# "IS THE LABOUR RELATION OF THE CIVIL SERVANT AN ADMINISTRATIVE CONTRACT?"

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**Abstract:**
*Nowadays, public institutions have contractual employees, hired on the basis of the Labour Code, and public servants, appointed on the basis of the Civil Service Statute. If the labour relation of the public servant is not qualified as a labour contract, what is its juridical character? This paper tries to demonstrate that the civil servant develops labour relations under different circumstances, i.e. on the basis of an administrative contract.*

***Keywords****: contractual employees; public servants; labour contract; administrative contract; juridical character*

## Introduction

The Romanian doctrine has provided that, as far as the employment relation of civil servants is concerned, "the juridical fact that generates the employment relation is not the at will agreement but the unilateral willingness of the authority that appoints" [1]. Only "the issuing of the appointment decree generates the public service employment relation"[1].

Following the enactment of the Civil Service Statute of 1999, the juridical literature hasn't ceased to define the juridical nature of civil servants' appointment. The first studies on the subject have concluded that the employment relations of the civil servant are mainly related to private law, since they are quite similar to the employment relations defined by labour law. This statement has been further developed and the logical outcome was that the employment relation is, in fact, a juridical labour relation with typical features generated by the specific incidence of certain public law provisions.

The present analysis mainly focuses on the present research advancements in employment relations of civil servants, starting with the interpretation of their juridical nature. The main questions lead to the two types of relations defined by private and public law analysts. On the one hand, there is clear proof supporting the idea that these relations are mainly governed by labour law, resembling the employment contract; on the other hand, it is equally true that the public service is related to public law, subsequently complying with specific juridical standards.

The very title of the paper may seem to favour the administrative contract nature of this type of relationship, but the conclusions will further develop these ideas and employ an original method in the attempt to define the juridical nature of the public service.

**The juridical character of the labour relation of the public servant**

The confirmation of the administrative contract nature of this juridical relationship came with the adoption of a resolution reached during a relatively recent appeal of the High Court of Cassation and Justice[2], postulating on the fact that the difference between the employment relations of the public service and the labour relations of employees is that the civil servant is the conveyor of the public power that he employs within the limitations set by his specific duties. Therefore, civil

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[1] Verginia Vedinaş, "The civil service statute, Comments, Legislation, Doctrine, Jurisprudence," (Bucharest: Universul Juridic Publishing House, 2009), 35.

[2] Decision no. 14/18.02.2008 of ÎCCJ.

servants do not perform under the stipulations of an employment contract but have employment relations based on the administrative appointment decision and do not fit the category of employees as defined by Art.1 of the Law 142/1998.

The main difference between the employment relations of the public service and those of employees is the fact that the civil servant is the conveyor of the public power that he employs within the limitations set by his specific duties. The appointment decision issued by the public authority, accompanied by the request or/and the prospective civil servant's acceptance of the position make up the at will employment agreement, i.e. the administrative contract.

The specific difference between the employment relations of the civil servant and those of employees is mainly related to the establishment of the juridical relationship based on which the services are provided and also makes reference to the fact that the civil servant is the conveyor of the public authority, while the employee is not. The civil servant is a public law entity, whereas the employee is a labour law entity.

Clearly, civil servants do not perform their duties in compliance with an employment contract, since they are in an employment relation derived from the administrative appointment decision but, this appointment decision, alongside the request or/and the prospective civil servant's acceptance of the position make up the at will employment agreement, i.e. the administrative contract.

The employment relations of the civil servants and labour relations are differentiated by the juridical framework based on which the services are provided, as well as by the fact that the civil servant is the only conveyor of the public authority.

Labour law analysts[3] have embraced the viewpoint of the High Court and argue that the employment relations of civil servants are contractual in nature, given the existence of two distinct circumstances for the enforcement of the at will agreement expressed by the subjects of the employment relations: a) the inclusion among civil servants in an executive public position defined as "apprentice", when the employment relation is established by the candidateship in the recruitment competition and the appointment in that public position, issued by the public institution or authority; b) the accession to the civil servant body in a specific executive public position, when the employment relation is defined by the appointment in that public position, issued by the authority or the management of the public institution and accompanied by the candidateship in the recruitment competition, followed by the professional oath taken by the appointed civil servant.[4]

Should we choose to share these ideas, the contract signed by the parties would appear as an adhesion contract, since the only option would be to agree or disagree with the working conditions and the salary. Such circumstances, *de lege ferenda*, would demand the alteration of Article 4 of Law no. 188/1999, through the introduction of Article $4^1$ that would stipulate the following: *"the appointment decision, accompanied by the request or/and acceptance of the position by the prospective civil servant, make up an at will employment agreement that is known as the administrative contract"*.

The jurisprudence of lower courts seems to embrace this vision: for instance, the decision no. 941/2006 of the Court of Appeal Bacau, stipulates that the juridical employment relationship between the civil servant and the authority or the public institution of the central and local authority has been controlled by the Law no. 188/1999, with its subsequent alterations on the Civil Service Statute.

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[3] Şerban Beligrădeanu, Ion Traian Ştefănescu, "Mutual civil liability between the parties of the contractual employment report of civil servants", Dreptul 4(2009): 78-79; Şerban Beligrădeanu, Ion Traian Ştefănescu, "Theoretical and practical studies on Law no. 188/1999 on the Civil Service Statute" Dreptul 2(2000), 7-14.

[4] Alexandru Ţiclea, Laura Georgescu, Ana Cioriciu Ştefănescu, Barbu Vlad, "Public labour law", (Bucharest: Wolters Kluwer Romania Publishing House, 2010) 29-30.

Indeed, in the case of civil servants, Law 188/1999 exceptionally stipulates the functional competence of the administrative contentious court in the settling of conflicts of rights, but this competence is not fully granted by jurisdiction but is limited to a certain category of labour conflicts, strictly defined by the special law.

As a consequence – as stipulated – by virtue of the absolute nature of functional competence regulations and the principle „exceptio est strictissimae interpretationis", any other disputes qualified as labour conflicts as defined by article 281 of the Labour Code fall under the jurisdiction of the courts stipulated in article 284, paragraph 1 of the Labour Code and not under the jurisdiction of Administrative contentious courts.

The analysis must start from the premise that the regulations related to the civil servant statute belong to the organic law, thus emphasizing again the special role played by the public service and the civil servant in the legal and constitutional system.

The public service describes the juridical status of the natural person legally empowered with responsibilities in fulfilling the competence of a public authority that consist in the aggregate rights and obligations that constitute the complex juridical contents existing between that particular natural person – the civil servant, and the authority that empowered him.

The public service cannot be the subject of an agreement between parties, it is the result of a universal at will employment act, thus defined by the legal empowering provided to the person who deploys the prerogatives of the public power and, at the same time, the public service is available to all citizens, under legal provisions.

The civil servant is appointed by the competent public authority and is legally endowed with the responsibilities of a public service in order to perform activities directed at the continuous fulfilment of a public service. Civil servants are appointed by an administrative unilateral appointment decision. The appointment in a public position endows the civil servant with a legal statute that stipulates his rights and obligations.

Unlike civil servants who are appointed, have an employment relationship and are governed by a special law – Law no. 188/1999 on the civil servants statute – it must be noted that contractual employees perform their duties based on the Labour Code and have an employment relationship established by an individual employment contract. The public service relationship is established only by the issuing of the appointment decision; the civil servant statute is acquired at the moment of appointment and is enforced after the oath has been taken.[5]

The contents of the individual employment contract comprise the aggregated rights and obligations of the parties as stipulated by the law or agreed upon by the parties.

The rights and obligations of the contracting parties and making up the contents of the individual employment contract are expressed in the clauses inserted in the contract as they constitute the material structure of the agreement between the parties and establish their rights and obligations.

Similarly, the Labour Code provides the freedom of negotiation and therefore the parties can enclose in their individual employment contract – defined as the "law of the parties" throughout the development of the juridical employment relationships – any clauses they may think necessary, complying with the legal provisions, the public order and good morals. Public institutions may be allowed an exception in the negotiation of an employment contract, applied to salaries and other benefits that have not been established by the wage and salary laws of the public sector.

These contracts do not allow the negotiation of clauses related to rights whose conferral and quantum have been established by legal provisions. The contractual personnel does not benefit from vacation premiums, while civil servants who take a leave of absence receive an amount that equals the salary they had received a month before taking the leave. Apart from certain circumstances, civil servants enjoy workplace stability whereas contractual personnel do not.

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[5] Verginia Vedinaş, "The civil service statute, Comments, Legislation, Doctrine, Jurisprudence," (Bucharest: Universul Juridic Publishing House, 2009) 35.

A recent study[6] of a renowned author revisits the juridical nature of the employment relationships of the civil servants and sheds a new light on previous studies that argued that the employment relationship of the civil servant is a typical manifestation of a juridical labour relationship which, even if different from the individual employment contract (archetype of the juridical labour relationship), is not essentially different from the latter and therefore, from a logical and juridical viewpoint, the employment relationship of the civil servant is a fundamental element of labour law (regulations). The author also emphasizes the fact that, from a legal viewpoint, the difference between the juridical employment relationships of employees and those of civil servants has gradually diminished.

The author continues with an account of the typology of the current juridical employment relationships, as follows: the juridical relationship of employees (generated by the signing of the individual employment contract, governed by the Labour Code); the juridical employment relationship of civilian civil servants (generated by Law no. 188/1999 on the Civil Service Statute or by certain statutes related to special categories of civil servants, such as police officers, diplomats and consuls, customs officers, etc); the juridical employment relationship of professional military personnel (officers and non commissioned officers – Law no. 80/1995); the juridical employment relationship of public officials; the juridical employment relationship of magistrates (governed by Law no. 303/2004); the juridical employment relationship between the cooperative retail society and its members (Law no. 1/2005).

In reference to this typology of juridical employment relationships, the author believes it wrong to limit the subject of Labour Law exclusively to the juridical employment relationship of the personnel (governed by the Labour Code), and strongly argues that all juridical employment relationships mentioned above are, in his monist labour law standpoint, elements of the Romanian labour law, whose *summa divisio* is made up of the common labour law (on the juridical employment relationship of employees, based on the individual employment contract mainly governed by the provisions of the Labour Code) and, on the other hand, of the special labour law (which includes the juridical employment relationships of civilian and military civil servants, of public officials, of magistrates and cooperative retail society members). The special labour law is based on different provisions of the Labour Code, nevertheless governed by the latter as common law.

Labour law analysts[7] are ones who strongly argue that the employment relations of civil servants are contractual in nature, as typical employment relations which, even if not rooted in the individual employment contract (archetype of the juridical labour relation), do not necessarily differ from the latter.[8]

The same authors argue that employment relations designate: *"the juridical labour relation created as a result of the agreement between the public authority or institution and the civil servant"*. The contractual nature of the employment relations of civil servants is also adopted, as previously stated, by the High Court of Cassation and Justice.

Basically, there are two distinct instances for the at will employment agreement manifesting the willingness of the subjects of the employment relation:

a) the first instance refers to the admission among the civil servants body on an executive public position professionally defined as "apprentice", when the employment relation is established by the candidateship in the recruiting competition and the appointment in that position, issued by the authority or the public institution;

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[6] Şerban Beligrădeanu, "Studies on the juridical labour relations of civil servants, as well as in relation to the typology of juridical labour relations, with a monist standpoint on the object of labour law", Romanian Private Law Journal 3(2010).

[7] Şerban Beligrădeanu, Ion Traian Ştefănescu, "Mutual civil liability between the parties of the contractual employment relations of civil servants" Law 4(2009): 78-79.

[8] Alexandru Ticlea (co-ordinator), Laura Georgescu, Ana Cioriciu Stefanescu, Barbu Vlad, "Public labour law", (Bucharest: Wolters Kluwer Publishing House, 2010) 31.

b) the second instance applies to the admission among civil servants, on a permanent executive public position, when the employment relation is established by the appointment in that public position, issued by the authority or the public institution and through the candidateship at the recruitment competition, followed by the oath taken by the appointed civil servant.

It must be noted that the juridical fact that generates the position relation is not the at-will agreement but the unilateral volition of the authority making the appointment, as argued by the eminent professor Iorgovan[9].

That is why the opinion according to which the common law juridical procedures applied to civil servants are mainly similar (as juridical bodies) to those applied for employees, that the special regulations for civil servants are similar, that the similarities are normal since the employment relations of civil servants are located at the interference of labour law and public law (mainly administrative law) – is not entirely realistic, from our standpoint.

We can therefore acquiesce, with the following suggestions, on the subsequent fundamental elements:

- the appointment of a person in the position of civil servant is carried out only with the consent or by an individual act of appointment in a certain public position; the consent of the civil servant is given gradually, the final phase being the oath;

- there is an at-will agreement, a contractual statute, without being an individual employment contract, as defined by the Labour Code, *but a* contract *of public law, an* administrative contract, *where the contractual freedom of the parties is compensated by the legislator*. We are talking about a contract: unnamed; with specific clauses both for stipulation acts (mainly) and for subjective acts (in those areas where negotiations are allowed by the law); solemn (the written form of the appointment decision, the taking of the oath); binding; onerous; with gradual execution; signed *intuitu personae*;

- upon signing the at-will agreement, the responsibilities of that specific position cannot be negotiated individually, as they are established – objectively and objectionably – by the law (by the authority or the public institution for each public position, in compliance with the law);

- the relation created upon signing the administrative contract – the employment relation (i.e. the relation between the civil servant and the authority or the public institution) – displays the specific traits of a juridical labour relation (the object and the cause corresponding to those of any juridical labour relation); both the civil servant and the employee are in a typical juridical labour relation; the civil servant, alike the employee, is subordinate to the one he is working for (the authority or the public institution).

Nonetheless, it is difficult to grasp how the employment relations of civil servants – juridical labour relations – are a vital in analyses and in labour law, but only as comparative benchmarks opposite the labour relations of employees, provided that their particular characteristics are noted, emphasized and regulated by public law provisions. It is equally difficult to understand why labour law exclusively deals with the juridical labour relation between the civil servant and the public authority only from the standpoint of comparisons with the labour relations of employees.[10]

We believe that, when identifying the juridical employment relations of civil servants, ne must start with the criteria used to define a contract as being administrative. The doctrine[11] emphasized a series of specific traits of administrative contracts that would define their juridical nature, as opposed to other types of contracts governed by private law:

- The juridical inequality of the parties, induced by the need to defend the general interest by the public authority, thus outranking the co-contractor;

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[9] Antonie Iorgovan, "Administrative law treatise" (Bucharest: All Beck Publishing House, 2005) 582.

[10] Ana Cioriciu Stefanescu, http://www.avocatnet ro/content/articles/id_19003/Raportul/de/serviciu/-/conditia/acordului/de/vointa./Consideratii/inedite html#ixzz1EFqXoKnO.

[11] Ioan Alexandru et al., "Administrative law" (Bucharest: Lumina Lex Publishing House, 2005), 412-414.

- The status of authority of the public administration or its proxy, held by at least one of the parties;
- The limitation of the public authority's free will, through legal provisions;
- Serving the public interest, by the public authority, thus endowing it with a special purpose;
- The extended interpretation of the contract, pertaining to the prevalence of the public interest of the administration;
- The strict performance of the obligations described in the contract, both by the private party and by the civil servant;
- The *intuitu personae* nature of the contract.

After a close inspection of these characteristics, one can easily qualify the employment relation as an administrative contract to the full extent of its significance. When defining a contract as being administrative, one can be guided by several criteria, as the differentiation serves the purpose of establishing the juridical standards to be applied. The easiest way of pinpointing the distinction is by identifying the law, where the law specifically defines a certain type of contract as administrative, without leaving any room for interpretation of its juridical system. The Romanian legislation uses this identification criterion only indirectly, by assigning contract litigations to administrative contentious courts.

The second method of defining a contract according to its juridical nature – which is our case in point – is the jurisprudential determination, where juridical literature[12] identifies two situations: one in which the interpretation of the contract is made by each court, after settling a dispute brought before it and a second case, when the interpretation results after the settlement of an appeal in the interest of the law by the High Court of Cassation and Justice. So far, the High Court has made indirect comments on the juridical nature of the employment relations of civil servants, in the above mentioned decision.

## Conclusions

Our attempt so far was to briefly describe a part of the contemporary doctrine that alternates between the two contradicting statements: on the one hand, the affiliation of the civil servant employment relations with labour law, as far as identifying an employment contract in these relations and, on the other hand, the inclusion of employment relations in the category of administrative contracts.

When establishing the juridical nature of the institution taken into account, we believe that one must start from the fact that the civil servant appointed in the public position performs the state power prerogatives on behalf of the authority (institution) that appointed him and thus expressing the competence of the latter.

The concluding opinion that this type of employment relation is an administrative contract is drawn by extrapolating the French model where, apart from determining the law, the description of a contract is also done in a jurisprudential manner, by establishing two criteria used to identify the administrative nature of a contract: an organic criterion that requires the presence of a public official as a contractor and an alternative criterion that makes reference either to the presence of exorbitant clauses from common law or to the provision of a public service as object of the contract. This opinion has led the doctrine to establish another definition for the administrative contract: any contract signed by a public official or on behalf of a public official can be qualified as administrative if it includes derogatory clauses from common law or is concerned with the provision of a public service.[13]

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[12] Dragoş Dacian, "Administrative law concepts. Coursebook for the academic year 2008/2009" http://apubb ro, p. 2.

[13] Phillippe Foillard**,** "Administrative law*"* (Paris: Paradigme Publishing House, 2008) 224.

We conclude with the following suggestion we have anticipated in the introduction and we intend to study thoroughly in the future: the employment relations of civil servants are qualified as an administrative contract, governed by public law, but of a mixed juridical nature, and the enforcement of labour law as *lex generalia* can only be performed when there is no other special provision that expressly regulates a component of the juridical relation.

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