THE FRAMEWORK AND LIMITS OF THE CONSTITUTIONAL AND LEGAL POWERS IN THE ACTIVITY OF THE PUBLIC MINISTRY IN THE CONTEXT OF RESPECTING THE FUNCTIONS OF THE STATE

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Abstract: *The material competence of public administrative authorities, with the object of drafting and issuing administrative acts, is provided in the Romanian Constitution and the Administrative Code introduced into the normative circuit by O.U.G. no. 57/2019. The legality control of administrative acts is generally ensured by the courts directly or indirectly, especially by the administrative litigation courts. Therefore, it is obvious that the Public Ministry, which is part of an executive-administrative body (see ECtHR decisions) and not of the judicial power, has no way to rule on the legality/opportunity of normative administrative acts, this control remaining exclusively in the task of administrative litigation courts. It remains to be discussed regarding the individual administrative acts, within what limits they can be subject to criminal prosecution. The present communication seeks to place in the natural concert of the legal powers of the various constitutional and legal authorities, each institution respecting the functions of the state and their competences.*

KEY WORDS: *competence; control of legality; state; functions; judicial power; administrative authorities.*
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1. Decision no. 68 from the 14th of March 2017 of the Constitutional Court regarding the resolution of the legal conflict of the constitutional nature between the Government of Romania and the Ministry of Public Affairs - the Prosecutor's Office attached to the ICCJ - the National Anticorruption Directorate[1] established with the power of the truth, as a general rule, that the interference of the Prosecutor's Office in the exercise of the powers established by law in accordance with the constitutional provisions regarding the separation of powers in the state, respectively any action that would have the effect of subrogating the powers of another public authority is unconstitutional.

With express reference to the Government Ordinances, the Constitutional Court found that no other public authority belonging to a power other than the legislative one can

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control the normative act of the Government from the perspective of the legality or expediency of the legislative act. Therefore, the Public Ministry, through the criminal investigation carried out by its own criminal investigation bodies, although it tried to exercise control over the legality and appropriateness of the regulatory administrative act, did nothing but arrogate powers that belong exclusively to the Parliament and the Government.[2]

Moreover, the jurisprudence of the European Court of Human Rights is consistent in this aspect, ruling that "Romanian prosecutors, acting as magistrates within the Public Ministry, do not meet the requirement of independence from the executive" and "cannot have specific powers of a judge."[3]

"It cannot be argued that prosecutors are part of the judiciary and that they administer justice. The qualification of prosecutors as agents of the executive power does not constitute a disregard for prosecutors, but expresses the position and role they have, according to art. 131 and 132 of the Constitution". (Ciobanu, 2008)

Relevant to the thesis mentioned above is the Report adopted by the European Commission for Democracy through Law (Venice Commission) on the occasion of the 94th plenary session held in Venice on March 8-9, 2013[4], from which the Court took over in the analysis some of its considerations: "Generally, the Venice Commission believes that the basic standard should be that criminal procedures should not be used to sanction political differences. Government Ministers must be held politically accountable for their political actions, and this is the right democratic way to ensure that they are held accountable within the political system. Criminal procedures must be applied only to criminal acts. Ministers' actions and decisions are often politically controversial and may later prove to be uninspired and contrary to national interests, but these issues need to be clarified by the political system. Impeachment or other criminal proceedings should not be used against political opponents for political reasons, but should be invoked only in those and a few extraordinary cases where a minister is suspected of a clear violation of the law."[5]

Also, in the same document it is stated that "When drawing the line between criminal and political responsibility, the particularities of the political decision-making procedure and the "political game" must also be taken into account. It is important for a democracy that ministers have the possibility to implement the policies for which they were elected, with a wide margin of error, without the threat of criminal sanctions. In a functioning democracy, ministers are held accountable for their political decisions through political means, not through criminal law.[...]" (paragraph 79).

Finally, the Venice Commission considered that "the ability of a national constitutional system to separate and distinguish between political responsibility of the criminal record of ministers (former and in office) is an indicator of the level of good functioning and democratic maturity, as well as respect for the rule of law. Prosecution should not be used

[2] Decision no. 68 of 14.03.2017 of the Constitutional Court of Romania, published in the Official Gazette of Romania no. 181 from the 14th of March 2017

[3] See in this regard the Judgment of the European Court of Human Rights pronounced in the Vasilescu case of May 22, 1998, the Judgment of the European Court of Human Rights pronounced in the Brumarescu case of October 28, 1999

[4] CDL-ADE 2013/001

[5] Ibidem, paragraphs 76-77

to criminalize political wrongdoing and dissent. The political actions of ministers must be subject to political accountability procedures. Criminal proceedings must be reserved for criminal acts."[6]

2. The Constitutional Court held that the constitutional jurisdiction is the only one competent to control the legality of the enabling (Vida, 1994) (simple) or emergency ordinances of the Government both in terms of the adoption procedure and the normative content.

In terms of the opportunity to adopt an ordinance by authorization/emergency, the Court ruled that it remains an exclusive attribute of the delegated legislator, respectively of the parliamentary control exercised by adopting a law approving or rejecting the ordinance. "At the same time, according to art. 3 paragraph (1) of the Government Emergency Ordinance no. 43/2002 regarding the National Anti-Corruption Directorate, approved with amendments and additions by Law no. 503/2002, with subsequent amendments and additions, the powers of this prosecutor's office aims to carry out the criminal investigation, under the conditions provided in the Code of Criminal Procedure, in Law no. 78/2000 for the prevention, discovery and sanctioning of acts of corruption, with subsequent amendments and additions, and in the emergency ordinance, for the offenses provided for in Law no. 78/2000, with subsequent amendments and additions, which are, according to art. 13, within the competence of the National Anticorruption Directorate. Pursuant to art. 24 of the Government Emergency Ordinance no. 43/2002, approved with amendments and additions by Law no. 503/2002, with subsequent amendments and additions, the provisions of the Code of Criminal Procedure, the procedural provisions of Law no. 78 /2000, with subsequent amendments and additions, and from Law no. 115/1999, republished, with subsequent amendments, shall also be applied appropriately in cases under the jurisdiction of the National Anti-Corruption Directorate."[7]

In the context of the analysis made by Decision no. 68/2017, the Constitutional Court established that the Public Ministry according to the provisions of art. 131 of the Constitution, art. 132 paragraph 1 of the Constitution, art. 62 of Law no. 304/2004 regarding the judicial organization, through the exercise of the functions by the prosecutors, the solutions adopted by them are given the possibility of legality and thoroughness control by the superior hierarchical prosecutor, the judge of rights and freedoms (art. 339-341 CPP) and by the court in the preliminary chamber (art. 342-348 CPP).

All of the above gives us the opportunity to appreciate the fact that the ordinances, whether through authorization or emergency, can only be controlled by the Constitutional Court in terms of constitutional legality, respectively by the Parliament in terms of legality in general and the appropriateness of the regulatory administrative act.

Moreover, in our opinion, this control of legality and expediency, being the only one that can be achieved constitutionally, also applies in the case of enabling or emergency

[6] Paragraphs 91, 92, 93 of Decision no. 68 of 14.03.2017 of the Constitutional Court of Romania, published in the Official Gazette of Romania no. 181 from the 14th of March 2017

[7] Paragraph 97 of Decision no. 68 of 14.03.2017 of the Constitutional Court of Romania, published in the Official Gazette of Romania no. 181 from the 14th of March 2017

individual ordinances. In other words, otherwise, this control of individual ordinances would be non-existent, which means it would remain without substance.

3. In the given context, we ask ourselves the following question: to what extent the other administrative acts, starting from the decision of the hierarchical Government downwards, including the administrative acts of the local public administration (drawn up and issued by collegial or single-person bodies) enjoy the same protection regime (constitutional and legal) as the administrative act presented above, respectively the enabling or emergency ordinance (both in terms of legality and expediency control).

It should be noted that enabling or emergency ordinances are and remain administrative acts until they are approved or rejected by law by the Parliament.

In this context, we consider that this control of the legality of local administrative acts (Drăganu, 1993) can only be carried out by the administrative litigation court through the direct action for annulment, respectively by any court through the indirect way, such as the exception of illegality, or by prefect and the Ministry of the Interior and Administration through the control of administrative guardianship (revocation request, referral to the administrative litigation court). (Bogasiu, 2018)

On the other hand, regarding the control of expediency of local administrative acts, we consider that it cannot be subject of the activity of the administrative litigation courts, it is true, contrary to some opinions from the doctrine that claimed, that the expediency can also be the object of the action in administrative litigation (this last thesis supported by Professor Antonie Iorgovan was received with much reservation in the doctrine of administrative law, today losing its consistency). (Iorgovan, 2005)

4. Considering the theses that were promoted by Decision no. 68/2017 by the Constitutional Court of Romania, for the identity of reason, we consider that they also apply to all other administrative acts, whether normative or individual, whether issued by a central authority or a local one.

Of course, our discussion may consider whether the elaboration of a normative or individual administrative act is the work of a collegial or one-person administrative body. We say this because in the situation where the normative administrative act is the work of a collegial body, it, for the reasons explained in Decision no. 68/2017, cannot be controlled for legality, nor even for expediency by another authority exercising another function in the state, being an expression of the political will of a majority required by law.

To the extent that the collegial body issues individual administrative documents, we consider that the control of legality/opportunity belongs exclusively to the courts of direct administrative litigation (action for annulment) or indirectly (exception of illegality) or to the prefect who exercises the guardianship control in a mandatory manner.

In this case, the vote in the collegial body cannot be censured for criminal conduct, since the councilors cannot be held legally responsible for the vote cast in the execution of the mandate. As far as voting is concerned, the responsibility is political and not legal.

Undoubtedly, the above arguments can be rationally countered in the case of single-person bodies that issue both normative administrative acts and individual acts (for example, the mayor, the president of the County Council, etc.).

As a consequence, the conduct of the one-person body may be altered by illegal acts of a criminal nature, but the exposure of a consequence must be the exclusive expression of the criminal investigation body.

Local public administration authorities develop and issue normative or individual administrative acts, thus ensuring *secundum legem* (Article 108 of the Constitution) the establishment of measures and rules introduced by the primary legislative/normative framework. On the other hand, even if local authorities do not have the right to primary regulation of social relations, they have their own competence conferred by the Constitution and the Administrative Code. In other words, in the Romanian Law system, the exercise of a power by issuing administrative acts is given by the Constitution and the law. The particular legal regime of administrative acts is the consequence of the legal competence that expresses the sum of the powers with which the local public administration was invested.

On the other hand, according to article 294 of the Code of Criminal Procedure, the prosecutor, once notified, is obliged to verify first of all his competence, and if the content of the notification results in any of the cases of preventing the exercise of the criminal action (art. 16, paragraph 1 of the Criminal Procedure Code) will proceed to classify the case.

Moreover, the Public Ministry, in case of illegality of the administrative act, has the option of directly referring the administrative litigation court for unilateral, individual administrative acts (art. 1 paragraph 4 of Law no. 554/2004 on administrative litigation, with the consent prior notice of the injured persons), respectively for normative administrative acts (art. 1 par. 5 of Law no. 554/2004 on administrative litigation, when a legitimate public interest is harmed).

Therefore, the control of legality can also be carried out in the case of individual administrative acts in this way, but the control of expediency cannot be exercised by administrative litigation courts. In our opinion, this control can be done only by the issuing body. (Waline, 2008)

In conclusion, the Public Ministry does not have the legal competence to carry out criminal proceedings regarding the legality/opportunity of the regulatory administrative act issued by the central administrative authority or a local administrative authority. At the same time, with the emphasis shown above, we consider that this thesis is applicable both in the case of normative administrative acts and in the case of individual administrative acts.

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