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CONSIDERATIONS REGARDING THE ESTABLISHMENT AND MODIFICATION, BY GOVERNMENT DECISION, OF THE RULES REGARDING THE CAREER AND MOBILITY OF SENIOR CIVIL SERVANTS

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CONSIDERATIONS REGARDING THE ESTABLISHMENT AND MODIFICATION, BY GOVERNMENT DECISION, OF THE RULES REGARDING THE CAREER AND MOBILITY OF SENIOR CIVIL SERVANTS

Irina ALEXE*

Abstract

One of the categories of civil servants for whom essential changes in the applicable regulatory framework have taken place over time, is the category of senior civil servants. Many of these changes were determined by the interference between the members of this category and policy makers. The recent Government Decision no.934/2020, dedicated, amongst others, to the career and mobility of senior civil servants, was the starting point of our analysis that aims to answer some questions regarding especially the solutions chosen to regulate, at secondary level, the applicable regulatory framework. This endeavor takes into consideration the fact that several decisions of the Romanian Constitutional Court specify, for other categories of civil servants, that such rules are essential to the status of civil servant and that, in accordance with constitutional provisions, they must be regulated by Organic Law. At the same time, in our analysis we emphasize the importance of predictable regulations, given that legal uncertainty affects the career and, implicitly, the lives of senior civil servants, and we propose some solutions for a coherent regulation that provides legal security.

Keywords:

Statute of civil servants; senior civil servants; policy makers; career; mobility; legal security; Administrative code; jurisprudence of the Constitutional Court of Romania.

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I. Preliminary issues

The fascination of the field of research analyzed for more than ten years, the field of civil service and, more specifically, of the category of senior civil servants¹, is still present, along with scientific curiosity and the need to emphasize the place and important role of this category of civil servants within an efficient public administration that also considers the right to good administration, a component of the rule of law (Art. 41 of the Charter of Fundamental Rights of the European Union, 2007; Mendes, 2009)².

Not only scientific curiosity, but also administrative experience and the desire to understand what determines the dynamics of multiple legislative changes and their associated instability³, as well as the unpredictability of

¹ I have dedicated a monograph and numerous papers to the category of senior civil servants and the permanent changes to which it has been subjected. See, in this regard: I. Alexe, *Înălții funcționari publici*, Ed. Universul Juridic, 2014; I. Alexe, *Reforma funcției publice după 10 ani de la aderarea României la Uniunea Europeană. Cazul înălților funcționari publici*, Revista de drept public nr. 2/2017, p.12 – 22; I. Alexe, *Modificări esențiale ale categoriei înălților funcționari publici, incluse în proiectul Codului administrativ*, Revista de drept public nr. 2/2018, p.116-128; I. Alexe, *Reforma reformei. Studiu de caz: Ordonanța de Urgență a Guvernului nr. 82 din 2013 în volumul Reforma statului: instituții, proceduri, resurse ale administrației publice*, coord. E. Bălan, C. Iftene, M. Văcărelu, Ed. Wolters Kluwer, 2016, p. 121-133; I. Alexe, *Categoria înălților funcționari publici. Tendințe actuale în volumul Administrația publică între misiuni și constrângeri bugetare: dimensiuni juridice și manageriale*, coord. E. Bălan, G. Varia, C. Iftene, Ed. Wolters Kluwer, 2014, p. 136-144; I. Alexe, *Principiul neutralității politice în privința numirii înălților funcționari publici*, în volumul *Administrația și puterea politică. Tendințe și evoluții în spațiul public european*, coord. E. Bălan, C. Iftene, M. Văcărelu, Comunicare.ro, 2013, p.122-137; I. Alexe, *Considerații referitoare la Decizia nr. 55/2014 a Curții Constituționale a României și la statutul juridic al unor înalți funcționari publici*, Curierul Judiciar, nr. 3/2014, p. 159-161; I. Alexe, *Aspecte privind mobilitatea înălților funcționari publici reflectate de jurisprudența instanțelor din România*, Revista de drept public, nr. 1/2012, p. 90-102; I. Alexe, *Mobilitatea înălților funcționari publici – modalitate de modificare sau de încetare a raporturilor de serviciu?*, Revista de drept public, nr. 4/2009, p. 43-51. (Alexe, 2009, 2012, 2013, 2014a, 2014b, 2014c, 2016, 2017, 2018a)

² Analyzing a civil servant position within the category of management positions, the Constitutional Court of Romania found, by Decision no. 414/2010, regarding the objection of unconstitutionality of the provisions of art. In point 1, art. In point 6, art. I point 27 and of art. I point 28 of the Law amending and supplementing Law no. 188/1999 on the Statute of civil servants, published in the Official Gazette, no. 291/4 May 2010 (2010), “the existence of an obvious legislative instability, [...] which calls into question [...] and the purpose of Law no. 188 of 1999, which expressly provides in art. 1 para. (2) that it is represented by the creation of a stable public service”.

³ Analyzing a civil servant position within the category of management positions, the Constitutional Court of Romania found, by Decision no. 414/2010, regarding the objection of unconstitutionality of the provisions of art. In point 1, art. In point 6, art. I point 27 and of art. I point 28 of the Law amending and supplementing Law no. 188/1999 on the Statute of civil servants, published in the Official Gazette, no. 291/4 May 2010, “the existence of an obvious legislative instability, [...] which calls into question [...] and the purpose of Law no. 188 of 1999,

building a career based on meritocracy by senior civil servants and on promotion competitions, are also important aspects that have led to the deepening of the study of the particularities applicable to the category of senior civil servants, which still include prefects and sub-prefects, secretaries general and deputy secretaries general of central public administration authorities and institutions, including autonomous administrative authorities, as well as governmental inspectors. We have used the phrase "still include" because, as we will see in the following sections, important and structural legislative changes have been announced and adopted in the category of senior civil servants (Administrative Code, 2019; Point II of the Press release regarding the normative acts, 2021), to be implemented in the near future.

Referring to the category of senior civil servants, two of the distinguished authors of the doctrine of public law argued the opinion that "this category of senior civil servants, although received "enthusiastically" in the Romanian legal system, we believe has not yet found the track, including the solution promoted by the Code. We believe this because the status of prefect and subprefect continues to face, in the institutional reality, practices that empty them of content, accentuating their political dependence, which exists everywhere in the states where it is found, but not in the forms in which it manifests here" (Vedinaş & Bitea, 2019, p. 21). We support this view, and the analysis of the ethical and social dimensions is of equal concern to us in order to identify the sources that led and still lead to legislative changes aimed at the category of senior civil servants, most often subject to political interference in the careers of persons holding civil servants position within this category. In our opinion, these political interferences, exercised including by amending the legislation to resolve particular issues, as well as the poor application of the rules, have contributed to the legal insecurity affecting the careers of senior civil servants in Romania.

According to the provisions of art. 73 para. (3) lit. h) of the Romanian Constitution, republished, the statute of civil servants must be regulated by organic law. Also, for the particular case of the prefect, the attributions are also established by organic law, according to the provisions of par. (3) in art. 123 of the Constitution.⁴ The doctrine in the matter highlights the fact that "by organic law is regulated those social relations considered fundamental for the organization and functioning of the state (...) being an extension of the Constitution, which have as object of regulation problems regarding

which expressly provides in art. 1 para. (2) that it is represented by the creation of a stable public service" (2010).

⁴ For the development of the idea and the particularities of this regulation see V. Vedinaş, M. Enache, *Comentariu la articolul 123 din Constituție*, în volumul I. Muraru, E.-S. Tănăsescu (coord.), *Constituția României. Comentariu pe articole*, ed. a 2-a, București, 2019, Ed. C.H.Beck, p. 1105-1108 (Vedinaş & Enache, 2019).

constitutional institutions" (Popescu, 2019, p. 638). We also note that the issues concerning the statute of a category of civil servants, senior civil servants, especially those relevant to the legal relationship (Vedinaş, 2016) and, implicitly, the career, together with the guarantees related to the exercise of these public functions, are the essence of the statute and should be regulated only by organic law.

Among the conclusions of one of the published studies, I underlined the fact that "in administrative law, as in other branches of law, there is a growing trend of Europeanization, which also involves the civil service.⁵ We had not reach to quantify the extent to which European law, through the specifics of its institutions, is also applicable to civil servants in Romania but we hope that those principles that lead to better governance, more transparent decision-making and professionalization not only of officials, but also of the administration, to be applied correctly in Romania as well.

It would be desirable for the civil service system to be carried out, as the statute provided, on meritocratic criteria for career development and not as often happens in practice, by introducing and applying exceptions to the established rules.

There is also a tendency of officials, but also of a part of the administration, to be inspired by the model of regulation and training of officials from other states, respectively European officials, but not always the imported solutions may be applicable to the specifics of the Romanian administrative system. Their application, at least in the case of senior civil servants, proved to be a failure that led to the restructuring of the category, but also to the rethinking of the mechanism of access to public positions included in it".⁶ We maintain these conclusions and further underline the additional arguments we have in mind, arising from recent normative acts and from the relevant jurisprudence of the Romanian Constitutional Court.

Given the importance of recent regulatory changes on the composition of the category of senior civil servants, we consider it necessary to highlight them in the final part of the study even if, in the strict sense, we extend the field of research as set out in the title and abstract, whereas many of the conclusions of the analyzes carried out over time on this category of civil servants, who are so often subject to political influence, are being revalidated.

We emphasize all these aspects in the context in which, according to statistical data provided by the National Agency of Civil Servants, in response to

⁵ For a relevant analysis of the field see: Seerden, R. (Ed.). (2018). *Comparative Administrative Law. Administrative Law of the European Union, Its Member States and the United States* (4th Ed.). Editura Intersentia. pp. 417-438. (Seerden, 2018); Alexandru, I. (2017). *De la dreptul administrativ național la dreptul administrativ global*. Editura Academiei Române. pp. 188-216 (Alexandru, 2017).

⁶ See also Alexe I. (2018b). *Funcția publică în România Centenară*. In D. -M. Şandru, I. Alexe, R. -F. Hodoş, & S. Golub (Coord.), *100 de ani de drept în România* (pp. 28-29). Ed. Hamangiu.

a request for information of public interest made by an individual, on September 15, 2020 the situation of civil servants in the category of senior civil servants was as follows: out of the 127 positions of prefect and sub-prefect, only two prefects and three sub-prefects were persons who entered the category of senior civil servants, under the law, by examination, competition or mobility, 101 persons exercised these functions temporarily, and 21 positions were vacant; of the 77 positions of Secretary General and Deputy Secretary General, 15 were held by senior civil servants, 52 persons held these positions on a temporary basis, and 10 positions were vacant or temporarily vacant; Of the 32 governmental inspector positions, 27 were filled by senior civil servants, two were temporary and three were vacant. Constantly following and studying the decisions of the Government and the decisions of the Prime Minister published in the Official Gazette of Romania, we mention that the situation of occupying positions in the category of senior civil servants is not very different even today.

II. Some aspects concerning senior civil servants, included in Law no. 188/1999 and in the Government Decision no. 341/2007

The statute of civil servants was regulated, according to the constitutional basis, for 20 years, by Law no. 188/1999 (1999), republished, with a few exceptions, and by Government Emergency Ordinance no. 57/2019 on the Administrative Code⁷, which took over and adapted the matter of civil service and civil servants, bringing essential changes in the category of senior civil servants. In the years in which it was in force, the Statute of Civil Servants has been amended and supplemented, by various normative acts, over fifty times. The amendments and completions that included the category of senior civil servants actually led to the circumvention of the declared purpose and the role for which this category of civil servants was established by Law no. 188/1999.

We defined the senior civil servant as representing "that category of civil servants, apolitical, who holds, through national competition, a public office in the category of senior civil servants, performing senior management in the central public administration and autonomous administrative authorities and ensuring stability of functioning authority or public institution" (Alexe, 2014a, p. 246), the motivation for establishing the category being that "to generate professionalism within the public administration, regardless of the political changes that take place periodically in any democratic state. However, the senior civil servant, seen as a mechanism for enforcing the rule of law by ensuring

⁷ Government Emergency Ordinance no. 57/2019. (2019). On the Administrative Code, published in the Official Gazette. no. 555/5 July 2019, with subsequent amendments and completions. During the study, for the economy of the text, we will refer to the Administrative Code, in its updated form.

professionalism in the exercise of administrative action, is difficult to conceive given that the persons designated by this category must have both a solid training and experience in administration, as well as some sympathy or at least political acceptance, sufficient to allow them to exercise and perform their duties." (Alexe, 2014a, p. 9).

In contrast to the principle of stability in the civil service, which Law no. 188/1999 provided for senior civil servants, highlighting the features of the immovability of civil servants, which today are not applicable to civil servants but to magistrates, in the doctrine of the early twentieth century, it was stated that "not so with issues that have and a political character, such as the function of prefect, secretary general of the ministry, etc. In principle, those who hold them cannot enjoy immovability; these officials must be revocable; for there must be unity of views between the government and these officials. Otherwise, they could create difficulties and obstruct the government's action" (Negulescu, 1906, p. 166).

Having regard all these issues, we still consider it essential that decision-makers establish, through an honest public debate, that includes all stakeholders, and then respect what they have established, the level to which political interference in administration, as well as the positions in the category of senior civil servants, which enjoy stability and other legal guarantees, respectively the positions of public dignity, which are held on political criteria.

Law no. 188/1999 regulated the category of senior civil servants and established the legal basis on which the Government could approve, by decision, various issues concerning the career of civil servants, the organization and functioning of disciplinary commissions or, as appropriate, the mobility of senior civil servants. Thus, according to the text of par. (1) in art. VII of Law no. 251/2006 (2006), normative act that substantially amended the Statute of civil servants, within 6 months from the entry into force of the law, "at the proposal of the National Agency of Civil Servants, by Government decision, approves: a) the rules on the organization and career development of civil servants; (...) (d) rules on the mobility of senior civil servants'. Based on this legal empowerment, with exceeding by 3 months the initial term, the Government Decision no. 341/2007 (2007), which established not only the rules on the organization and career development of senior civil servants, respectively their mobility, but also rules on entering the category of senior civil servants, which added to the law or distorted the meaning of the institutions provided by law. Such issues, sanctioned even by the courts notified with various such disputes, have been detailed in previous studies (e. g., Alexe, 2009, pp. 43-51; 2012, pp. 90-102; 2014a, pp. 13-19) and have led, in the end, to amendments to the normative act.

The essential issue that, in our opinion, must be analyzed, refers to the constitutionality of such delegation rules, respectively to the legality of the norms included in the normative acts adopted by the Government on these legal

grounds⁸, provided that, as we have shown, the statute of civil servants, with all the elements that ensure its essence, is regulated by organic law, the Government being empowered, in accordance with the provisions of art. 108 para. (1) and (2) of the Constitution, to adopt decisions only for the organization of law enforcement, not to add to the legal text, as happened in the case of mobility of senior civil servants, or to regulate, by decision, entry into career, ranking and the mobility of senior civil servants, contrary to legal provisions.

We reiterate the fact that Government Decision no. 341/2007 was adopted based on and in application of Law no. 188/1999, repealed by the Administrative Code.⁹

We mention, however, that this decision, as well as other acts adopted by the Government in application of the same law, continued to remain in force and to take effect, although the legal basis for their adoption was repealed. In these conditions, it is necessary to analyze whether or not this practice and the normative solutions proposed in the Administrative Code comply with the enactment principles and the modalities of application of normative acts in time, and our analysis must take into account the amendments brings in the field of career and mobility of senior civil servants.

III. Some aspects concerning senior civil servants, included in the Administrative Code and in the Government Decision no. 934/2020 (2020)

Administrative Code adopted in 2019 partially eliminated the purpose and role of the category of senior civil servants, as a whole. We recall that, based on the regulations in the statute, the doctrine emphasized the need for highly trained senior civil servants, in order to "ensure the stability of higher levels of administration at the time of political changes, without interrupting the administration" (Postelnicu, 2003, p. 84).

Thus, even if art. 394 para. (1) of the Code mentions that "senior civil servants perform senior management in public authorities and institutions", we note that the provision on ensuring the stability of the institution, continuity of management and functional connections is regulated only in art. 61, applicable to secretaries general and deputy secretaries general, not to prefects and sub-prefects or governmental inspectors. We consider that it is about a non-correlation in the Code of the norms taken from article 49 of Law no. 90/2001

⁸ For the analysis of the principle of separation and balance of powers, as well as for the observance of the Constitution and its supremacy, see Muraru, I., & Tănăsescu, E. -S. (2019). *Comentariu la Articolul 1 din Constituție*. pp. 13-19. (Muraru & Tănăsescu, 2019)

⁹ See the text of art. 597 para. (2) lit. b) of the O.U.G. no. 57/2019 regarding the Administrative Code (2019). When, referring to Law no. 188/1999, we use the phrase "repealed", we understand to refer to these exceptions as well.

(2011) and about an incomplete and partial regulation of the role of senior civil servants, only for certain positions within the category, especially since the first thesis from par. (1) in art. 61 of the Administrative Code expressly mentions the fact that “the secretary general of the ministry and the deputy secretaries general are senior civil servants, appointed by competition or examination, on the basis of professionalism”.

Related to the regulation of par. (1) in art. 61 of the Code, the doctrine expressed the opinion according to which “the public position of secretary general (...) is the only public position for which the Administrative Code establishes distinct attributions. This means that it is the most important function in an administrative authority, that it is obligatory to be included in its organizational chart and in its list of functions and that it cannot be the subject of reorganizations, abolitions, modifications of its attributions and regime, by acts of the head of an administrative authority. In support of this idea are also the provisions of art. 61 para. (1)” (Vedinaş, 2020). We only partially agree with this view, because powers are regulated even more extensively in the Code for prefects and sub-prefects. We also consider that there is no perfect correlation between the duties and the role of these senior officials and we do not understand the necessity and opportunity, nor the reasons for these clarifications only for some of the positions in the category of senior civil servants. In our opinion, it could be interpreted that only these senior civil servants can be appointed to public positions by competition or examination, on the basis of professionalism, which is not real, as these traits are essential elements of the career and are part of the statute applicable to all senior civil servants. We also note in context that, referring only to examination and competition, Article 61 is inaccurate and incomplete, as it refers neither to mobility nor to other ways of holding a public office in the category of senior civil servants, provided by law.

Moreover, art. 250 states that “the functions of prefect and sub-prefect are functions in the category of senior civil servants”, and their role, rights and obligations, acts and duties, are detailed in several separate chapters, while the phrase “government inspector” is used. only four times in the content of the Administrative Code, for this function being regulated neither the role or the position, nor the attributions, nor the necessity to maintain these functions in the category of high civil servants, nor the specific acts. In the spirit of respecting the legal truth, we mention that the same normative silence regarding the governmental inspector existed in the text of Law no. 188/1999, and the role and attributions of the governmental inspector, respectively the way of establishing them, are provided in art. 12 of the Government Decision no. 341/2007, entitled “Special provisions regarding the public position of governmental inspector”. We consider this way of establishing, by normative act of secondary level or by administrative act of tertiary level, some components that are of the essence of the statute and, as we mentioned in the previous

sections, they must be regulated by organic law.¹⁰ Also, from the interpretation of the text of par. (4) in art. 12 it can be concluded that some of the persons holding the position of governmental inspector, a position in the category of senior civil servants, inform prefects about the fulfillment of specific duties, prefects who are also members of the same category of officials. We reiterate that, in our opinion, such a report could lead to hierarchy or implicit subordination, established by Government decision and not by law (Alexe, 2014a, p. 237).

However, unlike the statute, the Administrative Code brings some novelties in terms of senior positions in the category of senior civil servants, the organization of selection and promotion competitions, career management, mobility in the category of senior civil servants (Vedinaș, 2020, pp. 307-309; Vedinaș & Bitea, 2019, pp. 21-22; Alexe, 2018a, pp. 116-128), 27 and other ways of changing legal relationship. respectively the administrative acts regarding these relationship (Alexe, 2019, pp. 108-111). We note that rules have been adopted at primary level that had previously been regulated by Government decision, especially regarding the mobility of senior civil servants, and we appreciate the increased quality of normative solutions compared to previous regulations, emphasizing in the context the agreement of this mode of regulation with the incidental constitutional text.

As an example, we specify the fact that, although in the Code mobility is regulated in the same way as in the Statute of civil servants, as a way of modifying the legal relationship,¹¹ it is now defined in art. 503 of the Administrative Code and not by secondary normative act, as previously defined in the text of art. 2 para. (3) of the Government Decision no. 341/2007. Thus, in accordance with the provisions of art. 503 para. (2) of the Code, “the mobility of senior civil servants includes all activities and decisions generating changes in the legal relationship of senior civil servants, within the category of senior civil servants, performed in public interest, for the activity of public authorities and institutions, and for the professional development of senior civil servants”.

Also, according to the provisions of art. 617 para. (5) of the Administrative Code “within 90 days from the date of entry into force of this code, Government Decision no. 611/2008, with subsequent amendments and completions, and Government Decision no. 341/2007, with the subsequent amendments and completions, are amended and agreed with the provisions of

¹⁰ For the critique of establishing such norms related to the essence of the statute, by Government decision or by decision of the Prime Minister see Alexe, I. (2014). *Înălții funcționari publici*. p. 84.

¹¹ For in-depth analysis of the subject see Alexe, I. *Mobilitatea înalților funcționari publici – modalitate de modificare sau de încetare a raporturilor de serviciu?*, op. cit., p. 43-51; in the same sense, Vedinaș, V. *Codul administrativ adnotat ...*, op. cit., p. 307 (Alexe, 2009, pp. 43-51; Vedinaș, 2020, p. 307).

this code". Government Decision no. 611/2008 regulates the organization and development of the career of civil servants¹², and the Government Decision no. 341/2007 aimed, as we have already mentioned, at entering the category of senior civil servants, career management and mobility of senior civil servants. Pursuant to the previously invoked article, although the 90-day deadline was not met, but was exceeded by approximately one year, the two normative acts were amended and supplemented, in order to be in line with the new legal provisions introduced in the Code. Government Decision no. 341/2007 was thus amended and completed by Government Decision no. 934/2020 (2020). Moreover, including the title of the normative act has been amended, the phrase "entry into the category of senior civil servants", being replaced by "holding public position in the category of senior civil servants", in the context in which the Administrative Code regulates the positions of this category.

According to the instrument of presentation and motivation of the draft normative act that became, after its adoption, the Government Decision no. 934/2020, it was also adopted to remove from the content of Government Decision no. 341/2007 those norms which, in accordance with the constitutional text, were regulated at the level of organic law (Government Decision no. 934/2020, 2020, in particular p. 1-6 of the Substantiation Note). Moreover, this is the reason why we appreciate the quality of the normative solutions in the Administrative Code that respect, to a greater extent than Law no. 188/1999, the constitutional provisions regarding the regulation, by organic law, of the status of civil servants. However, we also mention the fact that the Government's decision, in addition to the rules referring to the provisions of the Code, continues to include rules regarding the occupation, organization of competitions, redistribution or evaluation of professional activity, elements that can influence both career and the statute of senior civil servants. We argue this opinion in the next section, by analogy with the norms concerning the disciplinary commissions and with some of the decisions in the field of the Constitutional Court of Romania.

Regardless of this analysis, we also point out that, according to the constitutional provisions and those that regulate the elaboration of normative acts, "the law provides only for the future, except for the more favorable criminal or contravention law" (Article 15 para. (2) of the Romanian Constitution), and normative acts must respect the principles of enactment, including those aimed

¹² Government Decision no. 611/2008 for the approval of the norms regarding the organization and development of the career of civil servants. (2008). Official Gazette of Romania, Part I, no. 530/14 July 2008, with subsequent amendments and completions. After the entry into force of the Administrative Code, based on it, the Government Decision no. 546/2020 regarding the amendment and completion of the Government Decision no. 611/2008 for the approval of the norms regarding the organization and development of the civil servants' career. (2020). Official Gazette. no. 638/21 July 2020.

at predictability, clarity or hierarchy of norms (Law no. 24/2000, 2010). In these conditions, we also highlight the fact that the Government Decision no. 934/2020, which entered into force on 12 November 2020, contains rules and criteria for the assessment of senior civil servants from 1 January 2020. Even if the law imposed such deadlines, we consider that the Government's failure to comply with the obligation to adopt the decision, as mentioned above, during 2019, within no more than 90 days from the entry into force of the Administrative Code and the fulfillment of this obligation after 17 months, not after 3 months from the adoption of the emergency ordinance, can not remove the vices of this normative act that derive, in our opinion, including from the administrative incapacity of the authorities that elaborated these norms. Another discussion, which is not the subject of this study, refers to the justification of the choice of the solution used, for the adoption of the Administrative Code, of the legislative delegation provided by art. 115 of the Constitution and the urgency of such a regulation, given that the Government has adopted, after such a very long period, the secondary legislation by which the rules of the emergency ordinance can be applied. In our opinion, an exceeding of the legal term as in this case raises serious problems in being able to justify the urgency of the regulation and the chosen constitutional solution.

Given that Law no. 188/1999, which constituted the legal basis for the adoption of the Government Decision no. 341/2007, was repealed by the Administrative Code, we consider that the regulatory solution provided by art. 617 para. (5), according to which "Government Decision no. 611/2008, with subsequent amendments and completions, and Government Decision no. 341/2007, with subsequent amendments and completions, are amended and agreed with the provisions of this code", is at least debatable given that the "agreement" is neither a procedure nor a legislative event provided by Law no. 24/2000. We consider that the correct solution would have been to adopt an independent secondary normative act, which would have its legal basis in the Code, which would explicitly repeal the 2007 decision and which would only be detailed, if considers it necessary, the primary rules on the career and mobility of senior civil servants, without supplementing the legal text, thus respecting the rules of legislative technique, and the principles of legislation, including the hierarchy of normative acts.

VI. Some considerations of some decisions of the Constitutional Court of Romania regarding the regulation at secondary or tertiary level, of the aspects regarding the statute of civil servants

In the context, we consider it necessary to emphasize some of the aspects that the Romanian Constitutional Court mentioned when ruling on the constitutionality of some rules by which the legislator delegated to the

Government or even to ministers, in case of special statutes, the competence to adopt normative acts of secondary or tertiary level through which are regulated elements that contribute to the definition of the status of civil servants or special statutes.

Although these decisions by which the Constitutional Court found unconstitutionality of certain articles of primary legislation governing the statute of civil servants or, as the case may be, the status of the police servants (Law no. 360/2002, 2002)¹³, in relation to the criticisms made in each case, do not concern the mobility of senior civil servants, of the civil servants' career, and the respective texts or even the normative act as a whole are no longer in force, we emphasize those aspects that, for the future, may lead to a more correct regulation and to compliance by the legislator of the constitutional provisions.

In its jurisprudence, analyzing the essential elements of the status of police servants, civil servants with special statute, the Constitutional Court notes that "the legal statute of a category of staff is represented by the provisions of law on the conclusion, execution, amendment, suspension and ending of a legal relationship, in which the respective category is located" (RCC Decision no. 172/2016, 2016, para. 9).

In another decision, the Court examined the rules for assessing the activity and conduct of the police servants and noted that they "must comply with certain requirements of stability, predictability and clarity (...) delegating the task of establishing these rules to a member of the Government, by issuing administrative acts of a normative nature, of infralegal rank, determines a state of legal uncertainty. Moreover, against the background of the legislative gap highlighted above, the Court also notes that the legislative solution provided by art. 26 para. (3) of Law no. 360/2002 contravenes the norms of legislative technique, since, according to Law no. 24/2000 on the norms of legislative technique for the elaboration of normative acts, normative orders are issued only on the basis and in the execution of the law, must be strictly limited to the framework established by the acts on the basis and in the execution of which they were adopted and cannot contain solutions that contravene its provisions.

Therefore, in order to comply with the provisions of art. 73 para. (3) lit. j) of the Constitution, the Court emphasizes that the essential aspects regarding the evaluation of the police servant's activity, such as, for example, the criteria for evaluating the police servant's activity and conduct, the communication of the evaluation result and the possibility to challenge it, must be regulated by

¹³ For an analysis of the relationship between the general statute and the special statutes, see: Vedinaș, V. (2007). Considerații referitoare la raportul dintre Statutul funcționarilor publici și statutele speciale aplicabile unor categorii de funcționari publici. Dreptul, 4, pp. 141-150. Vedinaș, V. (2016). Legea nr. 188/1999 privind statutul funcționarilor publici. Comentarii pe articole (2nd ed.). Ed. Universul Juridic. pp. 44-52.

organic law. the rules specific to the evaluation procedure to be explained and detailed by order of the line minister.

In these circumstances, the Court finds that the provisions of art. 26 para. (3) of Law no. 360/2002, by referring to administrative acts, with legal force inferior to the law, which should regulate, in the absence of norms with the legal force of the organic law, the evaluation of the activity and conduct of the police servants, violates the provisions contained in art. 73 para. (3) lit. j) of the Constitution” (RCC Decision no. 637/2015, 2015, para. 31-33).

In the same decision, “the Court states that a legal provision must be precise, unequivocal, lay down clear, predictable and accessible rules the application of which does not permit arbitrariness or abuse. The legal rule must also regulate in a unitary, uniform manner, laying down minimum requirements applicable to all its addressees. In the present case, it is clear that the law inadvertently relativizes the regulation of the field of police servant evaluation, leaving it to the line minister to establish essential elements of the police servants legal relationships and, implicitly, of their statute.

In the light of the considerations set out above, the Court finds that the provisions of art. 1 para. (4) of the Constitution regarding the principle of separation and balance of powers in the state (by delegating an attribution that belongs exclusively to the legislator, to a member of the Government), as well as art. 1 para. (5) of the Constitution, in its component regarding the predictability and accessibility of the law, as the personnel concerned, who can relate, in these conditions, only to the deficient provisions of the law, are not able to adapt their conduct properly nor to have a precise representation of the conduct of the evaluation procedure” (RCC Decision no. 637/2015, 2016, para. 31-33). In the same sense, the Constitutional Court also ruled by Decision no. 818/2017 (2018), noting the unconstitutionality of the provisions of art. 69 para. (5) of Law no. 188/1999.¹⁴

We highlighted these considerations precisely in order to emphasize the possible vices of unconstitutionality of the legal basis of the Code, included in art. 617 para. (5), respectively of the illegality of the provisions of the Government Decision no. 341/2007, with amendments and completions, which also establish the rules and criteria for the assessment of senior civil servants. Also, in the light of these considerations of the Constitutional Court, we consider that the provisions of art. 526 of the Code, regarding the fact that “for the purpose of redistribution, the public authority or institution within which the vacant or temporarily vacant public office is located may organize a

¹⁴ According to art. 69 para. (5) of Law no. 188/1999, “the methodology for evaluating the individual professional performances of civil servants is approved by Government decision, at the proposal of the National Agency of Civil Servants, after consulting the trade unions of civil servants, representative at national level”.

professional test for the selection of the civil servant to be redistributed” (paragraph 4) and which constitutes the legal basis for the president of the National Agency of Civil Servants to establish, by order, “the redistribution procedure as well as the manner of conducting the professional testing for redistribution” (paragraph 5).

The aforementioned decisions refer to provisions that have been included in Law no. 360/2002, which regulates the status of the police servant, as a civil servant with special statute. In order to emphasize once again the importance of the existence, and in the normative act which regulates the statute of civil servants, in general, of norms in accordance with the constitutional provisions, we have chosen to briefly present some of the considerations that were the basis for pronouncing a recent decision of the Constitutional Court, regarding the disciplinary commissions provided by Law no. 188/1999, Decision no. 737/2020 (2020).

Thus, according to the provisions of art. 79 para. (5) of Law no. 188/1999, "the manner of setting up, organizing and functioning of the disciplinary commissions, as well as their composition, attributions, method of notification and working procedure shall be established by Government decision, at the proposal of the National Agency of Civil Servants". Analyzing these provisions, in relation to the criticisms made, by which the authors of the exception of unconstitutionality showed that, in their opinion, “the exclusive constitutional competence of the organic legislator to regulate in areas related to the status of civil servant to the executive power (...) affects art. 1 para. (4) of the Constitution” (RCC Decision no. 737/2020, 2020, para. 13) and considered“ that the legal norms regarding the occupation of public positions must respect requirements of stability and predictability imposed by art. 1 para. (5) of the Basic Law and not to generate a state of legal uncertainty, which cannot be achieved by administrative acts that have an increased degree of successive changes over time" (RCC Decision no. 737/2020, 2020, para. 14).

The Court noted "that the provisions of art. 79 para. (5) of Law no. 188/1999 infringe the provisions of art. 73 para. (3) lit. j) of the Constitution, because they allow the regulation by decision of the Government in the field of disciplinary liability, which, once employed, affects the fulfillment of the legal relationship of the civil servant, even reaching its termination by dismissal from public office.

The Court notes that the above-mentioned issues - essential in the conduct of administrative research - should have been regulated by organic law. Similarly, the Court ruled by Decision no. 392 of July 2, 2014, paragraph 19, by which it was noted that, regarding the civil servants with special statute, the disciplinary procedure of the preliminary investigation of the deed and the activity of the disciplinary council must be regulated by organic law. Likewise, by Decision no. 803 of 24 November 2015, paragraph 16, noted that essential

rules regarding the conduct of preliminary research, such as: establishing the composition of the disciplinary commission, the duties and activity of the disciplinary commission, the notification and working procedure of the commission, and acts adopted as following the procedure, they are not regulated by organic law.

Finally, the Court notes that, as a result of the finding of the unconstitutionality of the text of the law criticized by reference to the provisions of art. 73 para. (3) lit. j) of the Constitution according to the considerations previously exposed, it also affects the provisions of art. 1 para. (4) of the Constitution regarding the principle of separation and balance of powers in the state, by delegating to the Government an attribution that belongs exclusively to the legislator, as well as art. 1 para. (5) of the Constitution in its component regarding the predictability and accessibility of the law, because the official concerned will be able to report only to its incomplete provisions” (RCC Decision no. 737/2020, 2020, para. 28-30).

Taking into account all these arguments, but also the fact that the decisions of the Court having effects only for the future, and some texts of Law no. 188/1999 have already been repealed by Government Emergency Ordinance no. 57/2019, we consider it necessary to analyze and re-evaluate, in order to be in line with the jurisprudence of the Constitutional Court on the statute of civil servants, the rules of the Administrative Code that continue to establish, as mentioned in the previous section, legal grounds for adoption, by decision of the Government, or even by order of the President of the National Agency of Civil Servants, of some essential components of the statute of civil servants.

V. Instead of conclusions, a new Government Emergency Ordinance adopting amendments to the category of senior civil servants

We have mentioned in previous sections that successive legislative changes have frequently targeted the category of senior civil servants. Regarding some of the fluctuations in the regulations, the doctrine highlighted several aspects regarding the composition of the category of senior civil servants and the type of specific functions, resulting from the adoption of the Administrative Code: The category of senior civil servants has also undergone changes in terms of scope, which, since its introduction, has undergone changes in the sense of restricting it. According to art. 389 C. adm., it is to comprise only five categories of holders¹⁵, namely that of holders of public positions of secretary general and

¹⁵ We specify that the Secretary General and the Deputy Secretary General of the Government are no longer part of the category of senior civil servants, their legal situation being regulated in Part II of the Administrative Code, in the sense of establishing them in the category of positions

deputy secretary general within the central public authorities and institutions¹⁶, prefect, sub-prefect and governmental inspector, divided into two subcategories, namely: occupants of some state public positions - appointed by decision of the Prime Minister - and occupants of some territorial public positions - appointed by Government decision" (Vedinaş & Bitea, 2019, p. 21).

According to the Government Program 2020-2024, on the basis of which the Government was given the confidence of the Parliament, approved by the Parliament Decision no. 31/2020, "will also clarify the role of senior civil servants in the Romanian administrative system, especially prefects and sub-prefects, but also the body of governmental inspectors, currently inactive and costly for the state budget" (Chapter Public administration, point III - Specific objectives, from Annex no. 2, 2020). We point out that, in recent years, most of the authors specialized in public law have requested, based on their own analyzes, clarification of roles and separation of political and administrative functions, clarifying functions of public dignity from those of senior civil servants.

We also note that in that document assessments were made to the 'body of governmental inspectors' and specify that, in our view, those responsible for the current situation of governmental inspectors are not senior civil servants who hold these positions, but the creators of regulations which, as we have already shown, they have given rise to a state of legal uncertainty as to the careers of these senior civil servants (Alexe, 2014a) and have left it to the discretion of the government to apply legal provisions on the mobility of senior civil servants. We also do not consider that governmental inspectors are responsible for the costs generated by the state budget, but those decision-makers who, as it results from official data, prefer that the other positions in the category of senior civil servants be occupied by temporary staff by persons who do not have the quality of senior civil servant, and senior civil servants who, through mobility, hold the positions of governmental inspector, to receive summary duties or to determine them to resign from that position (Alexe, 2016). We also mention the fact that, after the appearance of the Administrative Code, apart from the amendments and completions of the norms from the Government decision regarding the career, mobility and evaluation of governmental inspectors, members of the category of senior civil servants, no other changes were made regarding their statute.

In the first section of our study, we noted that the category of senior civil servants still includes prefects and sub-prefects, secretaries general and deputy

of public dignity with ministerial rank and, respectively, Secretary of State, appointed by decision of the Prime Minister.

¹⁶ Including autonomous administrative authorities provided by the Constitution or established by organic law.

secretaries general of central public administration authorities and institutions, including autonomous administrative authorities, and governmental inspectors. According to the Government Emergency Ordinance no. 4/2021 (2020), the Administrative Code will be amended and supplemented in order to make structural and substantive changes in the category of senior civil servants, the deadlines for the implementation of the new rules being set at a maximum of 30 days from the entry into force of the ordinance. At the same time, according to the provisions of art. III alin. (3) of the invoked normative act, “within 60 days from the date of entry into force of this emergency ordinance, Government Decision no. 341/2007 on the occupation of public positions in the category of senior civil servants, career management and mobility of senior civil servants, with amendments and completions, is amended and agreed with the provisions of this emergency ordinance, at the proposal of the National Agency of Civil Servants”.

The object of our study is not the analysis of the constitutionality of the normative act nor the chosen regulatory solution, that of operating the amendments by means of the emergency ordinance. However, we point out that, in 2005, the changes made to the prefect's institution, the establishment of an examination attestation related to the transformation of the functions of prefect and subprefect, from positions of public dignity to civil servants positions, including the transformation of the position of secretary general of the prefect's institution into a subprefect position, they were also carried out by emergency ordinance (Government Emergency Ordinance no. 179/2005. 2005). Also, the Administrative Code itself is adopted in the form of an emergency ordinance. Both emergency ordinances were subject to constitutional review and, in relation to the criticisms made, the Constitutional Court found their constitutionality, by Decision no. 506/2006 (2006), respectively by Decision no. 60/2020 (2020). As it is known, the jurisprudence of the Constitutional Court is evolving, and a decision on the unconstitutionality of the emergency ordinance can be pronounced only by the Court. However, we reiterate (Călin & Alexe, 2020; Alexe & Banu, 2016; Alexe, 2015) the fact that we do not agree with the practice of excessive use of this legislative instrument by the Government, and we agree with the doctrinal opinions expressed in this regard.¹⁷

Returning to the content of the normative act, the prefect and the subprefect will be repealed from the category of senior civil servants, and will

¹⁷ For the analysis of the RCC Decision no. 506/2006 see Vedinaș, V., & Enache, M. (2019). *Comentariu la articolul 123 din Constituție*. In I. Muraru, & E. -S. Tănăsescu (Coord.), *Constituția României. Comentariu pe articole* (2nd Ed., p. 1106). Ed. C.H.Beck. For an analysis of the exception which has become the rule, the relevant case law and doctrine, see, in the same volume, D. Apostol Tofan, B. Dima, *Comentariu la articolul 115 din Constituție*. In I. Muraru, & E. -S. Tănăsescu (Coord.), *Constituția României. Comentariu pe articole* (2nd Ed., pp. 960-965, 974-975). Ed. C.H.Beck.

have the statute of dignitaries, and within the prefect's institution a new position is established, secretary general of the prefect's institution, which will be part of the category of senior civil servants. However, we point out the fact that, in our opinion, respecting the symmetry of legal acts and solutions, taking into account the normative solution adopted in 2005, by GEO no. 179/2005, it would have been opportune for one of the public positions of subprefect to be transformed into the public position of secretary general of the prefect's institution, not to have another 42 public positions established. However, we recognize that this aspect and the chosen solution are within the competence of policy makers.

The analysis of the future status of the prefect is not the object of our current study, but we appreciate the fact that the ordinance in question corrects the error in the Administrative Code, signaled in the doctrine, as follow "according to art. 251 para. (3), the prefect, although a senior civil servant, takes an oath of allegiance specific to the local elected officials! It is a truly paradoxical situation, whereby a member of the body of civil servants does not take the oath enshrined by the statute of the category of personnel in the public administration to which he belongs" (Vedinaş & Bitea, 2019) 57, given that the subprefect had to take the oath, in other words, as all other civil servants, according to art. 259 para. (4) of the Code. By the proposed amendment, both the prefect and the sub-prefect will take the oath provided in art. 251 para. (3).

We note in context that, starting with March 2021, the category of senior civil servants will include the secretary general and deputy secretary general within the public authorities and institutions provided in art. 369 lit. a) of the Code, the secretary general of the prefect's institution and the governmental inspector. For all these functions, in accordance with the provisions of art. 397 of the Code, the competence to adopt administrative acts regarding legal relationship¹⁸ belongs to the Prime Minister, who will dispose, by decision, except for the functions for which the appointment competence is expressly regulated by special normative acts. Related to this competence, the structuring of the category of senior civil servants is modified from the point of view of the type of position because, although they will be in the competence of appointing the prime minister, according to art. 383, 385, 387 and 389 of the Code, there will continue to be two subcategories: state public positions, held by secretaries general and deputy secretaries general of the central administration and governmental inspectors and, respectively, territorial public positions, held by secretaries general in the prefects' institutions.

¹⁸ For the analysis of the norms regarding the administrative acts to the legal relationship see Alexe, I. (2019). Particularitățile actelor administrative ce vizează raporturile de serviciu ale funcționarilor publici, reglementate în O.U.G. nr.57/2019 privind Codul administrativ. *Revista de drept public*, 4, pp. 103-112.

Another change that involves discussions and influences including the impossibility of applying mobility in the category of senior civil servants refers to the study requirements for persons who will hold the position of secretary general in the prefect's institution. Thus, the Government decided that it was necessary for the secretary general of the prefect's institution to be a graduate of higher legal, administrative or political sciences. According to art. 394 para. (4) lit. b) of GEO no. 57/2019, one of the conditions for occupying by examination or competition, a public position in the category of senior civil servants, is to have "higher studies graduated with a diploma or equivalent." We note that it is not possible for a senior civil servant to hold the position of secretary general or deputy secretary general in the central administration, or governmental inspector, to be mobility as general secretary of the prefect's institution, in the absence of specialized studies, respectively fulfilling the requirements of the position. Conversely, mobility may be arranged for a secretary general of the prefect's institution in any of the other positions in the category. We also appreciate the fact that these clarifications are introduced at primary level and not in secondary or tertiary legislation.

Regarding the specific studies, the normative solution adopted can be justified by the role and attributions that the normative act provides for the secretary general of the prefect's institution, including the one regarding the countersigning of the prefect's orders. We especially appreciate the fact that the emergency ordinance establishes, in the text of art. I pt. 4, the role of these senior civil servants, similar to that established for the secretaries general of the central administration, as well as essential attributions by which this role is exercised, to ensure "the stability of the prefect institution, continuity of management institution. The secretary general of the prefect's institution supports the activity of the prefect in exercising the attributions provided in art. 255 and coordinates the specialized structure / structures through which these attributions are performed". However, we consider criticizable, for the reasons of constitutionality shown in the previous sections, the provision regarding the legal basis for the attributions of the general secretary of the prefect's institution to be established by a decision of the Government.

Another debatable issue, for which we have not identified relevant reasons, refers to the fact that, through the provision regarding the remuneration of these newly introduced positions in the category of senior civil servants, at the level of the salary of a position of general manager, which is part of the category of management civil servants, an impermissible mixture of attributes of the two categories of public positions is achieved, the category of senior civil servants is hierarchized and differentiated, by salary. We will thus have, within the category, paid positions according to the senior civil servants category level and paid positions according to the management civil servants category level. We consider that, in fact, by applying mobility to the position of secretary general

of the prefect's institution, a senior civil servant who holds one of the other positions in the category, there is a demotion, including at the level of salary, masked by mobility. Conversely, there is an advancement in office, unjustified by passing an exam or competition, or a competitive procedure, on a meritocratic basis.

We hope that in the parliamentary procedure for the adoption of the emergency ordinance these issues will be analyzed and that it will be possible to correct those that lead to a more correct and predictable application of the rules on the career and mobility of senior civil servants.

At the same time, we regret that the policy-makers have not yet established and regulated, at the primary level, the role and responsibilities of the governmental inspectors, to set their place in the category of senior civil servants. We believe that an honest debate in the legislative forum, highlighting the moments and reasons that led to the lack of content of this position, is beneficial to configure this function from the category of senior civil servants in the law and in the administrative space.

Noting the failure of the legislative solution adopted in 2003 and materialized in 2005, by which prefects and sub-prefects were included in the category of senior civil servants, a failure for which, in our opinion, are largely responsible for policy makers in the last 14 years and not to such an extent, senior civil servants, we also understand the justification for choosing the solution of politicizing the functions of prefect and subprefect, respectively the need for separation, in a democratic state of the political level from the administrative one. However, we have no guarantee that, once this level of political interference in the administration and the separation of political and administrative roles, the discretionary application, slippage and exceptions to the rule, which the political power is prone to commit, have been established, regarding the category of senior civil servants, these will not continue. Aware that without a successful administration, a state cannot be successful itself, we believe that there is a need for a real debate, in which all actors involved participate, as well as a professionalization not only of the administration in general, but especially of persons holding high-level public positions, respectively positions of public dignity, in order to understand not only the role of civil servants or the mechanisms of a rule of law, but also the balance and the way of relationship between the political and the administrative level.

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