Civil servants: constitutional aspects

RDAI
Journal of Public Law and Infrastructure
REVISTA DE DIREITO ADMINISTRATIVO E INFRAESTRUTURA
ISSN: 2526-8120
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DOI: https://doi.org/10.48143/RDAI.14.mello.cab
Keywords: Servers, Fundamentals of validity, Legal rules, Legal regime

Summary

Gentlemen of the board, my colleagues, I would like, first of all, to thank you for the honor of this invitation, to be among the Municipal Prosecutors, to whom I am already linked by so many bonds of friendship, giving rise to another opportunity to debate a legal issue and propose a vision on this subject of the municipal servants and, who knows, during the debates, until I suggest something thinking about the future Constituent Assembly. I will take care of the constitutional angle and Prof. Adilson Dallari will then develop it from this same constitutional angle, but entering into considerations that also extract its foundation of validity of legal norms. The first consideration I want to make repeats something about what I have been insisting on for a long time. Usually, the theme of public servants is considered as if it were merely a work regime among several possible and that is peculiar only by typifying itself in a so-called statutory relationship. I think, however, that this issue has an often larger constitutional dimension. Strictly speaking, every constitutional discipline of the public servant is armed according to objectives closely linked to the purposes of the rule of law itself. It might seem surprising that a seemingly pedestrian theme – the basic legal regime of civil servants – had been covered in the constitutional text itself, giving it a position of emphasis, parallel to topics of marked magnitude such as the organization of the Executive, Legislative and Judicial Powers, structure of the State, individual rights and guarantees or minimum social rights. Indeed, in the first glance, perhaps it seemed, on the subject, inappropriate that a constitutional text intended to deal with supposedly minor issues, by groveing the fundamental lines of the civil servants regime. There is, however, a reason for this. And the reason is this: The rule of law presupposes, as we all know, the submission of power to a

framework of legality. The rule of law is born from a political movement that is worn both in the thesis of popular sovereignty and in the thesis of the need to contain power. Indeed, the objectives that inspire the legal consecration of the political project of the rule of law rest, above all, on the desire to protect the citizen against the untied exercise of power. However, the uncomerment of the exercise of power is particularly dangerous when coming from the Executive Branch. Well, the constitutional regime of civil servants aims exactly to establish basic rules that favor the neutrality of the state apparatus, in order to curb above all the Executive Branch from manipulating it with a disabbreacity capable of compromising objectives of the rule of law.

It is the Administration, in true rigor, that maintains the most intense contact with the administered and therefore most intensely threatens their freedom. If this has always been true, even in the historical period in which the rule of law emerges, today, the dimensions of this risk are much broader. No one is unaware that, currently, the Public Power assumes in social and economic life a role of the most extreme importance. The interference in individual conducts and, more than that, the very planning of the set of social conducts is carried out by the State with cotio and without ends, without any solid contestation, without any doctrinal or jurisprudential heart sound.

The state has come to have an overwhelming presence that seems to be even the result of reasons unrelated to any purely political projects or legal ideals. It is possibly linked to phenomena that emanate from technological development. This has made the action of individuals potentially much more predatory. Individual behaviors, thanks to the progress of technical resources, assumed the possibility of great resonance and their repercussions exceeded the restricted scope of a small number of close people. With this, the discipline of human conduct, the containment of the free action of individuals and social groups, must be often more complete and more intense, to organize an acceptable social life. Today, men with the use of the machine, with the availability of the means that civilization has provided, rub intensely, not only with those who are immediately close, but even with those who are most distantly situated. Think that urban law and its contemporary importance, for example, are direct results of this phenomenon. This right became relevant due to imposing circumstances generated by large human concentrations, by large city centers, which could only multiply as a result of technological development, since they were largely made possible by the possibility of building multi-storey buildings. Think about environmental health legislation, required because the

proliferation of factories has made pollution control demanding. Think about the consequences produced by computer resources. Think of the car, which allows fast travel, over long distances, and which also promotes major congestion. In short, the technological means in our time ended up demanding, for their possible predatory action or, at least, for their repercussion on social life, a very intense regulatory presence of the State. Because of this, we have had our freedom much more regulated, supervised and controlled than in the past and it is inevitable that this will happen. The agent of this control, the agent of these interferences, the agent of this programming is the state machine. But it is, above all, the Executive Branch that acts, who promotes and who concretizes such constricting measures and they can be, as they were in past historical periods, a source of very violent oppression. Well, in a historical period like this, it must be that this State, that this gigantic apparatus, that this omnipresent machine be impartial, that it is neutral, otherwise the objectives of the rule of law will be left over. Well, for such a machine to be impartial, to be neutral, it must be given that the agents who operate it have certain minimum conditions to perform their duties in a spirit of exemption, neutrality, loyalty to third parties, isonomy in dealing with those administered. How would this be possible if the agents of the state apparatus and, basically, of the Executive Branch did not have a legal status, a legal regime, that guaranteed them, that would give them the minimum of independence from the occasional holders of power? If this machine is all powerful today and there are no mechanisms conducive to an impartial performance of its operators, it is clear that, through them, it will be able to lead the destinies of society to its pleasure. And it can ensure the continuity of the occasional rulers, that is, of their highest thrusters, which, by republican principle, must be transitory. It can ensure the perpetuation of those who have been embedded in the top of the Executive, even if simply through successors prepared for this and who fulfill an interregnum assuring the persistence of the same group – almost as in a circle of the same beneficiaries of power. Only a machine prepared to be exempt, impartial, loyal, and that treats individuals isonomically can guarantee the achievement of the objectives of the rule of law, preventing and preventing the untied use of power in favor of factions that, through favoritisms and persecution, would eternalize themselves in charge of society. Thus, it seems to me, the constitutional provisions concerning civil servants fulfill, above all, a function corresponding to that of the predicaments of the judiciary and parliamentary immunities. It is easy to see that parliamentary immunities are granted to members of Congress with the point of giving them independence, preventing them from being pressable men and, therefore, enabling them to truly represent the will of

the community of voters. The preaching of the judiciary is also not put in honor of the magistrates themselves, but as a defensive instrument of us other citizens, so that these men are guaranteed and can be independent in the face of pressure, giving them an opportunity to act impartially, with neutrality. This same objective, undoubtedly recognized as such with regard to the Legislative and Judicial branches, is equally sought by the constitutional text when dealing with public servants. Only, the protective form does not coincide with that adopted with regard to deputies, senators and magistrates. However, it also reflects a mechanism that aims to ensure, at least, two objectives: equality of all citizens in access to administrative public office and protection of impartial, neutral, impartial behavior from those provided therein. Free access to public positions honors entry through sufficiency, through qualification, disputed in open positions by the various interested parties. Otherwise, agents who were controlling power at a given historical moment could channel to the state apparatus only their supporters, their friends, their godchildren, the members of the same political group, and could, of course, bar the access to the public service of those who were opponents of them, of those who were enemies to them, of those who were political contenders, of those who had different ideologies, opinions, convictions of the dominant group. Evidently, they could, once mastered of this machine, distribute as prebendes the public benefits, grant favors to those who were complicit with them, including politically and, on the contrary, carry out persecutions, cause inconvenience to those who did not commune in the same line as the occupants of power.

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References

Text originally published in Estudos de Direito Pública – EDP, São Paulo, n. 08, p. 81-92, Jan.-Jun. 1986, referring to the lecture given in the I Cycle of Public Law Studies, from December 9 to 12, 1985, in the auditorium of the São Paulo Cultural Center. The transcription of the text, for this republication, was carried out by Bruno Vieira da Rocha Barbirato and Evian Elias.

CARVALHO, R. Discounts as a means for the public servant to reimburse the State. Revista de Direito Administrativo e Infraestrutura, v. 2, n. 5, p. 201-227, Apr./Jun. 2018. https://doi.org/10.48143/rdai/05.rmuc

DI PIETRO, M. PUBLIC CONTEST IN INDIRECT ADMINISTRATION. Revista de Direito Administrativo e Infraestrutura, v. 2, n. 7, p. 405-410, Oct./Dec. 2018. https://doi.org/10.48143/rdai/07.mszp

MARTINS, R. What are the limits for the use of public tenders as an affirmative action tool?. Revista de Direito Administrativo e Infraestrutura, v. 1, n. 2, p. 335-367, Jul./Sep. 2017.https://doi.org/10.48143/rdai/02.rmm

MELLO, C. Notes on the theory of public bodies. Journal of Administrative Law and Infrastructure, v. 2, n. 4, p. 423-434, Jan./Mar. 2018. https://doi.org/10.48143/rdai/04.cabm

MELLO, C. Bid. Application of rules of Decree-Law 200, of 1967, to municipalities: of the bidable object. RDAI | Revista de Direito Administrativo e Infraestrutura, v. 3, n. 9, p. 353-363, May/Jun. 2019.https://doi.org/10.48143/rdai/09.cabm

MELLO, C. New aspects of the social function of property. RDAI | Revista de Direito Administrativo e Infraestrutura, v. 3, n. 8, p. 409-418, Jan./Mar. 2020. https://doi.org/10.48143/rdai/08.cabm

MELLO, C. The content of the legal-administrative regime and its methodological value. Revista de Direito Administrativo e Infraestrutura, v. 1, n. 1, p. 347-374, Apr./Jun. 2017. https://doi.org/10.48143/rdai/01.cabm

OLIVEIRA, S. SCORE OF SECURITIES IN PUBLIC COMPETITION: COMMENTS ON THE JUDGMENT DELIVERED IN MS 33,527/RJ. Revista de Direito Administrativo e Infraestrutura, v. 2, n. 7, p. 275-288, Oct./Dec. 2018. https://doi.org/10.48143/rdai/07.szo

MELLO, S. ; BØNSING, S. Ombudsman: a Brazilian-Danish approach. Revista de Direito Administrativo e Infraestrutura, v. 2, n. 5, p. 109-128, Apr./Jun. 2018. https://doi.org/10.48143/rdai/05.ssfm