THE REPRESENTATION OF THE ADMINISTRATIVE AND TERRITORIAL DIVISIONS BEFORE THE COURT OF LAW

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Abstract

The appropriate establishment of the local authority entitled to have the capacity of legal representative before the courts of law, when an administrative and territorial division is party to a case, raised many problems within the judicial practice. Not often, the motion to dismiss on grounds of lack of passive legal standing of the administrative and territorial divisions in the capacity of defendant in a dispute, was claimed or substantiated. This is why, this study aims to determine, in terms of the legislation in force, the local government authorities which are entitled to have the capacity of legal representative of the administrative and territorial divisions within a contentious administrative dispute. In order to emphasize the importance of the appropriate construction of the legal texts which regulate the subject in question, in the end of this study, we will expose a selection of case studies of the national case law.

Keywords*: Constitution, local government authorities, the motion to dismiss on grounds of lack of passive legal standing, contentious administrative, the Constitutional Court of Romania*.

1. Introduction

During the interwar period, the administrative law was the discipline which: „covered the activity of an authority. The state is a community situated on a territory consisting of governors and governed persons[1].” Along with the same lines, in what concerns the activity of the local government, deemed in the same time as an administrative authority, it was shown that it fulfills its duties by means of certain bodies consisting of natural persons or groups of natural persons, such as: ministers, prefects, police commissioners, county councils, town councils etc.[2]

The national legislation provides that the activity of the local government authorities is based on a series of principles of which the lawfulness principle is distinguished as being the base of the organization of state activity in general[3]. While in the field of private law, concepts such as economic freedom, competition[4], the principle of mutual consent, etc prevail, these concepts are unknown for the public law. Principles such as local autonomy, decentralization, public services

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[1] Paul Negulescu, *Tratat de drept administrativ.Principii generale*, vol.I, ed. IV, Marvan Publishing House, Bucharest, 1934, p.38.

[2] Anibal Teodorescu, *Tratat de drept administrativ*, vol.I, ed. V, Institutul de Arte Grafice Eminescu S.A., Bucharest, 1929, p.150.

[3] For a broad analysis of lawfulness principle, see Elena Anghel, *The lawfulness principle*, in CKS-eBook 2010, vol. I, Pro Universitaria Publishing House, Bucharest, ISSN 2068-779.

[4] See Laura Lazăr, *Abuzul de poziție dominantă. Evoluții și perspective în dreptul european și național al concurenței*, C.H.Beck Publishing House, Bucharest, 2013, 272 p.

deconcentration, etc. are specific to local government.

The principle of local autonomy established by art. 120 par. (1) of the Constitution, does not entail total independence and exclusive competence of the public authorities within administrative and territorial divisions, but they are bound to obey the legal regulations valid throughout the territory of the country, the legal provisions adopted in order to protect national interests[5]. The Constitutional Court of Romania states that, in its case law, the local government authorities whereby the local autonomy is fulfilled are the local councils and the mayors appointed within communes and towns, as well as and the county council[6].

Therefore, the European Charter of local autonomy itself, adopted in Strasbourg on October 15th, 1985 according to art. 3 item 1, refers to the internal legal framework, by means of the regulation of the local autonomy concept: "the right and effective capacity of local government authorities to settle and manage, within the law, in own behalf and in the interest of local population, an important part of public affairs"[7] Taking into account that art. 4 par. (2) of the Treaty on the European Union[8], provides that „The European Union observes (…) their national identity inherent to their fundamental, political and constitutional structures, including in what concerns local and regional autonomy". In a conference which remained memorable within the legal field, held at the Institute of Administrative Sciences on January 31st, 1926, Constantin Argetoianu, concluded the following, in the applause of the public: "the issue of decentralization is today, the same as yesterday, a problem to be solved in our country"[9].

The powers provided by the law in force for the public authorities within the administrative and territorial divisions include the powers of representation of their interests before the courts of law, according to Law no. 554/2004 of the contentious administrative[10]. In what concerns the legal proceedings within the contentious administrative, we hereby state that they are supplemented, according to art. 28, by the provisions of the Civil Code and the Code of civil procedure, up to the extent they are not inconsistent with the specificity of power relations between public authorities, on the one side and the persons aggrieved in their legitimate rights or interests, on the other side.

2. Content

2.1. The concepts of administrative and territorial divisions and local public authorities

The legal ground of the representation before the courts of law of the administrative and territorial decisions is the following: the

[5] The Constitutional Court of Romania, Decision no. 1162/2010, published in Official Journal no.747/2010.

[6] The Constitutional Court of Romania, Decision no. 822/2008, published in Official Journal no.593/2008.

[7] The Constitutional Court of Romania, Decision no. 566/2004, published in Official Journal no.155/2004.

[8] For details on the Treaty on the European Union, see Roxana-Mariana Popescu, *Introducere în dreptul Uniunii Europene*, Universul Juridic Publishing House, Bucharest, 2011, pag. 62-63.

[9] Constantin Argetoianu**,** *Administrative decentralization and regionalism*, Conference held at the Institute of Administrative Sciences on January 31st, 1926, published in Revista de Drept Public no. 2/1995, pp.99-111.

[10] Law no. 554/2004 of the contentious administrative, published in Official Journal no. 1154/2004 (latest amendment by Law no. 138/2014 on the amendment and supplementation of Law no. 134/2010 on the Code of civil procedure, as well as for the amendment and supplementation of related regulatory instruments, published in Official Journal no.753/2014).

Constitution of Romania and Law no. 215/2001 on the local government[11].

First of all, it is necessary to define the meaning of administrative and territorial divisions, according to the legislation in force and then to analyze the local government authorities which are entitled to represent before the courts of law the legal interests of the administrative and territorial divisions. The Constitutional Court of Romania considered that the administrative organization of the territory means its delimitation, according to economic, social, cultural, environmental, population etc. criteria, in administrative and territorial divisions, for the purpose of the organization and operation of the local government under the decentralization, local autonomy and public services decentralization principles, and under the eligibility principle of the local government authorities[12].

As we know, according to the Constitution of Romania, there are provisions on the administrative and territorial divisions and on the local government authorities in various articles, as follows:

- Art. 3 par. 3: „the territory is organized administratively into communes, towns and counties. According to the provisions of the law, certain towns are declared municipalities".
- Art. 120 par 1: "the local government within the administrative and territorial divisions shall be based on the principles of decentralization, local autonomy and public services deconcentration".
- Art. 121 par.1: "the local government authorities by which the local autonomy in communes and towns is fulfilled, are local councils and mayors designated according to the law".
- Art.122 par.1: "the county council is the local government authority coordinating the activity of commune and town councils, with a view to carry out the public services of county interest".
- Art. 123 par. 4: "there are no subordination relationships between prefects, on the one side, local councils and mayors, as well as county councils and their chairmen, on the other side".

Law no. 215/2001 on local governments provides on the subject approached by us on various articles, of which we hereby mention the following:

- Art. 1 alin.2 letter d): "deliberative authorities – local council, county council, General Council of Bucharest, local councils of administrative and territorial subdivisions of municipalities".
- Art. 1 par. 2 letter e): "executive authorities: mayors of communes, towns, municipalities, administrative subdivisions of municipalities, general mayor of Bucharest, the chairman of the county council".
- Art. 20 par. 1: "communes, towns, municipalities are the administrative and territorial divisions the local autonomy is exercised in and where the local government authorities are organized and function".

[11] Law no.215/2001 on local public government published in Official Journal no.204/2001 with latest amendment by law no. 265/2015 for the approval of Government Emergency Ordinance no.68/2014 for the amendment and supplementation of certain regulatory instruments

[12] The Constitutional Court of Romania, Decision no. 1177/2007, published in Official Journal no.871/2007, mentioned by Toader Tudorel, *Constituția României reflectată în jurisprudența constituțională,* Hamangiu Publishing House, Bucharest, 2011, p. 246.

Compared to the revised constitutional text, Law no. 286/2006 which brought essential amendments and supplementations to Law on the local government by leading to its republishing, identifies an executive authority within the level of county government, in the person of the chairman of the county council referred to in art. 1 par. 2 letter e) dedicated to the definition of certain terms and phrases (together with the mayors of communes, towns, municipalities and administrative and territorial subdivisions and with the general mayor of Bucharest), as executive authority[13].

2.2. The representation of the administrative and territorial divisions before the courts of law

Therefore, according to the legislation in force, the local deliberative authorities of Romania are the following: local council, county council, General Council of Bucharest, local councils of administrative and territorial subdivisions of municipalities, while the executive authorities are the following: mayors of communes, towns, municipalities, administrative subdivisions of municipalities, general mayor of Bucharest, chairman of the county council.

The question that arises is the following: in case of a dispute submitted for settlement to the contentious administrative court, which is the representative of the administrative and territorial division before the courts of law, the local deliberative authorities or the local executive authorities?

The answer to this question is simple. Law no. 215/2001 of the local government is the one providing the answer in art. 21 par. (2): the administrative and territorial divisions are represented before the courts of law by the mayor or by the chairman of the county council, as the case may be. According to the doctrine, this provision establishes the correlative right and obligation of the mayor (in case of communes, towns and municipalities) and respectively, of the chairman of the county council (in case of county), to represent before the courts of law the administrative and territorial divisions, in any circumstance, in relation to the place where the legal text is situated, in chapter called "*General provisions*".[14]

Furthermore, an interesting provision is the indication according to which in order for the protection of the interests of the administrative and territorial divisions, the mayor, respectively the chairman of the county council, represents the administrative and territorial divisions before the courts of law in the capacity of legal representative and not on own behalf (art. 21 par. 2^1).

According to an author, such an explanation was not necessary because the fact that the two authorities do not represent themselves before the court of law, bur the administrative and territorial division, was inhered from the provisions of par.(2)[15]. The quoted author states that this matter is reinforced by the provisions of par.(3), which provide the right of the mayor, respectively of the chairman of county council to authorize a long term higher legal education person within the specialized body of the mayor, respectively of the county council, or a lawyer, to represent the interests of the administrative and territorial division, and of the local government authorities before the courts of law[16].

[13] Dana Apostol Tofan, *Unele considerații privind reprezentarea unităților administrativ-teritoriale în justiție*, în Curierul Judiciar no.11/2010, Bucharest, p. 635.

[14] Idem, p. 637.

[15] Mihai Cristian Apostolache, *Primarul în România și Uniunea Europeană*, Universul Juridic Publishing House, Bucharest, 2015, p. 69.

[16] Idem, pp.69-70.

In what concerns the meaning of the concepts of capacity to be a party to legal proceedings and of legal standing, it should be noted that each concept has a different meaning. According to the Code of Civil procedure, there are two types of capacity to be a party to legal proceedings: use and exercise capacity. Therefore, as an author stated, the capacity to be a party to legal proceedings is the reflection on the procedural plan of the of the civil capacity of the material civil law, defined as that part of legal capacity of the person consisting of the capacity to have and exercise civil rights and to have and to undertake civil obligations, by concluding legal instruments[17]. According to art. 36 of the Code of civil procedure, the legal standing emerges from the identity between the parties and the subjects of the legal dispute, as it is submitted to the court of law.[18] The doctrine stated that the legal standing is the title which grants to a person the power to bring before the court of law the right of which sanction is required[19]. The quoted author showed that it is the procedural rendering of the capacity of holder of the right under which a person files a court action.

We should not fail to take into account the provisions of art. 123 par. 6) of the Constitution which expressly state that the prefect may appeal before the contentious administrative court, an act of the county and local council or of the mayor, if the act is deemed illegal[20]. This right of the prefect is called public guardianship. The institution of the public guardianship is established within the constitutional level in art. 123 par. (5) of the Fundamental Law. It is inconceivable in a state subject to the rule of law that an illegal act of a local authority cannot be appealed before the court of law by the prefect, as the Government representative, taking into account the fundamental mission of the Government to ensure the applications of the laws[21].

Law no. 215/2001 on the local government provides that the administrative and territorial divisions are legal entities of public law, with full legal capacity and patrimony. These are legal subjects of fiscal law, holders of the sole registration code and of the accounts opened with treasury and banking units.

The Constitutional Court of Romania, by means of Decision no. 356/2002 established that the mayor has the capacity to represent the administrative and territorial divisions before the court of law only in relations with third parties and not with the local council which, as in case of the mayor, is a body of the administrative and territorial division and has the same legitimacy as the mayor[22].

According to the Code of civil procedure, the conditions for the filing of a civil action are the following: any petition can be filed and supported if the person filing it has the capacity to be a party to legal proceedings, has the legal standing, raises a claim and substantiates an interest. Legal liability is involved in ensuring lawfulness,

[17] Oliviu Puie, *Contractele administrative în contextul noului Cod civil și al noului Cod de procedură civilă*, Universul Juridic Publishing House, Bucharest, 2014, p. 59.

[18] Law no. 134/2010 on the Code of civil procedure, republished in Official Journal no. 247/2015 (with the last amendment by Government Emergency Ordinance no. 1/2016 for the amendment of Law no. 134/2010 on the Code of civil procedure, and of related regulatory instruments, published in Official Journal no. 85/2016).

[19] Idem.

[20] In what concerns the parties to disputes submitted for settlement to contentious administrative courts, see Marta Claudia Cliza, *Drept administrativ, Part II*, Universul Juridic Publishing House, Bucharest, 2012, pp.109-115.

[21] The Constitutional Court of Romania, Decision no. 314/2005, published in Official journal no.694/2005.

[22] The Constitutional Court of Romania, Decision no. 66/2004, published in Official Journal no.235/2004.

as the mere approval of sanction measures would not be effective if their application did not pursue the restoration of the rights established by the law[23].

2.3. Case studies

In a case, the High Court of Cassation and Justice noted that the arguments of the appellant and of intervener commune Becicherecu Mic on the existence of a typing mistake and on the impossibility to remedy it on the merits, are unsubstantiated[24]. The High Court of Cassation and Justice showed that the Court of Appeal correctly noted that art. 19 of Local government law provides that towns, communes and counties are legal entities of public law and that they have patrimony and legal capacity, and that the real estate in question is the property of commune Becicherecu Mic. In this case, the signature of the mayor on the statement of claim is obviously biding on the administrative and territorial division which is the holder of the real estate contemplated by the dispute, respectively commune Becicherecu Mic, a fact which was not challenged by either party and which was noted in the recitals of the ruling under appeal.

Last but not least, we state that by means of Decision no. 12/2015 of the Panel for the settlement of law matters, the High Court of Cassation and Justice recently established that, under law no. 215/2001 of the local government (...) and of law no. 554/2004 of the contentious administrative (...), the administrative and territorial division, by means of its executive authority, namely the mayor, is not entitled to appeal before the contentious administrative court the resolutions adopted by its deliberative authority, respectively the local council, or the General Council of Bucharest, as the case may be[25].

In another case, the court held that the local public authorities have passive legal standing in case of a legal action on an element of the service report of a public officer within the local government body, as the commune, as a legal entity and therefore, a collective subject of law, can only undertake and fulfill obligations by means of its authorities which the law-maker vested with a certain competence[26].

As the concession right on the goods which are public and private property of the commune belongs, according to art. 36 par.(5) letter a) and b) exclusively to the local council, the mayor is not entitled, neither on own behalf, nor in the capacity of representative, to challenge the lawfulness of such a resolution, the decision to grant concession adopted by the local council being the decision of the administrative and territorial division, according to another case.[27]

3. Conclusions

As the title of this study anticipated, we analyzed an extensive bibliography in

[23] Elena Anghel, *The responsibility principle*, in Proceedings of the Challenges of the Knowledge Society Conference (CKS) no. 5/2015, pag. 364-370.

[24] The High Court of Cassation and Justice, division of contentious administrative and fiscal, decision no. 2298 of May 3rd, 2007, not published, *apud* Gabriela Bogasiu, *Legea contenciosului administrativ comentată şi adnotată*, edition III, revised and supplemented, Universul Juridic Publishing House, Bucharest, 2015, p.34-35.

[25] The High Court and Cassation and Justice, the Panel for the settlement of legal matters, decision no. 12 of May 25th, 2015, published in Official Journal no. 773/2015, Dana Apostol Tofan, *Drept administrativ*, vol. II, edition 3, C.H.Beck Publishing House, Bucharest, 2015, p.206.

[26] Craiova Court of Appeal, division of contentious administrative and fiscal, decision no. 898 of September 20th, 2005 in Culegere de practică judiciară 2005, Lumina Lex Publishing House, Bucharest, 2006, p.27-30

[27] Suceava Court of Appeal, division of contentious administrative and fiscal, decision no. 311 of February 26th, 2010, apud G Bogasiu, *op.cit.*, p. 36.

order to identify which authority is entitled to represent the interests of the administrative and territorial divisions of Romania before the courts of law. According to the legislation, doctrine and case law, the administrative and territorial divisions are represented before the court of law, by the mayor or by the chairman of the county council, as the case may be. We exposed in the conclusions of the study, a selection of case studies which were meant to reinforce the conclusions we reached during the draw up of this study.

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