Unconstitutional Issues Regarding Legal Provisions Concerning Public Office

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Abstract: The paper draws attention on the recent amendments regarding the legal framework concerning public servants. Analyzing the provisions of the Government's Emergency Ordinance no. 37/2009 and also of the Government's Emergency Ordinance no. 105/2009, both of them modifying the Law no. 188/1999 regarding the public servants statute, we conclude that their purpose is to politicize the civil services and this aim is being achieved by means on the edge of legality. The head of the civil services are no longer public servants and are selected exclusively on political criteria. Consequently, politicizing civil services may only have a negative impact on public administrative reform and the incentive of the activity of civil services is far from being reached.

Keywords: civil services; politics; decentralization; deconcentration

Social and economic features determine the necessity of reforming all fields of activity, the interess is higher in public jobs, because through public clerks, the aims of local, regional and national communities are represented and administered.The context of politic transformations that took place in time and even nowadays had strong consequences on laws regarding local public administration, therefore affecting laws concerning public clerks.

Establishing the organization and functioning of local public administration, Law no.215/2001 is the legal frame of public administration from administrative territorial institutions, being based on the principle of decentralization of local autonomy and deconcentration of public services. Moreover, transforming local public administration into an administration where public job and public clerk have the main roles was a process that gradually took place and this happened mainly by introducing in the Constitutions of the state several judicial laws considered principles and by creating an ordinary law in this field (Tatut & Paune, 1/2007, pp. 147-152).

The status of public clerks established by Law no. 188/1999 underlines the general regime of judicial rapports between public clerks and the state or local public administration, through autonomous administrative authorities or through public authorities and institutions of local and central public administration. Therefore, this law establishes the ways to become a member of this professional category, responsibilities involved and characteristics of one's activity, rights and obligations, also including the manner or transformation of ending job rapports of public clerks.

In the context of the need for adaptation to the needs of the society and to the demands of the European framework in this field, the Status of public clerks has been changed and this process continues. Moreover, the legislation part is continuously enlarged and made performant in the field of public service through numberless normative documents. In this respect, what is relevant is Law no. 161/2003 regarding some measures for assuring transparency while exercising public dignity of public jobs and in business, for preventing and sanctioning corruption, H.G. no. 611/2008 for approving norms related to organization and career development of public clerks, H.G. no. 1344/2007 regarding organization and working of discipline commissions.

Starting from the premises of creating a public clerk that is not involved in politics, a professional person, oriented towards performance and having as an apparent goal the separation of political jobs from the administrative ones, improving responsibility, efficiency and professional independence of the public clerk, the main conclusion reached was the reform in public administration, thus offering the Govern the possibility of exercising its control over local administration.

Introduced as a constitutional principle, descentralization is also one of the objectives of the government period between 2009-2012, referring to the reform from the public administration sector, its aim was to continue the reform in public administration that was based on the increase of autonomy of local collectivities, by creating both decision autonomy and financial-patrimony autonomy, in the same time with the starting of the real process of decentralization.[1]

Making decentralization move faster is one of the strategies of this reform in public administration. In this context, decentralization is not a purpose in itself, but a

[1] The governing program between 2009-2012, Chap. 22 The Reform of Public Administration, www.gov.ro.

means of facilitating the steps towards that level that, once reached, connects the person that makes decisions to the natural process of taking full responsibility. (Vedinas, 2009, p. 387)

In the context where the reform of public administration is a central point in taking measures whose goal is to bring stability to the socio-economic situation, based mainly on decentralization, we notice that legislative nowadays changes in this field only block this process, making it a political game.

Pretending to improve and complete the legislative and institutional frame, in order to bring efficiency in public administrative activities, including in everything that is related to the decentralization of public administration[1], we notice the Government Decree no. 37/2009, modifying Law no. 188/1999 regarding the Status of public clerks, abrogated on 06.10.2009 and declared unconstitutional on 07.10.2009, but also (Ordonanța de Urgența a Guvernului=O.U.G.=Urgent Disposition of the Government) O.U.G. no.105/2009 published in the Official Gazette 668 from the 6th of October 2009, which abrogated O.U.G. no. 37/2009 through art. XIV paragraph (1). This last normative document was declared unconstitutional by the Decision no. 1629/2009 referring to the acceptance of the exception of unconstitutionality of provisions of art. I point 1-5 and 26, art. III, art. IV, art. V, art. VIII and the annex no. 1 from The Urgent Decree of the Government no. 105/2009.

Both O.U.G. no. 37/2009 and O.U.G. no. 105/2009 bring one item of news in the field of public jobs. Therefore, according to art. III line 1 of O.U.G. no. 37/2009, *public functions, specific public functions and jobs based on a contract that offers the quality of leader of deconcentrated public services of ministries and of the other organs of central public administration from administrative-territorial unities […], also the adjuncts of these will be abolished in 32 days from the date when the present urgent decree becomes valid, then when the term from line (1) from the present urgent decree expires, deconcentred public services of the ministries and of the other organs of central public administration from administrative-territorial institutions from the annex to the present urgent decree will be run by a coordinator manager of deconcentred public service. The coordinator manager is to be helped by one or more adjuncts, depending on the number of positions that are abolished*; these dispositions have been taken over by

[1] Presenting reasons, The Law Project for approving The Urgent Decree of the Government no.37/2009, www.cdep.ro.

art. IV from O.U.G. no.105/2009. Therefore, the persons in charge with deconcentred public services no longer are public clerks, so they do not obey Law no. 188/1999 regarding the Status of public clerk, including recruitment and occupancy of public jobs.

Comparing the settlements in the two decrees, we notice the general opinion that these measures do not lead towards politicization of the state's control institutions; moreover they do not guarantee the results foreseen by the initiator.[1]

Interpreting the deeds mentioned taking into account Law no. 188/1999, we notice that the Government started mass dismissal as far as the leaders of deconcentrated institutions are concerned, without basing their facts on any of the reasons for dismissal of public clerks. In this respect, those public clerks did not break the law and they cannot be dismissed based on Law no. 188/1999 that disposes the termination of employment. Moreover, the activity of the leaders of the chosen institutions was not controlled by superior hierarchical organs, this leads to the conclusion that these dismissals were done subjectively. Therefore, the natural question that arises is if the purpose of such normative documents was that of improving public administration activity, because there is no doubt that the administrative reform did not make any good changes, because it was politicized and was transformed in a subjective process.

Furthermore, we must take into account the fact that, according to Law no.188/1999 (r2), regarding public clerks, the leaders of deconcentrated institutions had been selected based on a contest, according to their abilities and experience, while the established things through the Urgent Decree of the Government no. 37/2009, maintained as far as O.U.G. no. 105/2009 is concerned, underline the fact that competence is no longer seen as a criterion for being accepted for a job or dismissed, these persons were chosen for their position after evaluating their knowledge and abilities based on a management project which was pure formality.

In the context of these decrees, the recruitment procedure of new leaders in public deconcentrated institutions is exclusively based on political criteria. When these jobs were given for contest, according to art. III paragraph 4 from O.U.G 37/2009 and art. IV paragraph 4 from O.U.G. no. 105/2009, *people that are about to be named in a leading position inside deconcentrated public service receive the*

[1] The Social and Economic Council, *Points of view referring to the project of the Urgent Decree regarding measures taken for improving activity in public administration*, www.cdep.ro.

administrative document of the main authorized officer that will have these people as subordinates, this officer coordinating and having authority over the specific deconcentrated public service. Through this decree, the status of public clerks of deconcentrated public institutions' managers was modified; the legal basis for transformation is outside the Law 188/1999. Thus, these people no longer are public clerks, the management contract between coordinating managers and authorized officers is subject to law from Work Code, being similar to an individual work contract.

A relevant aspect is the procedure of naming a person to be in charge with a deconcentrated public institution, the equivalent of the contest for occupying a public job from Law no.188/1999. Therefore, according to art. IV from O.U.G. no.37/2009 and art. V from O.U.G. no.105/2009, *the evaluation of knowledge and managerial abilities based on management projects is organized by the authorized credit officers that are responsible for the respective deconcentrated public services, in maximum 32 days from the first day of viability of the present urgent decree.* Consequently, the fact that politics is involved in the process of recruitment and naming of managers of deconcentred public institutions can be easily noticed from the legal text. The authorized credit officer is represented by the minister that was named by the president based on the nomination of the Prime-Minister; this naming has exclusively political reasons. According to this procedure, the favorable result of this evaluation is also based on political reasons; only those persons that have the same political views have priority.

A first consequence of the fact that the leaders of the deconcentrated public institutions are no longer considered public clerks is lack of transparency and professionalism while recruiting them; these are priority principles in Law no. 188/1999. In this way, in order to have an open competition, The Status of public clerks underlines the measures providing free participation access to the contest or exam for any person that fulfills the conditions for occupying a public position. (Manda, 2007) O.U.G. no. 37/2009 and O.U.G. no.105/2009 do not contain anything regarding the organization of the contest or of the examination, practice totally confirms the formality of the exam taken by only one person recruited based on political nomination.

Thus, even if Law no. 188/1999 regarding the Status of public clerks was adopted in order to depoliticize public function, to provide stability for public clerks and to form a group of efficient professional people that would gain the crowds'

confidence, the transformation of this through O.U.G. no. 37/2009 and then through O.U.G. no. 105/2009, having apparently the same purpose, it does not succeed to reach the objective, from our point of view, but it does exactly the opposite. Once they were named according to Law no.188/1999, public clerks have stability in their job, except for the high public clerks that can be named in or dismissed from their position (Trailescu, 2008, p. 114), this exception is to be applied after it was adopted the O.U.G. no. 37/2009, respectively O.U.G. no. 105/2009 and the managers of public institutions.

Consequently, by using the political criterion exclusively, the managers of deconcentred institutions will be replaced by naming another person every time the authorized credit officers are changed. This naming will be made for maximum 4 years, art. III paragraph 6 from O.U.G. no. 37/2009 and art. IV paragraph 6 from O.U.G. no. 105/2009 saying that these functions *will be exercised based on a management contract with the authorized credit officers that is directly responsible for deconcentrated public service, having authority and taking care of the functioning of the respective deconcentrated institution, on maximum 4 years*, a fixed period, but not depending on anything else, established in such a way that it allows changing persons in that position based on political reasons and transformations. Thus, by the re-introduction of political view as a unique criterion in order to be promoted, serious offense is brought to public administration in Romania.

In conclusion, according to the thing established through O.U.G. no. 37/2009, maintained by O.U.G. no.105/2009, deconcentrated public institutions are lead by coordinating managers and vice-managers, evaluated by a commission formed at the level of each ministry that has the public deconcentrated service in its subordination, the commission is also composed of a representative of the institution of the prefect from the respective area. Thus, the first consequences of putting in practice the decree given is the fact that the prefect, a high public clerk, will coordinate deconcentrated public services led by political people that no longer are public clerks, while the leaders of ministries which are active public clerks, will coordinate and give dispositions for the managers of deconcentrated public services, thus creating a bizarre subordination between leaders in local and central public administration.

Before the adoption of O.U.G. no. 37/2009, a Legislative project was initiated in order to modify Law no. 188/1999 that had similar decrees with the ones discussed

in the O.U.G. no. 37/2009. It is important to notice that the Law for modifying and completion of Law no. 188/1999 regarding the Status of public clerks was declared unconstitutional by the Decision of Constitutional Court no. 710 from 6.05.2009. Inside the control of the constitutionality of laws before promulgation, The Constitutional Court noticed that the Law for modification and completion of Law no. 188/1999 is unconstitutional because it violates the constitutional principle of bicameralism in the Parliament of Romania, which was established in art. 61 from the Fundamental Law. As a consequence, The Court talked exclusively about lack of constitutionalized aspects of the respective law, because the legal procedure for adopting a law is a preliminary aspect in the analysis of constitutionality.

Critic opinions regarding lack of constitutionality of the Law for modifying and completion of Law no. 188/1999 regarding the Status of public clerk underline the violation of art. 41 paragraph 1 from the Constitution, focusing on the right to work, thus showing that the disappearance of the positions held by public clerks and the creation of functions related to public dignity is not allowed discrimination, based on politic criteria, taking into account the fact that public clerks are only subjected to law, not to political programs of parties. Moreover, even if the position of coordinator director of deconcentrated public service is not a public job, coordination a national service at the level of administrative-territorial institutions is an activity that supposes exercising responsibilities in order to achieve goals related to public power. This situation leads to being in a position which supposes exercising such actions, without respecting the principle of fidelity established by art. 54 paragraph 1 from the Constitution, expressed when pledging, on the other side, this may lead to the transfer of the respective activity from the field of public law to private law. [1]

After the Constitutional Court mentioned the lack of constitutionality of this law, the Government adopted O.U.G. no. 37/2009, that underlines again the established things from the Law declared unconstitutional. As far as the Law for approving The Urgent Decree of the Government no. 37/2009, this was declared unconstitutional, through the Decision of the Constitutional Court no. 1257 from 07.10.2009. The Constitutional Court saw that the Law regarding the approval of O.U.G. no. 37/2009 is unconstitutional, because numberless norms were violated regarding the adoption of urgent decrees specified in art. 115 paragraph (6) from

[1] The Constitutional Court, *Decision no.710 from 06.05.2009 referring to the objection of unconstitutionality of the Law for modifying and completion of Law no. 188/1999*, published in M. Of. no. 358/28.05.2009.

The Fundamental Law, underlining that *urgent decrees cannot be adopted in the field of constitutional laws, they cannot affect the regime of fundamental state institutions, the rights, the liberties and responsibilities established in the Constitution, the election rights and they cannot establish forcing measures towards goods that belong to public property.*

This Decree was not abrogated one day before The Constitutional Court gave the final verdict, by adopting the Urgent Decree of the Government no. 105/2009 regarding some measures taken in the field of public position and for strengthening the managerial ability at the level of deconcentrated public services of ministries and of the other organs of central public administration from public services, also taking into account the established measures for the cabinet of the dignitary from central and local public administration, the cabinet of the prefect and of the local chosen person in charge. A law for approving a normative act cannot be declared unconstitutional. But, The Constitution of Romania, related to legislation has the following in line 5 paragraph 115: *the urgent decree becomes valid after it is left for debate in an urgent procedure at the competent Chamber, in order to be seen and afterwards published in The Official Gazette of Romania,* thus only one of the conditions has been respected, the one referring to publishing, it was not given to be debated in the Parliament. Therefore, we question the respecting of the conditions in order to become viable the O.U.G. no. 105/2009 and the moment of effective abrogation of O.U.G. no. 37/2009.

In the Decision no. 1.257 from the 7th of October 2009, published in the Official Gazette of Romania no. 758 from the 6th of November 2009, the Constitutional Law was very blunt about any problem referring to previous mentioned aspects, showing that "in the situation when, through the law given to be controlled before promulgation, an abrogated decree is approved, we cannot speak about the existence of a case of inadmissibility as a direct consequence of the fact that constitutional control is applied to a law which is no longer viable. The direct object of control cannot be the constitutionality of the urgent decree that has just become not valid, but the constitutionality of the approval law of this, meaning validation of its normative content through the act of will of the Parliament. Just like the instance of constitutional contentious has notices, through the above decision, to decide would mean to admit that a law which approved an unconstitutional urgent decree no longer viable cannot be subjected to the control of the Constitutional Court in order to re-establish order rightly consecrated through The Fundamental Law, consequently, the established things from the

Constitution are not compulsory".[1] Thus, even if O.U.G. no. 37/2009 at that moment abrogated art. XIV paragraph (1) from The Urgent Decree of the Government no. 105/2009, constitutionality control envisaged the law for approving it before promulgation, not the urgent decree in itself was highly-important at that moment.

By analyzing the constitutionality of the law of approval of O.U.G. no. 37/2009, The Constitutional Court noticed that through its establishments, The Urgent Decree of the Government no. 37/2009 "affects" the judicial status of some public clerks in charge from the field of public services from deconcentrated public area of ministries and of the other organs of central public administration from administrative-territorial unities, established through Law no. 188/1999 ; moreover, the established features of this normative document express a tendency of politicizing governmental structures from administrative-territorial institutions, to be more precise at the level of counties, discussing even the constitutional and legal regime of public position.

O.U.G. no. 105/2009 contains the articles that have been previously found in controversial articles from the abrogated Decree, the only difference is that the article regarding the disappearance of public positions, specific public positions and jobs related to contract signing procedures, offering the quality of leader of deconcentrated public services of ministries and of other organs of central public administration from administrative-territorial institutions, and also to the other public services seen in annex no.1,but also to their vice-leaders, mentioning that all these positions *are and remain abolished or they will be abolished, according to circumstances*, without giving a specific date for these. Thus, disposals referring to recruitment and occupying process for the positions of coordinator manager and coordinator vice-manager remain the same; the politization of deconcentrated public services is not affected.

These aspects were taken into account by the constitutional instance that tried to give a solution to the exception, but it was noticed that through the legislative process used, the Government established that the things established through O.U.G. no. 37/2009, the normative document abrogated and declared unconstitutional will continue to have judicial effects materialized in a new act –

[1] *The Constitutional Court, Decision no. 1.257 from the 7th of October 2009 referring to the objection to unconstitutionality of the Law fro approval of The Urgent Decree of the Government no. 37/2009 regarding some measures for improving public administration activity,* published in the Official Gazette of Romania, Part I, no. 758 from the 6th of November 2009.

The Urgent Decree of the Government no. 105/2009 – that, as it has been shown, took entirely the initial establishments, having some insignificant changes.[1] Moreover, The Constitutional Court concluded that such a situation questions the constitutional legislative behavior of the Executive regarding the Parliament and finally, The Constitutional Court.

As far as the long-term consequences of these two normative documents are concerned, we underline the fact that they have effects over state budget, because the Government did not, previous to issuance, make a study related to the economic impact of the normative document, the effects were deepened by adopting O.U.G. no. 105/2009.

The negative effects of repeating these procedures of dismissal and naming on position appear after 6 months from other dismissals and naming on position, being underlined by the economic and organizational situation. First of all, these positions have two managers on one single job, because the ones that were dismissed appealed to court, afterwards gaining in front of the legislative instance. Because many of the dismissed people after the appearance of the Urgent Decree of the Government 37/2009 were again given the same job, nowadays, a single deconcentrated position has two managers, both paid from public funds. The effects can be seen in different job, the produced prejudice of state budget is the more important, the more complicated the situation becomes, having two incomes for the same job, one for a person named according to O.U.G. no. 37/2009 and one for the person named to replace the first.

A new item of information was brought by O.U.G. no. 105/2009 regarding mobility of public clerks. In this respect, the Government can detach public clerks on positions held for high public clerks– such as subprefect and prefect. According to the anterior form of Law 188/1999, detaching can be made respecting the category, class and professional degree of public clerk.

[1] The Constitutional Court, *Decision no. 1629 from 03.12.2009 referring to the approval of exception of unconstitutionality of dispositions of art. I points 1-5 and 26, art. III, art. IV, art. V, art. VIII and the annex no. 1 from The Urgent Decree of the Government no. 105/2009regarding some measures taken in the field of public positions and for strengthening managerial ability al the level of deconcentrated public services of ministries and other central public administration organs from administrative-territorial institutions and other public services, also establishing measures regarding the cabinet of the official from local and central public administration, the office of the prefect and the office of the chosen local leader*, published in The Official Gazette no. 28 from the 14th of January 2010.

We conclude that, as an interference of the Executive in legislative power, in the situation in which the Government adopts documents having a normative character, opposing the established dispositions of the Constitution, both the principle of separation of state powers and the supremacy of the Constitution are affronted.

Because a public modern administration needs the development of a corpus of professional public clerks, that will contribute to the efficiency of public administration that must be in accordance with European standards, we consider that the interference of politics is administration cannot lead the administrative reform in Romania to a positive direction.

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