STUDIES AND COMMENTS

Aspects of the privatization of public services

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Abstract

This article aims to analyze the public service as a fundamental institution of the administrative law and changes in its legal system, with special emphasis on privatization phenomenon in the field of public service.

There are critically analyzed weaknesses manifested in the privatization of public services and formulates proposals for drafting laws in the future.

The main negative aspects consist in how the State, through its authorities, supervises and controls (it monitors) how an individual, who was transferred to the provision of a public service, provides that public service and complies with the terms privatization assumed by privatization contract commitments.

Keywords: *civil service, state, private, privatization of public service monopoly, monitoring, transfer of responsibility.*

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I. General on public services

Public service is a fundamental institution of administrative law, representing one of the ways in which government implements its work, alongside making law sense of the *lato sensu* term in execution. In fact, as recorded the doctrine[2], long time the administrative law has been defined as a "right of public services", which in turn always and throughout means **the activity that state or the private authorized by the state are doing to meet the social needs of public interest**. Essential in determining the legal status of public services are, in our view, three elements:

A) who performs it;
B) the purpose of that provision;
C) the principles that governs it.

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[2] Antonie Iorgovan – *Administrative Law Treaty*, All Beck Publishing House, 2005, Vol. II, p. 178-188.

A) Who is providing it. Public service can be provided by two groups of law subjects:

a) of state, by its authorities, in that regard being found services that can be provided only by the state, are its monopoly, such as diplomatic and consular services, defense, justice, enforcement penalties[3].

- services provided either by the state or by individuals who have received legal permission to perform, such as education, social, cultural, etc.

If we were to determine which is **the rule** and which is **exception**, between the two types of services, we consider that the **rule**, in terms of their scope, of the representation in the public services, represents **the second category**.

B) The purpose of the provision of public services is represented by the satisfaction of social needs of public interest. The problem is related to that French doctrine calls "public administration missions[4]" and it is important to note that not every need that is manifested in terms of social life becomes automatically public social need. For this to happen it is necessary **that social need to be objectively determined, to be valued, measured in terms of political and transformed into a rule of law**, representing **public administration tasks.**

C) The principles governing the investigation of a civil service, whose scope varies from one author to another[5]. As far as we are concerned, we consider that at the base of exercising public services are the following principles:

- **equality in front of public service**, which is a recovery in terms of administrative law, of constitutional principle, of equality before the law and public authorities, without any privilege or discrimination, enshrined in Art. 16 (1) of the Basic Law. Based on this principle, all public service beneficiaries are entitled to equal treatment if the situation is the same.

- **continuity of public service**, which derives from the reality that social needs which it must satisfy do not know any interruption, so the way itself in which there are satisfied should be similar as running in time. On this principle was based banning strike for civil servants involved in providing various citizen needs.

- governing public law rules, whether that public service is provided by a public body or by an individual authorized by it.

In French doctrine, to these principles are added **the adaptability**, which is grafted on the reality that **social needs are constantly changing, transforming and public administration must adapt to the changes in their content.**

II. About privatization of public services

As we shown in the first section of this material, the public service may be offered by **the state** and by **the individual**, which are the only ones who are

[3] Although there are countries where they can be provided also by individuals, so-called "private prisons" in England

[4] „*Les missions de l''administration''.* See, *exempli gratia.*

[5] On this issue see Dana Apostol Tofan, *Drept administrativ*, second edition, All Beck Publishing House, Bucharest, 2008, p. 8-9.

committed, or do so concomitant with the state. The phenomenon of **privatization of public services** means the transfer to privates, to satisfy different categories of social needs. The reason behind it lies mainly in the fact that the state is a bad administrator and then, realizing this deficiency and wanting that it to be removed, appeals on individuals which should streamline procedures, means and results. By here, the aspects of philosophy and institution are logical, and we share them.

Which exceeds the limits of this vision and who we cannot agree are **exaggerations in the procedure** and **lack of responsibility**, first by state, in the design, implementation and monitoring of the privatization process in general, and of privatization of public services, in particular.

The criticisms that we bring to the way of understanding and implementing of privatization in general and in relation to public services in particular are the following:

a) the transformation of privatization from a necessity into an end in itself. We say this because, in our opinion, should be privatized first non-functional services, on which the state has manifestly inefficient.

Abandoning such a vision, we see that, referring first to Romania, the privatization process has not complied with such finality, often the result being the bankruptcy or dissolution of such work or service.

It is true that, by the Constitution the Romanian's economy is proclaimed to be a market economy[6], but this does not mean the disappearance of the state from the provision of the public service.

As we have expressed on other occasions, there are countries such as France, where the state is a serious competition to individualism, striving to retain control or monopoly in the provision of public services. There were implemented over time, also different legal procedures by which the state acts, and it is about the so-called *"quality contracts"* or *"quality commitment"*, whereby the state assumes certain benefits to individuals so that they prefer the services provided by state instead of those provided by the individuals[7].

Such contracts are experienced in public services such as France Telecom, Gaz de France, Chemins de faire etc.

We appreciate the positive experience, that should inspire also the activity of public authorities in Romania, imposing a genuine debate on this issue also in our country, in the way to generate specific and beneficial practices for Romanian realities.

b) lack of monitoring of how the provider complies with the terms of the privatization contract. The essence of privatization is that the government, when transferees to the private the provision of a public service, is obliged to follow the way in which the individual carries on the activity.

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[6] See art. 135 (1) from Romanian Constitution, republished.

[7] *Exempli-gratia,* there are public transport services, on railway, (chemins de faire francaises), in which state offers very good conditions for travelling materialized not only in the small price of the ticket, but also in its partially return to integral return, in the version where reaching destination take place over planned periods

Is excluded the attitude of the state is ruled not to follow and control by the specific means of "administrative police" the activity that the individual is carrying on as such.

Here comes out the combination of the rules of public law and private law. The first is reflected in the right of security and protection, form of administrative police law, that state exercises over how an individual behaves as a public service provider.

c) lack of transparency in the privatization process itself, but also the actual performance of the work subject to privatization.

One example is relevant to how essential public services were privatized in Bucharest, partner services such as water (RADET), electricity (ENEL), by concluding privatization acts in which was provided **the prohibition to make public**, which in our opinion can not be accepted. The privatization contracts are legal documents that have a hybrid of public and private law, public law regime dimension not only prohibited but even requires that they must be made public.

It is unacceptable that the privatization contract to specify the prohibition of making public.

It is true that the essence of the legal regime in private law, is that they are **the law of parties**, which are sovereign to decide their clauses, obviously under the law, including privacy issues of the contract. But when it comes to a contract covering a public service, it must be – also as the service it concerns – public, except for items that have no relevance to the public and may be confidential[8].

Conclusions

It is obvious that perspective we are going to, in present and especially in future, is one where private initiative is dominant. But in any case, not encompassing. In the world is a trend of privatization, including the public sphere. Italy experiences, since 1993, privatization solutions in the field of public service.

England, as I said, is practicing private prisons. Authors of employment law are becoming more aggressive in promoting so-called **monistic view of labor law,** that would encompass, in its regulatory and research subject, in addition to employees and civil servants and public officials, the professions and all providing socially useful work. This was a return to the uniqueness of the legal labor argument used to legitimize, in terms of legal status, the totalitarian regime. Specific concepts of that regime was that all those who conduct an activity, work, in *lato sensu* of the term were, *working people*, as an employee, because they obtained certain gains, a salary from this job, all equal between them, not accepting differences affecting the indestructible vision of unity and equality of all people, specific to the political and legal system in question. By this approach is not trying more than a matter of privatization also in the legal status of civil servant, a transfer

[8] On this problem we have considered contract with RADET for privatisation of public water service, which media reported that no one knew the average number of pages, because it was confidential.

of it from sphere of administrative law, public law branch, to the one of the labor law, branch of private law, a trend which, as us, we vehemently oppose[9].

The problem of **public function** is closely related to the **public service**, since usually, those working in the public service or public servants are generally subject to general status, represented by *Law no. 188/1999 on the status of civil servants*, with subsequently amended and supplemented, republished[10], or **civil servants subject to specific legal statutes**. Such a conclusion can be drawn from the contents art. 6 of Law no. 188/1999, which recognizes that specific statutes **may be adopted for civil servants from services of Presidential Administration, Parliament, diplomatic and consular services and other public services provided by law**. We find that the text makes an explicit speech about public services and qualifies those operating within them, as civil servants.

From this perspective, things can not be separated one from the other.

Privatization in the field of public service is a very complex issue, and the experiences that Romania crossed from 1990 to the present are more than eloquent. Take, for example, the privatization of public service education, or education, which is the constitutional origins are in art. 32 of the Constitution, according to which **the education can take place in the state institutions, private and confessional institutions.**

Based on this text, there were adopted after 1990 legislation that allowed the education at all levels, from pre-school, take place both in public state institutions, but also in the private ones[11].

If in the case of secondary and school education we do not pronounce, as regarding the university education we have arguments to say that it was subject to a fluctuating process, as regulation, unable to face the challenges, which caused and fueled experiences which have seriously and dangerously distant from the requirements of this public service very important for any society, whereof the great master of antiquity Aristotel said that a State which is not concerned about the quality of education does not know its interest, has no future, and it is thus condemned to regress, not progress. **Privatization in this field was understood more as a marketing**, meaning that the purpose of abandoning its purpose, was pursued the profit and this despite the fact that the purpose of educational institutions, public or private, shall be and remain providing a higher training and more able to ensure quality, performance and results in the activity that will run the future graduate.

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[9] About our reactions to such approaches, see Verginia Vedinaş – *About legal nature of service report of civil servant*, in Romanian Magazine of Private Law no. 5/2010, pp. 190-208; Verginia Vedinaş – *Civil Servant* – institution of administrative law, in Magazine „*Pandectele române*", no. 5/2011, pp. 82-95.

[10] Last republication of Law no. 188/1999 was realized on *Official Gazette no. 365 from 29 of May 2007*.

[11] After 1990, organisation and operation of education of all grades has been regulated by the followingregulations, among we mention Law no. 84/1995, Law no. 288/2004, Law no. 1/2011.

Another example can be taken into account and I already commented it, is **on how were privatized public services essential to society**, so-called **community public services.**

Improper procedures and lack of any involvement in monitoring the contractual terms already so bad, attracted unbearable prices for most of the users and often of dubious quality. In other words, **huge prices, minimum quality**.

We are in a "late" period for legislation and institutional proposals. But it's never too late nor vain when it comes to a discussion of solutions that could improve the quality of service to all who are in public interest, to needs in the end. Therefore we think it is normal that in view of the adoption of that long claimed **administrative code**, to enshrine rules covering mainly the following aspects:

a) to regulate **principles** governing the private transfer services, necessarily, be proclaimed **transparency** and **pre-emption of public interest**.
b) to devote mandatory **surveillance by public authorities the way of compliance with the terms of the privatization contract**, and also the **scope, purpose** and **means** used in public service.
c) to provide **administrative, contravention and criminal sanctions**, in the case where the rules governing public service are violated.

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