PARTICULARITIES OF THE EXERCISE OF THE PUBLIC SERVICE BY THE MILITARY

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Abstract: *The achievement of the public interest by the state implies the enduing with public prerogatives of certain persons, who, in the exercise of the public function and by fulfilling the conditions provided by law, acquire the quality of civil servants. The regulation of the public office in Romania offers both a general perspective, through the Statute of the Civil Servants, which since the adoption of the Administrative Code in 2019 is an integral part of it, and a particular perspective, embodied by the special statutes of certain professional categories that exercise the public office in a specific regime, derogating from the general rules. Law no. 80/1995 regulates the Statute of Military Personnel and, through the conditions of exercising the stipulated duties and rights, confers a special indisputable status to military personnel. However, the provisions of the same law do not establish the quality of civil servants of the military, this quality being established by juridical interpretation.*

Keywords: military, public office, civil servant, law

1. Constitutional determination of the public office

In the abstract, the state is endowed with powers, prerogatives and responsibilities that it exercises through its structures. The diversity of the fields of activity administered by the state generates a variety of functions that are performed by public authorities and institutions, specialized according to the material and territorial competences with which they are invested by law.

Based on these considerations, the public office represents *"the social need found in the structure of duties that should be performed in an institutional framework in order to satisfy the public interest in the best possible conditions"* [1].

The importance of the juridical regulation of the public office is significant, because, by means of juridical norms, the functions receive both the general recognition of their

content and the specific character applied and adapted to the areas of realization of the state power.

The implementation of the will of the state and concretization of the public office at all the levels of the administration is ensured by human resources, which, for this purpose *"take decisions and carry out technical activities in order to ensure the continuity of the functioning of the public authorities and institutions in the general public interest"* [2].

Civil servants are a fundamental component of any public system, which influences both the functioning of the state and the lives of the people. *"Civil servants are the mirror of the state, the interface with which the citizen meet, so that the state cannot be indifferent to how its image is reflected in the perception of the citizens."* [3].

The fundamental law of the state, the Romanian Constitution, does not define

public office, but provides elements for identifying some particularities of its exercise, including some references about the military.

According to art. 16 of the Romanian Constitution, *"Access to public, civil, or military positions or dignities may be granted, according to the law, to persons whose citizenship is Romanian and whose domicile is in Romania"* [4].

The condition of holding Romanian citizenship and that of establishing residence in Romania are imperative conditions for people's access to public positions and dignities, both being natural practices in the constitutional systems of democratic states and a guarantee of the person's attachment to the state in the governing of which he/she participates as a public servant.

In regulating the right of joining political parties, the Romanian Constitution makes another reference to the notion of civil servant and states that *"Judges of the Constitutional Court, the advocates of the people, magistrates, active members of the Armed Forces, policemen and other categories of civil servants, established by an organic law, shall not join political parties"*[5]. The argument for regulating the previous prohibition takes into account the fact that in the exercise of legal responsibilities, the persons holding certain public functions and prerogatives of state power must be impartial and independent in their activity, from the perspective of political interferences that could affect the good carrying out of essential public services of the state. This conception of contemporary democratic systems applies the theory of the *neutrality of public services* which entails the detachment of certain categories of civil servants from the political element [6].

The exercise of public functions is conditioned by the Romanian Constitution by the fact that *"Citizens holding public offices, as well as the military are liable for the loyal fulfillment of the obligations they*

are bound to, and shall, for this purpose, take the oath as requested by law" [7]. Thus, regardless of the nature of the public office exercised, the appointed persons acquire the quality of civil servant only after having expressed their fidelity to the country by means of the prescribed oath.

2. The juridical regime of the public office according to the Administrative Code

The adoption of the *Administrative Code* in 2019 represented an important moment of legislative unification of the field of public administration, which produced changes in the legislation applicable to the public office. The new regulation abrogated, with a few exceptions, the provisions of *Law no. 188/1999 on the status of civil servants* and added rules applicable to contract staff in the public administration, incorporating in a unitary conception the activity carried out by the human resources of the public administration, who must comply with specific rules and requirements resulting from the public service they realize.

The Administrative Code defines the public office as *"the assembly of attributions and responsibilities, established under the law, for the purpose of exercising the prerogatives of public power by public authorities and institutions"* [8].

The status of civil servants represents the common law of the public office and constitutes the assembly of rules on the juridical status of the civil servant [9]. Most European states recognize the need for a statutory regime in the regulation of the public office, and in the legislation of each of these states there is a general statute applicable to several categories of civil servants, and then there are special norms, which are concretized in statutes different from the general statute that is applied to specifically determined categories of civil servants.

In Romania, the content of special statutes is strictly determined by the Parliament by law. Specific rights, obligations and

incompatibilities, as well as categories of public positions characteristic to the public service in which they are included are regulated by these.

Although the Administrative Code stipulates that military personnel are among the categories of budgetary personnel to whom the provisions of the general state of the public office do not apply, it does not mean that they do not exercise a public office within one of the most important public services of the state and it does not mean that they cannot have their own status as specialized human resources within the public service of national defense.

3. The special status of military personnel

According to the legislation in force, the military personnel consists of active military personnel and active soldiers and enlisted holding ranks, these categories benefiting from special regulations of their rights and duties in the form of statutes.

According to *Law no. 80/1995 on the status of military personnel*, the military personnel are "*Romanian citizens who have been granted the rank of officer, warrant officer or non-commissioned officer, according to their military and specialized training, under the conditions provided by law. Military personnel are in the service of the nation*" [10]. Compared to the hierarchy provided by the Administrative Code, the military personnel are part of a better defined hierarchical structure: the military personnel hold military ranks and, according to these, they are part of the corps of officers, the corps of warrant officers or the corps of non-commissioned officers. The military rank is considered a "*right of the holder and represents the social recognition of the quality of a military*" [11].

The situations in which military personnel may find themselves and their ability to perform their duties shall be done taking into account the following categories:

a) *active military personnel*, when

they hold a military position, with the application of the conditioning of the constitutional provisions regarding the Romanian citizenship and the domicile in the country;

b) *reserve military personnel*, when they do not hold a military position, but they may be called, in accordance with the law, to perform military service as reservists or when needed, as active military personnel;

c) *retired military personnel*, when, according to the law, they can no longer be called to perform military service.

The active military personnel have the quality of professional military, by exercising the military profession ensuring the elements that concern both the functioning and the leadership of the military structures in time of peace and at war. The accomplishment of the specific attributions by the military personnel is done based on their investment by the state with the exercise of the public authority.

4. Membership of the military to the category of civil servants

An issue that has not been entirely solved from a legislative point of view is the quality of civil servants of the military personnel.

Law no. 80/1995 on the status of military personnel confers special status to the military, but does not mention that they are civil servants. However, on the other hand, one cannot deny that the exercise of the duties of the military personnel means precisely the carrying out of public functions specific to the public national defense service.

The comparative analysis of the provisions of the Romanian Constitution, of the Administrative Code and of the Statute of military personnel, as well as of other juridical regulations applicable in the field reveals inconsistencies in the application of a unitary juridical regime to the military as civil servant.

The interpretation of the constitutional provisions shows that public positions can also be military, which creates the premises for the existence of military civil servants, who join the other civil servants, civilians, whose status is regulated by the Administrative Code and by special status laws.

In this context, it is necessary to highlight the jurisprudence of the Romanian courts, before which, through various notifications, the quality of civil servants of the military personnel was brought into discussion.

By *Decision no. 34/2016*, the Constitutional Court of Romania established that, from the perspective of the legal basis for exercising public office, the Statute of the Civil Servants “*represents the general framework for civil servants (the military being a special category of civil servants)*” [12].

The High Court of Cassation and Justice supports the same idea by *Decision no. 10/2018* when responding to the finding that Law no. 80/1995 does not explicitly mention the quality of civil servants of the military: “*the fact that the Statute of Military Personnel does not name them as such cannot constitute a sufficient argument for the military not to be considered civil servants, since in the case of other categories of personnel their statutory regulations do not use the term of civil servants either*”[13].

Thus, the jurisprudence of the two courts has established a set of *criteria* applicable cumulatively for the membership of military personnel to the category of civil servants:

- a) Military personnel perform a public service, intended for the defence of the country and are considered, according to the law, to carry out specific activities in the service of the nation.
- b) Through the professional activity they carry out, the military personnel contribute to the functioning of a sector of the public administration represented by ministries and authorities of the central public administration with a role

in the field of defense, public order and national security.

- c) The appointment of military personnel is made by a unilateral administrative act, according to art. 78 of Law no. 80/1995, “they have not concluded individual employment contracts, but carry out their activity on the basis of service relations, specific to civil servants with special status” [14].
- d) Officers, warrant officers and non-commissioned officers benefit from the prerogatives of public power in the exercise of their position, they are invested with the exercise of public authority.
- e) Similar to civilian civil servants, the military personnel consist in professional corps, of the non-commissioned officers, of the military warrant officers and of the officers, being structured on military ranks, with the application of the principle of hierarchy.

5. Conclusions

At present, the exercising of a public function cannot be done without the contribution and involvement of the human factor. The specialization and the professionalization of human resources for the diversity of public services that the state provides creates the context for the adoption of specific juridical norms applicable to those exercising public functions. Both the Statute of the Civil Servants, which ensures at a general level the conditions for the exercise of public office, and the special statutes that delineate and regulate particular areas, contain a set of rights and obligations that the holders of public offices must fulfill.

The status of the military personnel is no exception from this rule and has a pronounced special character in the regulation of the public office that ensures the realization of national defense. Even if Law no. 80/1995 does not expressly mention the quality of civil servant of the military personnel, the conclusions are

obvious, an aspect underlined by the jurisprudence of the autochthonous courts in recent years.

The particularities of the system of defense, public order and national security currently determine an extension of the applicability

of the Statute of Military Personnel, the professionalized militarized appointments being a necessity for carrying out the specific activities of some public authorities of the state.

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