ADMINISTRATIVE ACTS EXTEMPTED FROM JUDICIAL REVIEW BY ADMINISTRATIVE COURTS

Marta – Claudia CLIZA[*]

Abstract

The Romanian legislation, meaning by this Law no. 554/2004, creates in article no. 5 a special regime for some administrative acts which will be considered as exceptions from the "common administrative procedure". These acts are not subject to the review of the courts, the exception being a total one or a partial one as it will be described in this study. The existence of the administrative procedure does not mean an absolute control on the administration. This is in fact the main reason why this article was included in Law no. 554/2004 and all implications will be described in this study.

Keywords: *Constitution, administrative acts, pleas of inadmissibility, Law no. 554/2004, contentious-administrative courts.*

1. Introduction

The administrative control is not and will never be an absolute one, without limits, so that once with the idea of such a control has also arisen the idea of some categories of acts that are to be removed from the scope of the control of the courts.

Traditionally, these acts have been called "pleas of inadmissibility", meaning administrative acts that are exempted from the full or partial review of the contentious-administrative courts.

Owing to the fact that the existence of such acts falls into the category of the exceptions, the importance of the concept and each category analysis involves a great importance for the theorists and practitioners of the administrative law.

2. The analysis of the administrative acts exempted from the judicial review by the courts – theoretical and practical implications

This analysis is based on the current wording of art. 4 of Law no. 554/2004[1], which provides the following:

(1) The following shall not be brought before the contentious-administrative court:

a) the administrative acts of the public authorities concerning their relations with the Parliament;

b) the acts of military command.

(2) The administrative acts for which amendment and dissolutions provided another judicial procedure by an organic law shall not be brought before the contentious-administrative.

[*] Associate Professor, PhD, Faculty of Law, "Nicolae Titulescu" University of Bucharest (email: cliza_claudia@yahoo.com).

[1] Law no. 554/2004 was amended and supplemented by the G.E.O. no. 190/2005 (Official Gazette no. 1179 of 28.12.2005), Law no. 262/2007 (Official Gazette no. 510 of 30.07.2007), Law no. 97/2008 (Official Gazette no. 294 of 15.04.2008), Law no. 100/2008 (Official Gazette no. 375 of 16.05.2008), Law no. 202/2010 (Official Gazette no. 714 of 26.10.2010) and Law no. 299/2011 (Official Gazette no. 916 of 22.12.2011), Law no. 76/2012 (Official Gazette no. 335/30.05.2012), Law no. 187/2012 (Official Gazette no. 757 of 12.11.2012), Law no. 2/2013 (Official Gazette no. 89 of 12.02.2013)

(3) The administrative acts for the application of the state of war, of siege or of emergency, those relating to national defence and security, or those issued to restore the public order, as well as those to eliminate the consequences of the natural disasters, of epidemics and epizootic diseases, shall be appealed only by abuse of power.

The Constitution of 1923 states that: "*The judicial power does not have the right to judge the government and military command acts.*"

The contentious-administrative law of 1925, enforced based on the wording of the Constitution, has come up with a definition of the governments act, definition that has been criticized by the doctrine.

In general, in the current western doctrine the administrative acts issued in "*exceptional circumstances*" or the acts expressing "*the powers of the executive in case of danger*" are considered within the scope of the plea of inadmissibility.

The Constitution of 1991 contained only art. 4 par. 2, which stated: "*The conditions and the limits of this right (the right to act within the contentious-administrative) shall be established by organic law*", wording that has remained unchanged and has become art. 52 par. 2 by the review of the Constitution by Law no. 429/2003, passed by the national referendum of October 18th-19th, 2003.

The review law, as shown, introduces in art. 126, par. 6 thesis I, the principle of art. 107, final par. of the Constitution of 1967 with the wording: "*The judicial review of the public authorities administrative acts before the contentious-administrative is granted, except those regarding the relations with the Parliaments, as well as the acts of military command*".

Basically, the term "government acts" is replaced by the term "acts regarding the relations with the Parliament", but art. 48 par. 2 that has become art. 52 par. 2 remained in force, so that the problem of their "reconciling" has arisen, especially since the Prof. Ioan Vida brought in the current Romanian legal Doctrine the thesis of the "intra-constitutional antinomies".

Two interpretations are possible:

a) art. 126 par.6 is the only establishment of the matter concerning the scope of the plea of inadmissibility and art. 52 par. 2 concerns other matters; and

b) art.126 par.6 governs the plea of inadmissibility of constitutional "status" and art. 52 par.2 governs the plea of inadmissibility of legal "status" within the limits permitted by art. 53 of the Constitution.

The scope of the plea of inadmissibility

Strictly speaking, the scope of the exempted administrative acts includes only the two categories of administrative acts provided by art. 126 par. 6 of the Constitution.

The traditional pleas of inadmissibility were grouped into two categories:[2]

- the pleas of inadmissibility deducted from the nature of the act;
- the pleas of inadmissibility determined by the existence of a parallel appeal.

Therefore, we can state that there are absolute exceptions, the two situations governed by par. 1 letters a) and b) and the relative exceptions, the situation of the

[2] For more, see E.E Stefan, *Administrative law manual, Part II, Seminar book*, Universul Juridic Publishing, Bucharest, 2012, p. 98.

"parallel appeal" governed by par. 2 of art. 5 of Law no. 554/2004.[3]

It was agreed that for the situations provided by par. 1 to use the term "exceptions to the contentious-administrative" and for the parallel appeal the term "pleas of inadmissibility in the contentious-administrative courts".

The parallel appeal, since it covers the disputes on the administrative act, also represents an administrative dispute, but it is formally settled outside the contentious-administrative courts.

It should be noted that the legislator asked that the "parallel appeal" to be regulated by organic law and to represent a judicial procedure in terms of article 126 of the Constitution.

The category of the ***acts of military command***, category of acts exempted from the contentious-administrative, provided for the first time in the Constitution of 1923 and then in the first special law of the contentious-administrative of 1925, was resumed in the identical wording in Law no. 29/1990 in order to get a constitutional consecration on the occasion of the review of the Constitution of 1991[4].

The justification for the introduction of such categories of acts exempted from the judicial review by the courts is observed in the situations arisen during the First World War, in parliamentarians' and public opinion memory being still actual, in 1923 some negative circumstances related to the command of the troops, the concerns particularly regarding the existing dangers for the technical leadership of the army if the judiciary would have the right to censor such acts[5].

The remove of such acts from the judicial review was based on the need to ensure the spirit of discipline of subordinates reported to the idea of prestige and authority of superiors, as well as to the conditions of the unit, the capacity and speed necessary for the military operations[6].

Therefore, emerged the main idea that in order to be within the scope of this category, there has to be about an act that comes from a military authority, being impossible for such acts to come from the civil or military authorities that "because of their nature or purpose are not commandments, hence the necessity of defining the concept of commandment[7].

The interwar doctrine usually distinguished between the acts of military command, the government acts of military command (those specific to the state of siege, requisitions, etc.) and the acts of military administration. This distinction aimed at the authority acts because it was widely acknowledged that the military authorities, in their capacity of legal entities, may also perform management acts[8].

However, not any act of a military authority was a military command act. While the acts from the first category which included for example acts of appointment of officers, of military rank promotion, of sanction, retirement etc., could be brought

[3] For more, see E.E Stefan, *Administrative law manual, Part II,* Universul Juridic Publishing, Bucharest, 2013, p. 69-70.
[4] D. A. Tofan, Drept administrativ, (Administrative Law, 2nd volume), All Beck Publishing, Bucharest 2004, p. 324.
[5] A. Iorgovan, Tratat de drept administrativ (Administrative Law Treaty), 2nd volume, 3rd edition, reorganized, revised and supplemented, Editura All Beck, collection of university course, Bucharest, 2002, p.560.
[6] R. N. Petrescu, Drept administrativ (Administrative Law), Accent, Cluj-Napoca Publishing, 2004, p. 414; L.Giurgiu, A. Segărceanu, C.G. Zaharie, Drept administrativ (Administrative Law), 3rd edition, reorganized, revised and supplemented, Sylvi Publishing, Bucharest, 2002, p.422; C. Ranicescu, Contenciosul administrative roman (Romanian contentious-administrative), 2nd edition, "Universală Alcalay" Co. Publishing, Bucharest 1937, p.311.
[7] D. A. Tofan, Drept administrativ, (Administrative Law) 2nd volume, All Beck Publishing, Bucharest 2004, p. 324.
[8] A. Iorgovan, Tratat de drept administrativ (Administrative Law Treaty), 2nd volume, 3rd edition, reorganized, revised and supplemented, Editura All Beck, collection of university course, Bucharest, 2002, p.561.

before the contentious-administrative court, the acts included in the second category, no matter if they came from the Head of the State, the Government, the Minister of Defence, could not be brought before the contentious-administrative[9].

For example, the interwar judicial practice ruled that the acts of withdrawal could be investigated and considered illegal by the courts, but could not be canceled; instead the plaintiff had the right to obtain the rectification of pension, by assuming that the maximum years of service would be achieved, as well as the civil damages[10].

During the interwar period, the delimitation of the scope of the military command acts from the government acts was difficult to accomplish due to the vagueness of the contentious-administrative law of 1925.

Most of the authors dealing with this concept have made the distinction between the acts of military command that are involved in the relations between the military authority and the civilian population and the acts of military command that are involved in the military hierarchy. The former were subject to the judicial review by way of the contentious-administrative, except in cases were they were committed during war time[11].

By elimination, only the acts that met the duty of command, of ordering something in what concerned military issues, were maintained within the scope of the acts of military command.

Therefore, the following acts were considered acts of military command during war time: troops changing, their building-up on the attack or defense line, attack, advance or retreat, etc., and during peace time: the establishment, reorganization or dissolution of military units, delimitation of recruitment areas, troops building-up for exercise, maneuvers.

From this perspective maintained for decades, an order of the Minister of National Defense passed in 1990, that set out quite arbitrarily that all administrative acts implemented in the army were included in the category of acts of military commend, which is said of the exempted acts, undeniably represents an illegal order[12].

The including of an actual administrative act within the scope of the acts of military command remains a matter of the court judgment, but also an assessment made by the public law science[13].

In other words, the contentious-administrative courts shall exercise a maximum caution when including an administrative act in the scope of the acts of military command and therefore of those exempted from the judicial review[14].

In relation with all these doctrine elements, the consecration by the new contentious-administrative law of the concept of act of military command is welcome.

Thus, according to art. 2 par. (1) letter j) of the law, the act of military command is defined as the administrative act concerning

[9] D. A. Tofan, Drept administrativ, (Administrative Law, 2nd volume), All Beck Publishing Bucharest 2004, p. 325.
[10] R. N. Petrescu, Drept administrative (Administrative Law), Accent, Cluj-Napoca Publishing, 2004, p. 415.
[11] A. Iorgovan, Tratat de drept administrativ (Administrative Law Treaty), 2nd volume, 3rd edition, reorganized, revised and supplemented, Editura All Beck, collection of university course, Bucharest, 2002, p.562 and the following.
[12] D. A. Tofan, Drept administrativ (Administrative Law), 2nd volume, All Beck Publishing, Bucharest 2004, p. 325.
[13] A. Iorgovan, Tratat de drept administrativ (Administrative Law Treaty), 2nd volume, 3rd edition, reorganized, revised and supplemented, Editura All Beck, collection of university course, Bucharest, 2002, p.565.
[14] V.Vedinaș, Drept administrativ și instituții politico-administrative (Administrative Law and political-administrative institutions), Practical Manuals, Lumina Lex Publishing, Bucharest, 2002, p.205.

the strictly military activities within the military organizations, specific to the military organization involving the right of the commanders to rule in matters relating to the troop control during war or peace time or as the case may be, during the serving of the military service[15].

In what concerns the old categories of acts exempted from the contentious-administrative review, under Law no. 29/1990, due to their nature, they were redesigned and entered into the category of those exempted under the new law of the contentious-administrative, in a particular way, based on the interpretation of art. 126 par. (6) of the republished Constitution, which regulates the pleas of inadmissibility of constitutional status in relation to art. 52 par. (2) of the republished Constitution (the conditions and limits of these rights are set by organic law), which aims the pleas of inadmissibility of legal status, within the limits accepted by art. 53 of the republished Constitution dedicated to the limitation of some rights and freedoms[16].

There is also the expression used by the Law of the contentious-administrative of 1925, in relation to the content of art. 107 of the Constitution of 1923, reason for which the marginal title of the article was changed from the "pleas of inadmissibility", as referred to in the project, in the "acts that are not brought to review and the limits of the review", the first category including the exempted acts of constitutional status and the second category including the exempted acts of legal status.

Thus, according to art. 5 par. (3) of the new regulation, "the administrative acts issued for the implementation of the state of war, siege or emergency regime, those relating to national defence and security, or those issued to restore the public order, as well as the ones designed to remove the consequences of the natural disasters, epidemics and epizootic diseases shall be appealed only by abuse of power".

In disputes involving such acts, the provisions on the suspension of the execution of the acts and on the trial of the appeal in particular situations, are not applicable.

It appears that the administrative acts listed above shall be brought before the contentious-administrative court only under certain conditions, and certain rules of the procedures set by the law are not applicable[17].

It is necessary for the respective acts to be appealed only by abuse of power, with the compliance of the conditions and limits provided by art. 53 of the republished Constitution.

In art. 2 of the law dedicated to the meaning of certain terms and expressions, the abuse of power is defined as representing "the performance of the right of assessment, belonging to the public administration authorities, by violating the fundamental right of the citizens provided by the Constitution or by the law".

In relation to the content of art. 5 par. (3) of the new law aforementioned, the old exempted categories of acts – acts relating to national security; diplomatic acts concerning the Romania's foreign policy; acts issued under exceptional circumstances – are to be reconsidered.

Thus, in what concerns the category of the acts relating to national security, in the opinion of the legislator from the inter war period, they were considered as a type of

[15] D. A. Tofan, Drept administrativ (Administrative Law), 2nd volume, All Beck Publishing, Bucharest 2004, p. 326.
[16] A. Iorgovan, Noua lege a contenciosului administrativ, Geneză şi explicaţii, (New law of the contentious-administrative, Genesis and explanations), Roata Publishing, Bucharest, 2004, p.305.
[17] A. Iorgovan, Noua lege a contenciosului administrativ, Geneză şi explicaţii, (New law of the contentious-administrative, Genesis and explanations), Roata Publishing, Bucharest, 2004, p.307.

government acts, together with the acts concerning the public order, being described as "acts aiming at the internal and external state security", a wording with the same meaning.

In turn, the jurisprudence of that time held that all the government acts that are not specifically listed in the law, in addition to the fact that they shall relate to a general interest in relation to public order or internal and external state security, "they shall be justified by the "existence of a serious and imminent danger that threatens the state".

In other words, as mentioned in the doctrine, the law should exempt them only in those serious moments when the state security was threatened and when the respective acts became governments and ceased to be simple authority acts, of organizing the law execution[18].

This is exactly what the current legislator considers by the express consecration of the abuse power criteria[19].

The first category of exceptions belongs to the political acts, traditionally qualified in the doctrine as "government acts'. Although the legislator has only defined the government acts in art. 2 par. (2) of the contentious-administrative law of 1925, later the doctrine and the jurisdiction have tried to find definitions for the government acts. Currently, the public authorities' acts - in their relation with the Parliament - benefit, under the actual amended and supplemented of Law no. 554/2004 by Law no 262/2007, from a new legal definition in art. 2 par. (1) letter k), according to which public authorities acts are "the acts issued by a public authority in the performance of its duties, provided by the Constitution or by an organic law, in what concerns the political relations with the Parliament.

From this definition would result the fact that it is about the administrative acts of all public authorities in what concerns the political relations with the Parliament. The current doctrine states that, compared with the new constitutional provisions and with the constitutional structure as a whole, in this category of exempted acts are included the political acts issued in the performance of the constitutional duties between the supreme representative body (the Parliament) and the two heads of the executive (the President and the Government) and the acts involved in case of direct relationships, when complex acts arise involving two or more authorities of the executive, of which at least one is in a direct relations with the legislator forum, with special reference hereto to the presidential decrees to be entered by the Prime Minister, and also most decrees that do not require this procedure.

Concerning the acts on the relations between the Government and the Parliament, the acts of the Parliament in the relations with the Government shall not be administrative acts; things are not that simple in what concerns the acts of the Government in its relations with the Parliament, in the board sense of the term. In the doctrine are identified two categories of acts of the Government as public authority of the executive power: government acts (political acts par excellence – motions, declarations etc.) and pure administrative acts (acts that settle technical organizational problems) of the public administration. It is also noted that not any act of the Government is a government act, because there may be decisions of the Government passed by the abuse of power and that violate rights and legitimate interests of persons. These decisions of the Government are normative or individual administrative acts,

[18] Al. Negoiță, Drept administrativ (Administrative Law), Sylvi, Publishing, Bucharest 1996, p.245.
[19] D. A. Tofan, Drept administrativ (Administrative Law), 2nd volume, All Beck Publishing, Bucharest 2004, p. 327.

and when they violate the law or supplement provisions of the law, they may be appealed before the contentious-administrative court under art. 52 of the republished Constitution and under the provisions of the special law in case, Law no. 554/20004, as further amended and supplemented. It was considered that, in case a Government decision violated the constitutional provisions, it might be appealed before the contentious-administrative court, the unconstitutionality being a serious form of illegality.

In order to analyze the acts concerning the relations of the Parliament with the President, the duties of the President in the relations with the Parliament shall be considered. In this category, the administrative doctrine includes: the addressing of messages to the Parliament (art. 88), the calling and dissolution of the Parliament (art. 89), the referendum (art. 90), the promulgation of the law (art. 77), the appointment of the candidate for the position of Prime Minister (art. 85 and art. 103) etc.

Professor Antonie Iorgovan states that when we traditionally distinguish between the decrees as legal acts and the exclusive political acts of the President of Romania, including its messages, we actually distinguish between the administrative law acts and the constitutional law acts that concern the exclusive political relations between the President and other political structures. It is also argued that most of the President's duties are performed by issuing decrees that shall be passed by the Prime Minister, and in this way is performed an indirect parliamentary control on the President by the Prime Minister, who is politically responsible before the Parliament.

Following extensive debates and arguments that took place in the doctrine and in the jurisprudence, it was held that the decrees of the President of Romania passed by the Prime Minister are complex legal acts that state a constitutional relationship between the two heads of the executive, on the one hand, and the Parliament, on the other hand, being included in the categories of the pleas of inadmissibility enshrined in art. 126 par. (6) of the Constitution, republished, meaning the acts concerning the relations with the Parliament[20].

The administrative acts listed in par. (3) of art 5 may be appealed before the contentious-administrative court only under certain conditions, and certain rules of the procedure regulated by the law of the contentious-administrative are not applicable in these cases; thus, it is firstly required that the respective acts to be appealed only for abuse of power, being understood that the concept of abuse of power in terms of art. 2 letter n) of the law is taken into account.

Therefore, in the absence of express provisions in the organic law, the contentious-administrative courts, when settling the disputes concerning the abuse of power, shall apply directly the wordings of the Constitution and firstly art. 53.

Thus, the courts shall determine whether the administrative act which represented the object of the dispute was necessary for the implementation of the regimes, or as the case may be, for the removal of the situations provided in par. 3 of art. 5.

Then the courts shall determine if the act appears to be necessary in a democratic society and if the limitation by the administrative act of exercising the violated right is proportional to the situation that caused the issuance of the act, and if it is somehow discriminatory.

[20] I. Rîciu, Procedura contenciosului administrativ (Contentious-administrative procedure), Hamangiu Publishing 2009, p. 178-181.

3. Conclusions

The specialized literature has widely discussed the issue of these types of acts, but has not excluded the fact that the establishment of some categories of exceptions from the legal review of the contentious-administrative courts would prevent the common law courts to take legal action to defend human rights and freedoms, such as the granting of indemnities, etc., however without having the jurisdiction to cancel or suspend the administrative acts that have caused the prejudice. This is why it should be concluded that the citizens should not remain uncovered by the total lack of a legal control, but this control shall not bear the substance of the act.

References

- Iorgovan, New law of the contentious-administrative, Genesis and explanations, Roata Publishing, Bucharest, 2004
- Iorgovan, *Administrative Law Treaty*, 2nd volume, 3rd edition, reorganized, revised and supplemented, Editura All Beck, collection of university course, Bucharest, 2002.
- Al. Negoiţă, *Administrative Law*, Sylvi, Publishing, Bucharest 1996.
- Ranicescu, *Romanian contentious-administrative*, 2nd edition, "Universală Alcalay" Co. Publishing, Bucharest 1937.
- A. Tofan, *Administrative Law*, 2nd volume, All Beck Publishing Bucharest, 2004.
- Rîciu, *Contentious-administrative procedure*, Hamangiu Publishing, Bucharest, 2009.
- L.Giurgiu, A. Segărceanu, C.G. Zaharie, *Administrative Law*, 3rd edition, reorganized, revised and supplemented, Sylvi Publishing, Bucharest, 2002.
- R. N. Petrescu, *Administrative Law*, Accent, Cluj-Napoca Publishing, 2004.
- V.Vedinaş, *Administrative Law and political-administrative institutions*, Practical Manuals, Lumina Lex Publishing, Bucharest, 2002.
- E.E Stefan, *Administrative law manual, Part II, Seminar book*, Universul Juridic Publishing, Bucharest, 2012.
- E.E Stefan, *Administrative law manual, Part II*, Universul Juridic Publishing, Bucharest, 2013.
- Law no. 554/2004, amended and supplemented by the G.E.O. no. 190/2005 (Official Gazette no. 1179 of 28.12.2005), Law no. 262/2007 (Official Gazette no. 510 of 30.07.2007), Law no. 97/2008 (Official Gazette no. 294 of 15.04.2008), Law no. 100/2008 (Official Gazette no. 375 of 16.05.2008), Law no. 202/2010 (Official Gazette no. 714 of 26.10.2010) and Law no. 299/2011 (Official Gazette no. 916 of 22.12.2011), Law no. 76/2012 (Official Gazette no. 335/30.05.2012), Law no. 187/2012 (Official Gazette no. 757 of 12.11.2012), Law no. 2/2013 (Official Gazette no. 89 of 12.02.2013).