THE ROMANIAN ADMINISTRATIVE CODE BETWEEN NECESSITY AND CONTROVERSIES

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ABSTRACT: *The official objective of the Romanian Administrative Code was to unify the legislation in the field of public administration. The idea of such a legislative codification was born in 2001, but the draft of the normative act which is the Romanian Administrative Code was introduced in public debate only in November 2016. The fact that there have been several general parliamentary elections along this lengthy debate, has led to a series of changes to this draft law that call into question the ultimate goal of this codification, ending with the declaration of the non-constitutionality of the normative act draft.*

KEYWORDS: *administrative code, legislation, public administration, unification.*
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After the collapse of the communist regime in 1989, the democratic regime installed in our country brought, from the point of view of legal life, an unusual abundance of normative acts, especially in the field of the administrative law. In this area, inflation and the speed of changes in regulatory acts created only instability and lack of consistency due to lack of vision and constancy. Moreover, the abundance of normative acts systematically led to parallel legal regulations, which resulted in the impossibility of the courts to create constant judicial solutions[1].

Starting from these well-known problems, the explanatory memorandum of the Romanian Administrative Code Draft invoked precisely the necessity of simplifying and restricting the legislation in the field of administrative law, of achieving a unitary legal framework, so as to simplify the beneficiaries' access to the legislation in force, to improve its application.

The desirability of a single codification in the field of administrative law did not belong only to the current political power, such intentions having been made since 2001, and later in the governance and legislative programs of the subsequent administrations, first grounded on the need to remedy the dysfunctions that existed and prospectively to

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cure the malfunctions that existed and exist both at the legislative technique level and in the merits of the regulations, in the administrative law field.[2].

All these negative aspects, together with the solutions proposed for their remedy, were set out in the Preliminary Theses of the Romanian Administrative Code, approved by the Government Decision no.196/2016[3].

Thus, the lack of uniform definitions of the main concepts in the public administration, the parallel legal provisions concerning mainly the local public administration` regulations, the existence of contradictory juridical rules, the lack of specific legal regulations regarding mainly public services, and the difficulties in applying unclear and unclear legal rules, were considered malfunctions of legislative technique[4].

As far as the malfunctions being substantive issues of the legislation in the field of administrative law, the draft of the Administrative Code refers to the institutional pillars that are the main institutions in the romanian public administration, pointing to the specific legislative shortcomings which there were to compile, together with the pre-existing regulations, the regulation of The Romanian Administrative Code.

It has been indicated that the legislation *on the activity of the central public administration* (M. Constantinescu, 2007) does not clearly delineate *the powers* of the Government from *the role of this institution*, respectively *the way in which these tasks are performed*.

About *the ministries*, their individual attributions are not clearly delineated from those which are common to this type of institutions.

Also, it is not clearly defined by the relevant legislation, the legal status of *the autonomous administrative authorities*, the legal nature of the acts issued by these institutions, and the position of these acts in the hierarchy of normative acts.

Regarding the Prefect Institution, in the explanatory memorandum[5] of the Draft Law of the Romanian Administrative Code, the need for clearer regulations was invoked. At this legislative moment, there are equivocally or insufficiently regulated the collaboration-control levers between the ministries (towards which the deconcentrated public services are subordinated) and the *prefect*.

These deficiencies are coming primarily from the insufficient regulation of the legal status of the deconcentrated public services, as well as from the lack of regulation of the legal relationships there are between these institutions and the competent ministers, respectively with the prefectorial office.

Issuing an Administrative Code was imposed primarily from the perspective of the legal regulations on the *local public administration*[6], due to the large legal rules that contain parallel provisions in the same regulatory field.

There are parallel regulations also regarding the local public authorities` organizing and functioning, which create difficulties in the implementation of these legal rules with diametrically opposed interpretation results.

[4] Law project concerning the Romanian Administrative Code, no.369/2018, p.1.
[5] Law project concerning the Romanian Administrative Code, no.369/2018, p.2.

There is also a lack of clarity regarding the legal tutelage exercised by *the Prefect* on the acts of the local public administration, and the nature of the legal responsability that is committed when the administrative acts are adopted.

There was also invoked also a need to reunite in the same normative act, all the legal provisions concerning the cases and the modalities of the suspension, respectively the legal end of the local elected representatives` mandates.

The conflict of interests regarding the situation of the local elected representatives also presents regulatory gaps, as *it does not provide the sanction to be applied* in the event of finding of such a state of affairs. The procedure of finding a *state of incompatibility* is also unclear, leading to incoherent interpretations and legal solutions[7].

Appears also a lack of clarity regarding *the validation of the local elected representatives` mandates*, as this is done by a committee of advisers who have not been validated either.

Another field that would impose the correlation of the legal regulations and their reunification, is the one regarding *the states` public and private property, respectively of the territorial administrative units`, and the way of exercising it*[8]. An undefined clearly legal regime is applied to the private property of the state, in the sense that both the common provisions of the Civil Code and certain elements applicable to public property are applied, due to the fact that, for example, the administrative-territorial units may be both private and public law persons, which has led to contradictory jurisprudence.

The lack of a legal framework specifying the sanctions applicable in case of non-observance of the legal provisions regarding the compilation/updating of the inventories of the public goods, may affect the public domain of the state.

It is also argued that changes in the *status of civil servants* are also necessary, as well as regarding *the legal regime applicable to the contract staff working in public administration*, as it appeared in the Explanatory Memorandum of the Romanian Administrative Code[9].

It was said that there are too frequent changes of the persons holding key positions, which leads to the impossibility of promoting and pursuing public policies in this field.

There were also invoked the inequities and inaccuracies regarding the seniority required for an executive public position, as well as for the leadership public position, respectively the lack of an evaluation and promotion system that rewards the performance.

Another field that necessarily imposes concrete changes is that of the *administrative responsibility*. The fact that there is no legal framework containing general rules and principles, and the fact that the administrative and patrimonial responsibility is regulated in disparate normative acts, distinct for different specific areas, leads to incoherence and very different, even diametrically opposed jurisprudential solutions which imposes new and efficient legislative solutions.

Last but not least, there is no concrete and clear definition of the concept of *public service*[10] in fundamental aspects, such as procedures for the setting up and the dissolution of this category of entities, criteria for their classification, and rules for their management.

[7] Law project concerning the Romanian Administrative Code, no.369/2018, p.3
[8] Law project concerning the Romanian Administrative Code, no.369/2018, p.3.
[9] Law project concerning the Romanian Administrative Code, no.369/2018, p.4.

All these announced aspects relied on in the explanatory memorandum are representing realities, the necessity of new regulations in the mentioned domains, which will lead to simplification, concreteness and efficiency was not denied by the political factors on the Romanian public scene, nor by the Romanian civil society.

Consultations took place, aimed to know the point of view of the representatives of public authorities and institutions, non-governmental organizations, higher education institutions whose work is circumscribed to the issues of the law aspects invoked, as well as the point of view of the associative structures representing the local public authorities related to the aspects relied on in the explanatory memorandum of the Romanian Administrative Code.

In this respect, the public consultation was permanently exposed on the official site of the Ministry of Regional Development and Public Administration, while public debates were also held, attended by representatives of the Presidential Administration and representatives of civil society, which included both non-governmental organizations and professional associative structures.

The attempts to remedy the legislative shortcomings in the new Romanian Administrative Code have been made through numerous regulatory proposals, considering that the recruitment and selection of the civil servants in the public administration should be done through a national competition, starting with 2020, and during 2018 -2019 a pilot system will be organized.

It was appreciated that the decentralization of the competitions for the employment of public servants is necessary, by removing the approvals of the National Civil Servant Agency. These approvals are going to be replaced by the obligation to notify this agency. Thus, the National Civil Servant Agency will acquire a controlling role regarding the observance of the legal provisions in the organization of the competitions.

It follows that the seniority for the leadership public positions will increase, which will lead to a *higher professional quality* of the public services coordination. For example, for office as head of office, it was supposed to increase from 2 years to 3 years. For the position of Head of Service, to increase from 2 years to 5 years. For senior executives and directors seniority to increase from 3 years to 7 years, and for senior civil servants to increase from 5 years to 7 years

Regarding the management of the public function and the necessity of relating the mechanisms of development to the coordination of the human resources policies in the public administration, will be establish a new institution, the National Public Employment Tracking System, which will be administered by the National Civil Servant Agency.

Another proposal related to the public servant was to remove the restriction on the transfer of civil servants on request, between institutions at different administrative levels.

Civil servants were supposed to be assessed on a half-yearly report, not on an annual report, and the assessment was about to be done primarily on criteria that are taking into account the fulfilment of the professional obligations and duties.

These professional tests were about to be carried out by a commission that may include representatives of the ANFP.

The project of the new Romanian Administrative Code proposed that the evaluation of the individual professional performances of the secretaries of the administrative-territorial units to be made by an evaluation commission which will include the president of the county council, and will also include local councilors, respectively county councilors.

The new legal regulation it was assumed to clarify *the disciplinary responsability of the civil servants*, correlating sanctions with the gravity of disciplinary misconducts, introducing new misconducts and sanctions. For example, in the case of unjustified absences from work or systematically non-observance of the work program, the sanction of the dismissal from the public servant status may be applied.

The project also distinguishes between *the responsibility for the opportunity of the acts*, which only intervenes in the situation of the officials and local elected represantatives and *the responsibility for the technical correctness and legality of the acts*, belonging to the specialized personnel.

For example, in the field of public procurement, the role of the principal authorising officer, who cannot always be a public procurement specialist, consists only in signing these documents for investment by the authority formula. As a result of applying the provisions of the Administrative Code, the principal authorising officer will only answer for opportunity issues and the specialized personnel who has drawn up, approved or countersigned, as the case may be, will be responsible for the technical and/or legal aspects.

The idea of repealing numerous administrative acts through the administrative code has created an optimistic perspective on this legislative project. BUT besides the positive effects, the current political power has inserted a number of controversial legislative issues that have attracted the public outrage.

On the 10th of July, 2018, the Deputies Chamber, as a decision-making body, adopted a series of amendments to the bill of the Administrative Code, which called into question the final aim of this legislative approach.

Thus, according to the changes, the general objective of the public authorities is no longer the "general interest", but the governance program. If in an initial form of the Administrative Code it was stipulated that *"the authorities and institutions of the central public administration, as well as the staff within them have the obligation to pursue the public interest"*, the modified form of the draft stipulates that they *"have the obligation to implement the governance program approved by the Parliament".*

The prefects, although were not politically affiliated, everyone knew the fact that they were usually called from the ruling party's sympathizers. The new Administrative Code regulated the fact that the *Prefect* is the representative of the Government at the local level, thus becoming the legal basis for political appointments and rewarding those who served the interests of the ruling party.

By way of derogation from the rules, the parliamentarians can be appointed directly to this post, after the end of their parliamentary term, without needing to participate to a competition, to be promoted.

Not only former parliamentarians could be appointed prefects directly by the Government, but also any other person, subject to the fact that, within two years from their appointment, they will have to graduate from a specialized course. The question arose, why the criteria for participation in the contest and, of course, the contest itself was maintained?

Another controversial issue for which that was brought an action before the Constitutional Court has referred to the granting of special pensions to all local elected representatives.

These special pensions were to be calculated, within three mandates, as a product of the months of the mandate, with 0.40% of the monthly gross monthly allowance corresponding to the function.

Mayors, deputy mayors, presidents and vice-presidents of county councils, elected from 1992, were to be beneficiaries of these pensions. The pension was supposed to be borne by the state budget and the convicted offenders for corruption offenses will not benefit it. Local elected representatives were also supposed to benefit training programs, with all the costs borne by the local budget.

These special pensions was possible to be cumulated with any pension provided by the public pension system or in any other private pension system. Given these provisions, it is obvious that they will result in a budget deficit, that will then be reflected in new taxes.

Another highly criticized issue, which was said to have the effect of returning Romania to feudalism, was the fact that the mayors will be able to organize them as self-emplyed persons.

All the attempts to regulate the conflict of interests in such a manner as to sanction any private interest beyond the public interest, was practicaly annihilated by this change. Moreover, they were able to represent groups of economic interests.

Therefore, the position of mayor, deputy mayor, chairman or vice-mayor of the county council was no longer incompatible with the status of an authorized individual person or individual enterprise or a family enterprise, respectively as a member of a group of economic interest.

Initially, the mayors and presidents of county councils could represent the administrative units only in the general assemblies of the regional community service operators, but in the modified form, they can also be part of the general meetings of the local operators.

Under the pretext of simplifying the validation procedure for local elected officials, they are no longer required to prove through criminal records that they are not convicted by a final court order or that they are not under a court order.

The management contract imposed by previous regulations on the appointment of local service chiefs has also been abolished. The appointment of the leaders in the case of the local interest institutions and deconcentrated services was about to be approved by the local council, on a proposal coming from the mayor, on the basis of a competition, but without the obligation of a management contract at the time of appointment.

Land, lakes and beaches are also easier to pass in the public domain of local authorities. The initial form of the project provided for this procedure, *"a thorough justification of the use or of the national, county or local public interest"*. This phrase has been deleted, the proposal of the majority, being sufficient in this respect.

There was also a change which was under the question, in the way the local councilors can approve decisions on the local budget, borrowing, decisions determining local taxes and fees, or regulating participation in county, regional, zonal or cross-border development programs, and also decisions on the organization and urban development of settlements and land planning, in the sense that it is determined that an absolute majority will be needed, compared to the current regulation which required a qualified majority.

Added to this amendments, there were no longer required the publication of the reports of the local council meetings, but only summaries, thereof situation, the lack of transparency in the activity of these entities.

It was also removed the obligation of the local ELECTED officials to bring to the attention of the citizens, all the facts and administrative acts of interest for the local community.

In other words, citizens would not know what exactly what was discussed in the local council meeting, but just what they wanted to be published.

IN CONCLUSION, although this *Administrative Code* was intended to make public administration more effective, all of the above changes have led to the conclusion that it will lead to greater opacity in public administration and easier access to public resources, resulting in more negative than positive effects.

Moreover, on November 6, 2018, the Romanian Constitutional Court accepted the objection of unconstitutionality of the Romanian Administrative Code as a result of the merging effect of several exceptions of unconstitutionality invoked by several entities, considering that the draft of the legislative act was unconstitutional as a unique corpus[11].

In order to pronounce this solution, the Court found, on the one hand, that the criticized project law was adopted without the opinion of the Economic and Social Council that is requested on the occasion of the initiation of the parliamentary legislative procedure, as provided by art.141 (1), paragraph 5 of the Constitution, with reference to art.1, paragraph 1 and art.2, paragraphs 1 and 2, from the Law no.248/2013 concerning the organization and functioning of the Economic and Social Council. On the other hand, the Court held that some of the texts were adopted by the Chamber of Deputies as a decision-making body, disregarding the principle of bicameralism provided by art. 61, paragraph 2 of the Constitution and/or the rules concerning the distribution of decision between the two Chambers, resulting from the provisions of art.75, paragraphs 4 and 5 from the Constitution.

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[11] Pronounced on the 20th of September, 2018.