LEGAL ASPECTS OF THE EXERCISE OF PUBLIC SERVICE WITHIN THE NATIONAL DEFENCE SYSTEM

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DOI: 10.55535/RMT.2022.1.14

The development of the attributions of the public authorities that play a significant role in the functioning of the national defence system is achieved through human resources. The legal regulation of human resources used by the national defence system offers a wide diversity that includes both militarized categories of personnel and those with civil status. This approach distinguishes the category of civil servants, with or without special status, who work within the central and territorial authorities of the national defence system. Starting from the provisions of the fundamental law, the Constitution of Romania, the analysed regulations take into account provisions of The Administrative Code, The Statute of Military Personnel, The Law on the Preparation of the Population for Defence, The Law on the Remuneration of Staff Paid from Public Funds, which, together, give particularities to the integrated implementation, through human resources, of the functions of the national defence system.

Keywords: defence; juridical domain; military domain; public service; human resources;

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INTRODUCTION

The ever-stronger expression of the role of the state in ensuring the good development of social life has materialised in the last century by the elaboration and multiplication of legal instruments appropriate to the achievement of the public will. Although it has a long history in revealing and consolidating the state edifice, the law has recently undergone an extensive process of transformation that has integrated the most diverse perspectives and areas and has generated new directions of action, including in the field of state defence. The assertion, in the context of globalisation, of the imperative to ensure the collective dimension of defence, together with the achievement of national defence, brings to the fore the need for juridical instruments and procedures adequate to the evolution of the security environment, both by the adoption form and by the normative content.

According to the Constitution of Romania, for the organisation and the functioning of the national defence system, both the legislative authority and the administrative authorities have adopted a series of regulations that produce juridical effects on the human resources of defence (military personnel, soldiers or military hired on a contract basis, administrative public servants, and civilian personnel).

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As underlined by the *Romanian Military Strategy* of 2021, the objectives that the Romanian state has set in the field of defence are achievable "*only by attracting and maintaining a sufficient and properly trained human resource*" (G.D. no. 832/2021, annexe, p. 30), which means that the current challenges in the field of defence that the legislator must address are the legislative adaptation and harmonization so that the human resources are constantly prepared for an adequate response to neutralise the risks and threats to state security.

With a pronounced administrative component for exercising state public offices, the public authorities with responsibilities in the field of national defence use specialised human resources to which specific regulations apply both for the public administration and for the military system, as appropriate. Given that distinct categories of rules

generate different juridical effects, sometimes diametrically opposed ones, it is important to identify the most appropriate ways to regulate the juridical situations under which personnel working within the structures of the national defence system fall.

THE LEGAL APPROACH OF HUMAN RESOURCES IN THE ORGANISING AND FUNCTIONING OF THE NATIONAL DEFENCE SYSTEM

Consisting of "the set of measures and activities adopted and carried out by the Romanian state in order to guarantee the national sovereignty, the independence and the unity of the state, the territorial integrity of the country and the constitutional democracy" (Law no. 45/1994, art. 1), the national defence is articulated to the institutional structures of the state through the national defence system that concretises the democratic control of the armed forces and ensures the transfer of will between the people and the militarised structures.

The legislative determination of the framework for the achievement of state functions is based on the fundamental law, the *Constitution of Romania*, which, although it does not provide a definition of national defence, establishes important legal benchmarks relevant to the field of defence, which the other sources of public law regulate and ensure their implementation. Thus, the democratic control of the armed forces, the right and the obligation of the citizens to defend the country, the quality of public servants of the military are established constitutionally.

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Understood, in a legal sense, as a public service of the state, the national defence particularises its connection to the system of state authorities by the fact that the exercise of the right of political, administrative and military command upon it does not have an exclusive nature or a unique subordination to absolute state authority. In the paradigm of contemporary democracies, the leadership of the national defence system is entrusted to the legislative authority and to the most important executive authorities of the state, based on distinct competencies that have their origin in the principle of separation of

powers in the state.

As stated in the local legislation, the leadership of the national defence system is an "*exclusive and inalienable attribute of the constitutional authorities of the state and is achieved by: the Parliament, the President of Romania, the Supreme Council of National Defence, the Government of Romania, the Ministry of Defence and the authorities of public administration with attributes in the field of national defence*" (Law no. 45/1994, art. 7). The distribution and the realization of the attributes of the above-mentioned authorities aim at the political-administrative character of the decisions in the field of national defence, decisions that must thus justify their legitimacy and legality, both during peacetime and during a crisis or war situations. At the same time, from the interpretation of the legal provisions, one can understand that the constitutional authorities do not carry out the actual military operations, even if the regulation of the title or the role of these authorities would suggest this.

Ensuring the military functions of the national defence is the attribution of the structures within the forces destined for defence, made up of the armed forces as well as of the protection forces. A significant, indisputable role in these structures is played by the army, which, according to the law, is *"the basic component of the armed forces, which ensures, in peacetime and in war, the integrity in a unitary conception of the activities of all the forces participating in the defence actions of the country"* (Law no. 45/1994, art. 26). It is relevant for the modality of regulating the exercise of public office within the national defence system to highlight the structuring of the army, from the administrative point of view, into central bodies of the Ministry of National Defence, categories of army forces and territorial military bodies, the corresponding exercise of the attributes within the different structures being correlated with the different status of the staff involved.

Consisting of "*the entire population capable of effort for national defence*" (Law no. 45/1994, art. 14), the human resources are included within the defence resources, along with the financial resources, the material resources and the resources of another nature specified by the law. Unlike the other categories of resources, the human resources that the state uses within defence have the property of being sized and adapted differently, depending on a wide range of situations, which can range from the state of peace to the state of war.

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Through the constitutional duty to defend the country, the Romanian citizens "have the right and the obligation to defend Romania". The exposition of the conditions for exercising this fundamental provision with a double character, of law and of obligation, is achieved by Law no. 446/2006 on the preparation of the population for defence, an organic law by means of which measures and actions are established in order to ensure "the human resources necessary for the armed forces and for the other forces provided by the public institutions of defence, of public order and of national security".

Starting from the premise that "*the human resources are the first strategic resources of an organisation (society, institution, association), in the information society the human capital replacing the financial capital as a strategic resource*" (Neag, Badea, Neagoie, 2010, p. 36), the fundamental nature of the human resources is legally affirmed both by the *Constitution of Romania* and by the regulations adopted by the legislative or the executive authority. Through the constitutional duty to defend the country, the Romanian citizens "*have the right and the obligation to defend Romania*" (The Constitution of Romania, art. 55 para. 1). The exposition of the conditions for exercising this fundamental provision with a double character, of law and of obligation, is achieved by *Law no. 446/2006* on the preparation of the population for defence, an organic law by means of which measures and actions are established in order to ensure "*the human resources necessary for the armed forces and for the other forces provided by the public institutions of defence, of public order and of national security*" (Law no. 446/2006, Article 2 (1).

From the perspective of the last-mentioned normative act, the fulfilment of the military service, achieved through the two main forms, active and in reserve, represents the most important form of ensuring the preparation for the defence of the Romanian citizens. Performing the military service can be done in compliance with the conditions regarding Romanian citizenship and at minimum 18 years, but it must be emphasised that the lower age limit that means the moment of acquiring the full capacity of exercise of the rights of a natural person is applied only to the right of defending Romania, only to the exercise of a subjective prerogative legally recognised, because, as stipulated by the Constitution of Romania, "*the citizens can be conscripted from the age of 20 and up to the age of 35, except for volunteers, under the conditions of organic law*" (The Constitution of Romania, Art. 55 paragraph 3).

Moreover, the general character of the implementation of the regulation of the compulsory military service was attenuated by the provisions of *Law no. 395/2005 on the suspension of the compulsory military service in peacetime and the transition to military service on a voluntary basis*, which, in the direction of implementing the concept of transforming the army regarding the professionalisation of the human resources of defence and the reduction of the personnel during peacetime, suspends the fulfilment of the compulsory military service,

"*as a long-term and short-term conscript*" (Law no. 395/2005, art. 2 para. 1).

However, if the evolution of internal and external factors requires the imposition of exceptional or extraordinary measures in the context of mobilization, war or siege, "*the fulfilment of the military service as conscript becomes mandatory for men aged between 20 and 35*", provided, of course, that the criteria required by law for the fulfilment of military service are met (Law no. 446/2006 art. 3 paragraph 5).

Another component of the human resources that the national defence system uses is represented by the personnel that fulfils the military service in reserve, who benefit from their specific status, ensured by the provisions of *Law no. 270/2015 on the status of volunteer reservists*, according to which voluntary reservists represent "*the personnel selected on a voluntary basis, who consent, on the basis of individual fixed-term contracts, to hold positions in the organization statements of the structures within the Ministry of National Defence*" (Law No 270/2015, Article 1).

The approach of the human resources of the defence using the criterion of their professionalisation naturally places the military personnel in the first position. According to the law, it consists of active military personnel and soldiers and military hired on a contract basis. The soldiers and the military hired on a contract basis belong to a separate corps of military personnel, a corps at the basis of the military hierarchy, whose members are recruited in a system based on volunteering, with employment based on a contract "*in relation to the level of training, state of health and aptitudes for the fulfilment of military duties, in positions provided in the organization statements of military units with ranks corresponding to this body of military personnel*" (Law no. 384/2006 art. 1 paragraph 2).

Placed at the highest level of professionalism, the military personnel are defined, in the synthetic expression of Law no. 80/1995 as "*Romanian citizens who have been granted the rank of officer, warrant officer or non-commissioned officer, in relation to their military and specialised training, under the conditions provided by law*" (Law no. 80/1995 art. 1). Exercising essential attributions in the field of defence, in the service of the nation, the military personnel benefit from special status, in the legal content of which duties and rights that confer prerogatives to exercise, on behalf of the Romanian state, of attributions specific to public office, are included. Even if the unanimity

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regarding the consideration of military personnel as public servants with special status is not met – although the current legislation allows for such an interpretation – the fact that by means of the military personnel, professional human resources, public offices, essential in the field of defence, are exercised is unequivocal.

The interconnection of the national defence system to the system of public authorities is also underlined by the assignment of the exercise of public offices within the administrative structures with the application of the general juridical regime of the public service, established by the *Statute of Public Servants*. An edifying example is provided by the situation of the personnel employed within the Ministry of National Defence, personnel composed of both military personnel and of civilian personnel, according to the provisions of *Law no. 346/2006 on the organization and functioning of the Ministry of National Defence*. The civilian personnel within the system of defence, public order and national security do their duties according to the specific legislation applicable to the category to which they are ascribed, an aspect that is also underlined by the law that unitarily regulates the remuneration of the personnel paid from public funds, which shows that the civilian personnel under discussion consists of public servants and personnel hired on a contract basis. (Law no. 153/2017 on the remuneration of personnel paid from public funds, Annex VI, art. 2, paragraph 5).

Public authorities and institutions do the duties that the state distributes on the criteria of material competence and territorial competence by means of public offices, the fulfilment of which is ensured through specialised human resources. In this sense, the public office is considered as "the mission, the social necessity found in the structure of some attributions that should be performed within an institutional framework in order to satisfy the public interest under the best possible conditions".

APPLICABILITY OF THE STATUS OF PUBLIC SERVANTS IN THE ACTIVITY OF MILITARY AUTHORITIES

From the general and simplified perspective on the organization and functioning of the system of state authorities, the human resources of the public administration consist of human collectivities that organise and carry out actions for other people (Manda, 2014, p. 117). Public authorities and institutions do the duties that the state distributes on the criteria of material competence and territorial competence by means of public offices, the fulfilment of which is ensured through specialised human resources. In this sense, the public office is considered as "*the mission, the social necessity found in the structure of some attributions that should be performed within an institutional framework in order to satisfy the public interest under the best possible conditions*" (Săraru, 2018, p. 365).

The notion of public service is inextricably linked to the notions of administrative authority and administrative activity (Apostol Tofan,

2020, p. 317), and the human resource specialised and invested by the state to perform its functions is represented by public servants, who are a fundamental component of any public system, a component that has the potential to influence both the functioning of the state and the quality of the life of the people. "*The public servants are the mirror of the state, the interface the citizen meets so that the state cannot be indifferent to how its image is reflected in the perception of the citizen*" (Vedinaș, 2018, p. 431).

The public servant is a representative of the state power, a specialised agent with responsibilities in ensuring the functioning of public services, in representing the authority and in exercising, where appropriate, the coercive force of the state. Considered a citizen with additional responsibilities, the public servant is "*the tributary of a continuous obligation not to do anything that could compromise, directly or indirectly, his image or that of the institution for the benefit of which he/she carries out his/her professional activity*" (Clipa, 2011, p. 129). Codified by legislation, the rights and obligations of the public servant provided by the legislation represent "*the legal support of the authority and of the prestige of the public servant, being ensured by the state through juridical, material, civil, administrative and even criminal means*" (Apostol Tofan, 2020, p. 341)

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It should be noted that not all the human resources involved in the exercise of the attributions of public authorities have the quality of public servants because the notion of public servant does not overlap in all circumstances over the notion of human resources — there are people who, on the basis of a contract under the regulation of the labour law, can be employed *on a contract basis* within an institution or authority, without being vested with the exercise of state public office prerogatives, but only with attributions in relation to the authority or institution with which they have concluded a labour contract according to the regulations in force.

The legislative transformations of the last decade in the matter of regulating the public office were determined by the process of legislative unification achieved in 2019 by adopting the *Administrative Code*. The previous regulation, *Law no. 188/1999 on the status of public servants* was adopted, with some modifications, by the *Administrative Code*, which thus became the basic normative act in ensuring the juridical regime of the public office in Romania. The new regulation also provided for a number of rules applicable to the personnel hired

on a contract basis in the public administration and applied in this manner the concept according to which all those working in the public administration, whether they are public servants or hired on a contract basis, are subject to specific rules and requirements resulting from the public service they perform (Vedinaș, 2020, p. 287).

According to the legal definition, provided in art. 5 of the Administrative Code, the public office represents "*the set of attributions and responsibilities, established under the law, for the purpose of exercising the prerogatives of public power by the public authorities and institutions*" (G.E.O.no. 57/2019, art. 5 letter y). From the perspective of the regulated elements, the *Administrative Code* establishes the meaning of the notion of the public servant as "*the person appointed, under the law, in a public office*" (G.E.O.no. 57/2019, art. 371 para. 1).

The public office represents "the set of attributions and responsibilities, established under the law, for the purpose of exercising the prerogatives of public power by the public authorities and institutions".

Through their activity, the public authorities exercising competencies in the field of defence do a public service of national interest and, in this sense, the persons determined by law are assigned prerogatives of public office with the express nomination in the category of public servants. These persons, who are employed within the Ministry of National Defence and who are appointed to the public office, are subject to the juridical regime of the status of public servants provided by the *Administrative Code*. The predominantly administrative nature of the attributions assigned to this category of staff is similar to that of the attributions of public servants in other structures of the central public administration and, as such, the applicable juridical regime is undifferentiated.

The public offices established by special statutes are specific public offices to which the special legislation is applied with priority, and, in the subsidiary, when applicable, the provisions of the Administrative Code are applied.

However, the regulation of the status of public servants by the *Administrative Code* has a high degree of generality and the common provisions applicable to the public servants in the central public administration cannot be used for juridical situations specific to military hierarchical relations. That is why the staffing of the military component of the human resources of the defence, representing the majority in relation to the others, is made according to special statutes that are based on the derogation established by art. 370 para. (3) and art. 380 of the *Administrative Code*.

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that, although some categories of budgetary personnel within the state authorities and institutions — as they are understood by *Law no. 153/2017* — do not benefit from regulations specific to public servants, which does not imply the exclusion from the possibility to benefit from a specific statute, in which the rights and freedoms are regulated separately, as is the case of the *Statute of Military Personnel* regulated by *Law no. 80/1995*.

Thus, according to the regulation of art. 382 let. h) of the *Administrative Code,* the provisions of the *Code* regarding the public servants do not apply to the military personnel and, in addition to this, according to art. 380 para. (1) of the same normative act, the military personnel are not expressly included in the enumeration of the categories of public servants that benefit from special statutes, such as, for example, the public servants within the institutions of the system of public order and national security that are mentioned here.

On the other hand, the importance of regulating by their own statute the duties and the rights of military personnel has a legal substantiation of the highest level, the Constitution of Romania being the one that stipulates that "*the structure of the national defence system, the preparation of the population, of the economy and of the territory for defence, as well as the status of military personnel, are established by organic law*" (The Constitution of Romania, art. 118, paragraph 3). The consecration of the status of military personnel by organic law — the most important normative act in the domestic law system, after the Constitution — has important juridical consequences that confer superior juridical force to its provisions and a prevalence over other incidental norms in the structures of the national system of defence.

By reference to the legal regime of the common law of the public service, the status of the military personnel has a pronounced special character, reflected both in the general provisions of Law no. 80/1995, as well as in the content of the duties and rights specific to the military personnel recognised under the same law.

THE JURIDICAL DETERMINATION OF THE QUALITY OF PUBLIC SERVANT OF THE MILITARY PERSONNEL IN THE ROMANIAN LEGISLATION

By reference to the legal regime of the common law of the public service, the status of the military personnel has a pronounced special character, reflected both in the general provisions of Law no. 80/1995, as well as in the content of the duties and rights specific to the military personnel recognised under the same law. The amendments brought, during its existence, to the normative act mentioned above contributed to the adaptation of its provisions so as to correspond

to the transformations that the national defence has undergone, but there are still many inconsistent aspects regarding the correlation of Law no. 80/1995 with other normative acts that regulate the public office in Romania.

From the comparative analysis of the provisions of the *Constitution of Romania*, as well as of other normative acts, among which the *Administrative Code* and the *Statute of Military Personnel* are highlighted, one can observe the non-unitary character of the norms referring to the quality of the military as public servant. For example, the references that the *Constitution of Romania* makes regarding the public office and where the military personnel can be found in three of its articles that refer to:

"The public, civilian or military functions and dignities, can be occupied, in accordance with the law, by persons who have Romanian citizenship and residence in the country."

- establishing the principle of equal rights "*the public, civilian or military functions and dignities, can be occupied, in accordance with the law, by persons who have Romanian citizenship and residence in the country.*" (The Constitution of Romania, art. 16 paragraph 3);
- establishing the constitutional limits of the right of association in political parties: "*judges of the Constitutional Court, ombudsmen, magistrates, active members of the army, police and other categories of public servants established by organic law may not be part of political parties*"; (The Constitution of Romania, art. 40 paragraph 3);

"Citizens who are entrusted with public offices, as well as the military, are responsible for the faithful fulfilment of their obligations and, for this purpose, will take the oath required by law".

- regulation of the fundamental duty of fidelity to the country, as a fundamental duty: "*citizens who are entrusted with public offices, as well as the military, are responsible for the faithful fulfilment of their obligations and, for this purpose, will take the oath required by law"*. (The Constitution of Romania, art. 54).

The interpretation of art. 16 paragraph 3 previously cited shows that, according to the constituent legislator, the public offices can also be of a military nature, which leads to the idea of the existence of military public servants, a category distinct from that of the public servants, considered civilians. This assertion seems to be refuted by the provisions of art. 54, which provides for distinct categories: the public servants and the military, an aspect that can be corroborated with another provision of the *Constitution of Romania,* which refers to the attributions of the President of Romania, who "*grants the ranks of marshal, general and admiral*" and "*assigns people in public offices,*

under the conditions provided by law" (the Constitution of Romania, art. 94, letters b) and c), in the sense that the first official qualities, materialized by military ranks, could not be included in the sphere of public offices.

The attribution, through art. 40, para. (3) of the *Constitution of Romania* of the quality of public servants to those who are active members of the army, by applying *the theory of neutrality of public services* takes into account the broad meaning of the notion of public servant, which includes tenured public office holders from several branches of state power. In the restrictive interpretation of the meaning of the notion used in the public administration, reiterated by the *Administrative Code*, the military is no longer considered a public servant, an aspect that is also inferred from the provisions of *Law no. 80/1995 on the status of military personnel*.

The lack of a unitary perspective has led, on the basis of the need to clarify certain litigious issues subject to the decision of the judicial authorities, the expression by the courts of law of decisions containing points of view intended to edify the meaning of the interpretation of legal rules in force on the quality of the military as a public servant. One should note in this regard the *Decision of the Constitutional Court no. 34 of February 9, 2016*, which specifies that the Statute of the Public Servants "*represents the general framework for the public servants (the military being a special category of public servants)*" (CC Decision no. 34/2016 para. 26).

Moreover, the High Court of Cassation and Justice, *by Decision no. 10 of April 16, 2018*, regarding the military, stated that: "*the fact that the Statute of Military Personnel (Law no. 80/1995) does not name them as such does not represent a sufficient argument for the military not to be considered public servants, because, in the case of other categories of personnel, their statutory regulations do not use the term public servants either.*" (ICCJ Decision no. 10/2018 para. 92). From the argumentation of the decision of the High Court of Cassation and Justice, one can notice that the membership of military personnel to the category of public servants is based on the fact that they perform a public service, meant for the defence of the country, they bring their contribution to the functioning of a public administration sector: the ministries and the authorities of central public administration with a role in the field of defence, public order and national security,

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CONCLUSIONS

The legislative harmonisation represents an essential premise for ensuring the functionality of any administrative structure and the adaptation of the juridical norms to the ever-changing reality is a constant challenge both for the legislator and for public or private law enforcement. Connected to the system of state public authorities through specific mechanisms, the national defence is called upon to respond to multiple challenges, some of them being generated right from within the system amid contradictory or incomplete regulations.

The activity of human resources in the field of defence is also achieved by overlapping heterogeneous sets of public positions, juridically assigned to various categories of military or civilian personnel, to which different legal provisions apply, some of which are specific to the military system, while others are based on regulations applicable in other public services of the state.

The activity of human resources in the field of defence is also achieved by overlapping heterogeneous sets of public positions, juridically assigned to various categories of military or civilian personnel, to which different legal provisions apply, some of which are specific to the military system, while others are based on regulations applicable in other public services of the state. In order to ensure the successful accomplishment of any type of activity within the military structures, it is imperative that the legislative asperities be diminished, in order not to create contradictions in the application of the law, with a subsequent negative effect on the results of the activities that are conducted.

Establishing by means of express legal provisions and recognising at the level of the entire legislation the military as a public servant brings advantages not only in terms of concordance between juridical norms but also in terms of the wider protection of the rights of the military personnel, the better correlation of the juridical regime of the exercise of specific duties, the capitalization on the performances of the human resources of defence at the level of the whole society and the increase of the prestige of the military profession.

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