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Public Administration and the  
Transformation of Civil Service: A  
Comparative (Law) Perspective

# Transformation of Civil Service in Portugal: A “Schizophrenic Reality”

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*L'assetto del pubblico impiego in Portogallo presenta una dimensione schizofrenica che è conseguenza di alcuni “traumi” della sua “infanzia difficile”, che condivide con tutti i paesi inseriti nella “famiglia” del modello amministrativo francese nel periodo dello Stato liberale (del XVIII e XIX secolo). Attualmente l'accesso al pubblico impiego è un contratto unificato per tutti i tipi di dipendenti pubblici, denominato “vincolo di impiego in funzioni pubbliche” (che crea un rapporto di lavoro privato/pubblico). Questo regime contrattuale mescola aspetti privatistici (i diritti e i doveri del lavoratore) e pubblicistiche (i doveri legati alla funzione, come quello di obbedienza), e introduce una dualità di giurisdizioni, in modo che può essere definito schizofrenico. Devono anche essere considerati due fenomeni nuovi, che si stanno verificando attualmente: l'aumento del numero di alti dirigenti ai vertici dell'Amministrazione Pubblica che sono alle dipendenze dirette della politica e la creazione di un nuovo tipo di “funzionari politici” (consulenti, assistenti), incardinati esclusivamente sulla “pubblica fiducia” dei membri del Governo (o delle autorità locali). Questi due nuovi sviluppi sono responsabili di un'altra situazione schizofrenica relativa alla Pubblica Amministrazione, che non funziona realmente né alla maniera francese né alla maniera americana.*

*The Portuguese Civil Service has a “schizophrenic dimension” that is a consequence of the “traumatic facts” of its “difficult childhood”, common to all the countries which are part of the “family” of the French administrative Law model, adopted in the period of the liberal State (of the 18th. and the 19th centuries). The current means to enter the Civil Service is through a unified contract for all public employees, which creates a private/public employment relationship. This contractual regime mixes private labour rights and duties with public regulations (including functional duties, like the duty to obey), as well as introduces a duality of jurisdictions. We consider two new phenomena: the increase in the number of senior public administration officials*

*who become political appointees, and the creation of a new kind of "political functionaries" (advisors, assistants), based exclusively on the "public trust" of the members of the Government. These phenomena are responsible for another "schizophrenic situation" relative to the Public Administration, that does not really work like the French way nor the American way.*

*Summary: 1. Psychoanalytical approach to the civil service.- 2. Key moments in the historical evolution of the Portuguese Public Service.- 3. Current civil service legal schizophrenia.- 4. Other signs of civil service schizophrenia.*

## **1. Psychoanalytical approach to the civil service<sup>[1]</sup>**

After the excellent global European overview done by the Chairperson, and some other excellent views on national perspectives, I'll talk about the transformation of the Portuguese Civil Service adopting a little bit more disruptive perspective, saying it has always been characterized by a schizophrenic<sup>[2]</sup> dimension. Such schizophrenic dimension is a consequence of the "traumatic facts" of its "difficult childhood"<sup>[3]</sup>, happened in all the countries integrating the "family" of the French administrative Law model, in the times of the liberal State (of the 18<sup>th</sup> and the 19<sup>th</sup>). Those facts could be identified as follows: firstly the creation of the administrative courts as administrative entities, constituted not by judges but administrative officials, as well as the birth of an "aggressive" model of Administration<sup>[4]</sup> ("Eingriffsverwaltung", as Bachof called it<sup>[5]</sup>) together with an authoritarian Administrative Law, designed to protect the Administration and not the individuals (as stated clearly in the Blanco Case<sup>[6]</sup>). Secondly: the adoption of the French notion of public service, as a special kind of employees exclusively dedicated to prosecuting the public interest in the exercise of the administrative power, neutral towards political parties and ideological influences. This Napoleonic model of civil service as a profession was combined with the German concept of special authoritarian relationships, inside the administration. The resulting "special power administrative relations" (as they were called) were not subordinated to law nor to subjective rights.

All these "traumatic events" conducted to an authoritarian notion of public

service, typical of the Liberal State in the countries of the continental model (of the 18<sup>th</sup> and the 19<sup>th</sup> centuries).

## **2. Key moments in the historical evolution of the Portuguese Public Service**

If we look now at the Portuguese Public Administration and Civil Service in a nutshell, we can identify a four periods evolution:

- 1<sup>st</sup> period (1834-1933) - After the liberal revolution of 1820, Mouzinho da Silveira created the Conselho de Estado (“Conseil d’État”), in 1834, and the French system of administrative Law has been adopted;
- 2<sup>nd</sup> period (1933-1974) - During the dictatorship, the French administrative Law System was kept together with the model of civil service, that imposed his authoritarian vision through the principle of obedience to the hierarchical superior (despite Marcelo Caetano, somewhat surprisingly, expressly rejected the theory of special power relations<sup>[7]</sup>).
- 3<sup>rd</sup> period (1974-2004) - After the “carnation revolution” of 1974, the 1976 Constitution established a democratic model of Administration based on the principle of legality, which prevails even over the hierarchical duty of obedience (art. 271, n. 3<sup>[8]</sup>). The public service model is maintained and access to civil service, according to the law, can occur in two ways: by administrative act or by (public) contract<sup>[9]</sup>. Here we could observe the subsistence of a dualist logic in the access to the public service.
- 4<sup>th</sup> period (2004-2014 and until now): This profound Reform of the Civil Service<sup>[10]</sup> seems to be based on two reasons: the flexibility of private law in the application of New Public Management theories, and aspects of comparative law, since the Italian model served as reference.

## **3. Current civil service legal schizophrenia**

After the Reform, the current way to access the Civil Service is a unified contract for all kinds of public employees, named “employment links in public functions”, which creates a private/public employment relationship. Moreover,

the general regime of work in public functions applies not only to contracts signed after the date on which the diploma came into force, but also to all contracts signed before, in retroactive terms. This means that the new contract applies today to most Civil Service employees, with some limited exceptions related to the exercise of sovereign functions (for instance: police, armed forces, independent administrative entities).

Let us say that this contractual regime mixes private (such as labour rights and duties) and public regulations (like functional duties, like the duty to obey) in a kind of schizophrenic way. And this can give rise to other situations of schizophrenic nature, such as the one that can happen between two employees performing the same tasks, but under two different legal regimes, depending if the same task executed by both is performed in the frame of an entity included, or not, in the exceptional regime.

We must add that this duality of regimes implies also duality of jurisdictions. As a matter of fact, all the administrative employment contracts litigation should fall under the jurisdiction of the administrative courts (art. 4, n. 1, ETAF), if there was not the exception clause of the n. 3, of the same article, that excludes them. According to this last norm, it is excluded from the administrative court's jurisdiction «*the assessment of disputes arising from work contacts, with the exception of disputes arising from the public employment relationship*». Therefore, although apparently included, most public service contracts are excluded from the jurisdiction of administrative courts, through a double negative formula. It seems a very schizophrenic normative formulation, doesn't it?

Also worth mentioning are the problems of qualification of civil service contracts due to its schizophrenic nature, which can be considered as either private law or public law. In fact, private law scholars tends to consider them as a special modality of private labour law contracts<sup>[1]</sup>, like any other special labour contracts; while some public law scholars considers them as public contracts (or public procurement), due to the nature of the administrative function performed<sup>[2]</sup>. Needless to say, this issue of the legal nature of public service contracts is extremely important, both in terms of its current application and its future development.

#### 4. Other signs of civil service schizophrenia

Another schizophrenic question is how to qualify the civil service in Portugal, taking in consideration some other relevant changes occurred in recent times. As we've seen before, Portugal adopted the French system of career of the civil servants, meaning that the public agents are independent in the exercise of their functions, and there is no "spoils system", as there is in the American system. That means also that the changes in the government do not mean a change in all the administration bodies and services.

In addition to that, we also need to consider two new phenomena arising nowadays:

- the increase in the number of senior officials in the top places of Public Administration who became political appointees. If this current trend continues to grow without limits or control, it can jeopardize the qualification of the civil service system, bringing it closer to the Anglo-Saxon model;
- the creation of a new kind of "political functionaries" (advisors and assistants), based exclusively on the "public trust" of the members of the Government (or of the local authorities), which arise due to the "distrust" of governments towards public officials in service at their own offices. This becomes even more problematic when these "new political employees" are not limited to assisting in the preparation and execution of government decisions but can acquire delegated powers to act *in lieu* of legitimate governments. This being even more dangerous from the point of view of the rule of law, since these "political officials" do not respond institutionally to the legislative assembly, nor to the public administration, nor to the courts, because they only answer (in a personal capacity) before those who appointed them.

These two current phenomena are responsible for another schizophrenic aspects of the Portuguese Public Administration, that does not really work like the French way nor the American way, although it has aspects of both systems.

In conclusion, there are so many symptoms of schizophrenia that the only

solution is to start psychoanalysis sessions immediately. And bear in mind that this is a lifelong problem, since there is never a definitive and complete cure for a psychical disease...

1. I begin to confess the pleasure and honour I feel for being here, participating in this 3<sup>rd</sup> “scientific anniversary party” of the Research Group and the International Review of CERIDAP, of the University of Milano, and meeting old and new friends in this Session, chaired by my good friend Prof. Jacques Ziller, in which I’ll talk about the transformation of Civil Service in Portugal. So, I would like to thank Prof. Diana Urania-Galetta for the kind invitation for being here, and give my congratulations to the CERIDAP.
2. Note from the Editorial Board of CERIDAP: the use of the word “schizophrenic” is the author’s own choice. It certainly does not involve any negative or prejudicial attitude vis a vis mental issues.
3. V. Pereira da Silva, *O Contencioso Administrativo no Divã da Psicanálise. Ensaio sobre as Ações no Novo Processo Administrativo*, II Ed., Almedina, Coimbra, 2009, pp. 9-13.
4. *Ivi*, pp. 13-52.
5. O. Bachof, *Die Dogmatik des Verwaltungsrechts vor den Gegenwartsaufgaben der Verwaltung*, in *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer*, n. 30, Walter de Gruyter, Berlin, 1972, p. 277.
6. V. Pereira da Silva, *O Contencioso Administrativo no Divã da Psicanálise. Ensaio sobre as Ações no Novo Processo Administrativo*, cit., pp. 10-12.
7. M. Caetano, *Manual de Direito Administrativo*, vol. II, IX Ed. (rep.), Almedina, Coimbra, 1981, pp. 684-877.
8. According to the article 271, n. 3, of the Portuguese Constitution: «*the duty of obedience ceases whenever compliance with orders or instructions implies the commission of any crime*».
9. See, D. Freitas do Amaral, *Manual de Direito Administrativo*, IV Ed., Almedina, Coimbra, 2015, pp. 681-687
10. See Law n. 23/2004, of 22<sup>nd</sup> June, followed by Law n. 59/ 2009, of 11<sup>th</sup> September, and Law n. 35/ 2014 of 20<sup>th</sup> June.
11. M. do Rosário Ramalho, *Tratado de Direito do Trabalho - Parte IV - Contratos e Regimes Especiais*, Almedina, Coimbra, 2019, pp. 503-704.
12. V. Pereira Da Silva, *Contencioso Administrativo no Divã da Psicanálise. Ensaio sobre as Ações no Novo Processo Administrativo*, cit., pp. 477-508.