ADMINISTRATIVE CONTROL OVER THE ACTIVITY OF LOCAL PUBLIC AUTHORITIES IN THE REPUBLIC OF MOLDOVA

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ABSTRACT: *One of the efficiency and lawfulness conditions of the local public authorities' activity is the correct application of legal norms in their activity. According to the art. 109 of the Constitution of the Republic of Moldova, local public authorities work on the basis of the autonomy principle and decentralization of local public services. Therefore any control carried out over their activity should be stipulated by legal acts not to affect the principle of local autonomy.*

In Republic of Moldova, this type of control is called administrative control and it is included in Chapter IX of the Law concerning the local public administration nr. 436- XVI from December 28, 2006. Analyzing these norms it can be noticed that the classic notion of administrative guardianship does not fit our case because the legislation provides a rather strict control on lawfulness as well as opportunity carried out by the central government over local public authorities.

Due to the lack of an actual mayor's institution, the administrative control over the local public administration done by the Territorial Office of State Chancellery, organized in all 32 districts. In the present paper we shall analyze the competence, as well the procedure of carrying out the administrative control over local public authorities' activity through present legislation.

KEYWORDS*: control on lawfulness, control on opportunity, Law concerning the local public administration în republic of Moldova nr. 436- XVI from December 28, 2006*
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The art. 109 (1) of the Constitution of the Republic of Moldova stipulates that the activity of local public administration in the administrative-territorial units is based on the principles of local autonomy and decentralization of local public services. Public administration authorities through which local autonomy is exercised are represented by the elected local councils and mayors. Local councils and mayors operate as autonomous

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administrative authorities and deal with public affairs in towns and villages. On the other hand, according to the art. 113 of the Constitution, district authorities, and namely district councils and presidents of districts, are assigned to deal with public affairs at a district level.

No authorities of central public administration – Government, ministry – has power to cancel, modify or suspend an act adopted or issued by any local council, district council or mayor, as appropriate, as it could do, for example, the Government with an act issued by the head of a ministry. [1]

In a unitary State, although the decentralised administrative authorities enjoy the autonomy their independence is not complete or absolute. Central authorities have the role and duty to apply control over the work of decentralised authorities.

The control applied over the local public administration bodies, called administrative guardianship, is a modality of external control. [2]

The administrative guardianship is an institution of public law under which the central authority of public administration and its local representatives have the role to apply control over the work of decentralised public authorities.

The control by the administrative guardianship is required, first of all, because the decentralised authorities provide public services, which must operate continuously and qualitatively, to ensure the general interest of citizens. Government is directly interested in the proper functioning of these services.

Second, central authorities have the duty to ensure that local or regional interests are not satisfied at the expense of, and on behalf of general interests. [3]

Third, central authorities must ensure that local authorities exercising their power meet various local needs that are also of State interest. The progress, blossoming and prosperity of a State depends, to a large extent, on the well-being of its localities.

Finally, central authority must supervise the maintenance of the unity of the State and suppress any centrifugal tendency of decentralised authorities. Too much autonomy may lead to political orientations in conflict with central authorities' political tendency. This may be especially relevant for countries where there are ethnic minorities group.

In a unitary State, the central public authorities are assigned the role to ensure the smooth implementation of local administration respecting, of course, the local specificity and autonomy. This objective can be achieved only by exercising the administrative guardianship control where the control body has a more limited power as compared with the hierarchical administrative control. This control must be a special one compatible with the principle of autonomy of decentralised authorities that is likely to restrict and reduce the local autonomy without abolishing it. [4]

The name of administrative guardianship appeared first in the French doctrine being entrenched in the interwar Romanian doctrine, although it was also criticized as being inconsistent with the notion of the special control. The notion of administrative guardianship is different from the notion of guardianship in the Civil Law. In the Civil Law, the term guardianship includes all the responsibilities and authority that a guardian exercises on behalf of and in place of a minor person. Exercising the guardianship, the guardian replaces the minor. The special control in the decentralised administration has a completely different character. It is a special control exercised by central authorities over some acts issued by the decentralized authorities. And in this case, as in many others, the

Public Law borrowed a term for one of its institutions with completely different competences from the Civil Law. [5]

The French doctrine distinguishes between classic concept and modern concept of administrative guardianship.

Classic concept is based on the objectives of the guardianship control. The first objective is that pubic persons who exercise the executive power shall respect the legislation, and the second one is considering the opportunity of the administrative activity, a good administration of the interests of a decentralized community.

These features of the guardianship control have led some authors to define it in a synthetic way as an element of decentralisation and local autonomy limit.

Means of achieving the guardianship control are: guardianship of persons (suspension and revocation of mayors, dismissal from office of councillors), guardianship of acts (implying the power to substitute the guardianship bodies of the local authorities, especially in financial matters, has power to cancel the acts adopted by local councils and mayors) and prior approval process.

The classic concept has been criticised on numerous occasions, among which can be mentioned:

- Excessive juridism motivated by the fact that guardianship has been also extended to the management acts
- A wrong modulation, sometimes the control mechanism is extended to acts initiated by the civil servants in financial issues, for example, to the guardianship body.
- The fact that the classic trilogy, substitution – cancellation – prior approval, is not adapted to the actual realities and the collaboration between partners is excluded.

This kind of criticism has led the doctrine and the French legislator to give up the classic concept of the administrative guardianship for a modern one, more adapted to the multifaceted character of guardianship.

Modern concept of guardianship is based on three new techniques of implementing it:

- Competition given by the State services for fulfilment of some community's tasks.
- Allocation of grants and different facilities to local community from the State budget.
- The process of sample-acts, which consists in developing sample regulations and statutes by the central services and transmitting them with an preliminary title to communities.

In 1982, the French legislator abandoned the idea of administrative guardianship of local communities promoting the concept of legality control.

The legislation in force does not regulate any more the administrative guardianship in an explicit manner. In this respect, the specialized literature states that, as a rule, in an administration based on the centralized principles the emphasis is on the hierarchical administrative control, and in a decentralized autonomous administration on the guardianship control.

Therefore, although the institution of the administrative guardianship is not provided by the legislation of the Republic of Moldovan, we support the view expressed in the doctrine that it exists and operates. [7] Indeed, such elements are found both in Constitution and in the Law no. 123-XV on Local Public Administration of 18.03.2003. Thus, the art. 96 (1) of the Constitution states that Government exercises the general

control over the public administration. The act of government requires the activity of control.

Guardianship control in the Republic of Moldova has undergone many changes reflected in particular in the Law on Local Public Administration. Administrative guardianship control, first, was regulated by the Law on Local Public Administration no. 186-XIV of 06.11.1998. The chapter XI of the Law stipulates that the prefect is in charge of in this respect. Thus according to the art. 109, *as representative of Government, the prefect supervise the compliance with the Law by the local authorities,* stipulating at the same time that, *there is no relationship of subordination between the perfect, on the one hand, and the local authorities, on the other.* [8]

For a more detailed description of the administrative guardianship control exercised by the prefect the art. 112 of the Law stipulated: *In executing the legality control of the acts issued by the local authorities, the prefect may request the review of the act considered illegal citing the justified reasons for its cancelation or modification. If, within 7 days, the local authorities do not review it, the perfect may take it to court.*

Later, the Law no. 123-XV of 18.03.2003 introduced important changes regarding the procedure and conditions for applying the administrative control over the administrative acts adopted by local authorities. The chapter IX of the Law no. 123-XV provided topics, principles, forms and procedure of applying the control as administrative guardianship. Later these provisions were cancelled through the Law no. 436-XVI on local Public Administration from 28.12. 2006.

The Law on Local Public Administration no. 123-XV, from 18.03.2003 provided that: *the Secretary shall submit the decision of the local council to the mayor and territorial office of the Government (known as State Chancellery) of the Republic of Moldova. If the local board considers the decision of the local council illegal, the mayor shall notify the Territorial Office of the Government and /or administrative court,* and also *the mayor´s acts shall be submitted after signing to the Territorial Office of the Government.* [9] The acts of the district president *shall be submitted after signing to the Territorial Office of the Government.* [10]

According to the Law no. 25-XVI from 16.02.2006, to amend or supplement the art. 24 of the Law no. 64-XII of 31.05.1990 on Government, a specialized central body of local public administration was created and namely a new ministry – The Ministry of Local Public Administration.

The main objective of the ministry is to ensure, within the powers defined by law, the achievement of constitutional prerogatives of the Government on applying the general control over local authorities.

The Ministry of Local Public Administration was also in charge of control on the legality of acts issued by local authorities, both of first and second levels, exercised through subordinate territorial divisions. [11]

Currently, according to the amendments to the Law on Government no. 64-XII from 31.05.90, the power to verify the legality of administrative acts issued by local authorities belongs to State Chancellery (before the Government's working apparatus), because the Ministry of Local Public Administration was abolished. [12]

Thus, the Government is responsible for organizing the administrative control over the local authorities, exercised directly by the State Chancellery or through its territorial offices of administrative control. [13]

From the above mentioned, it can be stated that the bodies in power to exercise the guardianship administrative control are, on the one hand, the Government and namely the State Chancellery and its local representatives: Territorial Offices of the State Chancellery; and, on the other hand, the local public administration authorities.

Over the years attempts have been made to determine which must be the active body of the administrative control, which is to check local authorities more efficiently changing at the same time the name of the control bodies: Government apparatus, State Chancellery, territorial offices, territorial divisions. Issues such as principles, forms and procedure of control as administrative guardianship have not undergone significant changes.

Thus according to the art. 62 (1) of the Law on Local Public Administration no. 436-XVI from 28.12.2006, the administrative control over local authorities is based on the following principles:

- Exercising it only according to the procedures and in cases provided by law;
- Respecting the proportionality between the extent of intervention of control authorities and the importance of protected interests;
- Not allowing to limit the power of local authorities to manage autonomously, under the law, affairs of their area of competence.

According to the art 61. (3) of the Law no. 436-XVI din 28.12.2006, the administrative control over the local authorities includes the control of legality and opportunity of local authorities' activity. [14]

Legality control consists in checking the legality of acts issued by local authorities. This control may be mandatory or optional.

The following acts of local authorities are subjects of mandatory control:

- Decisions of local councils of the first and second level;
- Acts issued by mayors, district presidents and prosecutor
- Acts on tenders and award of lands acts
- Acts of employment and termination of contracts of a civil servant
- Provisions involving expenses or financial commitments of at least 30.000 lei in the administrative-territorial units of the first level, and at least 300.000 lei in the administrative territorial units of the second level;
- Documents issued in exercise of power delegated by the State to local authorities.

A copy of the above-mentioned act is necessarily submitted, at the expense of the issuer, to the Territorial Office of the State Chancellery within 5 days of signing the document. The secretary of council is in charge of this duty and he/she must also submit the minutes of all council meetings to the subject in power of control within 15 days of the session. [15]

From the above mentioned, we can notice that the subject to mandatory legality control are only the normative acts issued by the mayor. In our opinion, all mayor's decries, regardless of their nature, should be subjects of legality control because the individual rights are more often violated in decrees of individual character. As a result, citizens are forced to defend their rights on their own in the administrative courts suffering moral and material damages.

In the case of optional control, the council secretary shall, until the 10th of each month, send the Territorial Office of the State Chancellery the list of acts adopted by the mayor or district president for the previous month.

Territorial Office of the State Chancellery may proceed to review the legality of any act which is not subject to mandatory control within 30 days of receipt of the list above. [16]

The same problem in the legality control, the mayor can be checked with individual character, but it will depend on the Territorial Office of the State Chancellery, that is their choice.

The control of legality may be made of office or upon request.

Legality control of office or the control required by the local government provided for in art. 66 of the Law on Local Public Administration no.436-XVI from 28.12.2006 "The local council of the first and second level local council may require Territorial Office of the State Chancellery to check the legality of any act of executive authority if it considers that it is illegal. If the local board considers that the decision is illegal, the mayor, district president or secretary may request the Territorial Office of the State Chancellery a control of legality.

The request of legality is made within 30 days from date of issue of the act, stating where the legislation is considered to be violated.

Within 30 days of receipt of the request, the Territorial Office of the State Chancellery will take one of the following decisions:

- Initiation of legality control proceedings;
- Dismissing the application with the reasons and informing the applicant.

Legality control upon request or at the request of the injured person is that any natural or legal person is considered injured in his right by a local government authority through an administrative act, may request the territorial administrative control of the Office State Chancellery the territorial legality of the act.

The application for the legality shall be submitted within 30 days after publication of the document. The legislation indicates what it is considered to be violated. Within 30 days of receipt of the request, the direction of territorial administrative control of the Territorial Office of the State Chancellery will take one of the following decisions:

- to trigger control procedure;
- to dismiss the application with the reasons and informing the applicant. In this case, the applicant is not deprived of the right to appeal directly to the administrative court. [17]

If it considers that a document issued by the local government is illegal, Territorial Office of the State Chancellery shall notify the local authority issuing unlawful Control Act, requiring modification either total or partial abrogation.

If mandatory exercise legality control, administrative control of the notification the Territorial Office of the State Chancellery must be made within 30 days of receipt of the copy of the act or the last document.

Within 30 days of receipt of notification, issuing local authority to amend or repeal the act in question.

If the time limits specified in paragraph 3, and the issuing local authority maintained its position or has not reviewed or challenged the act, the Territorial Office of the State Chancellery may refer to the administrative court within 30 days from the receipt of notification of refusal to modify or withdraw the act concerned or, if the local authority

issuing silently, within 60 days of notification of the request for modification or withdrawal of the act in question [18].

If it considers that the act can have serious consequences and to prevent an imminent damage, the direction of territorial administrative control of the Territorial Office of the State Chancellery may refer directly to the administrative court after receiving the document which it considers illegal, informing immediately the local authority.

Once the administrative court appeal, the Territorial Office of the State Chancellery may require its suspension of the contested act or disposition of other provisional measures. Within 3 days of receipt of notification, the administrative court decides on the suspension of the act and / or disposition of other provisional measures requested by the direction of territorial administrative control of the Territorial Office of the State Chancellery, after hearing the parties concerned. [19]

Opportunity to exercise administrative control of the higher authorities are allowed only by referring to the powers delegated by the state of local authorities. [20]

Control subjects of opportunity are: Government, specialized central public administration authorities and other administrative authorities, including acting through decentralized services of the administrative-territorial units according to their powers under the law. [21]

For local authorities to exercise their duties delegated by state, control subjects have the right opportunity to amend or repeal the act, within 15 days of receipt, on the grounds of expediency. In case of inactivity of local government authority even after the warning control subject, the latter may issue the document in place of the authority incapable of taking decision. [22]

In all cases provided in art. 70 (1) of the law, the control subject of opportunity notifies the local government authority within five days after adoption.

Where, the local government considers that the decision of the subject control opportunity is illegal under the law, it is entitled to appeal the decision in the administrative court within 30 days of notification, informing immediately the control subject of opportunity that issued the decision.

Local government authority may request the administrative court decision subject to emergency suspension control opportunity or provisional measures if there is danger of damage. The measures required at administrative court, the local government shall immediately inform the control subject of opportunity who issued the decision.

Administrative court, within three days of receipt of the notification, decide, after hearing the parties concerned, the suspension of the act and / or the disposition of other provisional measures requested.

At the request of the subject to administrative control, the local government is obliged to provide, within 10 days, copies of all documents and other information requested. Secretary of local councils are responsible for this obligation.

Local authorities and their officials are obliged to allow access to their premises and subdivisions, to answer questions, give explanations and to present documents at the request of officials subject to administrative control.

During control exercise, subject to administrative control officials cannot give direct orders of local public administration officials. Any request for documents should be addressed to the local authorities concerned. Transmission of documents will be made by Secretary [23].

Territorial Office of the State Chancellery is also subject to a superior control. According to article 72 of the Law on Local Public Administration no.436-XVI, "annually by the end of March, the Territorial Office of the State Chancellery of the Government shall prepare and submit a report on the control acts of local authorities for the period of activity since before. Reports on audit activity is made public. At the same time it published the list of repealed acts of the the local government.

A first indication that we would like to do, that refers to the legal nature of administrative control as trustee. He is, to a point, first external administrative control as he is exercised by a public authority (Territorial Directorate of Administration Control) on the work of other government authorities (local councils, mayors, district council).

We say "to a point" because the legality of measures for entry control authority is the responsibility of the administrative courts, not administrative authority , Territorial Office of the State Chancellery.

It is of "external" character because it "comes" from outside the organizational structures of control authority. It is not a hierarchical control because that exercised authority is not at a higher level than the control authority "between the administrative control territorials on the one hand, and local and district councils and mayors, on the other hand." [24] Administrative control as administrative tutelage, providing comprehensive limitation of autonomy and decentralization, has a special legal regime, particularly the legal regime of hierarchical control, which is an attribute of hierarchical power, which ensures the implementation of the principle of administrative centralization.

Tutelary control has certain characteristics that distinguish it from the hierarchical control:

- Hierarchical control is exercised by the superior authority and control is exercised by a tutelary hierarchical body, although it is in the public administration system to a higher level of representation of the general interests of society, [25]

- Hierarchical control is exercised by virtue of relations of subordination between the Controller and the controlled, they should not be stipulated by law, but control of guardianship is exercised only to and within the law;

- The hierarchical control, the upper body may revoke, suspend or cancel the provisions of the lower controlled body, while in the control of guardianship towards territorial administrative control it doesn't have these powers, it can only refer the matter to the administrative court for the cancellation of the which it considers illegal, that will give its final acts, the legality or appropriateness of the controlled acts.

The higher hierarchical control body cannot amend or adopt an act itself instead of the lower body, since this substitution would constitute a violation of the statutory jurisdiction. Higher administrative organ may, however, require lower body to adopt a certain decision in a given situation. [26]

From the above mentioned, we can note that the form of administrative control under administrative trusteeship exists only between public authorities of non-hierarchical relationships. So there cannot be administrative guardianship between the Government, ministries and those who exercise this power at district and local level, Territorial Office of the State Chancellery. [27]

In terms of material competence, it is a general control because the authorities upon which it is exercised have such a competence too regarding all their administrative acts.

In terms of territory, the right of control over Territorial Office of the State Chancellery is exercised over all local councils and mayors from the district and, of course, over the District Council itself.

In conclusion, we find out that control of administrative guardianship, named by the law of many democratic countries and guardianship control, is a form of administrative control, very special, with its specific features.

Both terms administrative guardianship and legal institution that it enshrines are new concepts in the doctrine, namely, in the Moldovan legislation, but promoting constitutional principles of autonomy and administrative decentralization require more and more scientific approach and propagation of the subject matter.

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