

CONTENTIOUS CONSTITUTIONAL AND CONTENTIOUS ADMINISTRATIVE

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ABSTRACT: *The requirements of the State based on the rule of law, enshrined by Article 1 paragraph (3) first sentence of the Constitution, concern the major goals of state activity, foreshadowed in what is commonly called as being the rule of law, expression that implies subordination of the State to the law, ensuring those means that would allow the law to censor political actions and, within this framework, to ponder possible abusive, discretionary tendencies, of State structures. The rule of law ensures the supremacy of the Constitution, correlation of laws and of all legislative acts with the Constitution, the assurance of the regime of separation of public powers, which must act within the law, meaning within the limits of a law expressing the general will.*

The State based on the rule of law becomes so, the State that aims to ensure the supremacy of the Constitution and the rule of law. Supremacy of the Constitution and compliance of the laws with the Basic Law is ensured through the jurisdictional review of the constitutionality of laws, by a separate authority, independent of all others, and which is regulated by the Basic Law. This authority is the contentious constitutional court, which contributes to the strengthening of the rule of law materialized in the decisions rendered within the review of constitutionality of laws before promulgation, as well as in those rendered within the a posterior review, on certain provisions contained also in laws on contentious administrative. The Contentious Administrative, being one of the fundamental institutions of public law, over time, has had different regulations regarding both formal matters (authorities called to solve disputes of this type) and material matters (categories of disputes covered by this contentious), being several times subject to constitutional review. Thus, the Contentious Administrative has a scope clearly defined by law. This legal regulation is subject to the will of the legislator and to the review of constitutionality, in both its modalities of expression. In this way, the competent judicial authorities and the Constitutional Court have competences in ensuring the rule of law, the functioning of democracy and in guaranteeing the exercise of human rights.

KEYWORDS: *contentious constitutional, contentious administrative, rule of law, administrative act, public authority*

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1. The requirements of the State based on the rule of law, enshrined by Article 1 paragraph (3) first sentence of the Constitution, concern the major goals of state activity, foreshadowed in what is commonly called as being *the rule of law*, expression that implies subordination of the State to the law, ensuring those means that would allow the law to censor political actions and, within this framework, to ponder possible abusive, discretionary tendencies, of State structures. The rule of law ensures the supremacy of the Constitution, correlation of laws and of all legislative acts with the Constitution, the existence of the regime of separation of public powers, which must act within the law, meaning within the limits of a law expressing the general will.

The State based on the rule of law becomes so the State that aims to ensure the supremacy of the Constitution and the rule of law. Supremacy of the Constitution and compliance of the laws with the Basic Law is ensured through the jurisdictional review of the constitutionality of laws, by a separate authority, independent of all others, which is regulated by the Basic Law. This authority is the contentious constitutional court, whose contribution to the strengthening of the rule of law materialized in the decisions rendered within the review of constitutionality of laws before promulgation, as well as in those rendered within the *a posteriori* review, on certain provisions contained also in laws on contentious administrative. The Contentious Administrative is one of the fundamental institutions of public law which, over time, has had different regulations regarding both formal matters (authorities called to solve disputes of this type) and material matters (categories of disputes covered by this contentious), regulations that several times were subject to constitutional review. Thus, the Contentious Administrative has a scope clearly defined by law. This legal regulation is subject to the will of the legislator and to the review of constitutionality, in both its modes of expression. In this way, the competent judicial authorities and the Constitutional Court have competences in ensuring the rule of law, the functioning of democracy and in guaranteeing the exercise of human rights.

2. Law no. 29/1990, one of the first laws enacted by the Parliament formed on the basis of the free elections of May 20, 1990, brought back the democratic virtues of the institution of contentious administrative.

This law not only that largely reiterated the principles enshrined in the 1923 Constitution and the 1925 Contentious Administrative Act, but it also took important steps for anchoring this institution in the requirements of the contemporary realities.

Thus, it established a control of full jurisdiction, it established a control on both the administrative act itself, and on the assimilated administrative act, and the acts challenged must come exclusively from an administrative authority.

The 1991 Constitution outlines the main principles of the institution of contentious administrative. It was thus introduced the fundamental right of the party aggrieved by a public authority by an administrative act or failure to resolve a request within the legal deadline, to ask for the recognition of a right, the annulment of the act and the repair of the damage.

The 1991 constituent legislator considerably extends the scope of administrative acts which may be appealed in contentious administrative.

On the grounds of the new constitutional rules, the existence of the administrative act, express or assimilated, can no longer be connected to the action or inaction of the government authority. This time public authorities in their entirety are considered. This means that under the new constitutional ground, any administrative act, regardless of the originating authority, may be challenged before courts of contentious administrative.

Law no.29/1990 operates with the expression of administrative authority. Given this circumstance the question is how to interpret the texts on which the administrative judge is going to adjudicate.

The Constitution of Romania enshrined under Article 150 paragraph 1 the principle according to which any laws or other normative acts shall remain effective insofar as "they are not in contradiction with any of the provisions of this Constitution".

The Constitutional Court ruled on an objection of unconstitutionality concerning Article 1 paragraph (1) of Contentious Administrative Law no.29/1990, which limited the control of courts of contentious administrative on administrative acts issued by administrative authorities, while Article 48 paragraph (1) of the Constitution, before revision, had a broader content as it related to public authorities. According to Article 1 paragraph (1) of Law no.29/1990, the action in contentious administrative could be filed only against acts issued by administrative authorities. The text in question was enacted before the Constitution. The Basic Law provided under Article 48 paragraph (1) that: "Anyone aggrieved by a public authority in his rights or legitimate interests through an administrative act or failure to resolve his request within the time-limits established by law, is entitled to obtain the acknowledgement of his right thus claimed or legitimate interest, the invalidation of such act and reparations for the damage suffered".

Between the concept of administrative authorities, used in the law, and that of public authorities used in the Constitution there is a difference of content. It is obvious that the constitutional concept is broader than that used in the mentioned law, including also the latter.

Thus arises a conflict between the challenged law and the Constitution. According to Article 150 paragraph (1) of the Constitution, any laws or other normative acts shall remain effective insofar as they are not in contradiction with any of the provisions of this Constitution.

In this case, since the legal text is narrower than the constitutional wording, it is clear that it must be regarded as modified in the sense that the expression of administrative authorities is repealed, being replaced by that of public authorities.

It was noted that Article 1 paragraph (1) of the Contentious Administrative Law no.29/1009 was repealed as concerns the reference to administrative authorities, being of direct application the provision of Article 48 paragraph (1) of the Constitution, which referred to public authorities.

In the grounds for this decision, the Court also stated that "under these circumstances, the ordinary legislator, in developing the constitutional principle, should intervene to determine the content and scope of this concept."

3. In 2004 was enacted the Contentious Administrative Law no.554/2004. This law was enacted as a natural result of the revision of the constitutional texts in matters of contentious administrative. This law is a huge step for the institution of contentious administrative which is designed to protect natural or legal persons aggrieved in their rights by government action or inaction. This is a new conception of contentious administrative.

One of the novelties of this law is the setting up of the institution of the Advocate of the People among subjects who can refer the court in order to exercise an action in contentious administrative and gives him the opportunity to refer the court of contentious administrative with an action filed on behalf of an individual.

Within the *a priori* constitutional review, the Constitutional Court was referred directly by the Advocate of the People with the objection of unconstitutionality of certain articles of the Contentious Administrative Law.

The author of the reference asked the Constitutional Court to declare that certain provisions of that law are unconstitutional and contrary to the constitutional principle of free access to justice, enshrined by Article 21 of the Constitution, as well as by Article 52 thereof.

The Advocate of the People stated that according to the principle of free access to justice, the right to go to court can be exercised by any person whose rights, freedoms and legitimate interests were violated; however, contrary to these provisions, Article 1 paragraph (3) of the Law includes the Advocate of the People among the subjects who can file an action in contentious administrative and gives him the opportunity to refer the court of contentious administrative with an action brought on behalf of individuals. In exercising these functions the Advocate of the People would replace an individual in exercising his procedural rights, automatically the individual acquiring active procedural capacity, contrary to the letter and spirit of the principle of free access to justice, under which the individual has the opportunity and not the obligation to go to court in order to defend his rights, freedoms and legitimate interests in an administrative case.

As a result, in the meaning of the constitutional provisions of Article 21, the individual is the one who decides whether or not to go to court, in order to protect his rights and freedoms, a contrary interpretation leading to the conclusion that an individual may be required to assert his rights before the courts and to automatically acquire procedural capacity in an administrative conflict.

Concerning the breach of Article 52 paragraph (1) of the Constitution, according to which only the aggrieved party can determine whether a specific administrative act has harmed or not a right or a legitimate interest and, respectively, only he is entitled to obtain recognition of the alleged right or legitimate interest, the annulment of the act and the reparation of the damages, it is pointed out that the initiation of an action in contentious administrative by the Advocate of the People on behalf of the petitioner, would amount to taking the interests of citizens by this constitutional authority. Thus, the conclusion is that the criticized legal texts transform the right, viewed as an opportunity of individuals to go to courts, into an obligation that appears as a breach of the liberty to choose the legal path to assert one's rights. Moreover, these legal provisions confer to the Advocate of the People the capacity of party in proceeding of administrative nature in which it has no self-interest.

The Constitutional Court found that the provisions subject to referral concerning the Contentious Administrative Law are constitutional.

No constitutional provision prevents the Advocate of the People from protecting the rights and freedoms of citizens in relation to all public authorities, including judicial authority. Regarding the Advocate of the People's opportunity to refer the court of law on behalf of individuals, similar solutions can be found also in other legislations.

According to the constitutional provisions¹, *"The Advocate of the People shall exercise his powers ex officio or upon complaint by persons whose rights and freedoms*

¹ Article 59 paragraph (1) of the Constitution.

have been violated, within the boundaries established by law". Accordingly, the Law on organisation and functioning of the Advocate of the People², whose aim is, according to Article 1 paragraph (1) thereof, "[...] protection of the rights and freedoms of citizens in their relations with public authorities", provides the powers of the Advocate of the People, including that consisting in seeing to the legal settlement of claims received, as well as the request addressed to authorities or government officials asking them to cease such infringements of rights and liberties, the reinstatement of the petitioner and the reparation of damage suffered. In the sense of these statutory powers, Article 1 paragraph (3) of the Contentious Administrative Law provides that: "*The Advocate of the People, as a result of the control carried out according to its organic law, in basis of a complaint of an individual, if it considers that the unlawful act or excess of power of the administrative authority can be removed only through justice, it can refer the competent court of contentious administrative with jurisdiction at the residence of the petitioner. The petitioner acquires, as of right, the capacity of applicant, being summoned as such*".

The power of the Advocate of the People to refer the court of contentious administrative ensures both protection of the public interest and observance of the private interest of the individual whose rights, freedoms or legitimate interests have been aggrieved.

The Advocate of the People does not replace the citizen with respect to his procedural rights, only supports him, also by filing an action before the court of contentious administrative, the citizen being the only one to decide whether he wants to continue or not the proceedings against the abusive administrative authority.

Thus, the petitioner who, by law, acquired the status of applicant may, under the rules of general jurisdiction, declare before the court, at the first hearing, to what extent he agrees with the action filed by the Advocate of the People, and during trial he may waive the action or may leave it pending. This procedure has its counterpart in the principle of litigant-led conduct of litigation and, therefore, is consistent with the principle enshrined by Article 21 paragraph (1) of the Constitution concerning the free access to justice.

Concerning the claim that the opportunity of an individual to go to court becomes an obligation resulting in breach of the freedom to choose the legal path to assert one's rights, which violates the provisions of Article 52 of the Constitution on the "*the right of a person aggrieved by a public authority*", the Court finds that the granting of such power to a public authority is a guarantee of protection and enforcement of public interest, within the limits and terms of the law.

As concerns the assertion that "the Advocate of the People is vested with an excessive power and, moreover, lacking consistency, respectively that of filing an action in contentious administrative on behalf of a person aggrieved in his legitimate rights or interests", as well as some of the allegations about the appropriateness or relevance of the texts under discussion, the Court finds that these issues are the sole responsibility of the Parliament.

4. The correlation between contentious constitutional and contentious administrative is achieved by the relations between them, which can lead to declaring unconstitutional certain provisions of Contentious Administrative Law or, as the case may

²Law no.35/1997.

be, the constitutionality of other provisions, to the strengthening of the jurisdiction of the courts of contentious administrative by the Court's decisions and to ensuring enforcement of the decisions of the Constitutional Court by the decisions of the courts of contentious administrative.

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