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QUALIFICATION OF ADMINISTRATIVE ACTS AS NORMATIVE AND INDIVIDUAL ACTS. THEORETICAL AND PRACTICAL ISSUES

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Abstract

The paper aims at analysing the administrative acts of a normative character and the administrative acts of an individual character, provided for in art. 2 par. (1) letter c) of the Law on the administrative contentious no. 554/2004, with its subsequent amendments and completions, from three perspectives, namely from theoretical perspectives, from the perspective of the rulings pronounced in the last years by the High Court of Cassation and Justice, but also from the perspective of the case law of the Constitutional Court of Romania. The distinction seems to us all the more important as this issue was approached by the Constitutional Court of Romania, at the beginning and towards the end of the year 2017, in the context of exercising the power provided by art. 146 letter e) from the Constitution of Romania, republished, a new attribution of the constitutional litigation court, introduced during the revision of the Fundamental Law from 2003, by which it acquired the role of a mediator in solving legal disputes of a constitutional nature between public authorities, legal disputes that might concern the content or the extent of their attributions stemming from the Constitution, which means that they are conflicts of competence, positive or negative, and which can create institutional blockages.

Keywords: *normative act, individual act, jurisprudence, Constitutional Court, characterization.*

1. Introduction

The recent case-law of the Constitutional Court of Romania, and we are referring here to the Decision no. 68 of February 27th, 2017, published in the Official Gazette of Romania, Part I, no. 181 of March 14th, 2017, as well as the Decision no.757 of November 23rd, 2017, published in the Official Gazette of Romania, Part I, no. 33 of January 15th, 2018, was a chance to, once more, bring into the attention of practitioners, as well as of the public, the subject concerning the delimitation of administrative acts into individual and normative acts, a significant issue in terms of the effects these types of acts produce, but especially in terms of the ways in which their legality can be verified.

The antecedent decisions were pronounced in the context in which subject to the attention of the Constitutional Court there were applications for resolving legal conflicts of a constitutional

nature between public authorities, respectively between the Government of Romania, on the one hand, and the Public Ministry - the Prosecutor's Office attached to the High Court of Cassation and Justice - the National Anticorruption Directorate, on the other hand, requests lodged by the President of the Senate and generated by the existence, pending before the National Anticorruption Directorate, of cases in which a criminal investigation was conducted on the way a normative act was passed, respectively on the examination of the legality of a Government decision.

We consider that the current doctrine on administrative law does not insist on the jurisprudential elements concerning the classification of the administrative acts depending on the extent of their effects, limiting themselves to the defining of these categories, alongside with other criteria to prioritize the administrative acts[61].

Under these circumstances, the present paper does not have the propose to conduct an exhaustive analysis of the above stated aspects, but, starting from the theoretical aspects of the two notions, we wish to show some differences appeared in the practice of the High Court of Cassation and Justice, as well as the emphasis added in the case-law of the Constitutional Court of Romania.

2. Legal framework

The notion of "administrative act" is not enshrined at constitutional level, although the Basic Law uses it in art. 52 - Right of a person injured by a public authority[62] and in art. 126 par. (6), with reference to the control by way of the administrative contentious[63].

At infra-constitutional level, the framework regulation is given by the provisions of art. 2 par. (1) letter c) of the Law on the administrative contentious no. 554/2004[64], with the subsequent amendments and supplements, which state that the administrative act is an "unilateral act of an

[61] See, for example, Negoiță, 1993, page 117; Iovănaș, 1997, page 21; Iorgovan, 2005, page 39; Brezoianu and Oprican, 2008, page 73; Manda, 2008, page 400; Trăilescu, 2008, page 182; Alexandru, Cărăușan and Bucur, 2009, page 332; Apostol Tofan, 2009, page 20; Petrescu, 2009, page 312; Vedinaș, 2015, page 100.

[62] According to art. 52 par. (1) of the Constitution of Romania, republished: „Any person aggrieved in his/her legitimate rights or interests by a public authority, by means of an **administrative act** (emphasis added - C.T.) or by the failure of a public authority to solve his/her application within the lawful time limit, is entitled to the acknowledgement of his/her claimed right or legitimate interest, the annulment of the act and reparation for the damage".

[63] According to art. 126 par. (6) of the Constitution of Romania, republished: „The judicial control of **administrative acts** (emphasis added - C.T.) of the public authorities, by way of the contentious business falling within the competence of administrative courts, is guaranteed, except for those regarding relations with the Parliament, as well as the military command acts. The administrative courts, judging contentious business have jurisdiction to solve the applications filed by persons aggrieved by statutory orders or, as the case may be, by provisions in statutory orders declared unconstitutional".

[64] Published in the Official Gazette of Romania, Part I, no. 1.154 of 7 December 2004.

individual or normative nature, issued by a public authority, under a regime of public power, in order to organize the execution of the law or to the concrete execution of the law, which gives birth, changes or exits legal relations"; at the same time, the law assimilates to the administrative acts "also the contracts concluded by the public authorities, regarding the valuation of the public property, the execution of the works of public interest, the provision of public services, the public procurements", thus giving the ordinary legislator the possibility to also establish, by means of special laws, other categories of administrative contracts subject to the jurisdiction of the administrative courts.

We stress out the fact that the previous legislation[65] did not have such an explanation. The Law no. 554/2004 provides for, among other things, as a novelty, also the definition of basic concepts in matters on administrative contentious, the current definition of the administrative act being introduced by the Law no. 262/2007[66], noting that the delimitation in individual or normative acts has been foreseen since the adoption of the basic law, in 2004.

3. Elements of theory and judiciary practice

The classification of the administrative acts that are of interest to us from the perspective of this paper is the one in normative administrative acts and individual administrative acts. The doctrine of administrative law[67] is unanimous in appreciating that the normative administrative acts are addressed to everybody, and anyone might fall under their incidence at a given time, while individual administrative acts are addressed to determined natural or legal persons. Moreover, it was underlined that individual acts can never violate normative acts[68].

The High Court of Cassation and Justice determined the criteria according to which it is established that an administrative act is an individual or a normative one[69], stating that its appointment is not achieved by the "cutting" of certain provisions in that act, thus affecting the unitary character of the act, but by whole examining of its contents, from the perspective of the features of each of these discussed categories (normative acts and individual acts). An

[65] Law on the administrative contentious no. 29/1990, published in the Official Gazette of Romania, Part I, no. 122 of 8 November 1990, as subsequently amended and supplemented, currently repealed by Law no. 554/2004.

[66] Law no. 262/2007 on the modification and completion of the Law on the administrative contentious no. 554/2004, published in the Official Gazette of Romania, Part I, no. 510 of 30 July 2007.

[67] See *supra*, note no. 1.

[68] See D. Brezoianu, 2004, page 71, *apud* Apostol Tofan, *op. cit.*, page 21.

[69] High Court of Cassation and Justice (H.C.C.J.) - The Administrative and Tax Litigations Chamber, Decision no. 1718 of 26 February 2013. Source: www.scj.ro.

administrative act is either normative or individual, depending on the extent of the legal effects it produces as a whole, irrespective of the concrete content of a part (for example an annex) of it.

Thus, administrative normative acts contain regulations of a general, impersonal character, which produce *erga omnes* effects, while individual acts, usually, produce effects toward a person, or sometimes toward several persons, expressly mentioned in the content of these acts. The wrong placement of a document in one category or another (that is, more often, the qualification of a normative act as an individual one than vice-versa) may lead to an unlawful judgment by the court before which this issue was raised.

Only for illustration purposes, we mention that the above distinction operates in the matter of communication of administrative acts, given that the disclosure of an administrative act is made by means of publication for normative acts and by means of communication for individual acts. The most effective way of communication is handing the document, under signature, to the recipient, either directly by the issuer or through an administrative courier or mail, by registered mail, while the display of the act, attested by drafting of a display report, is the extreme alternative, applicable in the case where the addressee refuses to receive the document under signature or he/she is not found at the premises. However, the issue of the communication of individual administrative acts by display cannot be substituted or mistaken for publication, because the presumption and the obligation to know the texts published in the Official Gazette of Romania operate only against the norms of law, establishing the presumption and the obligation to know the law[70].

In fact, in the meeting of the judges of the High Court of Cassation and Justice - the Administrative and Tax Litigations Chamber from October 22nd, 2012, in application of art. 2 par. (1) letter c) of Law no. 554/2004, it was adopted the principle solution according to which "the acts issued by the heads of the central public authorities approving, for example, the organizational structure, the function status or the organization and operation rules of the institution, are acts of an individual nature, being issued on the basis of the delegation attributed to the issuer by Government decision, for the enforcement and the practical implementation of the legal provisions with higher legal force, which makes that their publication in the Official Gazette is not mandatory"[71].

[70] H.C.C.J., Decision no. 1718/2013, cited above.
[71] Source: www.scj.ro.

4. The recent jurisprudence of the Constitutional Court of Romania

As we have stated beforehand, the issue of the normative and individual administrative acts was addressed as early as during the past year by the Constitutional Court. Decisions no. 68/2017 and 757/2017 have differentiated the effects these types of acts produce if there is a pending criminal investigation on the way a normative act was passed, respectively on the examination of the legality of a Government decision.

Both decisions were made in the case of settling applications for resolving legal conflicts of a constitutional nature between public authorities, a new power of the Constitutional Court, one of great importance and complexity, introduced with the 2003 revision of the Fundamental Law. Taken from the experience of other countries, where constitutional courts also have such a role[72] , the new attribution (new by comparison with the 1991 Constitution of Romania) has increased the degree of difficulty and complexity of the Constitutional Court's mission.

The beginning of these applications took place in 2005, with the authorities involved being the President of Romania and the Parliament[73]. We note that, from the beginning, by virtue of its quality of guarantor of the supremacy of the Basic Law, the Constitutional Court behaved as an impartial and objective arbitrator, always inviting the parties to a loyal constitutional conduct, one of cooperation and mutual respect, that is the expression of the spirit of the constitutional principle of the separation and the balance of powers, which implies, among other things, that public authorities must cooperate loyally with each other, must maintain a constructive dialogue, eventually using the path of the compromise, to find solutions that best match the interests of each other, in order to avoid conflicts. Thus, by resolving the existing conflicts between different public authorities, it is intended to remove possible institutional blockages and not to solve some political divergences[74].

The Decisions of the Constitutional Court no.68/2017 and 757/2017 offered the court the opportunity of ruling on the distinction between individual and normative administrative acts, applicable in criminal matters.

[72] Under various forms, such powers to solve the conflict are within the jurisdiction of Constitutional Courts (or Courts) in Portugal, Slovakia, Poland, Italy, Spain etc.

[73] Decision no.53/2005 on applications for resolving legal conflicts of a constitutional nature between the President of Romania and the Parliament, formulated by the President of the Chamber of Deputies and by the President of the Senate, published in the Official Gazette of Romania, Part I, no.144 of 17 February 2005.

[74] Decision no. 148/2003, published in the Official Gazette of Romania, Part I, no. 317 of 12 May 2003.

As regards the constitutional conflict that was the subject of the first decision, it was generated by the action of the prosecutors of the National Anticorruption Directorate to investigate on the opportunity and the circumstances of drafting the Government Emergency Ordinance no. 13/2017 on the amending and supplementing of the Law no.286/2009 on the Criminal Code and of the Law no.135/2010 on the Code of Criminal Procedure[75]. On that occasion, the Court examined, on the one hand, the particular attribution of law-making given to the Government by the Constitution, stipulating that, in adopting the emergency ordinance, the Government exercised one of its own competences, expressly provided for by the provisions of art.115 of the Basic Law.

On the other hand, the Court held, about the original competency of the Government, as an executive authority, that it regards the organization of the execution of the laws, which are primary regulation acts, through the issuance of decisions, secondary regulation acts, which are normative or individual administrative acts, issued for the purpose of the proper administration of the execution of the primary normative framework, which requires the establishment of measures and subsequent rules to ensure its correct application. Considering that the decisions are always adopted *secundum legem* and that they ensure the application or the enforcement of laws, it follows that, in the Romanian constitutional system, the rule is that the Government does not have the right to primarily regulate social relations, but only to adopt the secondary legislation.

Furthermore, since, from a formal point of view, of the issuing authority, both secondary legislation (Government decisions) and primary legislation (simple and emergency ordinances) are administrative acts, the Court analysed the way to control them. The common law on the control of the administrative acts is represented by Law no.554/2004, as subsequently amended and supplemented, but, by way of derogation from the common rule, the Government's simple or emergency ordinances are not subject to judicial review by the courts of common law, but, by virtue of their quality as primary regulatory acts, thus equivalent to the law, they are subject to the constitutional review enshrined in the Basic Law. As such, the investigation of the legality of the Government's simple or emergency ordinances concerns exclusively the reference to the Basic Law, which enshrines the procedure for the adoption of this type of normative act, as well as the fundamental rights and freedoms that its content must observe, and, in accordance with the constitutional and legal provisions in force, only the Constitutional Court is empowered to

[75] Published in the Official Gazette of Romania, Part I, no. 92 of 1 February 2017, rejected by Law no. 8/2017, published in the Official Gazette of Romania, Part I, no.144 of 24 February 2017.

adjudicate on the Government's simple or emergency ordinances, no other public authority having the material competence in this area. In this respect, the finding of non-compliance with the Constitution lacks the normative act of its legal effects, the applicable sanction concerning only the removal of the act from the active fund of the law, without being the premise of a legal liability of the persons involved in the legislative procedure or in the decisional act.

The Court concluded that no other public authority, belonging to a power other than the legislature, can control the Government's normative act from the point of view of the opportunity of the act of law-making. Assessing the appropriateness of adopting an emergency ordinance, in terms of the decision on law-making, is an exclusive prerogative of the delegated legislator, who may be censored only as expressly provided for in the Constitution, that is only through the parliamentary control exercised according to art. 115 par. (5) of the Basic Law. Only the Parliament can decide on the fate of such a normative act of the Government, by adopting a law approving or rejecting the ordinance, when, during the parliamentary debates, it has the power to censure the Government Ordinance, both in terms of legality and of opportunity. Moreover, according to art. 115 par. (8) of the Constitution, the law approving or rejecting an ordinance shall regulate, if such is the case, the necessary steps concerning the legal effects caused while the ordinance was in force.

Hence, by checking the circumstances in which the Government adopted the Emergency Ordinance no.13/2017, the Public Ministry - the Prosecutor's Office attached to the High Court of Cassation and Justice - the National Anticorruption Directorate has assumed the power to conduct a criminal inquiry in an area going beyond the legal framework, which may lead to an institutional blockage in terms of the constitutional provisions that enshrine the separation and balance of powers within the state. In the conditions under which the criminal prosecution requires research and criminal investigation on how the Government fulfilled the duties of the delegated legislature, the action of the Public Ministry becomes abusive and puts pressure on the members of the Government, which affects the sound operation of this authority as to what concerns the act of law-making, having as a result the fact that the delegated legislator would be deterred/intimidated from exercising its constitutional powers. Thus, through its conduct, the Public Ministry - the Prosecutor's Office attached to the High Court of Cassation and Justice - the National Anticorruption Directorate has acted *ultra vires*, has assumed a competence that it does

not possess - the control of the way to adopt a normative act, in terms of its legality and opportunity, which affected the good functioning of an authority.

There was a different situation altogether examined in the case of the Constitutional Court's Decision no.757/2017. In this case, the President of the Senate requested the Constitutional Court to resolve a legal conflict of a constitutional nature between the Government of Romania and the Public Ministry - the Prosecutor's Office attached to the High Court of Cassation and Justice - the National Anticorruption Directorate (N.A.D.), triggered by the criminal investigation by the N.A.D. of the legality of the Government Decision no.858/2013[76], respectively of the Government Decision no.943/2013[77]. In other words, it was requested to adjudicate on that, from the point of view of the criminal liability, as regards the verification of the legality of the secondary regulatory acts issued by the Government (the decisions), the same legal regime applies as to the primary regulatory acts adopted by the Government (ordinances and emergency ordinances).

This time, however, the Court held that the two Decisions of the Government are administrative acts of authority, of an individual nature. As such, in view of the dichotomy existing between the normative acts (the laws, the ordinances, the emergency ordinances and the normative decisions of the Government) and the individual acts (the decision of the Government with an individual nature), there can be no parallel between the two situations, in terms of criminal responsibility, especially since only the administrative acts of an individual nature can produce benefits, advantages or aids, as provided by the criminal law, so that the criminal investigative body has the competence to investigate the acts/facts of criminal significance, committed in relation to the issuance of the individual administrative act.

As such, insofar as the investigation on the legality of the individual administrative act is a matter prior and incidental to the prosecution and to the trial of the fact of which the person is accused, both the prosecution and the trial by a court in criminal proceedings may be carried out without the violation of art. 52 and art.126 par. (6) of the Constitution, all the more so since the criminal law provides for sufficient filters to ensure that criminal prosecution is not abusively/randomly/subjectively initiated, issues that concern the way in which the case is investigated, with sufficient mechanisms/procedures to remedy its possible deficiencies.

The Court emphasized that it is obvious that, in terms of the opportunity of issuing the individual administrative act, the Public Ministry does not have the power to prosecute, but it has

[76] Published in the Official Gazette of Romania, Part I, no. 692 of 13 November 2013.
[77] Published in the Official Gazette of Romania, Part I, no. 792 of 17 December 2013.

the power to investigate the criminal actions committed in connection with its issuance. Since there is no mechanism to control the opportunity of issuing the administrative act, if the law allows for a specific administrative operation to be left to the margin of appreciation of the administrative body, there can be no question of censoring the opportunity of its appreciation. It is for the court to ascertain whether the charge in criminal matters concerns acts/facts related to the opportunity or to the circumstances of the issuing of the individual administrative act.

5. Conclusions

The regulation of the administrative contentious by Law no. 554/2004 brought beneficial changes to the earlier legal framework, one of the most important being the one that covers the fundamental concepts used in this specific field, among whom it can also be found the notion of "administrative act", with its subdivisions: "a normative administrative act" and "an individual administrative act". However, the meaning of these syntagma is further developed in the judicial practice, whether we are talking about common law courts or about the Constitutional Court, by the judge called upon to apply the legal provisions to specific cases.

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