prevent” further penetration and influence.

We specify that art. 278 of the Labor Code regulates the common law nature of labor law and provides that “The provisions of this Code shall apply by common law to those legal employment relationships not based on an individual employment contract, insofar as the special regulations are not complete and their application is not incompatible with the specifics of the respective employment relationships.”

We thus understand that labor law applies and is common law to all other legal relations, of dignitaries, of the military, of magistrates, of priests and of other categories, with two conditions: they must not themselves contain their own rules or the rules that contain them not to be sufficient, and the provisions of the Labor Code to be compatible with the specifics of the respective labor relations.

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