

CERTAIN ASPECTS REGARDING THE RIGHT OF PUBLIC SERVANTS IN THE EUROPEAN UNION TO STRIKE. POSITIVE STATUTORY REGULATION OF THE RIGHT TO STRIKE IN ROMANIAN LAW

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The main idea of this study is represented by our attempt to answer the question: is there a compatibility between the right of public servants to strike and the continuous function of public services?

According to French public law doctrine¹, a strike represents „a concerted and collective stoppage of work in order to satisfy some requirements”. However, the right of public servants to strike may be either limited or prohibited if they are governed by restrictive provisions. Such restrictions vary in extent and, most often, they concern certain categories of workers because of their status (public service), the functions they perform (essential services, role in the industrial relations system), their hierarchical rank (managerial staff) or any combination of these.

In the European Union, the national legislation of states, while admitting the principle of the right to strike, imposes a number of restrictions on the exercise of this right. In some countries there are no laws or regulations on the subject, which can give rise to radically different interpretations by the public authorities: tacit prohibition or recognition. Furthermore, public servants are sometimes governed by entirely separate legislation which defines, in particular, the conditions for their right to strike, whereas other countries make no distinction between the private and public sectors, so that workers in the latter must observe the procedures laid down in the general legislation in order to strike.

Today, the arguments against the recognition of the right to strike for public employees is that public service strikes inflict more damage on the public than on the employer, and interrupt the so-called *essential services* that the state needs to continuously provide to the population in general. Another very common argument is that increasing strike action by public employees may be a major threat to the balance of public finances and indirectly curtail general efforts to implement anti-inflationary incomes policies.

In the EU there are important differences between states concerning positive statutory regulation of the right to strike in public services². Thus, we could identify three categories:

1. *States where public servants' strike is prohibited* (Belgium, Denmark, Portugal, Germany, Estonia)

For example, in Germany, according to the Constitution, the special category of employees known as *Beamte* or career public servants, are individuals who are appointed by the state, a municipality or other legal persons under public law to the career public service relationship, by sovereign act. Although career public servants have the right to form a collective organisation, they do not have the right to strike or the right to refuse to perform their duties. In Estonia, according to legislation, civil servants do not have the right to strike, with conciliation providing the only method of conflict resolution. Strikes are prohibited in the following institutions:

- government agencies and other state bodies and local government;

¹ Gerard Lyon Caen, Jean Pelissier, Alain Supiot, *Droit du travail*, 19 édition Dalloz, Paris, 1998, p. 1069.

² Jacques Ziller, *Administrations comparées*, Éd. Montchrestien, Paris, 1993, p. 428.

- the defence forces, other national defence organisations, courts, firefighting and rescue services.

In the above mentioned agencies and organisations, collective labour disputes should be resolved by negotiations, through the mediation of a conciliator or in court.

The current system of conflict resolution in these organisations is not sufficient to provide solutions. If an agreement is not concluded during the conciliation process, there are no legal options for civil servants to protect their rights.

It seems that the issue of public employees' right to strike remains a controversial issue in Estonia, as it is in many countries.

2. *States where there are no sanctions for the public servants to declare strikes, although the right of public servants to strike is not recognized* (the United Kingdom, Austria, Holland)

Holland - Dutch law does not contain any positive statutory regulation of the right to strike. A 1903 law declaring strikes by public servants a punishable offence was abolished in 1980. As there are no positive statutory provisions, public servants' right to strike is regulated by case law, within the limitations deriving from the European Social Charter.

In practice, however, in accordance with Article 31 of the Council of Europe Social Charter the right to strike may be subject of restrictions '... such as are prescribed by law and are necessary in a democratic society for the protection of the rights and freedoms of others or for the protection of public interest, national security, public health or morals'.

In Austria there are no legal regulations on strikes and no right to strike exists as such. Nevertheless, the freedom of assembly and association is guaranteed by the Constitution without any qualifications. However, relative to the totality of law, the right to strike exists for public employees, civil servants and even for the police and the armed forces³.

3. *States where the exercise of the right to strike has a hybrid structure: public servants have this right, except some categories (policemen, military etc.)* – France, Spain, Greece, Italy, Luxembourg

For a long time, in France, public servants had not had the right to strike, but, after the Constitution of 1946 came into force, the case law regulated this right, so that its exercise has to respect the continuous function of public services.

This is still a delicate topic. Nowadays, in this country, a law from July 31st 1965 is still in force and it prohibits so-called „greves tournante”, which cause major injuries to public services.

In Greece, the right to strike is guaranteed by the Constitution (Article 23), but it is subject of a number of statutory limitations. The right to strike is restricted for civil servants, staff of public corporations and employees of certain key services.

In Luxembourg, a right to strike does not exist explicitly in the Constitution or in legislation. However, article 11 of the Constitution guarantees trade union freedoms, that is the freedom of association, from which a Supreme Court ruling in 1952 derived the right to strike. The right to strike was extended to the public sector under the Law of April 16th 1979, but excludes certain groups such as diplomats, the judiciary, senior civil servants and managers, the armed forces and the police and medical and security personnel.

In this regard, the Committee of Experts has stated that, because of the diversity of terms used in national legislation and texts on the subject, some confusion has sometimes arisen between the concepts of minimum service and essential services; they must therefore be defined very clearly.

The notion of *essential services* has been defined by the jurisprudence of the International Labour Organisation (ILO) in accordance with the [Convention of July 9th 1948 \(No. 87\) concerning the freedom of association and protection of the right to organise](#). This definition is

³ Peter Fairbrother, David Hall, Steve Davies, Nikolaus, Hammer, and Emanuele Lobina, *The right to strike in the electricity sector in EU countries*, University of Greenwich, 2002, p. 41.

restrictive and applied only in cases where the interruption of services would pose a danger to the population, in terms of people's life, safety or health.

Clearly, what is meant by essential services, in the strict sense of the term, depends to a large extent on the particular circumstances prevailing in a country⁴; likewise, there can be no doubt that a non-essential service may become essential, if a strike lasts beyond a certain time or extends beyond a certain scope, thus endangering the life, personal safety or health of the whole or of a part of the population.

Thus, essential services, in the strict sense, where the right to strike may be subject of major restrictions or even prohibitions, have been considered by the Committee to be: the hospital sector, electricity services, water supply services, the telephone service, air traffic control⁵. These few examples do not represent an exhaustive list of essential services.

When the Committee of Experts uses the expression "essential services" it refers only to essential services in the strict sense of the term (i.e. those the interruption of which would endanger the life, personal safety or health of the whole or of a part of the population), in which case restrictions or even prohibition may be justified, accompanied, however, by compensatory guarantees.

The establishment of minimum services in the case of strike should only be possible in: (1) services the interruption of which would endanger the life, personal safety or health of the whole or of a part of the population (*essential services in the strict sense of the term*); (2) services which are not essential in the strict sense of the term, but where the extent and duration of a strike might be such as to result in an *acute national crisis* endangering the normal living conditions of the population; and (3) *public services of fundamental importance*.

In this connection, the Committee of Experts has observed that a too broad definition of the concept of public servant is likely to result in a very wide restriction or even the prohibition of the right to strike for these workers. The Committee has pointed out that one of the main difficulties is due to the fact that the concept itself varies considerably from one legal system to another. For example, the terms *civil servant*, *fonctionnaire* and *funcionario* are far from having the same coverage; furthermore, an identical term used in the same language does not always mean the same thing in different countries; lastly, some systems classify public servants into different categories, with different status, obligations and rights, while such distinctions do not exist in other systems or do not have the same consequences.

For this reason, it has been considered futile trying to draw up an exhaustive and universally applicable list of categories of public servants, who should enjoy the right to strike or be denied such a right, given that they exercise authority in the name of the State. The Committee has considered that the prohibition of the right to strike in the public service should be limited to public servants exercising authority in the name of the State or services the interruption of which would endanger the life, personal safety or health of the whole or of a part of the population (*essential services in the strict sense of the term*).

In conclusion, because of large differences in national regulations concerning strikes in the public sector, on the 7th of October 2003, the Parliamentary Assembly of the Council of Europe has adopted a motion (Document # 9962) and the following recommendations have been made:

⁴ The restrictive notion of *essential services* is also referred to in the Belgian Law of August 19th 1948, which defined the limitations on the right to strike in order to maintain the continuity of vital services, such as hospital services and security services.

⁵ Bernard Gernigon, Alberto Odero, Horacio Guido, *ILO principles concerning the right to strike*, in *The International Labour Review*, Geneva, 2000, p.20.

a. The need to tackle the issue of the limitations to the exercise of the right to strike, considering the need to ensure balance between this and other rights protected by treaties and charters of fundamental rights;

b. It recognises that, with a view to the harmonisation of national regulations concerning strikes in the public sector, it is necessary to pursue a tighter cooperation at all levels in Europe and focus on the need to ensure a steady exchange of information. This exchange has to overcome any fragmentation between the various regulations on strikes in the sector of public services and to make the most of the positive aspects of the diverse regulatory systems in force in Europe; Underlines the need to strengthen and step up European cooperation regarding the regulation of strikes affecting public services, so that citizens can be protected in a homogeneous manner throughout Europe;

c. The different choices made by the member states' law-makers concerning the need to guarantee essential public services have an impact on the entire European Union, when a collective withdrawal takes place in the context of services which, from the structural or functional point of view, are connected at supranational level.

The regulation of the right to strike of the Romanian civil servants according to the current legislation

According to a definition formulated in our specialty literature, *public service* refers, in a functional (material) meaning, to that activity performed or supervised by a public authority, through which social needs of general interest are carried out⁶.

In view of accomplishing the attributions for which they were founded, public services have public functions, which, according to art. 2, line 1 of *Law no. 188/1999 regarding the Statute of civil servants*, republished, represent “the whole of the attributions and responsibilities, established by law, to the purpose of achieving the public power prerogatives by the central public administration, local public administration and the autonomous administrative authorities”. These public functions are carried out by civil servants. Therefore, between *public service – public function – civil servant* there always is a whole-to-part relation, meaning that, usually, in a public service there is at least one public function taken by a civil servant.

One of the basic features of public service is that of its *continuity*, a characteristic based on the idea that public service aims at, by definition, satisfying certain needs of general interest. Or, such a satisfaction of public, general interests cannot be discontinuous. Any interruption may trigger perturbations for the collectivity. This principle was instituted on a jurisprudential way, stating that public service is free from any modalities of interruptions. As a result, the right to strike among civil servants, therefore of those who should contribute to the continuous functioning of public service, appears as one of the most controversial rights, the controversy arising from the idea of preemption of the general interests carried out through the public services against the private interests followed when starting the strike.

The Romanian legislator defines strike in a similar fashion to the western doctrine, art. 251 line 1 of the Labor Code, respectively art. 40 of *Law no. 168/1999 regarding the settlement of labor conflicts*, modified through Law no. 261/2007, stating that the strike represents “the voluntary and collective cession of work within a legal entity...”.

Art. 43 of the Romanian Constitution enumerates, among the fundamental rights of citizens, the right to strike, which, in the formulation of the constitutional text, is granted only to employees. Thus, “the employees have the right to strike in order to defend the professional, economic and social interests” (line 1), the law establishing the conditions and the limits for

⁶ Verginia Vedinaş, *Drept administrativ*, third edition III, revised and updated, Universul Juridic Printing House, Bucharest, 2007, p. 227.

exercising this right, as well as the warranties necessary to ensure the essential services for society (line 2).

The term *employees* used by the legislator of the constitution should be understood in a broader signification. In such a perspective, one should admit that *civil servants* were also considered, not only the employees⁷. Nevertheless, an express regulation, though extremely synthetic, is contained in art. 30 line 1 of Law no. 365 from 29.05.2007, according to which “civil servants are granted the right to strike, under the conditions of the law”.

According to line 2 of art. 43 of the Constitution, the exercising of the right to strike is to be carried out on the basis of a law. At the moment, the law the Constitution refers to, as well as art. 30 of the Statute of Civil Servants, is the Law no 168/1999 regarding the settlement of labor conflicts, modified by Law no. 261/2007.

The common law regarding the exercising of the right to strike also comprises the legal limitation, to ensure the good functioning of the social-economic activities and the warranty of the humanitarian interests⁸. According to art. 66 line 1 of Law no. 168/1999, *the employees* (s.n.) from certain fields (health and social assistance, telecommunications, public radio and television, railroad transportation, public transportation, sanitation services, gas, electricity, water and heat supply) may call a strike only provided that the organizers ensure the essential services, but not less than 1/3 of the normal activity, with the observance of the minimum life support conditions of the local community. Through *essential services* one should understand those services which are integrated in the specific activity of that particular legal entity⁹.

An important issue is raised in relation to the final, supplementary stipulation contained in art. 66 line 1, namely “with the observance of the minimum life support conditions of the local community”. In a rational interpretation there results that the personnel of the legal entity calling the strike should meet two cumulative conditions: to ensure the essential services, but not less than 1/3 of the normal activity, as well as the observance of the minimum life support conditions of the local community.

For the *civil servants*, we see that there are no current conditions regarding the calling of the strike, obviously, except for certain categories of civil servants who do not have the right to strike. Thus, according to the legal regulations (art. 63 of Law no. 168/1999, modified), the following categories of civil servants may not call a strike:

- civil servants with a special statute within the Ministry of Internal Affairs and Administrative Reform and within the institutions and structures under its supervision or coordination (see art. 45 line 1, letter e of *Law no. 360/2002 regarding the Statute of the policeman*), as well as other categories of personnel which, through organic laws, are forbidden to exercise this right (for instance the prefect and vice-prefects – according to art. 20 of *Law no. 340/2004 regarding the institution of the prefect* – do not have the right to strike. Moreover, neither the civil servants who perform their activity within the institution of the prefect,

⁷ In the doctrine it has been suggested that this omission represents a lack of our Constitution, since, on one hand, civil servants could not be assimilated to employees and, on the other hand, the legislator’s will was not that of excluding civil servants from the exercising of this fundamental right (see Verginia Vedinaş, *Law no. 188/1999 regarding the Statute of civil servants, with the subsequent modifications, republished*, third edition, revised and updated, Lumina Lex Publishing House, Bucharest, 2004, p. 84).

⁸ Ion Traian Ştefănescu, *Tratat de dreptul muncii*, Wolters Kluwer Romania, Bucharest, 2007, p.703.

⁹ Alexandru Țiclea ș.a., *Dreptul muncii*, Rosetti Publishing House, Bucharest, 2004, p. 783.

considering the fact that they are under the supervision of the Ministry of Internal Affairs and Administrative Reform, cannot call a strike).

Although the total interdiction to strike refers to certain categories of personnel, the settlement of the conflicts of interests appeared within such entities can be conducted through alternative (amiable) means: conciliation, mediation, arbitration.

From the corroborated reading of the two normative acts – Law no. 168/1999, modified and Law no. 188/1999, republished, we can draw two conclusions related to the right to strike of civil servants.

First, art. 28 line 1 of Law no. 188/1999, the Statute of civil servants, which later became art. 30 line 1 following the republication of the law on May 29th, 2007, through the modification made by Law no. 251/2006, the strike of the civil servants is no longer conditioned by the *observance of the principle of continuity and celerity of public service* (s.n.). As we mentioned before, the principle of continuity is of the essence in the public service and consists in its uninterrupted functioning, which must at all times respond to the needs of general interests¹⁰. The characteristic of celerity is not found yet in the traditional features of public service, being considered as a characteristic of the civil procedure¹¹. That is why celerity represented an element of novelty in the text contained by the unaltered form of art. 28 line 1 of Law no. 188/1999.

Secondly, we can conclude that, as at the present moment, the civil servants' right to strike is no longer conditioned by the observance of the principle of continuity and celerity of public service, it means that the exercise of this right should relate to the criteria and restrictions contained in art. 66 line 1 of Law no. 168/1999, modified, namely *to ensure the essential services, but not less than 1/3 of the normal activity, as well as to satisfy the minimum life support conditions of the local communities*.

As a result, we are of the opinion that the current solution of the problem in our country is the one mentioned above. Nevertheless, given the major legislative failures, we believe that, in the future, it is necessary to rethink the solution of juridical regulation, taking into consideration the fact that the regime of the strike in the matter of civil servants presents certain particularities as opposed to the strike of regular employees. The general regulation in the matter of the employees' strike (Law no. 168/1999) is not enough to constitute the common law in the matter of the civil servants' strike as well. Here's why the present law should be completed with express dispositions to regulate the regime of the civil servants' strike, to identify and nominate the essential public services which must function under any conditions and to establish the necessary restrictions¹², even with the enlargement of the range of public services where the strike is forbidden. Under the circumstances when the legislation lacks such stipulations, the strike of the civil servants who act for instance in the public services within the financial administration and treasury, customs and city halls could have an extremely dangerous impact in Romania, with devastating effects on the national economy, the financial stability, the anti-inflationary policy, employment, emphasized once again by the present world crisis.

¹⁰ Anton Trăilescu, *Câteva considerații în legătură cu formele de organizare a serviciilor publice și regimul lor juridic*, in „Dreptul”, no. 12/2002, p. 98.

¹¹ Verginia Vedinaș, *op. cit.*, p. 88.

¹² Ioan Muraru, Simina Tănăsescu, *Drept constituțional și instituții politice*, Lumina Lex Publishing House, Bucharest, 2002, p. 217.

REFERENCES

- Caen, Gerard Lyon et alii, *Droit du travail*, 19 édition Dalloz, Paris, 1998.
- Fairbrother, Peter et alii, *The right to strike in the electricity sector in EU countries*, University of Greenwich, 2002.
- Gernigon, Bernard et alii, *ILO principles concerning the right to strike*, in The International Labour Review, Geneva, 2000.
- Ștefănescu, Ion Traian, *Tratat de dreptul muncii*, Wolters Kluwer Romania, Bucharest, 2007.
- Țiclea, Alexandru et alii, *Dreptul muncii*, Rosetti Publishing House, Bucharest, 2004.
- Vedinaș, Verginia, *Law no. 188/1999 regarding the Statute of civil servants, with the subsequent modifications, republished*, third edition, revised and updated, Lumina Lex Publishing House, Bucharest, 2004.
- Idem, *Drept administrativ*, third edition III, revised and updated, Universul Juridic Printing House, Bucharest, 2007.
- Ziller, Jacques, *Administrations comparées*, Éd. Montchrestien, Paris, 1993

The Belgian Law of August 19th 1948.